



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

Issue Brief

March 2018

What the Military Law of Obedience Does (and Doesn't) Do

Christopher Fonzone

The responsibility of the military to obey orders from superiors surprisingly became a hot topic during the 2016 presidential campaign, when then-candidate Trump proposed to bring back waterboarding and a “hell of a lot worse” and appeared to suggest targeting intentionally the civilian family members of terrorists.¹ These comments prompted a swift and severe response, with a number of former officials – including, most prominently, former Central Intelligence Agency and National Security Agency Director Michael Hayden – making clear that they would expect the military to disobey such illegal orders.² Trump responded to the uproar by stating that he would “not order a military officer to disobey the law,”³ and he has since signaled that he is willing to defer to his Cabinet and cast those proposals aside.⁴

Although the specific controversies that arose during the campaign have seemingly passed, more recent events have again returned to the public eye questions of when members of the military must obey superior orders.⁵ What happens, commentators have asked, “if President Trump orders

¹ See, e.g., *Transcript of the New Hampshire GOP Debate, Annotated*, WASH. POST (Feb. 6, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/02/06/transcript-of-the-feb-6-gop-debate-annotated/?utm_term=.f78e11353e7f (comments on waterboarding); Tom LoBianco, *Donald Trump on Terrorists: 'Take Out Their Families'*, CNN (Dec. 3, 2015, 12:19 PM), <http://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html>.

² See, e.g., Nick Gass, *Ex-CIA Director: Armed Forces Would Ignore Trump*, POLITICO (Feb. 27, 2016, 9:48 PM), <http://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/02/cia-director-armed-forces-ignore-trump-219918#ixzz41QYxQAFN>; Rebecca Kheel, *Joint Chiefs Chairman: Trump Orders Would Harm Troop Morale*, THE HILL (March, 17, 2016, 2:13 PM), <http://thehill.com/policy/defense/273441-joint-chiefs-chairman-trump-orders-would-harm-troop-morale>.

³ See, e.g., David M. Jackson, *Trump: I Won't Order the Military to Break the Law*, USA TODAY (Mar. 4, 2016, 2:45 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/03/04/donald-trump-military-the-wall-street-journal-international-law/81325216/>.

⁴ See, e.g., Richard Sisk, *Trump to Defer to Mattis on Keeping Torture Ban*, MILITARY.COM (Jan. 27, 2017), <http://www.military.com/daily-news/2017/01/27/trump-defer-mattis-keeping-torture-ban.html>.

⁵ For example, Admiral Swift, the commander of the United States Pacific Fleet, recently responded to a question by saying that he would comply with a presidential order to attack China with nuclear weapons. See Austin Ramzy, *What if Trump Ordered a Nuclear Strike on China? I'd Comply, Says Admiral*, N.Y. TIMES (July 27, 2017), https://www.nytimes.com/2017/07/27/world/asia/us-admiral-nuclear-strike-china-trump-order.html?_r=0. Although a spokesman for the Pacific Fleet later pointed out that the question was purely hypothetical and that Admiral Swift was

Secretary of Defense Mattis to do something deeply unwise?”⁶ These questions implicate a body of law that has a long history and that sits at the intersection of some of our country’s most fundamental values and interests: the rule of law, civilian control of the military, and the need for good order and discipline in our armed forces.

In light of the continued focus on this topic, this Issue Brief aims (a) to provide a quick primer on the law of military obedience; (b) to illustrate how that law might apply to some current debates; and (c) to highlight how the law of obedience, while an important doctrine with a long and distinguished lineage, does not, and was never intended to, serve as a mechanism for debating the course of contested areas of national security policy.

It is important to note at the outset that books have been written on this rich topic, which almost invariably arises in difficult situations where lives are on the line. The Brief therefore does not purport to offer a definitive treatment of the subject or answer every question; rather, the hope is that it will inform generalist readers on the basics of the doctrine, so they can understand and participate in contemporary debates. To that end, Sections I and II provide background on the military chain of command and the legal responsibility of military officials to obey superior orders, laying out how members of the armed forces face a dual obligation to obey lawful orders and to disobey unlawful orders. Section III then explains how the law might apply to then-candidate Trump’s campaign comments about waterboarding and targeting the families of terrorists, before Sections IV and V discuss how those legal principles may apply in other scenarios. In doing so, the Issue Brief makes clear that the U.S. military has a strong rule of law culture and takes seriously its obligation to operate lawfully, but that the law of obedience is not intended to be, and should not be seen as, a forum for re-litigating contested legal determinations on publicly debated issues. That is the responsibility of other actors in our political system – not least of which is an engaged citizenry making clear its views and working through the political process to make them a reality.

I. The Chain of Command

Before turning to a detailed discussion of the law governing when military orders must be obeyed, it is worth beginning with the basics of who has the authority and responsibility to make and implement military orders under U.S. law. These individuals constitute what is known as the military

merely emphasizing the importance of civilian control, *id.*, this answer and rising tensions with North Korea have brought the law of obedience back into the public eye, *see, e.g.*, Dan Lamothe, *If Trump Wants a First Nuclear Strike Against North Korea, His Advisers Have Few Options*, SYDNEY MORNING HERALD (Aug. 11, 2017), <http://www.smh.com.au/world/if-trump-wants-a-first-nuclear-strike-against-north-korea-his-advisers-have-few-options-20170811-gxud1v.html>.

⁶ *See* Sarah Grant & Jack Goldsmith, *What If President Trump Orders Secretary of Defense Mattis To Do Something Deeply Unwise?*, LAWFARE (Aug. 22, 2017, 12:36 PM), <https://www.lawfareblog.com/what-if-president-trump-orders-secretary-defense-mattis-do-something-deeply-unwise>.

chain of command.⁷ The chain of command dictates which commanders can convey orders to which subordinates.⁸

The Constitution, statutory law, and executive branch practice combine to define the chain of command. Article II of the Constitution places the president at the apex, making him the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”⁹ As Justice Robert Jackson noted in his famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁰ “[t]hese cryptic words have given rise to some of the most persistent controversies in our constitutional history,” but whatever else they might mean, they “undoubtedly pu[t] the Nation’s armed forces under presidential command.”¹¹

Title 10 of the U.S. Code delineates the operational chain of command below the president.¹² It makes the Secretary of Defense the statutory “head” of the Department of Defense, with delegated authority to run the Department,¹³ and authorizes the president to establish, through the Secretary, combatant commands to execute “the range of combat and peacetime missions in accordance with tasking from the Secretary.”¹⁴ Title 10 further specifies that, “unless otherwise directed by the President,” the chain of command to a combatant command runs “from the President to the Secretary of Defense” and “from the Secretary of Defense to the commander of the combatant command”¹⁵ The commanders of combatant commands are also granted the statutory authority to

⁷ JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 225 (2013).

