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Command Responsibility in the Twenty-First Century: The United States Basic Framework and Future Military (and Quasi-Military) Operations

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COMMAND RESPONSIBILITY IN THE TWENTY-FIRST CENTURY: THE UNITED STATES BASIC FRAMEWORK AND FUTURE MILITARY (AND QUASI-MILITARY) OPERATIONS

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The purpose of this essay is not to argue for changes to international humanitarian law, the law of war, or the legal structures governing military command, but rather to confirm that the basic legal framework of the United States does not provide a means to excuse lapses in command responsibility in future engagements.[1] The military command model examined in this article begins with the president's Commander in Chief authority and how this authority is expansive, delegable, and contained. The term "contained" denotes that the authority to subject to liability for its misuse whether for a law of war violation or for other "extra-legal" acts. (It is not a purpose of this article to argue that any particular president, past or notional, has committed war crimes, but rather to assess the United States' constitutional command authority construct in light of command responsibility obligations). The doctrine of command responsibility can be defined as "a legal doctrine which in certain circumstances imposes criminal liability on a military commander for law of war violations committed by forces under [that commander's]

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1. For the purpose of this essay, the terms "law or war" and "international humanitarian law" are used interchangeably. *See, e.g.*, FRITS KALSHOVEN & LIESBETH ZEGFELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 11 (2001); Christopher Greenwood, *Historical Development and Legal Basis, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 9 (Dieter Fleck ed., 1999). Just as the purpose of this essay is not to seek changes in the legal construct governing liabilities arising from conflict, this essay does not seek a new definition for either term.

command."[2] The United States Department of Defense concluded in its 2015 *Law of War Manual* that "[c]ommanders have duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war."[3] The *Manual* also notes that a commander can be held responsible for the conduct of forces under her or his command, either by taking an affirmative role in the commission of law of war offenses, or omission in failing to prevent offenses.[4] This is an important point: failing to take the steps necessary to prevent law of war offenses from occurring, when a commander has the authority or ability to do so, may also constitute an offense.[5] Commanders also have a duty to ensure that forces that commit such offenses are held liable through one of several adjudicatory systems,

2. VICTOR M. HANSEN & LAWRENCE FREIDMAN, THE CASE FOR CONGRESS: SEPARATION OF POWERS AND THE WAR ON TERROR 54 (2009). The authors of this book refer to "the commander" in a vernacular denoting that such persons are men (e.g. him, his). My bracketing of words is to ensure that commanders may be from both genders. *See also In re* Yamashita, 327 U.S. 1, 14-16 (1946); Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996); Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704 (May 3, 1993), reprinted in 32 I.L.M. 1159, 1192-94 (1993). The international application of the doctrine of command responsibility differs. *See Prosecutor v. Blaskic*, Judgment (Trial Chamber ICTY, March 3, 2000) ¶¶ 295, 302 ("Proof is required that the superior has effective control over the persons committing the violations of international humanitarian law in question, that is, has the material ability to prevent the crimes and to punish the perpetrators thereof."); *Prosecutor v. Kayishema*, Judgment (Trial Chamber ICTR, May 21, 1999) ¶ 229 (stating that the "material ability to control the actions of subordinates is the touchstone of individual responsibility under Article 6(3)"); *Prosecutor v. Delalic*, Judgment (Trial Chamber ICTY, Nov. 16, 1998) ¶¶ 377, 378; *Prosecutor v. Akayesu*, Judgment (Trial Chamber ICTR, Sept. 2, 1998) ¶ 491.

3. The Secretary of Defense is established by 10 U.S.C. § 113, which reads in pertinent part:

> (a) There is a Secretary of Defense, who is the head of the Department of Defense, appointed from civilian life by the President, by and with the advice and consent of the Senate. A person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force.
>
> (b) The Secretary is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President and to this title and section 2 of the National Security Act of 1947 (50 U.S.C. 3002) he has authority, direction, and control over the Department of Defense.

10 U.S.C. § 113(a)-(b) (Supp. III. 2012). It should be noted that the term "command" is absent from this language, but by analogy, the Secretary has authority and control over forces in a manner analogous to command. Policies and orders relating to all aspects of the military may be issued by the Secretary of Defense unless contrary to law. This includes adherence to international law norms. These norms are now found in the Manual. *See* DEPT'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL§ 18.23.3, at 1123 (2015) [hereafter MANUAL]. On the history of this manual and its applicability to military personnel, see generally Charles Dunlap, *The DoD* Law of War Manual *and its Critics: Some Observations*, 92 INT'L L. STUDIES 85 (2016); Dep't of Def., Directive 2311.01E (Feb. 22, 2011).

4. MANUAL, *supra* note 3, § 18.23, at 1122-24.

5. *Id.* § 18.23, at 1122-23.

including military trials titled as courts-martial.[6] Neither the *Manual*, nor this article, equates liability with a finding of guilt.[7] To the contrary, liability simply denotes a legal accusation (preferably of a charge similar to an indictment) followed by an adjudication which fully incorporates due process. Although modern due process has significantly evolved since World War II, the concept of command responsibility dates prior to the Fifteenth Century with the case of Peter von Hagenbach where a court composed of Burgundian nobles prosecuted and sentenced to death one of their own for cruelly mistreating a civilian population in Breisach, a city that had nominally been under Habsburg rule.[8]

Although the doctrine of command responsibility predates the United States, the United States' legal academy[9] and Department of Defense (as well as the predecessor agencies, the War Department and Department of the Navy), have been influential in the shaping of this doctrine. For instance, dating to the Civil War, with the issuance of General Orders 100, the United States undertook a lead role in trying to confine war's deleterious effects to the actual place of the fighting and the forces involved.[10] General Order 100 embodied the core law of war principles such as proportionality, distinction, and necessity.[11] Moreover, the United States Government sent representatives to the Hague Conventions of 1899 (Convention with respect to the Laws and Customs of War on Land),[12] 1907 (Convention respecting

6. *Id.*

7. *See id.* § 18.23.3.2, at 1124.

8. *See, e.g.*, Timothy L.H. McCormack, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudication Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 692-93 (1997); Dr. Matthew R. Lippman, *Humanitarian Law: The Development and Scope of the Superior Orders Defense*, 20 PENN ST. INT'L L. REV. 153, 158 (2001). Concepts of the law of war predate the trial of von Hagenbach. *See generally* MAURICE KEEN, CHIVALRY 231-45 (1984).

