ARTICLE

THE GENERALS' CONSTITUTION *IN EXTREMIS*: CIVIL RIGHTS, CIVILIAN SUPREMACY, AND A NATIONAL SECURITY COMMITMENT "MOST SEVERELY TESTED"

Dan Maurer[*]

ABSTRACT

This article describes the legal confusion that surfaces when a senior military commander dissents from, disobeys, or more offensively defies an apparently lawful order from the commander-in-chief to use force in ways that might check, curb, frustrate, or violate the constitutional liberties of the domestic public. Relying on both hypothetical and historical examples in which the constitutional values of civilian control of the armed forces and domestic civil rights collide, this article suggests that routine reliance on traditional civil-military relations theory and the military's own criminal law only sets the stage for the potential conflict and fails to provide a map that detours around hazards or would soften a future collision. I locate the cause of the collision's damage to be weakly-secured intersection of military professionalism norms, ambiguous constitutional text, and federal statutes that say more about the roles of the senior military elites than about the working dynamics of the relationship they live in with their civilian political superiors (and nothing relevant at all about those civilian superiors). The article presents novel, if broad, interpretations of some of those statutes (like the Uniform Code of Military Justice) to conclude that only a legislated safe harbor provision (properly tuned to accommodate professional norms, relevant military criminal law, and the values of civilian control over the military and values protected by the Bill of Rights) can serve the necessary two functions. It must act simultaneously as, first, a sufficient check on presidential discretion and, second, offer sufficient guidance and norm-reinforcing protocols to the professional military in ways that deter or moderate such confrontational constitutional collisions of values.

---

[*] Associate Professor, Ohio Northern University Pettit College of Law. For their discussion and comments on earlier drafts, special thanks to Joshua Braver, Lindsay Cohn, Ashley Deeks, John Dehn, Peter Feaver, Dakota Rudesill, and Heidi Urben; the participants in the AALS Early Works in National Security Law workshop, especially to Stephen Cody, Cody Corliss, Brenner Fissell, Amy Gaudion, and Rachel VanLandingham, and the editors of the *Harvard National Security Journal* who improved this article in every way. The author is a retired U.S. Army lieutenant colonel and judge advocate, a veteran of two combat tours and whose service included typical judge advocate assignments, a fellowship as a strategist for the Army's Chief of Staff, and as professor at both the U.S. Military Academy and The Judge Advocate General's Legal Center & School. The analysis and conclusions do not reflect the policy or positions of any part of the U.S. government.

CONTENTS

INTRODUCTION

The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect to defeat it.[1]

It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[2]

It is no longer hyperbole to claim that the office of the American President is functionally an elected monarchy, albeit a limited one. With a new sphere of criminal immunity for most "official acts"[3]—a class of conduct still largely undefined—and near limitless authority to use force abroad and domestically provided certain formalist preconditions are satisfied in the president's own judgment[4] (with almost no judicial scrutiny over a president's claim that they are satisfied[5]), the Founders' worst fears of a chief executive-turned-popular tyrant are now far more convincing.[6] When the commander-in-chief is unconcerned with his historical legacy, reckless in his disregard of presidential norms, unfazed by political consequences in a re-election campaign or possible impeachment, and free from criminal accountability,[7] few of the checks the public would rely on to curb presidential misconduct, malpractice, corruption, or malfeasance—in short, what I call "presidential dereliction"—remain as safeguards. Only the executive branch institutions and the agents employed by them, responsible for executing the president's agenda and policies, are available to curb presidential dereliction. A rather critical task, therefore, is to have a perspicuous understanding of what legal authorities permit these agents to do in upholding the rule of law in these *in extremis* conditions.

---

[1] Martin v. Mott, 25 U.S. 19, 31 (1827).
[2] Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004).
[3] Trump v. United States, 603 U.S. 593, No. 23–939, slip op. at 42 (July 1, 2024).
[4] *See*, *e.g.*, 10 U.S.C. §§ 251–254 (describing the limits on the president's authority to use "militia or the armed forces" domestically in response to insurrection); 50 U.S.C. § 1631 (describing the limits on the president's authority under the National Emergencies Act); 50 U.S.C. § 21 (describing the predicate facts for the president's invocation of the Alien Enemies Act); and 50 U.S.C. §§ 1541–1550 (describing the limits on the president's authorities under the War Powers Resolution of 1973).
[5] Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1366–85 (2009) (surveying four contexts illustrative of "national security fact deference").
[6] *Trump*, 603 U.S. 593, slip op. at 30 (Sotomayor, J., dissenting) ("In every use of official power, the President is now a king above the law.").
[7] *Id*., slip op. at 3 ("Whether described as presumptive or absolute, under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution.") (Sotomayor, J., dissenting).

This article addresses the collision of constitutional values and legal responsibilities when the President orders the military to apply force domestically in a manner that is apparently lawful on its face but still presents the subordinate senior officer with reasons to dissent or even disobey. For example, the order may be, *according to the judgment of that officer*, legal but "normatively inconsistent,"[8] or its constitutionality or statutory legality could be uncertain. What law is broken, or what legal duties or norms are breached, when the country's precept of civilian control of the military is endangered as military officials take concrete steps to defend the public from threats to civil rights by elected political officials? Because such an order would be given to the military through its most senior, presidentially appointed, flag officers, they are the locus of this collision and the most acute witnesses to what may be dangers to the public's constitutional rights.[9] This is a constitutional dilemma receiving too little attention in the national security law literature and none at all by modern courts.

Because the situations are exceptionally rare and significant, these are best conceived as *in extremis* events outside of routine administrative control by the President and Secretary of Defense over the military bureaucracy and its non-warfighting operations. Though historically rare, they are not fantastical. After his election to a second term, Donald Trump regularly suggested he would use the military (active duty and the National Guard) in aggressive and widescale domestic immigration enforcement[10]: an

---

[8] Ryan Burke & Jahara Matisek, *Trump(ing) Tradition: Old Laws, New Norms, and the Danger to Civil-Military Relations*, 51 ARMED FORCES & SOC'Y 2 794, 795 (2024).

[9] Flag officers in the U.S. military are officers in the ranks of brigadier general, major general, lieutenant general, and general (in the Army, Air Force, Space Force, and Marine Corps), and rear admiral-lower half, rear admiral-upper half, vice admiral, and admiral (in the Navy). This scoping of the analysis to only interactions between strategic elites is consistent with one branch of civil-military relations study among political science scholars. Risa A. Brooks, *Integrating the Civil-Military Relations Subfield*, 22 ANN. REV. POL. SCI. 379, 380 (2019). Similar questions have been asked in the context of Trump's potential decision to launch nuclear weapons and the steps General Milley took to insert himself between the president's decision and any action taken to execute that order. *See*, *e.g.*, John C. Dehn, *The Good Officer: President Trump, General Milley, and the "Necessity" of Constitutional Fidelity*, 90 BROOK. L. REV. 1, 3–6 (2024); Jeffrey Goldberg, *The Patriot: How General Mark Milley Protected the Constitution from Donald Trump*, THE ATLANTIC (Sept. 21, 2023), https://www.theatlantic.com/magazine/archive/2023/11/general-mark-milley-trump-coup/675375/ [https://perma.cc/5UZP-57ML]; Tom Nichols, *Trump Put Milley in Impossible Position*, THE ATLANTIC (Sept. 17, 2021), https://www.theatlantic.com/ideas/archive/2021/09/mark-milley-barely-stayed-inside-lines/620102/ [https://perma.cc/N8T5-XMJU].

[10] *E.g.*, Alexandra Hutzler, *Trump Confirms Plan to Declare National Emergency, Use Military for Mass Deportations*, ABC NEWS (Nov. 18, 2024), https://abcnews.go.com/Politics/trump-confirms-plan-declare-national-emergency-military-mass/story?id=115963448 [https://perma.cc/P5ZY-R2PV]. Trump's initial series of Executive Orders issued on January 20, 2025, declared a national emergency at the southern border, directed the Department of Defense to support the Department of Homeland Security and the Department of Justice in their immigration enforcement efforts, and portrayed drug cartels and other transnational criminal organizations—not just illegal immigrants—as an

unprecedented military deportation campaign, relying on authorities in the National Emergencies Act[11] and Insurrection Act,[12] among others.[13]

Similar questions about a senior military leader's objections to, and interventions in, problematic civilian management decisions have been asked before. For the most part, however, they have been the jurisdiction of civil-military relations scholars who orient their analysis toward "military professionalism" and debate the virtues and vices of disobedience and dissent.[14] But practical difficulties of balancing martial norms and constitutional values continue to haunt military leaders during political crises, suggesting this is not merely a matter of reinforcing a rule of professional ethics.[15] The contentious Trump years, in which the president waffled between fawning over and dismissing the competence of his senior uniformed advisors, is a recent illustration of the known but difficult-to-avoid traps of civil-military relations.[16]

The problem implicates the core foundations and assumptions of American civil-military relationships, the constitutional limits on executive power, the oath of office to "support and defend" the Constitution (sworn by presidents and military officers), and the military's own internal criminal justice system—perhaps the most directly relevant but least understood of the variables.[17] The dilemma suggests that fidelity to his or her understanding of the Constitution's conflicting commitments may challenge a military leader's internal "conviction,"[18] character, and personal constitution.

"invasion" and a threat to national security, territorial integrity, and public safety, and ordered U.S. Northern Command to develop contingency plans for the use of military force independent of civil law enforcement. *See Presidential Actions*, THE WHITE HOUSE (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/ [https://perma.cc/4YT9-SQJN].

[11] National Emergencies Act, Pub. L. No. 94–412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651).

[12] 10 U.S.C. §§ 251–255.

[13] *See generally* WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY (2016); Elizabeth Goitein, *Deployment of the U.S. Military for Immigration Enforcement: A Primer*, JUST SEC. (Dec. 3, 2024), https://www.justsecurity.org/105321/military-immigration-enforcement-deportation/ [https://perma.cc/HU48-JRUA]; Scott R. Anderson, *The Real Legal Limits on Domestic Military Deployments*, LAWFARE (Nov. 19, 2024), https://www.lawfaremedia.org/article/the-real-legal-limits-on-domestic-military-deployments [https://perma.cc/5EK8-DQAE].

[14] *See infra* Part III.A.

[15] Risa Brooks, *Paradoxes of Professionalism: Rethinking Civil-Military Relations in the United States*, 44 INT'L SEC. 7, 8 (2020) ("Prevailing conceptions of military professionalism, however, are underdeveloped and unable to meet contemporary challenges to civil-military relations.").

[16] *See infra* Part II.D.

[17] *See* PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 93 (2005); *see infra* Part III.C.4 (discussing the dilemma's possible UCMJ implications).

[18] RICHARD M. SWAIN & ALBERT C. PIERCE, THE ARMED FORCES OFFICER 3 (2017).

Outside of *in extremis* conditions, legal and normative subordination of the military to the control of elected civilian political elites is taken as self-evident in American society, law, and politics.[19] No military-led *coup d'état* has ever interrupted the continuous governance by civilian authority in American history. But its absence in the historical record by no means signals the existence of an otherwise healthy civil-military relationship: one that simultaneously ensures the military is capable of doing whatever national defense requires while securing its consistent deference to the aims and direction of civilian government, whatever that partisan patina may be.[20] Fractures and frictions in the relationships among elite political and military actors are not only foreseeable but common, springing from disagreements over policy goals, wartime strategy, budget appropriations and resourcing, and even one group's moral antipathies toward the other.[21]

These disagreements, though unlikely to inspire a coup, nevertheless can be quite dangerous to a republic.[22] They may undermine public confidence in either the military writ large or in political institutions and actors; they may sow distrust between civilian principals and their military advisors, diluting the latter's readiness to execute orders from the former; they may induce the military to slow-roll projects and policies with which it disagrees; they may trigger disrespect, and possibly outright disobedience by senior generals and admirals or large numbers of the rank and file.[23] Assuring the military's functional utility is high while keeping it bounded by duties from custom, norms, and laws is therefore a continual challenge.

This challenge is usually framed as one for superior civilian government officials to manage—a challenge with three tasks. The first task is to keep the military from breaking its leash entirely to operate on its own initiative and for its own assumed institutional interests. The second task is to keep the military from taking advantage of its public esteem to the detriment of civil government. The third task is to keep the military from serving the individual political ambitions of its uniformed leaders. This is fundamentally a principal-agent dilemma,[24] but this article will not concentrate on these tasks occupying the attention of the civilian political leader.

---

[19] *See* Brenner M. Fissell, *The Military's Constitutional Role*, 103 N.C. L. REV. 331, 334–35 (2025) ("[T]he fundamental normative bases of civilian control have been undertheorized—bracketed off as an assumption not in need of serious defense.").
[20] *See infra* Part III.A.
[21] *See generally* Deborah Avant, *Conflicting Indicators of "Crisis" in American Civil-Military Relations*, 24 ARMED FORCES & SOC'Y 375 (1998).
[22] *See generally* Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, 22 PARAMETERS 2 (1992) (a fictionalized historical account of the military, economic, and political factors contributing to a coup).
[23] *See generally* DANIEL MAURER, CRISIS, AGENCY, AND LAW IN US CIVIL-MILITARY RELATIONS (2017).
[24] Janine Davidson, *The Contemporary Presidency: Civil-Military Friction and Presidential Decision Making: Explaining the Broken Dialogue*, 43 PRES. STUD. Q. 129, 133 (2013).

Instead, this article addresses the inverse of this principal-agent problem. Civil-military relations and legal scholars are coming to grips with a plausible scenario in which senior military officials view themselves in danger of being accessories—as aiders and abettors—in a civilian politician's scheme of doing violence to the Constitution, or being complicit in civilian leaders' unwitting assaults on it.[25] These senior military officials may believe themselves duty-bound (if not legally obligated) to prevent their civilian superiors from undermining civil liberties; from bowing to the rabid influence of populism; and from serving the political ambitions of their civilian leaders in ways that forsake transparency and welcome disinformation.[26] Acting on that assumed duty or legal obligation and self-justified by their claim to constitutional—not political—fidelity, these military leaders would invert the usual civil-military relations worry: rather than the military leading authoritarian despotism, it would be the military presuming to "save" society from one.[27]

The Trump administration's demonstrated desire to employ military force in a variety of domestic settings during the latter half of 2020 (from "riot" control to election "security") is a recent example demonstrating that this problem is not theoretical. That desire was firmly resisted by senior military officers concerned that these plans breached the Constitution's commitments to free assembly and expression, which they swore an oath to defend.[28] While it is too soon to know senior military leaders' concerns about Trump's controversial 2025 deployment of active duty Marines and the California National Guard to support Immigration and Customs Enforcement (ICE) raids in Los Angeles,[29] or about his direction of the D.C. National Guard to assist in the federal takeover of the city's metropolitan police,[30] the first year of Trump's second term spotlights the contemporary relevance of this extraordinary problem.

Such resistance, along a spectrum from disagreement to defiance, poses a *concurrent* risk to the Constitution's commitment to civilian control of the

---

[25] Risa Brooks, *The Paradoxes of Huntingtonian Professionalism*, *in* RECONSIDERING AMERICAN CIVIL-MILITARY RELATIONS: THE MILITARY, SOCIETY, POLITICS, AND MODERN WAR 17, 22 (Lionel Beehner, Risa Brooks & Daniel Maurer eds., 2021) ("[S]ilence is an ineluctably political act; inaction by military leaders can shape public debate, especially if it suggests to the public that the military is complicit in or supportive of a politician's agenda.").

[26] *See infra* Part II.D.

[27] *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 3 (2018).

[28] *See id*.

[29] Tom Bowman, *Trump Mobilizes Marines and More National Guard Troops for Duty in LA*, NPR (June 9, 2025), https://www.npr.org/2025/06/09/g-s1-71640/trump-mobilizes-marines-for-duty-in-los-angeles [https://perma.cc/3FJH-2JEY].

[30] *See* Anne Flaherty, *National Guard in DC to Carry M17 pistols, Conduct Law Enforcement Duties, Task Force Says*, ABC NEWS (Aug. 22, 2025), https://abcnews.go.com/Politics/defense-secretary-hegseth-authorizes-2k-national-guard-troops/story?id=124876085 [https://perma.cc/QS53-LM7M].

military, another part of the Constitution these officers swore an oath to defend, and one ingrained within their professional training and identity.[31] The Trump administration was not the first to wrestle with this concurrent risk: every time the Insurrection Act is used to deploy U.S. military forces domestically, the tension is evident.

The dilemma is further complicated by the nature, purpose, and specific prohibitions of military criminal law. As this article will explain in greater detail in Part III.C.4., it is an idiosyncratic justice system designed by Congress,[32] overseen by the executive branch,[33] managed day-to-day through the military chain-of-command, and ultimately answerable to the federal judiciary.[34] In short, "the Constitution offer[s] no practical guide for a general faced with a rogue president."[35] Political scientists concerned about norm erosion draw similar conclusions:

> [S]erving officers are instructed on the necessity of honoring authoritative command channels such as the executive and Congress. However, they are also bound by a variety of other allegiances, ranging from the operational requirements to the mission, professional norms of conduct, supervisory responsibility for subordinates, and support to democratic governance, to name a few. When circumstances place these obligations in tension, servicemembers may be forced to discern—often without clear guidelines—which takes precedence.[36]

Scholarship in the disciplines of political science, security or strategic studies, public administration, history, and sociology dominates the literature on civil-military relations theory and practice.[37] But these fields traditionally ignore the relevance of legal analysis and scholarship on this subject, instead limiting their legal themes to references to the constitutional division of labor between the president as chief executive and Congress, and general maxims like the constitutional rule of "civilian control over the military," while generally lacking reference to legal analysis by the courts, legal scholars, or

---

[31] *See infra* Part III.C.1.
[32] Uniform Code of Military Justice [hereinafter UCMJ], Pub. L. No. 81–506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801–946a).
[33] JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I–2, ¶ 5 (2024) [hereinafter MCM].
[34] Ortiz v. United States, 585 U.S. 427 (2018); 10 U.S.C. § 867a (describing appellate jurisdiction by the U.S. Supreme Court over the military justice system).
[35] PETER BAKER & SUSAN GLASSER, THE DIVIDER: TRUMP IN THE WHITE HOUSE, 2017–2021 468 (2022).
[36] Risa A. Brooks, Michael A. Robinson & Heidi A. Urben, *Speaking Out: Why Retired Flag Officers Participate in Political Discourse*, 7 TEX. NAT'L SEC. REV. 49, 67 (2023).
[37] Peter D. Feaver, *Civil-Military Relations*, 2 ANN. REV. POL. SCI. 211, 212, 230–32 (1999); *see also* Kenneth W. Kemp & Charles Hudlin, *Civil Supremacy over the Military: Its Nature and Limits*, 19 ARMED FORCES & SOC'Y 7, 12 (1992).

specific relevant statutory constraints or definitions.[38] Legal scholars are not silent on the subject, often situating jurisprudential arguments in the context of existing civil-military relations theories (though not empirical data).[39] Nevertheless, according to Deborah Pearlstein, the subfield of civil-military relations, while broad, has not yet fully taken advantage of the techniques and interests of all relevant disciplines, and legal academia approaching the subject leaves it "undertheorized."[40]

Taking the Trump administration's efforts as a proof of concept, this article isolates the legal dimensions of this problem. It draws on civil-military relations theory and practice to help identify the constitutional and professional values and legal rules in tension and under pressure. It calls for a reasonable legislative safe harbor provision, essentially codifying well-established moral and professional duties and attempting to strike a fair balance among the values in tension. Sticking to a purely domestic context to stress the conflict between protecting civil rights and preserving civilian control of the armed forces, this article will not address the most obvious *non*-domestic context in which a president's lawful order might be challenged by a defiant military: an order to launch nuclear weapons during an armed conflict.

Proceeding in four parts, this Article begins in Part I by identifying the values, ideals, and expectations in tension: *government integrity* (that is, cohesion and unity among public officials) and *integrity in government* (that is, the admixture of professional and personal values of those public officials).

---

[38] Three recent exceptions break this tradition: BRETT J. KYLE & ANDREW G. REITER, MILITARY COURTS, CIVIL-MILITARY RELATIONS, AND THE LEGAL BATTLE FOR DEMOCRACY (2021) (studying military justice systems in more than 100 countries, and framing them within the axiom of military subordination to civilian control); Lindsay P. Cohn, *To Execute the Laws of the Union: Domestic Use of Federal Military Force in the United States*, *in* MILITARY OPERATIONS AND ENGAGEMENT IN THE DOMESTIC JURISDICTION: COMPARATIVE CALL-OUT LAWS 57 (Pauline Collins & Rosalie Arcala-Hall eds., 2022) (briefly describing the legislative history of the Posse Comitatus Act); *and* Burke & Matisek, *supra* note 8 (discussing the role and potential of the UCMJ to regulate the unprofessional, norm-breaking, partisan criticism of presidents by retired officers).

[39] *See*, *e.g.*, Stephen I. Vladeck, *Military Officers and the Civil Office Ban*, 93 IND. L. J. 243 (2018); Joshua Kastenberg, *The Crisis of June 2020: The Case of the Retired Generals and Admirals and the Clarion Calls of the Critics in Lex Non Scripta (Historic) Perspective*, 99 NEB. L. REV. 594 (2021); Richard K. Sala, *Congress can Delegate Authority, But Not Responsibility: Accountability for the Domestic Use of the Armed Forces*, 46 VT. L. REV. 24 (2021); Anthony J. Ghiotto, *The Presidential Coup*, 70 BUFF. L. REV. 369 (2022); Dan Maurer, *Paved with Good Intentions?: Civil-Military Norms, Breaches, and Why Mindset Matters*, 11 J. NAT. SEC. L. & POL'Y 343 (2021); Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341 (1994); Dan Maurer, *Fiduciary Duty, Honor, Country: Legislating a Theory of Agency into Strategic Civil-Military Relations*, 10 HARV. NAT'L SEC. J. 259 (2019); Fissell, *supra* note 19 (using contemporary political theory to suggest the normative grounds for the constitutional principle of civilian control of the armed forces).

[40] Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 801 (2012) (commenting that "for all the appropriately intense focus in recent years on the legality of what the military does, where the modern military fits in our constitutional democracy has remained remarkably undertheorized in legal scholarship").

Part II introduces a hypothetical fact pattern to illustrate the tensions revealed when one constitutional duty collides with another. This is juxtaposed against historical accounts of civilian political elites relying on military force domestically in ways that implicate the constitutional rights and liberties of the civilian population, including a contemporary crisis of civil-military relations during the latter months of the first Trump administration. Part III unpacks civilian control of the armed forces by reviewing the ways in which civil-military relations theory and the constitutional text, statutes, norms and regulations governing military professionalism contribute to understanding this concept. Part IV generalizes the dilemma into four primary concerns, sketches their apparent implications, and suggests the contours of a legislative "safe harbor" provision that amends existing codification of strategic-level leadership responsibilities in the U.S. civil-military relationship.

I. NATIONAL SECURITY V. CIVIL RIGHTS AND LIBERTY INTERESTS

A. Two Public Goods in Tension

Providing national security through lawful mechanisms is frequently viewed as being in tension with the protection of civil rights and civil liberties.[41] If emphasis is placed on one, the other is neglected—-a sentiment raised by Alexander Hamilton even before the Constitution was ratified.[42] Protection *by* the government, purportedly acting in our defense, can raise questions of whether we sometimes need protection *from* the government's means and methods of providing that security. The concern usually refers to government action that curbs, limits, intervenes in, or monitors everyday civil activities (like boarding airplanes, making cell phone calls, or searching the internet).[43] The military is usually not considered a threat to, nor defender of, these ordinary civil activities.

---

[41] For a very small sampling of the voluminous literature and popular commentary, *see*, *e.g.*, Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004); DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2002); Nancy V. Baker, *National Security Versus Civil Liberties*, 33 PRES. STUD. Q. 547 (2003).

[42] THE FEDERALIST NO. 8, at 120 (Alexander Hamilton) (Benjamin Fletcher Wright ed. 1961).

[43] *See*, *e.g.*, Ron Nixon, *Airport Security Advances Clash With Privacy Issue*s, N.Y. TIMES (May 8, 2015), https://www.nytimes.com/2015/05/09/us/airport-security-advances-clash-with-privacy-issues.html [https://perma.cc/P3DX-L2HH]; Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RES. CEN. (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/ [https://perma.cc/W84Z-5UWT]; Carpenter v. United States, 138 S. Ct. 2206 (2018) (holding that law enforcement must have a warrant to search a cell phone's "cell site location information").

The public's concern responds to the government's usual grounds for such intervention: fulfilling its constitutional responsibilities by enhancing national *domestic* security in the face of possible terrorism, sabotage or espionage by partisans during an armed conflict, or transnational criminal threats.[44] In this view, there is an inverse relationship between the government escalating imposition in the name of public safety and the range of historically permissible individual freedoms.[45] The government actors at the forefront of this tension are usually local police and prosecutors, state National Guard troops acting in support of law enforcement, border control agents, and "homeland security" personnel.[46]

But a related concern refers to government action limiting *extra*ordinary or infrequent civic engagement (like public protests or voting in free and fair elections) by the type of federal agents responsible for the *conventional* understanding of national security (protection from foreign threats): the active-duty military.[47] The academic literature, and public scrutiny, on the domestic use of the federal military has been, until recent years, exclusively focused on conditions in which the armed forces augment civilian law enforcement in riots, natural disaster relief, illicit drug interdiction, and illegal immigration, or on limits imposed by the Posse Comitatus Act and the Insurrection Acts.[48] But those traditional domestic uses of the armed forces are

---

[44] *See* Korematsu v. United States, 323 U.S. 214, 218 (1944) (upholding the military's order excluding Americans of Japanese ancestry from living in certain designated "military areas" in California premised on the military's conclusion that such persons posed threats to national security during an active state of war with the Japanese Empire [". . . we cannot reject as unfounded the judgment of the military authorities and of Congress"]). This case's holding, though not its reasoning from a premise of deference to the judgment of defense officials, was famously repudiated in Trump v. Hawaii, 585 U.S. 667, 138 S. Ct. 2392, 2423 (2018).