⁸ *Id.* at 226 (noting that the “essence of military command is the conveyance of lawful orders from commander to combatant soldier”).

⁹ U.S. CONST., ART. II, § 2.

¹⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹¹ *Id.* at 641 (Jackson, J., concurring). Although, as discussed later in this Issue Brief, there remains great controversy about the breadth of the president’s Commander in Chief powers – e.g., to what extent that grant of authority allows the president to use force without constitutional approval, there “seems to be no question” that the Clause “establishes a particular hierarchical relationship within the armed forces and the militia (when called into federal service), at least for purposes of traditional military matters – and this relationship appears to be something no statute can change.” 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, 768 (2008).

¹² There are actually two distinct branches of the military chain of command. See JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES xiii (25 March 2013) (hereinafter JOINT PUB. 1). One branch, called the operational chain of command, runs from the president, through the Secretary of Defense, to the Combatant Commanders for missions and forces assigned to the Combatant Commands. See *id.* at xiii-xiv. For purposes other than the operational direction of the Combatant Commands, the chain of command runs from the president to the Secretary of Defense to the Secretaries of the Military Departments. *Id.* For simplicity’s sake, given the subject matter of most of the issues discussed in this brief, all references to the chain of command herein are references to the operational chain of command unless otherwise noted.

¹³ 10 U.S.C. § 112-13.

¹⁴ Grant & Goldsmith, *supra* note 6; see also 10 U.S.C. § 161 (2012).

¹⁵ 10 U.S.C. § 162 (2012).

“prescrib[e] the chain of command to the commands and forces within the command,” unless “otherwise directed by the President or the Secretary of Defense.”¹⁶

The fact that the statutes specifying the chain of command explicitly state that the president may “otherwise direct” a different arrangement “represents congressional recognition of the president’s discretion as commander in chief to shape the structure of his own command” or “at least a constitutional accommodation between the political branches.”¹⁷ In other words, within the constitutional limits set by the Appointments Clause, the president may design the chain of command as he sees fit (as may the Secretary of Defense or combatant commanders with respect to their subordinates, so long as their arrangements do not conflict with the views of their superiors).

Nonetheless, the statutory chain of command is a “norm, which has generally held”¹⁸ – for example, current military directives and doctrine mirror the relevant statutes by stating that the operational chain of command runs from the president to the Secretary of Defense to the commander of a combatant command, with the commander of the combatant command further prescribing the chain of command for forces within his or her command.¹⁹

II. The Law of Obedience

The law governing when the Secretary of Defense and members of the Armed Forces may disobey orders – and the consequences of their doing so – reinforces the proper functioning of the chain of command.

The Secretary of Defense is the only civilian in the operational chain of command (as it currently exists in statute and military doctrine), and he is therefore subject to a different legal regime than the members of the armed forces who constitute the rest of the chain. Under this regime, there is no specific legal provision that subjects him or her to criminal punishment for failing to follow orders.²⁰ The Supreme Court has made clear, however, that the Constitution requires the heads of “purely executive” agencies, such as the Department of Defense, to be at-will employees who serve at the

¹⁶ 10 U.S.C. § 164(c)(1)(B) (2012).

¹⁷ BAKER, *supra* note 7, at 226.

¹⁸ *Id.*

¹⁹ See, e.g., U.S. DEPARTMENT OF DEFENSE, DIRECTIVE 5100.01, FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MAJOR COMPONENTS 2 (December 21, 2010) (hereinafter DOD DIR. 5100.01) (“The operational chain of command runs from the President to the Secretary of Defense to the Commanders of the Combatant Commands.”); JOINT PUB. 1, *supra* note 12, at xiii-xiv (noting that the operational chain of command “runs from the President, through [the Secretary of Defense], to the [Combatant Commanders] for missions and forces assigned to their commands” and that the Combatant Commanders prescribe the chain of command within their commands)”

²⁰ Secretary Mattis, as a former military officer, presents an interesting and, given the long tradition of not having retired military officers serve as the Secretary of Defense, essentially unique question in this respect. Retired members of the armed forces “who are entitled to pay” are subject to the Uniform Code of Military Justice (UCMJ). See 10 U.S.C. § 802(a)(4). If this provision covers Secretary Mattis – an issue this Brief does not explore – he would then face the prospect of criminal penalties for disobeying lawful superior orders, as discussed later in this Brief, in addition to the possible consequences facing a civilian Secretary of Defense.

pleasure of the president.²¹ The Secretary of Defense can therefore refuse to follow a presidential order for any number of reasons – because of a policy disagreement, as a matter of conscience, or because he believes the order is unlawful – but must be prepared to lose his or her job for doing so.²²

Indeed, although presidents rarely fire Cabinet officials, some of the most notable examples of presidents doing so, or Cabinet officials resigning in anticipation of being fired, involve disobedience. The so-called “Saturday Night Massacre” involved Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigning rather than carrying out President Nixon’s order to fire special prosecutor Archibald Cox, who was investigating the Watergate affair. More recently, President Trump fired Acting Attorney General Sally Yates after she refused to defend the president’s Executive Order that suspended entry into the United States for individuals from seven Muslim-majority countries.²³

While the Secretary of Defense risks losing his job if he fails to follow an order issued by the president, the stakes are even higher for soldiers, sailors, airmen, and Marines in the chain of command. That’s because, unlike civilian officials, members of the armed forces face not only the loss of a job for disobeying superior orders,²⁴ but also the prospect of criminal punishment.

Members of the armed forces are subject to the Uniform Code of Military Justice (UCMJ),²⁵ which forms the foundation of the military justice system and defines criminal offenses under military law.

²¹ See *Humphrey’s Executor v. United States*, 295 U.S. 602, 632 (1935) (discussing *Myers v. United States*, 272 U.S. 52 (1926)). The Supreme Court has held, in contrast, that Congress may provide the heads of agencies that exercise “quasi-legislative” and “quasi-judicial” functions – i.e., agencies such as the Securities and Exchange Commission or Federal Trade Commission that focus on rulemaking and adjudication – with tenure protection such that they can only be removed for good cause. See *id.* at 628-29.

