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The Presidential Coup

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What prevents the President from abusing the military power at his disposal to stage a coup and actively impose presidential rule upon the United States? What if generations of presidential assertions of authority, congressional acquiescence, and judicial abdication have not only laid the groundwork for the President to use military power to impose his will, but in fact have legally sanctioned such a presidential coup? And what if the informal checks and balances that historically protected against such abuse—specifically a benevolent President, a constitutionally faithful military, intra-executive branch checks, and public opinion—have also eroded to no longer function as checks?

This Article explores these questions by arguing that the decay of formal and informal checks, buttressed by historical incrementalism, has created an environment ripe for a malevolent President to use the military power at his disposal to effectuate a presidential coup. Legal scholarship seldomly takes seriously the threat of a presidential coup. Such reluctance to engage seriously with a presidential coup has

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been understandable, as little historical evidence suggested a President was likely to turn the military power at his disposal against the American people. Nonetheless, the increasing use of the military by the Trump Administration to circumvent the constitutional design, followed by the use of the military to quell Black Lives Matter protests in Washington, D.C., and then culminating in the President's reluctance and failure to use the military power at his disposal to defend the U.S. Capitol during the January 2021 insurrection suggest that such a threat of a presidential coup is ever-growing and becoming increasingly realistic. Legal scholarship needs to engage with the potential of a presidential coup with seriousness, examining its risk, the means to protect against it, and whether those means are functioning. This Article presents a novel framework that does just that.

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INTRODUCTION

Consider the following hypothetical: a sitting United States President, frustrated by Congress' refusal to act on his signature legislative agenda, signs a series of executive orders and deploys the vast administrative state to carry out his objectives. But when the executive agencies prove unable or unwilling to carry out his agenda, he turns to the military to fulfill his objectives. In turn, when state and local governments pass laws to actively shield themselves from the impact of these orders, the President declares an insurrection and deploys the military to break these "federalism blockades" by taking control of city and state governments as necessary to enforce his executive orders. And when the President's term expires, he finally uses the military to prevent a peaceful transfer of power and instead remains in office, enabled and protected by the military apparatus at his disposal.

This scenario may be less far-fetched than it appears. Indeed, the first presidential action contemplated above—presidential deployment of the military to carry out basic domestic enforcement functions—occurred with regular frequency during the Trump administration. The second action—federal militarization of local jurisdictions under the purview of the Insurrection Act—consequently became a more realistic probability than at any time since the Civil War and Reconstruction.[1] And the third and ultimate action—a refusal to leave office—was a significant enough risk at the end of the Trump Administration that senior military leadership had to consider it.[2] While the end of the Trump administration may have slowed the risk, it was not

1. *See* Andrew Buttaro, *The Posse Comitatus Act of 1878 and the End of Reconstruction*, 47 ST. MARY'S L.J. 135, 147–52 (2015) (details the involvement of federal soldiers in policing the Southern states during Reconstruction).

2. *See* Susan B. Glasser, *"You're Gonna Have a F**king War": Mark Milley's Fight to Stop Trump from Striking Iran*, NEW YORKER (July 15, 2021), https://www.newyorker.com/news/letter-from-bidens-washington/youre-gonna-have-a-fucking-war-mark-milleys-fight-to-stop-trump-from-striking-iran.

extinguished, leaving the ultimate question: what legal and structural checks exist to prevent the use of the military to effectuate such a "presidential coup"? This Article examines that question.

The Trump Administration's use of the military in domestic matters added a sense of urgency to the question asked above. Take President Trump's rhetoric and frustrations regarding border security between the United States and Mexico as an example.[3] As a political candidate, President Trump advocated building a wall to separate the United States from Mexico, even going as far as to promise that Mexico would pay for the wall.[4] He campaigned strongly to replace the informal "catch-and-release" policy of addressing illegal immigration with federal prosecution.[5]

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3. *See generally* Rebecca Morin, *A Quick History of Trump's Evolving Justifications for a Border Wall,* POLITICO (Jan. 8, 2019, 9:26 PM), https://www.politico.com/story/2019/01/08/trumps-evolving-reasons-border-wall-1088046.