9. *See generally* Neal Kumar Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006). Professor Katyal appears to consider the academy as one means in which legal theory may be translated into legal practice. *See* Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

10. *See* General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863), *reprinted in* FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Washington: Government Printing Office 1898), http://www.loc.gov/rr/frd/Military_Law/pdf/Instructions-gov-armies.pdf.

11. MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 107-08 (2014).

12. *See* Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803.

the Laws and Customs of War on Land),[13] as well as to the Geneva Convention of 1929,[14] and the four Geneva Conventions of 1949.[15] These representatives shaped a "majoritarian approach" to international law, and as well as an expansion of a law of war regime to constrain conflict.[16] Although in several instances the United States has neither participated in international judicial bodies nor adhered to significant decisions of international governing bodies, this has not resulted in narrowing the doctrine of command responsibility.

A modern definition of command responsibility does not limit the term "command" to a military commander; rather, extends this term to a national leader regardless of whether this leader is elected through a democratic process, appointed through a parliamentary process, created through inheritance, or through a power struggle. The term "command responsibility" denotes the ability to govern or control aspects of a sovereign's armed forces as well as personnel or persons engaged in military operations related to conflict (or support to forces engaged in military operations) at the sovereign's behest, or aligned with the sovereign.[17] For reasons noted below, the United States' current doctrine of command responsibility remains viable in light of the changing nature of foreseeable conflicts.[18] However, before any analysis can be accomplished there are two aspects of modern military operations that are essential to discern—the changing nature of the battlefield, and the United States Government's current enforcement mechanisms and practices.

It is critical to note that the United States Government has been at the center of the changing nature of the modern "battlefield," and its military has applied the law of war in each conflict beginning with establishing a legal basis (*jus ad bellum*) for entering into the conflict. Since World War II, the

13. *See* Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

14. Convention Relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

15. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3115; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

16. *See, e.g.*, GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 54-60 (2016).

17. *See, e.g.*, Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573 (1999); Leslie Green, *Superior Orders and Command Responsibility*, 75 MIL. L. REV. 309 (2003).

18. *See* Mamani v. Berzain, 825 F.3d 1304, 1308 (11th Cir. 2016).

legal basis for conflict which the United States used to justify entering into a conflict took cognizance of Articles 2(4) and 51 of the United Nations Charter.[19] "Cognizance," however, does not denote a strict interpretation of the wording by the executive branch in each conflict. Article 2(4) requires signatory nations to refrain from using force or threatening force against another state for purposes contrary to the United Nations.[20] That is, the United Nations, by its construct, strives for peaceful resolutions between conflicting states. Article 51 permits a state to act in self-defense, but this article also requires notification to the Security Council.[21] Although the myriad legal basis advanced by the executive branch during these operations has often been challenged, the fact that there was a stated legal basis denotes that, in theory, the United States will comply with prevailing rules governing the law of war, including the enforcement of governing command responsibility. From the end of World War II to the present, the United States military, *inter alia*, has taken an overt part in conflicts in Korea (1950-1953),[22] Lebanon (1958),[23] Vietnam (1961-1975),[24] the Dominican Republic

19. *See* Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J.L. COMM. 503, 652 (2008).

20. U.N. Article 2(4) reads: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, ¶ 4.

21. U.N. Article 51 reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51.

22. *See* United States v. Bolton, 192 F.2d 805, 806 (2d Cir. 1951); S.C. Res. 82 (June 25, 1950); S.C. Res. 83 (June 27, 1950); ROBERT LECKIE, THE WARS OF AMERICA 858 (1968).

23. Titled as "Operation Blue Bat," and consistent with the so-called "Eisenhower Doctrine," the United States and Great Britain briefly occupied Beirut in 1958 for the purpose of preventing a communist takeover of that country's government. *See, e.g.*, GEOFFREY WAWRO, QUICKSAND: AMERICA'S PURSUIT OF POWER IN THE MIDDLE EAST 235-39 (2010); DOUGLAS LITTLE, AMERICAN ORIENTALISM: THE UNITED STATES AND THE MIDDLE EAST SINCE 1945, at 235 (2008).

24. For the basis of increased United States involvement leading to an aerial campaign in 1964, see Act of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (known as the "Gulf of Tonkin Resolution"). The historic literature on the modes of warfare and legal analysis of the United States involvement in Vietnam are without parallel. *See generally* WILLIAM CONRAD GIBBONS, THE U.S. GOVERNMENT AND THE VIETNAM WAR: EXECUTIVE AND LEGISLATIVE ROLES (1995).

(1965),[25] Grenada (1983),[26] Lebanon (1983),[27] Libya (1986),[28] Panama (1989-1990),[29] Iraq (1990-1991),[30] Somalia (1992-1993),[31] Yugoslavia (1998-1999),[32] Afghanistan (2002-present),[33] and Iraq (2002-present).[34] Each of these examples included a presidential statement of legality as well congressional funding. There are other examples in which the United States Government supplied forces with military training, advisors, and materiel, as well as a number of covert operations in which small scale "special forces" or intelligence personnel took part that are not listed herein. With the exception of the Korean War, none of these conflicts involved a mass confrontation between symmetrical forces.[35] In contrast, the majority of the operations were against armed insurgencies, guerilla factions, or forces which were not constructed to comply with international legal norms. Asymmetrical conflict against an insurgent adversary is likely to continue for the remainder of the century. Another type of "conflict," discussed further

25. 52 Dep't. St. Bull., U.S. Acts to Meet Threat in Dominican Republic 738 (1965); ABRAHAM LOWENTHAL, THE DOMINICAN INTERVENTION 1-2 (1972).

26. *See, e.g.*, Stefoano Luconi, *Operation Urgent Fury: The Shift From Rhetorical to Military Offensive in Reagan's Global Rollback of Communism*, *in* THE GLOBALIZATION OF THE COLD WAR: DIPLOMACY AND LOCAL CONFRONTATION, 1975-85, at 38-52 (Max Guderzo & Bruna Bagnato eds., 2010).

27. *See, e.g.*, Geoffrey Kemp, *The American Peacekeeping Force in Lebanon*, *in* THE MULTINATIONAL FORCE IN BEIRUT, 1982-1984, at 131 (Anthony McDermott & Kjell Skjelsbaek eds., 1991).

28. *See, e.g.*, WILLIAM E. LEUCHTENBERG, THE AMERICAN PRESIDENT: FROM THEODORE ROOSEVELT TO BILL CLINTON 642-43 (2015).

29. *See, e.g.*, KARIN VON HIPPEL, DEMOCRACY BY FORCE: US MILITARY INTERVENTION IN THE POST-COLD WAR WORLD 27-42 (2000).