²² One further point worth making: Although Cabinet officials serve at the pleasure of the president, it is not accurate to say, as many press reports do, that the president may fire such officials for “any or no” reason. The president is, at the very least, bound by his constitutional obligations, such that he could not fire a Cabinet official because of his religion or race. See Marty Lederman & David Pozen, *Why Trump’s Disclosure to Russia (and Urging Comey to Drop the Flynn Investigation, and Various Other Actions) Could be Unlawful*, JUST SECURITY (May 17, 2017, 12:36 PM), <https://www.justsecurity.org/41024/why-trumps-disclosure-and-more-might-be-unlawful/>.

²³ See Press Release, Office of the Press Sec’y, *Statement on the Appointment of Dana Boente as Acting Attorney General* (Jan. 30, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/30/statement-appointment-dana-boente-acting-attorney-general>.

²⁴ The president’s ability to fire a member of the armed forces is not quite as straightforward as his ability to fire the Secretary of Defense. Congress has provided commissioned military officers with limited tenure protections, stating that they can only be “dismissed” from the armed forces “by sentence of a general court-martial”; “in commutation of a sentence of a general court-martial”; or “in time of war, by order of the President.” The ongoing hostilities in Afghanistan and elsewhere likely make this a “time of war” for purposes of this statute, such that, although “it’s extraordinarily unlikely that any President in the modern era would be obliged to force officers out, as almost all would retire if asked,” if “it became necessary to compel an officer to leave the military, the Constitution and the law provide a way to make that happen.” Charles Dunlap, *Can Presidents ‘Fire’ Senior Military Officers? Generally, yes . . . but it’s complicated*, LAWFIRE (Sept. 15, 2016), <https://sites.duke.edu/lawfire/2016/09/15/can-presidents-fire-senior-military-officers-generally-yes-but-its-complicated/>.

²⁵ See 10 USC §§ 801-946 (2016).

The UCMJ has a number of provisions that touch upon obeying orders.²⁶ Most relevantly, Article 90 of the UCMJ states that anyone who “willfully disobeys a lawful command of his superior commissioned officer” shall receive a punishment that could possibly include death (if the offense is committed during wartime).²⁷ Another provision, Article 92, subjects to punishment anyone who “violates or fails to obey any lawful general order or regulation” or, “having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order.”²⁸ Furthermore, the Manual for Courts Martial (MCM), the document the Department of Defense officially publishes to guide courts-martial, makes clear that “an order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate.”²⁹ In other words, the interest in military discipline is thus vindicated by a “clear presumption . . . that service members will obey the orders issued by their superiors.”³⁰

The duty of obedience extends only to “lawful” orders, however, and the MCM makes clear the “inference [that a superior’s order is legal] does not apply to a patently illegal order, such as one that directs the commission of a crime.”³¹ Service members are therefore not expected to obey – and are, in fact, required to disobey – orders that are “manifestly” or “patently” illegal.³² This rule squares with a long history “of holding soldiers responsible for manifestly illegal acts” that “is already apparent in the military law of ancient Rome.”³³ The Charter of the Nuremberg Tribunal also famously made clear that “the fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility,”³⁴ and the organic statutes of

²⁶ See Shane Reeves & David Wallace, *Can US Service Members Disobey an Order to Waterboard a Terrorist?*, LAWFARE (April 6, 2016), <https://www.lawfareblog.com/can-us-service-members-disobey-order-waterboard-terrorist>.

²⁷ 10 U.S.C. § 890 (2016).

²⁸ 10 U.S.C. § 892 (2016).

²⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14(c)(2) (2016) (hereinafter MCM).

³⁰ Reeves & Wallace, *supra* note 26.

³¹ MCM, *supra* note 29, pt. IV, ¶ 14(c)(2).

³² See GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 359 (2010) (discussing “manifest” illegality as the standard). While the terms “manifestly” and “patently” are used most frequently to identify those orders that must be obeyed, the modern military codes used by armed forces around the world use a variety of “identical or virtually identical” terms to identify such orders, such as “manifest,” “outrageous,” “gross,” “palpable,” “indisputable,” “clear and unequivocal,” “transparent,” “obvious,” “without any doubt whatsoever,” or “universally known to everybody.” See Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 952 (1998).

³³ See *id.* at 946.

³⁴ *Charter of the International Military Tribunal*, art. 8, annexed to Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 UNTS 280, 288; see also SOLIS, *supra* note 32, at 354-57 (discussing the evolution of the standard from Nuremberg).

more recent international criminal tribunals contain similar language.³⁵ Case law from domestic courts-martial also reflect this principle.³⁶

As Colonel David Wallace, the Head of West Point's Department of Law, and his Deputy, Lieutenant Colonel Shane R. Reeves, have recently noted, the fact that the law both expects members of the armed forces to follow orders and holds them criminally liable for doing so in certain circumstances seemingly places the service members in a "difficult position."³⁷ This seeming difficulty stems from the fact that the law of obedience implicates two, potentially competing interests: military discipline and the supremacy of the law. With respect to the former, one of the first things that every service member learns upon starting training is that he or she shall follow orders,³⁸ as no "military force can function effectively without routine obedience" to superior orders.³⁹ The Supreme Court has put it this way:

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. Vigor and efficiency on the part of the officer, and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other.⁴⁰

³⁵ See U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL, § 18.22.4 (June 2015) (hereinafter LAW OF WAR MANUAL); see also Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Annex to *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, art 7(4) (1993), U.N. Doc. S/25704 (May 3, 1993), adopted by U.N. Security Council Resolution 827 (1993), U.N. Doc. S/RES/827(1993) (May 25, 1993) ("The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility."); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, art 6(4), Annex to U.N. Security Council Resolution 955 (1994), U.N. Doc. S/RES/955(1994) (Nov. 8, 1994) ("The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him [or her] of criminal responsibility.").

³⁶ See *United States v. Calley*, 22 U.S.C.M.A. 534, 543-44 (C.M.A. 1973) ("In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement. But there is no disagreement as to the illegality of the order to kill in this case. For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder."). The Supreme Court has recognized this principle in civil cases. See, e.g., *Mitchell v. Harmony*, 54 U.S. 115, 137 (1851) ("Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. . . . And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify.").

