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# The Good Officer: President Trump, General Milley, and the "Necessity" of Constitutional Fidelity

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# The Good Officer

## PRESIDENT TRUMP, GENERAL MILLEY, AND THE "NECESSITY" OF CONSTITUTIONAL FIDELITY

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### INTRODUCTION

Public discourse surrounding certain events during the final year of the Trump presidency indicate the need for a thoughtful examination of whether senior civilian or military officials may ever justifiably disobey a president. This difficult issue is further complicated by the Supreme Court's recent decision in *Trump v. United States*, which held that former presidents enjoy absolute or presumptive immunity from criminal prosecution for their official acts.[1] This Article leverages published reports and insider accounts to explore the delicate questions of whether, and if so under what circumstances, one's oath to support and defend the Constitution of the United States may require civilian or military officials to resist or defy unconstitutional presidential orders.

In 2021, Bob Woodward and Robert Costa published a book in which they reported that General Mark Milley, then Chairman of the Joint Chiefs of Staff, had called his Chinese counterpart during the uncertainty following the 2020 election to prevent the Chinese government from making a

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[1] Trump v. United States, 144 S. Ct. 2312, 2328 (2024).

miscalculation that might lead to war.[2] Their reporting also suggested that Milley had inserted himself into the operational chain of command of the armed forces, including its nuclear forces.[3] Before these claims had been published in full or vetted, some politicians and pundits accused Milley of treason and called for his court-martial.[4] Others reflexively lamented the potential negative effects of Milley's actions on civil-military relations.[5] Retired Army Lieutenant General Mark Hertling argued that General Milley had acted within the scope of his responsibilities when calling his Chinese counterpart.[6] However, former Army officer and well-known Trump-Ukraine phone call whistleblower Alexander Vindman contended that Milley should have resigned rather than undermine the nuclear chain of command.[7] He then called for Milley's resignation or ouster.[8] In response to General Milley's retirement, president-elect Trump suggested that Milley might have been executed "in times gone

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[2] *See* BOB WOODWARD & ROBERT COSTA, PERIL xiii–xxviii (2021) [hereinafter PERIL]. Reporting at the time also referred to the prologue of *Peril* prior to its release. *See*, *e.g.*, Isaac Stanley-Becker, *Top General Was So Fearful Trump Might Spark War That He Made Secret Calls to His Chinese Counterpart, New Book Says*, WASH. POST (Sept. 14, 2021, 6:49 PM), https://www.washingtonpost.com/politics/2021/09/14/peril-woodward-costa-trump-milley-china/ [https://perma.cc/WV5J-K7UL].

[3] *See* PERIL, *supra* note 2, at xiii–xxviii.

[4] Matthew Brown & Tom Vanden Brook, *Trump, Republicans Call Milley 'Treasonous' for Call with China*, USA TODAY (Sept. 15, 2021, 4:26 PM), https://www.usatoday.com/story/news/ politics/2021/09/15/trump-rubio-accuse-general-milley-treason-over-woodward-expose/8346958002/ [https://perma.cc/B8CW-EH98]; Bryan Metzger, *Republicans Call Gen. Mark Milley 'Traitor,' and Say He Should be Fired or Court-Martialed for a Report That He Secretly Intervened to Avoid War with China*, BUS. INSIDER (Sept. 15, 2021, 1:21 PM), https://www.businessinsider.com/republicans-milley-fired-resign-court-martialed-treason-china-trump-call-2021-9 [https://perma.cc/G2MG-HF7E].

[5] Such arguments include participation of individuals outside the chain of command, increased partisanship based on public reaction to Milley's actions, and potential long-term consequences for civil-military relations. *See, e.g.*, Carrie A. Lee, *Gen. Milley Reportedly Tried to Work Around Trump on Nukes. Did He Have Authority to Do This?*, WASH. POST. (Sept. 15, 2021, 7:00 AM), https://www.washingtonpost.com/politics/2021/09/15/gen-milley-reportedly-tried-work-around-trump-nukes-did-he-have-authority-do-this/ [https://perma.cc/Z9NN-LJDG].

[6] Mark Hertling, *Retired General: General Milley Did His Job*, CNN (Sept. 16, 2021, 11:01 PM), https://www.cnn.com/2021/09/16/opinions/milley-woodward-costa-book-hertling/index.html [https://perma.cc/3MJC-U7WM].

[7] Alexander S. Vindman, Opinion, *Alexander Vindman: Milley Had Another Choice—to Resign*, WASH. POST (Sept. 17, 2021, 4:17 PM), https://www.washingtonpost.com/outlook/alexander-vindman-general-milley-resign/2021/09/17/79fe52d8-17b1-11ec-a5e5-ceecb895922f_story.html [https://perma.cc/98R9-9CVE].

[8] *Id*.

by" for his "egregious" act of calling China,[9] prompting General Milley to take safety precautions for himself and his family.[10]

When questioned by Congress about these reports, General Milley explained that his actions toward China were consistent with his responsibilities and were coordinated with civilian leadership, including the Secretary of State and the acting Secretary of Defense.[11] General Milley also said that he was fully committed to the Constitution and its principle of military subordination to civilian control, stating that he would only disobey unlawful orders.[12] Yet, Woodward and Costa reported that Milley had told House Speaker Nancy Pelosi that certain procedures would prevent the former president from "illegally, immorally, unethically [or] without proper certification" ordering the launch of a nuclear weapon or other "use of force."[13] Milley also allegedly assured Speaker Pelosi that he would "prevent" any unwarranted use of the military "domestically and/or internationally,"[14] and instructed the National Military Command Center (NMCC) staff to ensure that he was involved in "any order for military action, not just the use of nuclear weapons."[15]

If these reports are accurate, General Milley's statements and actions appear to be inconsistent with his limited statutory authority as "the principal military *adviser* to the President, the

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[9] Donald J. Trump (@realDonaldTrump), TRUTH SOC. (Sept. 22, 2023, 7:59 PM), https://truthsocial.com/@realDonaldTrump/posts/111111513207332826 [https://perma.cc/R2BM-KQ3C]. Although not yet certified, it appears former president Trump has been reelected to a second term. This article will therefore refer to him as "the former president" when discussing his actions during his previous term of office, and as "president-elect" when referring to his actions as a candidate for president in the November 2024 election and thereafter.

[10] Jonathan Lehrfeld, *Milley Says He'll Ensure Family Safety After Trump's Execution Remark*, MIL. TIMES (Sept. 28, 2023, 12:59 PM), https://www.militarytimes.com/news/your-military/2023/09/28/milley-says-hell-ensure-family-safety-after-trumps-execution-remark/ [https://perma.cc/ALF9-MBDA].

[11] Paul D. Shinkman, *Milley Confirms Efforts to Contain Chaos in Trump's Waning Days*, U.S. NEWS (Sept. 28, 2021, 11:26 AM), https://www.usnews.com/news/national-news/articles/2021-09-28/milley-confirms-efforts-to-contain-chaos-in-trumps-waning-days [https://perma.cc/VLL8-7UDG].

[12] *Id.* The Constitution places the armed forces of the United States under civilian control in two primary ways. First, by granting Congress express authority to create, to fund, and to regulate the armed forces, including the militia. U.S. CONST. art. I, § 8, cls. 12, 13, 14, 16. Second, by designating the president as commander-in-chief of the armed forces, "and of the Militia of the several States, when called into the actual Service of the United States." U.S. CONST. art. II, § 2. For additional background and information about civilian control of the military, see generally KATHLEEN J. MCGINNIS, CONG. RSCH. SERV., IF11566, CONGRESS, CIVILIAN CONTROL OF THE MILITARY, AND NONPARTISANSHIP (2020).

[13] PERIL, *supra* note 2, at xxi. The authors claim to be quoting a "transcript of the call" between Milley and Pelosi. *Id.* at xix.

[14] *Id.* at xxiii.

[15] *Id.* at xxvi–xxvii.

National Security Council, the Homeland Security Council, and the Secretary of Defense."[16] The chain of command for operational orders to the armed forces does not include the Joint Chiefs of Staff or its Chairman.[17] It now seems relatively clear that Milley's guidance to the NMCC was intended to ensure that existing decision-making protocols would be followed,[18] perhaps so that Milley would have an opportunity to tender his military advice or to threaten his resignation if warranted.[19] This may have seemed both necessary and prudent given the former president's alleged animosity toward senior advisors counseling restraint as well as his penchant for soliciting advice from obsequious advisors with no "operational experience."[20] For example, shortly after the 2020 election, the former president allegedly signed an order directing the withdrawal of all troops from Afghanistan without consulting General Milley, the acting Secretary of Defense, or his National Security Advisor, Mr. Robert O'Brien.[21] When General Milley learned of the order and

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[16] 10 U.S.C. § 151(b)(1) (emphasis added). Milley confirmed this understanding of his role. *See* Jeffrey Goldberg, *The Patriot: How General Mark Milley Protected the Constitution from Donald Trump*, ATLANTIC (Sept. 21, 2023), https://www.theatlantic.com/magazine/archive/2023/11/general-mark-milley-trump-coup/675375/ [https://perma.cc/F4ZF-SPWF] (summarizing and quoting from multiple interviews with General Milley). With that said, Goldberg's reporting suggests that General Milley may have been prepared to defy the President if necessary, perhaps by countermanding his orders. *See id.* ("When I mentioned to Milley . . . that Trump was mentally and morally unequipped to make decisions concerning war and peace, [Milley] would say only, 'The president alone decides to launch nuclear weapons, but he doesn't launch them alone.' [Milley] then repeated the sentence.").

[17] *See* 10 U.S.C. § 162(b) (outlining operational chain of command for armed forces).

[18] According to a report issued by the Congressional Research Service, in September 2021, Milley wrote a memo to Congress clarifying that "he is a part of the 'chain of communication,' in his role as the President's primary military advisor, but he is not in the 'chain of command' for authorizing a nuclear launch. He also noted that, if the President ordered a launch, the [Chairman of the Joint Chiefs of Staff] would participate in a 'decision conference' to authenticate the presidential orders and to ensure that the President was 'fully informed' about the implications of the launch." AMY F. WOOLF, CONG. RSCH. SERV., IF10521, DEFENSE PRIMER: COMMAND AND CONTROL OF NUCLEAR FORCES (2022).

[19] Milley reportedly told senior leaders in the National Military Command Center, "[i]f you get calls [to launch a nuclear weapon] . . . there's a process here, there's a procedure. . . . I'm part of that procedure. You've got to make sure that the right people are on the net." PERIL, *supra* note 2, at xxvi–xxvii. Milley also allegedly believed that "staying on gave him leverage with Trump because Trump effectively could not fire him." *Id.* at 109. Note, however, that Congress has authorized a president to alter the operational chain of command. 10 U.S.C. § 162(b) (identifying chain of command for US armed forces "[u]nless otherwise directed by the President").

[20] Attorney General William Barr allegedly used this phrase in reference to Stephen Miller, one of Trump's more notorious civilian advisors, for encouraging the use of armed forces in response to protests after the murder of George Floyd. *See* PERIL, *supra* note 2, at 88.

[21] The order had allegedly been drafted by lower-level advisors. *Id.* at 156–58.

informed Mr. O'Brien, "[t]he memo was nullified."[22] Former Secretary of Defense Mark Esper also wrote that, prior to his removal, he, General Milley, and others often confronted careless and potentially dangerous recommendations from some of the former president's personal advisors.[23]

In an editorial about these events, former US Naval War College faculty member Tom Nichols argued that General Milley's interactions with the nuclear launch chain of command were "a breach of civil-military tradition and an overstepping of his military authority."[24] Nevertheless, Professor Nichols opined that Milley "made a judgment call in an unprecedented situation, and we should be glad for it" because "[t]he Constitution of the United States has no provision for the control of planet-destroying weapons while a president is losing his mind and trying to overthrow the government itself."[25]

Unfortunately, Professor Nichols is correct to observe that if a president ignores their solemn oath to "preserve, protect and defend the Constitution,"[26] including their obligation to "take care that the Laws be faithfully executed,"[27] there is little authoritative guidance regarding the specific actions senior civilian or military officials should take.[28] Although every officer of the US government and every enlisted member of the armed forces takes an oath "to support and defend the Constitution of the United States against all enemies, foreign and domestic,"[29] it is not clear what that oath practically requires of them when a president contemplates unlawful or other constitutionally questionable measures. Professor Nichols proposed that "the answer" to preventing such dilemmas in the future "lies in

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[22] *Id.* at 158 (quoting National Security Advisor Robert C. O'Brien).

[23] *See* MARK T. ESPER, A SACRED OATH: MEMOIRS OF A SECRETARY OF DEFENSE DURING EXTRAORDINARY TIMES 6–7 (2022) (summarizing events in which President Trump's advisors made dangerous or careless recommendations that required "sober minds" to "pull[] us back from the brink").

[24] Tom Nichols, *Trump Put Milley in Impossible Position*, ATLANTIC (Sept. 17, 2021), https://www.theatlantic.com/ideas/archive/2021/09/mark-milley-barely-stayed-inside-lines/620102/ [https://perma.cc/S7LQ-J43S].

[25] *Id.*

[26] U.S. CONST. art. II, § 1.

[27] *Id.* art. II, § 3.

[28] Military officers who have sued to challenge their orders or duties on the basis of allegedly unconstitutional presidential orders or other actions have had their cases dismissed for lack of standing, or on the ground that the issue involves a nonjusticiable political question, or both. *See* Smith v. Obama, 217 F. Supp. 3d 283, 303 (D.D.C. 2016) (dismissing the case on both grounds); *see also* Smith v. Trump, 731 F. App'x 8, 9 (D.C. Cir. 2018) (dismissing the appeal for mootness).

[29] 5 U.S.C. § 3331 (federal officers); 10 U.S.C. § 502 (enlisted members of armed forces); 32 U.S.C. § 304 (enlisted members of national guard); *id.* at § 312 (national guard officers).

electing better leaders."[30] Moreover, as one commentator has cogently observed, "[t]he failure of other institutional checks and balances to perform as constitutionally intended has left our military leaders with a disproportionate responsibility" to defend the constitutional order.[31] If true, such a state of affairs has the potential to undermine the public's perception of the apolitical nature of our armed forces, as Milley's situation amply demonstrates.[32] In sum, these events suggest a need to carefully contemplate whether civilian or military officials have a right or duty to resist or defy unconstitutional presidential orders.[33]

The Supreme Court's recent decision in *Trump v. United States* complicates this difficult topic.[34] The majority's conclusion that former presidents are either absolutely or presumptively immune from criminal prosecution for their official acts will likely increase the risk that presidents and their advisors will contemplate unconstitutional measures.[35] It is therefore important to clarify that the Court did not hold that all presidential actions are to be deemed "legal" or "constitutional."[36] A president's immunity from *personal* civil and criminal responsibility for official acts does not prevent courts from reviewing the legality of those acts in other cases within judicial cognizance.[37] Moreover, irrespective of whether a presidential order, authorization, or other act is reviewable in a

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[30] Nichols, *supra* note 24.

[31] Kori Schake, *Milley, Trump and the Fragile State of U.S. Democracy*, BLOOMBERG (Sept. 15, 2021, 2:08 PM), https://www.bloomberg.com/opinion/articles/2021-09-15/milley-trump-nukes-and-the-future-of-u-s-democracy [https://perma.cc/3WNX-N7LP].

[32] *See* Nichols, *supra* note 24. More recently, General Milley is quoted as saying, "We [the armed forces] stay out of domestic politics, period, full stop, not authorized, not permitted, illegal, immoral, unethical—we don't do it." Goldberg, *supra* note 16.

[33] For a list of the officials potentially included within this thesis, see 50 U.S.C. § 3021(c)(1)–(2) (listing primary and optional members of the National Security Council).

[34] *See generally* Trump v. United States, 144 S. Ct. 2312 (2024).

[35] *Id.* at 2327 ("[U]nder our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to [presumptive] immunity."). *See* Andrew Weissmann, *Three Flaws in the Supreme Court's Decision on Presidential Criminal Immunity*, JUST SEC. (July 17, 2024), https://www.justsecurity.org/97781/three-flaws-supreme-court-immunity/ [https://perma.cc/U94M-SWFX].

[36] *Trump*, 144 S. Ct. at 2347 ("The President is not above the law. But Congress may not criminalize the President's conduct in carrying out the responsibilities of the Executive Branch under the Constitution.").

[37] Regarding a former president's absolute immunity from civil liability for official acts, see Nixon v. Fitzgerald, 457 U.S. 732, 749 (1982) (holding "a former President of the United States[] is entitled to absolute immunity from damages liability predicated on his official acts").

court of law, an *ultra vires* presidential act does not vest subordinate officials with lawful authority (also known as "public authority") to execute it.[38] Under recent as well as long settled Supreme Court precedent, acts of government officials that exceed their lawful authority, whether in violation of the Constitution or of an applicable federal statute, are invalid.[39] Officials who execute unlawful or unconstitutional presidential directives not only violate the law and may be subjected to criminal punishment or civil liability for their actions, they also violate their constitutional oath.[40] Although a sympathetic prosecutor or presidential pardon might prevent criminal prosecution and punishment,[41] and judicial immunity doctrines might prevent civil liability,[42] such exemptions from one's

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[38] *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 178–79 (1804) (holding a presidential order in violation of a statute "afford[s] [officer executing such order] no protection . . . and he must pay such damages as are legally awarded against him"); *see also* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 122 (1804) (stating that a naval commander must have probable cause to believe his actions were lawful under the facts and law to "excuse him from the damages sustained thereby"); *but see* Durand v. Hollins, 8 F. Case. 111 (C.C.D.N.Y. 1860) (holding that actions of a naval officer executing orders within the president's lawful discretion "justified" those actions, rendering him immune from civil liability); *In re* Neagle, 135 U.S. 1, 75–76 (1890) (holding that a federal marshal who assaulted a man while protecting a Supreme Court justice riding circuit was acting with lawful authority from Congress and the president and could not be imprisoned on state criminal charges). *See also infra* Part I.

[39] *See Trump*, 144 S. Ct. at 2327 ("If [a] President claims authority to act but in fact exercises mere 'individual will' and 'authority without law,' the courts may say so.") (citations omitted); *see also* Lucia v. SEC, 585 U.S. 237, 252 (2018) (vacating decision of an administrative law judge appointed in violation of Constitution); Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006) (effectively invalidating the president's military commissions order for violating an applicable act of Congress); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–89 (1952) (invalidating a presidential order to the Secretary of Commerce to seize and operate steel mills, as well as the Secretary's orders implementing the President's order); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 126–31 (1866) (granting a writ of habeas corpus and thereby effectively voiding sentence of military commission held to have been convened contrary to the Constitution and a law passed by Congress).

[40] *Compare Barreme*, 6 U.S. (2 Cranch) at 179, *Murray*, 6 U.S. (2 Cranch) at 122, *Durand*, 8 F. Case at 112, *and In re* Neagle, 135 U.S. at 67–72, *with infra* note 42 and accompanying text.

[41] President Barack Obama famously, or perhaps infamously, chose to "look forward" and not "backward" with respect to George W. Bush administration officials who were complicit in the illegal torture of detainees, which may have effectively immunized or pardoned them. *See* Adam Serwer*, Obama's Legacy of Impunity for Torture*, ATLANTIC (Mar. 14, 2018), https://www.theatlantic.com/politics/archive/2018/03/obamas-legacy-of-impunity-for-torture/555578/ [https://perma.cc/ZR5G-PQWA]. Congress effectively immunized some officials who participated in torture but only in certain circumstances and only if they "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful." *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1004(a), 119 Stat. 2680, 2739–44 (codified in part at 42 U.S.C. § 2000(dd)).

[42] *See* Butz v. Economou, 438 U.S. 478, 508 (1978) ("Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, our decisions recognize that there are some officials whose special functions require a full exemption from [such] liability."); *id.* at

*personal* legal responsibility do not justify a subordinate official's violation of the law, nor do they mitigate any constitutional injury that their unlawful actions cause.[43] Government officials therefore may, and arguably should, vindicate their oath to support and defend the Constitution by resisting, and if necessary defying, all *ultra vires* presidential directives or other acts even if there would be little risk of their suffering personal legal consequences for following them.