30. *See Crisis in the Persian Gulf: Hearings and Markup Before the H. Comm. on Foreign Affairs*, 101st Cong. 59 (1990) (statement of James A. Baker III, Sec'y of State). For pertinent resolutions, see, e.g., S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 2, 1990); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990). For the United Nations' response, see S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991); William V. O'Brien, *Desert Storm: A Just War Analysis*, 66 ST. JOHN'S L. REV. 797 (1992).

31. *See* RICHARD J. REGAN, JUST WAR: PRINCIPLES AND CASES 184-93 (1996).

32. *See NATO's Role in Relation to the Conflict in Kosovo*, N. ATL. TREATY ORG., http://www.nato.int/kosovo/history.htm (last visited Jan. 21, 2017).

33. *See* S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001).

34. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498. Note that United States military forces were engaged against Saddam Hussein's Iraqi regime since 1992, providing air operations to contain Hussein's forces from attacking ethnic minorities and starting a new offensive. Remarks on Hurricane Andrew and the Situation in Iraq and an Exchange with Reporters, 2 PUB. PAPERS 1429, 1429-30 (Aug. 26, 1992).

35. Franklin B. Miles, Asymmetric Warfare: An Historical Perspective 5, 6, 8-10 (unclassified strategy research project) (Mar. 17, 1999), https://www.hsdl.org/?view&did=439201.

below, requires highly technical competency in space and in cyberspace either against a symmetrical adversary (China, Russia, etc.), or against an asymmetrical adversary (e.g. ISIS), is also a possibility.

The article is divided into two sections. Part I analyzes the constitutional basis of command responsibility as well as how this responsibility has been shaped by the Judicial Branch and Congress. Part II briefly discusses the application of international law and human rights norms in the context of two models of future operations and the corresponding potential for command liability, beginning with the Commander in Chief. This article does not provide the full array of international law or human rights laws, but rather focuses on two principle areas of consideration. The first involves the use of non-military personnel who assist or take part in quasi-military roles. An increasing concern arises from questions over the extent of responsibility of United States command authorities over foreign, and particularly indigenous, forces. The second involves the targeting of an opponent's warfighting capabilities in future conflicts through highly technical means without a full knowledge of the transit path to target. As a critical caveat to this article is the concession that it is by no means as comprehensive as one might like. Rather, the purpose of the article is to contribute to a recognition that traditional notions of command authority in the United States constitutional construct are expansive but, correspondingly, so too are the liabilities for failure to adhere to the principles of the law of war. And, most importantly, the current United States legal construct affords full opportunity for the domestic prosecution of violations and safeguards against forces succumbing to violations.

I. COMMAND AUTHORITY FROM THE PRESIDENT TO THE COMMANDING OFFICER: A BRIEF ROADMAP

The United States Constitution, in Article II, Section 2, Clause 1, empowers the President with a clear mandate of command authority over the nation's active duty military forces.[36] Command authority traditionally flows from the President, through the Secretary of Defense, to combatant commanders, and then to commanding officers fielded throughout the

36. The U.S. Constitution, Article II, Section 2, Clause 1 reads in full:

> The President shall be 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; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

U.S. CONST. art. 1, § 2, cl. 1.

world.[37] At present, the military is structured into nine combatant commands, which are categorized as either "geographic" or "functional."[38] Although constitutional and statutory constraints on this authority exist, in no direct language does the Constitution place limits on the Commander in Chief's authority to command forces. There are, however, indirect limits. For instance, Article I leaves to Congress the authority to declare war[39] as well as the authority to create laws governing the conduct of the Armed Forces, including a state National Guard when called into federal service.[40] The primary set of governing rules for the internal discipline of the Armed Forces

37. The office and powers of the Secretary of Defense are codified in 10 U.S.C.S. § 113 (2009). See also *supra* note 3 for pertinent statutory text. The command authorities of combatant commanders are authorized in 10 U.S.C. § 164 (2006). This section reads, in pertinent part:

> c) Command Authority of Combatant Commanders.—
>
> (1) Unless otherwise directed by the President or the Secretary of Defense, the authority, direction, and control of the commander of a combatant command with respect to the commands and forces assigned to that command include the command functions of—
>
> (A) giving authoritative direction to subordinate commands and forces necessary to carry out missions assigned to the command, including authoritative direction over all aspects of military operations, joint training, and logistics;
>
> . . .
>
> (E) assigning command functions to subordinate commanders . . . .

Id. Although there is an understandable misconception, the Chairman of the Joint Chiefs of Staff and the Joint Chiefs possess no command authority over fielded military forces. *See, e.g.*, U.S. ARMED FORCES, JOINT PUBLICATION 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, at II-10 to II-11 (2013); DEPT. OF DEF., DIRECTIVE 5100.01, FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MAJOR COMPONENTS (2010). The Chairman serves as the primary advisor to the President and Secretary of Defense. *Id.* The Chief of Staff of the Air Force, Chief of Staff of the Army, Chief of Naval Operations, and Commandant of the United States Marine Corps have, in addition to advising the Secretary of Defense and President, the duty to organize, train, and equip the nation's fielded forces. *Id.* The legal authority for this construct is elaborated in 10 U.S.C.S. §§ 101-18505 (2016).

38. Combatant commands are established per 10 U.S.C. § 111(b)(9) (2006). The functional commands include United States Transportation Command, United States Special Operations Command, and United States Strategic Command. Each of these commands has a worldwide reach in the sense that each deploys strategic warfighting capabilities across the globe. The geographic commands are divisible as follows: United States Northern Command (North America), United States European Command, United States Southern Command (South America), United States Africa Command, United States Central Command (Egypt and the Near East), and United States Pacific Command. The geographic commands control military forces in their area, with the exception of specified functions such as embassy guards, special-forces, and certain intelligence operations, operating within the command. *See, e.g.*, DEP'T OF DEF., DIRECTIVE 5100.01, FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MAJOR COMPONENTS (2010); ANDREW FEICKERT, CONGRESS. RESEARCH SERV., THE UNIFIED COMMAND PLAN AND COMBATANT COMMANDS 3, 28, 36, 58 (2013); U.S. ARMED FORCES, *supra* note 37, at II-9 to II-13; Unified Command Plan, U.S. DEP'T OF DEFENSE, http://www.defense.gov/Military-Services/Unified-Combatant-Commands (last visited Jan. 19, 2017).