³⁷ Reeves & Wallace, *supra* note 26.

³⁸ SOLIS, *supra* note 32, at 341.

³⁹ MICHAEL WALZER, JUST AND UNJUST WARS 311 (4th ed. 2006).

⁴⁰ *In re Grimley*, 137 U.S. 147, 153 (1890); see also *Parker v. Levy*, 417 U.S. 733, 743-44 (1974) (repeating the point); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (noting that the "inescapable demands of military discipline and obedience

At the same time that obedience to higher orders is essential to military effectiveness, the supremacy of the law is also a fundamental value.⁴¹ Presidents of both parties have long recognized that the law itself is an important national security tool,⁴² as has the Department of Defense. Consistent with these views, the Department of Defense's then-General Counsel recently noted that "the law of war is of fundamental importance," not only because following it is the "right thing to do," but also because it is consistent with "fighting well and prevailing."⁴³

Scholars have noted the potentially conflicting nature of these two interests. If the law governing obedience were to reflect only military discipline, it would require obedience to all orders and hold the individual who issued the order liable for any unlawful conduct he or she commanded. Conversely, if the law governing obedience reflected solely a concern with the supremacy of the law, it would hold "subordinates liable for all crimes committed pursuant to superior orders, even when the offense was relatively minor, seemingly lawful under the circumstances, or commanded under threat of court martial."⁴⁴ There is almost universal recognition, however, that neither of these extreme approaches is acceptable. The former elides the fact that crimes are committed by individuals who should, at least in certain circumstances, bear responsibility for their actions; while the latter risks good order and discipline by encouraging the re-litigation of orders as they move down the chain of command.⁴⁵

So how does the law of obedience mediate between the two interests in a way that doesn't put service members in an untenable position? In short, it does so by narrowly defining the set of orders that soldiers are required to disobey – i.e., manifestly or patently illegal orders – to ones that

to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection").

⁴¹ See Osiel, *supra* note 32, at 961-65.

⁴² See PRESIDENT BARACK OBAMA, NATIONAL SECURITY STRATEGY 3 (February 2015) ("The strength of our institutions and our respect for the rule of law sets an example for democratic governance. When we uphold our values at home, we are better able to promote them in the world. This means safeguarding the civil rights and liberties of our citizens while increasing transparency and accountability. It also means holding ourselves to international norms and standards that we expect other nations to uphold, and admitting when we do not."); PRESIDENT GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 36 (March 2006) ("We will encourage all our partners to expand liberty, and to respect the rule of law and the dignity of the individual, as the surest way to advance the welfare of their people and to cement close relations with the United States."); PRESIDENT WILLIAM J. CLINTON, A NATIONAL SECURITY STRATEGY FOR A GLOBAL AGE (December 2000) ("Our national interests are wide-ranging. They cover those requirements essential to the survival and well-being of our Nation as well as the desire to see us, and others, abide by principles such as the rule of law, upon which our republic was founded."); PRESIDENT GEORGE H.W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 6 (January 1993) ("Maintaining our own high standard of democratic practice and the rule of law is vital to our ability to lead by example."); PRESIDENT RONALD REAGAN, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 3 (January 1988) ("National Security Strategy must start with the values that we as a nation prize. Last year, in observing the 200th anniversary of our Constitution, we celebrated these values with a sense of rededication-values such as human dignity, personal freedom, individual rights, the pursuit of happiness, peace and prosperity.").

⁴³ LAW OF WAR MANUAL, *supra* note 35, at ii.

⁴⁴ See Osiel, *supra* note 32, at 962.

⁴⁵ *Id.*

are not, in practice, hard to discern.⁴⁶ Rather, the illegality of such orders are typically present on their face – or, at the very least, plain – leaving a service member no need to “reason why” the orders are unlawful.⁴⁷

Indeed, as one noted military justice scholar has noted, “manifestly” or “patently” illegal orders are “exceedingly rare,” such that a service member “may go through an entire military career and never encounter” one.⁴⁸ There are accordingly few courts-martial finding orders to be manifestly illegal, and the facts of such cases demonstrate the obviousness of the illegality that meets that standard.⁴⁹ For example, in one case, a court-martial found manifestly unlawful an order to take a wounded trespasser “out to the Bomb Dump and shoot him.”⁵⁰ Another case found manifestly unlawful an order to take a prisoner “down the hill and shoot him.”⁵¹

III. A Case Study in What the Law of Obedience Can Do: Trump’s Campaign Rhetoric on Waterboarding and Targeting Civilians

This backdrop helps explain the swift and strong response to then-candidate Trump’s suggesting the possibility of orders directing the use of waterboarding or the targeting of civilians under a Trump Administration. Campaign rhetoric is, of course, different than a specific military order, and some commentators have pointed out that there is some uncertainty as to what then-candidate Trump was precisely recommending.⁵² That said, in both of these scenarios, the hypothetical orders being contemplated raise the specter of “manifest” illegality.

Consider the following reaction by a well-known former senior military lawyer to the prospect of targeting the civilian family members of terrorists:

“Any order to specifically target civilian family members who are not directly participating in hostilities is simply a nonstarter for today’s military,” says [Charles J. Dunlap, Jr., former Deputy Judge Advocate General of the Air Force and current Professor of Practice at Duke Law School.] Such a command, he adds, would be a “classic example of an illegal order that could not and would not be obeyed.”⁵³

Similarly, the Heads of West Point’s Department of Law wrote the following about a potential order to bring back waterboarding or a “hell of a lot worse” under the law in place today:

⁴⁶ See Reeves & Wallace, *supra* note 26.

⁴⁷ SOLIS, *supra* note 32, at 359.

⁴⁸ *Id.* at 358.

⁴⁹ *Id.* at 360 n. 119.

⁵⁰ United States v. Kinder, 14 C.M.R. 742, 750 (A.F.B.R. 1954).

⁵¹ United States v. Griffen, 39 C.M.R. 586 (ACMR 1968).

⁵² See Charles J. Dunlap, Jr., *Trump’s Campaign Rhetoric, ISIS, and the Law of War*, THE CONVERSATION (Mar. 9, 2016, 6:14 AM), <https://theconversation.com/trumps-campaign-rhetoric-isis-and-the-law-of-war-55807> (discussing possible interpretations of Trump’s comments on targeting the family members of terrorists).