[45] This trade-off probably depends on a variety of contingent factors: the nature of the threat (*e.g.*, public health, armed conflict); how recent or current the threat seems to the public; the character of the civil liberty that is imposed upon (*e.g.*, privacy, travel, employment, due process); the political alignment of the individual asked; the individual's trust in government institutions; and who specifically stands to have their liberties restricted. Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 AM. J. POL. SCI. 28, 38–43 (2004) (finding that Americans' attitudes toward exchanging some of their civil liberties for increased security in the immediate aftermath of the 9/11 terrorist attacks depended on their "sense of the threat" and their trust in government, which in turn could be traced to factors of race and partisan identity).

[46] Manny Fernandez, Miriam Jordan, Zolan Kanno-Youngs & Caitlin Dickerson, "*People Actively Hate Us": Inside the Border Patrol's Morale Crisis*, N.Y. TIMES (Sept. 15, 2019) (updated Oct. 25, 2021), https://www.nytimes.com/2019/09/15/us/border-patrol-culture.html [https://perma.cc/7JWF-SCX5].

[47] *See* Lindsay P. Cohn & Steve Vladeck, *The Election and the Military*, LAWFARE (Nov. 2, 2020), https://www.lawfareblog.com/election-and-military [https://perma.cc/SN4D-KWKP].

[48] The Posse Comitatus Act, 18 U.S.C. § 1385, prohibits the use of the military to enforce civil law unless expressly authorized by the Constitution or by Congress; the Insurrection Acts, 10 U.S.C. §§ 251–255, create statuary exceptions in which Congress permits the

supplanted in priority by an administration that balances national security interests and liberty interests according to a different formula, as evidenced below.

B. The Ominous Tidings of 2020

As described in more detail in Part II.D., *infra*, in the latter days of the first Trump administration, senior military leaders were called upon by senior civilian officials to, at least, consider the employment of active-duty military forces to counter domestic public protests against (predominantly) police brutality and systemic racism, "prepare" for potential violence related to the 2020 presidential election and the Electoral College vote certification, and to secure ("seize") allegedly fraud-inducing voting machines after the election.[49] Most notably, these discussions involved the Chairman of the Joint Chiefs of Staff, the nation's senior ranking military officer and—by statute—the principal military advisor to the President and the Secretary of Defense.[50]

Civilian political interest in the unconventional but lawful use of the military to counter civil unrest on American soil is not new.[51] Public support for such use is rare and never universal,[52] and wanes today notwithstanding the

---

president to use the military domestically under certain conditions. *See generally* BANKS & DYCUS, *supra* note 13.

[49] MICHAEL C. BENDER, FRANKLY, WE DID WIN THIS ELECTION: THE INSIDE STORY OF HOW TRUMP LOST (2021) (reporting conversations with General Milley about oval office debates with President Trump over responses to the Black Lives Matter protests in the summer of 2020); Martin Pengelly, *Trump Told Top US General to 'Just Shoot' Racism Protesters, Book Claims*, GUARDIAN (June 25, 2021), https://www.theguardian.com/us-news/2021/jun/25/donald-trump-general-mark-milley-crack-skulls [https://perma.cc/RA2F-HB9E]; *see also* MARK ESPER, A SACRED OATH: MEMOIRS OF A SECRETARY OF DEFENSE DURING EXTRAORDINARY TIMES (2022) (recounting conversations between then-Secretary of Defense Esper and then-President Trump) (Trump later denied he suggested shooting protestors); *Presidential Findings to Preserve Collect and Analyze National Security Information Regarding the 2020 General Election* (Dec. 16, 2020), https://www.politico.com/f/?id=0000017e-7db3-d1fc-ad7f-fff3fd720000 [https://perma.cc/6RLJ-8ZW5] (unofficial draft); Nicholas Reimann, *Trump Reportedly Asked Advisors About Deploying Military To Overturn Election*, FORBES (Dec. 19, 2020), https://www.forbes.com/sites/nicholasreimann/2020/12/19/trump-reportedly-asked-advisors-about-deploying-military-to-overturn-election/?sh=21b362e4ce2b [https://perma.cc/D55E-5RRR].

[50] Established by the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99–433, 100 Stat. 1006 (1986) (*codified at* 10 U.S.C. § 152 ("Chairman: Appointment; grade and rank"), § 153 ("Chairman: functions"), *and* § 163 ("Role of Chairman of Joint Chiefs of Staff")).

[51] *See infra* Part II.C.

[52] *See* Kendall Karson, *52% of Americans Support Deploying Military to Control Violent Protests: POLL*, ABC NEWS (June 7, 2020), https://abcnews.go.com/Politics/52-americans-support-deploying-military-control-violent-protests/story?id=71097167 [https://perma.cc/ES8A-GEEY]; Andrew Stanton, *Most Voters Back Sending Troops to Quell Riots, But Blame Trump for LA—Poll*, NEWSWEEK (June 16, 2025), https://www.newsweek.com/most-voters-back-sending-troops-quell-riots-blame-trump-poll-2086281 [https://perma.cc/K6N8-LJS2].

public's current high regard for the military as a public institution—at least relative to other government and cultural institutions.[53]

However, the civil rights movement of the 1960s, coupled with the antipathy and anger the Vietnam War aroused, led to sharp criticism of those who serve in uniform as representing the antithesis of the liberty they are meant to defend. These movements also lead to the belief that servicemembers and their leaders are hostile toward, and seek to distance themselves from, fomenters of dissent and civil disobedience.[54] That basis for criticism has surfaced again. Today, some scholars have begun to notice and to warn that relatively high approval for the military (especially considering high public confidence in military officers' honesty and ethical decision-making[55]) and low approval of civil political leadership can correlate to public support of non-democratic inversions of civilian control.[56] Survey data reveals that a surprisingly significant percentage of Americans believe military leaders should publicize their policy preferences, and that presidents—regardless of their own judgment—should follow the advice of military leaders whether they propose using or (by an even larger margin) not using military force.[57] The next section discusses why public support for these government officials may seem misplaced when the public's concern is the protection of civil liberties and individual rights.

---

[53] Megan Brenan, *Americans' Confidence in Major U.S. Institutions Dips*, GALLUP (July 14, 2021), https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx [https://perma.cc/KHY9-ZSCS] (noting that 69 percent of Americans had "a great deal" or "quite a lot" of confidence in the military, down 3 percent from 2020 but only one point behind "small business" and the second-most favored institution). *But see* Brian Kennedy, Alec Tyson & Cary Funk, *Americans' Trust in Scientists, Other Groups Declines*, PEW RESEARCH CENTER (Feb. 15, 2022), https://www.pewresearch.org/science/2022/02/15/americans-trust-in-scientists-other-groups-declines/ [https://perma.cc/FND3-9BZ8] (noting that the percentage of Americans who had a "great deal of confidence in the military to act in the public's best interests fell from 39% to 25% between November 2020 and December 2021).

[54] *See*, *e.g.*, ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 212 (1970) ("Jittery, naïve, suspicious in matters relating in any way to 'rights,' the military professionals do the best they can. But their training has left them pitifully limited").

[55] David T. Burbach, *Confidence Without Sacrifice: American Public Opinion and the US Military*, *in* RECONSIDERING AMERICAN CIVIL-MILITARY RELATIONS: THE MILITARY, SOCIETY, POLITICS, AND MODERN WAR 149, 150–51, 153 (Lionel Beehner, Risa Brooks & Daniel Maurer eds., 2021). Gallup's December 2021 poll, however, showed a drop of ten points since 2017. Lydia Saad, *Military Brass, Judges Among Professions at New Image Lows*, GALLUP (Jan. 12, 2022), https://news.gallup.com/poll/388649/military-brass-judges-among-professions-new-image-lows.aspx [https://perma.cc/LLF8-TT78].

[56] Political scientist and civil-military relations scholar Lindsay Cohn cautions that causation between these variables is not clear. Correspondence with Lindsay Cohn on earlier draft, on file with the author.

[57] Ronald R. Krebs & Robert Ralston, *Civilian Control of the Military Is a Partisan Issue*, FOREIGN AFFS. (July 14, 2020), https://www.foreignaffairs.com/articles/united-states/2020-07-14/civilian-control-military-partisan-issue [https://perma.cc/9FJA-9SHU]; Ronald R. Krebs, Robert Ralston & Aaron Rapport, *No Right to Be Wrong: What Americans Think about Civil-Military Relations*, 21 PERSPS. POL. 606, 606–24 (2021).

C. Here to Preserve Democracy, Not to Practice It

Members of the military are largely heralded and lionized for their sacrifice and service, but this high public esteem is ironic and often ill-informed:[58] servicemembers are not usually considered archetypes of social or political liberalism. They are often viewed as patriotic[59] but patriarchal;[60] noble[61] but naïvely obedient to any order;[62] inclined toward undemocratic, authoritarian-leaning subordination,; and disconnected from civil society, civil liberties,[63] and culture-—preferring following orders over celebrating individual freedoms and diversity of opinion.[64] This view is supported to some

---

[58] Jim Golby, Lindsay P. Cohn & Peter Feaver, *Thanks for Your Service: Civilian and Veteran Attitudes after Fifteen Years of War*, *in* WARRIORS & CITIZENS: AMERICAN VIEWS OF OUR MILITARY 110 (Kori Schake & Jim Mattis eds., 2016) (commenting about survey results indicating a "significantly higher tendency for nonveterans to respond to questions about the military with 'don't know' or 'no opinion'"); *see also* James Fallows, *The Tragedy of the American Military*, ATLANTIC (Jan./Feb. 2015), https://www.theatlantic.com/magazine/archive/2015/01/the-tragedy-of-the-american-military/383516/ [https://perma.cc/ZY8N-MKRV] (noting a contemporary, post-9/11 norm of a "reverent but disengaged attitude toward the military—we love the troops, but we'd rather not think about them").

[59] Lymari Morales, *Nearly All Americans Consider Military Service "Patriotic*,*"* GALLUP (July 3, 2008), https://news.gallup.com/poll/108646/nearly-all-americans-consider-military-service-patriotic.aspx [https://perma.cc/9X27-TB93]; Ronald R. Krebs & Robert Ralston, *Patriotism or Paychecks: Who Believes What About Why Soldiers Serve*, 48 ARMED FORCES & SOC'Y 25, 26, 36 (2022).

[60] ROBERT U. NAGEL, KINSEY SPEARS & JULIA MAENZA, GEO. INST. WOMEN, PEACE AND SEC., REPORT: CULTURE, GENDER, AND WOMEN IN THE MILITARY: IMPLICATIONS FOR INTERNATIONAL HUMANITARIAN LAW COMPLIANCE 7, 18 (2021), https://giwps.georgetown.edu/wp-content/uploads/2021/10/Culture_Gender_Women_in_the_Military.pdf [https://perma.cc/5UXC-EYE3] ("[t]he lack of apparent influence that women have in some regions of the military is due to the masculinized nature of the institution itself"); Elizabeth M. Trobaugh, *Women, Regardless: Understanding Gender Bias in U.S. Military Integration*, 88 JOINT FORCE Q. 46, 47–50 (2018).

[61] *See* J. Carl Ficarrotta, *Are Military Professionals Bound by a Higher Moral Standard?*, 24 ARMED FOR. & SOC'Y 59 (1997); United States v. Meakin, 78 M.J. 396, 404 (C.A.A.F. 2019).

[62] *See* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 311 (1977) ("No military force can function effectively without routine obedience, and it is the routine that is stressed"); *see also* LIEUTENANT COLONEL DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 143–48(1996).

[63] This trope conflicts with survey results as far back as 1999, at least among senior military officers. *See* James A. Davis, *Attitudes and Opinions Among Senior Military Officers and a U.S. Cross-Section, 1998–99*, *in* SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY 101 (Peter D. Feaver & Richard H. Kohn eds., 2001).

[64] Rosa Brooks, Civil-Military Paradoxes, *in* WARRIORS & CITIZENS: AMERICAN VIEWS OF OUR MILITARY 62 (Kori Schake & Jim Mattis eds., 2016) (referring to a survey of U.S. Army War College students [typically lieutenant colonels and colonels on track for high command positions] indicating that the trait of "openness" ["strong intellectual curiosity, creativity, and comfortable relationship with novelty and variety"] was lower than the

extent empirically: those who join a hierarchical and command-centric military do so voluntarily, and the majority of senior military officers identify as politically conservative, are ideologically aligned with the Republican Party (even if not displaying outward partisanship),[65] and are adherents to mainstream religious faiths.[66] It also accords with a foundational premise of Huntington's "objective control" theory of civil-military relations, subscribed to by most civil-military scholars and uniformed professionals[67]:

> Loyalty and obedience are the highest military virtues . . . [so] [w]hen the military man receives a legal order from an authorized superior, he does not argue, he does not hesitate, he does not substitute his own views; he obeys instantly. He is judged not by the policies he implements, but rather by the promptness and efficiency with which he carries them out.[68]

Aside from demographic and sociological reasons,[69] legal structures have also reinforced a perception of separate and unequal cultures. The ends and the means used to attain them in the martial sphere are seen—even by the U.S. Supreme Court—as categorically distinct from those of the civil sphere.[70]

---

general public); original survey and analysis in Stephen J. Gerras & Leonard Wong, *Changing Minds in the Army*: *Why It Is So Difficult and What To Do About It* (2013), https://press.armywarcollege.edu/monographs/515/ [https://perma.cc/5BMT-UDLB]; *see also* SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 60 (1957) (noting that traditional views of the "military mind" assume *a priori* that military professionals are by nature "opposed to democracy and to desire the organization of society on the basis of the chain of command" and that it is "not flexible, tolerant, [or] intuitive").

[65] HEIDI A. URBEN, PARTY, POLITICS, AND THE POST-9/11 ARMY 19–56 (2021); Michael Moran, *In New England, a Sense of Abandonment*, NBC NEWS (June 15, 2005), https://www.nbcnews.com/id/wbna8228127 [https://perma.cc/6UJQ-X7CT] (quoting political scientist Michael Desch as saying: "The typical American military officer today is southern, white, conservative, likely to self-identify with the Republican Party, to be quite religious, and increasingly he's likely to be an evangelical Protestant"); *see also* JASON K. DEMPSEY, OUR ARMY: SOLDIERS, POLITICS, AND AMERICAN CIVIL-MILITARY RELATIONS 72 (2010) (Table 5.1, summarizing results from surveys of Army officers' "ideological identification" between 1954 and 2004).

[66] MELISSA HALLER, RAND CORPORATION, FORECASTING RELIGIOUS AFFILIATION IN THE UNITED STATES ARMY 38–40 (2021); KRISTY N. KAMARCK, CONG. RSCH. SERV. R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED FORCES: BACKGROUND AND ISSUES FOR CONGRESS 46–47 (2019) (drawing on survey data collected by the Defense Manpower Data Center).

[67] URBEN, *supra* note 65, at 161–62.

[68] HUNTINGTON, *supra* note 64, at 73.

[69] *See* Andrea Asoni, Andrea Gilli, Mauro Gilli & Tino Sanandaji, *A Mercenary Army of the Poor? Technological Change and the Demographic Composition of the Post-9/11 U.S. Military*, 45 J. STRATEGIC STUD. 568, 568 (2022) (debunking the widely held assumption that the contemporary U.S. military recruits members primarily from disadvantaged socioeconomic communities and backgrounds).

[70] *See* In re Grimley, 137 U.S. 147, 153 (1890) ("An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier").

The "illiberal and undemocratic . . . . militarism," as Professor Fissell describes it, manifests most obviously in the law that commands and regulates the members of the armed forces.[71] A significant number of military criminal statutes and rules of procedure, for example, are deliberately aimed at preventing disruptions to the chain-of-command's ability to execute missions,[72] whereas no such teleology exists in Oregon's, Alaska's, or New Mexico's criminal code. Both statutes[73] and Supreme Court precedent[74] have over centuries erected artificial legal distinctions between the civil and martial communities in part based on assumed social and cultural distinctions.[75] Those distinctions are then emphasized to merit further military-only narrowing of certain constitutional due process protections, like military-specific limits on partisan political participation.[76]

As recognized by the public and under the law, the military is subordinated to civilian political authority; its members lead professional and personal lives that are organized and policed to an extent constitutionally inconceivable if applied to civilians; its members and their attitudes are generally associated with self-consciously anti-democratic professional, social, cultural, and political norms.[77] Gene Hackman's portrayal of a fictional seasoned Navy captain of a nuclear missile-carrying submarine accurately illustrates this conventional view of an apolitical American military sitting outside the body politic: "We're here to preserve democracy, not to practice it."[78]

---

[71] Fissell, *supra* note 19, at 368.
[72] *See*, *e.g.*, 10 U.S.C. § 883 (criminalizing "malingering"), § 885 (criminalizing "desertion"), § 890 (criminalizing "willfully disobeying superior commissioned officer"); MCM, *supra* note 33, at pt. II–23–29 (authorizing commanders to place military members under various forms of pre-trial restraint, including arrest and "[p]retrial confinement"); *id.*, at pt. III–14–15 (authorizing commanding officers to issue "search authorization[s]" for private property based on probable cause).
[73] UCMJ, *supra* note 32.
[74] Parker v. Levy, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society"); *id.* at 749 ("The differences noted by this settled line of authority, first between the military community and the civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice").
[75] *See generally* Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH. L. REV. 669 (2021).
[76] DEP'T OF DEF., DOD DIRECTIVE 1344.10: POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES 2 (Feb. 19, 2008) https://www.marines.mil/Portals/1/Docs/134410p%5B1%5D.pdf [https://perma.cc/YWU6-G2HZ].
[77] KYLE & REITER, *supra* note 38, at 29 ("Internally, a military is not a democracy, yet it is called on to serve a democratic state and draws its members from a democratic society that values debate, dissent, and plurality of views and opinions. Meanwhile, the military cannot indulge such behaviors deemed essential to meaningful political life . . . a soldier does not engage in debate and compromise with superiors in response to an order").
[78] CRIMSON TIDE (Hollywood Pictures, Don Simpson/Jerry Bruckheimer Films 1995).

During his first term, Trump's reported interest in using military force domestically to achieve political advantages and his claims of legal authority to do so fueled public and academic interest; for example, reporting on the Insurrection Act became somewhat of a cottage industry in the summer of 2020.[79] Not only do such crises raise fascinating bureaucratic problems of real-world command and control, but the potential role for senior military elites like General Milley implicates a poorly understood dilemma. Given General Milley's reported reactions to President Trump's suggestions,[80] there is no proper legal framework for determining whether military leadership could, ironically, act as a legal curb on autocratic impulses by political actors who view civil protest as threatening to "law and order."

Without a framework from civil-military relations theory or the law, the degree of deference the *military agent will or ought to give to the political principal* when those civil liberties and freedoms are perceived to be at risk is part of that unanswered question. It is a species of what Pauline Shanks Kaurin refers to as the agent's problem of dealing with an "unprincipled principal."[81] Borrowing a line from Justice O'Connor's opinion in a case about a citizen-detainee's right to fair notice, "it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[82]

But which principles take precedence? As the first Trump administration demonstrated several times, civil liberties and rights, other than generic "due process," are strained when the political leadership wields—or threatens to wield—the military domestically in such a way as to risk eliciting military disobedience or dissent. But such scenarios also strain the very

---

[79] *See, e.g.*, Lindsay P. Cohn, *Yes, Trump Can Send the Military to Shut Down Protests. Here's What You Need to Know*, WASH. POST (June 2, 2020), https://www.washingtonpost.com/politics/2020/06/02/can-trump-send-military-shut-down-protests-heres-what-you-need-know/ [https://perma.cc/LJ62-U8FV]; Barbara Starr, Ryan Browne and Nicole Gaouette, *Pentagon Officials Express Concern as Trump Threatens to Use Military to 'Dominate' Protestors*, CNN (June 2, 2020), https://www.cnn.com/2020/06/01/politics/troops-deploying-washington-dc/index.html [https://perma.cc/N6NB-T3JW]; Scott R. Anderson, Emma Broches, Eric Halliday & Julia Solomon-Strauss, *What Made Trump's Protest Response in D.C. Unique?*, LAWFARE (June 8, 2020), https://www.lawfareblog.com/what-made-trumps-protest-response-dc-unique [https://perma.cc/9UUJ-L78K]; Quint Forgey, *'We'll Put Them Down Very Quickly': Trump Threatens to Quash Election Night Riots*, POLITICO (Sept. 11, 2020), https://www.politico.com/news/2020/09/11/trump-election-night-riots-412323 [https://perma.cc/9KLS-9CKA].

[80] *See infra* Part II.D.

[81] Pauline Shanks Kaurin, *An "Unprincipled Principal": Implications for Civil-Military Relations*, 15 STRATEGIC STUD. Q. 50, 50 (2021) ("[t]he question of an unprincipled principal arises when the moral or other normative qualities—such as integrity, humility, and trust—are absent or when moral or normative perspectives differ between the principal and the agent").

[82] *Hamdi*, 542 U.S. at 532.

character of civilian control principles. When the military elites disagree with the civilian political leadership about the means, methods, or ends of war-fighting, an "agency problem" is created.[83]

D. Finer's Warning: Beware the Generals Coming to the Rescue

The exercise of politically unpalatable civil rights and civil liberties *domestically* presents a similar context for such dilemmas to unfold. It raises the possibility of a new-old concern, one more familiar to historians of Latin America, the Middle East, Southeast Asia, and parts of Europe: that of the "General on Horseback," examined in Samuel Finer's classic work in the early 1960s.[84] Finer described the socially-responsible "custodian" of constitutional virtues—a heroic military figure willing to rescue the polity from the alleged indignities and mismanagement of the civilian politicians, and in the process reversing the civilian-military relationship dynamic and placing military judgment ahead of civilian by force or threat of force.[85] Finer argued that an emphasis on professionalization actually had the perverse effect of giving the military various "motives" to intervene. One motive is based on the military's self-identity as the:

> nation's custodian against foreign foes . . . [and] as a fighting force, not as a body of policemen. It often vents its discomfort at having to act against its own nationals by blaming the "politicians," and by thinking of itself as being "used" by these for their own sordid purposes. The strain which such duties put on the loyalty of the armed forces is often too great and impels them to disobey or even to act against their government.[86]

Finer's warning was cast as a critique on the (still) standard theory of what keeps American armed forces from intervening in domestic politics—its tightly bound professionalism in a narrow area of expertise.[87] This antipathy

---

[83] Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57, 58 (1989); James Burk, *Responsible Obedience by Military Professionals: The Discretion to Do What is Wrong*, *in* AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA 149, 151–54 (Suzanne C. Nielsen & Don M. Snider eds., 2009).

[84] S.E. FINER, THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS (1962).

[85] *Id*. at 35–39.

[86] *Id.* at 27.

[87] Krebs & Ralston, *supra* note 57. The literature regarding military interventions, including coups, in other countries reveals that "professionalism" is a double-edged sword: it may encourage a culture of deference and non-interference, backing away from interventions, or it may convince the military elite of its moral superiority and right to defy corrupt or incompetent civilian politicians. *See*, *e.g*., FINER, *supra* note 84*,* at 25–27; Valerie Plave Bennett, *The Motivation for Military Intervention: The Case of Ghana*, 26 WEST. POL. Q. 659 (1973); Avad Al-Qazazz, *Military Regimes and Political Stability in Egypt, Iraq and Syria*, 12 BERKELY J. SOCIO. 44 (1967); Morris Janowitz, *The Military in the Political*

toward "policing" fellow citizens with military force and fear of being used for "sordid purposes" is justified by American historical civil-military relationships. The contemporary strain placed upon the loyalty and effectiveness of the modern military has its roots in similar Constitution-straining duties seemingly placed on military leaders by presidents.

The following Part summarizes these matters through a hypothetical scenario of a president's order to use military force to stop domestic civil unrest and protest.

II. MILITARY RESPONSE TO DOMESTIC UNREST

A. The Hypothetical Rogue President Against a Defiant Military Leadership

To illustrate what this abstract set of concerns and paradigm could look like, consider this hypothetical: the President of the United States, running for re-election and widely unpopular, is frustrated with relentless protests springing up in large, demographically diverse urban centers in every region of the country. These civilians are a mélange of marchers, picketers, and rally attenders. Some protest systemic police racism, some protest in favor of reproductive rights, and some protest an on-going but disastrous military campaign to interdict illegal drugs and migrants on the southern border. The protests are mostly non-violent, but all are economically disruptive and have led to high-profile concert cancelations and shuttered store fronts. Some of the President's advisors refer to the protests as "civil disturbances;" some call them "riots;" one even calls it an "insurgency;" all claim they are unlawful, politically motivated and inspired or financed by foreign "agitators." Local law enforcement is overwhelmed by the number and diversity of protestors. Mayors (but not each governor) request state and federal assistance, and both police and protestors are injured and hospitalized in various confrontations using non-lethal weapons. Tent cities spring up in various high-visibility downtown parks and move frequently before police can order them removed. Long convoys of mopeds and family sedans painted with protest slogans caravan through the suburbs.

With the presidential election just weeks away, the President first orders the Chairman of the Joint Chiefs of Staff, Admiral J.Y. Freeman, to immediately revise and publish a new "Standing Rules for the Use of Force"[88]

Development of New Nations, 20 BULL. ATOMIC SCIENTISTS 6, 9 (1964) (describing "common ideologies" of military junta leaders).