39. Congress shall have power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. CONST. art. 1, § 8, cl. 11.

40. Congress shall have power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. 1, § 8, cl. 14.

is the Uniform Code of Military Justice (UCMJ).[41] In one regard, the UCMJ sets limits on the president's control over service members. This body of law prevents military commanders from interfering in military trials, to convict service-members and others on trial, or to deny such persons of their fair trial rights.[42] Additionally, because Congress holds the power to appropriate monies for the Armed Forces, it can shape the size, scope, and availability for deployment of the military.[43] Finally, the United States Senate bears responsibility for consenting to the promotion of commissioned officers, and most importantly, officers who achieve the rank of general officers.[44] At best, the very wording of these legislative authorities are only indirect influences on the President's commander in chief powers over the forces of the United States. On the other hand, while the President's command authority is broad, it has been both expanded and constricted by the judicial and legislative branches.

a. Judicial Buttressing of Command Authority through Constitutional Jurisprudence

There are three countervailing aspects of the federal judiciary regarding command authority. The first aspect is that from the earliest period in the nation's history, the judiciary determined that there was no inconsistency between the Constitution's construct and president's unparalleled authority over the military.[45] Although the federal judiciary's early jurisprudence established the constitutional consistency of the president's command authority, an important recognition is that in 1896, in *Closson v. United States ex rel. Armes*, the Court of the Appeals for the District of Columbia indirectly found that command authority delegated by the President through the Secretary of War and to the various commands in the Army remained constitutional.[46] Thus, a secretary of defense or subordinate military

41. *See, e.g.*, Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2006).

42. *See* 10 U.S.C. § 837 (2006).

43.

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States. . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years. . . . To provide and maintain a Navy.

U.S. CONST. art. 1, § 8, cl. 1, 12-13.

44. *See, e.g.*, 10 U.S.C. § 624(c) (1994).

45. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 946-49 (2008).

46. *See* Closson v. United States *ex rel.* Armes, 7 App. D.C. 460 (D.C. Cir. 1986). Much of the literature regarding this decision involved court-martial jurisdiction over civilians because Armes was a retired officer recalled to active duty for the purpose of a court-martial proceeding.

commanders carry with them, a delegable mantle of the president's command authority. A second aspect of the command authority arises when the president exercises a command outside of the parameters of statutory law. That is, the president can commit military forces into an overseas operation contrary to congressional intent.[47] The federal judiciary, through a doctrine of non-justiciability arising from a "political question," has indirectly strengthened the president's command authority by informing the nation's citizenry that challenges to presidential actions in the realm of command authority over overseas deployed military forces can only be resolved through the electorate or the legislative branch.[48] For instance, in 1953, the *Orloff v. Willoughby*, the Court determined that the judicial branch was not competent to review the placement of service-members within the military, and, in the middle of its decision, the Court noted "judges are not given the task of running the Army."[49] Although *Orloff* may be of limited value in the present as a result of superseding laws ending the conscription program which gave rise to that case, the comment regarding the competency of judges provides critical context to other decisions on command authority.

Significantly, the appellate court decision also highlights the broad constitutionally permissible scope of the downward delegation of military authority, even to retired officers. *See, e.g.*, Joseph Bishop, Jr., *Court-Martial Jurisdiction of Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 352 (1964); Richard E. Blair, *Court-Martial Jurisdiction over Retired Regulars: An Unwarranted Extension of Military Power*, 50 GEO. L. J. 79, 84-87 (1961-62); *see also* Taussig v. McNamara, 219 F. Supp. 757, 759 n.3 (D.D.C. 1963).

47. The controversy between the executive and legislative branches over the War Powers Resolution provides a context for this issue. *See, e.g.*, RICHARD NIXON, WAR POWERS RESOLUTION, H.R. DOC. NO. 93-171 (1973); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982); JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 113 (1995).

48. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (holding, in a non-military decision, that the non-justiciable test is as follows: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government?; (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise?; (iii) Do prudential considerations counsel against judicial intervention?). In my opinion, the answer to each of these inquiries would require us to decide this case if it were ready for review. However, in *Marbury v. Madison* and *Luther v. Borden*, the Court had already formulated a recognition of the political question. Marbury v. Madison, 5 U.S. 137, 165-70 (1803); Luther v. Borden, 48 U.S. 1, 46-57 (1849); *see also* Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment) (declaring the Court's incompetency to adjudicate disputes between the legislative and executive branches in the foreign policy arena).

49. Orloff v. Willoughby, 345 U.S. 83, 95 (1953). Of course, the federal judiciary can review service-members' and civilian employee claims of discrimination, but not the placement of individual service-members to overseas locations, or the determination that service-members receive specified training or access to classified data. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (noting that gender discrimination in military pay and allowance mechanisms is subject to judicial scrutiny). However, even judicial avenues of redress have significant limits. *See* Chappell v. Wallace, 462 U.S. 296, 305 (1983).

In *Martin v. Mott*, an appeal arising from the 1812 War with Britain, Justice Joseph Story, in writing for a unanimous Court, penned into the decision the following statement on the command authority of the president: "A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object."[50] In *Fleming v. Page*,[51] a decision arising from the war with Mexico which ended in 1848, Chief Justice Taney described the president's commander in chief authority as "authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States."[52] In 1974, in *Parker v. Levy*, the Court upheld the principle that individual military commanders to include the president, may curtail free

50. Martin v. Mott, 25 U.S. 19, 30 (1827). The petitioner in this decision, a New York militia soldier, refused to acquiesce to the state governor's calling up of the militia in compliance with President James Madison's declaration of an emergency and Congress' corresponding declaration of war against Britain. *Id.* at 20-22. The War itself was controversial, as no federalist legislator voted to declare war on Great Britain. *See, e.g.*, DONALD HICKEY, THE WAR OF 1812: A FORGOTTEN CONFLICT 48-52 (bicentennial ed. 2012). The reactions of citizens directed to comply with militia obligations were correspondingly negative. *See* Jason Britt, *Unwilling Warriors: An Examination of the Power to Conscript in Peacetime*, 4 NW. J.L. & SOC. POL'Y 400, 402 (2009). The rest of the statement is equally salient to the understanding of command authority:

> The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance.