It is for these reasons that this Article proposes a legal doctrine or moral framework for senior government officials faced with an "unconstitutional" presidential order. It posits a "necessity of constitutional fidelity," which is essentially a species of the lesser-evils necessity doctrine recognized in Supreme Court decisions and state common law.[44] The proposed framework endeavors to balance one's oath to support and defend the Constitution of the United States with their general obligation to obey an elected Chief Executive and constitutionally designated Commander-in-Chief. Although a growing literature theorizes an intra-executive branch "separation of powers,"[45] including related aspects of civil-military relations,[46] this literature contemplates a broader

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506 ("[F]ederal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 812–13 (1982) ("In order to establish entitlement to absolute immunity a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.").

[43] As Chief Justice John Marshall stated in the seminal *Marbury v. Madison* opinion, one's constitutional "oath certainly applies, in an especial manner to . . . official [conduct]. How immoral to impose it . . . if [justices, judges or other officials] were to be used as . . . knowing instruments, for violating what they swear to support!" Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

[44] *See infra* Section III.B.

[45] *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006) (outlining "a set of mechanisms that create checks and balances within the executive branch"); *see also* Rebecca Ingber*, Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 142–43 (2018) (surveying relevant literature).

[46] *See* Deborah Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 801, 803 (2012) (examining the appropriate role of armed forces in legal and policy debates, and concluding that military may appropriately constrain civilian authority in limited circumstances); Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOUS. L. REV. 553, 557 (2007) (positing shared constitutional authority over armed forces "imposes upon military leaders both a right and duty to provide candid and complete information to the executive and legislative branches on matters within their spheres of constitutional competence" and that "members of the military who fail to provide this information to the Executive or the Legislature, especially if acting out of allegiance or loyalty to the other branch of government, have violated their oath of fidelity to the Constitution"). Regarding the rule of law and the role of lawyers, see Victor Hansen, *Understanding the Role of Military*

spectrum of issues related to bureaucratic compliance or resistance and provides little guidance about the point at which one's constitutional oath may require that such resistance become defiance.[47] This Article therefore seeks to stimulate a more robust discourse on this narrower and more delicate issue while emphasizing the limited circumstances under which it potentially arises, the limited number of officials who may plausibly invoke it, and its limited potential efficacy. Part I considers whether members of the armed forces of the United States have a general legal duty to disobey all unlawful orders. Part II summarizes the many sources of legal ambiguity that facilitate potential abuses of a president's constitutional powers and statutory authorities. Part III distills a "necessity of constitutional fidelity" and its elements from a variety of sources and posits its elements. Part IV discusses the relevance of a president's motives to the determination of whether an act is unconstitutional as well as some examples of presidential orders or acts that may be deemed unconstitutional. Ultimately, this Article contends that General Milley's actions may have been consistent with his oath and a necessity of constitutional fidelity, while explaining why more information is needed to fully assess the reasonableness of Milley's beliefs and actions.

## I. IS THERE A GENERAL "DUTY" TO DISOBEY UNLAWFUL ORDERS?

During Supreme Court oral arguments in *Trump v. United States*, Justice Samuel A. Alito Jr. stated that members of the armed forces "are bound by the Uniform Code of Military Justice not to obey unlawful orders."[48] Justice Alito made this observation when alluding to a question raised in lower court oral arguments about whether a president would be immune

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*Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 621 (2009) (stressing, *inter alia*, the divided nature of civilian control over military and importance of military officers candidly advising Congress). *But see* Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1834 (2007) (proposing, *inter alia*, increased executive branch oversight of military lawyer promotions to reduce resistance to presidential decisions).

[47] *See* Ingber, *supra* note 45, at 154 (noting "this scholarship does not provide an answer as to when such [bureaucratic] resistance is appropriate, or not, and where the line should fall"); Corn & Jensen, *supra* note 46, at 558–59 (asserting that armed forces are "not under the control of executive branch in the same way as other executive agencies" but that it is nevertheless "axiomatic that the authority of the Commander in Chief requires absolute fidelity to the President in relation to his command of the armed forces").

[48] Transcript of Oral Argument at 24, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939).

from prosecution if they ordered SEAL Team 6 to assassinate a political rival.[49] Justice Alito explained, "I think one could say it's not plausible that that [action] is legal . . . ."[50] Although the Court quickly moved on to discuss other matters, Justice Alito essentially confirmed one of the central claims of this Article: there are circumstances in which senior executive branch officials or members of the armed forces would be required and expected to disobey an unlawful order from a president.[51]

Ten former Secretaries of Defense appear to agree with Justice Alito on this point.[52] On January 3, 2021, they jointly published an op-ed in which they unequivocally stated, "[e]fforts to involve the U.S. armed forces in resolving election disputes would take us into dangerous, unlawful and unconstitutional territory."[53] They added, "[c]ivilian and military officials who direct or carry out such measures would be accountable, including potentially facing criminal penalties, for the grave consequences of their actions on our republic."[54]

When considering whether there is a duty to disobey unlawful orders from a president, we must first recognize that the ultimate legal consequences for such disobedience by senior civilian officials or military officers are unclear. Absent the obvious commission of a crime, such officials might simply be fired for insubordination rather than prosecuted. It is also unlikely that a senior officer of General Milley's status would be court-martialed, although it is theoretically possible.[55] General

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[49] *See id.*; *see also* Adam Liptak, *Trump's Boldest Argument Yet: Immunity from Prosecution for Assassinations*, N.Y. TIMES (Jan. 10, 2024), https://www.nytimes.com/2024/01/10/us/politics/trump-immunity-prosecution-assassination.html [https://perma.cc/EJD3-7RCJ].

[50] Transcript of Oral Argument, *supra* note 48, at 24.

[51] *See also* Real Time with Bill Maher, *Real Time with Bill Maher: General Michael Hayden on National Security and the Election (HBO)*, YOUTUBE (Feb. 12, 2016) https://www.youtube.com/watch?v=pC7-RMhfSos [https://perma.cc/56J5-SAM8] (at 1:47 of the interview, General Michael Hayden, a former director of the National Security Agency and of the Central Intelligence Agency, stated that if Trump, then a presidential candidate, "once in government" ordered the unlawful killing of a terrorist's family members, "the American armed forces would refuse to act").

[52] *See* Ashton Carter et al., *All 10 Living Former Defense Secretaries: Involving the Military in Election Disputes Would Cross into Dangerous Territory*, WASH. POST (Jan. 3, 2021, 5:00 PM), https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html [https://perma.cc/S6VL-BGS5] (signed by Ashton Carter, Dick Cheney, William Cohen, Mark Esper, Robert Gates, Chuck Hagel, James Mattis, Leon Panetta, William Perry, and Donald Rumsfeld).

[53] *Id.*

[54] *Id.*

[55] A president or secretary of defense may convene a court-martial, but it would be difficult to prosecute a very senior officer in full compliance with the Uniform Code of Military Justice (UCMJ) and Manual for Courts-Martial. 10 U.S.C. § 822(a)(1)–(2).

Douglas MacArthur was relieved of command and forced to retire, but not prosecuted, for defying President Truman with respect to Truman's strategic goals and operational approach to the Korean conflict, even though MacArthur had publicly denounced Truman's strategy and had ordered military operations that were inconsistent with it.[56] But General MacArthur's insubordination involved only policy disagreements with a president rather than defying unlawful or unconstitutional presidential orders.[57]

Even if criminal prosecution is unlikely, it is helpful to consider US military law regulating obedience to orders as doing so might reveal general legal or moral principles with broader potential application. Some may share Justice Alito's apparent belief that the constitutional fidelity of US military officers will provide a reliable check on most or all potential abuses of presidential power involving the armed forces. Although the framework offered in this Article is not limited to the members of the armed forces, it is useful to consider whether service members have a general "duty to disobey" all unlawful orders.[58] If so, one might reasonably conclude that presidents and other senior civilian officials should not issue or transmit illegal orders that trigger this duty.

As one of the most cited experts on US military law, Colonel William Winthrop, explained, "obedience by inferiors is the fundamental principle of the military service, it is yet required to be rendered *only* to a lawful order."[59] While this might suggest a general ability to disobey all unlawful orders, Winthrop clarified that "the only exceptions recognized to the rule of obedience [involve] cases of orders so *manifestly* beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness."[60] As examples, Winthrop

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Although General Milley is now retired, he remains subject to the UCMJ and to being recalled to active duty for court-martial. *See id.* at § 802(a)(4); *see also id.* at § 825(e).

[56] *See* H.W. Brands, *The Redacted Testimony That Fully Explains Why General MacArthur Was Fired*, SMITHSONIAN MAG. (Sept. 28, 2016), https://www.smithsonianmag.com/history/redacted-testimony-fully-explains-why-general-macarthur-was-fired-180960622/ [https://perma.cc/N54D-QWA6] (recounting the nonpublic information which led to Douglas MacArthur's forced retirement).

[57] *Id.*

[58] *See* Richard Dahl, *What is a Military 'Duty to Disobey'?*, FINDLAW (Nov. 27, 2019), https://www.findlaw.com/legalblogs/law-and-life/what-is-a-military-duty-to-disobey [https://perma.cc/4WJS-BTQW]; *see also* Keith Petty, *A Duty to Disobey?*, JUST SEC. (Nov. 28, 2016), https://www.justsecurity.org/34612/duty-disobey/ [https://perma.cc/V9HZ-RCPY] (positing a "duty to disobey manifestly unlawful orders in combat").

[59] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 296 (2d ed. 1920) (emphasis added).

[60] *Id*. at 296–97 (emphasis added).

included, *inter alia*, "a command to violate a specific law of the land . . . or a command to do a thing wholly irregular and improper given by a superior when incapacitated by intoxication or otherwise . . . ."[61] Winthrop also noted that "[e]xcept in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized."[62]

Nothing has changed in this area of military law since these words were published over a century ago. No affirmative "duty" to disobey unlawful orders is mentioned in the Uniform Code of Military Justice (UCMJ), the statutory code governing US military discipline and punishment.[63] Three UCMJ articles punish disobedience, including Article 90, ("Willfully disobeying superior commissioned officer"); Article 91, ("Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer"); and Article 92, ("Failure to obey order or regulation").[64] The text of these offenses permits punishment only when "lawful" orders or regulations are disobeyed.[65] Official commentary to these offenses clarify that limiting punishment to the disobedience of only *lawful* orders is not the legal equivalent of a general duty to disobey *unlawful* orders.[66] For example, the commentary to Article 92 of the UMCJ explains that "[a] general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it."[67] The commentary to Article 90 states, "[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*. This inference does not apply to a *patently* illegal order, such as one that directs the commission of a crime,"[68] which principle should be understood to include an

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[61] *Id*. at 297. In contemporary America, we might consider whether this includes any obvious psychological defect or cognitive impairment, including perhaps being "drunk" on one's perception of one's power.

[62] *Id*.

[63] *See* 10 U.S.C. §§ 801–946a.

[64] *Id.* §§ 890–892.

[65] *Id.* §§ 890, 891(2), 892(1)–(2).

[66] *See* U.S. DEP'T OF DEF., MANUAL FOR COURTS-MARTIAL UNITED STATES IV-24–IV-28 (2024) [hereinafter MCM 2024]. The Manual for Courts-Martial is an official Department of Defense publication that compiles key sources of law, including the rules of procedure and evidence applicable to courts-martial. *See* 10 U.S.C. § 836(a) ("Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals . . . may be prescribed by the President . . . .").

[67] MCM 2024, *supra* note 66, at IV-28.

[68] *Id.* at IV-24 (emphasis added).

order to commit an obvious war crime.[69] However, this commentary is helpful only in situations where the illegality of an order is clear, which in many circumstances may require knowledge of the law that is beyond the ken of the average soldier or officer.

In fact, the phrase "unlawful order" appears only once in a text search of the 2024 edition of the Manual for Courts-Martial, in the discussion following the "[o]bedience to orders" defense in Rule for Courts-Martial (R.C.M.) 916(d).[70] The precise meaning of the phrase "unlawful order" is not explained, although the rule clarifies that the "obedience to orders" defense does not apply if "the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[71] The commentary to this rule explains, however, that in the context of a court-martial proceeding, "the lawfulness of an order is [ordinarily] decided by the military judge."[72] If the judge presiding over a case disagrees with a defendant's understanding of the law, then the defense fails.[73] Furthermore, under R.C.M. 916 (l), "[i]gnorance or mistake of law, including general orders or regulations, ordinarily is not a defense."[74] Given the phrasing of R.C.M. 916 (d), a member of the armed forces who *mistakenly* but *reasonably* believes that an *unlawful* order was *lawful* has a viable "obedience to orders" defense.

All of this demonstrates a strong bias in military law in favor of *obedience* to orders, including orders that may be legally questionable. This bias is appropriate in a broad range of circumstances, such as those involving potential life and death decisions in the fog of war on a battlefield. In criminal law terminology, prosecuting a soldier for disobeying an order later determined to be unlawful entails a "failure of proof" defense, which means that the government cannot prove a required element of the crime charged—the lawfulness of the order.[75]

Regarding the legality of acts undertaken in response to an order, the Manual for Courts-Martial explains that "[a]n act

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[69] See *infra* Section IV.B.

[70] MCM 2024, *supra* note 66, at II-136.

[71] *Id.*

[72] *Id.*; *see also* John Ford, *When Can a Soldier Disobey an Order*, WAR ON ROCKS (July 24, 2017), https://warontherocks.com/2017/07/when-can-a-soldier-disobey-an-order/ [https://perma.cc/8QTQ-BLS6] (discussing numerous difficulties in determining whether certain orders are unlawful and may be disobeyed).

[73] MCM 2024, *supra* note 66, at II-136.

[74] *Id.* at II-139. A mistake of fact might also provide a defense in some limited circumstances. *Id.* at II-138.

[75] *Id.* at II-136.

performed pursuant to a lawful order is justified. . . . An act performed pursuant to an unlawful order *is excused unless* the accused knew it to be unlawful or a person of ordinary sense and understanding would have known it to be unlawful."[76] In other words, in the US armed forces, a lawful order creates public authority and a public duty to act,[77] whereas an unlawful order does not, even when issued by a president.[78] In cases of reasonable doubt about the legality of an order, military law preferences the general military duty of obedience by excusing a subordinate who reasonably follows superior orders from criminal liability.[79]

In short, there is no general, affirmative "duty" to disobey *all* unlawful orders in US military law. At most, US service members have a "duty" not to commit or to facilitate patently obvious crimes even if ordered to do so. This "duty" is, generally speaking, no different than that shared by every US citizen. The difference lies in the fact that the implementation of this duty is much more complicated in the armed forces, particularly in situations involving war or other national emergency.[80] Warfighting typically requires members of the armed forces to engage in or to support acts of violence that would be ordinarily be common crimes.[81] When attacking enemy forces, vehicles, supplies, buildings or other equipment and structures, members of the armed forces engage in acts that would in other circumstances be murder, assault, arson, and other common law crimes codified and made punishable by the UCMJ,[82] and applicable to their conduct "in all places."[83] Foreseeable but unintended collateral deaths in war, even if permitted by

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[76] *Id.* (emphasis added).

[77] John C. Dehn, *Why a President Cannot Authorize the Military to Violate (Most of) the Law of War*, 59 WM. & MARY L. REV. 813, 885–86 (2018).

[78] *See supra* Part I (citing cases in which the Supreme Court found presidential orders without legal effect because they were found to be violative of the Constitution and/or an applicable statute).

[79] This aspect of military law is conceptually similar to the doctrine of qualified immunity from civil liability adopted by the Supreme Court for government officials other than the president. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

[80] The Department of Defense website defines its mission: "Our mission is to provide the military forces needed to deter war and ensure our nation's security." *About*, U.S. DEP'T OF DEF., https://www.defense.gov/about/ [https://perma.cc/YG7E-7CT9].

[81] For a similar discussion to what follows here, see Dehn, *supra* note 77, at 879–86.

[82] *See* 10 U.S.C. §§ 918, 926, 928 (murder, arson, and assault, respectively); *see also id.* at §§ 928(a), 929 (maiming and burglary/unlawful entry, respectively).

[83] *Id.* § 805.

international law, might be deemed manslaughter.[84] Service members supporting attacking forces would potentially be guilty of the violent acts in which those forces engage as accomplices.[85] Moreover, the operational planning for such attacks could be considered a conspiracy to commit every act of violence that the operational plan obviously contemplates.[86] When such acts are planned, supported, and executed pursuant to lawful authority, however, they are considered legally justified rather than unlawful.[87] To be justified, the relevant acts must be part of a military or other public duty and comply with all applicable laws, which includes obedience to lawful orders.[88]

The decisions of military courts reflect these principles. For example, in *United States v. Keenan*, the Court of Military Appeals upheld a marine's murder conviction, stating that "a [battlefield] homicide committed in obedience to a lawful order is justified, but one in execution of a patently illegal order is not."[89] The court cited with approval the trial court instructions, which explained:

> [T]he acts of a Marine done in good faith and without malice, in the compliance with the orders of a superior . . . [are] justifiable, unless such acts are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know them to be illegal. . . . A Marine is a reasoning agent, who is under a duty to exercise judgment in obeying orders to the extent that where such orders are manifestly beyond the scope of the authority of the one issuing the order, and are palpably illegal upon their face, then the act of obedience to such orders will not justify acts pursuant to such illegal orders.[90]

The Court of Military Appeals later reached an identical conclusion with respect to the acts of Lieutenant William Calley, who both led and participated in a massacre of unarmed men, women, and children at My Lai in Vietnam.[91]

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[84] *Id.* § 919 (defining manslaughter to include unlawfully killing a human being "by culpable negligence" or "while perpetrating or attempting to perpetrate an offense" under the UCMJ other than murder).

[85] *Id.* § 877 (including among those deemed to have committed an offense those who "aid[], abet[], counsel[], command[], or procure[] its commission").

[86] *Id.* § 881 (defining crimes of conspiracy to commit a UCMJ offense and conspiracy to commit an "offense under the law of war").

[87] *See* MCM 2024, *supra* note 66, at II-136.

[88] *Id.*; *see also* WINTHROP, *supra* note 59, at 674 ("Homicide is said to be 'justifiable' when committed by a public officer in the due execution of the laws or administration of public justice.").

[89] United States v. Keenan, 39 C.M.R. 108, 118 (C.M.A. 1969).

[90] *Id.* at 117 n.3 (quoting trial court instructions).

[91] United States v. Calley, 48 C.M.R. 19, 26 (1973); *see also id.* at 29 ("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

Additionally, individuals may be held criminally responsible for their unlawful actions even if others are not. The trial and punishment of those who order or otherwise facilitate the commission of a crime is largely independent of, and irrelevant to, the prosecution or punishment of each individual who participated in its commission.[92] Under the UCMJ, as is generally true in US criminal law, superiors who give unlawful orders may be guilty of soliciting a crime.[93] If the orders are carried out and a crime is committed, any superior officer issuing or transmitting an unlawful order with the intent that it be carried out may be charged as an accomplice to that crime and punished as though they committed it personally.[94] Superiors are also potentially guilty not only of any crime that they expressly order but also of any foreseeable crime committed in furtherance of the crime they solicited.[95] However, US criminal law generally does not require everyone who is complicit in a crime to be tried and convicted; for example, potential co-defendants might be granted immunity in exchange for their testimony,[96] or might simply be acquitted for various reasons.[97] Generally speaking, one may be prosecuted and punished for their complicity in a crime regardless of whether others involved in it are prosecuted or convicted.[98] Thus, even if a president is, or might be, immune from civil liability and criminal prosecution for issuing unlawful or other unconstitutional orders, those who transmit or execute any such orders are not necessarily similarly protected.

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is . . . palpably illegal . . . ."); *id.* ("For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder.").

92 *See Keenan*, 39 C.M.R. at 118–19 (finding that alleged inconsistent verdicts in separate trials of defendants charged in relation to the same incident turn on "differences in the evidence and the inferences drawn therefrom" and therefore did "not require reversal of the findings of guilty against [Keenan]").

93 10 U.S.C. § 882(a) ("Any person subject to this chapter who solicits or advises another to commit an offense under this chapter . . . shall be punished as a court-martial may direct.").

94 *Id.* § 877 ("Any person punishable under this chapter who—(1) commits an offense punishable by this chapter, or aids, abets, counsels, *commands*, or procures its commission . . . is a principal.") (emphasis added).