4. Donald Trump (@realDonaldTrump), TWITTER (Aug. 5, 2014, 4:34 PM), https://twitter.com/realDonaldTrump/status/496756082489171968 [https://web.archive.org/web/20170505144255/https://twitter.com/realDonaldTrump/status/496756082489171968] ("SECURE THE BORDER! BUILD A WALL!"); Donald Trump (@realDonaldTrump), TWITTER (Aug. 25, 2015, 8:39 AM), https://twitter.com/realDonaldTrump/status/636155822326829056 [https://web.archive.org/web/20161114225826/ttps://twitter.com/realDonaldTrump/status/636155822326829056]. ("Jeb Bush just talked about my border proposal to build a 'fence.' It's not a fence, Jeb, it's a WALL."); *Transcript: Read the Full Text of the CNBC Republican Debate in Boulder,* TIME (Oct. 28, 2015, 11:40 PM), http://time.com/4091301/republican-debate-transcript-cnbc-boulder/ (Donald Trump said, "As far as the wall is concerned, we're going to build a wall. We're going to create a border. We're going to let people in, but they're going to come in legally. They're going to come in legally. And it's something that can be done, and I get questioned about that. They built the [G]reat [W]all of China. That's 13,000 miles. Here, we actually need 1,000."); *Face the Nation Transcript August 23, 2015: Trump, Christie & Cruz,* CBS NEWS (Aug. 23, 2015, 1:53 PM), https://www.cbsnews.com/news/face-the-nation-transcripts-august-23-2015-trump-christie-cruz/ (Donald Trump stated, "And, you know, we're building a wall. And it's going to be a great wall. OK? And, by the way, Mexico will pay for it.").

5. *See Full Transcript: Donald Trump's 2016 Republican National Convention Speech,* NEWSWEEK (July 22, 2016, 1:34 AM), https://www.newsweek.com/donald-trump-full-transcript-republican-national-convention-hillary-clinton-482945 (quoting Donald Trump asserting that "[b]y ending catch-and-release on the border, we will end the cycle of human smuggling and violence"). *Full Text: Donald Trump Immigration Speech in Arizona,* POLITICO (Aug. 31,

Then-candidate Trump also campaigned strongly against sanctuary cities such as Chicago, Seattle, and Washington D.C., which would not provide information to federal authorities about individuals allegedly in the country illegally.[6]

Once elected, President Trump was unable to successfully act on any of these campaign positions. After Mexico refused to pay for a wall,[7] he turned to Congress.[8] Congress also refused to adequately fund the wall.[9] When he

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2016, 10:54 PM), https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614 (Donald Trump proclaimed that he would "[e]nd Catch-And-Release . . . . Under my Administration, anyone who illegally crosses the border will be detained until they are removed out of our country."); Sarah N. Lynch & Mica Rosenberg, *U.S. Attorney General Reviews Calls to Prosecute First-Time Border Crossers,* REUTERS (Apr. 6, 2018, 4:59 PM), https://www.reuters.com/article/us-usa-immigration/u-s-attorney-general-renews-calls-to-prosecute-first-time-border-crossers-idUSKCN1HD2VM ("Ending 'catch and release' was one of Trump's central promises during the 2016 campaign, but immigration authorities have faced a shortage of space to house people who have been detained.").

6. *See Full Text: Donald Trump Immigration Speech in Arizona*, *supra* note 5 (Then-candidate Donald Trump promised, "We will end the Sanctuary Cities that have resulted in so many needless deaths. Cities that refuse to cooperate with federal authorities will not receive taxpayer dollars, and we will work with Congress to pass legislation to protect those jurisdictions that do assist federal authorities."). *See generally* Michelle Ye Hee Lee, *What Exactly Are 'Sanctuary Cities' in Immigration Policy?*, WASH. POST (Sept. 7, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/09/07/what-exactly-are-sanctuary-cities-in-immigration-policy; Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1704–05 (2018) (offering a comprehensive analysis of the Trump administration's immigration policies and examining its campaign to 'crack down' on sanctuary cities).

7. *See* Louis Nelson, *Mexico to Trump: We Won't Pay for a Border Wall Under Any Circumstances,'* POLITICO (Aug. 28, 2017, 7:10 AM), https://www.politico.com/story/2017/08/28/trump-border-wall-mexico-responds-242084 (including a statement from the Mexican foreign ministry reading: "[a]s the Mexican government has always stated, our country will not pay, under any circumstances, for a wall or physical barrier built on US territory along the Mexican border").

8. *See* Tal Kopan, *Trump Asks for $33B for Border, Including $18B for Wall,* CNN (Jan. 6, 2018, 5:32 AM), https://www.cnn.com/2018/01/05/politics/border-security-billions-trump-wall/index.html (quoting a White House official, "the border wall needs to be fully funded by Congress").