[88] These standing rules, along with "Standing Rules of Engagement," are published periodically in classified and unclassified versions by the Office of the Chairman of the Joint Chiefs of Staff. It is a base document, establishing key concepts and definitions (like "self-defense" and "hostile intent"), and which offers a catalogue of various approved types of tactics, techniques, and weapons (and amount of force) that may be used in various situations

with an amended definition of self-defense that would permit the military to use lethal force to stop or prevent even *non*-imminent, *non*-lethal attacks on private commercial or governmental property.[89] Next, he orders four-star General Mackland Arthur,[90] Commander of U.S. Northern Command and responsible for providing military support for homeland security,[91] to deploy active-duty military police, intelligence-gathering units, and aviation units to aid local civilian law enforcement authorities in confronting the protestors with "crisis response capability" at what the President refers to as "the front lines." The President has not invoked any authorities under the Insurrection Acts[92] or the National Emergencies Act[93] but is said to be considering these options. The Department of Justice's Office of Legal Counsel has circulated a draft

---

and identifies the level of authority required to approve certain tactics, techniques, and weapons; this catalogue is used subsequently by subordinate operational commands to develop rules of the use of force (domestically) or rules of engagement (in armed conflict) tailored to mission objectives, anticipated risk, and in light of political considerations regarding the purpose and ultimate objective for which the military is being employed. *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES (June 13, 2005) [hereinafter SRUF]; *see also* CENTER FOR LAW AND MILITARY OPERATIONS, DOMESTIC OPERATIONAL LAW: 2021 HANDBOOK FOR JUDGE ADVOCATES 117 (2021).

[89] The SRUF explains that "[n]ormally, force is to be used only as a last resort, and the force used should be the minimum necessary. . .[but] [d]eadly force is to be used only when all lesser means have failed or cannot be reasonably employed . . . [and the use of force must be] reasonable in intensity, duration and magnitude" under the circumstances. SRUF, *supra* note 88, at Encl. L, ¶¶ 5.b.1., 5.c. *See also* Dan Maurer, *Border Militarization Blurs the Distinction Between 'Policing' Immigration and 'Combating' Immigrants*, LAWFARE (April 30, 2025), https://www.lawfaremedia.org/article/border-militarization-blurs-the-distinction-between--policing--immigration-and--combating--immigrants [https://perma.cc/TB5Y-Y75J] (highlighting the concern about what lethal force would be permitted in defense of the southern border against illegal immigrants).

[90] This is a not-so-subtle reference to General Douglas MacArthur (1880–1964). MacArthur is famous not just for his valor as a young general in World War I, his leadership of allied forces in the Pacific Theater in World War II, or his relief from command in Korea by President Truman. MacArthur's reputation is one of brilliance, erudition, conceit, ego, and well-deserved notoriety for generating extreme tension in the civil-military relationship between himself and more than one President of the United States. For excellent discussion of this history, see generally H.W. BRANDS, THE GENERAL VS. THE PRESIDENT: MACARTHUR AND TRUMAN AT THE BRINK OF NUCLEAR WAR (2016) and see MATTHEW MOTEN, PRESIDENTS & THEIR GENERALS: AN AMERICAN HISTORY OF COMMAND IN WAR 227–270 (2014). For MacArthur's self-serving autobiographical perspective, see DOUGLAS MACARTHUR, REMINISCENCES (1964).

[91] *See* Lisa L. Turner, Jeanne Meyer & Harvey Rishikof, *Understanding the Role of Northern Command in Defense of the Homeland: The Emerging Legal Framework—Authorities and Challenges*, *in* HOMELAND SECURITY: LEGAL AND POLICY ISSUES 43, 44–45 (Joe D. Whitley & Lynne K. Zusman eds., 2009).

[92] *See* 10 U.S.C. §§ 251–255 (establishing conditions precedent for the President's federalizing the "militia" of a state or employing federal armed forces to suppress an "insurrection, domestic violence, unlawful combination, or conspiracy" or other "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States.").

[93] Pub. L. 94–412, 90 Stat. at 1257–58 (codified at 50 U.S.C. §§ 1601, 1621, 1622, 1631, 1641, and 1651).

memorandum opinion explaining the President's inherent Article II authority to deploy federal forces, satisfying the federal obligation under Article IV of the Constitution to protect states from "domestic violence,"[94] and to revise "rules for the use of force" under these circumstances and concluded that the planned use of General Arthur's forces will not violate the Posse Comitatus Act.[95] The Department of Defense's Office of the General Counsel and lawyers on the National Security Council Staff harbor reservations about this authority (primarily because the President has not formally invoked the Insurrection Act to justify the use of force, Congress has not "call[ed] forth the Militia,"[96] and the use of lethal force to stop looting and fleeing suspects may violate the Fourth Amendment[97]) but refuse to commit those reservations or arguments in writing.

Our fictitious General Arthur and Admiral Freeman are thus placed on the horns of a dilemma. On one hand, if they obey a presumptively lawful order from the constitutionally empowered but politically actuated commander-in-chief, they risk the safety of American citizens, subverting their constitutionally protected civil liberties, and endanger the carefully cultivated image of an apolitical or at least non-partisan military.[98] On the other hand, if they disobey or dissent from the order, they risk subverting constitutionally directed and historically exercised civilian control of the military, and *still* endanger the carefully cultivated image of a nonpolitical (or at least non-partisan) military. As two civil-military relations scholars phrased it, one can

---

[94] For an example, see Memorandum from Antonin Scalia, Asst. Att'y Gen., Office of Legal Counsel, to Mary C. Lawton, Dep. Asst. Att'y Gen., Dep't of Justice, *Re: Law Relating to Civil Disturbances* (Jan. 6, 1975).

[95] The Posse Comitatus Act generally prohibits the employment of federal military as civilian law enforcement. 18 U.S.C. § 1385. Various judicial tests have been used to demarcate the line between permissible and impermissible participation of military forces. *See*, *e.g.*, Memorandum from Steven A. Engel, Asst. Att'y Gen., Office of Legal Counsel, for the General Counsel, Department of Defense, *Military Support for Customs and Border Protection Along the Southern Border Under the Posse Comitatus Act*, 45 Op. O.L.C. __, 4–6 (Jan. 19, 2021) (discussing various tests applied by the circuit courts and the test adopted in previous O.L.C. opinions). Invoking the Insurrection Act has a much longer and varied history. *See generally* ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878 (1988). It has been invoked by Presidents Jefferson, Jackson (twice), Lincoln, Grant (three times), Hayes (three times), Cleveland, Wilson, Hoover, Franklin Roosevelt, Eisenhower, Kennedy (three times), Lyndon Johnson (five times), George H.W. Bush (twice). Grounds for its criticism—as "dangerously overbroad and ripe for abuse"—are not taken up here. *See* Joseph Nunn, *The Insurrection Act Explained*, BRENNAN CENTER FOR JUSTICE (Apr. 21, 2022), https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained [https://perma.cc/ZZ3S-Z2EK].

[96] U.S. CONST. art. I, § 8, cl. 15.

[97] *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985) (it is a Fourth Amendment violation if the officer does not possess a good-faith belief that the suspect poses a significant threat of death or serious physical injury to the officer or others).

[98] Elizabeth McLaughlin, *"Sickening": Here's Why One Retired Military Officer Spoke Out Against Trump*, ABC NEWS (June 4, 2020), https://abcnews.go.com/Politics/sickening-retired-military-officer-spoke-trump/story?id=71074748 [https://perma.cc/42KT-Z7TZ].

argue that "[a]biding the principle of civilian control enshrined in the Constitution (and the norms that support it) should not come at the expense of protecting American citizens' most fundamental civil liberties."[99] As they weigh conflicting constitutional imperatives, knowing that criminal liability for their actions (and job insecurity, at least) may result from disobeying the commander-in-chief's order, their moral and professional constitutions are tested. What does the *law* say about safely resolving this dilemma?

One mistake in this regard is to assume the scenario relates solely to an exercise of presidential war power as commander-in-chief because he is using the military "for national security" (very broadly defined), thus triggering the question of the extent to which he ought to benefit from the judicial deference historically afforded.[100] Another mistake is to assume it is solely an exercise of his domestic law enforcement responsibility, thus triggering the question of the extent to which the order ought to be subject to barriers (if any) imposed by Congress and the courts.[101] Instead, the substantive dilemma—the gravamen of this case—is the exercise of independent judgment by an "inferior" executive branch official[102] contrary to the specific order or intentions of the President. Unlike other politically-appointed members of the cabinet or other very senior civilian officials, however, senior cabinet-level military officers or those in the direct operational chain-of-command for military actions (like our General Arthur and Admiral Freeman) are subject to their own criminal justice system peculiar in its forms, functions, and triggers for culpability.[103] Subordination, performance of duty, and respect for authority are ingrained maxims within this body of law,[104] and the role of *Congress*—by enacting that law and keeping certain responsibilities for it away from the commander-in-chief—undercuts the argument that unitary executive theory[105] provides the necessary framework for military elites to resolve this problem. In other words,

---

[99] Risa Brooks & Michael A. Robinson, *Let the Generals Speak? Retired Officer Dissent and the June 2020 George Floyd Protests*, WAR ON THE ROCKS (Oct. 9, 2020), https://warontherocks.com/2020/10/let-the-generals-speak-retired-officer-dissent-and-the-june-2020-george-floyd-protests/ [https://perma.cc/V99X-UBTM].

[100] *See* The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) ("[w]hether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance . . . 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"); Martin v. Mott, 25 U.S. 19, 29–30 (1827) (the President has "exclusive" power to determine when conditions legally warrant invocation of the Insurrection Act and that decision is "conclusive" on all other parties).

[101] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring) (creating a three-level framework for the degree of scrutiny applied to presidential action in light of Congress's implied to expressed will on the subject area).

[102] Weiss v. United States, 510 U.S. 163, 182 (1994) (Souter, J., concurring).

[103] UCMJ, *supra* note 32.

[104] *See infra* Part III.C.4.

[105] For summaries and analyses of the "unitary executive theory," *see* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, and Future*, 2020 SUP. CT. REV. 83 (2021), and STEVEN CALABRESI & CHRISTOPHER YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008).

the question of the extent to which the President can unilaterally control the conduct of military officers and dictate standards for that conduct is answered by looking at Congress's involvement in the setting of those standards via the UCMJ.

But military criminal law is also not dispositive. If General Arthur refused to follow the order, would he be committing "mutiny," opening himself to a potential court-martial for "usurp[ing] or overrid[ing]" lawful military authority?[106] Might he be prosecuted for conduct that is "prejudic[ial] of good order and discipline?"[107] Counter-factually, if he followed the order, would he be engaging in conduct "unbecoming an officer,"[108] or "of a nature to bring discredit upon the armed forces" risking the public's esteem?[109] Or, because he swears an oath to "support and defend the Constitution" and "bear true faith and allegiance" to it,[110] rather than to a particular party or president, could his obedience be construed, ironically, as being "derelict…in his duties?"[111] In other words, if he objects on professional grounds to the President's order, does he have a professional "duty to disobey?"[112] Or a professional duty to resign in protest?[113] If the order is unlawful or unconstitutional, the general has a legal duty to disobey it,[114] but who is empowered to draw that legal conclusion?

This hypothetical crystallizes the alarming legal dilemma arising from the collision of these particular constitutional values and responsibilities. But American history reveals a precedent of practice, including very recent

---

[106] 10 U.S.C. § 894(a)(1); *see* MCM, *supra* note 33, at pt. IV, ¶ 21.b.(2) (listing the elements of the offense).

[107] 10 U.S.C. § 934; *see also* Lindsay P. Cohn, *It Wasn't in My Contract: Security Privatization and Civilian Control*, 37 ARMED FORCES & SOC'Y 381, 388 (2011) (concluding that "[t]he tendency of all of [the military justice system's unique martial criminal prohibitions] is to encourage individuals in the military to think from the perspective of the organization and of the civilian leadership, rather than from a narrower perspective of self or even service branch").

[108] 10 U.S.C. § 933; *see* MCM, *supra* note 33, at pt. IV, ¶ 90.c.(2) ("action or behavior in an official capacity that, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character").

[109] 10 U.S.C. § 934; *see* MCM, *supra* note 33, at pt. IV, ¶ 91.c.(3) ("conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem").

[110] Pub. L. 89–554, 80 Stat. 424 (1966) (codified at 5 U.S.C. § 3331); *see infra* Part III.C.1.

[111] 10 U.S.C. § 892(3).

[112] Andrew R. Milburn, *Breaking Ranks: Dissent and the Military Professional*, 59 JOINT FORCE Q. 101, 107 (2010).

[113] Risa Brooks, *Paradoxes of Professionalism*, *supra* note 15, at 19 (Resignation is a topic of sustained scholarly debate. For example, if a senior officer resigns in protest "and that action mobilizes public opposition, the costs to the civilian leadership of pursuing that action increase."). For contrasting views on the normative desirability of this option, compare Richard H. Kohn, *On Resignation*, 43 ARMED FORCES & SOC'Y 41 (2017) (criticizing principled resignation as dangerous for national security) with JAMES M. DUBIK, JUST WAR RECONSIDERED: STRATEGY, ETHICS, AND THEORY 157–64 (2016) (arguing that conditions-based principled resignation of senior officers, if done "candidly and privately," recognizes their moral autonomy, as opposed to rendering them "mere instruments of a government").

[114] MCM, *supra* note 33, at pt. IV, ¶¶ 18.c.(1)(c), 16.c.(2)(a).

practice, wherein the question of how the civilian and military leaders interpreted these same values and responsibilities had real, and sometimes tragic, consequences.

B. Collision of Civilian Control and Civil Rights Precedent

American history is replete with examples of executive branch officials deploying the military to contain or end civic disobedience or civil unrest domestically—sometimes *against* those claiming defense of their own liberties and rights, sometimes in *defense* of those whose civil liberties and rights are threatened by popular or state action. The federal government tried, but ultimately had to rely on state and privately-funded militia, to suppress Shays' Rebellion against "tirannical [sic] oppression" of tax collectors in Massachusetts in 1786-87.[115] Washington relied on the Militia Act (a precursor to the Insurrection Acts) and an advisory notice by a Supreme Court justice in dispatching militia to end the Whiskey Rebellion of 1794 in Western Pennsylvania, another uprising fueled by economic disfunction and privation.[116] In 1859, President Buchannan ordered then-Colonel (and slave-owning) Robert E. Lee to Harpers Ferry to end John Brown's violent attempt at leading a slave uprising.[117]

In 1867, Congress passed the first of the Reconstruction Acts, establishing direct military governments (to enforce "peace and good order") in ten former Confederate states.[118] Congress imposed a duty on the military commanders of those districts, governing civil society in each state, to:

> protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, *all disturbers of the public peace and criminals*; and to this end he *may allow* local civil tribunals to take jurisdiction of and to try offenders, or, *when in his*

---

[115] *See* Robert A. Gross, *A Yankee Rebellion? The Regulators, New England, and the New Nation*, 82 NEW ENG. Q. 112, 113 (2009).

[116] THOMAS SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 4 (1986); Richard H. Kohn, *The Washington Administration's Decision to Crush the Whiskey Rebellion*, 59 J. AM. HIST. 567, 571–72, 575–78 (1972); Act of May 2, 1792, 1 Stat. 264 (First Militia Act of 1792), § 2 (No such judicial notice is required under the current Insurrection Act: 10 U.S.C. § 252 leaves answering the question of whether "ordinary judicial proceedings" are not capable of enforcing federal law to the president); *see also* WILLIAM HOGELAND, THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY 238 (2006).

[117] Robert E. McGlone, *Rescripting a Troubled Past: John Brown's Family and the Harpers Ferry Conspiracy*, 75 J. AM. HIST. 1179, 1183–85 (1989); *see also* Craig Simpson, *John Brown and Governor Wise: A New Perspective on Harpers Ferry*, 1 BIOGRAPHY 15, 22 (1978).

[118] An Act to Provide for the More Efficient Government of the Rebel States, Pub. L. 39–153, 14 Stat. 428 (1867), § 1.

> *judgment* it may be necessary for the trial of offenders, he *shall have power to organize military commissions or tribunals* for that purpose, and all interference under color of State authority with the exercise of military authority under this act, shall be null and void.[119]

President Grant later employed the military to suppress the Ku Klux Klan in 1871[120] and to peacefully end the fierce popular unrest after the divisive and fraud-ridden 1872 Louisiana gubernatorial election.[121] Presidents Franklin Roosevelt,[122] Lyndon Johnson,[123] and George H.W. Bush[124] invoked the Insurrection Acts to quell violent race riots in Detroit, Chicago, and Los Angeles during their respective Administrations. In 1957, President Eisenhower deployed the 101st Airborne Division to Little Rock, Arkansas, to protect nine Black children from the foreseeable violence of "demagogic extremists" and "disorderly mobs" while attempting to enter Central High School under the Supreme Court-mandated public school desegregation order.[125]

But a precedent does not mean all instances of domestic deployments are without risk of overreach. In 1861, President Lincoln appointed a popular and stalwart anti-slavery officer, General John C. Frémont,[126] to command the Western Department, headquartered in St. Louis, Missouri but a territory that

---

[119] *Id.* § 3 (emphasis added).
[120] Ku Klux Klan (Civil Rights) Act of 1871, Pub. L. No. 42–22, § 3, 17 Stat. 13, 14 (1871); *see also* Stephen I. Vladeck, *Note: Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 168 (2004).
[121] *See generally* JOSEPH G. DAWSON III, ARMY GENERALS AND RECONSTRUCTION: LOUISIANA, 1862–1877 (1982); President Ulysses S. Grant, Message to Congress Regarding Intervention in Louisiana (January 13, 1875), https://millercenter.org/the-presidency/presidential-speeches/january-13-1875-message-regarding-intervention-louisiana [https://perma.cc/AQ5T-9PNB].
[122] CLAYTON D. LAURIE & RONALD H. COLE, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877–1945, 409–20 (1997).
[123] Douglas A. Poe, *The Use of Federal Troops to Suppress Domestic Violence*, 54 A.B.A. J. 168, 168–71 (1968).
[124] Paul Taylor & Carlos Sanchez, *Bush Orders Troops Into Los Angeles*, WASH. POST, May 2, 1992, https://www.washingtonpost.com/archive/politics/1992/05/02/bush-orders-troops-into-los-angeles/4c4711a6-f18c-41ed-b796-6a8a50d6120d/ [https://perma.cc/2VK5-9QBF].
[125] JEAN EDWARD SMITH, EISENHOWER IN WAR AND PEACE 720–25 (2012); Exec. Order No. 10,730, 22 Fed. Reg. 7628 (1957) ("Providing Assistance for the Removal of an Obstruction of Justice Within the State of Arkansas"), https://www.archives.gov/milestone-documents/executive-order-10730 [https://perma.cc/P4L5-BLCB]; President Dwight D. Eisenhower, Address to the Nation (Sept. 24, 1957), https://www.eisenhowerlibrary.gov/sites/default/files/research/online-documents/civil-rights-little-rock/1957-09-24-press-release.pdf. [https://perma.cc/6FGU-6CL2].
[126] *See* JAMES M. MCPHERSON, TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF 54–55 (2008) (Frémont had been a well-known public figure for quite some time already); *see also* TOM CHAFFIN, PATHFINDER: JOHN CHARLES FRÉMONT AND THE COURSE OF AMERICAN EMPIRE 7–8 (2004).

included all land between the Mississippi River and the Rocky Mountains.[127] Lincoln gave Frémont wide latitude: "*carte blanche*; you must use your own judgment and do the best you can."[128] Despite Lincoln's known policy resistance to emancipation at that point in the Civil War (as he was attempting to keep slave-holding Kentucky neutral), Frémont moved much more aggressively, exploiting Lincoln's confidence and grant of discretion by declaring martial law in his Department, ordering the summary execution of captured guerillas, and issuing his own "emancipation proclamation" for all slaves owned in Missouri.[129] Frémont subsequently ignored "with proconsular arrogance" Lincoln's even-tempered letter explaining to the General the imprudence of his unilateral commands.[130] This forced Lincoln to countermand publicly the General's emancipation order and his capital punishment policy, and to relieve him of his duties.[131]

Lincoln later wrote to Republican Senator from Illinois Orville H. Browning, framing Frémont's order as one that implicated a collision of two sacrosanct values in the words or deeds of a senior military leader: respect for constitutional subordination of the military to civilian judgment and respect for the rights of Americans the commander believes threatened by government action or inaction:

> Gen. Frémont's proclamation as to confiscation of property, and the liberation of slaves, is purely political, and not within the range of military law, or necessity. . . . That must be settled according to laws made by lawmakers, and not by military proclamations. The proclamation, in the point in question, is simply "dictatorship." It assumes that the General may do anything he pleases . . . [and] I cannot assume this reckless position; nor allow others to assume it on my responsibility. You speak of it as being the only means of saving the government. On the contrary, it is itself the surrender of the government.[132]

The following subsection briefly recounts one more historical episode in which a senior military commander openly defied a presidential order

---

[127] T. HARRY WILLIAMS, LINCOLN AND HIS GENERALS 34 (1952).
[128] *Id*. at 35.
[129] MCPHERSON, *supra* note 126, at 57.
[130] Letter from President Abraham Lincoln to General John C. Fremont (Sept. 2, 1861), *reprinted in* LINCOLN ON WAR: OUR GREATEST COMMANDER-IN-CHIEF SPEAKS TO AMERICA 115–116 (Harold Holzer ed., 2011); *see also* JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 353 (1988).
[131] WILLIAMS, *supra* note 127, at 36–40; *see also* DONALD STOKER, THE GRAND DESIGN: STRATEGY AND THE U.S. CIVIL WAR 44–55 (2010).
[132] Letter from Abraham Lincoln to Orville H. Browning (Sept. 22, 1861), LIBRARY OF CONGRESS, , https://tile.loc.gov/storage-services/service/mss/mal/119/1192200/1192200.pdf [https://perma.cc/4SHJ-UZMG].

because he believed he was acting consistently with constitutional principles he held higher in priority than the dictates of his civilian principals. The case study demonstrates the danger of assuming the disobedient senior officer is on the right side of history.

C. General MacArthur v. the "Bonus Army"

More than a decade before his leadership in World War II's South Pacific theater, and nearly two decades before he was relieved of command in Korea by President Truman for disobeying orders and nearly inciting World War III, General Douglas MacArthur used military force against U.S. citizens—indeed Army veterans and their families—in Washington, D.C. In striking parallels to contemporary crises, his use of military force was in precisely the same vein that President Trump later considered, in June 2020 and August 2025, as means to impose "law and order": as a ready, efficient, and intimidating policing force for controlling a large, unruly crowd of Americans relying on faith in their government's respect for their civil rights to assemble, petition the government, and protest injustice.

Veterans of the Great War were promised pensions ("adjusted compensation" certificates, or "bonuses") by Congress in 1924,[133] the amount of cash tied to the number of days served either in the United States or in foreign territory during World War I. The benefit, however, would not become fully redeemable until 1945. Amid the Great Depression, this proved an untenable timeline for many veterans and their families. Tens of thousands marched on Washington, D.C., in early 1932 to raise public awareness and induce Congress to pay the bonus as a lump sum immediately, alleviating their economic hardships. Calling themselves the "Bonus Expeditionary Force," the demonstrators and their families camped in what quickly grew into a shantytown across the Anacostia River from the Washington Navy Yard. After the House passed a bill to accelerate the pay-off of the bonuses but which failed to pass in the Senate, much of this "army" went home dejected, but the remaining thousands stayed encamped with little or no sanitation and increasing desperation (many had no home to return to). Some took occupancy in various government buildings and made daily sojourns downtown to continue their influence campaign. When the D.C. police attempted to evict them from federal property, gunfire killed two of the bonus marchers. In short order, riots erupted not far from the White House and Capitol. Aware that uprisings by disgruntled, undercompensated, aggrieved veterans had recently toppled the government in Italy, and believing that "communists" had infiltrated and perhaps even led the "Bonus Army," President Hoover permitted MacArthur—then the federal Army's Chief of Staff, or senior

[133] Pub. L. No. 68–120, 43 Stat. 121 (1924).

ranking military administrator over the Department—to use military force to beat back the rioters.[134]

Declaring to his adjutant (then-Major Dwight Eisenhower) that there was "incipient revolution in the air,"[135] MacArthur donned his military uniform, replete with medals dangling from his chest to awe former soldiers into respectful obedience,[136] and took personal command of infantry, artillery, and tanks[137] on the streets of D.C.[138] He believed that "90 percent of [the demonstrators] were fake" (that they were agitators sent by the American Communist Party), so he "enthusiastically" executed what he believed was his commander-in-chief's intent. As MacArthur wrote decades later in his autobiography:

> The movement was actually far deeper and more dangerous than an effort to secure funds from a nearly depleted federal treasury. The American Communist Party planned a riot of such proportions that it was hoped the United States Army, in its efforts to maintain peace, would have to fire on the marchers. In this way, the Communists hope to incite revolutionary action. Red organizers infiltrated the veteran groups and presently took command from their unwitting leaders.[139]

What makes this episode particularly poignant is that MacArthur ignored the orders of President Hoover, exceeding his mandate to disperse the crowds by using deadly force well-beyond the expectations of, and politically disadvantageous to, the President. Hoover had ordered the Secretary of War to take control of the increasingly chaotic situation on the streets to reinforce the outnumbered police, including on Capitol Hill, who then passed the order to MacArthur. Secretary Hurley ordered the General to:

> [c]ooperate fully with the District of Columbia police force which is now in charge. Surround the affected area and clear it without delay . . . [and] [u]se all humanity consistent with the due execution of this order.[140]

This order did *not* include the task of routing the demonstrators and razing their Anacostia bivouac, nor did it suggest MacArthur had discretion to

---

[134] BRANDS, *supra* note 90, at 90.
[135] D. CLAYTON JAMES, 1 THE YEARS OF MACARTHUR 1880–1941 399 (1970).
[136] WILLIAM MANCHESTER, AMERICAN CAESAR: DOUGLAS MACARTHUR 1880–1964 164 (1978).
[137] *Id*. Another interesting historical note: leading the armored cavalry (tanks) was then-Major George S. Patton, Jr.
[138] *Id*. (speaking of himself in the third person, MacArthur told Eisenhower: "MacArthur has decided to go into active command in the field").
[139] MACARTHUR, *supra* note 90, at 93.
[140] *Id*. at 94.

deviate from the order, escalating his force, if—in his professional opinion—he felt the situation demanded it. Nevertheless, deviation and escalation is precisely what MacArthur did despite receiving communications from the White House to halt his advance before crossing the Anacostia River.[141] Twice, he scorned this command saying that he could not be "bothered by people coming down and pretending to bring orders."[142] It is not clear why he thought such orders were inauthentic, and he did not seek clarification or confirmation from either the Secretary of War or the President. Instead, MacArthur crossed the Eleventh Street Bridge into Anacostia, tore down and burned the demonstrators' camp (which he later described in sympathetic terms: "morose men squatted by burning campfires listening silently to the endless speeches, always tinged with the increasing violence of Communist propaganda").[143] His troops employed tear gas (which led to two casualties) and bayonetted a seven-year-old through the leg.[144] To MacArthur, "[t]he show of force, the excellent discipline of the troops, and the proper use of tear gas had turned the trick without serious bloodshed."[145]

As he rationalized his conduct later that night to the press, MacArthur made clear how dire and stark he considered the situation: "[a]nother week might have meant that the government was in peril . . . [so] [h]ad the President not acted when he did he would have been derelict in his duty."[146] This implied that Hoover had granted MacArthur permission to use the degree of force he felt necessary under the circumstances, or that that Hoover commanded the assault in Anacostia directly. Neither of these implications were true but illustrate instead MacArthur's ability to manufacture top-cover—to shift responsibility for his conduct to the civilian principal and lauding the action in a way that would make it difficult for the President to contradict or disavow. Then-New York Governor, Franklin D. Roosevelt, upon learning of this rout, remarked to an advisor that MacArthur was "one of the two most dangerous men in America."[147] President Hoover's actual intent was misconstrued (perhaps knowingly), his orders violated, and his prospect of re-election dimmed by MacArthur's brutal assault that day—an assault that the modern reader senses reflects the general's own personal determination, not that of his civilian superior, of what duty in defense of the Constitution demanded.