Martin v. Mott, 25 U.S. 19, 30 (1827). Thus, while the decision was predicated on the Military Act of 1795, the overall passage on command authority remains a bulwark statement of the President's constitutional authority to the present. *Id.*

51. 50 U.S. 603 (1850). The issues underlying this decision did not occur as a challenge to the President's command authority. Rather, a shipping firm challenged a port collector of duties against the judgement of a tax on a merchant shipment that had originated in the Mexican state of Tamaulipas. The shipping firm claimed that since the Mexican state and its port of origin, Tampico, were held by the United States, the tax duties levied against the shipment were in error. Chief Justice Taney led a unanimous Court to conclude that because Congress had not incorporated this territory into the United States as either a territory or a state, while the territory itself was subject to United States military authority, it remained part of Mexico and was therefore a foreign land. *Id.* at 615. The Court, in issuing this decision placed a limit on the President from diminishing Congressional authority in foreign policy (territorial enlargement of the United States through the Senate's treaty making power) as well as its authority under Article I, § 3, Clause 1 which reads:

> New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

Id. at 615.

52. *Fleming*, 50 U.S. at 615.

speech in order to effectuate a disciplined force.[53] Underlying this authority is that it has been enabled by Congress through the passage of specific statutes, though such an authority clearly predates the Constitution. In 1998, in *Department of the Navy v. Egan*, the Court, in a decision arising from a challenge to a denial of a security clearance, recognized that the judiciary has "traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[54] And, in *Solorio v. United States*, the Court upheld the ability of the President to administer the full array of jurisdiction over service-members, through the UCMJ.[55] That there are two types of offenses within the UCMJ is critical to note. Most of the offenses are congressionally enumerated, but several, listed under Article 134 are grants of authority to the executive branch to create crimes essential to the "good order and discipline" of the military.[56] Finally, in limited circumstances, military jurisdiction may be asserted over civilians in the employ of the Department of Defense.[57]

In addition to the federal judiciary directly recognizing the doctrine of command authority, it has also, notwithstanding the limits set by the Court in

53. 417 U.S. 733, 759 (1974). This decision arose during the Vietnam Conflict in which service-members had expressed their opposition to the government's military policies by publishing underground newspapers as well as publicly demonstrating against the war. *See, e.g.*, Avrech v. Sec'y of the Navy, 418 U.S. 676 (1974); Cortright v. Resor, 477 F.2d 245 (2d Cir. 1971); Priest v. Sec'y of the Navy, 517 F.2d 1013 (D.C. Cir. 1977); DAVID CORTRIGHT, SOLDIERS IN REVOLT: GI RESISTANCE DURING THE VIETNAM WAR 20-24 (1975); JOSHUA KASTENBERG, SHAPING MILITARY LAW: GOVERNING A CONSTITUTIONAL MILITARY 105-18 (2014).

54. 484 U.S. 518, 530 (1988).

55. 483 U.S. 435 (1987). Solorio reversed a prior decision, *O'Callahan v. Parker*, 395 U.S. 258 (1969), in which the Court in 1969, narrowed military jurisdiction to offenses committed overseas as well as to offenses that had a military nexus. *Id.* However, *Solorio* eviscerated *O'Callahan*. *See* KASTENBERG, *supra* note 53, at 179-81.

56. *See, e.g.*, 10 U.S.C. § 934 (2012). This law, which codifies the "General" article (Article 134 UCMJ) reads as follows:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

The article itself has been the subject of historic criticism. *See, e.g.*, Paul T. Fortino, *Article 134 of the UCMJ: Will* Avrech *Mean Taps for the General Article*, 50 NOTRE DAME L. REV. 158, 159-60 (1974); Robinson O. Everett, *Article 134, Uniform Code of Military Justice: A Study in Vagueness*, 37 N.C. L. REV. 142, 143 (1959). However, this grant of authority from Congress to the president should also be viewed as a requirement that the president necessarily oversee compliance with international law applicable to armed conflict.

57. *See* 10 U.S.C. § 802 Art. 2(a)(10) (2012) (stating that the doctrine applies "[i]n time of declared war or a contingency operation [to] persons serving with or accompanying an armed force in the field"); *see also* United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012).

Youngstown Sheet and Tube Co. v. Sawyer,[58] indirectly but significantly created a strengthened command authority through the aforementioned non-justiciable political question doctrine. For instance, in *Holztman v. Schlesinger*,[59] the Court determined that even though a congresswoman was among the appellants contesting the United States aerial assault in Cambodia and Laos, and even though Congress had refused to appropriate monies for military operations in either of the two countries, the federal judiciary would not intervene against the executive branch.[60] Although Justices William O. Douglas and Potter Stewart tried to enable the judiciary to determine whether the United States' involvement in Vietnam was constitutional or unconstitutional, the other justices refused to consider the question at all.[61] During the Vietnam Conflict, neither the Court nor the lesser judiciary was willing to directly address whether the use of conscripted citizens in the conflict was of a constitutional magnitude.[62] Even the use of military intelligence to surveil United States citizens was determined to be outside of the jurisdiction of the federal courts.[63] And specified questions such as whether a presidential order to place naval mines in harbors in North Vietnam likewise were deemed to be out of the judiciary's reach.[64]

The precedent set by the courts during the Vietnam Conflict continued through later military operations. After the United States' invasion into Grenada, a federal court dismissed a lawsuit from eleven congressmen to enjoin President Ronald Reagan from further deployment of forces because Congress has not declared war.[65] In 1990, forty congressmen sought to prevent United States forces from engaging in offensive operations against Iraq unless Congress first expressly authorized the use of such forces.[66] However, a federal judge found the issue non-justiciable and solely within

58. 343 U.S. 579 (1952); *see also Ex Parte* Milligan, 71 U.S. 2 (1866) (imposing a limit against using the military to supersede civil trials of civilians).

59. 414 U.S. 1421 (1973).

60. 484 F.2d 1307, 1312 (2d Cir. 1973). The facts of this decision are found in *Holtzman v. Schlesinger*, 361 F. Supp. 553, 555-60 (E.D.N.Y. 1973). Note that Congress had acted to prohibit the use of funds for military operations in Cambodia. Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, § 7(a), 84 Stat. 1942, 1943 (1971) (prohibiting funds appropriated from being used to introduce U.S. ground troops into Cambodia).

61. Mora v. McNamara, 389 U.S. 934 (1967).

62. *See* Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

63. Laird v. Tatum, 408 U.S. 1 (1972).

64. Da Costa v. Laird, 471 F.2d 1146 (2d Cir. 1973).

65. Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985); *see also* Flynt v. Weinberger, 588 F. Supp. 57 (D.C. Cir. 1984) (finding the imposition of a press ban during the invasion of Grenada a non-justiciable question).