95 MCM 2024, *supra* note 66, at IV-7 ("Each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it.").

96 In the military context, the authority to grant immunity is prescribed in R.C.M. 704. MCM 2024, *supra* note 66, at II-86–II-87.

97 *See* United States v. Garcia, 16 M.J. 52, 57 (C.M.A. 1983) ("[T]he acquittal of his co-conspirators will not serve to avoid [a defendant's] conviction in the absence of some compelling reason of record in the other cases."); *see also id.* ("[A verdict of 'not guilty' may as well mean only 'not proven' as to the particular accused.").

98 *Id.*

The main difficulty in the context of presidential orders is that the legal and factual issues surrounding a president's constitutional or statutory authority can be rather complex and nuanced. Nevertheless, the general principles articulated above prevail. Presidential orders or other acts that are within the scope of a president's constitutional and statutory authorities provide public authority for other officials to execute them in a manner consistent with all other applicable law. Presidential orders not within a president's constitutional and statutory powers—including those that violate or require a violation of a constitutionally valid, applicable criminal or other statute—are *ultra vires* and do not provide public authority upon which others may act.[99] It would seem axiomatic that in US constitutional law as in US military criminal law, "the obedience of a [subordinate] is not the obedience of an automaton. A [subordinate] is a reasoning agent, obliged to respond, not as a machine, but as a person."[100] As the above analysis clarifies, US military "law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders."[101] However, the breadth of presidential powers and ambiguities regarding their parameters often make it difficult to determine whether a president's orders are "palpably" or "manifestly" unlawful or unconstitutional.

## II. LEGAL AMBIGUITIES THAT FACILITATE ABUSES OF POWER

This Part explores how vague constitutional text and broad federal statutes facilitate potential abuses of power by a president. The presidency's robust and ambiguous constitutional and statutory authorities, coupled with the practical inability of coordinate branches of government to check every potential abuse of those authorities in real time, provide a window of opportunity that a less-than-virtuous president might exploit. For example, a president may consider a range of alleged

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[99] The Obama administration Office of Legal Counsel acknowledged that "[t]he public authority justification does not excuse all conduct of public officials from all criminal prohibitions." Memorandum from David J. Barron, Acting Assistant Att'y Gen., to U.S. Att'y Gen. 16 (July 16, 2010) [hereinafter the Aulaqi Memo]. It further observed that Congress "may design some criminal prohibitions to place bounds on the kinds of governmental conduct that can be authorized by the Executive . . . . [o]r . . . may . . . delimit the scope of conduct that the legislature has authorized the Executive to undertake pursuant to another statute." *Id.*

[100] United States v. Calley, 48 C.M.R. 19, 26 (1973) (quoting trial court instructions).

[101] *Id.* at 26–27.

national security measures under a veil of secrecy provided by executive privilege, classified information control measures, or both. Even if a whistleblower comes forward, relevant statutes initiate investigative processes that do not immediately terminate ongoing or imminent abuses of presidential power.[102] If a lawsuit is quickly initiated, judicial intervention is not guaranteed and may ultimately prove ineffective.[103] Practically speaking, if a president issues time-sensitive orders of questionable legality, there may be many circumstances in which only resistance or defiance by senior armed forces officers or executive branch officials will effectively prevent any impending constitutional harm. The challenge lies in identifying presidential orders that merit such actions, and the persons who should be permitted to take them.

This Article uses the term "unconstitutional" to describe issued or impending presidential orders, authorizations, or other acts (collectively "acts," "directives," or "measures") that entail clear violations of the Constitution or laws of the United States, including the abuse of accepted constitutional powers or statutory authorities that are intended or virtually certain to result in a significant subversion of the Constitution. Such unconstitutional acts include egregious examples of what Robert Tsai has called "manufactured emergencies," which refer to situations where a presidential administration knowingly distorts or fabricates information to justify the use of emergency powers and measures.[104] It distinguishes such orders from those

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[102] *See generally* Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, 112 Stat. 2396, 2397 (providing a detailed explanation of the ICWPA and implementing guidance). *See* MICHAEL E. DEVINE, CONG. RSCH. SERV., R45345, INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTS. 13–15 (2021); *see also* 10 U.S.C. § 1034 (whistleblower protections for members of armed forces).

[103] In general, but particularly in emergencies, the federal judiciary often seems inclined to avoid deciding critical constitutional or statutory questions via broad application of the political question doctrine. *See* Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952) ("[F]oreign relations, the war power, and the maintenance of a republican form of government . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."). Courts also frequently defer to the executive regarding the operative facts. *See, e.g.*, Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1366–85 (2009) (discussing the courts' deference in national security related cases); *see also* Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J.F. 590, 597–601 (2020) (discussing the author's beliefs as to why judges increasingly defer to the exercise of emergency powers, including accepting affirmative misrepresentations made during litigation).

[104] Tsai, *supra* note 103, at 592 ("The manufactured emergency is a public-policy problem whose nature or scope is fabricated or exaggerated beyond reasonable parameters. . . . [T]he difficulty today is that, for many political and technological reasons, the temptation to lie on a grand scale, with potentially disastrous consequences, is historically unprecedented.").

that are unwise or even grossly imprudent but are nevertheless within a president's constitutional or statutory authority.[105] An officer's oath to support and defend the Constitution arguably requires resistance to or defiance of unconstitutional presidential orders or other acts, but compliance with those that are unwise but within a president's lawful authority (unless a military officer or civilian official has the desire, ability, and courage to resign).[106]

Several events during the first Trump presidency revealed the challenges inherent in classifying presidential acts as either unconstitutional or imprudent but nevertheless lawful. A president's constitutional or statutory authority is often ambiguous and unsettled—not every potential abuse of presidential power clearly violates a valid, applicable statute, relevant constitutional text, or an authoritative judicial precedent.[107] Moreover, it seems that at least some political appointees in the Office of Legal Counsel (OLC) are inclined to craft result-oriented legal opinions that support the policy preferences of a sitting president, which then exacerbates the legal uncertainties surrounding presidential powers and further enables their abuse.[108] Ordering the launch of a nuclear weapon or a major conventional attack is arguably within a president's independent constitutional authority as Chief Executive and

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[105] While this Article attempts to provide general guidance about the nature of presidential actions that might be deemed "unconstitutional," its analysis clarifies that the situations to which it applies require the exercise of prudent judgment, including an objective assessment of all relevant facts.

[106] Former Defense Secretary Esper claimed that he and Milley came close to resigning at times. ESPER, *supra* note 23, at 4–5. Mr. Esper claimed that he ultimately did not do so because, (1) "my soldiers don't get to quit"; (2) "Trump could certainly place a true loyalist as acting secretary . . . [a]nd . . . real damage could be done"; and (3) "[w]e had a sacred oath to the Constitution . . . [and] the answer always came back to staying and fighting the good fight, the necessary one." *Id.* at 5–7.

[107] Presidents possess independent authority to order the launch of a nuclear weapon. *See* Anya L. Fink & Paul K. Kerr, CONG. RSCH. SERV., IF10521, DEFENSE PRIMER: COMMAND AND CONTROL OF NUCLEAR FORCES (2022) ("The U.S. President has sole authority to authorize the use of U.S. nuclear weapons. This authority is inherent in his constitutional role as Commander in Chief."). A president may attempt to do so even if completely unnecessary and unwarranted. General Milley told a reporter that "[t]he President alone decides to launch nuclear weapons, but he doesn't launch them alone." Goldberg, *supra* note 16.

[108] *See* Barry Sullivan, *Reforming the Office of Legal Counsel*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 723, 730–35 (2021) (discussing OLC's tendency to give presidents advice they want to hear); *see also* Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515, 538–59 (2021) (discussing causes and effects of OLC opinions that aggressively support presidential power and policy preferences); *but see* Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1715 (2011) (arguing "OLC's written opinions tend to be protective of executive power. But this need not be taken as proof of lawlessness or the abandonment of principle").

Commander-in-Chief.[109] However, the OLC purports to recognize that such actions must be defensive in nature, or if they are not, then they require congressional consultation and preapproval if a major armed conflict would likely result.[110] Thus, at a minimum, such an order would be unconstitutional as defined here if clearly unwarranted by the circumstances,[111] or if intended or highly likely to undermine the constitutional requirement to involve Congress in any decision to use non-defensive armed force that any reasonable person aware of all relevant information would believe to be substantially likely to trigger a major armed conflict.[112]

Constitutional as well as statutory war and emergency powers provide ample opportunities for abuses of presidential powers that might be classified as unconstitutional. A president's powers in these areas are often incredibly broad and precariously vague for several reasons. First, and most fundamentally, substantial disagreement surrounds the effect of the Constitution's vesting of "executive power . . . in a President of the United States,"[113] as well as the effect of a president's

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[109] *See* April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C 1 (2018) [hereinafter Engel Memo].

[110] *See* 50 U.S.C. § 1541(c) ("The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."); *but see* Engel Memo, *supra* note 109, at 9–10. ("In evaluating whether a proposed military action falls within the President's authority under Article II of the Constitution, we have distilled our precedents into two inquiries. First, we consider whether the President could reasonably determine that the action serves important national interests . . . . Second, we consider whether the 'anticipated nature, scope and duration' of the conflict might rise to the level of a war under the Constitution."); Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 10 (2011) [hereinafter Krass Memo] (articulating substantively identical framework).

[111] Under the OLC framework, a president's unilateral use of force must reasonably be thought to serve important national interests. *See* Engel Memo, *supra* note 109, at 9–10. Some scholars have concluded that this test is not a "meaningful constraint on presidential power." Curtis Bradley & Jack Goldsmith, *OLC's Meaningless 'National Interests' Test for the Legality of Presidential Uses of Force*, LAWFARE (June 5, 2018, 3:13 PM), https://www.lawfaremedia.org/article/olcs-meaningless-national-interests-test-legality-presidential-uses-force [https://perma.cc/59AD-45AV]. The OLC has naively said "[w]e would not expect that any President would use this power without a substantial basis for believing that a proposed operation is necessary to advance important interests of the Nation." Engel Memo, *supra* note 109, at 10.

[112] *See* Krass Memo, *supra* note 110, at 13 (indicating anticipated hostilities from unilateral presidential use of force must not rise to level of "'war' in the constitutional sense necessitating congressional approval under the Declaration of War Clause").

[113] U.S. CONST. art. II, § 1. Opinions range from the assertion that no substantive powers are vested by this clause to the idea that they vest all executive power as understood in the Founding Era, except as allocated to other branches by the Constitution's text. *See* Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA.

constitutional obligation to "take Care that the Laws be faithfully executed."[114] Additionally, the text of statutes authorizing presidents to respond to emergencies often grant presidents nominally unfettered discretion to determine that such emergencies exist and exactly how to respond to them.[115] These ambiguities and their derivative effects permeate issues of presidential power in both domestic and foreign affairs.[116] This Part surveys key aspects of a president's emergency and protective powers in both of these contexts before explaining why these powers are not enhanced or made "exclusive" by a president's constitutional designation as Commander-in-Chief.

### *A. Domestic Affairs*

In domestic affairs, opportunities for an abuse of presidential powers arise primarily from vague constitutional and statutory text coupled with the extensive manpower and equipment possessed by federal agencies, especially the armed forces. The constitutional and statutory ambiguities that could support the aggressive use of coercive force by these entities, including lethal and non-lethal armed force, are perhaps more numerous and more dangerous than most Americans realize.

For example, despite an absence of constitutional text explicitly supporting its conclusions, the Supreme Court has posited, mostly in dicta, that presidents possess broad constitutional power—including the authority to deploy the armed forces—to protect federal personnel, instrumentalities, property, and functions.[117] Federal functions warranting such

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L. REV. 1269, 1273 (2020) (asserting the clause is not a grant of substantive power); *but see* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 234–35 (2001) (arguing the Vesting Clause vests all foreign affairs powers not expressly allocated by the Constitution in the president).

[114] U.S. CONST. art. II, § 3. For an excellent examination of this obligation and potential power, see generally Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019) (arguing the Take Care Clause establishes a fiduciary duty to act in the national rather than personal interest and to take affirmative steps toward that end).

[115] *See* Tsai, *supra* note 103, at 593 ("Presidents today realize that open-ended grants of authority, coupled with judicial acquiescence, mean their assertions of emergency power nearly always prevail.").

[116] As Professor Henry Monaghan succinctly observed, "very considerable disagreement exists concerning many legal aspects of the Presidency." Henry P. Monaghan, *The Protective Power of Presidency*, 93 COLUM. L. REV 1, 6 (1993). One commentator has posited that the situation has deteriorated to the point that a "presidential coup" against the Constitution is possible. *See* Anthony J. Ghiotto, *The Presidential Coup*, 70 BUFF. L. REV. 369 (2022). The *Trump* immunity decision unquestionably adds to this concern.

[117] *See In re* Debs, 158 U.S. 564, 582–85 (1895) ("[t]he entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all

protection appear to include all "rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."[118] The precise source(s) and parameters of these implied powers have never been clarified.[119] This ambiguity likely accounts for the anonymous federal law enforcement agents that engaged in constitutionally questionable conduct near protests that followed the murder of George Floyd in Portland, Oregon and elsewhere.[120] If a president can authorize the use of armed force, including lethal force, to protect a federal judge,[121] or may use the armed forces to remove obstructions to interstate commerce and coerce compliance with federal laws,[122] it is arguable that a president may authorize federal agents to use reasonable force to detain and remove suspected rioters believed to present a risk of harm to federal property or personnel on something less than probable cause.[123]

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national powers and the security of all rights entrusted by the Constitution to its care," including resort to courts or using "the army of the Nation, and all its militia . . . to compel obedience to its laws"); *In re* Neagle, 135 U.S. 1, 63–67 (1890) (asserting broad authority of the president to act without statutory authority).

[118] *Neagle*, 135 U.S. at 63–67 (suggesting a president may protect "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution").

[119] *See* Monaghan, *supra* note 116.

[120] *See* Jonathan Levinson et al., *Federal Officers Use Unmarked Vehicle to Grab People in Portland, DHS Confirms*, NAT'L PUB. RADIO (July 17, 2020, 1:04 PM), https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland [https://perma.cc/V29D-Y5XT]; *see also* Garrett M. Graff, *The Story Behind Bill Barr's Unmarked Federal Agents*, POLITICO (June 5, 2020, 8:08 AM), https://www.politico.com/news/magazine/2020/06/05/protests-washington-dc-federal-agents-law-enforcement-302551 [https://perma.cc/3UYR-U5D7].

[121] *See Neagle*, 135 U.S. at 67 ("We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death . . . .").

[122] *See Debs*, 158 U.S. at 582–85; *see also infra* notes 133–141 and accompanying text (discussing the Insurrection Act).

[123] *See* United States v. Sharpe, 470 U.S. 675, 682 (1985) (holding that when detaining individuals on less than probable cause, the Fourth Amendment requires courts to examine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place") (citing Terry v. Ohio, 392 U.S. 1, 88 (1968)). The nature and duration of a detention are likewise determined by a reasonableness standard that considers the context of the entire situation or "totality of the circumstances." *See id*. at 686–89 (determining reasonableness of duration of detention short of arrest by examining "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant" and including consideration of defendant's evasive actions); *but see* Hayes v. Florida 470 U.S. 811, 816 (1985) (holding detention and removal of someone from a public place might be considered an arrest that should require probable cause that someone is or was involved in a crime or attempted crime). The *Hayes* court held "the [Fourth Amendment] line is crossed when the police, without probable cause or a warrant,

As for the use of the armed forces in routine domestic law enforcement, the Posse Comitatus Act (PCA) generally prohibits the use of *federal* armed forces or federalized national guard units for purposes of domestic law enforcement unless "expressly authorized by the Constitution or [an] Act of Congress,"[124] However, the Homeland Security Act of 2002 vaguely provides:

> the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency.[125]

This apparent congressional acknowledgment of presidential power to use the armed forces for a "serious emergency" suggests that authority to use federal armed forces for domestic law enforcement need not be "*expressly* authorized by the Constitution or an Act of Congress," as the PCA requires.[126] No *general* emergency power is expressly granted by the Constitution,[127] although some protective powers appear to be granted, and limited, by Article IV, Section 4.[128] A president

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forcibly remove a person from his home *or other place in which he is entitled to be* and transport him to the police station, where he is detained, although briefly, for investigative purposes." *Id.* (emphasis added). The Court's decision in *Hayes* does not contemplate exigent circumstances surrounding the protection of federal property, nor would it necessarily control situations in which a curfew or other lawful control measure affects the legality of someone's presence in a public or other place.

[124] 18 U.S.C. § 1385. The criminal penalty prescribed by the PCA applies only to the use of the Army or Air Force, but its prohibition on law enforcement activities has been extended to other services by policy. *See* 10 U.S.C. § 275 (directing creation of such a policy); U.S. DEP'T of DEF., Instruction NO. 3025.21 (2019) (implementing that statute). Such policies might be changed or overridden by an assertive president.

[125] 6 U.S.C. § 466(a)(4).

[126] *Id.*

[127] *See* Monaghan, supra note 116, at 33 ("While the grants of power to the national government include some emergency powers, they seem largely confined to protection against violence, both foreign and domestic, including the power to repel sudden attacks, 'suppress Insurrections,' suspend the privilege of habeas corpus in cases of 'Rebellion or Invasion,' and protect the states against 'domestic violence.'") (citations omitted).

[128] *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."). James Madison argued that this section empowers the federal government to "interpose" itself under the circumstances indicated. THE FEDERALIST No. 43 (James Madison). Although Madison did not clarify the parameters of permissible federal intervention, he implied that it includes interposition of the militia or the armed forces in some circumstances. *See also* THE FEDERALIST No. 28 (Alexander Hamilton) (positing "seditions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body" and that "[s]hould such emergencies at any time happen under the national government, there could be no remedy but force").

might therefore leverage Supreme Court cases postulating broad, inherent executive protective powers and this statutory ambiguity to justify domestic uses of the armed forces for manufactured emergencies while claiming the PCA is not violated.[129]

Another exception to the PCA authorizes the use of state National Guard personnel to support federal missions without federalizing them.[130] This exception was exploited by the Trump administration in relation to the infamous Lafayette Square incident, in which National Guard units in state status (with anonymous federal agents) used aggressive tactics to disperse protestors so that the former president and members of his cabinet could be photographed while the former president held up a Christian Bible in front of a church. Had National Guard personnel been federalized, their use for this purpose would have violated the PCA, at least without an invocation of the Insurrection Act.[131]

The Insurrection Act vaguely but explicitly provides presidents with textually unlimited discretion to determine when and how to use the armed forces to enforce federal law, including constitutionally protected civil rights.[132] The Insurrection Act provides:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages . . . make it impracticable to enforce the

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[129] *See* Tsai, *supra* note 103, at 593 ("A manufactured crisis is not when a public official or policy analyst makes a good-faith call about the severity of a problem and turns out to be wrong . . . . Instead, the problem of the fake emergency entails a rejection of the legitimate role that other institutions play within our system of government and the broader culture of respect and accountability—evidenced by a willingness to lie about the motives that led to government action, the ends to which power is dispensed, and ultimately a disdain for the human beings whose lives or property are affected.").

[130] 32 U.S.C. § 502(f).

[131] Mark Nevitt, *Good Governance Paper No. 6 (Part Two): Domestic Military Operations—The Role of the National Guard, Posse Comitatus Act and More*, JUST SEC. (Oct. 21, 2021), https://www.justsecurity.org/72988/good-governance-paper-no-6-part-two-domestic-military-operations-the-role-of-the-national-guard-posse-comitatus-act-and-more/ [https://perma.cc/Q6YA-3SZX] (noting "this fairly obscure provision was repurposed by the U.S. Department of Justice as an Insurrection Act loophole by Attorney General Barr"); *see also* Aaron C. Davis, *How Trump Amassed a Red State Army in the Nation's Capital—and Could Do So Again*, WASH. POST. (Oct. 1, 2020, 7:13 PM), https://www.washingtonpost.com/investigations/how-trump-amassed-a-red-state-army-in-the-nations-capital—and-could-do-so-again/2020/10/01/2f10e17c-f9d6-11ea-a275-1a2c2d36e1f1_story.html [https://perma.cc/SYY3-4PLR].