---

[141] As MacArthur retold the tale thirty years later, he "received word from the Secretary of War, as we were in the midst of crossing the river, to suspend the operation at my discretion. [He] halted the command as soon as [h]e had cleared the bridge, but at that moment the rioters set fire to their own camp." *Id*. at 95.
[142] *The Bonus March (May-July, 1932)*, PBS, https://www.pbs.org/wgbh/americanexperience/features/macarthur-bonus-march-may-july-1932/ [https://perma.cc/Z5R6-NDDM].
[143] MACARTHUR, *supra* note 90, at 93.
[144] MANCHESTER, *supra* note 136, at 152.
[145] MACARTHUR, *supra* note 90, at 95.
[146] *Id.*
[147] MANCHESTER, *supra* note 136, at 166. The other was Democratic populist Huey Long, then Governor of Louisiana and later Senator.

D. Modern-day Malpractice, Misconduct, or Mettle?

Returning to Part II.A.'s hypothetical will illustrate why the law is—as yet—no objective source of help for military officers trying to weigh one constitutional duty or value against another. Imagine that the military leadership (say, Admiral Freeman, the Chairman of the Joint Chiefs of Staff [CJCS]) has reason to believe, honestly and subjectively, that the information on which the President is standing firm is objectively and manifestly erroneous. Trusting in her judgment, she may therefore conclude one of two things: either the political leader is recklessly or negligently failing to understand actual facts, or the political leader is knowingly or purposefully false or misleading.[148] Because of this "disinformation," Admiral Freeman believes honestly that the deployment of military force, ordered by her commander-in-chief, appears to violate, or predicts it will violate, the constitutional protections and liberties of her fellow Americans, *even if* that deployment has statutory legal basis and even if courts would defer to the President's determination that the relevant factual predicates for using that statutory authority are met. After senior military officials attempt to reconcile the information with observable and reported facts, Admiral Freeman offers and recommends several alternatives to this deployment of force and objects to the proposed change to the Standing Rules for the Use of Force.[149] This is precisely the expectation former Chairmen placed on themselves:

> . . . appreciation of far more than military matters . . . they should know what military power can and cannot do and presumably recommend accordingly in invoking or withholding its use.[150]

She maintains hope that her candid identification of the threat to constitutional liberties that this proposed action implies will sway the President to back down. After all, this is precisely the kind of comprehensive and considered counsel, both "direct and unfiltered," that presidents have come to expect of their most senior uniformed advisors:

> I expect the Joint Chiefs of Staff to present the military viewpoint in government councils in such a way as to assure that the military factors are clearly understood before decisions are reached [but] . . . *[w]hile I look to the Chiefs to present the military factor without reserve or hesitation, I regard them to be more than military men and expect their help in fitting*

---

[148] For the sake of this hypothetical, the Model Penal Code's definitions of these traditional *mens rea* elements will suffice. *See* MODEL PENAL CODE § 2.02 (1985) (defining purposefully, knowingly, recklessly, and negligently).

[149] 10 U.S.C. § 153(a)(2)(A) (listing CJCS responsibilities that are "[s]ubject to the authority, direction, and control of the President and the Secretary of Defense").

[150] MAXWELL D. TAYLOR, SWORDS AND PLOWSHARES 255 (1972).

> *military requirements into the over-all context of any situation*, recognizing that the most difficult problem in Government is to combine all assets in a unified, effective pattern.[151]

Nevertheless, her arguments and recommendations are rejected by the political leadership. This rejection in turn would trigger several possible actions:

- Admiral Freeman, the Chairman resigns, but does not publicly announce why;[152] or
- the Chairman resigns, disclosing to the press her reasons why; or
- the Chairman complies and General Arthur commences the deployment of federal forces to American cities; or
- the Chairman, General Arthur, and perhaps other senior military officials at the Pentagon, refuse to commence the deployment of federal troops, outright disobeying the presidential command, and await a reaction from the White House;[153] or
- the senior military officials disagree publicly with the President, justifying their dissent on unspecified "constitutional" grounds and principles, and await a reaction from the White House; or
- the Chairman herself personally engages with legislative leaders in an effort to induce Congress to formally intervene by Joint Resolution and to suspend operational funding, without disclosing this effort to the Secretary of Defense or President; or
- The Chairman and General Arthur comply with the order; however, acting as a sort of tacitly approved "proxy" for the silent active-duty leadership, recently retired (but still high-profile) flag officers publicly

---

[151] National Security Action Memorandum 55 from President John F. Kennedy to the Chairman, Joint Chiefs of Staff, subject: Relations of the Joint Chiefs of Staff to the President in Cold War Operations (June 28, 1961), https://history.state.gov/historicaldocuments/frus1961-63v08/d32 [https://perma.cc/3U98-K8UT] (*emphasis added*). Interestingly, historian Matthew Moten claims that General Taylor was the primary author of this memorandum, as a recommendation to President Kennedy after his investigation into the disastrous Bay of Pigs invasion. MOTEN, *supra* note 90, at 279–80; *see also* Jim Garamone, *Dempsey Speaks on Experiences in Civil-Military Relations*, DOD NEWS (Nov. 20, 2014), https://www.war.gov/News/News-Stories/Article/Article/603690/dempsey-speaks-on-experiences-in-civil-military-relations/ [https://perma.cc/Z35N-QNA3] (emphasizing the cross-generational importance of "candor" in the relationship between presidents and the chairmen of the Joint Chiefs of Staff).

[152] Alexander Vindman, *Milley Had Another Choice – to Resign*, WASH. POST (Sept. 17, 2021), https://www.washingtonpost.com/outlook/alexander-vindman-general-milley-resign/2021/09/17/79fe52d8-17b1-11ec-a5e5-ceecb895922f_story.html [https://perma.cc/J924-7AGP].

[153] For an example of a senior field commander disobeying direct orders from the President to commence operations, consider the tenure of General George McClellan of the Union Army under President Lincoln. *See* DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 662–66 (2005); Brian Holden Reid, *General McClellan and the Politicians*, 17 PARAMETERS 101, 101, 103–04 (Sept. 1987); WILLIAMS, *supra* note 127, at 24–28, 62–71, 170–75.

> denounce the President's plan for the use of military force domestically.

This was, roughly, the tenor of events (and plausible alternatives) in the Summer and Fall of 2020. The hypothetical mirrors the relationship dynamic between General Mark Milley, the Chairman of the Joint Chiefs of Staff, the Secretary of Defense, Mark Esper, and President Trump (and his close confidants and personal advisors) in response to the Black Lives Matter protests following George Floyd's murder by police officers in Minneapolis, the so-called "Antifa" "riots," the migrant "crisis" at the southern border, and later during the frenzied litigious aftermath of the presidential election. During this period, Trump called for governors to make mass arrests,[154] suggested using deadly force against protestors and migrants attempting to cross the southern border throwing rocks,[155] threatened to deploy the U.S. military to American cities if mayors and governors could not stop the George Floyd demonstrations, and then actually approved the "prepositioning" of units from the 82nd Airborne Division and deployed the D.C. Army National Guard to the streets of Washington to disperse crowds near the White House.[156] In addition to federalizing the California National Guard to support I.C.E. operations in Los Angeles, and the use of the D.C. National Guard and the Guard from several other states (at Trump's request) to police violent crime and homelessness in the nation's capital, Trump made similar threats to use the military in quasi- or direct law enforcement in large American cities like Chicago and Baltimore to combat crime and address alleged civil unrest, saying that the "our country is in danger – and it is in danger in these cities."[157]

---

[154] Kevin Liptak, Ryan Nobles & Sarah Westwood, *An Agitated Trump Encourages Governors to Use Aggressive Tactics on Protestors*, CNN (June 1, 2020), https://www.cnn.com/2020/06/01/politics/donald-trump-race-police/index.html [https://perma.cc/V59K-WTPK].

[155] Norah O'Donnell, *Former Defense Secretary Mark Esper: President Trump Suggested Shooting Protestors, Missile Strikes in Mexico*, CBS NEWS (May 9, 2022), https://www.cbsnews.com/news/donald-trump-mark-esper-sacred-oath-60-minutes-2022-05-08/ [https://perma.cc/Q6NL-YJLF]; Ted Hesson, Rebecca Morin & Andrew Restuccia, *'Consider it a rifle': Trump says migrants throwing rocks will be treated as armed*, POLITICO (Nov. 1, 2018), https://www.politico.com/story/2018/11/01/trump-immigration-953569 [https://perma.cc/K9MZ-2QFB].

[156] Christina Wilkie & Amanda Macias, *Trump Threatens to Deploy Military as George Floyd Protests Continue to Shake the U.S.*, CNBC (June 2, 2020), https://www.cnbc.com/2020/06/01/trump-threatens-to-deploy-military-as-george-floyd-protests-continue-to-shake-the-us.html [https://perma.cc/9MLE-XKU7]; Paul Sonne et al., *Pentagon Disarms National Guard Activated in D.C., Sends Active-duty Forces Home*, WASH. POST (June 5, 2020), https://www.washingtonpost.com/national-security/pentagon-disarms-guardsmen-in-washington-dc-in-signal-of-de-escalation/2020/06/05/324da91a-a733-11ea-8681-7d471bf20207_story.html [https://perma.cc/7SKH-EB8K]; Phil Stewart, *Trump Wanted to Deploy 10,000 Troops in Washington, D.C., Official Says*, REUTERS (June 7, 2020), https://www.reuters.com/article/us-minneapolis-police-protest-troops/trump-wanted-to-deploy-10000-troops-in-washington-d-c-official-says-idUSKBN23E0DY [https://perma.cc/57QJ-8JZU].

[157] Chris Cameron, *Deploy National Guard to Chicago? Trump Says He Has 'The Right to Do Anything I Want to Do.'*, N.Y. TIMES (Aug. 26, 2025),

In 2020, Trump's call-to-action was met not with public disagreement from General Milley (at first) or resignations, but with a deluge of objections from sources (retired military generals and admirals) usually more disinclined to engage in policy debates openly, preferring an agnostic non-partisan image during controversies.[158] This norm of public silence from retired senior military members even pervades heated public debates on matters of war and peace—so much so that when retired flag officers do come forward to criticize the political administration's decisions in or about armed conflict, they are noted outliers: widely-reported exceptions that prove the rule.[159] But between June 1 and June 7, 2020, immediately following the Lafayette Square violence and Milley's now infamous walk of the Park with Trump and Attorney General William Barr while in his camouflaged duty uniform,[160] twenty-two generals and admirals (nineteen of them retired), including the last four Chairmen of the Joint Chiefs of Staff, commented publicly—all had something to criticize. Their affiliation with the military, and their relative high standing within it, was obvious in each case: none hid their rank or the very senior duty positions in which they last served, presumably to signal their credibility as critics. Because it was unusual, their attention-grabbing bursts of public comment emphasized the emotive gravity of the situation.[161] But they all supplemented their appeal to ethos and pathos with a widely acceptable and articulable basis for their disagreement: they nearly all referred in some way to the U.S. Constitution.

---

https://www.nytimes.com/2025/08/26/us/politics/trump-national-guard-chicago-dictator.html [https://perma.cc/47PS-JUS3].

[158] Risa Brooks, Michael A. Robinson & Heidi A. Urben, *Generally Speaking: Assessing Political Speech by Retired General and Flag Officers*, LAWFARE (Mar. 8, 2024), https://www.lawfaremedia.org/article/generally-speaking-assessing-political-speech-by-retired-general-and-flag-officers#:~:text=Under%20the%20Trump%20presidency%2C%20some,against%20protesters%20in%20June%202020 [https://perma.cc/P9LN-77SA].

[159] Martin L. Cook, *Revolt of the Generals: A Case Study in Professional Ethics*, 38 PARAMETERS 4, 4 (2008); David S. Cloud, Eric Schmitt & Thom Shanker, *Rumsfeld Faces Growing Revolt by Retired Generals*, N.Y. TIMES (Apr. 13, 2006), https://www.nytimes.com/2006/04/13/washington/rumsfeld-faces-growing-revolt-by-retired-generals.html [https://perma.cc/BY62-42TE]; William H. McRaven, *Our Republic Is Under Attack From the President*, N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/opinion/trump-mcraven-syria-military.html [https://perma.cc/Q6JP-G9UA]; Kori Schake, *McRaven's Rousing Protest: Are Civil-Military and Democratic Norms in Tension*, WAR ON THE ROCKS (Aug. 18, 2018), https://warontherocks.com/2018/08/mcravens-rousing-protest-are-civil-military-and-democratic-norms-in-tension/ [https://perma.cc/3ZUX-95HT].

[160] Dan Lamothe, *Pentagon's Top General Apologizes for Appearing Alongside Trump in Lafayette Square*, WASH. POST (Jun. 11, 2020), https://www.washingtonpost.com/national-security/2020/06/11/pentagons-top-general-apologizes-appearing-alongside-trump-lafayette-square/ [https://perma.cc/UW2A-Z8AE].

[161] For Milley's reported actions before, during, and after the Lafayette Square incident, and the apparent ethical dilemma he believed he faced because of his "mistake," *see* BAKER & GLASSER, *supra* note 35, at 467–78.

Allusions to the Constitution provided an arguably principled, non-partisan, basis on which to justify their unusual public candor.[162] However, allusions rarely offer trenchant analyses of facts and explicit reasoning—especially if presented on social media. For example, retired Chairman of the Joint Chiefs of Staff, Army General Martin Dempsey tweeted that "America is not a battleground [and] [o]ur fellow citizens are not the enemy."[163] On NPR three days later, he voiced his worry about the relationship between elected officials and senior military leaders.[164] Retired Vice Admiral Mike Franken said the military is "not a tool for political expediency or ego-inflation" and "not a weapon to use against our citizens."[165] This first salvo was a general, and oblique, reference to core democratic values and less about the Constitution, but that soon changed in the days that followed.

Retired Chairman of the Joint Chiefs of Staff, Navy Admiral Mike Mullen, on the pages of *The Atlantic*, wrote, "We must, as citizens, support and defend the right – indeed the solemn obligation – to peacefully assemble and to be heard."[166] In *Foreign Policy,* the retired Commander of U.S. Forces in Afghanistan, Marine Corps General John Allen, wrote: "peaceful protesters had just been deprived of their first amendment rights" and—apocalyptically—said this might signal the "end of the American experiment."[167] Retired NATO[168] Supreme Allied Commander, Navy Admiral James Stavridis, in *Time Magazine*, wrote about the officer's oath to support and defend the Constitution.[169] As did retired Commander of U.S. Special Operations Command, Navy Admiral William McRaven;[170] as did General Milley in a

---

[162] Brooks, Robinson & Urben, *supra* note 36, at 49–72 (reviewing survey results of retired flag officers, asked about their personal justifications for violating the "norm" of post-retirement political activism).

[163] *See* Scott Neuman & Mark Katkov, *Former Defense Secretary Mattis Issues Stunning Rebuke of Trump*, NPR (June 4, 2020), https://www.npr.org/2020/06/04/869255813/former-defense-secretary-mattis-issues-stunning-rebuke-of-trump [https://perma.cc/7RRL-K3ZJ].

[164] Steve Inskeep, *Former Joint Chiefs Chairman Condemns Trump's Threat To Use Military at Protests*, NPR (June 4, 2020), https://www.npr.org/2020/06/04/870004024/former-joint-chiefs-chairman-condemns-trumps-threat-to-use-military-at-protests [https://perma.cc/M97S-GJPQ].

[165] Mike Franken (@FrankenforIowa), TWITTER (June 1, 2020), https://twitter.com/FrankenforIowa/status/1267603513095393281 [https://perma.cc/9RPU-HJMT].

[166] Mike Mullen, *I Cannot Remain Silent*, THE ATLANTIC (June 2, 2020), https://www.theatlantic.com/ideas/archive/2020/06/american-cities-are-not-battlespaces/612553/ [https://perma.cc/DKA5-FCR2].

[167] John R. Allen, *A Moment of National Shame and Peril—and Hope*, FOREIGN POL'Y (June 3, 2020), https://foreignpolicy.com/2020/06/03/trump-military-george-floyd-protests/ [https://perma.cc/T3BQ-TWCG].

[168] North Atlantic Treaty Organization.

[169] James Stavridis, *I Spent My Career in the U.S. Navy. The U.S. Military Must Stand Up for Its Soul in This Moment*, TIME MAG. (June 3, 2020), https://time.com/5847343/military-stand-up-for-its-soul/ [https://perma.cc/3MA8-RMWS].

[170] *Interview: Admiral William McRaven (U.S. Navy, retired)*, MSNBC (June 5, 2020), https://www.msnbc.com/morning-joe/watch/clearing-of-peaceful-protesters-not-morally-right-says-adm-mcraven-84470853618 [https://perma.cc/JPK2-5UK9].

letter to the Joint Force on June 2;[171] as did retired Marine General and former Secretary of Defense James Mattis in *The Atlantic*,[172] who wrote of the need to hold accountable those that "make a mockery of the Constitution" by using the military to violate constitutional rights. Retired Commander of U.S. Forces Korea, Army General Vince Brooks, wrote about how the American military should be seen as the "reliable…protector of American constitutional democracy" and was concerned about the politicization of the current Chairman and Defense Secretary.[173] The retired commander of U.S. Central Command, Army General Joseph Votel, described the military as "apolitical" no less than ten times, and reiterated the importance of the officer's oath of office.[174] Finally, Colin Powell, retired Chairman of the Joint Chiefs of Staff and former Secretary of State, applauded his former colleagues for speaking out, saying "we have a Constitution. And we have to follow that Constitution," in a CNN interview.[175] In all, six of the nineteen retired officers mentioned the oath of office and three mentioned explicitly the fragile civil-military relationship being at risk of fracture.[176]

While some expert civil-military relations commentators wrestled with what this norm-breaking foretold about the health of civilian supremacy over the armed forces,[177] some observers were sanguine about this particular

---

[171] Memorandum from Mark A. Milley, General, U.S. Army, to the Joint Force (June 2, 2020), https://int.nyt.com/data/documenthelper/6990-milley-memo/fc4fb1c4459fbdbc87a7/optimized/full.pdf#page=1 [https://perma.cc/Q28V-63MV].

[172] Jeffrey Goldberg, *James Mattis Denounces President Trump, Describes Him as a Threat to the Constitution*, THE ATLANTIC (June 3, 2020), https://www.theatlantic.com/politics/archive/2020/06/james-mattis-denounces-trump-protests-militarization/612640/ [https://perma.cc/7Y4E-LRNP].

[173] Vincent K. Brooks, *Dismay and Disappointment—A Breach of Sacred Trust*, HARV. KENNEDY SCH. BELFER CTR. FOR SCI. & INT'L AFFS. (June 4, 2020), https://www.belfercenter.org/publication/dismay-and-disappointment-breach-sacred-trust [https://perma.cc/EX3J-T6K5].

[174] Joseph Votel, *An Apolitical Military Is Essential to Maintaining Balance Among American Institutions*, ARMY TIMES (June 8, 2020), https://www.armytimes.com/opinion/commentary/2020/06/08/an-apolitical-military-is-essential-to-maintaining-balance-among-american-institutions/ [https://perma.cc/7QUS-WJJ6].

[175] Devan Cole, *Colin Powell: Trump Has 'Drifted Away' from the Constitution*, CNN (June 7, 2020), https://www.cnn.com/2020/06/07/politics/colin-powell-donald-trump-protests-cnntv/index.html [https://perma.cc/AU7T-AZ5K].

[176] For a complete list of each officer's statements and a summary of their common themes, see Lt. Col. Daniel Maurer, *The Generals' Constitution*, JUST SEC. (June 9, 2020), https://www.justsecurity.org/70674/the-generals-constitution/ [https://perma.cc/B9W5-FXW3].

[177] *See*, *e.g.*, Brooks, Robinson & Urben, *supra* note 36; Victor Davis Hanson, *Not-So-Retiring Retired Military Leaders*, NAT'L REV. (June 7, 2020), https://www.nationalreview.com/2020/06/not-so-retiring-retired-military-leaders/ [https://perma.cc/ZC3N-RJZF]; Hugh Hewitt, *No, Colin Powell. Trump Isn't the One Who's 'Drifted' from the Constitution*, WASH. POST (June 9, 2020), https://www.washingtonpost.com/opinions/2020/06/09/how-colin-powell-got-away-with-an-unjustified-dig-trump-about-constitution/ [https://perma.cc/5V3V-M3FE].

principled stand,[178] or at least argued that historical context—and what the retired military officer sought to do or stood for—actually matters in how we should assess the supposed threat to civilian authority. "In light of the nation's military and political history, [it is] a gross distortion to claim that the conduct [of these retired general officers like Colin Powell] undermines either the Constitution or imperils the goal of an apolitical military."[179] In fact, survey data suggests most active-duty officers, regardless of seniority, experience, or political preference, support retired officers expressing their political beliefs.[180]

If opinions differed on whether these retired officers were to be praised for their principled, if unusual, stand, the same cannot be said of another—much larger—group of retired flag officers, denounced almost immediately and universally as "perpetuating the big lie about the election," in the spring of 2021.[181] A group of 124 retired officers, under the umbrella group name of "Flag Officers 4 America,"[182] felt compelled to speak out primarily on two issues: first, what they alleged to be election fraud in the 2020 presidential campaign, implying it was a method through which Democrats intended to stay in power indefinitely if not checked, and, second, COVID-19 pandemic-related public health measures.[183] The group described the public health measures as a "full-blown assault on our Constitutional rights in a dictatorial manner."[184] They disagreed vehemently with a number of other actions, inactions, and policies it felt posed existential risks to the United States. They criticized the "mental and physical condition" of President Biden, suggesting he lacked the capacity to fulfill his duties,[185] and criticized securing the Capitol complex with National Guard troops after the January 6, 2021, violence intended to disrupt the Electoral College vote certification. In fact, they condemned the decision:

> [to place] thousands of troops deployed around the U.S. Capitol Building, patrolling fences guarding against a non-existent

---

[178] *See* Deborah Avant & Kara Kingma Neu, *Military Dissent Could Curb Democratic Backsliding in the U.S.*, POL. VIOLENCE AT A GLANCE (June 11, 2020), https://politicalviolenceataglance.org/2020/06/11/military-dissent-could-curb-democratic-backsliding-in-the-us/ [https://perma.cc/R4YP-X3VY].

[179] Kastenberg, *supra* note 39, at 599.

[180] Urben, *supra* note 65, at 147–48.

[181] Bryan Bender, '*Disturbing and Reckless': Retired Brass Spread Election Lie in Attack on Biden, Democrats*, POLITICO (May 11, 2021), https://www.politico.com/news/2021/05/11/retired-brass-biden-election-487374 [https://perma.cc/8SWA-H5N2] (quoting Marybeth Ulrich, professor at the Army War College and U.S. Air Force Academy).

[182] *Flag Officers for America*, https://flagofficers4america.com/ [https://perma.cc/7SSG-G94P].