⁵³ Mark Thompson, *President Trump’s Illegal Military Orders*, TIME (Mar. 4, 2016), <http://time.com/4244608/donald-trump-military-orders-illegal/>.

The manual regulating interrogation for the armed forces, Field Manual (FM) 2-22.3, expressly prohibits waterboarding, conducting mock executions, inducing hypothermia or heat injury, as well as many other actions. The McCain-Feinstein Amendment to the 2016 National Defense Authorization Act enshrines in congressional legislation the requirement for military members to only use the interrogation techniques found in the manual making waterboarding and other similar techniques obviously illegal. It is clear today that a service member directed to waterboard could . . . justifiably refuse the manifestly illegal order.⁵⁴

Although the law of obedience is difficult to apply in the abstract, since the manifest illegality of an order is “usually an objective question related to a specific situation,”⁵⁵ numerous other commentators have expressed their agreement with these views. In short, the hypothetical action in both of these scenarios – at least as that action has been popularly understood – would transgress a clear and well-known legal command, and therefore be one of those “extremely rare” orders that commands disobedience.

IV. What the Law of Obedience Does Not Do

As the law of obedience continues to be a subject of public discussion, however, it is important to keep in mind that the hypothetical scenarios concerning waterboarding and the intentional targeting of civilians are much more the exception than the rule. Few legal prohibitions are as clear, and, even when the legal rules are clear, the facts are often murky. Disobeying a superior order is something that is “extremely unusual” in the military, and it is only the “extraordinarily rare” order that falls outside the obligation to obey superior orders and therefore triggers the obligation to disobey. Put simply, the law of obedience is simply not a mechanism for contesting difficult legal or policy issues.

This is not to say that the Department of Defense or broader U.S. national security community shortchanges the importance of the rule of law. To the contrary, U.S. national security institutions have an extremely strong rule of law culture. For example, the Department of Defense takes a number of steps to ensure that its people understand their legal obligations. It generally requires service members to receive basic law of war training.⁵⁶ It, as required by certain treaties, disseminates those treaties and promotes their study.⁵⁷ And it also promulgates “instructions, regulations, and procedures” to implement the law of war throughout the organization.⁵⁸

More broadly, career officials care deeply about ensuring that their actions are lawful, and national security processes therefore incorporate timely and competent legal advice, often by having counsel participate in the preparation of options.⁵⁹ The precise nature of this legal counsel will, of course,

⁵⁴ Reeves & Wallace, *supra* note 26.

⁵⁵ SOLIS, *supra* note 32, at 359.

⁵⁶ See DOD DIRECTIVE 2311.01E, *DoD Law of War Program*, ¶ 5.8 (May 9, 2006).

⁵⁷ LAW OF WAR MANUAL, *supra* note 35, at § 18.6.1.

⁵⁸ *Id.* § 18.7.

⁵⁹ See, e.g., Jack Goldsmith, *Libertarian Panic, Unlawful Action, and the Trump Presidency*, LAWFARE (Nov. 22, 2016, 2:28 PM), <https://www.lawfareblog.com/libertarian-panic-unlawful-action-and-trump-presidency> (noting that “career officials in

vary by context. Thus, President Trump’s directive laying out his Administration’s national security process grants a seat at all National Security Council (NSC) and Principals Committee meetings to the White House Counsel and NSC Legal Adviser, presumably so that they can, as appropriate, relay to policymakers legal advice that has been coordinated with subject matter experts from across the interagency.⁶⁰ More tactical legal issues may, on the other hand, be handled by military lawyers in theater, as the Department of Defense officially requires “qualified legal advisers” to be “available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations” and also mandates that “commanders of the combatant commands ensure that all plans, policies, directives, and rules of engagement, and those of subordinate commands and components, are reviewed by legal advisers to ensure their consistency with the law of war and [Department of Defense] policy on the law of war.”⁶¹

Attention to the legality of military operations does not, however, eliminate legal uncertainty. The Constitution itself is full of “open-textured dictates”⁶² – e.g., the president is the “*Commander-in-Chief*” who must “*take care*” that the laws be faithfully executed; individuals are entitled to all of the process that is “*due*”⁶³ – and other key legal provisions use similarly flexible terms – e.g., parties to a conflict must take “*feasible*” precautions to reduce the risk of civilian harm,⁶⁴ combatants must refrain from attacks where the civilian harm would be “*excessive*” in relation to the “*concrete and direct*” military advantage expected to be gained.⁶⁵ And there are relatively few court decisions construing and making more definitive the meaning of these open-textured commands, to say nothing of the fact that it would likely be unreasonable to require all service members to be familiar with cutting-edge legal developments.⁶⁶

the intelligence and defense communities are deeply committed to lawful action to a degree that outsiders do not appreciate”).

⁶⁰ See National Security Presidential Memorandum-4 of April 4, 2017, *Organization of the National Security Council, the Homeland Security Council, and Subcommittees*, 82 Fed. Reg. 16881 (Apr. 6, 2017).

⁶¹ LAW OF WAR MANUAL, *supra* note 35, § 18.5. Academic scholarship, based on interviews with military lawyers, discusses how these policies have been implemented and suggests that judge advocates play an integral role in theater. See Laura Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT’L L. 1 (2010) (discussing how judge advocates, among other things, “mingle with operational employees, the commanders and troops on the battlefield,” “help devise the rules of engagement and train troops in those rules, both before they deploy and on the battlefield,” and “play a key role in ensuring that commanders impose penalties on rule breakers within the military justice system.”).

⁶² See Lisa Monaco, *Help Wanted: Custodians for the Rule of Law*, JUST SECURITY (July 28, 2017, 8:41 AM), <https://www.justsecurity.org/43688/wanted-custodians-rule-law/>.

⁶³ U.S. CONST., ART. II, §§ 2-3 & AMEND. V.

⁶⁴ Harold Koh, Legal Adviser, Department of State, *Letter to Paul Seger, Legal Adviser of Switzerland regarding Switzerland’s Position on the U.S. Reservation to Protocol III of the Convention on Certain Conventional Weapons*, Dec. 30, 2009 (“In particular, the U.S. reservation is consistent with article 57(2)(ii) and article 57(4) of the 1977 Additional Protocol I to the Geneva Conventions. Article 57(4) provides that governments shall ‘take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.’ Although the United States is not a party to Additional Protocol I, we believe these provisions are an accurate statement of the fundamental law of war principle of discrimination.”).