[132] *See* Mark Nevitt, *Good Governance Paper No. 6 (Part One): Domestic Military Operations—Reforming the Insurrection Act*, JUST SEC. (Oct. 20, 2021), https://www.justsecurity.org/72959/good-governance-paper-no-6-part-one-domestic-military-operations-reforming-the-insurrection-act/ [https://perma.cc/YH7S-HMF4] (discussing need for reforms due to "rupture of longstanding norms" that has undermined "historical practice and political considerations" that have constrained domestic use of the armed forces).

> laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the [regular] armed forces, *as he considers necessary* to enforce those laws . . . .[133]

The Act also permits a president to suppress unlawful violence within a state when "[A]ny part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection."[134]

Furthermore, "[t]he President," upon deciding to use "the militia or the armed forces, or both . . . *shall* take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy."[135] This text appears to vest a president with virtually unlimited discretion to use the armed forces in any number of ways. The Supreme Court has suggested it may include the imposition of "martial law" under limited circumstances,[136] and has held that it permits the use of war measures against US citizens if a genuine civil war exists, but only if such measures are consistent with international law.[137]

This broad discretion provides ample opportunity to abuse the powers nominally conferred.[138] However, presidents

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[133] 10 U.S.C. § 252 (emphasis added).

[134] *Id.* § 253(1).

[135] *Id.* § 253 (emphasis added).

[136] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866) (implying martial law may be exercised if the necessity for doing so is "actual and present . . . such as effectually closes the courts and deposes the civil administration").

[137] Upholding President Lincoln's blockade at the outset of the Civil War as a constitutionally permissible war measure, the Supreme Court said: "Whether the President, in fulfilling his duties as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.'" Prize Cases, 67 U.S. (2 Black) 635, 670 (1862). Note, however, the Court also cited congressional ratification of Lincoln's actions as an alternate basis for its decision. *Id.* at 671. The dissent similarly posited that a president has broad discretion to respond to such emergencies. *Id.* at 690–92 (Nelson, J., dissenting). The dissent disagreed that a president could resort to war measures under international law without antecedent congressional authorization. *Id.* at 687–89, 693 (Nelson, J., dissenting).

[138] When interpreting similar language, the Supreme Court recently stated that the statute "exudes deference to the President in every clause." *See* Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018) (interpreting 8 U.S.C. § 1182(f), including "[w]henever the President finds," "as he shall deem necessary," and other statutory language similar to the Insurrection Act); *see also* Elizabeth Goitein & Joseph Nunn, *An Army Turned Inward: Reforming the Insurrection Act to Guard Against Abuse*, 13 J. NAT'L SEC. L. & POL'Y 355, 355 (2023) (characterizing the Insurrection Act as "among the most potent of the president's emergency powers" and "among those most susceptible to

may also make questionable or unwise decisions that are nevertheless permitted by this capacious authority. For example, during the protests that followed the murder of George Floyd, Attorney General Barr allegedly advised the former president that he could lawfully use federal armed forces in response but insisted that doing so was a measure of last resort unjustified by the circumstances then existing.[139] The former president nevertheless publicly discussed using the armed forces to protect lives and property from alleged rioters.[140] Had he ordered federal armed forces to deploy for this purpose, it may have been considered excessive or imprudent, but—depending upon the precise circumstances and measures authorized—it would not necessarily have been unconstitutional, or even unprecedented.[141]

Conversely, President Trump may have considered invoking the Insurrection and National Emergencies Acts in an attempt to undermine or nullify the 2020 presidential election results despite utterly insufficient evidence that fraud or foreign interference affected the outcome.[142] Orders to the armed forces

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abuse" because the terms establishing the criteria for deployment "provide few meaningful constraints"). For a concise explanation of how the Insurrection Act is typically implemented, see Mark Nevitt, *The President and the Domestic Deployment of the Military: Answers to Five Key Questions*, JUST SEC. (June 2, 2020), https://www.justsecurity.org/70482/the-president-the-military-and-minneapolis-what-you-need-to-know/ [https://perma.cc/PW52-RS5C]. One should note, however, that statutes cannot provide presidents with *carte blanche* to violate other applicable aspects of the Constitution, such as the Fourth Amendment. *See, e.g.*, *supra* note 123 and accompanying cases and text.

139 PERIL, *supra* note 2, at 90–91.

140 Just before the infamous June 1, 2020, forcible clearing of Lafayette Square to provide for a photo opportunity, President Trump spoke in the Rose Garden at the White House, where he said, "[i]f a city or state refuses to take the actions needed that are 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." *Id*. at 94.

141 At the request of California's governor, President George H.W. Bush authorized deployment of federal armed forces to stop looting and rioting that occurred after a jury acquitted police officers involved in the arrest and beating of Rodney King of criminal charges. *See* Exec. Order No. 12804, 57 Fed. Reg. 19361 (1992). *See also* Paul Taylor & Carlos Sanchez, *Bush Orders Troops Into Los Angeles*, WASH. POST (May 1, 1992, 8:00 PM), https://www.washingtonpost.com/archive/politics/1992/05/02/bush-orders-troops-into-los-angeles/4c4711a6-f18c-41ed-b796-6a8a50d6120d/ [https://perma.cc/K5SK-V3Q6].

142 PERIL, *supra* note 2, at 193–95, 287. During the relevant time period, Trump ally Mike Lindell was photographed heading into the West Wing of the White House, carrying a document that said, "Insurrection Act *now*" and "Martial law if necessary." *Id*. at 287. More recent reports state that Michael Flynn and others had suggested various plans for using the armed forces and other federal agencies to seize voting machines and ballots. Robert Draper, *Michael Flynn is Still at War*, N.Y. TIMES (Feb. 6, 2022) https://www.nytimes.com/2022/02/04/magazine/michael-flynn-2020-election.html [https://perma.cc/SA5L-X4Q4]; *see also* Alan Feuer, *A Retired Colonel's Unlikely Role in Pushing Baseless Election Claims*, N.Y. TIMES (Jan. 4, 2022), https://www.nytimes.com/2021/12/21/us/politics/phil-waldron-jan-6.html [https://perma.cc/5SQW-4T75].

intended to facilitate a subversion of the Constitution—whether by impermissibly influencing Congress's election certification or by otherwise attempting to nullify the results of a lawful election—would be an unconstitutional abuse of a president's constitutional and statutory powers (and a prime example of a "manufactured emergency" in domestic affairs).[143] Similarly difficult issues also arise from ambiguous presidential powers in the context of foreign affairs and national security.

### *B. Foreign Affairs & National Security*

In the areas of foreign affairs and national security, the constitutional and statutory ambiguities surrounding inherent presidential powers are arguably even more acute. Some constitutional law scholars contend that the Vesting Clause of Article II of the Constitution grants the president all foreign affairs powers possessed by the national government and not elsewhere granted to another branch of government.[144] Other scholars have argued that express and implied foreign affairs and national security powers are largely shared by Congress and the presidency.[145] As Justice Jackson observed in his concurring opinion in *Youngtown Sheet & Tube v. Sawyer*, there is a "poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."[146] These words are as true today as when Justice Jackson wrote them over seventy years ago.

Making matters worse, in *Zivotofsky v. Kerry*, the Supreme Court held that a president possesses at least one "exclusive" foreign affairs power beyond the ability of Congress

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[143] *See generally* Tsai, *supra* note 103 (arguing the recent blurring of the line between "ordinary rule" and "emergency governance" has led to the rise of manufactured emergencies).

[144] *See, e.g.*, Prakash & Ramsey, *supra* note 113, at 234–35 (arguing the Article II Vesting Clause grants authority to the president over aspects of foreign affairs not expressly or impliedly granted elsewhere in the Constitution).

[145] *See* HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 92 (1990). *See also* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS 60 (1976) ("To prevent the supremacy of one branch over any other[s] . . . powers [over war and foreign affairs] were mixed; each branch was granted important powers over the same area of activity."); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 171 (4th ed. 1957) ("The verdict of history . . . is that the power to determine the substantive content of American foreign policy is a *divided* power, with the lion's share falling usually, though by no means always, to the President.").

[146] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). Justice Jackson further observed that our country's entire history of "partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question[, which] largely cancel each other." *Id.* at 634–35.

to regulate: "the power to recognize or decline to recognize a foreign state and its territorial bounds."[147] Although the majority opinion acknowledged that Congress possesses foreign affairs powers that might bear on the recognition power,[148] the Court's decision provides additional support for overbroad OLC arguments that presidents sometimes possess constitutional authority to ignore federal laws.[149] Unfortunately, the OLC has a well-worn practice of leveraging the general notion of "core" or "exclusive" presidential powers in foreign affairs, as well as judicial canons of statutory interpretation, to limit or nullify statutory constraints upon presidential discretion.[150] For example, even before the Court's decision in the *Trump* immunity case, former OLC lawyers argued that generally applicable criminal statutes should not be understood to apply to a president without a clear statement from Congress.[151] The Take Care Clause arguably requires the opposite approach: general criminal statutes and other laws, if applicable to the circumstances at issue, should be understood to prohibit a president from engaging in or authorizing the proscribed

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[147] Zivotofsky v. Kerry, 576 U.S. 1, 28 (2015).

[148] *Id*. at 19–20.

[149] Perhaps the most infamous examples of this OLC practice are represented in the so-called "torture memos" adopted after the September 11, 2001 terrorist attacks on the United States, which argued that federal laws prohibiting torture did not constrain a president acting in his capacity as commander-in-chief. *See* Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to William J. Haynes II, Gen. Couns., U.S. Dep't of Def. (Mar. 14, 2003) [hereinafter Torture Memo] (arguing that statutory constraints and prohibitions, including a federal law criminalizing torture, do not apply to extraterritorial military interrogations of certain enemy aliens); *see also infra* Section II.C.

[150] *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1229–30, 1232 (2006) (discussing use of constitutional avoidance canon of statutory interpretation in executive branch legal interpretation to "defend" presidential powers). *But see* John C. Dehn, *Institutional Advocacy, Constitutional Obligations, and Professional Responsibilities: Arguments for Government Lawyering Without Glasses*, 110 COLUM. L. REV. SIDEBAR 73, 80 n.45 (2010) (arguing use of constitutional avoidance canon by executive branch often assumes the "fact to be proved, that there is a 'serious constitutional problem' to be avoided when interpreting a statute delimiting executive power") (citation omitted).

[151] *See, e.g.*, Jack Goldsmith, *Why the Supreme Court Should Grant Certiorari in United States v. Trump*, LAWFARE 2–3 (Feb. 6, 2024, 10:28 PM), https://www.lawfaremedia.org/article/why-the-supreme-court-should-grant-certiorari-in-united-states-v.-trump [https://perma.cc/J6TG-X8K2] (arguing the D.C. Circuit opinion, concluding that former President Trump is not immune from criminal prosecution, is insufficiently attentive to OLC practice of requiring a clear statement before concluding a general criminal statute applies to a president); *but see* Trevor W. Morrison, *Moving Beyond Absolutes on Presidential Immunity*, LAWFARE (Mar. 18, 2024, 8:00 AM) lawfaremedia.org/article/moving-beyond-absolutes-on-presidential-immunity [https://perma.cc/C64Z-3G7F] (arguing "presidential immunity from criminal prosecution should be limited to circumstances in which the prosecution would punish a former president for the exercise of an exclusive, unregulable presidential power").

conduct absent relatively clear express or implied constitutional or statutory authority to do so.[152]

All of this adds to uncertainties about presidential foreign affairs and national security powers that have long existed. For example, with the support of only one federal court decision,[153] and other *obiter dicta*,[154] some executive branch attorneys have long argued that a president has inherent and exclusive constitutional authority to protect US instrumentalities, nationals, and other interests abroad.[155] For several decades, OLC lawyers have opined that a president possesses independent constitutional authority to use armed force abroad whenever (1) a use of force is in the "national interest," and (2) the president anticipates that the use of force will not precipitate a substantial conflict that should require prior congressional consultation and authorization.[156] The OLC claims that presidents have significant discretion over both

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[152] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517–18 (2004) (plurality held that congressional authorization to use necessary and appropriate force provided implied authority to detain a US citizen alleged to be part of enemy forces in armed conflict with the United States for purposes of 18 U.S.C. § 4001, which prohibits detention without congressional authorization); *see also* Aulaqi Memo, *supra* note 99, at 23 (arguing congressional authorization provides "authority to use lethal force abroad . . . [against] a United States citizen who is part of an enemy organization"); *see also* John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 656 (2011) ("The President's power to see that the laws are faithfully executed refutes the idea that he is to be a *law breaker*.") (emphasis in original); Monaghan, *supra* note 116, at 10 (arguing presidents have no authority "to invade private rights" of American citizens except "when acting pursuant to some 'specific' constitutional power . . . [and] cannot act *contra legem*, . . . [but] must point to affirmative legislative authorization . . ."). The partial concurring and dissenting opinions in *Trump v. United States* also acknowledge the principle that a president (and by implication, those he directs or empowers) may have a public authority defense to criminal prosecution for official acts that violate otherwise applicable criminal statutes. *See* Trump v. United States, 144 S. Ct. 2312, 2353 (Barrett, J., concurring in part). *See also id.* at 2364 (Sotomayor, J., dissenting); *id.* at 2374 (Jackson, J., dissenting).

[153] *See* Durand v. Hollins, 8 F. Cas. 111, 111 (C.C.S.D.N.Y. 1860) ("The question whether it was the duty of the president to interpose for the protection of the citizens at Greytown against an irresponsible and marauding community that had established itself there, was a public political question, . . . which belonged to the executive to determine; and his decision is final and conclusive.").

[154] *See* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 79 (1872) (including among the privileges and immunities guaranteed by the Fourteenth Amendment, "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government"); *see also In re* Neagle, 135 U.S. 1, 64 (1890) (noting with approval the intervention of a US Navy commander to protect a Hungarian native, Martin Koszta, who was in the process of becoming a US citizen).

[155] U.S. DEP'T STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES 38–48 (3d ed. 1933) (theorizing a president's independent and exclusive constitutional power to protect instrumentalities and citizens abroad).

[156] Krass Memo, *supra* note 110, at 10; *see also* Engel Memo, *supra* note 109, at 1, 3, 7–8, 18 (citing several previous OLC opinions).

determinations,[157] so much so that some presidential power scholars argue that the "national interests" test is effectively "meaningless."[158] Other commentary has questioned unilateral presidential uses of force that risked escalation to a major conflict or "'war' in the constitutional sense."[159] Nevertheless, if a president is willing to conclude that escalation is not anticipated, even where it seems possible or likely, OLC lawyers have opined that a use of force would be lawful.[160] In this area of constitutional law, OLC legal opinions may provide no meaningful constraint on assertions of presidential power.[161] There is also evidence that permissive OLC opinions have caused some presidents and senior executive branch officials to agree with former President Richard Nixon's statement that, "when the President does it . . . that means that it is not illegal,"[162] meaning that if a "president . . . approves an

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[157] *See* Engel Memo, *supra* note 109, at 10 (recognizing a "broad set of interests" permitting a "great deal of discretion"); *see also id.* at 18–22 (noting use of force "will likely rise to the level of a war only when characterized by 'prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.'").

[158] Bradley & Goldsmith, *supra* note 111; *see also* Katherine Yon Ebright, *Unilateral Use of Force in the "National Interest": Taiwan Doesn't Meet the Test*, JUST SEC. (Nov. 12, 2021), https://www.justsecurity.org/79172/unilateral-use-of-force-in-the-national-interest-taiwan-doesnt-meet-the-test/ [https://perma.cc/SK3Y-NP7L] (explaining how the national interests test expanded across multiple administrations).

[159] *See* Ryan Goodman, *White House '1264 Notice' and Novel Legal Claims for Military Action Against Iran*, JUST SEC. (Feb. 14, 2020), https://www.justsecurity.org/68594/white-house-1264-notice-and-novel-legal-claims-for-military-action-against-iran [https://perma.cc/KYD7-9TTL] ("The substantial risk of escalation as a result of the Soleimani and Shahlai strikes should have required the President to obtain prior congressional authorization for the use of force."); *see also* John Dehn, *On N. Korea: Calling on Congress and the President's Advisors to Defend the Constitution*, JUST SEC. (Apr. 25, 2017), https://www.justsecurity.org/40254/ calling-congress-presidents-advisors-defend-constitution/ [https://perma.cc/KYD7-9TTL] (arguing for congressional authorization for any attack on North Korea). For a concise account of the decision to strike Iranian General Soleimani, including internal executive branch disagreement regarding the risk of Iranian retaliation or escalation, see Kenneth F. McKenzie Jr., *I Carried Out the Strike that Killed Soleimani. America Doesn't Understand the Lesson of His Death*, ATLANTIC (May 24, 2024) https://www.theatlantic.com/ideas/archive/2024/05/qassem-soleimani-iran-middle-east/678472/ [https://perma.cc/67JY-ZVYW].

[160] *See* Engel Memo, *supra* note 109, at 21 (asserting that "the fact that there is some risk to American personnel or some risk of escalation does not itself mean that the operation amounts to a war" and noting "[w]e were advised that escalation was unlikely (and reviewed materials supporting that judgment), and we took note of several measures that had been taken to reduce the risk of escalation by Syria or Russia").

[161] *See* Stephen Pomper, *Has War Become Too Humane?*, FOREIGN AFFS. (Sept. 21, 2021), https://www.foreignaffairs.com/articles/united-states/2021-09-21/has-war-become-too-humane? ("[E]xecutive branch lawyers can and do say 'no' to policymakers' questions about whether and how the United States can use force . . . .").

[162] Interview by David Frost with Richard Nixon, Former U.S. President, in Monarch Bay, Cal. (1977),

action . . . because of the national security or . . . because of a threat to internal peace and order of . . . significant magnitude . . . then . . . the president's decision . . . enables those who carry it out to carry it out without violating a law."[163] The Supreme Court's decision granting presidents absolute or presumptive immunity from criminal prosecution for official acts will undoubtedly add to the dangerous and errant perception that presidents are above the law in matters they deem to be related to national security. This misperception likely also stems in part from the president's constitutional designation as "Commander-in-Chief."[164]

### *C. The Commander-in-Chief Power*

As the discussion to this point indicates, in both domestic and foreign affairs, one way that presidents may abuse power is via their constitutional and statutory authority over the armed forces. This risk requires clarification of a president's constitutional authority as Commander-in-Chief. Linguistically, the title evokes notions of a supreme authority and absolute power. The OLC has sometimes argued that this lexical implication is constitutional law: a president's power to command and to direct the activities of the armed forces is an "exclusive" or "preclusive" power.[165] These are constitutional code-words for presidential powers that are beyond the power of Congress to regulate, such that a president may disregard laws that purport to constrain exercises of that power.[166]

The majority opinion in the *Trump* immunity case selectively cited and misrepresented precedent to vaguely imply that a president may possess many exclusive constitutional

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https://docs.house.gov/meetings/JU/JU00/20191211/110331/HMKP-116-JU00-20191211-SD408.pdf [https://perma.cc/K384-JW5Y].

[163] *Id.*

[164] U.S. CONST. art. II, § 2.

[165] Torture Memo, *supra* note 149, at 4–6; *see also id.* at 5–6 n.8 ("[T]he Commander-in-Chief and [Article II] Vesting Clauses grant the President authority not just to set broad military strategy, but also to decide all operational and tactical plans.") (alternation in original). *See infra* note 167 and accompanying text.