[183] *See Open Letter from Retired Generals and* Admirals (May 10, 2021), https://img1.wsimg.com/blobby/go/fb7c7bd8-097d-4e2f-8f12-3442d151b57d/downloads/2021%20Open%20Letter%20from%20Retired%20Generals%20and%20Adm.pdf?ver=1620643005025 [https://perma.cc/HV6T-A3T4].

[184] *Id*. at 1.

[185] *Id*. at 2.

> threat, along with forcing Politically Correct policies like the divisive critical race theory into the military at the expense of the War Fighting Mission, seriously degrades readiness to fight and win our Nation's wars, creating a major national security issue.[186]

They also railed against inadequate policing of the civic protests: "Anarchy as seen in certain cities cannot be tolerated."[187] They called for the continued construction of a border wall because "illegals are flooding our Country" and "open borders jeopardize national security."[188]

But, notably, just as the retired flag officers did the preceding summer in the wake of the Trump administration's crackdown on protests, this group bolstered its claims of righteous indignation and resentment toward the presidential administration with claims of their own constitutional fidelity:

> Under a Democrat Congress and the Current Administration, our Country has taken a hard left turn toward Socialism and a Marxist form of tyrannical government which must be countered now by electing congressional and presidential candidates who will always act to defend our Constitutional Republic. The survival of our Nation and its cherished freedoms, liberty, and historic values are at stake.[189]

For these retirees, the tension was not one of normal democratic politics in a pluralistic culture that, demographically, looks much different than when these officers first commissioned as young lieutenants, in some cases more than half a century earlier (it was signed exclusively by white men, whose average age was eighty).[190] Rather, in an unsubtle nod to their partisan leanings with hyperbole, they alleged that this "conflict is between supporters of Socialism and Marxism vs. supporters of Constitutional freedom and liberty."[191]

Their open letter was roundly criticized on numerous fronts: for its "appalling partisan invective"[192] and confrontational tone "meant to inflame,

---

[186] *Id*.
[187] *Id*.
[188] *Id*. at 1.
[189] *Id*. at 2.
[190] Jim Golby, *Military Officers Should Stay Out of Politics*, BULWARK (May 13, 2021), https://www.thebulwark.com/military-officers-should-stay-out-of-politics/ [https://perma.cc/D2XH-URMW] ("The most impressive part of the list is how unimpressive the names on it are. They included only one 4-star officer, Adm. Jerome L. Johnson, who retired from the Navy in 1992. Most of the signatories have similarly been retired for decades, and even national security journalists and other recently retired 4-stars admit they can only recognize a few of the names").
[191] *Open Letter*, *supra* note 183, at 1.
[192] Peter Feaver, *The Military Revolt Against Joe Biden*, FOREIGN POL'Y (May 12, 2021), https://foreignpolicy.com/2021/05/12/joe-biden-military-revolt-liz-cheney/

rather than to inform;"[193] for its emphasis on rhetoric over substance (it "fails to assemble a coherent argument"[194]); for the organizers' embarrassing failure to vet those who attached their names to the letter;[195] as well as for breaking the same norm that failed to hold in check the June 2020 criticisms of Trump's choices.[196]

The majority of the comments in June 2020 were from retired generals and admirals, not those currently serving on active duty, while *all* 124 in May 2021 were retired. But three reasons underscore that such an airing of grievances was not a trivial blip in the news cycle. First, these officers remain subject to court-martial prosecution for violating the Uniform Code of Military Justice (UCMJ), even in retirement.[197] On the books, "contemptuous words"[198] about a sitting president is a crime, as is the vague offense of "conduct unbecoming an officer"[199] and conduct that is "prejudic[ial] of good order and discipline in the armed forces"[200] or is "of a nature to bring discredit upon the armed forces."[201] Not only were these retired officers *at risk* of prosecution for reproaching Trump and Biden (obliquely, by condemning their actions) also broke a fairly old norm of stoic silence in American civil-military relations: one that is not imposed by the Constitution, not imposed by statute,

---

[https://perma.cc/2ZKL-EH4U] ("It is a dog's breakfast of partisan hyperbole and misleading innuendo about the 2020 election of the kind that is ubiquitous in the darker corners of the internet and the worst fringes of the Republican Party").

[193] Paula D. Thornhill, *Should We Care About That Letter?*, DEFENSE ONE (May 14, 2021), https://www.defenseone.com/ideas/2021/05/should-we-care-about-letter/174041/ [https://perma.cc/2RZ8-PAEP].

[194] *Id*.

[195] *See* Jeff Schogol, *How 'Rear Adm. Jack Meehoff' Fooled a Bunch of Real Retired Generals and Admirals*, TASK & PURPOSE (May 17, 2021), https://taskandpurpose.com/news/military-retired-generals-admiral-jack-meehoff/ [https://perma.cc/W4GZ-ESB4].

[196] Golby, *supra* note 190.

[197] 10 U.S.C. § 802(a)(4).

[198] 10 U.S.C. § 888 (Art. 88, UCMJ: "Contempt toward officials"); *see* MCM, *supra* note 33, at pt. IV, ¶ 14 (describing the elements of this offense, explaining its terms, and identifying its maximum punishment); *see also* Burke & Matisek, *supra* note 8, at 795 (noting the "non-enforcement of UCMJ law, even for retirees, erodes professionalism and civil-military norms for active-duty personnel and sets a dangerous precedent for future interactions between elected leaders and the military").

[199] 10 U.S.C. § 933 (Art. 133, UCMJ: "Conduct unbecoming an officer"); *see* MCM, *supra* note 33, at pt. IV, ¶ 90 (describing the elements of this offense, explaining its terms, and identifying its maximum punishment); *see also* United States v. Meakin, 78 M.J. 396, 403–04 (C.A.A.F. 2019) (concluding, *inter alia*, that the gravamen of the Article 133 offense is "that the officer's conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command the obedience of his subordinates so as to successfully complete the military mission" (citations omitted)).

[200] 10 U.S.C. § 934 (Art. 134, UCMJ); *see* MCM, *supra* note 33, at pt. IV, ¶ 91c.(2).

[201] MCM, *supra* note 33, at pt. IV, ¶ 91c.(3).

not by any military field manual or regulation, and not by any legal case precedent.[202]

This is the second reason why the publicity of both sets of flag officers was consequential, despite their retired status. Civil-military relations scholars and even some former chairmen tend to endorse this norm of retiree silence,[203] because they recognize that the American public, by and large, does *not* distinguish between retired generals and active generals.[204] In consequence of that blurring, these retired officers might be considered the proxy voice of the silent but disaffected senior leaders—many of whom they know personally—still in uniform.[205] The third reason is related: there is risk that the effect (if not the purpose) of highly-respected retired flag officers opining publicly is to signal its informal guidance to those still on active duty in positions of responsibility at the Pentagon.[206]

In reality, as much as in the hypothetical, the active-duty military leadership is left with an uncomfortable choice. If they disobey (whether based on highly-suggestive public opinions from retired flag officers or not), they tacitly reject a core premise about the constitutional distribution of authority between elected civilians and military—the poorly-defined relationship of "civilian control of the military"—not to mention possible criminal sanction under the UCMJ[207] and accusations of partisanship. It is a possible conflict

---

[202] *See* Jim Golby & Hugh Liebert, *Keeping Norms Normal: Ancient Perspectives on Norms in Civil-Military Relations*, 4 TEX. NAT'L SEC. REV. 75, 77, n.6 (2021) (noting increasing prevalence of political campaigns soliciting retired flag officers to speak and promote platforms); *see also* Brianna Kablack, Tammy Kupperman Thorp, Peter Bergen & David Sterman, *The Military Speaks Out: Serving and Retired U.S. Military Leaders' Views About the Trump Administration*, NEW AMERICA (Jan. 19, 2021), https://www.newamerica.org/international-security/blog/military-speaks-out/ [https://perma.cc/FZ7Y-TCPQ].

[203] Kathleen A. Mahoney-Norris, *The Retired Officer and the State*, *in* INSIDE DEFENSE: UNDERSTANDING THE U.S. MILITARY IN THE 21ST CENTURY 205–220 (Derek S. Reveron & Judith Hicks Stiehm eds., 2008); Heidi Urben, *Wearing Politics on Their Sleeves? Levels of Political Activism of Active Duty Army Officers*, 40 ARMED FORCES & SOC'Y, 568, 570–71 (2014); Heidi Urben, *Generals Shouldn't Be Welcome at These Parties: Stopping Retired Flag Officer Endorsements*, WAR ON THE ROCKS (July 27, 2020), https://warontherocks.com/2020/07/generals-shouldnt-be-welcome-at-these-parties-stopping-retired-flag-officer-endorsements/ [https://perma.cc/XY6R-T4U7]; *Top U.S. officer Warns Not to Mix Military and Politics*, REUTERS (May 23, 2008) (quoting Admiral Mike Mullen), https://www.reuters.com/article/us-usa-military-officers/top-u-s-officer-warns-not-to-mix-military-and-politics-idUSN2322109120080523 [https://perma.cc/S976-Q5UR].

[204] *See* Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, 55 NAVAL WAR COLL. REV. 9, 28 (2002) ("Like princes of the church, they represent the culture and the profession just as authoritatively as their counterparts on active duty").

[205] *See* Brooks & Robinson, *supra* note 99.

[206] *See id*.

[207] An officer who resigns her commission prior to retirement is not subject to the UCMJ's jurisdiction after separation; of course, the president need not accept that resignation, thereby keeping the officer on Active Duty in order to prosecute.

between what is "morally right" and "legally right." H.L.A. Hart famously wrote:

> [T]he certification of something as legally valid is not conclusive of the question of obedience…however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.[208]

Hart thought the basis for that moral scrutiny was "outside the official system"[209] represented by posited law. But because this article is bound up in questions of what the *Constitution* demands and permits, the dilemma remains. The Constitution is both the supreme law of the land and, therefore, necessarily within the hierarchy of laws, *and* an objective reference point for the demonstration of national values against which other laws are judged legitimate; therefore, it is imbued with moral weight. The senior military agent may very well be unable to differentiate between the two potential sources of obligation and is forced to rest her decision on other grounds.

> [T]heir allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited tradition or attitude; or the mere wish to do as others do.[210]

But what if hypothetical General Arthur and Admiral Freeman instead follow the order? They would risk appearing to reject core beliefs about the protection of fundamental constitutional rights of fellow citizens, a duty of protection implied by—among other things—the military officer's oath of office and the UCMJ. This would increase risk both externally and internally: eroding the trust or confidence the general public would have in the military upon seeing them use or threaten force of arms in American cities; simultaneously, eroding the trust junior officers and enlisted servicemembers have in the good faith, competence, and nonpartisanship of the senior chain-of-command. Unfortunately, there is no standard way for the senior uniformed leaders to weigh the risk that their action or inaction will erode civilian control of the military against the risk that their action or inaction will dissipate the public's trust in the military as a non-partisan institution.

Imagine hypothetical General Arthur, now facing an order he believes would lead to the infringement of constitutionally protected liberties even if the President invoked the Insurrection Act. Is he in a position to defy the President's order by claiming, with good cause, that it is "unlawful" (not just

---

[208] H.L.A. HART, THE CONCEPT OF LAW 210 (2d ed. 1994).
[209] *Id.*
[210] *Id*. at 203.

a bad idea) on one or more of the grounds just listed?[211] He is not a lawyer, let alone a judge or justice interpreting this order against a legal standard like the Constitution or judicial precedent. In the hypothetical, legal advice from the Department of Justice and Department of Defense, considering various statutes and Article II, is inconsistent or contradictory. Because the order is *presumptively* lawful, on what legal grounds might the General rebut this presumption? And if he *does* have legal grounds for this, do they reinforce or—instead—further erode the other constitutional requirement value of subordination to civilian control of the armed forces?

The testimony of General Milley before the January 6th Committee in November 2021 isolates these concerns illustratively:

> I think it's fundamental to the health of the Republic that we have an apolitical military. And apolitical means nonpartisan, neither Democrat nor Republican, and we execute the lawful orders of the civilian leadership that's appointed over us. The key is "lawful" orders, and therein lie some judgment calls. But, I mean, it's something that I've been talking about a lot, even though I've become a lightning rod for the politicization of the military. . . .

This was followed up by a comment from Rep. Adam Schiff:

> And, General, I would be less than candid if I didn't say that I did think that your role in front of St. John's Parish contributed in a very negative way, destructive way, to the politicization of the military. I appreciate what you're saying now, but those actions, I think, were a serious body blow at the time.
>
> "And I agree with that," replied Gen. Milley.[212]

When questioned about whether he holds President Trump responsible for the attack on the Capitol, Milley responded:

> I think that's the responsibility of the American people and their designated representatives [to decide]. I have my personal opinions, and it's probably best kept to myself as a military officer, you know? But you can imagine what it might be, right? So – but that's not my place. It's not the job – and you don't want the job – of the military, holding political leaders accountable. That is not the military's job. The military must remain apolitical. And my opinions on things like that should

[211] Anthony J. Ghiotto, *(Un)lawful Orders*, 27 N.Y.U. J. LEGIS. & PUB. POL'Y 283, 288.
[212] Interview by Select Committee to Investigate the January 6th Attack on the U.S. Capitol with Gen. Mark A. Milley, U.S. Army, in Washington, D.C. (Nov. 17, 2021) at 63–65.

> remain with me, and I should not state them publicly, because that's getting the military back into an area that we shouldn't be in. It is the job of the American people, it's the job of the American Congress, it's the job of the judiciary to hold political leadership, to include Presidents, accountable. It is not the job of the military, and we don't want me to opine on that.[213]

When asked about using existing military justice authority to punish Trump-detracting retired generals (a scenario he was asked to consider by the Trump Administration), or to punish Lieutenant General (retired) Michael Flynn for his firebrand support and advocacy for declaring martial law and other events related to the Capitol attack, Milley responded:

> anyone who retires from the military is subject to the Uniform Code of Military Justice for the rest of their life. And generals, you know, we take off the uniform and you're retired, but you always have the title of general and you're always subject to these rules, to the Code.[214]

Officers like hypothetical General Arthur or Admiral Freeman may be said to be acting in one of two ways. They may be acting unethically in disregard of quasi-sacred professional expectations and norms (and possibly engaging in conduct that violates the military's criminal code). Conversely, they may be demonstrating their individual personal courage, nourished by their professional code and sense of responsibility, and obeying their oath of office under the protection of the military justice system despite being under intense professional pressure to simply salute and execute. The confounding difficulty is that either of these judgments can be used to describe any course of action the hypothetical officers take in response to the commander-in-chief. In either case, law does not provide a definitive resolution or clear guide to behavior in such situations. In defense of one part of the Constitution or another, their personal constitutions are "most severely tested."[215]

III. CIVILIAN PRINCIPALS AND MILITARY AGENTS

One fundamental concern of a liberal democracy is how to keep its professionalized armed forces strong enough to defend the state against external threats but weak enough that it poses no practical internal threat of usurping civil government's executive power.[216] Another concern is how to prevent elected civilian officials from using the military in such a way that

---

[213] *Id*. at 268–69.
[214] *Id*. at 57–58.
[215] *See Hamdi*, 542 U.S. at 532.
[216] *See* Peter D. Feaver, *The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control*, 23 ARMED FORCES & SOC'Y 149, 149 (1996).

democracy devolves into dictatorship.[217] These are two sides of the same coin: both concerns are rooted in American constitutional structure and therefore have salient legal—not just practical and political—dimensions. But they represent two polar ends of a spectrum: worst case scenarios. The very real challenges beguiling civilian and military national security leaders occur well within these bounds, but this makes resolving them all the more difficult. Where a military junta or a civilian dictatorship are clear crises antithetical to the nature of the liberal democracy and have relatively clear constitutional and statutory curbs, the muddy middle ground where most American civil-military conflicts play out require more nuanced and focused attention.

This Part discusses potential sources of insight and confusion about the character of the relationship between—primarily—the President (and key civilian subordinates) and senior uniformed military officials with the power, responsibility, and authority to manage the operations and organization of the military domestically and abroad. The Constitution, legislation, professional norms, and the common analytic framework of theory all prove to be resources or artifacts of civil-military relations expectations that may together reconstruct some pragmatic method for resolving this conflict between constitutional values and duties.[218]

A. Civil-Military Relations Theories

> *Instead of asking why the military engage in politics, we ought surely to ask why they ever do otherwise. For at first sight the political advantages of the military vis-à-vis other and civilian groups are overwhelming. The military possesses vastly superior organization. And they possess arms.*[219]

This section briefly summarizes the key theories of civil-miliary relations insofar as they implicate the clash between the constitutional values of civilian supremacy and civil liberties.

1. Huntington

The classic view of the relationship between the military, especially the senior officer corps, and the political elites is best represented by Samuel Huntington's seminal *The Soldier and the State* from the 1950s, still taught in the war colleges to senior officers and to undergraduate cadets at West Point.[220]

---

[217] *See* Hanna Rosin, *How Trump Could Manipulate the Military*, THE ATLANTIC (DEC. 14, 2023), https://www.theatlantic.com/podcasts/archive/2023/12/how-trump-could-manipulate-military/676341/ [https://perma.cc/J5RL-D345]

[218] *See infra* Part IV.B.

[219] FINER, *supra* note 84, at 5.

[220] HUNTINGTON, *supra* note 64; *see* William E. Rapp, *Civil-Military Relations: The Role of Military Leaders in Strategy Making*, 45 PARAMETERS 13, 13 (2015) ("Soldiers have been raised on Huntingtonian logic and the separation of spheres of influence since their time as junior lieutenants"); *see also* Marybeth Ulrich, Professor of Gov't, U.S. Army War College,

This view posits a theory of "objective control" in which the military accedes to civilian domination and tacitly promises to not interfere in politics in exchange for autonomy in a "separate" sphere—small and compact and focused entirely on maximizing military professionalism and military effectiveness.[221]

Huntington advanced the notion that the best way to ensure civilian control over a military while ensuring that the military was still capable of providing for security meant "rendering [military officers] politically sterile and neutral."[222] If a military's political ideology, preference, or loyalty become factors in governmental decision-making, that government becomes less concerned with the military's technical competence.[223] It becomes, instead, more concerned with insulating itself from military influence in order to prevent uniformed leaders from "superimposing" "political considerations and values" on top of martial considerations and values. It also becomes concerned with imposing political will on an otherwise politically agnostic institution.[224]

The political abstinence of a military class, subordinate entirely to a legitimate civilian leadership, entailed greater autonomy for the military to exercise its unique responsibility: expertise in the "management of violence," and "corporateness" used for the greater social welfare.[225] Besides its corporateness, military professionalism is grounded in two other values: expertise (the application of specialized knowledge and skill) and responsibility (the obligation for societal service).[226] In other words, professionalization of the military (specifically its officer corps) is both a means and an end of good civil-military relations wherein civilian control is secured *from* military interference and the state is secured *by* its military.[227]

Huntington's basic premises have endured. They can be seen reflected in Department of Defense policy on partisan political participation[228] and

---

Noon Time Lecture Series: Civil-Military Relations: Professional Foundations for Senior Leaders (Oct. 25, 2011) (video recording *available at* https://www.youtube.com/watch?v=yS2SitYWv08 [https://perma.cc/AJ9Z-KCBG]); *see also* Mackubin Thomas Owens, U.S. Air Force Academy 2013 Ira C. Eaker Distinguished Lecture on National Defense Policy: What Military Officers Need to Know about Civil-Military Relations (July 2013) (text *available at* https://www.files.ethz.ch/isn/169443/Owens_201307_Military_Officers_*and*_Civil_Military_Relations.pdf [https://perma.cc/CD3N-NXGS]).

[221] *See* HUNTINGTON, *supra* note 64, at 7–18, 83–85.

[222] *Id*. at 84.

[223] *Id.* at 35.

[224] *Id*.

[225] *See id*. at 8–11.

[226] *Id*. at 8–10.

[227] *Id.*

[228] *See* DEP'T OF DEF., DIRECTIVE 1344.10, *supra* note 76, at 2.

leadership doctrine manuals.[229] They have also become the norm for teaching senior officers about civil-military relations in the decades since, as well as an objective scholarly ruler for measuring deviations from its supposed best practices.[230]

Under a strict reading of Huntington, the proper course of action for our hypothetical Admiral Freeman and General Arthur is to ignore the political ramifications of the domestic deployment, presume the lawfulness of the decision, stay absolutely silent about the wisdom or folly of the action in the media or before Congress, provide the President with feasible options for deploying the military to achieve the desired policy aim effectively and efficiently, and then to salute and execute the option the President chooses with singular diligence. Their sense that the order would be normatively inconsistent with their oath of office is immaterial and therefore all that is left for them to worry about is how to "make the best of a bad situation."[231]

2. Post-Huntington

The second, more modern view, acknowledges the existence of troubling "paradoxes" and tensions inherent to Huntington's theory, undermining its value for contemporary institutional and warfighting challenges the Department of Defense faces.[232] Professor Risa Brooks identifies various subtle tensions driven by the very act of adhering to

---

[229] *See* DEP'T OF THE ARMY, ARMY DOCTRINE PUBLICATION 6-22, ARMY LEADERSHIP AND THE PROFESSION 1–9 (2019).

[230] *See* Barry R. McCaffrey, *Foreword*, *in* AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA xiii (Suzanne C. Nielsen & Don M. Snider eds., 2009) ("The senior military leadership must be objective, expert, and determinedly nonpartisan."); *see also* Nielsen & Snider, *Introduction*, *id*. at 2 ("Seeking to advance the theoretical literature as well as to address pressing policy concerns relating to both parties in the civil-military relationship, this book follows the trail that Huntington blazed.").

[231] HUNTINGTON, *supra* note 64, at 76–77. It is unclear what Huntington might say now if he knew senior officers had routine access to military lawyers on their staff, officers trained to identify legal concerns arising from orders and plans and to make recommendations that would ensure those orders and plans are legally sufficient. He did write: "[if] the statesman claims to be acting legally, but the action seems illegal to the officer, then the issue is one of the relative competence of the officer and the statesman to judge what is legal and illegal. Most modern states which have military professions also have a group of specialized experts, the judiciary, whose function it is to decide such issues . . .In any event, the officer is bound to give a considerable presumption of validity to the opinion of the statesman." It is not clear what Huntington might make of a situation in which a four-star admiral, commanding a unified Combatant Command, is advised by his senior judge advocate officer that the President's operational plan would, if executed, violate domestic and international law—especially when that question is not going to be presented to the "judiciary" before the strikes occur. *See*, *e.g.*, Gordon Lubold, Courtney Kube, & Dan De Luce, *Top Military Lawyer Raised Legal Concerns About Boat Strikes*, NBC NEWS, (Nov. 19, 2025), https://www.nbcnews.com/politics/national-security/top-military-lawyer-raised-legal-concerns-boat-strikes-rcna243694 [https://perma.cc/5SJX-9C7D] (discussing a contemporary controversy in which this dilemma is raised).

[232] Brooks, *supra* note 25, at 17.

Huntington's objective control norms.[233] For example, the unrealistic barrier between professional military competence and political engagement, at the heart of Huntington's theory, "does not require or inspire (and may even inhibit) the introspection and understanding necessary to assure officers remain apolitical."[234] Additionally, prevailing views of professionalism "foster an antagonism toward bureaucracy and bureaucratic processes"—a danger to "politico-strategic effectiveness" given the role that interagency cooperation plays in war-fighting.[235] Brooks concludes that these paradoxes reveal conduct "and mindsets within the officer corps that work to facilitate political behavior, subvert civilian control of military activity, compromise strategic effectiveness, and even undermine some aspects of military professionalism itself."[236]

Rather than separate spheres of professional duties, the increasingly common way (at least among academics) to describe the strategic level civil-military relationship is as a principal-agent relationship.[237] The civilian (here, we mean the President or potentially the Secretary of Defense) is the "principal" giving direction, and a degree of limited authority, to the military or an individual leader[238] serving as an "agent."[239] The "agent" must in turn act in accord with the best interests of the civilian authority (the office, not the person) without breaking free to act, instead, for his own self-interest or the perceived interest of the military as an organization.[240] The leading proponent of this approach has been Professor Peter Feaver, who described the relationship as a "game of strategic interaction,"[241] and relied on mathematical tools from micro-economics and game theory to propose a mechanism for predicting elites' behaviors.[242] Feaver's model is chiefly concerned with

---

[233] *Id.*
[234] *Id*. at 20.
[235] *Id*. at 28–29.
[236] *Id*. at 17–18.
[237] FEAVER, ARMED SERVANTS, *supra* note 17, at 57–58; David Pion-Berlin & Danijela Dudley, *Civil-Military Relations: What is the State of the Field*, *in* HANDBOOK OF MILITARY SCIENCES, 14 (Anders McD Sookermany ed. 2020); Patricia M. Shields, *Civil-Military Relations: Changing Frontiers*, 66 PUB. ADMIN. REV. 924, 925 (Naomi Caiden ed., 2006); Shanks Kaurin, *supra* note 81, at 53–54.
[238] By "leader," we can also mean the small group of very senior military officers helming each of the Armed Services who are members of the Joint Chiefs of Staff, as well as the four-star generals and admirals serving as "combatant commanders" who report directly to Secretary of Defense and the President. *See* 10 U.S.C. § 151 (describing duties of the Joint Chiefs of Staff); 10 U.S.C. § 7033 (describing duties of the Chief of Staff of the Army); 10 U.S.C. § 8081 (describing duties of the Chief of Naval Operations); 10 U.S.C. § 9033 (describing duties of the Chief of Staff of the Air Force); 10 U.S.C. § 9082 (describing duties of the Chief of Space Operations); 10 U.S.C. § 164(b) (describing responsibilities of combatant commanders).
[239] FEAVER, ARMED SERVANTS, *supra* note 17, at 57–58.
[240] *Id.*
[241] Peter D. Feaver, *Crisis as Shirking: An Agency Theory Explanation of the Souring of American Civil-Military Relations*, 24 ARMED FORCES & SOC'Y 407, 407 (1998).
[242] FEAVER, ARMED SERVANTS, *supra* note 17, at 12–13, 54–95.

control: when and how the civilian principal employs certain mechanisms of punishment and monitoring to shape or steer the conduct of the military agent in ways that prevent the armed forces from undermining the rights and responsibilities left to civilian authority by the Constitution.[243]

Though it provides a more refined understanding of the relationship as one of "shades of overlapping (but not entirely) authority [and a] mutually agreeable and defined scope of responsibility,"[244] Feaver's agency model is not without its own weaknesses. It assumes rational actors and aggregates the conduct of myriad individuals into overlarge and simplified categories (thereby potentially ignoring personal motives and competences); it ignores the potential effects of interpersonal relationships and irrational decision-making based on preserving alliances and reputations (or breaking them); and it does not account for military agents whose duties seem to straddle the political-military divide, engaging in conduct and making decisions that are not driven solely by military experience and expertise (*e.g.*, the CJCS, or geographic combatant commanders). Moreover, it cannot be readily translated into actionable guidance for senior military leaders faced with the dilemma posed in this article. In fairness, Feaver's model was never intended to do so.