66. *See* Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

the province of the Congress as a whole to decide.[67] No domestic liability for the exercise of command authority contrary to an international court decision appears to exist at present. For instance, in 1986, the International Court of Justice determined that the United States' participation in mine-laying activities in Nicaraguan waters was unenforceable through any domestic judicial mechanism.[68] In short, the president's commander in chief authority is enhanced by the political question non-justiciability doctrine. Given the construct of such an expansive authority, then, a brief analysis of the statutory restraints as well as enhancements to this authority become critical to understanding how command responsibility exists in the nation's domestic jurisprudence.

b. Statutory Basis of Command and Command Responsibility: The UCMJ

In 1950, Congress issued the UCMJ in place of two sets of laws governing the Armed Forces.[69] The UCMJ remains a unique disciplinary tool of military commanders, but trials conducted under it largely mirror federal criminal trials. Prior to 1950, the Army, and after 1947, the Air Force, was governed by a set of laws titled as the Articles of War.[70] Since the country's founding, Congress had, on five occasions, issued new versions of the Articles of War to incorporate some expansions in due process rights.[71] Personnel in the Department of the Navy were governed under the jurisdiction of the Naval Articles.[72] All uniformed service personnel, including reservists and National Guardsmen who are called into federal duty are subject to the UCMJ.[73] Certain civilians who accompany the Armed Forces of the United States to overseas locations are likewise subject to this body of law.[74] In theory, the UCMJ adopts the basic provisions of the law of war.[75] There is an additional statutory constraint on the commander in chief

67. *Id.*

68. Charter of the United Nations and Statute of the International Court of Justice, Jun. 26, 1945, 59 Stat. 1031, T.S. No. 933; Military and Paramilitary Activities in and Against Nicaragua (Nicar v. U.S.), Judgment, 1986 I.C.J. 14 (June 27). On enforceability, see Shelley v. Kramer, 334 U.S. 1 (1948) and Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977).

69. *See* THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 355-56 (John Whiteclay Chambers II et al. eds., 1999).

70. *Id.*

71. *See* JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980, at 1-129 (2001).

72. *Id.*

73. 10 U.S.C. § 12406 (2012).

74. 32 U.S.C. § 326-27 (2012).

75. *See, e.g.*, United States v. Harman, 68 M.J. 325, 326 (C.A.A.F. 2010); GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 22-33 (1989).

authority in terms of issuing orders to subordinate commands. In 1895, William Winthrop, a scholar and military officer who gained the sobriquet "the Blackstone of Military Law," penned that the president has the authority to issue direct orders as well as regulations to the nation's forces.[76] Yet, in 1867, Congress issued an act requiring the president to submit orders through a chain of command, thereby prohibiting an ability to directly command forces in the field.[77] It may remain an open question as to whether this law is enforceable or can withstand constitutional scrutiny.

While the UCMJ incorporates due process rights for service members, it enforces the doctrine of command responsibility in a myriad of ways, and only a few of these are noted herein. For instance, the UCMJ prohibits persons subject to its jurisdiction from articulating contemptuous language toward certain officials including the president, vice president, Congress as a whole, the Secretaries of Defense and Service Secretaries, and state governors in locations where the person is stationed.[78] "Mutiny" and "sedition" may be severely punished, to include, in rare circumstances, a death sentence.[79] Thus, freedom of speech—the most basic of rights in the United States—is restricted in the military. Contained within the UCMJ is a

76. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 27 (1896). On the title "Blackstone of Military Law," see Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006) (citing Reid v. Covert, 354 U.S. 1, 19 (1957)).

77. FRANCIS D. WORMUTH & EDWIN B. FIMRAGE WITH FRANCIS P. BUTLER, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 92 (2d ed. 1989). Note, however, this law was issued during a period in which the president and Congress were at odds over Reconstruction and Congress attempted to remove the president through impeachment. It is the author's opinion that the judiciary would conclude a challenge to this act to be nothing more than a non-justiciable political question.

78. "Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct." 10 U.S.C § 888 (2012).

79.

> (a) Any person subject to this chapter who—
>
> (1) with intent to usurp or override lawful military authority, refuses, in concert with any other person, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;
>
> (2) with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence, or other disturbance against that authority is guilty of sedition;
>
> (3) fails to do his utmost to prevent and suppress a mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior commissioned officer or commanding officer of a mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.
>
> (b) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished by death or such other punishment as a court-martial may direct.

10 U.S.C. § 894 (2012).

criminal offense enumerated as Article 92 and titled "failure to obey a lawful order or regulation."[80] While it is true that persons subject to the UCMJ have a duty to resist unlawful orders, both the UCMJ and corresponding case law inform such persons that orders are presumed to be lawful.[81] Congress also enabled the Secretary of Defense and the departmental secretaries to issue regulations to departmental personnel, and the service secretaries had the authority to delegate through the various echelons of military command, the authority to issue further regulations.[82] As previously noted, failures to follow regulations can also result in criminal liability for persons subject to the UCMJ.[83]

The president, even while serving in the capacity as commander in chief, is not amenable to the UCMJ's jurisdiction. Additionally, neither the secretary of defense nor the service secretaries can be subject to courts-martial.[84] Yet, the president, as well as the civilian personnel noted above, possess the power of a general court martial convening authority.[85] That is, each can order a court-martial (or other military trial) to be held against a service-member or other person subject to the military law.[86] This authority, at a minimum, places a duty on the president, secretary of defense, and service-secretaries, in light of the *Manual*, to not only prosecute persons for committing war crimes, it also, places a duty to affirmatively prevent such crimes from occurring.[87]

There should be no question as to whether a failure to ensure that service-members and civilians accompanying comply with the laws of war enforceable against a sitting president or the civilian leadership of the

80.

> Any person subject to this chapter who—
> (1) violates or fails to obey any lawful general order or regulation;
> (2) 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; or
> (3) is derelict in the performance of his duties;
> shall be punished as a court-martial may direct.

10 U.S.C. § 892 (2012).

81. *See, e.g.*, 10 U.S.C. § 890 (2012) ("(i) Inference of lawfulness. 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. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime. (ii) Determination of lawfulness. The lawfulness of an order is a question of law to be determined by the military judge.").

82. *See, e.g.*, United States v. Romano, 45 M.J. 269 (C.A.A.F. 1990).

83. 10 U.S.C. § 892 (2012).

84. *See* 10 U.S.C. § 802 (2012).

85. 10 U.S.C. § 822 (2012).

86. *Id.* In terms of military trials (commissions) over non-uniformed combatants, see 10 U.S.C. § 948h (2012).