[166] For an excellent summary of efforts by the George W. Bush administration to advance such arguments, including in the courts, see Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers after* Hamdan, 16 J. TRANSNAT'L L. & CONTEMP. PROBS. 933, 950–56 (2007).

powers,[167] including the Commander-in-Chief power.[168] If that were accurate, then presidential orders to the armed forces would *always* be constitutional and would *always* provide public authority to do anything a president directs without regard to relevant laws enacted by Congress.[169] Professor Stephen Vladeck once characterized this view as a "Commander-in-Chief override" theory.[170] Whatever the validity of exclusive presidential power claims in other contexts, neither the text of the Constitution nor the relevant case law support such assertions with regard to a president's power as Commander-in-Chief. Although a comprehensive examination of these issues is beyond the scope of this Article, a relatively concise review is necessary.[171]

Both numerically and substantively, the Constitution's text regarding the creation, regulation, and use of the armed forces is weighted heavily in Congress's favor. The Constitution vests the "executive power" in the president,[172] and designates the president as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[173] Congress, however, is granted several express powers over the armed forces, including "[t]o raise and support Armies,"[174] "[t]o provide

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[167] *See* Trump v. United States, 144 S. Ct. 2312, 2327–28, 2334 (2024) (describing several presidential powers as "conclusive and preclusive"). The opinion carelessly mischaracterizes precedent by asserting that "the courts have 'no power to control [the President's] discretion' when he acts pursuant to the powers invested exclusively in him by the Constitution." *See id.* at 2327 (alteration in original) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803)). The *Marbury* opinion does not say that *all* powers vested "exclusively in a president afford unreviewable discretion," but rather that the Constitution vests a president with "certain important political powers" for which a president is "accountable only to his country in his political character and to his own conscience." *Marbury*, 5 U.S. (1 Cranch) at 165–66. Chief Justice Robert's misrepresentation of *Marbury* directly implicates the Commander-in-Chief power, which is vested in the president alone. *See Trump*, 144 S. Ct. at 2327.

[168] *See Trump*, 144 S. Ct. at 2327 (describing presidential powers as "of 'unrivaled gravity and breadth'" and subsequently listing Commander-in-Chief power as the first example).

[169] *See id.* at 2328. ("Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority. It follows that an Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power.").

[170] Vladeck, supra note 166, at 937.

[171] I have written on various aspects of this issue at greater length elsewhere. *See generally* Dehn, supra note 152 (distilling and explaining three doctrines of necessity attributable to Commander in Chief power); *see also* Dehn, *supra* note 77, at 886–95; John C. Dehn, *War is More than a Political Question: Reestablishing Original Constitutional Norms*, 487 LOY. U. CHI. L. REV. 485, 490–504 (2019).

[172] U.S. CONST. art. II, § 1.

[173] *Id.* art. II, § 2.

[174] *Id.* art. I, § 8, cl. 12.

and maintain a Navy,"[175] "[t]o make Rules for the Government and Regulation of the [armed] Forces,"[176] and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be [called into federal service]."[177] These general powers over military personnel and organizations are supplemented by the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over . . . all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings."[178] Combined, these powers give Congress broad control over the existence, organization, and regulation of the federal armed forces and the militia, including the locations where those entities would most likely be concentrated and from which they would draw their support.

Congress also possesses several express powers over matters of war and national security—the situations in which the armed forces are most likely to be employed. In addition to its express power "[t]o declare War,"[179] Congress is explicitly granted powers "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"[180] to "make Rules concerning Captures on Land and Water,"[181] and "[t]o define and punish Piracies and [other] Felonies committed on the high Seas, and Offenses against the Law of Nations."[182] These powers, and others,[183] including the Necessary and Proper Clause,[184] provide Congress with extensive authority to regulate both decisions to use the armed forces and the actions of those forces in both peace and war. Given the founding generation's significant concern about the threat that standing armies pose to political and civil liberties,[185]

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[175] *Id.* art. I, § 8, cl. 13.

[176] *Id.* art. I, § 8, cl. 14.

[177] *Id.* art. I, § 8, cl. 16.

[178] *Id.* art. I, § 8, cl. 17.

[179] *Id.* art. I, § 8, cl. 11.

[180] *Id.* art. I, § 8, cl. 15.

[181] *Id.* art. I, § 8, cl. 11.

[182] *Id.* art. I, § 8, cl. 10.

[183] *Id.* art. I, § 8, cl. 1 (granting Congress powers to tax and to spend to "provide for the common [d]efen[s]e"); Monaghan, *supra* note 116, at 33–34 (explaining that Article IV, Section 4 of the Constitution also grants the national government several protective powers, which Congress may implement under plain text of the Necessary and Proper Clause).

[184] U.S. CONST. art. II, § 8, cl. 18. ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[185] *See, e.g.*, THE FEDERALIST No. 8 (Alexander Hamilton) (discussing significant risks presented if there were standing armies in the several states).

about which they had complained in the Declaration of Independence,[186] the fact that the Framers divided control of the armed forces among elected representatives—and granted the lion's share of those powers to Congress rather than a president—is unsurprising.[187]

The view that the Commander-in-Chief power is subordinate to Congress is confirmed by longstanding judicial precedent. As Justice Jackson wrote in his *Youngstown* concurrence, the president "has no monopoly of 'war powers,' whatever they are."[188] Furthermore, Justice Jackson explained:

> The Constitution expressly places in Congress power "to raise and support Armies" and "to provide and maintain a Navy." This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement. . . . Congress . . . is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions.[189]

More generally, although Justice Jackson's opinion is often cited to support the existence of exclusive presidential powers, including in the *Trump* immunity decision,[190] he also cautioned that "[p]residential claim[s] to . . . conclusive and preclusive [powers] must be scrutinized with caution, for what is at stake

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[186] THE DECLARATION OF INDEPENDENCE paras. 13–15 (U.S. 1776) (accusing the King of Great Britain of, *inter alia*, keeping among the Colonies "in times of peace, Standing Armies without the Consent of our legislatures. . . . affect[ing] to render the Military independent of and superior to the Civil power. . . . [and] quartering large bodies of armed troops among" the American Colonists).

[187] *See* THE FEDERALIST No. 4 (John Jay) (discussing not only risks of placing power to make war in one person, but also importance of vesting such power in a central government); *see also* THE FEDERALIST Nos. 26, 28 (Alexander Hamilton) (discussing importance of vesting powers of national defense in the legislature); THE FEDERALIST No. 29 (Alexander Hamilton) (discussing the importance of vesting the powers of the militia in the legislature, but implying residual state power to appoint officers would serve as check on federal abuses); THE FEDERALIST No. 41 (James Madison) (explaining how the Constitution reduces risks of dangers presented by a standing army by placing relevant powers in Congress); THE FEDERALIST No. 69 (Alexander Hamilton) (explaining how a president's power over armed forces is less than a King of Great Britain because it is reduced by powers vested in Congress).

[188] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).

[189] *Id.* at 643–44 (emphasis omitted). Justice Jackson continued, "[t]he purpose of lodging dual titles in one man was to insure that the civilian would control the military . . . ." *Id.* at 646.

[190] *See, e.g.*, Trump v. United States, 144 S. Ct. 2312, 2327–28 (2024) (citing Justice Jackson's concurring opinion more than once in its discussion of "conclusive and preclusive" presidential powers).

is the equilibrium established by our constitutional system."[191] With respect to the Commander-in-Chief power specifically, Justice Jackson explained that a president's "command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress."[192]

Former Army Judge Advocate General G. Norman Lieber also endorsed congressional primacy in regulating the actions of the armed forces:

> No distinct line can be drawn separating the President's constitutional power to make [regulations] from the constitutional power of Congress "to make rules for the government and regulation" of the land forces. Regulations are, when they relate to subjects within the constitutional jurisdiction of Congress, unquestionably of a legislative character, and if it were practicable for Congress completely to regulate the methods of military administration, it might, under the Constitution, do so. But it is entirely impracticable, and therefore it is in a great measure left to the President to do it. So far as Congress chooses to exercise its jurisdiction in this respect it occupies the field, and the President can not [sic] encroach on it.[193]

Consistent with this view, the Supreme Court has repeatedly described Congress's power over the organization and discipline of the armed forces as "plenary."[194] Moreover, the Supreme Court has never held that any president acting as Commander-in-Chief may, by virtue of that fact, disregard an applicable law

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[191] *Youngstown*, 343 U.S. at 638. Indeed, Justice Jackson's entire discussion of the commander-in-chief power conveys significant concern regarding its rhetorical use and deep suspicion that it conveys any broad, "conclusive" or "preclusive" power. *Id.* at 640–47.

[192] *Id.* at 645–46; *see also id.* at 643–44 ("There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants."); *id.* at 644 ("That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.").

[193] G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS AND EXECUTIVE REGULATIONS IN GENERAL 11–16 (Wash., Gov't Printing Off., 1898).

[194] *See* Weiss v. United States, 510 U.S. 163, 177 (1994) ("[T]he Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline'") (quoting Chappell v. Wallace, 462 U.S. 296, 301 (1983)); *see also* Solorio v. United States, 483 U.S. 435, 446 (1987) ("The unqualified language of [Article I, Section 8,] Clause 14 suggests that whatever these concerns, they were met by vesting in Congress, rather than the Executive, authority to make rules for the government of the military."); Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion) ("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . . The Framers expressly entrusted that task to Congress.").

enacted by Congress.[195] Thus, the power to regulate the actions of the armed forces is shared by Congress and the president, with Congress possessing constitutional primacy within its very broad sphere of relevant authority.

The fact that many powers over war and the armed forces are shared does not mean that they are entirely commensurate. There are differences between adopting general rules that regulate the official actions or personal conduct of members of the armed forces and making specific decisions regarding their precise operational employment on a battlefield or elsewhere. As explained by Chief Justice Chase in an oft-cited opinion:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions. . . . But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.[196]

Although some scholars read this concurring opinion to suggest that a president has exclusive power to direct the operational activities of the armed forces free from legislative constraint,[197] the full opinion does not bear the weight of that argument.[198] Chief Justice Chase observed that Congress's power is "to make the necessary laws," which gives it power to "provide . . . for carrying on war."[199] He also acknowledged Congress's express constitutional power to make laws regulating the discipline of

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[195] *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); *see generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman II].

[196] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in part and in the result). Chase's opinion is sometimes mischaracterized as a dissenting opinion, but it begins by stating "[f]our members of the court, *concurring with their brethren* in the order heretofore made in this cause, but unable to concur in some important particulars with the opinion which has just been read, think it their duty to make a separate statement of their views of the whole case." *Id.* at 132 (emphasis added).

[197] *See* Barron & Lederman II, *supra* note 195, at 1018–19 (characterizing Chase's opinion as "the first judicial expression of the theory of the substantive Commander in Chief preclusive power"); *see also id.* at 1019 n.307 (discussing scholars who arrived at similar conclusions).

[198] *See* Dehn, *supra* note 152, at 634–36 (conducting a detailed analysis of the *Milligan* majority and concurring opinions).

[199] *Milligan*, 71 U.S. (4 Wall.) at 139.

the armed forces and the militia.[200] The main point of his concurring opinion was to argue that *Congress*, pursuant to its powers over war and the armed forces, could have authorized the military tribunal at issue but chose not to do so.[201] This undermines any assertion that the concurring justices were endorsing the notion of an exclusive Commander-in-Chief power unconstrained by law.

In sum, there is little to no persuasive legal authority for the claim that a president's constitutional powers to command the armed forces or to "direct the conduct of campaigns" are broadly exclusive or preclusive. Congress's *legislative* power simply does not extend to the inherently executive function of directing the precise deployment and employment of personnel and other resources in response to specific tactical, operational, or strategic settings.[202] It *does* extend to placing general policy limits on those decisions and on the personal and official conduct of service members, such as prohibiting the commission of war crimes.[203] The totality of the relevant Supreme Court precedent reveals the Court's consistent understanding that a president's power to command and direct the actions of the armed forces in armed conflict entails broad discretion to direct their movements and other activities, but that this power is exercised *pursuant to* all laws applicable to the armed forces or other members of the federal government under the circumstances at issue. It also entails a *limited* power to invade general constitutional and statutory rights in specific, exigent circumstances not contemplated by enacted laws, but only to the narrowest extent justified by those circumstances.[204]

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[200] *Id.* at 137.

[201] *Id.* at 140 ("We cannot doubt that, in such a time of public danger, Congress had power under the Constitution to provide for the organization of a military commission and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power, but that fact could not deprive Congress of the right to exercise it."); *see also id.* at 141 ("We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but, by the strongest implication, prohibited them.").

[202] *See* Dehn, *supra* note 152, at 651 ("While Congress cannot direct the President to attack a specific enemy position at a certain time, from the north or south, by land or air, with tanks or [infantry], or by frontal assault, flank attack, or envelopment, it can regulate how the armed forces must treat a captured enemy and place other general limits on command discretion in matters of war and military discipline.").

[203] *See infra* Section IV.B (discussing the congressional prohibition of law of war violations by the armed forces and others).

[204] *See* Dehn, *supra* note 152, at 651–61 (discussing arguable sources and theorizing limits of such powers); *see also Milligan*, 71 U.S. at 139–40 (Chase, C.J., concurring) (asserting that neither could the president nor "any commander under him,

This discussion does not resolve every legal issue surrounding the Commander-in-Chief power. As established above, there are contested issues regarding a president's general constitutional authority to employ the armed forces in some circumstances. Moreover, there can be difficult questions regarding the specific actions authorized by broadly worded laws, such as those authorizing the use of "necessary and appropriate force."[205] The point of this brief analysis is to emphasize that these legal issues remain salient because the Commander-in-Chief power does not vest presidents with "conclusive and preclusive" constitutional authority over the armed forces, or over the country and its emergencies.[206]

### *D. The National Emergencies Act*

The National Emergencies Act (NEA) is a microcosm of the challenges created by broad and relatively unconstrained statutory authority. The NEA grants presidents broad discretion to declare a national emergency in domestic or foreign affairs (and to continue it in perpetuity).[207] Doing so allows a president to exercise various statutory powers, some of which include authorities constitutionally assigned to Congress.[208] Although Congress attempted to retain power to terminate these emergencies by simply adopting a joint resolution,[209] its ability to do so is constitutionally limited; Article I, Section 7 of the Constitution requires that joint resolutions be presented to the

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without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.").

[205] *See* Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001); *see also* Legal Authorities Supporting the Activities of the National Security Agency Described by the President, 30 Op. O.L.C. 1, 2 (2006) (articulating statutory and constitutional arguments for conducting domestic electronic surveillance after attacks of September 11, 2001).

[206] With this said, a president and subordinate commanders appear to possess a limited power to adopt measures that temporarily invade general constitutional or statutory rights when justified by specific, extraordinary circumstances, which I have elsewhere described as meeting "situational strict scrutiny." Dehn, *supra* note 152 at 652 (adopting the term "situational strict scrutiny" and generally describing that where "a compelling public interest exists and the means chosen are narrowly tailored to achieving that interest, the government's actions are constitutionally permissible, or at the very least excusable by Congress").

[207] 50 U.S.C. §§ 1621, 1622(d).

[208] *Id.* § 1621(a)); *see also A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use [https://perma.cc/QBM4-PSXK].

[209] 50 U.S.C. § 1622(a)(1).

president, who may disapprove them.[210] If disapproved, they must be repassed by two thirds of both chambers to take effect.[211] Put simply, there are virtually no statutory limits upon a president's ability to proclaim and to perpetuate a national emergency, but action by a supermajority of Congress is needed to terminate them, even if they are "manufactured emergencies."[212] This likely explains why the United States has been operating under at least one or another (often several) presidentially declared states of emergency since at least 1979.[213] Alternatively, when faced with obvious abuses of a president's constitutional or statutory powers, a majority of the House of Representatives may impeach a president,[214] but a supermajority of the Senate is required to convict and remove them from office.[215] By the time any of these legislative processes play out, grave constitutional harm might already be unavoidable, and potentially even irreversible.

### *E. The Practical Limits of Legislative Checks and Balances*

Practically speaking, Congress is a deliberative body and unable to check impending abuses of presidential power in real time, while often lacking the political will to do so at all.[216]

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[210] U.S. CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives . . . .").

[211] *Id.*; *see also* INS v. Chadha, 462 U.S. 919, 944–51, 958 (1983) (holding that a statute authorizing "legislative veto" of an executive branch action without bicameral consideration or presentment to the president for approval or disapproval was unconstitutional).

[212] *See* Tsai, *supra* note 103 (discussing the danger of manufactured emergencies).

[213] *See* Olivia B. Waxman, *Trump Just Declared an Emergency at the Border. The U.S. Has Been in a Constant State of Emergency Since 1979*, TIME (Feb. 15, 2019, 10:54 AM), https://time.com/5496270/presidents-history-national-emergency [https://perma.cc/7ADS-VHUD]. For a "running list" of declared national emergencies traced to the executive orders that declared and most recently perpetuated them, see *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST. (Aug. 12, 2024), https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act [https://perma.cc/G9GC-DM5S] (listing powers that presidents may exercise in declared emergencies).

[214] U.S. CONST. art. I, § 2, cl. 5.

[215] *Id.* art. I, § 3, cl. 6.

[216] Partisan politics also play a prominent role in a president's ability to act in the face of congressional intransigence. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (observing that the "rise of the party system" provides "extraconstitutional supplement to real executive power," noting a president "often may win, as a political leader, what he cannot command under the Constitution").

Although Congress has enacted whistleblower and other protections to encourage the disclosure of improprieties,[217] the processes are reactive and time-consuming.[218] They can also be corrupted by a president or well-placed loyalists in the executive branch.[219] It would therefore seem unavoidable that in the face of some impending abuses of presidential power, any meaningful check on a president must come from within the executive branch.[220] If one is to contemplate what many might see as an extraordinary intra-executive branch constitutional doctrine, the important issues become (1) who may act to prevent such abuses, (2) under what circumstances, and (3) in what ways. These issues are addressed in the next Part.

## III. CONSTITUTIONAL FIDELITY AND THE "GOOD OFFICER"

Perceptions about the propriety of official actions may often depend upon someone's prior political or theoretical commitments, the luxury of hindsight, and perhaps also a desire for attention. As noted above, whistleblower Alexander Vindman and others reflexively asserted that General Milley's alleged actions had subverted the constitutional principle of civilian control of the military and the statutory chain of command.[221] After Vindman lauded his actions with respect to

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[217] *See* 5 U.S.C. § 2302(b)(8)–(9); *see also id.* § 7211 ("Employees' right to petition Congress"); 10 U.S.C. § 1034 (providing similar protection for members of armed forces who communicate with Congress).

[218] *See* Vindman, *supra* note 7; *see also* DEVINE, *supra* note 102, at 2.

[219] As has been thoroughly reported, Alexander Vindman reported President Trump's 2019 efforts to pressure Ukraine into investigating his political rival, Joseph Biden, and Biden's son Hunter, to his superiors, which resulted in a whistleblower complaint. *See* Danny Hakim, *Who Is Alexander Vindman? White House Aide Reported Ukraine Concerns*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2019/11/19/us/alexander-vindman.html [https://perma.cc/KB9B-2AZU]. To review the whistleblower complaint, see Brandon Carter, *READ: House Intel Committee Releases Whistleblower Complaint On Trump-Ukraine Call*, NAT'L PUB. RADIO (Sept. 26, 2019), https://www.npr.org/2019/09/26/764071379/read-house-intel-releases-whistleblower-complaint-on-trump-ukraine-call [https://perma.cc/AJ68-AF3V]. Although the acting Director of National Intelligence was statutorily obligated to disclose the whistleblower complaint to Congress, the White House Counsel made overly broad assertions of executive privilege and a political appointee in the OLC drafted a dubious opinion that rejected the conclusions of the Intelligence Community Inspector General. *See* DEVINE, *supra* note 102, at 13–15. This OLC opinion was roundly criticized by a group of former federal inspectors general. *See* Gordon Ahl, *Inspectors General Criticize OLC Whistleblower Opinion*, LAWFARE (Oct. 25, 2019, 10:41 AM), https://www.lawfareblog.com/inspectors-general-criticize-olc-whistleblower-opinion [https://perma.cc/Y2MS-VLX2].

[220] *See generally* Ghiotto, *supra* note 116 (providing a similar analysis regarding the potential origins and possible prevention of a "presidential coup"); *but see* Ingber, *supra* note 45 (questioning "efficacy of bureaucratic resistance as a check" upon a misguided president).

