

**COMMAND RESPONSIBILITY IN THE
TWENTY-FIRST CENTURY: THE UNITED**

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including military trials titled as courts-martial.⁶ Neither the *Manual*, nor this article, equates liability with a finding of guilt.⁷

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below, requires highly technical competenc

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 war³⁹ as well as the authority to

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

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 *Holtzman 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

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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 in the presence of a superior officer. UCMJ, Art. 91, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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

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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.

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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

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

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systems alleged to be used, in part, for the enrichment of fissile material

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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,