87. U.S. CONST. art. II, § 3, cl. 1.

military to the same degree that enforceability applies against military officers. The president is subject to impeachment for violating various provisions in U.S. law that are applicable to all civilians such as "crimes against the law of nations,"[88] or more specific offenses such as the Torture Victims Prevention Act of 1991.[89] Given that the Constitution requires the president to faithfully execute the nation's laws, it must be assumed that this provision covers all laws.

Impeachment processes begin the House of Representatives, and then transition into the Senate.[90] Constitutionally, a single member of the House may initiate an impeachment vote against a president, vice president, or executive officer whose position occurred as a result of the Senate confirmation process.[91] The Constitution requires two-thirds of the senators present for a vote to concur on the individual's removal from office.[92] The operative basis for impeachment is the commission of "high crimes and misdemeanors."[93] Impeachment of civilian officers charged with the maintenance and discipline of the armed forces is not unheard of in American history. For instance, in 1876, the House of Representatives impeached Secretary of War William Belknap for the misappropriation of federal monies and the acceptance of money for appointments.[94] And, of course, President Richard Nixon faced the possibility of an actual impeachment trial but resigned before submitting to the Senate's jurisdiction.[95] If, as noted above, a president is not amenable to the UCMJ or the Manual, she or he is certainly responsible to ensure that forces conform to the law of the former and the expectations of the later. Of course, the liability of a president under either the Constitution's impeachment process, or other avenues of accountability is not only a legal question, it also presents a political question.[96]

88. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

89. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73. Whether the president is subject to the criminal laws in terms of prosecution is an unknown, based on several constitutional ramifications.

90. U.S. CONST. art. I, § 2, cl. 5.

91. 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2342, at 712, § 2400, at 823-24, § 2469, at 948 (1907).

92. U.S. CONST. art. I, § 3, cl. 6-7.

93. U.S. CONST. art. II, § 4. "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." *Id.*

94. HOUSE COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, at 20 (Comm. Print 1974); WILLIAM S. MCFEELY, GRANT: A BIOGRAPHY 443-44 (1982).

95. *See* United States. v. Nixon, 418 U.S. 683 (1974).

96. *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010); El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 844 (D.C. Cir. 2010); Nixon v. United States, 506 U.S. 224,

II. FUTURE OPERATIONS AND COMMAND AUTHORITY

Although there is a possibility that in the coming decades the United States will participate in an array of conflict arenas, two areas important to consider are operations in which the United States personnel assist in the training and joint operations with indigenous forces and cyber operations. In regards to cyber operations, there is, of course, a difference between state action which falls short of war such as law enforcement and the collection of intelligence, on the one side, and actual conflict in which the law of war becomes a governing body of rules. This article is written in regard to only the conflict governed by the law of war (and hence the *Manual*). However, because the *Manual's* drafters concluded that there are a number of "unknowns" in the application of the law of war to cyber operations, and the drafter's provided very little on United States service-personnel responsibilities regarding the conduct of indigenous police and military forces in the treatment of their own population.

a. Cyber Operations

Because cyber operations remain relatively new, there is little settled agreement as to the line of delineation between a military operation and government sanctioned "strategic messaging," or the use of propaganda. The ability to attack an opposing state's or hostile organization's critical infrastructure through the use of electronic media in cyberspace without placing members of an armed force (or government) can, in one respect, be viewed as part of a continuum of warfare which began with the age of artillery.[97] However, the use of computer technology in state to state relations as well as in dealing with even a hostile organization does not necessarily amount to war, or even a step toward an armed conflict.[98] As an example, in 2010, Iranian computers governing Siemens' manufactured centrifuge

226-27 (1993); Stephen Wasby, *Impeachment as a "Political Question"*, 16 JUST. SYS. J. 113, 113-116 (1994).

97. *See*, *e.g.*, HEATHER DINNISS, CYBER WARFARE AND THE LAWS OF WAR 1-5, 60 (2012). In TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt ed., Cambridge University Press 2017), there is a consensus among scholars that participated in the authoring of the Manual that a cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the use of force. The *Manual*'s drafters recognized that there the cyber-attacks against the Georgian government constituted a use of force because these operations were used in furtherance of a kinetic military operation. However, there was a lack of consensus amongst scholars that Stuxnet constituted a cyber-attack. *Id.* at 88.

98. This is taking into account UN Charter 2(4). *See generally* THOMAS C. WINGFIELD, THE LAW OF INFORMATION CONFLICT: NATIONAL SECURITY LAW IN CYBERSPACE, 354-55 (2000); Duncan B. Hollis, *An E-SOS for Cyberspace*, 52 HARV. INT'L L.J. 373, 405 (2011).

systems alleged to be used, in part, for the enrichment of fissile material "crashed" after a malicious code caused the computers to continuously reboot, but there is no consensus that the malicious code constituted an act of war.[99] Three years earlier, cyber-attacks against Estonian government computer systems which likely originated in Russia were not considered to be an act of war, even though such attacks were disabling to certain governmental functions.[100] On the other hand, cyber-attacks against the Georgian Government prior to the Russian invasion into Georgia in 2008 were clearly part of a military operation.[101] In scenarios in which the use of cyber-based weaponry does constitute an act of war, there are several command responsibility features important to consider.

The targeting of an opposing state's or organization's infrastructure by denying the use of computer technology, disrupting critical governmental data, corrupting governmental functions are legitimate military functions.[102] The *Manual* describes the use cyber-based assets (or weaponry) to create floods, disrupt civil air traffic monitoring and control systems, and the triggering of a nuclear reactor meltdown as constituting a use of force.[103] Less clear is whether these notional operations would result in a violation of one or more of the fundamental principles of the law of war, because the operation would depend on the necessity and proportionality of the operation, as well as whether non-combatant populations were sufficiently protected. Even more vexing would be to analyze the law of war principles against would be an operation involving "strategic messaging," which results in civilian deaths and injuries. Additionally, the respect for neutrality remains a guiding principle in cyber operations, as it exists in physical domains such as maritime and airspace.[104]

Ultimately, in regard to military cyber operations, the president remains responsible for ensuring that military personnel subject orders as denoted by international law have exclusive control over the actual operation and civilians, such as federal employees and contractors do not take direct part in hostilities.[105] As such, the president is also responsible for requiring, either

99. SOLIS, *supra* note 16, at 706-07.

100. Stephen W. Korns & Joshua E. Kastenberg, *Georgia's Cyber Left Hook*, 38 PARAMETERS 60-63 (2009).

101. *Id.* at 65.