[221] *See* Vindman, *supra* note 7; *see also* Lee, *supra* note 5.

the former president's infamous phone call with the Ukrainian President, Vindman argued that General Milley should have resigned, as former Secretary of Defense James Mattis did, rather than undermine the chain of command.[222] Recall that Secretary Mattis resigned when the former president abruptly ordered US troops out of Syria, which was arguably a problematic foreign policy decision—and eventually reversed—but one that is clearly within the president's constitutional authorities.[223] It was not a situation that violated the Constitution or an applicable statute, nor one that threatened to subvert the Constitution or its vital principles. Similarly, one should note that Milley did not resign over President Biden's order to withdraw American troops from Afghanistan even though he had recommended against doing so and later classified the withdrawal as a "strategic failure."[224]

If reports (as well as attorney sanction orders and criminal indictments) are to be believed, the end of the first Trump administration involved sycophantic advisors encouraging the former president to use the armed forces to undermine or overturn election results as well as the prospect of an outgoing president ordering a completely unjustified nuclear or conventional strike that could have resulted in a devastating war.[225] We must also remember that around the time of these events, the former president had appointed inexperienced partisan loyalists to key positions within the Department of Defense and the Intelligence Community after summarily dismissing their predecessors.[226] It is difficult to gauge the effect these events may have had on General Milley's perception of the situation unfolding around him, though reports suggest that he

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[222] *See* Vindman, *supra* note 7; *see also* DEVINE, *supra* note 102, at 13 (providing an account of Vindman's actions).

[223] *See* Jeffrey Goldberg, *The Man Who Couldn't Take It Anymore*, ATLANTIC (Oct. 2019), https://www.theatlantic.com/magazine/archive/2019/10/james-mattis-trump/596665/ [https://perma.cc/JS5U-R6PS] (recounting General Mattis' resignation and quoting Mattis as saying, "If you leave an administration, you owe some silence. When you leave an administration over clear policy differences, you need to give the people who are still there as much opportunity as possible to defend the country").

[224] Goldberg, *supra* note 16.

[225] *See* PERIL, *supra* note 2, at xxv–xxvii.

[226] *See* David E. Sanger & Eric Schmitt, *Trump Stacks Pentagon and Intel Agencies with Loyalists. To What End?*, N.Y. TIMES (Nov. 16, 2020), https://www.nytimes.com/2020/11/11/us/politics/trump-pentagon-intelligence-iran.html [https://perma.cc/Y3PV-AC9T]; *See also* ESPER, *supra* note 23, at 662–64 (wherein Esper describes White House efforts to "decapitat[e] the Department [of Defense] . . . ."). In Esper's view, "by the fourth year [of Trump's presidency], once Trump beat impeachment, and more true believers were brought into the White House, blind loyalty to the president and absolute alignment with his views became the litmus test." *Id.* at 664. Moreover, "[c]ompetence, experience, knowledge of government, and other [laudable] attributes . . . were often thrown out the Oval Office window." *Id.*

was very concerned.[227] As Vindman admitted, Milley tried working with members of the White House Staff in an effort to counter the former president's worst impulses, but to little avail.[228] One might appreciate, even if Vindman does not, that General Milley might reasonably have believed his resignation would only make it easier for the former president to misuse the armed forces.[229] The issue to consider here is whether legal or moral principles might excuse or justify Milley's actions and help us to distinguish them from those of Vindman and Mattis. This Part undertakes that task.

### *A. The Meaning of Constitutional Fidelity*

The suggestion that a senior military officer or executive branch official might resist or defy a plausibly lawful order from the constitutionally designated Chief Executive and Commander-in-Chief may seem absurd on its face. One must recall, however, that their oath is to the Constitution and not to a president. What that oath practically requires in specific circumstances may be rather unclear. A recent edition of *The Armed Forces Officer*, a guide published by the Department of Defense, advises military officers that they are "defenders of the Constitution and servants of the nation."[230] It explains that their "oath to support and defend the Constitution means swearing to uphold the core values that define the essence of American citizenship."[231] Further, it counsels that officers "are required to embody the values [they] have taken an oath to defend" and that professional "courage is not a matter of heroism or extraordinary

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[227] Goldberg, *supra* note 16. Reports claim Milley was "keeping an eye on the activities of the men dispatched by Trump to lead the Pentagon after Esper was fired," and may have "warned them that they would be held accountable for breaking the law or violating their oaths." *Id.*

[228] *See* Vindman, *supra* note 7.

[229] *See id.* (Vindman confidently claimed that if Milley resigned, other generals would serve as a necessary check on the President). Former Secretary of Defense Robert Gates believes Milley was "uniquely qualified to defend the Constitution from Trump in those final days." *See* Goldberg, *supra* note 16 (noting Milley believed other generals would have done the same things he did: "I think that any of my peers would have done the same thing. Why do I say that? First of all, I know them. Second, we all think the same way about the Constitution").

[230] U.S. DEP'T OF DEF., THE ARMED FORCES OFFICER 33 (2007) [hereinafter 2007 AFO]. Despite its status as an official publication, the cover material for the 2007 (and 2017) editions of this reference contains the following disclaimer: the "opinions, conclusions, and recommendations expressed or implied within are solely those of the contributors and do not necessarily represent the views of the Defense Department or any other agency of the Federal Government." *Id. See also* RICHARD M. SWAIN & ALBERT C. PIERCE, THE ARMED FORCES OFFICER viii (2017).

[231] 2007 AFO, *supra* note 230, at 2.

strength, but of inner conviction and faith—the decision to do the right thing for the right reason, no matter the cost."[232]

Constitutional fidelity is similarly emphasized in an excellent recent "open letter" proposing principles for civilian control of the armed forces and best practices for civil-military relations.[233] The letter was signed by eight former Secretaries of Defense and five former Chairmen of the Joint Chiefs.[234] It begins by acknowledging that "[c]ivilian control of the military is part of the bedrock foundation of American democracy," and asserts that democracy "is not threatened by the existence of a powerful standing military so long as civilian and military leaders—and the rank-and-file they lead—embrace and implement effective civilian control."[235] The letter posits that "[c]ivilian control operates within a constitutional framework under the rule of law."[236] It further notes that "[m]ilitary officers swear an oath to support and defend the Constitution, not an oath of fealty to an individual or to an office," and that "[a]ll civilians, whether they swear an oath or not, are likewise obligated to support and defend the Constitution as their highest duty."[237] It then unequivocally states that "the military is obligated (by law and by professional ethics) to refuse to carry out an illegal or unconstitutional policy/order/action," that "it is the responsibility of senior military and civilian leaders to ensure that any order they receive from the president is legal," and that "[i]t is the responsibility of *senior* military and civilian leaders to provide the president with their views and advice that includes the implications of an order."[238] Such virtuous ideals have also been embraced by graduates of the United States

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[232] *Id.* at 3.

[233] *See* Ashton Baldwin Carter et al., Open Letter, *To Support and Defend: Principles of Civilian Control and Best Practices of Civil-Military Relations*, WAR ON ROCKS (Sept. 6, 2022), https://warontherocks.com/2022/09/to-support-and-defend-principles-of-civilian-control-and-best-practices-of-civil-military-relations/ [https://perma.cc/77A6-W9UV].

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.* (emphasis added).

Military Academy at West Point,[239] and by all living former Secretaries of Defense.[240]

These high ideals suggest a moral or legal basis for taking measured actions to resist or defy unconstitutional presidential orders or other acts. However, as retired US Air Force Deputy Judge Advocate General Charles Dunlap cautioned in a recent analysis of this open letter, one's "oath to support and defend the Constitution . . . is not *carte blanche* for each officer to interpret the Constitution in exercising their official duties."[241] While true, General Dunlap's vague statements on these matters provide little insight into who he believes may or must engage in such evaluations, although he clearly thinks it should not be "junior personnel" or "troops in the field."[242] Fortunately, the open letter primarily addresses the responsibilities of "senior military and civilian leaders."[243]

### *B. General Notions of "Public Necessity"*

It would seem rather intuitive that government officials, especially military officers, must typically comply with, and ensure that their subordinates follow, the directives of superior officials purportedly exercising constitutional and statutory authority. But as Thomas Jefferson once wrote:

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[239] A monument, Constitution Corner, near the Superintendent's quarters on the grounds of West Point, states: "The United States boldly broke with the ancient military custom of swearing loyalty to a leader. Article VI required that American Officers thereafter swear loyalty to our basic law, the Constitution. . . . Our American Code of Military Obedience requires that, should orders and the law ever conflict, our officers must obey the law. Many other nations have adopted our principle of loyalty to the basic law. This nation must have military leaders of principle and integrity so strong that their oaths to support and defend the Constitution will unfailingly govern their actions. The purpose of the United States Military Academy is to provide such leaders of character." *See* Bill Coughlin, *Constitution Corner*, HIST. MARKER DATABASE (June 16, 2016), https://www.hmdb.org/m.asp?m=59186 [https://perma.cc/UZQ5-DXEQ]. Similarly, in a Veteran's Day address following the November 2020 election, General Milley said, "We do not take an oath to a king, or a queen, to a tyrant or a dictator. . . . No, we do not take an oath to a country, a tribe, or a religion. We take an oath to the Constitution. Each of us will protect and defend that document, regardless of personal price." PERIL, *supra* note 2, at 154.

[240] *See* Carter et al., *supra* note 52 ("Each of us swore an oath to support and defend the Constitution against all enemies, foreign and domestic. We did not swear it to an individual or a party.").

[241] Maj. Gen. Charles Dunlap, Jr., USAF (Ret.), *Return to Sender?: Analyzing the Senior Leader "Open Letter" on Civilian Control of the Military*, 15 HARV. NAT'L SEC. J. 77, 92 (2023).

[242] *See id.* at 100, 102 (expressing concerns about junior officers interpreting the legality of official orders).

[243] *See* Carter et al., *supra* note 233. General Dunlap primarily critiques the open letter by examining its broader potential implications rather than its specific recommendations. *See* Dunlap, Jr., *supra* note 241, at 100–04.

> [A] strict observance of the written laws is doubtless one of the high duties of a good citizen: but it is not the highest. [T]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. [T]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property & all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[244]

This language seems to refer to some sort of national existential crisis, in the sense that the nation might cease to exist without a public official taking decisive action contrary to written law.[245] Jefferson provided several examples of what he meant, however, including the emergency invasion of property rights during war.[246] These examples seem to conform to a general doctrine of "public necessity," versions of which were effectively adopted in the Suspension Clause,[247] and have been acknowledged in Supreme Court decisions.[248]

Jefferson also suggested who might claim this authority: it is not available to "persons charged with petty duties, where consequences are trifling, and time allowed for a legal course . . . ."[249] This description might fairly encompass Vindman's role and the phone call to which he responded.[250]

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[244] Letter from Thomas Jefferson, Former U.S. President, to John B. Colvin, Author (Sept. 20, 1810) [hereinafter Jefferson Letter], https://founders.archives.gov/documents/Jefferson/03-03-02-0060 [https://perma.cc/TW4S-A94Q].

[245] In a similar vein, President Lincoln famously argued, "[a]re all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?" WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME vii (1998).

[246] *See* Jefferson Letter, *supra* note 244 ("[W]hen, in the battle of Germantown, Gen Washington's army was annoyed from Chew's house, he did not hesitate to plant his cannon against it, altho' the property of a citizen.").

[247] The Suspension Clause prohibits suspension of the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it," which is undoubtedly a type of public necessity. U.S. CONST. art. I, § 9, cl. 2.

[248] *See* Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1851) ("There are . . . occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer charged with a particular duty may impress private property into the public service or take it for public use."); *see also* United States v. Russell, 80 U.S. (13 Wall.) 623, 629 (1871) ("[A] taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate and the danger . . . is impending . . . ."); United States v. Caltex (Phil.), Inc., 344 U.S. 149, 154 (1952) (observing that at common law "in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved").

[249] Jefferson Letter, *supra* note 244.

[250] *See* DEVINE, *supra* note 102 (outlining the whistleblower's actions launching investigation and impeachment for President Trump's effort to pressure President Zelensky).

Instead, this extraordinary authority is available only to those "who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of it's [sic] very high interests are at stake."[251] Jefferson added that "the line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, [and to] throw himself on the justice of his country and the rectitude of his motives."[252]

Some commentators interpret Jefferson's letter to argue for an executive prerogative to ignore or dispense with the law.[253] Criminal law experts might understand Jefferson's phrasing as a reference to a "necessity" or "lesser evils necessity" justification defense. Although not universally or uniformly adopted in US criminal codes or common law, a necessity defense justifies an otherwise illegal act when performed to avert a greater evil or harm.[254] Its conceptual cousins, public and private necessity, are also defenses to tort liability in some US jurisdictions.[255] Jefferson posited that a public necessity of the highest order may justify violating the written law, potentially including the Constitution.[256] This points to a fundamental principle for "the good officer" faced with a potential abuse of presidential power—the constitutional or other legal harm(s) one seeks to prevent must be of a greater magnitude than the constitutional harm(s) that one should reasonably anticipate will result from one's actions.

The necessity defense in US criminal law has several elements that are instructive in this context. According to Professor Joshua Dressler, these elements are as follows, "[f]irst, [the person performing the otherwise criminal act, known as] the actor[,] must reasonably believe he is faced with a clear and imminent danger."[257] Second, the actor must believe that their action(s) "will be effective in abating the danger that he seeks to avoid . . . ."[258] "Third, there must be no effective *legal* way to

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[251] Jefferson Letter, *supra* note 244.

[252] *Id.*

[253] *See* Julian Davis Mortenson, *A Theory of Republican Prerogative*, 88 S. CAL. L. REV. 45, 63–66 (2014) (arguing Jefferson prioritized the exercise of executive power over the law when "the legal rules don't make sense"); *see also* Jeremy David Bailey, *Executive Prerogative and the "Good Officer" in Thomas Jefferson's Letter to John B. Colvin*, 34 PRESIDENTIAL STUD. Q. 732, 734–35 (2004) (arguing Jefferson believed preserving the principle of law could justify acting above the written law).

[254] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, 281–85 (9th ed. 2022) [hereinafter DRESSLER 9th ed.].

[255] DAN B. DOBBS ET AL., THE LAW OF TORTS §§ 117, 119 (2d ed. 2017).

[256] *See* Jefferson Letter, *supra* note 244 (suggesting the president might acquire or purchase land without a constitutionally required congressional budget appropriation in specific circumstances).

[257] DRESSLER 9th ed., *supra* note 254, at 283.

[258] *Id.* at 284.

avert the harm."[259] "Fourth, the harm . . . cause[d] by violating the law must be less serious than the harm that [t]he [actor] seeks to avoid."[260] Fifth, "lawmakers must not have previously anticipated the choice of evils and determined the balance to be struck . . . ."[261] Each element is determined from the standpoint of the actor, who must behave reasonably under the circumstances as they (reasonably) understand them.[262]

### *C. A Necessity of Constitutional Fidelity*

Applying these principles to the situations that General Milley reportedly faced during the Trump presidency provides the outlines of a potential moral or legal "defense" for one's actions if resisting or defying an unconstitutional presidential order.[263] First, those actions must be directed to preventing the execution of an unconstitutional presidential act or order as defined earlier.[264] Because any such acts would undermine a president's constitutional authority as Chief Executive and Commander-in-Chief, they must be directed toward preventing illegal or otherwise corrupt acts that entail constitutional harms of a greater magnitude. Thus, it seems that any federal government official who would consider taking measures to

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[259] *Id.*

[260] *Id.*

[261] *Id.* (internal quotations and citations omitted). Dressler mentions one additional element that does not seem relevant in the context of presidential powers, that the person seeking to invoke necessity must not have "substantially contributed to the emergency." *Id.* at 285, 288–89.

[262] *Id.* at 283–85. The situations to which these principles might apply are potentially limitless, although there are valid questions regarding their application to private defendants that may not translate to the context of public authority and constitutional law. *See id.* at 286–92. For example, there are longstanding questions about the application of a necessity doctrine to homicide. *Id.* at 287–91. These questions do not undermine the legality of ordering service members to conduct potentially fatal operations to preserve the safety and security of the nation. *See id.*

[263] The quotation marks indicate that a "defense" in this context is conceptual and perhaps rhetorical rather than an accepted legal defense. R.C.M. 916 provides "[a] death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful." MCM 2024, *supra* note 66, at II-136. It is unclear whether this rule adopts only a "public authority" justification defense or whether it encompasses all potential justification defenses, which would potentially include lesser-evils necessity. For a general discussion of the common law origins of UCMJ defenses, see Dehn, *supra* note 77, at 871–74. Note that some common law defenses have been found inapplicable to military trials, at least in certain contexts. *See* United States v. Washington, 57 M.J. 394, 397–98 (C.A.A.F. 2002) (holding that duress was not a defense to disobedience of a lawful order because military orders sometimes require soldiers to risk their lives). There is a general canon of statutory construction that common law terms of art may not retain their traditional meaning if it would frustrate "Congress' general purpose in enacting a law." Moskal v. United States, 498 U.S. 103, 117 (1990).

[264] *See supra* Part II.

resist, obstruct, or disobey an anticipated or issued unconstitutional presidential order must:

(1) reasonably believe (to a moral certainty) that the execution of a presidential order or plan would (a) be intrinsically and manifestly unconstitutional—meaning that it would clearly violate or require a violation of the Constitution or of an applicable federal law, or (b) clearly violate, or seriously impair or undermine, constitutional principles of the highest order; and

(2) take only those measures that the official reasonably believes to be of lesser constitutional import, and to be both necessary to prevent, and likely to be effective in preventing, the execution of the unconstitutional order or plan, at least for some appreciable period that would allow for additional interventions.[265]

Undermining a president's constitutional authority as Commander-in-Chief by taking judicious measures to prevent them from using the armed forces to undermine or nullify a lawful election, or from ordering an unconstitutional use of military force (for personal reasons rather than any true national interests), would likely satisfy these requirements. This may explain Professor Nichols' intuition that the nation should be grateful for what Milley did.[266]

Because this "necessity of constitutional fidelity" would apply only in situations involving impending violations of law or of vital constitutional principles, its application is limited in several ways. Regarding the first element, an official must be in a position to sufficiently understand the factual and legal context in which an order or plan would be executed in order to properly assess its true purpose, likely legality, and constitutional import. The comparatively limited number of officials involved in high-level (especially classified) national security decision-making limits the universe of those who might plausibly claim a necessity to disobey or otherwise attempt to

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[265] The need for flexibility in the second element is dictated by the complexity of the federal government. The Supreme Court has recently reiterated that a president exercises complete control of the Executive Branch and "those who wield executive power on his behalf," and possesses an "'unrestricted power of removal' with respect to executive officers of the United States whom he has appointed." Trump v. United States, 144 S. Ct. 2312, 2328 (2024) (internal quotations and citations omitted). Even if one anticipates that they will be fired and replaced with a more partisan loyalist for defying the president, there will be a political cost for removing someone that they or a previous president appointed with Senate confirmation. With that said, the extent to which one reasonably anticipates others might follow one's example in resisting or defying a president is a factor to be considered in determining whether to resist or defy a president, or simply to resign.

[266] *See supra* notes 24–25 and accompanying text.

prevent the execution of unconstitutional presidential orders.[267] Those executing orders issued by a higher headquarters seldom possess adequate information to evaluate the legality or morality of the orders they have received, and should typically presume those orders to be lawful absent sufficient reliable information to the contrary.[268] Any potential claim of a necessity to resist or defy a president is therefore generally limited to officials in roles that enable them to understand and assess both the context of the orders or plans and any potential constitutional or other legal harms they would likely entail or produce. This is consistent with what Jefferson argued.[269]

Regarding the second element, a senior government official should have reasonable discretion to determine how best to prevent the execution of an unconstitutional order in a large, complex organization like the US government. While in criminal law, the harm to be avoided must be imminent, which suggests a relatively close temporal proximity to the harm's occurrence,[270] the permissible timing and nature of actions taken to prevent grave constitutional harm should be assessed in relation to the likelihood, imminence, certainty, and potential magnitude of the harm.[271] From the available information, it seems as though

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[267] The participants in national security decision making can vary widely depending upon the activities, agencies, and issues involved, and a president may sometimes ignore established protocols. *See* ESPER, *supra* note 23, at 320–24 (describing a National Security Council principals meeting related to Venezuela and Iran); *but see id.* at 315–18 (describing planning instigated by a presidential advisor for a very large military presence at the southern border, but about which Mr. Esper and General Milley had not been notified or consulted in advance).

[268] *See supra* Part I; *see also* Dunlap, Jr., *supra* note 241, at 99–102 (emphasizing a requirement to disobey unlawful orders and also the need to presume the lawfulness of orders unless patently illegal); Dehn, *supra* note 77, at 885–86, 892–95 (explaining the theory underlying the presumption of lawfulness and providing examples).