A military's professional autonomy, even if grounded in reason, fact, and expertise, is not always regarded highly by civilian presidential principals:

> Any organization of men in the military service bent on inflaming the public mind for the purpose of forcing government action through the pressure of public opinion is an exceedingly dangerous undertaking and precedent . . . It is for the civil authority to determine what appropriations shall be granted, what appointments shall be made, and what rules shall be adopted for the conduct of its armed forces. . . . [W]henever the military power starts dictating to the civil authority by whatever means adopted, the liberties of the country are beginning to end.[245]

Where such doubt and disregard exist, it may be more helpful to view the civil-military relationship as Professor Eliot Cohen has: as an "unequal dialogue"[246] in which the civilian principal's

---

[243] *Id*. at 2–3, 59–68.
[244] MAURER, CRISIS, *supra* note 23, at 86; for further criticism of Feaver's method and conclusions, see DUBIK, *supra* note 113, at 64–67.
[245] President Calvin Coolidge, Speech before the American Legion Convention: Toleration and Liberalism (Oct. 6, 1925) (transcript available at https://coolidgefoundation.org/resources/speeches-as-president-1923-1929-4/ [https://perma.cc/KFF3-DSG6]).
[246] Eliot A. Cohen, *The Unequal Dialogue: The Theory and Reality of Civil-Military Relations and the Use of Force*, *in* SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND

> ultimate domination . . . is contingent, often fragile, and always haunted by his own lack of experience at high command . . . [F]or a politician to dictate military action is almost always folly. Civil-military relations must thus be a dialogue of unequals and the degree of civilian intervention in military matters a question of prudence, not principle.[247]

Under this view, it may be entirely justified for a president to step across the artificial Huntingtonian threshold to dictate material tactical decisions for the military, rather than merely ratifying the suggestions offered by military leadership. Of course, this does not help the military officer contrive what to say, or how to say it, in that dialogue of unequals when she believes the superior elected official contrives to harm, or through negligence or carelessness allow to be harmed, constitutional liberties and rights.

Alternatively, there is a hybrid view that accepts the nature of the unequal dialogue and the agency characterization of the military but criticizes reliance on a predictive, rational actor-based model. In this view, the principal-agent relationship between civilian and military elites at the apex of national security decision-making can be analogized to other principal-agent dynamics, like clients and their lawyers.[248] But unlike Huntington, who also drew parallels to lawyers and doctors, this view takes the analogy more (but not entirely) literally and suggests that the military as an agent is bound by fiduciary-like duties to the oversight of civilian political control.[249] In this view, familiar duties of care, competence, diligence, and concepts like "conflict of interest" and "scope of authority," suggest a certain degree of solicitude and deference to the ultimate objectives of the civilian principal (assuming they are lawful objectives employing lawful means).[250] However, such relationships also carry duties of "candor" to certain external oversight bodies (like courts),[251] and making good faith, non-frivolous and meritorious claims,[252] and they may be terminated by the agent-attorney under certain conditions, severing the relationship.[253] Of particular note, the American Bar

---

AMERICAN NATIONAL SECURITY 429, 429–458 (Peter D. Feaver & Richard H. Kohn eds., 2001).

[247] Eliot A. COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME 12 (2002).

[248] MAURER, CRISIS, *supra* note 23, at 13, 75–89; MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT 5, 135, 228–31(1960); *see also* HUNTINGTON, *supra* note 64, at 7–8.

[249] MAURER, CRISIS, *supra* note 23, at 102–05; *see* Maurer, *Fiduciary Duty, Honor, Country, supra* note 39; *see also* Maurer, *Paved with Good Intentions*, *supra* note 39.

[250] MAURER, CRISIS, *supra* note 23, at 102–05.

[251] *See* AMERICAN BAR ASSOCIATION [ABA] *Model Rules of Professional Conduct*, Rule 3.3 (Candor Toward the Tribunal).

[252] *Id*., Rule 3.1 (Meritorious Claims and Contentions).

[253] *Id*., Rule 1.16 (Declining or Terminating Representation).

Association's Model Rules of Professional Conduct, in relation to an attorney representing an organization (rather than an individual client), holds:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.[254]

If senior military elites, whether General Milley or our hypothetical Admiral Freeman, are conceived as fiduciary-like agents to the Office of the President or Office of the Secretary of Defense, then their relationships may be defined in terms analogous to those of other principal-agent relationships. If so, then certain fiduciary-like duties and other concepts (like the conditions in which an agent may withdraw from "representation" without consent of the principal and without professional sanction, and viewing the representation itself as a relationship to the office, not the civilian office holder) may be a beneficial mechanism for guiding behavior of the parties when the senior military officer objects, dissents, disobeys, or otherwise rejects an order from the civilian political authority. Assuming the order is at least facially lawful, the only plausible way for the senior military official to avoid criminal liability under the UCMJ[255] is if Congress encodes such duties as a form of safe harbor in statutes, like existing authorities for the Chairman[256] and Combatant Commanders[257] or the UCMJ itself.[258]

3. When is the Civilian's "Right to be Wrong" Wrong?

In the waning days of the Clinton Administration—an administration beset by civil-

---

[254] *Id*., Rule 1.13 (Organization as Client).
[255] *See infra* Part III.C.4.
[256] 10 U.S.C. §§ 152, 153 (describing the appointment, rank, and functions of the Chairman of the Joint Chiefs of Staff).
[257] 10 U.S.C. § 164(b) (describing responsibilities of combatant commanders).
[258] MAURER, CRISIS, *supra* note 23, at 155–75 (discussing possibility of amending the Goldwater-Nichols Act to encode such duties and proposing draft language to do so); *see infra* Part IV.B.

military friction over controversial deployments in the Balkans, Haiti, and Somalia and the *Don't Ask, Don't Tell* law[259]—political scientist and civil-military relations scholar Peter Feaver christened a new phrase to describe an old problem: the "civil-military problematique." He defined it as:

> a simple paradox: because we fear others we create an institution of violence to protect us but then we fear the very institution we created for protection . . . ever after [it] poses a latent threat to the liberty of the group.[260]

This problematique, he wrote, is the summation of two principles in tension with one another: the military must be strong enough to protect society, but weak enough to not pose a danger to the society it is designed to protect.[261] Feaver's description is a beautifully simplified statement of an intrinsic and constant agency problem, one that self-sustains because of the narrow professionalized responsibility or mandate for the employment of the corporate military's expertise.[262] But it assumes it is always the civilian principal—and the public she represents—who is *at risk from* an improperly untethered military agent. This view of civilian supremacy harkens back to the foundational and still dominant academic and professional perspective on civil-military relations. Huntington wrote:

> the superior political wisdom of the statesman must be accepted as a fact. If the statesman decides upon war which the soldier knows can lead to national catastrophe, then the soldier, after presenting his opinion, must fall to and make the best of a bad situation.[263]

This conceptualization led Feaver to later adduce the civilian political principal's "right to be wrong"—a bumper sticker for the maxim that even incorrect policy preferences of elected civilians, even those driven by naked partisanship, trump those of the military, even when the military offers contrary advice based on experience and expertise or as an institution is weakened by the civilian's policy.[264]

The hypothetical dilemma described in Part I.A., *supra*, undermines the universality of this assumption; it offers a twist on the problematique. It suggests a context in which the military is expected to be (or on its own

---

[259] DALE R. HERSPRING, THE PENTAGON AND THE PRESIDENCY: CIVIL-MILITARY RELATIONS FROM FDR TO GEORGE W. BUSH 331–76 (2005) (examining the relationship between President Clinton and the Department of Defense across several international crises and domestic policy).
[260] Feaver, *The Civil-Military Problematique*, *supra* note 216, at 150.
[261] *Id*. at 151–52.
[262] *See* HUNTINGTON, *supra* note 64, at 8–18.
[263] *Id*. at 76–77.
[264] FEAVER, ARMED SERVANTS, *supra* note 17, at 65.

initiative accepts the responsibility to be) strong enough to protect the liberty interests and civil rights of the society it shields from external threats. But, unlike Feaver's classic problematique, this protection is from elected civilian officials convinced that federal military power can and ought to be employed to protect their own political survival with "security" as a pretextual rationale. This *inverted problematique* is not only theoretically possible, but it is a natural consequence of the same conditions giving rise to a state-created national security establishment in its own defense.[265] There are several reasons for this.

First, the civilian government inculcates in its military the precepts of civilian control by emphasizing the rule of law, by requiring an oath of fidelity to the Constitution rather than to a party or administrative element of the government,[266] and by holding servicemembers accountable through various monitoring "ancillary mechanisms," including their own separate criminal law.[267] Second, the military may believe its credibility and legitimacy are based on the public's perception of its expertise and its limited role in governance.[268] Third, the civilian government has the legal authority to order the military to engage in actions against the interests of fellow citizens under certain prescribed conditions.[269] Fourth, following its oath and its conception of the rule of law, the military may believe *it* has good cause to assert that civilian liberty interests are in danger from civilian governance and its orders.[270] But, fifth, the military is ill-equipped to draw such legal conclusions because it is the civilian government that assigns it a much narrower scope of technical responsibility and in which it demands a particular expertise. Finally, and ironically, the military's exercise of its initiative to protect civilian liberties and rights may undermine its own claim to legitimacy.

---

[265] *Id*. at 57–58.
[266] *Id*. at 57.
[267] *Id*. at 98.
[268] The extent to which this statement describes what actually influences the civilian public's perception of the military's credibility and legitimacy is uncertain: it may depend on whether the public is considering the military as an organization or element of government authority, or whether the public is considering *actions taken by* the military in support of a particular political policy or objective, and even the source of the information the public relies on (and even then, there may be a difference between actions taken in armed conflict abroad in a "popular" war and those taken in unpopular conflicts). *See*, *e.g.*, Héctor Perla, Jr., *Explaining Public Support for the Use of Military Force: The Impact of Reference Point Framing and Prospective Decision Making*, 65 INT'L ORG. 139, 140 (2011) (arguing that "public support for military engagements will increase when the public perceives its principal objective as seeking to prevent losses" and the opposite if the perceived objective is some sort of "gain"); James Golby, Peter Feaver & Kyle Dropp, *Elite Military Cues and Public Opinion About the Use of Military Force*, 44 ARMED FORCES & SOC'Y 44 (2017); Ronald R. Krebs & Robert Ralston, *More Deferential But Also More Political: How Americans' Views of the Military Have Changed Over 20 years*, WAR ON THE ROCKS (Nov. 17, 2021), https://warontherocks.com/2021/11/more-deferential-but-also-more-political-how-americans-views-of-the-military-have-changed-over-20-years/ [https://perma.cc/TJ6P-QJQS].
[269] Insurrection Act, *supra* note 4.
[270] BAKER & GLASSER, *supra* note 35, at 566–68, 579.

If Feaver's problematique implies the civilian's invariant *right to be wrong*, this inverted problematique suggests asking whether the military's senior leadership has a legally-protected professional *duty to defy*—and if so, whether it is contingent or invariant. In practical civil-military relations, unfolding in real-time and hobbled by personality conflicts, misunderstandings driven by different professional "cultures" and esoteric planning methods,[271] incomplete information (because it cannot yet be clarified, is impossible to obtain, or is purposefully withheld), neither implication—a right to be wrong or a duty to defy—is unconditionally guaranteed.

Several observations are possible at this point. First, there have been several scholarly attempts at framing a theory that both describes and prescribes the contours of the strategic-level civil-military relationship. Second, there is no true consensus—at least among scholars—as to what the exact framework is or ought to be. Third, despite a lack of consensus, there is at least a trio of paradigmatic elements: (a) all theories recognize the asymmetry in power and authority between the two parties, and that if left unchecked, the balance of power and influence can shift with undesirable outcomes; (b) all recognize that both parties have interests worth preserving and defending against unjust encroachments from the other; and (c) all are necessarily grounded in the axiom that the a senior-subordinate relationship is an unquestionable byproduct of the Constitution's grants of power to the president and to Congress. The next section, therefore, surveys the Constitution's division of labor to see if it reveals actionable insights for the challenge posed in this article.

B. Constitution: Indeterminate Text and Judicial Precedent

> On first glance, the Constitution itself might be expected by those swearing oaths to

defend it to provide comfortable ballast for elite military or civilian decision-makers sitting atop the horns of this constitutional dilemma: a rule, standard, or framework for resolving what appears to be a conflict between two or more constitutionally imposed duties. But hunting for such a tool in the Constitution's roughly 4400 words is a fool's errand. Unlike some contracts, or even some legislation, there is no overt background recital or glossary of definitions within the text to aid future actors relying on the document but hampered by a sense of indeterminacy.[272] Canons of construction and

[271] *See generally* Davidson, *supra* note 24, (discussing "institutional drivers" of the "mutual frustration" among political and military elites, especially in the context of decision-making on the use of force).

[272] *See generally* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1084 (2017).

interpretation,[273] systems of linguistic analysis,[274] and historical inquiry into original public meaning[275] or the Framers' specific intentions[276] are all attempts across a "range of approaches" at deciphering the Constitution by parties exercising or disputing their rights, authorities, and duties, or by those analyzing the work of the judges, executive officials, and legislatures that are doing the deciphering.[277]

But senior strategic-level military actors confronted by the dilemma are not in court disputing rights, authorities, and duties. Nor are they looking backward in hindsight analyzing various courses of action dispassionately and arguing that one was better, legally, than another. They are in the thick of it, personally and directly—not abstractly and objectively—coping with bouts of "public anxiety . . . [without] an interval of detached reflection."[278] In such high stress moments, government officials suffer from the "poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."[279] While Justice Jackson was writing about the "equilibrium" and relative power of the president and Congress, his insight is no less apt for intra-Executive Branch confusion over constitutional authorities and duties.

Nevertheless, the difference between Congress's power under Article I and the President's under Article II is a much cleaner separation than that between the President and the military. Congress and the President are co-equal, in theory, and the latter's decisions regarding national security may overlap with the roles and interests of the former, but at least *Youngstown* provided a framework for untangling the controversy case-by-case.[280]

---

[273] *E.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 113 (2011) (noting that canons of interpretation are "rules of thumb" for decerning linguistic meaning but that canons of construction are guides for "translating" the meaning into "legal effect").

[274] *E.g.*, Stephanie H. Barclay, Brady Early, & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 527 (2019) (explaining the virtue of corpus linguistics methodology as a "data-driven originalism").

[275] The secondary literature on "originalism" and a method of constitutional reasoning is enormous; for a small sample, see, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); JACK M. BALKIN, LIVING ORIGINALISM (2014); Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L. J. 609 (2008); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); and ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022).

[276] *E.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683 (2012).

[277] Cass R. Sunstein, *There is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015).

[278] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[279] *Id.*

[280] *Id.* at 635–38.

Article II assigns to presidents the duty of "commander in chief" of the military, yet in no manner prescribes what that duty entails.[281] While it gives presidents military command, it gives no military rank, and presidents are not members of the armed forces, not paid out of funds appropriated to finance servicemember salaries, and not subject to the disciplinary and judicial constraints of the military justice system enacted by Congress. On the other hand, the text of Article II's commander in chief clause says nothing directly about what decisions are outside the bounds of the President's authority when it comes to war-waging or the management of the military's bureaucracy.[282] It is possible that a president *could* (according to Justice Story's commentaries) personally take command in the field in "extraordinary emergencies" when he or she is "possessed of superior military talent."[283] By any objective measure, Dwight Eisenhower possessed such talent and experience, yet did not put his uniform back on to take command of U.S. Forces on the Korean Peninsula, nor did Ulysses S. Grant ride to battle the KKK in the Reconstruction South. So, while constitutionally possible, it remains highly implausible.

As Professor Luban writes, "[t]he Commander in Chief Clause is a sphinx, and specifying its power and the theory generating them is its riddle."[284] Professor Prakash likewise cautions that "proponents of ["absolute and unchallengeable authority"] cannot say where the Commander in Chief's power begins and ends . . . [and] establishing the [commander-in-chief] Clause's limits is an acute and persistent problem."[285]

Article I, § 8, however, does impose limits on presidents by assigning certain responsibilities regarding military force to Congress. But the role of Congress in declaring war, appropriating money to fund military operations, making "[r]ules for the [g]overnment and [r]egulation" of the military," to "call[] forth the [m]ilitia to . . . suppress [i]nsurrections and repel [i]nvasions"[286] is well known.[287] If the generals are reading the national

---

[281] *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) ("[t]he powers of the President are not as particularized as are those of Congress").

[282] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 705 (2008) [hereinafter Barron & Lederman, *Original Understanding*] (commenting that "the precise list of executive actions encompassed by [traditional unitary Executive proponents, regarding war powers] is not self-evident"); Mark Patrick Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 916 (2019).

[283] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1486 (1833).

[284] David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 483 (2008).

[285] Saikrishna Bangalore Prakash, *Deciphering the Commander-in-Chief Clause*, 133 YALE L.J. 1, 1 (2023).

[286] U.S. Const. art. I, § 8, cl. 11, 14, 15.

[287] While well known, this separation of powers concern remains a source of wide academic disagreement. For some of the many examples, see Matthew C. Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613 (2017); DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS—1776 TO ISIS (2016); JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO

security provisions of the Constitution outside the Pentagon's "tank" or the White House Situation Room, it is likely to provide them a strong sense that the president's power over the military is *not* absolutist and universal. Trump's refrain of "my generals" was not just naïve, abnormal, and an unfair reading of Article II—it was plainly oblivious to the legal authority of Congress.

Still, to what extent does this text help those senior uniformed officials object, dissent, or disobey? In 1866, the Court opined:

> [Congress] has…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.[288]

It is probably unreasonable to expect actors like our hypothetical General Arthur and Admiral Freeman to conduct even a superficial study of how these constitutional provisions intersect and relate—if at all—to their dilemma. They will likely turn immediately to their active-duty judge advocate legal advisors.[289] But in considering "their nature . . . [and the] principles of our institutions,"[290] should these lawyers be consulting—and attempting to apply—a *Youngstown* analysis in the mold of Justice Jackson? Should they consult canonical opinions like the *Prize Cases*?[291] This evidences only a broad reach of precedents to which the judiciary ought to defer and leave unhampered; they say nothing about deference to precedents by military commanders who believe the commander-in-chief is acting corruptly, unjustly, or at the dangerous fringe of constitutional authority.[292] What about an older

---

CHAIN THE DOG OF WAR: THE WAR POWERS OF CONGRESS IN HISTORY AND LAW (2d ed. 1989); Oona A. Hathaway, Tobias Kuehne, Randi Michel & Nicole Ng, *Congressional Oversight of Modern Warfare: History, Pathologies, and Proposals for Reform*, 63 WM. & MARY L. REV. 137 (2021); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008).

[288] Ex parte Milligan, 71 U.S. 2, 139 (1866).

[289] Michael W. Meier, *Evolving Role of the Judge Advocate in the 21st Century: From Operational Law to National Security Law*, 26 SW. J. INT'L L. 309, 320 (2020); *see also* Ghiotto, *(Un)lawful Orders*, *supra* note 211, at 291.

[290] Meier, *supra* note 289, at 320.

[291] 67 U.S. (2 Black) 635 (1863).

[292] In *The Prize Cases*, the Court wrote:

> 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

case like *Fleming v. Page*[293] from immediately after the Mexican-American War? That case only described some of the expectations of the commander-in-chief and what he cannot do *viz*. Congress.[294] No case has explained the nature of the relationship between the civilian elected Commander-in-Chief and his subordinate unelected military commanders, let alone opined on the nature of lawful subordination to an allegedly *un*constitutional order from the president.

Not only have the courts opined that the President has near plenary authority over implementation of immigration rules, subject to little or no judicial review,[295] a President's decision to use the military at home under the auspices of a legislative grant of authority may be contestable in the courts, yet subject to an extraordinary degree of judicial deference.[296] Not even the Supreme Court can stipulate with anything more than vague generalizations, like: "this nation's tradition of keeping military power subservient to civilian authority" is a "tradition . . . firmly embedded in the Constitution."[297] The Court, in discussing civilian control, always assumes lawful use of that constitutional supremacy over the military.[298]

Only indirectly has the Court hinted at such a pathological or flawed relationship. As far back as 1842, the Court explained that a subordinate military officer cannot choose what rule or order to follow, favoring the

---

> department of the government to which this power was entrusted. He must determine what degree of force the crisis demands.

Id. at 670 (internal quotations omitted and emphasis in the original).

[293] 50 U.S. 603, 615 (1850).

[294] *See* In re Debs, 158 U.S. 564, 582–85 (1895); *see also* Cunningham v. Neagle, 135 U.S. 1, 63–64 (1890).

[295] United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542–43 (1950).

[296] Martin v. Mott, 25 U.S. 19, 29–30 (1827) (the President had "exclusive" power to determine when conditions legally warrant invocation of the predecessor to the modern Insurrection Act and that decision is "conclusive" on all other parties); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (Jackson, J., concurring) (1952); Trump v. Hawaii, 585 U.S. 667, 138 S.Ct. 2392, 2408 (2018). There is precedent for judicial review of a President's action taken under a specific emergency power after declaring a national emergency. Biden v. Nebraska, 600 U.S. 477, 483(2023) (striking down the Administration's effort to forgive and cancel more than $400 billion in student debt by asserting powers derived from the COVID-19 declaration of a national emergency).

[297] Reid v. Covert, 354 U.S. 1, 40 (1957).

[298] *See* Greer v. Spock, 424 U.S. 828, 837-38 (1976) (citing U.S. Const. Preamble and U.S. Const., Art. I, § 8; Art. II, § 2, and quoting United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955) for the proposition that "this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable"). *Greer* also refers to the "American constitutional tradition of a politically neutral military establishment under civilian control. It is a policy that has been reflected in numerous laws and military regulations throughout our history." *Greer*, 424 U.S. at 839; *see also* Parker v. Levy, 417 U.S 733, 751 (1974) ("The military establishment is subject to the control of the civilian Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.").

superior civilian president and his appointed civilian officials at the head of the military even if that power is still limited by Congress or decision by those political actors is "unwise or mistaken" in the expert opinion of the officer—to hold otherwise would be to risk "a complete disorganization of both the army and navy."[299]

In other examples, presidents may nominate officers at their discretion for the position of Chief of Staff of the Army,[300] or as commander of a Unified Combatant Command,[301] or as the Chairman of the Joint Chiefs of Staff.[302] However, many of those nominations are subject to confirmation by the Senate[303] and it is Congress that has codified the nominee's necessary qualifications[304] and duties[305]—and in some instances has codified specific tasks for those generals and admirals.[306] The President, moreover, cannot unilaterally "dismiss" (tantamount to a dishonorable discharge) an officer from active duty (in effect firing her) absent a court-martial conviction.[307] At most, the President can remove the offending officer from her current position and replace them with another, more obedient or acquiescent, officer—at least temporarily.[308] The strongest legal move available to the President in dealing with a recalcitrant, dismissive, or disobedient senior officer is to relieve them of their duties, order another subordinate to charge the officer with a criminal offense under the UCMJ, then personally refer the case to a General Court-Martial.[309] The senior officer, like our hypothetical General Arthur, knows this, yet it provides little comfort and less guidance on how to balance two apparently competing and conflicting constitutional duties. Nothing in the Constitution's assignment of roles and responsibilities to Congress and the President provides a roadmap or resource from which the military actors can safely navigate through this collision of constitutional fidelities and values. The text's natural ambiguities leave it open to competing interpretations by antagonists each acting in good faith and to its potential evolution by judicial reasoning.[310]

C. Statutory Roles and Rules, Not Relationships

---

[299] United States v. Eliason, 41 U.S. 291, 301–02 (1842).
[300] 10 U.S.C. § 7033.
[301] 10 U.S.C. § 164.
[302] 10 U.S.C. § 152.
[303] *See, e.g.*, 10 U.S.C. § 152(a)(1).
[304] 10 U.S.C. § 164(a) (describing the qualifications for nomination as Combatant Commander).
[305] *See, e.g.*, 10 U.S.C. § 164(b)–(e) (describing the responsibilities of Combatant Commanders).
[306] *See, e.g.*, 10 U.S.C. § 153 (describing responsibilities of the Chairman, "subject to the authority direction and control of the President and Secretary of Defense").
[307] 10 U.S.C. § 804.
[308] Mullan v. United States, 140 U.S. 240 (1891); Wallace v. United States, 257 U.S. 541 (1922).
[309] 10 U.S.C. § 822 (authorizing the President to convene general courts-martial).
[310] LEVITSKY & ZIBLATT, *supra* note 27, at 99.