⁶⁵ LAW OF WAR MANUAL, *supra* note 35, § 5.12 (citing Additional Protocol I to the Geneva Conventions).

⁶⁶ *Id.* at § 5.5.2.

It is thus common for there to be reasonable disagreement on national security legal questions. For example, as Georgetown Law Professor and former Department of Defense official Rosa Brooks has noted, several military leaders have questioned the “legality, morality and strategic wisdom” of targeting U.S. citizens with drone strikes outside of traditional battlefields.⁶⁷ Commentators have similarly raised questions about the United States’ targeting of the Islamic State’s oil-related infrastructure in Iraq and Syria.⁶⁸ But these contested questions are precisely the sort of issues that do not trigger a service member’s obligation to disobey a superior order. As a noted scholar of military justice has put it:

Junior soldiers are not expected to parse the orders they receive or apply a lawyer’s judgment to directions from those of higher grade. They are not expected to review law books or be familiar with case law. . . . In doubtful cases, the order must be presumed lawful and it must be obeyed.⁶⁹

It is important to note here that we are not talking about the responsibilities of those individuals, including legal counsel, who are involved in advising the president, the Secretary of Defense, or other military officers who are making decisions in the first instance. These individuals should, as appropriate given their positions and roles, state their views and advocate for the contested legal and policy positions that they think are right.

That said, once the individual vested with the authority to make a decision does so, the strong presumption is that those subordinate to the decision maker in the chain of command will carry out that order. To be sure, Department of Defense doctrine contemplates members of the armed forces asking questions on legal issues through appropriate channels,⁷⁰ and, in practice, “service members are expected to clarify any questionable orders,”⁷¹ but it is only the extremely rare order that is “manifestly” or “patently” illegal that mandates disobedience.

Practical considerations further support this approach. As laid out at the outset, the president (and other senior officials) have broad discretion to fire individuals below them in the chain of command

⁶⁷ See Rosa Brooks, *The Military Wouldn’t Save Us from President Trump’s Illegal Orders*, WASH. POST (Mar. 4, 2016), https://www.washingtonpost.com/opinions/the-military-wouldnt-save-us-from-president-trumps-illegal-orders/2016/03/04/9ef8fd44-e0ea-11e5-846c-10191d1fc4ec_story.html?utm_term=.f6f277d6934b.

⁶⁸ See Marty Lederman, *Is it Legal to Target ISIL’s Oil Facilities and Cash Stockpiles?*, JUST SECURITY (May 27, 2016, 8:57 AM), <https://www.justsecurity.org/31281/legality-striking-isils-oil-facilities-cash-stockpiles/>.

⁶⁹ SOLIS, *supra* note 32, at 359-60.

⁷⁰ See LAW OF WAR MANUAL, *supra* note 35, § 18.3.1 (“Similarly, individual service members are not expected to be experts in the law of war; service members should ask questions through appropriate channels and consult with the command legal adviser on issues relating to the law of war.”); *id.* at § 18.5.2 (“During military operations, questions on the law of war from U.S. forces or coalition partners related to a specific issue should be referred through the operational chain of command for resolution. It may also be appropriate to refer questions to either the office of the Judge Advocate General of a Military Department, the Staff Judge Advocate to the Commandant of the Marines Corps, the General Counsel of a Military Department, the Legal Counsel to the Chairman of the Joint Chiefs of Staff, or the DoD General Counsel.”).

⁷¹ Reeves & Wallace, *supra* note 26.

and to restructure the chain as they see fit. Thus, if a defense official is refusing to carry out an order because of concerns surrounding its legality and the president or another senior official does not share those concerns, he or she likely has many ways in which to try to find another official that will carry out the order. This, of course, could take time and the internal disagreement could alert other institutional actors to the issue; depending on the circumstances, there thus may be substantial political costs if the president or another official chooses to fire or reassign an official over a legal dispute. But, in reality, the president's and other superiors' broad authority over the chain of command will make it difficult for a defense official to prevent the implementation of an order on legal grounds unless there is a broad and deep recognition of its illegality – perhaps because the order crosses a fundamental line with respect to the laws of war or is illegal in a highly salient way that threatens significant strategic and professional blowback (such as the targeting of civilians or waterboarding).

V. The Duty to Obey and the Decision to Use Force

Up to this point, this Issue Brief has almost exclusively discussed the law of obedience in the context of issues concerning how the United States conducts hostilities it has already entered (called the *jus in bello*). But what about legal questions concerning whether the United States should go to war (called the *jus ad bellum* in international law)? Questions of whether to use force in the first place are among the most important a president can face, and such decisions can have extraordinary consequences, particularly in this nuclear age. Indeed, public discussion about the possibility of the United States using force against North Korea is in fact what has recently placed the responsibility of military members to follow superior orders back on the public's radar.⁷²

So how does the law of obedience apply to these questions? A starting point for analysis is the fact that military personnel below a certain rank are generally not held liable for *jus ad bellum*, as opposed to *jus in bello*, violations. Here is how the court in the High Command Trial of the Nuremberg Tribunals put it:

Somewhere between the dictator and supreme commander of the military forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it.⁷³

This distinction has since been incorporated into U.S. military doctrine and more recent international instruments,⁷⁴ and reflects the fact that “it would be unjust to punish individual military

⁷² See Lamothe, *supra* note 5.

⁷³ United States v. Von Leeb et al. (“The High Command case”), 11 TWC 462, 486 (1950).

⁷⁴ See, e.g., Keith Petty, *A Duty to Disobey?*, JUST SECURITY (Nov. 28, 2016, 8:40 AM), <https://www.justsecurity.org/34612/duty-disobey/> (discussing, among other things, the U.S. Army Field Manual on the Law of Land Warfare and negotiations over the crime of aggression at the International Criminal Court).

members based on *jus ad bellum* considerations when they have no influence on whether their State has resorted to force lawfully under applicable international law.”⁷⁵

Thus, since the vast majority of military personnel are not “in a position effectively to exercise control over or to direct the political or military action” of the country,⁷⁶ they are not liable for *jus ad bellum* violations. And precisely because they face no *jus ad bellum* liability, a number of military justice scholars argue, these individual service members have no corresponding obligation to disobey manifestly illegal orders to initiate the use of force.⁷⁷

This leaves those members of the military who do have a say in whether the United States goes to war: It is at least theoretically possible that these individuals could be held liable for *jus ad bellum* violations, provided there was an appropriate forum with jurisdiction over them. How would the law of obedience apply to them?