[269] Jefferson Letter, *supra* note 244.

[270] DRESSLER 9th ed., *supra* note 254, at 287.

[271] Replacing a theory of necessity grounded in the temporal imminence of harm with one that entails a broader contextual assessment of when action is justified to *prevent* harm is similar to recent developments in the justification to use force in national self-defense under international law. The United States has adopted a flexible view of necessity to engage in self-defense that considers "the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage." WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 9 (2016). International law experts have made similar arguments. *See, e.g.*, ELIZABETH WILMSHURST, CHATMAN H., PRINCIPLES OF INTERNATIONAL LAW ON THE USE OF FORCE BY STATES IN SELF-DEFENCE 2 (2005), https://www.chathamhouse.org/sites/default/files/publications/research/2005-10-01-use-force-states-self-defence-wilmshurst.pdf [https://perma.cc/5SWQ-SWCZ] ("The criterion of imminence requires

General Milley undertook limited measures to avert potentially momentous unconstitutional orders that seemed imminent to many in and out of government.[272] Extreme measures, such as a military coup against a president, would likely cause more constitutional harm than they would prevent in almost if not every circumstance. Indeed, a military coup would be difficult to justify in terms of its necessity and efficacy given significant uncertainty about the events that might follow it. Criminal acts, such as the unauthorized disclosure of classified information, must also be carefully evaluated both as to their necessity and likely efficacy. Ultimately, the prospect of explaining one's actions to those whose cooperation is needed (such as the NMCC staff), to Congress, to a jury, or to the entire nation, should provide an adequate constraint upon senior military or civilian officials contemplating such actions.[273]

### *D. Lawful Alternatives*

A final note about the feasibility of an official's resignation or other lawful alternatives to resistance or defiance is necessary. It is certainly correct to argue that if an official's immediate resignation or threatened resignation would prevent the issuance or execution of an unconstitutional directive or measure, then that self-sacrificial and lawful alternative is required. This is because the constitutional harm caused by one's insubordination would be unnecessary if one's resignation would avoid it. The same is true of any other lawful alternative—such as invoking the Twenty-Fifth Amendment—assuming it is both feasible and likely to be effective under the circumstances.[274] But the application of the necessity principles

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that it is believed that any further delay in countering the intended attack will result in the inability of the defending state effectively to defend itself against the attack. In this sense, necessity will determine imminence: it must be necessary to act before it is too late.").

[272] *See* PERIL, *supra* note 2, at 160 (discussing how after one post-election meeting regarding a potential attack on Iran, the Director of the Central Intelligence Agency reportedly worried aloud to Milley, "This is a highly dangerous situation. We are going to lash out for his ego?").

[273] *See* Monaghan, *supra* note 116, at 38 (discussing how in the context of presidential assertions of emergency powers "subsequent congressional approval is necessary . . . . [and] would seem to induce caution in the executive, while not being so onerous as to deter the President from acting when necessity warrants").

[274] The Twenty-Fifth Amendment provides, *inter alia*, for succession to the presidency in the event of a president's death, resignation, or being "unable to discharge the powers and duties of [their] office." U.S. CONST. amend. XXV, § 3. Several members of the Trump administration reportedly considered invoking this provision after the events of January 6, 2021. Maggie Haberman & Michael S. Smidt, *Jan. 6 Panel Puts Focus on Cabinet Discussions About Removing Trump*, N.Y. TIMES (June 10, 2022),

articulated above does not depend upon the speculations of attention-seeking pundits about what might have prevented the issuance or execution of unconstitutional presidential orders. The critical inquiry is what General Milley reasonably believed to be necessary and effective under the circumstances as he understood them. General Milley might reasonably have believed that his resignation would not prevent the impending constitutional harms that he perceived, but that ensuring he was consulted by those tasked to execute any unconstitutional orders would.[275] Without more information, including a much more detailed explanation from General Milley, we cannot and should not endeavor to conclusively assess the reasonableness of Milley's beliefs or actions.

## IV. EXAMPLES & ISSUES

There are countless potential circumstances that might lead a senior civilian or military official to contemplate resisting or defying unconstitutional presidential orders or other acts. This Part considers some recent examples that demonstrate the difficult legal and factual issues that often accompany presidential decision making in matters of war and national security. These examples reinforce the idea that only those with sufficient access to all relevant information will be in a position to evaluate whether presidential directives are unconstitutional. This Part begins by considering the relevance of a president's motives to an objective evaluation of whether an impending presidential order or other act is unconstitutional.

### *A. The Relevance of a President's Motives*

One might reasonably question whether a "necessity of constitutional fidelity" is needed at all. If government officials may disobey unconstitutional presidential orders because they do not provide public authority to act, then that should be sufficient to prevent many or most abuses of power. But as posited here, presidential acts may be unconstitutional in two ways. The first is when an act violates a validly enacted and applicable law without relatively clear constitutional or statutory presidential authority (public authority) for doing so. As discussed above and in examples that follow, a president may

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https://www.nytimes.com/2022/06/10/us/politics/25th-amendment-trump-cabinet.html [https://perma.cc/HT4M-3NBP].

[275] *See supra* note 19 and accompanying text.

have plausible legal authority to act in certain ways and under certain circumstances that might otherwise violate existing laws. In such cases, the legality of an order might not be entirely clear. The second involves the use of a president's acknowledged constitutional or statutory powers, such as emergency powers, in an effort to undermine the Constitution.[276] The necessity of constitutional fidelity is a useful framework when a president may plausibly claim authority to take a given action, but their motive for doing so is to subvert vital constitutional principles. For example, former Secretary of Defense Esper and General Milley developed "Four Nos" that they would endeavor to honor during the remainder of the Trump presidency, two of which were "no politicization of the D[epartment] o[f] [D]efense[,] and no misuse of the military."[277] Their enforcement of these "nos" would have necessarily turned on the former president's motives for exercising his constitutional or statutory authority over the armed forces.

In the first category of unconstitutional orders, a president's motives will typically be irrelevant. The George W. Bush administration's "enhanced interrogation" program is an example of this. The primary purpose of the program was to protect Americans by preventing future terrorist attacks, which is certainly a vitally important public purpose.[278] This unquestionably proper motive did not change the fact that this program—which violated numerous US treaty and customary international law obligations and federal criminal statutes implementing those obligations—was patently unlawful.[279] The argument that torture might be an indispensable measure for protecting the nation and its citizens is precluded by the fact that both domestic and international law specifically prohibit torture in that context.[280] In this category, "unlawful" will often, if not always, be "unconstitutional."

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[276] *See supra* Part III.

[277] ESPER, *supra* note 23, at 402. The others were "no unnecessary wars," and "no strategic retreats." *Id.* It is not clear whether these "redlines" were for purposes of disobedience or resignation, but the two in this Article would seem to be policy rather than legal "redlines."

[278] *See* Torture Memo, *supra* note 149.

[279] *See infra* Section IV.B. For a summary of international treaties prohibiting torture in armed conflict, see *Rule 90: Torture and Cruel, Inhumane or Degrading Treatment*, INT'L HUMANITARIAN L. DATABASES, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule90#refFn_59AAFF5E_00005 [https://perma.cc/GV66-5E7Y]. Federal laws prohibiting torture include 18 U.S.C. § 2441 (c)(1) & (d)(1)(A) (War Crimes Act) and 18 U.S.C. § 2340A (Torture). As a law of war violation, torture is also punishable under the Uniform Code of Military Justice. *See infra* Section IV.B.

[280] *See*, *e.g.*, DRESSLER 9th ed., *supra* note 254, at 284–85 (noting that in a criminal context necessity cannot be claimed where a lawmaking entity has already

The second category involves situations in which a president's constitutional or statutory authorities are so broad or ambiguous the strongest evidence that their use would be unconstitutional are their motives for invoking them. For example, using the broad authority of the Insurrection Act or other statutes to use the federal armed forces or state national guard troops to undermine the results of an election would be an unconstitutional abuse of these laws. It does not matter if a president believes that the only possible explanation for their electoral defeat is widespread fraud if no substantial, objectively reliable evidence supports that conclusion. Additionally, ordering an attack on a foreign government for personal reasons rather than the "national interest" would raise similar constitutional concerns despite a president's general constitutional authorities over the armed forces, foreign affairs, and national defense. This does not include disagreement with a presidential act based in general moral or policy concerns; a president's clear purpose must be at odds with the Constitution or a law of the United States. The emphasis on a constitutional basis for resisting or defying a president is what differentiates this theory from those that have suggested the military may disobey orders for broader moral or policy reasons.[281] The proper focus can only be orders that violate or subvert the Constitution or laws of the United States.[282]

Of course, a president may have several motives for certain actions, some of which may be political or ideological. In approving the torture program, for example, the Bush administration may have been seeking to avoid or to minimize political backlash that would have resulted from another significant, successful terrorist attack within the United States. Some members of the administration may also have been seeking to reestablish a Nixonian view of presidential security

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contemplated the circumstances and precluded the act in question. Because torture is prohibited by international and federal law, one cannot claim that any war creates necessity to engage in it).

[281] *See* Peter D. Feaver, *Will the Military Obey Trump's Orders?*, FOREIGN POL'Y (Feb. 29, 2016, 4:58 PM), https://foreignpolicy.com/2016/02/29/will-the-military-obey-president-trumps-orders-hayden-bill-maher/ [https://perma.cc/Q7FA-MV22] (hypothesizing that senior military officers may disobey a legal but unwise policy); *see also* Andrew R. Milburn, *Breaking Ranks: Dissent and the Military Professional*, U.S. ARMY (Oct. 6, 2010), https://www.army.mil/article/47175/breaking-ranks-dissent-and-the-military-professional/ [https://perma.cc/8EZW-4AHL] (arguing that a military officer may "disobey an order he deems immoral; that is, an order that is likely to harm the institution writ large—the Nation, military, and subordinates—in a manner not clearly outweighed by its likely benefits").

[282] As the Manual for Courts-Martial explains, "the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order." *See* MCM 2024, *supra* note 66, at IV-24.

powers both within and beyond the Executive Branch.[283] The relevance of such ancillary goals may depend upon unknowable factors such as the extent to which they provide the actual reason(s) for taking a specific action. It seems fair to say, however, that they do not *necessarily* affect the legality or constitutionality of a presidential act if it is supported by a valid public purpose and a reasonable understanding and assessment of the available, objectively reliable information.

Despite the obvious relevance of motive in assessing whether an act is unconstitutional, the majority opinion in the *Trump* immunity case inexplicably held that courts cannot consider a president's motives when categorizing their actions as official or unofficial conduct.[284] This aspect of the holding was described as "nonsensical" by a former federal prosecutor:

> [w]here motive evidence would help establish the necessary showing of illegality . . . [at least] for functions that are not core constitutional presidential functions, then the consideration of motive evidence is a logical companion to the consideration of illegality. This is particularly so where a statute makes motive an element of the crime.[285]

Moreover, some constitutional doctrines and statutory prohibitions expressly incorporate a motive or purpose requirement, meaning that they are not triggered or violated unless the relevant government entity acted with a prohibited motive or purpose.[286] Thus, it is unclear whether the "broad and sloppy" majority opinion in the *Trump* immunity decision will withstand future scrutiny,[287] or whether it will eventually be universally described as "egregiously wrong," "deeply damaging," and "on a collision course with the Constitution from the day it was decided."[288] Regardless of how these issues play

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[283] *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007) (discussing constitutional views and motivations of Vice President Cheney's legal advisor David Addington, including reestablishing a view of presidential security powers reminiscent of the Nixon administration); *see also* H. JEFFERSON POWELL, THE PRESIDENT AS COMMANDER IN CHIEF: AS ESSAY IN CONSTITUTIONAL VISION 17 (2014) (explaining Nixon's "crude" formulation of presidential power is shared by other former officials).

[284] *See* Trump v. United States, 144 S. Ct. 2312, 2333 (2024).

[285] Weissmann, *supra* note 35.

[286] For example, only "purposeful" classifications on the basis of race are presumptively inconsistent with the Fourteenth Amendment's Equal Protection Clause and trigger the requirement that courts review those classifications under a rigorous standard known as strict scrutiny. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 240–46 (1976) (distilling and clarifying the purposeful racial discrimination requirement from several previous cases).

[287] Weissmann, *supra* note 35.

[288] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2264–65 (2022) (describing the majority's view of *Roe v. Wade*). For an excellent critique of the *Trump*

out in the courts, they do not alter the fact that senior civilian and military officials may consider a president's motives when evaluating whether a presidential order or other act is unconstitutional.

### *B. Ordering or Authorizing Law of War Violations*

Prior presidential administrations have sometimes asserted that a president may authorize law of war violations, some of which would amount to war crimes. For example, as a candidate for the 2016 presidential election, Donald Trump claimed that he would authorize torture and killing of the family members of terrorists.[289] During his previous term, the former president asserted that he could order the destruction of Iranian cultural property.[290] As discussed earlier, the Bush administration OLC, in a memorandum opinion later withdrawn, opined that "federal criminal laws of general applicability," including the War Crimes Act and general torture prohibition, should not be "misconstrued to apply to the interrogation of enemy combatants" because doing so "would conflict with the Constitution's grant of the Commander-in-Chief power solely to the President."[291] The opinion also stated that "previous opinions make clear that customary international law is not federal law and that the President is free to override it at his discretion."[292]

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immunity majority opinion and its abandonment of professed conservative principles of constitutional interpretation, see Mark Graber, Trump v. United States *as* Roe v. Wade, VERFASSUNGSBLOG (July 5, 2024) https://verfassungsblog.de/trump-v-united-states-as-roe-v-wade/ [https://perma.cc/6P4A-MBM3].

[289] *See* Jenna Johnson, *Trump Says 'Torture Works,' Backs Waterboarding and 'Much Worse*,*'* WASH. POST (Feb. 17, 2016), https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html [https://perma.cc/82JP-8ZVY]; *see also* Tom LoBianco, *Donald Trump on Terrorists: 'Take out Their Families*,*'* CNN (Dec. 3, 2015, 12:19 PM), http://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html [https://perma.cc/M7LX-6HHD]; *but see* Nolan D. McCaskill*, Trump Says He'll Defer to Mattis and Pompeo on Waterboarding*, POLITICO (Jan. 25, 2017, 3:13 PM), http://www.politico.com/story/2017/01/trump-waterboarding-mattis-pompeo-234174 [https://perma.cc/PPR4-HXWM] (describing Trump's later backpedaling on the issue of torture).

[290] *See* John Bowden, *Trump Doubles Down on Threat to Iran's Cultural Sites*, HILL (Jan. 5, 2020, 8:18 PM), https://thehill.com/homenews/administration/476868-trump-doubles-down-on-threat-to-iran-cultural-sites/ [https://perma.cc/75N9-LYUC] (quoting Trump as saying "[t]hey're allowed to kill our people. They're allowed to torture and maim our people. They're allowed to use roadside bombs and blow up our people. And we're not allowed to touch their cultural sites? It doesn't work that way").

[291] *See* Torture Memo, *supra* note 149, at 1.

[292] *Id.* at 2. For a thorough review of the Bush administration's torture program, see S. REP. NO. 113-288, 2 (2014) (providing the Senate Committee on Intelligence study

First published in June of 2015, the Department of Defense *Law of War Manual* adopts views rather different from the Bush administration OLC, but also more nuanced.[293] The *Law of War Manual* repeatedly states that members of the armed forces have a "[duty not] to comply with clearly illegal orders to commit law of war violations."[294] For reasons that are unclear, however, the *Law of War Manual* does not cite *any* federal statute or other officially promulgated source of US military law in support of this statement.[295]

Unfortunately, the *Law of War Manual* also creates ambiguity regarding its otherwise clear statements about the duty to disobey orders to commit law of war violations. In its discussion of the "force of the law of war under U.S. domestic law," the Manual explains, "[t]he specific legal force of a law of war rule under U.S. domestic law may depend on whether that rule takes the form of a self-executing treaty, non-self-executing treaty, or customary international law."[296] It then discusses these issues briefly without explaining their implications, including the notion that a president might be able to undertake a "controlling executive" act that might supersede relevant international law.[297] The Manual later states, however, that

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of the Central Intelligence Agency's detention and interrogation program between late 2001 and early 2009).

[293] It has become common practice to refer to the laws of war as "international humanitarian law" or "IHL" and the "law of armed conflict" or "LOAC." Congress used the term "law of war" in the UCMJ, as does the Law of War Manual. *See* 10 U.S.C. § 821; *see also* U.S. DEP'T OF DEF., LAW OF WAR MANUAL (2023) [hereinafter LAW OF WAR MANUAL]. For consistency, I will do the same.

[294] LAW OF WAR MANUAL, supra note 293, at 1088 (emphasis added); *see also id.* at 254 ("duty not to comply with orders that are clearly illegal also applies to violations of the principle of proportionality"); *id.* at 1087 ("[e]ach member of the armed services has a duty to . . . refuse to comply with clearly illegal orders to commit violations of the law of war"); *id.* ("[m]embers of the armed forces *must refuse* to comply with *clearly* illegal orders to commit law of war violations"); *id.* at 1088–89 ("requirement to refuse to comply with orders to commit law of war violations applies to orders to perform conduct that is clearly illegal or orders that the subordinate knows, in fact, are illegal" and "the duty not to comply with orders that are clearly illegal would be limited in its application when the subordinate is not competent to evaluate whether the rule has been violated"); *id.* at 1152 ("subordinates must refuse to comply with clearly illegal orders to commit violations of the law of war").

[295] With one exception, the relevant sections in the *Law of War Manual* cross-reference each other. The exception to this is para. 18.3.2.1, which cites two cases: a German case and an American case. The American case, already discussed in Part I, was *United States v. Calley*, in which the defendant was denied an obedience to orders defense for killing unarmed men, women, and children. *Id.* at 1088–89 n.27–28; *see also supra* notes 91 & 100 and accompanying text.

[296] LAW OF WAR MANUAL, *supra* note 293, at 38.

[297] *Id.* at 39. The Manual first vaguely mentions the Supreme Court's concept of self-executing treaties without resolving how it applies to the law of war treaties. *Id.* It then quotes, without explanation, a Supreme Court opinion suggesting that a president may sometimes issue a "controlling executive . . . act" that supersedes relevant international law. *Id.* (citing The Paquete Habana, 175 U.S. 677, 700 (1900)

violations of the law of war may be punished under the UCMJ, without explaining why.[298] In other words, the Manual does not fully clarify whether the UCMJ requires unconditional compliance with the law of war, or whether a president has constitutional authority to order or authorize law of war violations.

In previous scholarship, I endeavored to resolve these ambiguities.[299] Retracing the history and theory of military criminal law and the jurisdiction of military tribunals, I concluded that a president does not possess authority to order or authorize violations of the laws of war that would entail or result in a crime codified in a punitive article of the UCMJ, except as a reprisal.[300] The salient points are as follows. First, Article 18 of the UCMJ, which vests general courts-martial with jurisdiction over "any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war,"[301] is a legislative execution of law of war treaties and customary international law in the UCMJ.[302] The legal effect of this execution is to make law of war obligations a part of US military criminal law binding upon all US persons subject to the UCMJ and involved in military operations to which these international law obligations apply.[303] As an exercise of Congress's express power to make rules for the government and regulation of the armed forces, a president may not "override" this (or any other) aspect of the UCMJ,[304] as the Supreme Court concluded in *Hamdan v. Rumsfeld*.[305]

Of course, by authorizing punishment permitted by the law of war, the UCMJ necessarily executes all aspects of that law, including the authority to engage in reprisals.[306] "Reprisals are extreme measures" that would otherwise violate the laws of war, which are undertaken to induce an enemy's compliance

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("International law is part of our law, . . . where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .").

298 *Id.* at 1132.

299 *See generally* Dehn, *supra* note 77 (evaluating the president's authority to order military to violate the law of war as implemented by Congress in the UCMJ).

300 *Id.* at 891–92.

301 10 U.S.C. § 818(a).

302 Dehn, *supra* note 77, at 845–69.

303 *Id.* at 869–86.

304 *Id.* at 886–95; see also *supra* Section II.C.

305 Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that the president's military commissions order violated an applicable aspect of the law of war, and therefore Article 21 of the UCMJ, which then governed all military commissions).