9. *See* Philip Rucker et al., *Trump Threatens Again to Shut Down Federal*

sought comprehensive immigration reform to include additional resources to patrol the border, Congress again rejected such legislation.[10] His Executive Order attempting to end sanctuary cities by eliminating all federal grants for sanctuary localities was then struck down by a federal judge.[11]

Government Over Border-Wall Funding, WASH. POST (July 29, 2018), https://www.washingtonpost.com/politics/trump-threatens-again-to-shut-down-federal-government-over-border-wall-funding/2018/07/29/a8795546-9333-11e8-810c-5fa705927d54_story.html ("The president has not received from Congress as much funding as he has requested for his proposed wall along the Mexican border."); Bob Bryan, *Congress' Massive New Spending Bill Completely Whiffed on Trump's Demands for 'The Wall*,*'* BUS. INSIDER (Mar. 22, 2018, 10:29 AM), https://www.businessinsider.com/trump-wall-funding-for-mexico-border-in-spending-bill-2018-3 ("The massive $1.3 trillion omnibus bill does not include funding for what Trump typically refers to as the 'Wall.' Instead, the bill includes just under $1.6 billion for increased border security.").

10. Donald Trump (@realDonaldTrump), TWITTER (Jul 5. 2018, 10:08 AM), https://twitter.com/realDonaldTrump/status/1014873774003556354 [https://web.archive.org/web/20180705142841/https://twitter.com/realDonaldTrump/status/1014873774003556354] (stating "Congress must pass smart, fast and reasonable immigration laws now"); *see also* Jacob Pramuk, *House Overwhelmingly Rejects Latest Republican Immigration Bill After Last-Ditch Trump Push for Support,* CNBC (June 27, 2018, 1:51 PM), https://www.cnbc.com/2018/06/27/house-rejects-latest-republican-immigration-bill.html. *But see* Mike DeBonis, *House Passes Bills to Crack Down on 'Sanctuary Cities' and Deported Criminals Who Return to U.S.,* WASH. POST (June 29, 2017), https://www.washingtonpost.com/powerpost/house-passes-bills-to-crack-down-on-sanctuary-cities-and-deported-criminals-who-return-to-us/2017/06/29/f65419c4-5cff-11e7-9fc6-c7ef4bc58d13_story.html ("The House on Thursday passed two hard-line immigration bills that would penalize illegal immigrants who commit crimes and local jurisdictions that refuse to work with federal authorities to deport them."); Ira Mehlman, *Senate Has No Excuse for Ignoring the Public's Will to Deport Criminal Aliens*, THE HILL (Sept. 7, 2017, 10:20 AM), https://thehill.com/blogs/pundits-blog/immigration/349601-senate-has-no-excuses-for-ignoring-the-publics-will-on (criticizing the Senate for not voting on the above referenced bills passed by the House).

11. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801 (Jan. 25, 2017) ("In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes . . . ."); Cnty. of Santa Clara v. Trump, 250 F. Supp. 3d 497, 508 (N.D. Cal. 2017) ("The Constitution vests the spending powers in Congress, not the President, so the Order cannot constitutionally place new conditions on federal funds."); Cnty. of Santa Clara v. Trump, 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2017) (granting summary judgment in favor of Santa Clara and enjoining

In most of these instances, President Trump turned to the military to fulfill his policy objectives. He utilized the National Guard to patrol the border,[12] military lawyers to prosecute alleged illegal immigrants in federal court,[13] and

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the portion of the Executive Order the prevents sanctuary cities from receiving federal funding); City of Chicago v. Sessions, 888 F.3d 272, 277 (7th Cir. 2018), *vacated* No. 17-2991, 2018 WL 4268817 (7th Cir. 2018) ("The founders of our country well understood that the concentration of power threatens individual liberty and established a bulwark against such tyranny by creating a separation of powers among the branches of government. If the Executive Branch can determine policy, and then use the power of the purse to mandate compliance with that policy by the state and local governments, all without the authorization or even acquiescence of elected legislators, that check against tyranny is forsaken. The Attorney General in this case used the sword of federal funding to conscript state and local authorities to aid in federal civil immigration enforcement. But the power of the purse rests with Congress, which authorized the federal funds at issue and did not impose any immigration enforcement conditions on the receipt of such funds.").