To begin, it is difficult to define who precisely would fall within this category. The Constitution grants Congress the power to declare war and, as discussed above, makes the president the Commander in Chief, with substantial authority to direct the actions of the military and relieve or replace those who do not heed his or her commands.⁷⁸ It is thus not entirely clear which officials below the president in the chain of command would be considered in a position where they could “influence” the decision to use force or “effectively . . . exercise control over or to direct the political or military action” of the country. There appears to be no direct precedent that answers the question of which U.S. officials might be subject to *jus ad bellum* liability; and, given our

⁷⁵ LAW OF WAR MANUAL, *supra* note 35, § 3.5.2.3.

⁷⁶ Proposed amendments to the Rome Statute of the International Criminal Court would make this class of individuals potentially liable for the crime of aggression – i.e., waging certain types of unlawful wars. See Resolution RC/Res.6, Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, Jun. 11, 2010. The United States has expressed reservations about aspects of these proposed amendments. The language in the text should thus not be taken as a definitive statement about the scope of *jus ad bellum* liability, see Harold Hongju Koh, Legal Adviser, Department of State, *Statement at the Review Conference of the International Criminal Court* (June 4, 2010), although it does track the traditional view that only those who have influence over the decision to go to war may be held liable for it. Cf., e.g., David Rodin, *The Liability of Ordinary Soldiers for Crimes of Aggression*, 6 WASH. U. GLOBAL STUDIES L. REV. 591, 591 (2007) (noting the traditional view that “ordinary soldiers who participate in an unjust war do no wrong so long as they do not violate the norms of *jus in bello*” and arguing that “there is at least a theoretical basis for extending liability for the crime of aggression” to those soldiers).

⁷⁷ See, e.g., Petty, *supra* note 74 (“Where there is a limited duty to disobey manifestly unlawful orders in the *jus in bello* context, there is no corresponding duty in the *jus ad bellum* – the laws governing the initiation of armed conflict.”); see also SOLIS, *supra* note 33, at 359 (“Manifest illegality is not a soldier disobeying based on the asserted illegality of his nation’s *jus ad bellum* resort to force.”). Of course, even if a soldier has no responsibility to disobey a particular order on *jus ad bellum* grounds, a first strike can still present *jus in bello* questions – for example, as Anthony J. Colangelo has recently pointed out, the use of nuclear, instead of conventional, weapons would raise extremely challenging *jus in bello* questions. See Anthony J. Colangelo, *Would the Military Really Have to Obey a Trump Command to Fire a Nuclear Weapon?*, L.A. TIMES (Aug. 4, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-colangelo-duty-nuclear-20170804-story.html>.

⁷⁸ U.S. CONST., ART. I, § 8, cl. 11 & ART. II, § 2.

constitutional structure, it seems likely that, at most, only a small number of individuals would be covered.

Nonetheless, any individuals who do fall in this category could find themselves in a situation where they receive an order from a superior that, if followed, could lead to their being held liable for *jus ad bellum* violations. But even if this is the sort of conflict where an obligation to disobey a manifestly illegal order might theoretically kick in – and it is not clear that such an obligation applies here⁷⁹ – it is worth noting that the reasons identified above that caution against extending the hypothetical scenarios concerning waterboarding and the intentional targeting of civilians too broadly apply with particular force to questions concerning the United States’ resort to the use of force in the first instance.

There are few legal issues that have been subjected to more debate. Consider how, in the past couple of years alone, numerous commentators and Members of Congress have questioned the Executive Branch’s interpretation of the 2001 Authorization for Use of Military Force and the domestic and international legality of U.S. strikes on the Assad Regime in response to its use of chemical weapons. Courts, moreover, have rarely addressed when the president may direct the use of military force, and scholars have taken a range of views on the topic.⁸⁰ Although written in a slightly different context, the following passage from Justice Jackson’s famous *Youngstown* concurrence does a fairly good job of explaining the state of the law:

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

⁷⁹ Many of the scholarly statements noting that there is no duty to disobey manifestly illegal orders in the *jus ad bellum* context do not differentiate between the vast majority of service members who would not be subject to liability for *jus ad bellum* violations and the small handful that would. The statements would thus appear to cover all service members. Nonetheless, one of the major reasons for concluding that service members are not under an obligation to disobey manifestly illegal orders to use force is that they face no liability for such decisions, and the analyses of which I am aware do not specifically consider whether a different conclusion should be reached for service members to whom such liability might attach.

⁸⁰ The academic literature on the president’s constitutional authority to direct the use of military force is vast and complex. For a good, albeit very brief, summary of the debate, a good place to start is Marty Lederman, *Syria Insta-Symposium: Marty Lederman Part I – The Constitution, The Charter, and Their Intersection*, OPINIO JURIS (Sept. 1, 2013), <http://opiniojuris.org/2013/09/01/syria-insta-symposium-marty-lederman-part-constitution-charter-intersection/>. Lederman points out that there are “three principle schools of thought” on this question: (1) a “traditional view” that “except in a small category of cases where the President does not have time to wait for Congress before acting to interdict an attack on the United States, the President must always obtain ex ante congressional authorization, for any use of military force abroad”; (2) a view “at the other extreme” that “there are virtually no limits whatsoever,” as the president can take the nation to war to advance “the national security interests of the United States”; and (3) a “third way,” which has governed recent U.S. practice, pursuant to which the president has substantial authority to act, so long as the action does not rise to the level of war in the constitutional sense. *Id.*

Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question.⁸¹

International law similarly does not always offer definitive answers to questions of when a state may resort to the use of force. Absent a United Nations Security Council Resolution or host nation consent, states may traditionally only use force in self-defense against an actual or “imminent” armed attack. But the question of when an attack is “imminent” is hotly debated, particularly in a world where armies do not mass on borders and nuclear weapons can cause grave damage in an instant.⁸²

Against this backdrop, while one can of course imagine a manifestly illegal order to use force, it seems more likely that such an order would, in all but the rarest circumstances, present a question of contested illegality that does not trigger an obligation to disobey.⁸³ Indeed, consistent with this view, courts – whether appropriately or not – have repeatedly refused to second-guess presidential decisions to order the use of military force abroad, and courts martial have also ruled that such decisions are political questions not susceptible to judicial second-guessing.⁸⁴

Moreover, the practical considerations discussed above – i.e., the president’s broad authority to structure the chain of command and choose individuals to fill it – would appear to apply with particular force in the context of presidential decisions to use force. Disobedience on legal grounds would thus only be effectual if the views were broadly shared and the dissenting individual was not easily replaced or circumvented.