306 Dehn, *supra* note 77, at 891.

with that law,[307] but not as "revenge or collective punishment."[308] Although many reprisals are clearly prohibited by law of war treaties and customary international law,[309] including "reprisals against cultural property,"[310] others are not. The United States reserves the right to engage in certain reprisals that are prohibited by treaties to which the United States is not a party and that it claims are not general customary international law binding upon the United States.[311] Decisions to engage in reprisals are subject to various conditions and must occur at the national level.[312] Reprisals are therefore an example of a lawful "controlling executive" act that may authorize what would otherwise be a law of war violation.[313] The factual and legal nuances raised by these matters further buttress the argument that only senior officials who are sufficiently aware of all relevant information may resist or defy a president's decision to engage in a reprisal.[314] The legal acumen displayed in the Law of War Manual make it abundantly clear, however, that senior Department of Defense attorneys possess the expertise required to assist in assessing the legality of such actions.

For these reasons, officials possessing adequate information to fully assess the context, purpose, and operational details of an impending presidential order or other act may resist or defy only those that would clearly violate the law of war and thereby entail or result in the commission of a UCMJ offense.[315] As the military case law discussed in Part I indicated,[316] reasonable compliance with the law of war is

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[307] LAW OF WAR MANUAL, *supra* note 293, at 1124 (defining reprisals as "extreme measures of coercion used to help enforce the law of war by seeking to persuade an adversary to cease violations" and "acts taken against a party: (1) that would otherwise be unlawful; (2) in order to persuade that party to cease violating the law").

[308] *Id.* at 1125 ("Reprisals are intended to influence a party to cease committing violations at present and in the future. Reprisals are not revenge or collective punishment."). Note that this provides another example that purpose or motive is relevant to compliance with international law.

[309] *Id.* (listing many prohibited reprisals).

[310] *Id.* at 1128.

[311] *Id.* (explaining certain reprisals prohibited by Additional Protocol I that the United States does not renounce); *see also id.* at 1129 n.225.

[312] *Id.* at 1126.

[313] *See id.* at 39.

[314] *See*, Charles J. Dunlap, Jr., *Trump's Campaign Rhetoric, ISIS and the Law of War*, CONVERSATION (Mar. 9, 2016, 6:14 AM), https://theconversation.com/trumps-campaign-rhetoric-isis-and-the-law-of-war-55807 [https://perma.cc/3WQQ-DQQX] (former Deputy Judge Advocate General explaining limited circumstances under which Trump's statements about killing family members might be lawfully undertaken).

[315] Dehn, *supra* note 77, at 896.

[316] *See supra* notes 90–92 and accompanying text; *see also infra* note 322 and accompanying text.

necessary to provide a public authority justification defense for acts of war that would otherwise be crimes.[317]

### C. *Targeting Americans with Lethal Force or Other War Measures in Armed Conflict*

As discussed in Part I, federal courts hearing oral arguments in *Trump v. United States* contemplated whether a president could order the assassination of a political rival that they deem to be a threat to the national security of the United States.[318] The former president's lawyer may have tried to equate this hypothetical situation to President Obama's authorization to kill Anwar al-Aulaqi, a dual US-Yemeni citizen affiliated with Al Qaeda in the Arabian Peninsula (AQAP).[319] These situations are not identical. This section briefly clarifies the circumstances under which American citizens, like Anwar al-Aulaqi, may be intentionally and lawfully targeted with lethal force or subjected to other measures of war. In short, such actions are lawful only in the context of an armed conflict and only when consistent with applicable international law.

The Obama administration OLC concluded that the US government may target al-Aulaqi in the context of the armed conflict Congress authorized by the Authorization for Use of Military Force (AUMF) adopted on September 18, 2001.[320] Rather than asserting a general presidential authority to "override" the relevant federal criminal statutes,[321] however, an OLC memo explained "the [public authority] justification would be available because the operation [to target al-Aulaqi] would constitute the 'lawful conduct of war'—a well-established variant of the public authority justification."[322] In a thoughtful

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[317] Dehn, *supra* note 77, at 871–80.

[318] *See supra* notes 48–50 and accompanying text.

[319] *See* Transcript of Oral Argument, *supra* note 48 (President Trump's attorney posing whether President Obama could be charged with murder for drone strikes abroad that killed US citizens).

[320] Aulaqi Memo, supra note 99, at 23 ("In light of these precedents, we believe the AUMF's authority to use lethal force abroad also may apply in appropriate circumstances to a United States citizen who is part of the forces of an enemy organization within the scope of the force authorization."); *see also* Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

[321] One statute at issue was 18 U.S.C. § 1119, which the opinion carefully and thoughtfully analyzed to determine whether it allowed common law defenses such as the public authority justification. *See* Aulaqi Memo, *supra* note 99, at 12–19. The other was 18 U.S.C. § 956 (a), also carefully analyzed. *Id.* at 35–37. It is common and appropriate to interpret federal criminal statutes in light of common law defenses, even if not expressly codified. *See, e.g.*, United States v. Peterson, 483 F.2d 1222, 1228–31 (D.C. Cir. 1973).

[322] Aulaqi Memo, supra note 99, at 20 (citing multiple criminal law treatises).

and thorough analysis of the issue, Professor H. Jefferson Powell reached the same general conclusion.[323]

These determinations are consistent with Supreme Court decisions that have upheld the use of war measures against US citizens when those measures occur within the context of an armed conflict and are consistent with applicable international laws of war.[324] As the Supreme Court explained when responding to a claim during the Civil War that using war measures against citizens violated the Constitution, "it is a proposition never doubted that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights."[325] The Court first concluded, however, that the Civil War was an armed conflict subject to then-existing international laws of war.[326] The Court also required that the exercise of the challenged war measures (a naval blockade and associated seizure of vessels and cargo) be fully consistent with international law.[327] The Court further noted that although the president had initiated these measures while Congress was not in session, Congress later ratified them.[328] Thus, the resort to war measures against citizens may be lawful, even within the territorial United States, but *only* when the relevant government acts are undertaken in

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[323] H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 69 (2016) ("[I]n a circumstance where only the war powers are adequate to protect the Republic, the Constitution authorizes the political branch to employ those powers, even if U.S. citizens are the source of military threat to the Republic."). I have reached similar conclusions in my published research. *See* John C. Dehn, *Targeting Citizens in Armed Conflict: Examining the Threat to the Rule of Law . . . in Context*, CATO UNBOUND (June 8, 2011), https://www.cato-unbound.org/2011/06/08/john-c-dehn/targeting-citizens-armed-conflict-examining-threat-rule-law-context/ [https://perma.cc/W3J2-VGJ5]; *see also* John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 193 (2011).

[324] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles[, but i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."); *see also* Aulaqi Memo, supra note 99, at 22–23 (citing other precedent).

[325] Prize Cases, 67 U.S. (2 Black) 635, 673 (1862). The Court cited *Rose v. Himely*, in which it said about France in relation to its revolting territory of St. Domingo, "admitting a sovereign who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act." Rose v. Himely, 8 U.S. (4 Cranch) 241, 272 (1808).

[326] *Prize Cases*, 67 U.S. (2 Black) at 666–68.

[327] *Id*. at 674–82 (applying the relevant law of nations to determine the legality of the seizures and condemnation of property).

[328] *Id*. at 670–71 (acknowledging congressional act and observing, without admitting it was necessary, that "if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress . . . this ratification has operated to perfectly cure the defect").

the context of a situation properly classified as an "armed conflict" under international law. As discussed in the next section, Supreme Court precedent imposes additional limitations on the resort to "martial law" within the United States.

### *D. Martial Law & Excessive Force*

During his previous term, the former president questioned whether protestors could be shot in the legs.[329] As a recent candidate for a second presidential term, the president-elect advocated in favor of prosecuting certain civilians, including members of Congress and former vice presidents, in televised military tribunals.[330] And in their efforts to change the outcome of the last presidential election, one or more Trump advisors suggested that the former president could declare martial law and rerun elections in certain states.[331] The section briefly explains why these actions would likely be unconstitutional even if attempted pursuant to an invocation of the Insurrection Act, a presidential declaration of "martial law," or both.

When exercising its powers of domestic governance, the federal government typically must comply with all aspects of the Constitution, including the Fourth, Fifth, and Sixth Amendments. Important aspects of the Fourth and Fifth Amendments do not establish clear rules but rather broad principles that are applied contextually. The Fourth Amendment prohibits "unreasonable" searches and seizures,[332] and the reasonableness of a specific government search or seizure is context dependent.[333] For example, the Supreme Court has held that the use of lethal force against a fleeing suspected felon constitutes a seizure that must comply with the Fourth Amendment, which requires that officers have probable cause to

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[329] ESPER, supra note 23, at 1 (recounting President Trump's inquiry related to protestors in Washington D.C.).

[330] *See, e.g.*, Chris Cameron, *Trump Amplifies Calls to Jail Top Elected Officials, Invokes Military Tribunals*, N.Y. Times (July 1, 2024), https://www.nytimes.com/2024/07/01/us/politics/trump-liz-cheney-treason-jail.html [https://perma.cc/5JXZ-M8V6].

[331] Howard Altman et al., *Calls for Martial Law and US Military Oversight of New Presidential Election Draws Criticism*, MIL. TIMES (Dec. 2, 2020), https://www.militarytimes.com/news/your-military/2020/12/02/calls-for-martial-law-and-us-military-oversight-of-new-presidential-elections-draws-criticism/ [https://perma.cc/8DJQ-Z9AN].

[332] U.S. CONST. amend IV.

[333] *See, e.g.*, *In re* Debs, 158 U.S. 564, 582–85 (1895) ("The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.").

believe the individual against whom lethal force is to be used presents a threat of grave, imminent harm to officers or others.[334] The Fifth Amendment provides that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law."[335] According to the Supreme Court, the specific process due is context dependent and subject to a balancing test.[336] Criminal trials of those not in the armed forces typically require adversarial proceedings in a state or federal court and, under the Sixth Amendment, a unanimous jury verdict.[337] Perhaps the former president or his advisors believe that a president may invoke the Insurrection Act or declare "martial law" to override these and other constitutional requirements and limitations.

No federal statute defines martial law or expressly authorizes a president to declare martial law; the ambiguity surrounding this concept prompts calls for action by Congress.[338] Martial law might generally be described as a temporary replacement of civilian authorities with military authorities.[339] In the context of the Civil War, however, Chief Justice Chase, concurring in *Milligan*, discussed the difference between "military government" and "martial law proper."[340] According to Chief Justice Chase, "military government" refers to situations in which the armed forces "supersed[e], as far as may be deemed expedient, the local law and [authority is] exercised by the military commander under the direction of the President, with

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[334] *See* Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."); *see also id.* at 11 ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

[335] U.S. CONST. amend. V.

[336] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (reviewing precedent to clarify that the demands of the Due Process Clause are not fixed, but "require[] consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

[337] *See* Ramos v. Louisiana, 140 U.S. 1390, 1397 (2020).

[338] *See* Tim Lau & Joseph Nunn, *Martial Law Explained*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/martial-law-explained [https://perma.cc/7MJV-ZZL2] (discussing the need for Congress to clarify the scope and boundaries of presidential power with regards to martial law).

[339] *Id.* Although state governors may declare martial law, the focus of this Article is the president and federal government authority. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[340] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 142 (1866) (Chase, J., concurring).

the express or implied sanction of Congress."[341] While this might be thought to refer to measures undertaken pursuant to the Insurrection Act, Colonel Winthrop explained that military government refers to situations in which the armed forces occupy and administer enemy territory in times of war.[342] Martial law is properly understood to entail the displacement of domestic civil authorities by military authorities in matters of domestic governance,[343] and according to Chief Justice Chase,

> is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and, in the case of justifying or excusing peril, by the President in times of insurrection or invasion or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.[344]

The idea that martial law could be declared and implemented in any part of the United States not directly beset by war or other significant armed conflagration was rejected by the *Milligan* majority, which held that "[m]artial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."[345] The Supreme Court has also indicated that both the invocation and the continuing necessity of martial law are subject to judicial review.[346] Thus, martial law is constitutionally permissible only in the context of ongoing,

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[341] *Id.*

[342] WINTHROP, supra note 59, at 799 ("By *military government* is meant that dominion exercised in war by a belligerent power over territory of the enemy invaded and occupied by him and over the inhabitants thereof.").

[343] *Id.* at 817 ("Martial law, as the term is used in this treatise, is military rule exercised by the United States, (or a State,) over its own citizens, (not being enemies,) in an emergency justifying it.").

[344] *Id.*

[345] *Id.* at 127; *see also id.* ("If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then,* on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course."). For a more thorough explanation of the type and usages of military commissions, see John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899 (2003).

[346] *See Milligan*, 71 U.S. (4 Wall.) at 127 ("As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."); *see also* Duncan v. Kahanamoku, 27 U.S. 304 (1946) (holding that residents of Hawaii, then a territory, were entitled to constitutional protections after the attack on Pearl Harbor rather than martial law); Comment, *Use of Military Force in Domestic Disturbances*, 45 Yale L.J. 879, 880 (1936) ("[I]n practice, however, while courts have purported to accept the Governor's declaration as final, they have often reviewed the evidence upon which it is based where the legality of his action, taken pursuant thereto, is in question.").

significant, collective armed violence, and only when local civilian courts or other civil authorities are rendered ineffective by that violence. The justices disagreed only regarding congressional authority to authorize military tribunals during the Civil War in Indiana, which had not been invaded and in which the federal courts were open.[347]

This precedent severely undermines any suggestion that a president has virtually unlimited discretion to declare or to impose measures of martial law, whether pursuant to the Insurrection Act or any other constitutional or statutory authorities. While presidents may deploy the number and type of armed forces they deem necessary to execute federal laws or to protect civil rights, they must generally do so in support of civil authority rather than in place of it, and a manner consistent with generally applicable constitutional principles and limitations, including the Fourth, Fifth, and Sixth Amendments. A president's constitutional and statutory authorities should not be interpreted as a power to disregard other applicable aspects of the Constitution or its Bill of Rights, including due respect for the constitutional authority and operations of state governments.[348] This is undoubtedly why the *Milligan* Court held that using military tribunals when civilian courts were open and available to provide defendants with a trial by a jury of their peers was unconstitutional. The case law also strongly indicates that a president may substitute military for civil authority only when the latter is rendered ineffective by significant, ongoing or impending collective armed violence, and only to the extent strictly necessary.[349] This understanding is

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[347] *See supra* notes 196–201 and accompanying text.

[348] In general, broad statutes like the Insurrection Act should be interpreted to avoid constitutional violations or other serious constitutional problems. This is known as the avoidance canon or constitutional avoidance canon. *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress."); *see also* McFadden v. United States, 576 U.S. 186, 197 (2015) (stating the constitutional avoidance canon "is a tool for choosing between competing plausible interpretations of a provision"). Regarding respect due to state governments, Article IV, Section 4 of the Constitution empowers the federal government to "protect" the states from "domestic Violence" only "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) . . . ." U.S. CONST. art. IV, § 4; *see also supra* note 128 and accompanying text; Morrison, *supra* note 151.

[349] Luther v. Borden, 48 U.S. (7 How.) 1, 45–46 (1849) (the Court stated that under a declaration of martial law "officers [may] . . . lawfully arrest any one [sic] who . . . they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. . . . No more force, however, can be used than is necessary to accomplish the object").

also reinforced by the Constitution's general subordination of the armed forces to civilian authority.[350] The case law further suggests that even a valid declaration of martial law does not permit the use of excessive force,[351] and that, "if the power [of martial law] is exercised for the purposes of oppression, or any injury wilfully [sic] done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable."[352] Put simply, a declaration or implementation of martial law is unconstitutional if not strictly necessary to respond to collective armed violence, or if the measures adopted are constitutionally prohibited, including those that are primarily intended to injure or oppress. Such orders do not provide the armed forces with public authority to act.

## CONCLUSION

It has been said that "the Constitution is not a suicide pact."[353] That notion must be extended to its subordination of the armed forces to presidential authority in limited circumstances.[354] If a president attempts to abuse constitutional or statutory powers in ways that would clearly violate valid, applicable laws, or that would seriously impair vital constitutional principles, senior civilian and military officials

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[350] *Id.* at 80 (observing that President Washington had subordinated the military to civilian authority when responding to the Whiskey Rebellion).

[351] *Id.* at 46. *See also* Eric Merriam, *Necessary Necessity: Courts' Historical Assessment of the Condition Precedent for Martial Law*, 75 OKLA. L. REV. 191 (2023) (showing that American judicial decisions have consistently required strict necessity as a condition precedent for the imposition and implementation of martial law). The Supreme Court recently overruled *Korematsu v. United States*, in which a majority of the Court upheld one of the most egregious abuses of martial law. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. . . . *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'").

[352] *Luther*, 48 U.S. at 46.

[353] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159–60 (1963) ("The powers of Congress to require military service for the common defense are broad and far-reaching, for while the Constitution protects against invasions of individual rights, it is not a suicide pact."); Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."); *see also* RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (1st ed. 2006); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257 (2004) ("The Constitution is not a suicide pact . . . . [and] should be construed to avoid constitutional implosion . . . .").

[354] The emphasis on "presidential" and not general "civilian" control of the military is required by both the narrow applicability of necessity principles articulated here and the constitutional provisions granting Congress plenary power to make rules for military governance and regulation. *See supra* note 194 and accompanying text.

may, and arguably must, honor their oath to support and defend the Constitution by taking prudent actions they reasonably believe would prevent such acts.[355] With that said, no panacea exists for preventing abuses of presidential powers, and those who defy or displease a president can expect to be fired and replaced, as was Secretary Esper.[356] Nevertheless, sequential acts of defiance based upon a necessity of constitutional fidelity will alert other executive branch officials, Congress, State officials, and the public to the impending dangers, and would provide time for congressional, judicial, or other interventions.[357]

It seems likely that many politicians and pundits who immediately criticized General Milley's alleged actions were, like Professor Nichols, thankful for them (even if secretly).[358] While the situations in which a high level government official might need to "pull[] a Schlesinger"[359] will hopefully be rare, fidelity to the Constitution requires those confronted with such dilemmas to have the courage to "do the right thing for the right reason, no matter the cost" and then to "throw [themselves] on the justice of [their] country and the rectitude of [their] motives."[360] During the run up to the November 2020 election, General Milley is said to have exhorted senior military leaders "to do what's right for the country, no matter what the cost is to ourselves."[361] If judiciously implemented in accordance with the above principles, that sentiment would seem to reflect the moral courage and constitutional fidelity required of the good officer.

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[355] As one commentator has observed, the country may not be able to rely upon senior military leaders with sufficient constitutional integrity to check presidential abuses of power due to "(1) the ambiguity in defining what constitutes a legal order; (2) an acceptance of a commander in chief-centric view of civilian control of the military; and (3) the rise of careerism and extremism within the military." Ghiotto, *supra* note 116, at 433.

[356] *See* ESPER, *supra* note 23, at 654–60.

[357] *See, e.g.*, Barton Gellman, *How to Harden Our Defenses Against an Authoritarian President*, WASH. POST (July 30, 2024, 6:00 AM), https://www.washingtonpost.com/opinions/2024/07/30/trump-authoritarian-president-government-defend/ [https://perma.cc/6X79-WJQB].

[358] *See* Nichols, *supra* note 24.

[359] This is a reference "to an edict by former secretary of defense James Schlesinger to military leaders in August 1974 not to follow orders that came directly from President Nixon, who was facing impeachment, . . . without first checking with Schlesinger and his JCS Chairman . . . ." *See* PERIL, *supra* note 2, at xxv–xxvi.

[360] 2007 AFO, *supra* note 230, at 3; Jefferson Letter, *supra* note 244; *see also supra* notes 232 & 252 and accompanying text.

[361] PERIL, *supra* note 2, at 110. Similarly, after the infamous Lafayette Square incident and photo opportunity, Milley published a memo to the armed forces in which he wrote, "[w]e in uniform—all branches, all components, and all ranks—remain committed to our national values and principles embedded in the Constitution." *Id.* at 97–98. It also contained a handwritten addendum: "We all committed our lives to the idea that is America—we will stay true to that oath and the American people." *Id.* at 98.