12. Julie Hirschfeld Davis & Katie Rogers, *Trump Will Work with Governors to Deploy National Guard to the Border,* N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/us/politics/trump-governors-national-guard-border-mexico.html (President Trump stated, "We are going to be guarding our border with our military." The article also notes that "the White House said Mr. Trump had been referring to mobilizing the National Guard, a step that previous presidents have taken to support border enforcement."); Rose L. Thayer, *National Guard Troops to Stay on Border for Another Year,* STARS & STRIPES (Aug. 31, 2018), https://www.stripes.com/news/us/national-guard-troops-to-stay-on-border-for-another-year-1.545308 ("National Guard personnel are authorized to remain on the U.S.-Mexico border for another year, the Defense Department confirmed . . . . The authorization allows for up to 4,000 soldiers to serve with U.S. Customs and Border Protection agents through Sept. 30, 2019 . . . ."). Notably, the military members sent to patrol the border are members of the National Guard and not active duty military. The National Guard members deployed to the border are in federal title 32 status, meaning that they are under the command and control of their governor rather than the president, although the federal government finances the operation. *See* 32 U.S.C. §§ 901–907; Manny Fernandez, *National Guard Has Eyes on the Border. But They're Not Watching Mexico.*, N.Y. TIMES (May 15, 2018), https://www.nytimes.com/2018/05/15/us/national-guard-texas-mexico.html.

13. *See* Alex Johnson & Courtney Kube, *Pentagon Sending Military Lawyers to Border to Help Prosecute Immigration Cases,* NBC NEWS (June 21, 2018, 11:10 PM), https://www.nbcnews.com/storyline/immigration-border-crisis/pentagon-sending-military-lawyers-border-help-prosecute-immigration-cases-n885216 ("Twenty-one military lawyers are being sent to Arizona, Texas and New Mexico to help prosecute illegal immigration cases . . . . The lawyers, who are to have 'criminal trial experience,' will be appointed as full time special U.S. attorneys for up to 179 days, or around six months, the Defense Department said in

military installations and resources to house detained immigrants.[14] His rhetoric turned into action when he exercised his authority under the National Emergencies Act to declare a state of national emergency at the border.[15] By doing so, President Trump attempted to unlock a series of statutory authorities that would allow his administration to divert congressionally authorized funds, resources, and personnel away from the military and towards border security, culminating in the building of the wall.[16] Once again, though, Congress rejected President Trump's border security policy objective by terminating his declaration of a

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confirming the plan.").

14. W.J. Hennigan & Philip Elliott, *Two Military Bases in Texas Set to House Thousands of Migrants,* TIME (June 25, 2018, 12:31 PM), http://time.com/5321083/military-bases-house-migrants/ ("The Defense Department has been directed to build short-term detention camps on two U.S. military bases in Texas . . . ."); Philip Elliott & W.J. Hennigan, *Exclusive: Navy Document Shows Plan to Erect 'Austere' Detention Camps*, TIME (June 22, 2018, 2:31 PM), http://time.com/5319334/navy-detainment-centers-zerol-tolerance-immigration-family-separation-policy/ ("The U.S. Navy is preparing plans to construct sprawling detention centers for tens of thousands of immigrants on remote bases in California, Alabama and Arizona, escalating the military's task in implementing President Donald Trump's 'zero tolerance' policy for people caught crossing the Southern border . . . ."); Jay Croft & Barbara Starr, *Military Bases Could House Up to 20,000 Undocumented Immigrant Children*, CNN (June 22, 2018, 11:45 AM), https://www.cnn.com/2018/06/22/politics/military-bases-undocumented-immigrant-children/index.html ("The Department of Health and Human Services has assessed three bases in Texas . . . . The bases could be used as housing within a month if the pace of border crossing continues and no other solution is found . . . .").

15. Proclamation No. 9,844, 84 Fed. Reg. 4,949 (Feb. 20, 2019) (relying upon 50 U.S.C. §§ 1601–1651). *See generally* Jessica Taylor & Brian Naylor, *As Trump Declares National Emergency to Fund Border Wall, Democrats Promise a Fight*, NPR (Feb. 15, 2019, 5:00 AM), https://www.npr.org/2019/02/15/695012728/trump-expected-to-declare-national-emergency-to-help-fund-southern-border-wall.

16. *See* Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J.F. 590, 594 (2020); *see also* Senator Chris Murphy, *National Security Is Stronger When Congress Is Involved. Here's How We Get Back to the Table.*, WAR ON THE ROCKS (July 20, 2021), https://warontherocks.com/2021/07/national-security-is-stronger-when-congress-is-involved-heres-how-we-get-back-to-the-table ("There are at least 123 statutory powers that become available to the president when he declares a national emergency . . . .").

national emergency.[17] Undeterred, President Trump vetoed Congress' termination action.[18] The national emergency declaration remained, and President Trump succeeded in his policy objectives, buoyed by military funding and personnel despite repeated rejections by Congress and the judiciary.