While the Constitution and court precedent fail to untangle this conflict, federal statutes may offer a glimpse of how to do this, broadly construing the reasonable implications of certain military personnel-specific legislation.[311]

1. Oath of Office

Starting with the simplest and most direct statutory commandment that any military officer must take note of, consider the oath of office:

> I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. [So help me God].[312]

However, some scholars lack faith that the oath serves as a meaningful guide:

> the foundation of the American professional military ethic lies in the oath to the Constitution, few officers have even read it, let alone possess a deep historical grasp of the meaning and central values it represents.[313]

This view predates the recent surge in professional discussion of the oath during and after the Trump Administration,[314] among other notable effects, established the baseline duties and credentials of the Chairman of the Joint Chiefs,[315] the Secretary of Defense,[316] the various Secretaries of the

---

[311] *See* MAURER, CRISIS, *supra* note 23, at 37.
[312] 5 U.S.C. § 3331.
[313] MARTIN L. COOK, ISSUES IN MILITARY ETHICS: TO SUPPORT AND DEFEND THE CONSTITUTION 84 (2013). Cook's conclusion that "few officers have even read it" is easily dismissed: the oath is, almost universally as a professional norm, recited by the officer during his or her promotion ceremony to be commissioned in the next higher rank to express publicly a "moral commitment and common ethical instruction," like a renewal of marriage vows at each anniversary. SWAIN & PIERCE, supra note 18, at 1.
[314] *E.g.*, Jim Garamone, *Joint Chiefs Stress Servicemembers' Commitment to Constitution*, DOD NEWS (Jan. 13, 2021), https://www.defense.gov/News/News-Stories/Article/Article/2470780/joint-chiefs-stress-service-members-commitment-to-constitution/ [https://perma.cc/23NB-TQYN]; James Joyner & Butch Bracknell, *They Make You Take an Oath to the Constitution: They Don't Make You Read It*, WAR ON THE ROCKS (Oct. 31, 2022), https://warontherocks.com/2022/10/they-make-you-take-an-oath-to-the-constitution-they-dont-make-you-read-it/ [https://perma.cc/KSG6-9EBS]; Joseph Chapa, *The Oath of Office and the Insurrection*, WAR ROOM (Jan. 7, 2022), https://warroom.armywarcollege.edu/articles/oath-of-office/ [https://perma.cc/PC5Z-NBSX].
[315] 10 U.S.C. § 152.
[316] 10 U.S.C. § 113(a)(1).

armed services,[317] the combatant commanders,[318] and many other senior military and political appointees with strategic responsibility for the management of national security on behalf of the President. It does not, however, give express direction or intent with respect to the day-to-day relations between civilian political leadership and military commanders and senior Pentagon staff. Therefore, it offers no insight into how a senior military officer ought to, or legally can, disobey, dissent, or interfere with otherwise lawful constitutional orders by civilian leaders.[319]

2. Uniform Code of Military Justice

The final, and most complex, statutory source for potential guidance or insight is the military's unique military disciplinary and criminal system, the Uniform Code of Military Justice (UCMJ).[320] This criminal code applies to those within the Armed Forces (plus a few ancillary additions): In other words, criminal jurisdiction attaches to a specialized, temporary, public service employment relationship with the federal government.[321] This legal structure "may adjudicate guilt and impose punishment through judicial proceedings called courts-martial or military tribunals . . . based, more or less, on concepts of judgmental neutrality, independence, fairness, evidence, and transparency."[322] Congress enacts the Code and statutorily protects the familiar due process rights and liberties of accused servicemembers.[323] But Congress also authorizes the commander-in-chief to promulgate implementing rules of evidence and procedure, outline factors influencing prosecutorial discretion, define most punishments, and even establish the particular definitions of

---

[317] 10 U.S.C. § 7013(a)(1) (Secretary of the Army); 10 U.S.C. § 9013(a)(1) (Secretary of the Air Force).
[318] 10 U.S.C. § 164.
[319] *See* MAURER, CRISIS, *supra* note 23, at 45–46, 155.
[320] UCMJ, *supra* note 32.
[321] 10 U.S.C. § 802 (defining the personal jurisdiction of the UCMJ). For additional background and the long history and character of American military justice, see generally CHRIS BRAY, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND (2016); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2nd ed. 1920); David A. Schlueter, *The Court-Martial: A Historical Survey*, 87 MIL. L. REV. 129 (1980); Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987); JONATHAN LURIE, THE SUPREME COURT AND MILITARY JUSTICE (2013).
[322] Dan Maurer, *Sovereign, Employer, Community: A Theory of Military Justice Beyond Discipline, Obedience, and Efficiency*, 107 MARQ. L. REV. 399, 403 (2023) [hereinafter *Theory of Military Justice*].
[323] *See, e.g.*, 10 U.S.C. § 813 (prohibiting pre-trial punishment); 10 U.S.C. § 827 (right to defense counsel); 10 U.S.C. § 831 (prohibiting compulsory self-incrimination); 10 U.S.C. § 841 (right to challenge panel members and the judge); 10 U.S.C. § 843 (establishing statute of limitations); 10 U.S.C. § 844 (prohibiting double jeopardy); 10 U.S.C. § 855 (prohibiting cruel and unusual punishment); *see also* EUGENE R. FIDELL, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 4 (2016); Dan Maurer, *Why Are Non-Unanimous (Court-Martial) Guilty Verdicts Still Alive After* Ramos*?*, 60 AM. CRIM. L. REV. 127, 132–36 (2023).

various elements of criminal offenses, provided the rules hew closely to federal civilian rules.[324]

It has long been assumed that the military justice system's "structure and practices . . . conform[] to a basic two-part idea . . . [that] military leaders rely on disciplined, obedient troops to accomplish military objectives . . . and military leaders are *ipso facto* best positioned to regulate and punish behavior they deem dangerous to that state of discipline."[325] Such a system "invests in non-lawyers' substantial authority to decide when, how, and whether to charge, prosecute, discipline, and punish members" of this employment community.[326] But the organizing principle of command-directed discipline and obedience is not the defining feature anymore. The Supreme Court has recently recognized the fundamentally "judicial" character of this system and analogized it to state criminal processes, downplaying the historically central role of the commander in military justice.[327] Congress, moreover, has shifted certain conventional and long-held prosecutorial decision-making authorities from senior commanders to judge advocate lawyers.[328]

Nevertheless, while the modern UCMJ prohibits traditional "garden-variety crimes unrelated to military service,"[329] like murder,[330] rape,[331] and robbery,[332] it remains concerned with prohibiting and punishing a slew of purely martial offenses—acts or omissions that have no analogue in civilian criminal codes, like desertion,[333] "contempt toward officials,"[334] dereliction of duty,[335] disobeying a lawful order or regulation,[336] conduct prejudicial to "good order and discipline,"[337] conduct "unbecoming an officer,"[338] and

---

[324] 10 U.S.C. § 836; *see* MCM, *supra* note 33, at pts. II (rules for courts-martial), III (military rules of evidence), IV (descriptions and explanations of the "punitive articles"), V (non-judicial punishment procedure), app. 2.1 (non-binding disposition guidance)
[325] *Theory of Military Justice*, *supra* note 322, at 405.
[326] Maurer, *A Logic of Military Justice?, supra* note 75, at 675.
[327] Ortiz v. United States, 585 U.S. 427, 437–42 (2018); *see also* Maurer, *A Logic of Military Justice?, supra* note 75, at 677–97 (discussing this case).
[328] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531–539, 135 Stat. 1541 (2021) (establishing the position of "special trial counsel" and new "covered offenses" outside the discretionary control of senior commanders with court-martial convening authority); *see also* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022) (increasing the number of "covered offenses"); 10 U.S.C. § 824(a) (describing the new "special trial counsel").
[329] *Ortiz*, 585 U.S. at 428.
[330] 10 U.S.C. § 918.
[331] 10 U.S.C. § 920.
[332] 10 U.S.C. § 922.
[333] 10 U.S.C. § 885.
[334] 10 U.S.C. § 888.
[335] 10 U.S.C. § 892(3).
[336] 10 U.S.C. §§ 890, 892.
[337] 10 U.S.C. § 934.
[338] 10 U.S.C. § 933.

misbehavior before the enemy, to name but a few.[339] The core characteristic of these martial offenses is their functionalism; the prohibited behaviors are prohibited because they:

> render the individual servicemember less ready to do his duty or perform the mission . . . [or] endanger or harm other servicemembers or government military property . . . [or] interfere with command's self-policing law enforcement authorities . . . [or] interfere with or degrade the command's ability to execute its mission . . . [or] aid the enemy in a time of conflict . . . [or] depict, for no other reason than their inherent scandalous, shocking or immoral nature, the servicemember as something other than a morally-upstanding servicemember, or which embarrass the service itself . . . [or otherwise] prejudice "good order and discipline" . . . .[340]

It is difficult to see how, at first, such a criminal code might address a civil-military relationship in crisis, like that depicted in the General Arthur hypothetical or in the real-world historical case study of the Trump administration in 2020 described *supra*. In theory, no rank is above the law and no due process right applies differently depending on one's rank or position (although some *authorities* are dependent on one's rank and position, and some crimes are, too). However, the fact that a servicemember has a professional duty to *disobey* an unlawful order, regardless of who gives it, suggests that the military does not completely devalue the inherent "moral value and autonomy"[341] of its members and provides a legal defense—possibly—against oath-violative directions from civilian political leaders.

"Possibly" is worth emphasizing here.[342] The act of lawful disobedience, as a defense to the crime of disobeying orders, is severely caveated. A recent article in a leading civil-military relations journal restated an aphorism oft-repeated by those in uniform: "[M]ilitary officers have a constitutional responsibility to follow orders from civilian officials, unless

---

[339] 10 U.S.C. § 899.

[340] Dan Maurer, Larrabee *at the District Court: Misunderstanding Military Criminal Law by the Article III Judiciary Is Far from Retired*, U. ILL. L. REV. ONLINE 23, 43–44 (2021). The Court has long accepted and underscored the axiomatic supposition that the government must prohibit and penalize such conduct within the military ranks: *See, e.g.*, Martin v. Mott, 25 U.S. 19, 30 (1827); United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 343 (1922); Reid v. Covert, 354 U.S. 1, 36 (1957); Parker v. Levy, 417 U.S. 733, 758–59 (1974). *But see* Ortiz v. United States, 585 U.S. 427, 437–38 (2018).

[341] Fissell, *supra* note 19, at 360.

[342] The following section, through the text associated with note 366, is adapted from an article I first published as *Governing Military Norm-Defiance in a Norm-Defying Presidency*, LAWFARE (Aug. 8, 2024), https://www.lawfaremedia.org/article/norm-defying-military-disobedience-in-a-norm-defying-presidency--what-role-does-the-ucmj-play [https://perma.cc/2YW3-X9FT]. Thanks to the editors of *Lawfare* for permission to republish and adapt some of that text.

those orders are unlawful, unethical, or immoral."[343] This is only partially true. There *is* a potential affirmative defense when disobeying certain orders. Rule for Court-Martial 916(d) states that acting "pursuant to orders" is a legitimate defense against charged misconduct, "*unless* the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[344] This precludes the "just following orders" defense against killing unarmed prisoners of war, for example.

Moreover, an order could be unlawful, unethical, *and* immoral, all in one. In such a case, however, the *only* lawful grounds for disobeying it is the order's illegality, not its unmooring from ethics and morals. Conversely, an order could be lawful, *but* unethical *or* immoral. In such a case, there are *no* lawful grounds for disobeying it, though doing so may exemplify "moral courage" in a professionally endorsed way.[345] In other words, there is no *constitutional* duty to disobey an *unethical or immoral* command from a civilian authority, as judged by the military recipient of the order. This is another way of saying a military officer has a duty to obey a lawful order from a competent authority, even if it conflicts with one's personal code of ethics and raises substantial moral questions. But that is the general rule; it turns out that applying it to a specific command from a *civilian* leader like the President or Secretary of Defense to a military officer is not straightforward at all.

The military's criminal law on obedience to orders becomes considerably more nuanced than what is generally appreciated by the public. To illustrate, consider the hypothetical General Arthur and Admiral Freeman in the case where the President does order the domestic deployment of active-duty military forces by invoking the Insurrection Act and orders a significant change to the Standing Rules for the Use of Force. If either Arthur or Freeman refuses to carry out the order, not on grounds that the order is unlawful or unconstitutional but on grounds that it is normatively inconsistent with their oath of office, is there a criminal sanction awaiting them for disobeying the order? In other words, does the civilian principal have a viable deterrent in the UCMJ—one that enforces the constitutional values of military subordination to legitimate civilian political authority?

---

[343] Burke & Matisek, *supra* note 8, at 797; *see also* Milburn, *supra* note 112, at 102 ("The military officer belongs to a profession upon whose members are conferred great responsibility, a code of ethics, and an oath of office. These grant him moral autonomy and obligate him to disobey an order he deems immoral . . ."). Army doctrine reiterates this: DEP'T OF THE ARMY, ADP 6-22, ARMY LEADERSHIP AND THE PROFESSION ¶¶ 1-17 (2019) ("Army forces reject and report illegal, unethical, or immoral orders or actions").

[344] MCM, *supra* note 33, at pt. II, r. 916(d) (emphasis added).

[345] *See, e.g.*, Ted Thomas & Ira Chaleff, *Moral Courage and Intelligent Disobedience*, 8 INTERAGENCY J. 58 (2017) (discussing the professional responsibility, as opposed to legal responsibility, to disobey "immoral, unethical, or illegal" orders).

As explained in considerably more detail elsewhere,[346] the answer is *not as much as one would expect*. There are two threshold matters that drive how a servicemember could be charged under the UCMJ for disobeying an order: (1) the *form*, or mechanism of delivery, of the order (not its substance), and (2) *who* gave the order. If the form or delivery mechanism of the order is that of a *direct* command specifically aimed at a *particular* subordinate, it opens the door to two possible "disobedience" crimes: first, "willfully disobeying [a] superior commissioned officer" under Article 90, UCMJ;[347] and second, failure to obey a "lawful order issued by a member of the armed forces" under Article 92(2), UCMJ.[348] Each possesses different criminal elements and carries different potential maximum punishments.

Alternatively, if the form or delivery mechanism of the order is a *generalized* order or regulation aimed at governing the conduct of a large class of servicemembers (or all of them) for a non-localized period, or if the disobedience reflects a willful or negligent failure to abide by a non-trivial custom of the service or other duty imposed by a statute, regulation, or standing operating procedure, it opens the door to three possible disobedience varietals: first, a failure "to obey any lawful general order or regulation" under Article 92(1), UCMJ;[349] second, a failure to obey a "lawful order issued by a member of the armed forces" under Article 92(2), UCMJ;[350] and third, a dereliction of duty under Article 92(3), UCMJ (if the breached duty was one imposed by custom, statute, standing operating procedure, for example).[351] Again, despite each of these offenses prohibiting forms of disobedience, they are each constructed around different elements and carry different potential maximum punishments.

The second preliminary issue is the identity of the order-giver. If the order is from a "superior commissioned officer"[352] to a subordinate and is in the form of a direct command specifically aimed at a particular subordinate, there is only one possible offense: "willfully disobeying [a] superior commissioned officer" under Article 90, UCMJ.[353] If the order is of that same *direct* form but is issued by some other "member of the armed forces" who is *not* a "superior commissioned officer" relative to the recipient, then failure to obey it is punishable as an Article 92(2) offense.[354] Alternatively, if the order

---

[346] Maurer, *Governing Military Norm-Defiance, supra* note 342.
[347] 10 U.S.C. § 890.
[348] 10 U.S.C. § 892.
[349] *Id.*; *see also* MCM, *supra* note 33, at pt. IV, ¶ 18.c.(1).
[350] 10 U.S.C. § 892; *see also* MCM, *supra* note 33, at pt. IV, ¶ 18.c.(2).
[351] 10 U.S.C. § 892; *see also* MCM, *supra* note 33, at pt. IV, ¶ 18.c.(3).
[352] 10 U.S.C. § 801(5) defines "superior commissioned officer" as a "commissioned officer superior in rank or position" to some other member of the armed forces.
[353] 10 U.S.C. § 890.
[354] For example, a military policeman, in the rank of sergeant, pulls over a colonel for exceeding the speed limit on a military installation, and orders the driving superior commissioned officer to produce his license and registration. *See* MCM, *supra* note 33, at pt. IV, ¶ 18.c.(2)(iii).

is a general order or regulation promulgated by a competent civilian authority like the Secretary of the Army, by a general court-martial convening authority, or by some other commanding officer, disobeying that order is punishable as an Article 92(1) offense.[355]

There are meaningful differences among these varieties of disobedience crimes, but the bottom line is simple: Neither offense captures the disobedience of General Arthur or Admiral Freeman to a specific order given by the President or the Secretary of Defense in the hypothetical. Nothing in Article 92(1) is applicable because the order here is specifically directed to a subordinate; only Article 90, or possibly Article 92(2), can be so construed. But Article 90 is inapplicable because the President and Secretary are not, by statutory definition, "superior commissioned officers."[356] Article 92(2) is similarly inapplicable because neither of these civilian principals are "members of the armed forces." At most, the civilian President or Secretary of Defense, intent on wielding the UCMJ as a prod to ensure compliance by their uniformed agents in the sense meant by civil-military relations scholars like Peter Feaver,[357] would have to argue that disobeying such an order under such conditions constitute a dereliction of duty under Article 92(3).[358] But that too is limited by how the *Manual for Courts-Martial* and the military courts have interpreted "duty" and "custom."[359] It is unlikely that either term encompasses the kind of scenario implicating a clash of constitutional values described above.

A close reading of the two Articles—the most directly on-point prohibitions on disobeying orders—and their elements defined in the *Manual* strongly suggest that the apex military leaders face little prospect of criminal punishment for disobeying even lawful orders from a superior *civilian* authority like the President or Secretary of Defense, despite those officials having statutory power within the military justice system as General Courts-Martial Convening Authorities.[360] This is another way of saying that such civilian authorities cannot compel (using explicit or tacit threats of criminal sanction via Articles 90 or 92 of the UCMJ) military subordinates *directly* to do or not do some action, even if lawful and related to a military duty. Consequently, the only viable criminal sanctions available would be a charge of "conduct unbecoming an officer" under Article 133,[361] or "conduct of a nature to bring discredit upon" the armed forces or that which is "to the

---

[355] 10 U.S.C. § 892(1).
[356] *See* 10 U.S.C. § 801(5).
[357] FEAVER, ARMED ATTACKS, *supra* note 17, at 93.
[358] 10 U.S.C. § 892(3).
[359] U.S. v. Blanks, 77 M.J. 239, 242–43 (C.A.A.F. 2018) (emphasis added, internal citations omitted); MCM, *supra* note 33, at pt. IV, ¶¶ 18.b.(3), 18.c; Maurer, *Governing Military Norm-Defiance*, LAWFARE, *supra* note 342.
[360] 10 U.S.C. § 822(a)(1) and (2).
[361] 10 U.S.C. § 933; MCM, *supra* note 33, at pt. IV, ¶ 90.c.(2).

prejudice of good order and discipline" under Article 134,[362] novel applications of two offenses almost never used to address *disobedience*.[363]

It should be noted that there is also no "acting consistent with my oath of office" defense or "acting consistent with my statutorily imposed requirement for exemplary conduct" defense to such a prosecution, if one were attempted. A striking characteristic of the military justice system, alluded to above, is that many of its rules—and many of the explanations of the criminal offenses' elements (*and their defenses*)—are the purview of none other than the President. In other words, the President may, by executive order, at any time amend the explanation of the "lawfulness" of an order and thereby expand or constrict the parameters of what constitutes the ability to disobey him without criminal penalty.[364]

However, the martial character of such disobedience pulls it within a category of offenses that arguably contain a unique attribute. Criminal codes do not simply proscribe and punish certain conduct deemed harmful. *Some* prohibitions may be viewed as implicit or indirect professional *prescriptions* to do the inverse of what the law prohibits—that is, the professional vice we want to deter has a direct corollary professional virtue we want to endorse.[365] This is not true for all crimes: the command implied by the prohibition on murder cannot reasonably be viewed as a command to save a life. But the UCMJ's natural regard for employment-related martial offenses means it is

---

[362] 10 U.S.C. § 934.

[363] It is beyond the scope of this article to consider why such a gap exists, and what that gap says about the UCMJ drafters' attention to the problem of enforcing military subordination to legitimate civilian political authority using criminal law. Of course, none of this prevents the civilian principal from taking adverse administrative actions against the disobedient senior military officer; relief from command and reassignment, or a forced resignation or retirement are non-punitive alternative coercive measures outside of the UCMJ.

[364] The president's ability to do this is not unbounded; the explanation of the offense's elements cannot contradict or vitiate the statutory text of the UCMJ and must be consistent with relevant controlling judicial precedent. If it conforms this way, the courts will treat the MCM's explanation as "persuasive" authority in case-by-case application. United States v. Miller, 67 M.J. 87, 89 (C.A.A.F. 2008).

[365] I emphasize here that I am only suggesting that certain offenses in military law can be thought of not merely in terms deterrence and retribution, but also as something akin to a *duty to effectuate its opposite* or an expectation that the professional standard is of a certain kind of virtuous behavior. This work aligns with the that of Professor McAdams and others. *See*, *e.g.*, Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000) ("law changes behavior by signaling the underlying attitudes of a community or a society . . . [and] because people are motivated to gain approval and avoid disapproval, the information signaled by legislation and other affects their behavior"); Paul A. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 473 (1997) ("laws can contribute to the formation and change of community norms and individuals' moral reasoning . . . [and] the act of criminalization sometimes nurtures the norm"). I am not suggesting the UCMJ's purpose, as a whole, or in its individual punitive articles, is to inculcate virtue, at least in the sense used by legal philosophers. I offer and defend a theory of military justice's purpose (much wider in scope than simply what it punishes) in *Theory of Military Justice*, *supra* note 322.

replete with the kinds of prohibitions that *can* be recast as affirmative duties to act in some implicitly prescribed way: a normative catalogue of "thou shall" duties, not just "thou shall not" restrictions, in keeping with the "underlying attitudes"[366] of the military community and public expectations signaled by Congress's enactment of the non-punitive "requirement for exemplary conduct" statute.[367]

For example, it is a criminal offense under the UCMJ to not just disobey lawful orders, but also to "wrongfully" wear on one's uniform an "insignia, badge, ribbon, device, or lapel button" one has not earned or is not authorized to wear;[368] to knowingly make a false official statement;[369] to "feign illness, physical disablement . . . or intentionally inflict[ ] self-injury" with an intent to "avoid work, duty, or service";[370] to be "derelict in the performance" of one's duties;[371] to engage in "conduct unbecoming" of an officer;"[372] and to engage in conduct "of a nature" that discredits the armed forces.[373] Restated as their virtuous corollaries, these statutory bars essentially command personnel: to do your job to the standard required and expected, even when it is dangerous or difficult; to not inflict more harm upon yourself or others to gain advantages or benefits when held by the enemy; to be truthful and candid about your qualifications and military experience, especially about that which is bestowed for exceptional martial merit and valor; to act in ways that fortify the command's ability to effectively manage an orderly and usually self-controlled force . . . to seek clarity and legal justification when higher headquarters imposes an order that would significantly depart from conventional norms in the use of military force, fits in the "grey area" of legality, or would impose a questionable "duty;" to maintain one's personal honor and integrity as a senior representative of the officer corps and institution—one who diligently follows the moral demands of the oath of office, not one who diligently follows every whim or caprice of the principal; and to protect the institutional military's reputation as a non-partisan, selfless, honest broker, and to preserve the public's esteem and confidence in the institution.[374]

The offense of being "derelict in the performance of duties" illustrates this character. It is a species of the general prohibition against disobeying a general order or regulation in Article 92, UCMJ.[375] It has unique elements,

---

[366] McAdams, *supra* note 365, at 340.
[367] *See supra* Part III.C.2. I made this argument originally in *Breaking Ranks in a Civil-Military Crisis: Strategic Communication to Register Dissent*, JUST SECURITY (Aug. 26, 2020), https://www.justsecurity.org/72164/breaking-ranks-in-a-civil-military-crisis-strategic-communication-to-register-dissent/ [https://perma.cc/MUR7-8AMK].
[368] 10 U.S.C. § 906a.
[369] 10 U.S.C. § 907.
[370] 10 U.S.C. § 883.
[371] 10 U.S.C. § 892.
[372] 10 U.S.C. § 933.
[373] 10 U.S.C. § 934.
[374] Maurer, *Breaking Ranks*, *supra* note 367.
[375] 10 U.S.C. § 892(3).

distinct from those of the "failure to obey a general order or regulation" offense:

> (a) That the accused had certain duties;
> (b) That the accused knew or reasonably should have known of the duties; and
> (c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.[376]

The key premise is the existence of a legal "duty." The *Manual for Courts-Martial* explains that a duty "may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service."[377] Further, "customs of the Service, academic literature or testimony, testimony of persons who have held similar or superior positions," may be positive evidence of that the accused knew of an extant duty.[378] It is conceivable, then, that our hypothetical general could suggest that a combination of his oath of office, the requirement for exemplary conduct, and historical norms of nonpartisan military professionalism and competence in context of civilian supremacy create *a duty to defy.* That is to say: *following that order would itself be a "dereliction of duty" he should assiduously avoid*. This is not an affirmative defense to the prosecution if the general is charged with violating Article 92(3), but it is certainly an argument that favors non-prosecution in the first place—the officer turned the criminal prohibition into virtuous affirmative duty to do the opposite.[379]

The offense of "conduct of nature to bring discredit upon the armed forces"[380] offers similar grounds on which a senior military officer might stand firm against an order believed to be unconstitutional or at least normatively inconsistent with her oath of officet. This statute prohibits "conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem."[381] There is no exhaustive list of such conduct, and the conduct need not violate another provision of law, and the public need not even know of the conduct in question—that is, an actual drop in public esteem based on actual knowledge of the conduct at issue need not be proven.[382] Our

---

[376] MCM, *supra* note 33, at pt. IV, ¶ 18.b.(3).
[377] *Id.*, ¶ 18.c.(3)(a).
[378] *Id.*, ¶ 18.c.(3)(b).
[379] It is beyond the scope of this article to discuss whether I may be conflating two philosophical theories of ethics: aretaic or virtue ethics (acting in conformance with certain "virtuous" character traits and behaviors) and deontological ethics (acting because of a duty to act, irrespective of consequences). In practice, it is doubtful that the constitutionally challenging scenario presented to a senior military officer, at issue in this article, will force him to parse the difference between the two.
[380] 10 U.S.C. § 934.
[381] MCM, *supra* note 33, at pt. IV, ¶ 91.c.(3).
[382] United States v. Phillips, 70 M.J. 161, 165–66 (C.A.A.F. 2011).

hypothetical general officer might suggest that he has an affirmative professional responsibility to disobey or even disrupt the questionable order from his civilian superior on grounds that doing so will validate the military's credibility as a nonpartisan service and *raise* it in public esteem. As with Article 92(3)'s dereliction of duty, this latter claim is not an affirmative defense to a charge, but may provide reasonable, defensible grounds on which to justify non-prosecution. And as explained in Part IV.B., *infra*, such affirmative duties can be prescribed within "safe harbor" legislation that *would* serve as a practical guide for mediating the clash of constitutional values.