102. *See, e.g.*, Harold Hongju Koh, Legal Adviser, Department of State, International Law in Cyberspace: Remarks as Prepared for Delivery to the USCYBERCOM Inter-Agency Legal Conference (Sept. 18, 2012), reprinted in 54 HARV. INT'L L.J. ONLINE 1 (Dec. 2012).

103. MANUAL, *supra* note 3, at 998-99.

104. *Id.* at 1002.

105. *See, e.g.*, *id.* at 1008; INT'L COMM. OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2003), https://www.icrc.org/ara/

directly, or through the delegable authority, that actual military operations in cyberspace conform to the law of war. The failure to do so would constitute a failure in command responsibility. Thus, when a question arises as to whether an activity is a military operation or a state function to convince a foreign population that its leaders are in error, there is a probable requirement to constrain the possibility of collateral damage.

b. U.S. Oversight Over Indigenous Coalition Forces to Conform to the Law of War

Since the beginning of the United States' involvement in the training of Afghani forces, a question has existed as to the extent that United States forces are required to "police" indigenous forces to conform to basic laws safeguarding human life and health. For instance, the Afghani police and military have been accused of recruiting children to serve as soldiers. Afghani police and soldiers have also been accused of abusing women and children near the presence of U.S. military personnel.[106] Yet news reports indicate that although United States service-members have reported on the abuse, there have been specific instructions to ignore the abuses.[107] Such instructions appear to run afoul of a specific Department of Defense Instruction that personnel attached to the military are to prevent the trafficking of humans for the purpose of prostitution.[108]

Should the United States military find itself in an increased ground role in Syria or in other countries, there is a likelihood that indigenous forces "allied" with the United States will not conform to the law of war or respect civilians within their own country. Moreover, as in the case of Afghanistan, the conduct of indigenous forces, while constituting repugnant illegal acts, may not be, *per se*, a law of war violation because the acts are not conducted against foreign nationals in actual conduct. But the complicity or failure of

assets/files/other/direct_participation_in_hostilities_sept_2003_eng.pdf; Geoffrey S. Corn, *Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 J. NAT'L SECURITY L. & POL'Y 257, 259-61 (2008).

106. *See, e.g.*, Shane Harris, *Marines Trained That Rape in Afghanistan Is a "Cultural" Issue*, DAILY BEAST (Sept. 23, 2015, 11:12 AM), http://www.thedailybeast.com/articles/2015/09/23/marines-taught-to-look-the-other-way-when-afghans-rape-children.html; Christine Hauser, *Green Beret Who Hit Afghan Child Rapist Should Be Reinstated, Lawmakers Say*, N.Y. TIMES (Mar. 3, 2016), https://www.nytimes.com/2016/03/04/world/asia/green-beret-who-hit-child-rapist-should-be-reinstated-lawmakers-say.html.

107. *See, e.g.*, Joseph Goldstein, *U.S. Troops Are Told to Ignore Afghan Allies' Abuse of Boys*, N.Y. TIMES, Sept. 21, 2015, at A1.

108. DEP'T OF DEF., INSTRUCTION NUMBER 2200.01, Combating Trafficking in Persons (Apr. 21, 2015).

U.S. forces to affirmatively stop such actions from occurring does implicate the law of war. Given the president's expansive authority over the nation's forces, the issuance of orders through the Department of Defense to theatre commanders is not only a reasonable use of authority, it appears to be necessary. As noted earlier, in addition to the issuance of orders, the president is empowered to craft offenses under Article 134. In regard to the oversight of "allied forces," no specific offense has been issued regarding a duty to prevent abuses to non-combatants by "allied" forces. The Secretary of Defense possesses the authority to issue an order requiring United States personnel to protect the lives and health of local nationals.[109] And such an order would minimize allegations that United States forces aided or abetted crimes.

While it is true that the law of war might not apply to indigenous forces, since such forces are engaged in internal policing, the conduct of United States service-members, civilian personnel, and contracted forces are governed by an international law regime which mirrors the law of war. One analogy to consider is that the law of war requires the transfer of captured persons only to a sovereign that complies with international humanitarian law.[110] This law is mirrored in a pending bill titled "A law to establish a policy against sexual abuse on all United States military installations, whether located in the United States or overseas."[111] Introduced by Congressman Duncan Hunter, a California Republican, the bill originated out of the failure of senior commanders to enable their forces to intervene on behalf of child victims.[112] The *Manual* already prohibits the trafficking of persons in detainee status for the purpose of prostitution, and Additional Protocol I, signed on June 8, 1977, likewise prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault."[113] While the legislative process considers Congressman Hunter's bill, the commander in chief could

109. However, such orders may not contravene the intent of Congress. *See, e.g.*, Harmon v. Brucker, 355 U.S. 579, 582 (1958).

110. *See, e.g.*, *An Arrangement for the Transfer of Enemy Prisoners of War and Civilian Internees from the Custody of British Forces to the Custody of American Forces, Dated 31 January 1991, in* THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW 348 (Peter Rowe ed. 1993).

111. H.R. 4717, 114TH CONG. (2016) ("To establish a policy against sexual abuse on all United States military installations, whether located in the United States or overseas.").

112. "(a) Findings.—Congress makes the following findings in part: (1) Members of the United States Army and Marine Corps serving in Afghanistan were advised to respect cultural and religious practices of Afghans and told that sexual abuse perpetrated by local allies was a matter of Afghan law." *Id.*

113. Additional Protocols to the Geneva Conventions art. 75(2)(b), June 8, 1977, 1125 U.N.T.S. 37.

issue an order to prevent what the bill seeks, and more importantly, the secretary of defense can likewise, take the initiative and issue a regulation to the same effect.

CONCLUSION

This article is by no means a comprehensive analysis of command responsibility. Yet it is clear that because the president possesses a vast array of constitutionally based authority as commander in chief, and this authority is delegable, there is a command responsibility which attaches to this authority. That this authority has been judicially expanded through the non-justiciable political question doctrine and the federal judiciary has left review of military operations decisions to the legislative branch and electorate should reinforce an expectation that that a sitting president has an affirmative duty to ensure that not only the military complies with international humanitarian law, but also that all persons amenable to United States law who accompany the military or work alongside of it comply with the law as well. Part of the command responsibility equation demands that in areas which the *Manual*'s drafters had decided were too new to address (or areas not envisioned at the time despite the comprehensive nature of the *Manual*), the president will ensure issuance of regulations to comport with the law. There is also the issue that liability for the failure to ensure compliance as well as for breeches in the law also be enforced through the constitutionally appropriate adjudication.