In the end, the foregoing does not mean that senior military officials who might theoretically be liable for *jus ad bellum* violations have no prospect of raising concerns about the legal basis for going to war. To the contrary, the entire premise of these individuals’ potential *jus ad bellum* liability is that they have some measure of influence over the decision to go to war. They thus should have the opportunity to raise their legal concerns – just as the General of U.S. Strategic Command recently said he would do.⁸⁵ Of course, there is no guarantee that raising such concerns will be successful, and there is always the possibility that a senior official may face a conflict between a superior’s order to go to war and his or her own view as to the legality of that order. But there are no definitive

⁸¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

⁸² See, e.g., Press Release, Office of the Press Sec’y, *Remarks of John O. Brennan, “Strengthening Our Security by Adhering to Our Values and Laws”* (Sept. 16, 2011) (“Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an “imminent” attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.”).

⁸³ See, e.g., Jack Goldsmith, *The Ease of Writing an OLC Opinion in Support of Military Action Against North Korea*, LAWFARE (Sept. 14, 2017, 8:53 AM), <https://www.lawfareblog.com/ease-writing-olc-opinion-support-military-action-against-north-korea>.

⁸⁴ See, e.g., *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990); *United States v. Huet-Vaughn*, 43 MJ 105 (1995).

⁸⁵ See Daniella Diaz, *Top General Says He’d Push Back Against “Illegal” Nuclear Strike Order*, CNN (Nov. 20, 2017, 5:07 PM), <http://www.cnn.com/2017/11/18/politics/air-force-general-john-hyten-nuclear-strike-donald-trump/index.html>.

precedents or easy answers as to what happens in such a scenario, and given the discussion above, one should be cautious about extending the waterboarding and civilian targeting examples to this context.

Conclusion

The foregoing illustrates that the military law of obedience is a doctrine designed to protect service members from having to obey manifestly illegal orders. As the response to then-candidate Trump's comments on waterboarding and the targeting of civilians demonstrates, the doctrine helps ensure that the U.S. military does not transgress clear and well-known legal commands. But what the law of obedience most distinctly is not is a tool for saving the Nation from simply unwise or legally contested orders.

This may seem unsatisfying, particularly given how the presidency has accumulated power since World War II. But it is the way it should be. The law of obedience currently enables members of the military to check momentary excesses from leadership in exceptional and rare cases. Expanding it beyond these narrow confines and making service members' willingness to disobey orders an operative legal check would not only decrease the incentive for national leadership to engage in a deliberate, coordinated, and reasoned legal review of military action, but it would also undermine service members' confidence in their orders – with adverse impacts on good order and discipline – and, more fundamentally, have a potentially deleterious impact on civil-military relations. An elected president, Senate-confirmed military leadership, and strict adherence to the chain-of-command are “core elements” of civilian control of the military,⁸⁶ and refusing to follow orders from the president or Secretary of Defense because of a policy or legal disagreement undermines this principle of fundamental importance to American democracy. As Yale Law Professor Bruce Ackerman has noted, military disobedience in these circumstances can “become a precedent for future generals to take the law into their own hands” – a dynamic with uncertain, and potentially disastrous, consequences.⁸⁷

In the end, relying on the military to disobey orders is not the way to prevent unwise or questionable national security practices. Indeed, there is no legal silver bullet to this end. Rather, the best hope is for other institutional actors to exercise their constitutional authorities to change the Nation's course or do what they can to convince the president of the rightness of their views. National security professionals can argue for their preferred positions before saluting smartly if their views don't carry the day. Members of Congress can use their oversight and legislative authority to try to prompt positive action; some, in fact, have already begun to do so by holding hearings or beginning to focus on potential legislative proposals that would address some of the concerns that have put the law of

⁸⁶ Grant & Goldsmith, *supra* note 6.

⁸⁷ Dan Lamothe, *If Trump Wants a Nuclear Attack Against North Korea, His Military Advisers Have Few Other Options*, WASHINGTON POST (Aug. 10, 2017), <https://www.washingtonpost.com/news/checkpoint/wp/2017/08/10/if-trump-wants-a-nuclear-attack-against-north-korea-his-military-advisers-have-few-other-options/>.

obedience back in the public eye.⁸⁸ And an engaged citizenry can “speak out strongly and repeatedly, in the media, in the classroom, in the neighborhood and on the streets.”⁸⁹ For, even though the feedback loop may not occur as quickly as one might wish, national security policy is always ultimately responsive to the will of the people, through the ballot box, if nothing else.

⁸⁸See, e.g., Ted Lieu, *The Need to Reform the Nuclear Weapons Launch Approval Process*, THE HILL (Aug. 5, 2016, 6:04 AM), <http://thehill.com/blogs/congress-blog/the-administration/290410-the-need-to-reform-the-nuclear-weapons-launch-approval>. (“Congress must work to reduce the structural defects in America’s nuclear launch protocols. One reform would be to require more people—who are not beholden to the President—to concur prior to launching a nuclear strike, such as the Speaker of the House and the Senate Majority Leader. It is time to put appropriate checks and balances on the one decision that could annihilate civilization as we know it.”); Garrett Hinck, *Video and Testimony: Senate Foreign Relations Committee Hearing on Authority to Order the Use of Nuclear Weapons*, LAWFARE (Nov. 14, 2017, 10:40 AM), <https://www.lawfareblog.com/video-and-testimony-senate-foreign-relations-committee-hearing-authority-order-use-nuclear-weapons>.

⁸⁹ Brooks, *supra* note 67.

About the Author

Christopher Fonzone is a partner in the Washington D.C. office of Sidley Austin. Previously, he served in the Obama Administration as Deputy Assistant to the President, Deputy Counsel to the President, and National Security Council (NSC) Legal Adviser. He also worked at the Department of Justice in the Office of Legal Counsel and on the Civil Division's Appellate Staff; served as Special Counsel to the General Counsel of the Department of Defense; and clerked for Justice Stephen Breyer of the United States Supreme Court and Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit. Fonzone is a graduate of Cornell University and Harvard Law School.

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