D. Military Professionalism Norms

Besides a scholarly framework, the Constitution itself, and explicit statutory rules, a fourth source of potential guidance for senior military elites embroiled in what they view as a conflict between their constitutional fidelities is the body of non-legal norms that have coalesced around their offices' responsibilities. "Norm," however, is a complex concept. Multiple disciplines use the term, and thus have adopted various definitions over time. Legal theorists have defined a norm as:

> any standard—general, individualized, or particularized—that is supposed to guide conduct and serve as a basis for evaluation or criticism. Strict rules, rules of thumb, presumptions, principles, standards, guidelines, plans, recipes, orders, maxims, and recommendations can all be norms. Furthermore, moral, legal, religious, institutional, rational, logical, familial, and social standards are norms as well . . . [and] they purport to tell [their subjects] what, in some sense, they are entitled to, ought to, or may do.[383]

Or more simply, a norm is an "ought to" rather than a "must do" or it is "must not do" validated by a higher level norm or rule, regulation, law, or mandate.[384] Another legal scholar, specifically in the context of *presidential* norms, defined them as a "thick network of rules or standards" that are "unwritten or informal," that "make concrete, and mediate among, competing values,"[385] and which "govern political behavior"[386] as "expected behavioral patterns . . .[that] generate moral reasons for compliance."[387]

---

[383] SCOTT J. SHAPIRO, LEGALITY 41 (2013) (footnotes omitted).
[384] HANS KELSON, PURE THEORY OF LAW 5 (1967); *see also* RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 111–18 (2021).
[385] Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2189–91 (2018).
[386] *Id.* at 2196.
[387] *Id.* at 2197.

Political scientists have defined "norm" with great variation: as a "collective understandings of the proper behavior of actors;"[388] "a standard of appropriate behavior for actors with a given identity;"[389] "shared codes of conduct" that "become common knowledge withing a particular community . . . accepted, respected, and enforced by its members;"[390] "shared codes of conduct in a society applicable to the relationship between the military, the political leadership, and the civilian society;"[391] "socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels;"[392] and more pithily as the "unwritten rules of the game."[393]

1. Commonly Accepted Civil-Military Norms in Practice

Through both public discourse and scholarship, there are many illustrative examples of what have been described as civil-military relationship norms by practitioners and academics. It is perhaps a telling indicator of modern concerns about the health of the American civil-military relationship that a large cohort of former Secretaries of Defense (eight) and former Chairman of the Joint Chiefs of Staff (five) communicated, as a single voice, their view of the "bedrock foundation of the United States' constitutional republic: what civilian control of the military does and does not mean, and how to preserve it."[394] In their "open letter," these officials articulated a set of "core principles and best practices" as a sort of civics lesson review, necessary for an "exceptionally challenging civil-military relationship" but without approaching the norm-busting danger zone of overt intervention into a political controversy. Several of their points—which are really just statements of fact, not norms—may resonate for General Arthur and Admiral Freeman of our hypothetical above. For one, "[m]ilitary officers swear an oath to support and defend the Constitution, not an oath of fealty to an individual or to an office. All civilians, whether they swear an oath or not, are likewise obligated to support and defend the Constitution as their highest duty."[395] For another, the

---

[388] Jeffrey W. Legro, *Which Norms Matter? Revisiting the "Failure" of Internationalism*, 51 INT'L ORG. 31, 33 (1997).
[389] Martha Finnemore & Kathryn Sikkink*, International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 891 (1998).
[390] LEVITSKY & ZIBLATT, *supra* note 27, at 101.
[391] Marybeth P. Ulrich, *Civil-Military Relations Norms and Democracy: What Every Citizen Should Know*, *in* RECONSIDERING AMERICAN CIVIL-MILITARY RELATIONS: THE MILITARY, SOCIETY, POLITICS, AND MODERN WAR 46 (Lionel Beehner, Risa Brooks, & Daniel Maurer eds., 2021).
[392] Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSPS. POL.725, 727 (2004).
[393] Golby & Liebert, *supra* note 202, at 77.
[394] Open Letter, *To Support and Defend: Principles of Civilian Control and Best Practices of Civil-Military Relations*, WAR ON THE ROCKS (Sep. 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/38ET-58YP].
[395] *Id.*

writers emphasized that Congress plays a major role in civilian control of the military through its extensive list of enumerated powers in Article I of the Constitution[396]—but for some reason failed to mention the most direct manner: the "make rules" clause in Section 8, the very authority under which the UCMJ is enacted. They also highlighted the role of the judiciary in the civil-military relationship: "through judicial review of policies, orders, and actions involving the military" the courts indicate decisively when a "policy/order/action [is] illegal or unconstitutional."[397]

Unfortunately, the authors did not acknowledge the very limited extent to which the courts review "policies, orders, and actions involving the military"—the judiciary's deference to national security decision-making, including under the rubric of non-justiciable political questions,[398] renders this more of an idealized principle than a real-world best practice.

Other principles the group highlighted include:

> It is the responsibility of senior military and civilian leaders to ensure that any order they receive from the president is legal . . .[and] [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 . . . [and] [m]ilitary officials are required to carry out legal orders the wisdom of which they doubt. Civilian officials should provide the military ample opportunity to express their doubts in appropriate venues . . . [and] [t]he military reinforces effective civilian control when it seeks clarification, raises questions about second- and third-order effects, and proposes alternatives that may not have been considered.[399]

Nothing in the letter was inconsistent with the contemporary scholarly framework for understanding the complex civil-military relationship. But such norms presuppose the existence of a regular and predictable relationship of mutual professionalism and respect. But the conditions described in the hypothetical—and in the historical record—illustrate a breach of norms, so expecting norms to guide these actors when these actors are breaking norms is an exercise in futility. But to the extent that these former officials represent the apex of the civil-military relationship, and that their service spanned political parties, this collective interpretation may well serve as a proxy for the contemporary understanding of an *idealized* civil-military relationship by its practitioners and—because they were aided by a leading academic in the

---

[396] *Id.*
[397] *Id.*
[398] *See generally* Karen A. Ruzic, *Military Justice and the Supreme Court's Outdated Standard of Deference:* Weiss v. United States, 70 CHI.-KENT L. REV. 265 (1994).
[399] Open Letter, *supra* note 394.

field—the contemporary understanding of best practices by scholars.[400] In this sense, they are best characterized as *normatively preferable* norms, not norms as they necessarily look in practice.

But as instructive as these principles and best practices may be, they still do not provide enough guidance to the senior military official facing an apparent dilemma in which he must either sacrifice (or violate) the constitutional protections of his fellow citizens or sacrifice the constitutional demand of military subordination to elected civilian presidents and secretaries of defense. For example, in a recent survey of retired flag officers regarding support for the supposed norm of non-participation in political or partisan controversies after retirement, respondents strongly suggest that some norms are unlikely to be sufficient checks on improper conduct or guideposts for proper conduct.[401] Though there was general agreement about the existence of this specific norm, there was substantial disagreement over what *exactly* the norm prohibits or permits, whether one can ever be justified in violating it, and what the probable consequences of the violation would or should be.[402] If such "elasticity of normative interpretation"[403] makes consensus—and enforcement—difficult for the norm of retired officers speaking out on political controversies, it may be reasonable to extrapolate similar elasticity with respect to the dilemma posed by the clash of constitutional values and duties presented in this article. As with retiree political participation, it is more reasonable to assume that individual behavior—that of our hypothetical General Arthur or Admiral Freeman—will reflect and be motivated by a "layered set of considerations:" how they perceive their "competing obligations to protect the institution and its members, act in the spirit of their oath to the Constitution, and stay true to their own moral compass."[404]

2. Meta-Norm of Democratic Civil-Military Relations

Even if individual norms might not come to the practical aid of the senior military officer faced with this conflict, it may be possible to infer a *meta*-norm for civil-military relations. This meta-norm is a higher-level *norm about norms* (the set of informal but expected standards of behavior mutually policed in this particular professional context) and has at least five elements: these norms reflect and uphold certain *democratic* and *principled* values, namely: (1) unelected military officials do not dictate policy, through action or

---

[400] Peter Feaver & Michèle Flournoy, *Let's Stop Being Cavalier About Civilian Control of the Military*, LAWFARE (Sep. 13, 2022), https://www.lawfaremedia.org/article/lets-stop-being-cavalier-about-civilian-control-military [https://perma.cc/477Y-ZUKD].
[401] Brooks, Robinson & Urben, *supra* note 36, at 63–65. The authors are careful to note, however, that their survey was answered by only twenty-three retired flag officers, and thus "by no means representative of the broader population of retired flag officers, which is typically estimated at more than 7,500 individuals at any time." *Id.* at 62.
[402] *Id.*
[403] *Id.* at 51.
[404] *Id.*

inaction, and are subordinate to elected officials even when a civilian official's decision or judgment is poor; (2) unelected military officials do not hold civilian officials accountable for bad decisions, poor judgment, incompetence, or illegal or unconstitutional conduct; (3) actual use of military capabilities, evolution of military culture, design of military tactics, and the exercise of military leadership remains the near-exclusive province of uniformed military officials; (4) both parties must be responsive to and obey the "rule of law," with final fidelity owed by both parties to the Constitution, including legal decisions from the courts that seemingly encroach upon the party's responsibilities, expertise, functions, and authorities; and (5) in obeying the dictates of the first four elements, both parties in the civil-military relationship act, advise, decide, and interpret within their respective spheres of responsibility reasonably and in good faith.

What the meta-norm does not do, though, is provide prescriptive direction or even discrete guidance for *how* to arbitrate in real time between competing values when one party (*e.g.*, the senior military official) believes the other is proposing an action whose constitutionality is doubtful or uncertain. But when viewed in concert with the common frameworks of "objective control" and "agency" preferred by scholars and studied by practitioners identified above, it may may prove helpful (but not dispositive) to resolving the constitutional clash of values and duties.

The final Part below catalogues four central concerns implicated by the scenarios (real and imagined) above. Each plays a role in the apparent clash of constitutional values and fidelities. Together, they represent the consequences of the dearth of definitive guidance in the Constitution, theory, current statutes, and practical professional norms. The Milley-Trump relationship is a proof-of-concept that—while historically rare—such conflicts are not implausible; the risk of any occurrence, however, calls for legislative intervention.

IV. CHALLENGES AND ANSWERS FOR NON-PARTISAN NORMS, FOR THE CONSTITUTION, AND FOR STATUTES

A. Four Central Concerns

This section considers the ambiguities of constitutional powers and the lack of definitive prescriptive rules in either statutes or military professionalism norms arising during *in extremis* clashes between the civilian commander-in-chief's view of his constitutional duty and the views that senior military elites hold of their own constitutional fidelities, at least on the issue of using armed force domestically.

First, any action or inaction by the senior military official under these conditions (as described in Part II, hypothetically or historically) will always

risk the *appearance* of either (a) illegitimately or unlawfully disobeying the authority of the President, breaching professional norms, and possibly violating the UCMJ in doing so; or (b) forsaking the Constitution itself (and thereby the rights of citizens), by disregarding other professional norms and principles implied by their oath of office. No matter what course of action is followed, the civilian has positioned the military upon the horns of dilemma.

The public's view of the military's legitimacy—or "constitutional fidelity"[405]—during and in the wake of such *in extremis* scenarios may therefore depend to a high degree on the military's ability to articulate its persuasive grounds for whatever action it takes or does not take. Those grounds risk being viewed as self-serving if they are rooted only in the profession's own self-regulating norms, values, or ethics, or if they are merely superficial references to one's oath of office and the Constitution generally. Worse, those grounds may be criticized as mere disingenuous cover for the military actor's partisan preferences, undermining the military's stated goal and public expectation to remain avowedly nonpartisan and neutral. Further eroding that confidence would be dissent among the dissenters—that is to say, it is plausible that the views of the senior military actor's immediate peers and subordinates, all of whom sit at the top of the defense department's hierarchy, may not be aligned; indeed, some may reject the reasoning, method, or conclusions of that senior military officer with respect to resolving the clash of constitutional values.

Second, support for civil rights puts the military leadership in the position of making abstract constitutional, not just technical legal, arguments in their own defense. While the President has the benefit of the entire Department of Justice (including the highly-influential and arguably independent Office of Legal Counsel) to render advice and support a constitutional argument, senior uniformed officials fearing criminal liability (if not the end of their careers and professional ostracism) have only the guaranteed benefit of the military's independent defense bar and the advice of the Department of Defense's Office of General Counsel or the separate Services' general counsel offices, neither of which have a role or regular experience in analyzing and arbitrating *intra*-branch constitutional crises. This weakens the military officer's ability, as an agent with "fiduciary-like" duties, to objectively justify distancing herself from her civilian principal and his conduct, or even disavowing it. The agent's action or inaction, in the face of the principal's command, will appear to be in violation of her duties of diligence and loyalty, and—ironically—unprincipled.

The final two problems are easier to spot: neither statutes nor the Constitution assign a role like this to the Armed Forces—that is, protector of the public's civil liberties from potentially unconstitutional or morally debased decisions of the commander-in-chief. Therefore, the agent's action or inaction,

[405] Dehn, *supra* note 9, at 11, 40–44.

in the face of the command, will appear to be in violation of her scope of responsibility—the range of discretionary and semi-discretionary judgment over particular and defined matters upon which the agent has a claim to expertise, assigned by the principal. Because statutes that define and authorize such high-ranking military positions (like that of the Chairman of the Joint Chiefs of Staff) grant extraordinary authority to the President and Secretary of Defense to detail the duties of that agent,[406] the only principal that matters in practice to the agent is the President or his immediate civilian advisors—the very source of the conflict.

An objective standard or prescriptive rules—codified into law by the branch of government that makes "rules for the government and regulation of the armed forces," not by the Chief Executive—is the only measured mechanism for reducing the risks introduced by each of these four primary concerns.

B. The Duty to Defy in a Limited Safe Harbor Statute

Civil-military relations theory, the Constitution's text, and professional norms all lack practical guidance and protections for a senior military elite caught between these two conflicting constitutional fidelities. Because the real stakes involve potential criminal liability for the officer and are of the gravest public consequence, the most assured path toward a standards-based and transparent solution must be found in legislation.[407] But that legislation must provide the military actor with a way to decide between possible courses that attempt to balance the competing values of subordination to civilian authority and respect for constitutional rights without reliance on his or her idiosyncratic understanding or interpretation of those rights or professional norms. At the same time, it must also deter bad faith efforts by either the civilian or military official to undermine the legitimate authorities and responsibilities of the other by alleging, falsely or recklessly, their constitutional infidelities or breaches. As Professors Levitsky and Ziblatt cautioned, "politics without guardrails" is a dangerous step toward an autocracy that a highly polarized public does not care to prevent.[408] In this case, the guardrail could be an *inter*branch, institutional, channel for defining, identifying, and resolving an *intra*branch crisis.

> A reasonable solution starts, in part, by adopting Professor Dehn's "constitutional necessity" defense to protect a reasonably acting military officer under conditions like those faced by General Milley:any federal government official who

[406] 10 U.S.C. §§ 152, 153.
[407] Not everyone agrees. Dehn, *supra* note 9, at 39 ("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").
[408] LEVITSKY & ZIBLATT, *supra* note 27, at 116, 208.

> would consider taking measures to 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.[409]

Dehn explains that a "reasonable belief" in this context means that the "official must be in a position to sufficiently understand the entire factual and legal context in which the order or plan would be executed in order to reasonably assess its purpose, likely effect, legality, and constitutional import."[410] With such requirements (*sufficient* understanding of the "entire factual and legal context"), this would effectively limit the population of officers to whom this constitutional necessity defense protects to a very few at the summit of the national security establishment—it would of course include General Milley, and our hypothetical General Arthur and Admiral Freeman.

Dehn gives less detail with respect to what "necessary" measures are. He contends that a military coup as a means to disrupt the plan would cause more damage than it would prevent, on the whole, and that a decision to release "classified information" should be "carefully considered."[411] He does offer a useful standard for judging possible measures between these extremes: the military actor's course of conduct should be determined by the "likelihood, imminence and magnitude of the harm" she seeks to prevent or mitigate.[412] Dehn does not provide, however, a test or standard by which the official can know reasonably what a constitutional principle or value "of the highest order" is, or what to do if multiple such principles and values conflict.

Because of the limited population of servicemembers for whom this defense is applicable, it is unnecessary to amend the UCMJ's prohibitions, or the *Manual for Courts-Martial*'s explanations, on disobeying orders or dereliction of duty or similar punitive articles that might be used against such

---

[409] Dehn, *supra* note 9, at 47–48.
[410] *Id.*
[411] *Id.*
[412] *Id.*

an officer. Instead, it would be more sensible to amend the provisions of Title 10 that outline the general roles, responsibilities, and qualifications of these senior military officers[413] to include something like this "constitutional necessity" defense.

But more can be done while tinkering with these sections of Title 10. It is entirely plausible to enact a "safe harbor" triggered by this clash of constitutional values and fidelities, and to provide express authorization for certain forms of intervention available to senior military officers who reasonably believe they are caught in this dilemma. The challenge is to ensure the amendment reflects the core identity of civilian supremacy over the military, that it respects commonly-accepted norms of professional identity and conduct within the military, that it reinforces the military's oath-born commitment to support and defend the *entire* Constitution and its values, but that it does not undermine the ability of the UCMJ to ultimately hold accountable unwarranted violations of good order and discipline within the ranks, especially those motivated by bad faith or in reckless disregard for foreseeable consequences.

With these caveats in mind, the essential features of this safe harbor should include a specific and timely reporting requirement to Congress (*e.g.*, to the Chair and Ranking Members of the House and Senate armed services committees) when the relevant senior officer is ordered to do an apparently unlawful, unconstitutional, or oath-violative act, and the civilian principal refuses to alter course after being advised, or if the civilian refuses to provide the military agent in question reasonable opportunity to provide appropriate counsel.

The legislative safe harbor provision should further specify that in the unlikely event of the military officer's resignation in protest *under such conditions* (while inconsistent with traditional professional norms), a resignation made in a good faith objection on "constitutional" grounds is not to be construed as a dereliction of duty (in the non-criminal, professionalism sense) nor an act of partisan disrespect for the office of the commander-in-chief, and does not affect receipt of statutorily-authorized retirement benefits. This would thereby serve as a special-case amendment to the current, general-case, "Requirement for Exemplary Conduct" imposed on all officers and those in positions of authority, regardless of rank or seniority,[414] and removes a potential financial security-based disincentive to breaking ranks with the President.

The safe harbor provision should nevertheless emphasize that disagreement or disobedience on such constitutional grounds does not provide

---

[413] *See, e.g.*, 10 U.S.C. § 7033 (describing the qualifications and responsibilities of the Chief of Staff of the Army).
[414] *See supra* Part III.C.2.

the military with law enforcement authority over any civilian official related to the alleged misconduct. This would, in effect, foreclose the kind of dangerous advice publicly given to General Milley, in the wake of the contested 2020 election returns, to command and enforce the physical removal of President Trump from the White House if he refused to depart upon the inauguration of President Biden.[415]

The safe harbor provision might further specify that certain uncontested and noncontroversial civil-military relations values should guide the conduct and advice provided by these senior military officers to their civilian principals. This might look very much like the catalogue of "core principles and best practices" the former secretaries of defense and former chairmen offered.[416] At the very least, any prescription will likely reinforce the straightforward "meta" norm[417] that reflects foundational premises of democratic civilian control of professional armed forces expected to demonstrate expertise in the "management of violence."[418]

The provision could also strengthen the normative basis on which senior uniformed leaders might exercise a perceived "duty to defy" by including two specific prescriptions. First, by analogizing to the model rules of attorney professional conduct and its provisions on representing organizations,[419] it might buttress the unstated axiom that their service as agents originates in the constitutional supremacy of the civil government, generating specific professional duties of candor, diligence, competence, good faith, and loyalty to the republic as represented by institutions that transparently and regularly conduct their affairs according to the rule of law, and to act in the best interests of the civil office they support, not those of the civilian office-holder.

Next, the safe harbor provision can emphasize the virtuous conduct that is the implied corollary to martial vices prohibited by certain UCMJ punitive articles,[420] and translate these into affirmative expectations and obligations. The virtuous corollaries to the prohibitions on service-discrediting conduct, conduct unbecoming an officer, and dereliction of duty can be recast as duties to seek clarity and legal justification when civilian authority imposes an order that would significantly depart from conventional norms in the use of military force, its constitutionality is uncertain, or would impose a questionable duty that seems to subvert the officer's oath; to maintain one's personal honor and

---

[415] John Nagl & Paul Yingling, *". . . All Enemies, Foreign and Domestic": An Open Letter to Gen. Milley,* DEFENSEONE (Aug. 11, 2020), https://www.defenseone.com/ideas/2020/08/all-enemies-foreign-and-domestic-open-letter-gen-milley/167625/ [https://perma.cc/6CGE-5B8E].
[416] *See supra* Part III.D.3.
[417] *See supra* Part III.D.4.
[418] HUNTINGTON, *supra* note 64, at 11 (quoting Harold Laswell).
[419] ABA Model Rules, *supra* note 251, Model Rule 1.13.
[420] *See supra* Part III.C.4.

integrity as a senior representative of the officer corps and institution; and to protect the public's expectation that the military is a non-partisan and politically neutral institution; and thereby preserve the public's esteem and confidence in the institution.

To have more than a mere salutary appearance, any such safe harbor provision must balance the competing constitutional values of civilian authority supremacy and respect for public rights, and not block practical courses of action feasible for the military officer to take. But if it does not also incorporate respect for the principles of military professionalism, the nature of this principal-agent relationship, and account for the ever-present risk of criminal prosecution under the UCMJ balanced against the benefits of stressing the implied virtuous corollaries to certain martial misconduct, the safe harbor remains too rocky for the military to consider practically useful when *in extremis*.

CONCLUSION

The question picked apart in this article is: what can, or should, happen when the unelected senior military leadership believes he or she must act (or not act), contrary to the will of the elected civilian leadership, to avert a crisis implicating *both* of these fundamental constitutional commitments—one to civilian supremacy over the military and the other to the constitutional liberties and rights of fellow Americans? In such cases, the merits and flaws of the generals' personal constitutions are as exposed to public scrutiny as those of the U.S. Constitution.

This article, in a departure, investigates the consequences of considering *military disobedience grounded in constitutional principles* as a special paradigm all to itself. It presents the first comprehensive legal analysis of this species of dilemma—an apparent conflict between adhering to positive laws and professionalism norms regulating civilian control of the military on one hand and on the other protecting civil liberties and rights from those very actors relying on the normative value of civilian control as their source of legitimacy. It does so by augmenting consideration of statutes and the Constitution with traditional and contemporary strands of the political science sub-discipline of civil-military relations.

Responding to a clash of constitutional virtues, values, and fidelities is not a mission for which military servicemembers, even the elite actors at the top of the chain-of-command and directly advising the President and Secretary of Defense, are trained. Indeed, the best-case scenario would see them without any experience in this type of conflict whatsoever. But, as recent history has demonstrated, such clashes are foreseeable. Mere faith in the words of the officer's oath, one's idiosyncratic sense of professional duty, and vague allusions to the Constitution ought not be considered sufficient guideposts for

the actors, nor sufficient markers of accountability for the public to whom both the civilian and military leaders ultimately serve.

This article concludes with recommendations for a reasonable congressional intervention—a safe harbor amendment to Title 10 replicated within existing statutes that already outline some of the duties and qualifications of these senior uniformed leaders. This safe harbor would provide encoded guideposts that are not only consistent with but reinforce explicitly the accepted nature and best practice norms of the civil-military dynamic and account for the role that military justice can play in both assigning and shielding criminal liability. In addressing *in extremis* demands described throughout this article, and in promoting a limited "duty to defy," nothing short of explicit remedial legislation is justifiable.