And what if sanctuary cities continued to refuse to provide federal law enforcement information on alleged illegal immigrants in their jurisdiction?[19] Would President Trump have been able to declare a state of national emergency or an insurrection and deploy the United States Army to seize control of those cities from democratically elected mayors?[20] Could he have then used the military at his disposal to refuse to leave office at the end of his term?[21]

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17. *See* Patricia Zengerle, *U.S. House Votes Again to End Trump's Border Emergency Declaration*, REUTERS (Sept. 27, 2019, 11:11 AM), https://www.reuters.com/article/us-usa-trump-congress-emergency/u-s-house-votes-again-to-end-trumps-border-emergency-declaration-idUSKBN1WC1S7.

18. Lauren Egan, *Trump Issues First Veto, Rejecting Measure to Overturn Border Declaration,* NBC NEWS (Mar. 15, 2019, 3:52 PM), https://www.nbcnews.com/politics/white-house/trump-issues-first-veto-rejecting-measure-overturn-border-declaration-n983676.

19. *See, e.g.*, Adam K. Raymond, *Acting ICE Director Wants to Arrest Politicians Running Sanctuary Cities*, N.Y. MAG. (Jan. 3, 2018), http://nymag.com/daily/intelligencer/2018/01/acting-ice-director-wants-to-arrest-pols-in-sanctuary-cities.html (Acting ICE Director Thomas Homan stated, "We've got to take these sanctuary cities on. We've got to take them to court and we've got to start charging some of these politicians with crimes.").

20. *See, e.g.*, Glenn Harlan Reynolds, *Could Trump and Sessions Send Federal Troops to California Over Immigration?*, USA TODAY (Mar. 13, 2018, 3:15 AM), https://www.usatoday.com/story/opinion/2018/03/13/trump-sessions-might-send-federal-troops-california-immigration-laws-glenn-reynolds-column/417633002/; *see also* Stephen I. Vladeck, *Yes, Trump Can Invoke the Insurrection Act to Deport Immigrants*, ATLANTIC (May 17, 2019), https://www.theatlantic.com/ideas/archive/2019/05/can-trump-use-insurrection-act-stop-immigration/589690/ (highlighting that under the Insurrection Act, "if the president determines that ordinary law enforcement is inadequate to enforce federal law, he can deploy the military to assist").

21. *See, e.g.*, Nicholas Reimann, *Trump Reportedly Asked Advisors About Deploying Military to Overturn Election,* FORBES (Dec. 19, 2020, 5:11 PM), https://www.forbes.com/sites/nicholasreimann/2020/12/19/trump-reportedly-asked-advisors-about-deploying-military-to-overturn-election/ ("President Donald Trump reportedly inquired about an idea raised by his former (and now

How did the United States, purportedly built upon the premise of separation of powers, get to the point where a President may exercise potentially uncheckable authority to utilize military power to achieve policy objectives rejected throughout the constitutional design? Perhaps even more alarming, is the threat of the President using his military power to actively impose presidential rule upon a democratically elected entity, whether that be at the local, state, or federal level, more of a possibility today than it has been since Reconstruction?

This Article explores these questions through the lens of a potential "presidential coup." While legal scholarship regularly examines the role and influence of the presidency in foreign affairs and national security matters, it seldom takes seriously the threat of a domestic presidential coup.[22] Such a reluctance to engage with the possibility of a presidential coup is understandable, as little historical evidence suggested a President was likely to turn his

pardoned) national security adviser, Michael Flynn, that the U.S. military be deployed to overturn the results of the presidential election . . . ."); *see also* Reis Thebault, *Joint Chiefs Chairman Feared Potential 'Reichstag Moment' Aimed at Keeping Trump in Power*, WASH. POST (July 15, 2021, 8:44 PM), https://www.washingtonpost.com/politics/joint-chiefs-chairman-feared-potential-reichstag-moment-aimed-at-keeping-trump-in-power/2021/07/14/a326f5fe-e4ec-11eb-a41e-c8442c213fa8_story.html (In the wake of President Trump's electoral defeat, the Chairman of the Joint Chiefs "began informally planning with other military leaders, strategizing how they would block Trump's order to use the military in a way they deemed dangerous or illegal. . . . [The Chairman of the Joint Chiefs] played reassuring soothsayer to a string of concerned members of Congress and administration officials who shared his worries about Trump attempting to use the military to stay in office.").

22. *But see* Tsai, *supra* note 16, at 592–95; Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J.F. 610, 610–13 (2020). While both Professor Tsai and Professor Vladeck identify the statutory means by which the President may abuse the military power at his disposal, they both neglect to place these authorities in the broader context of a presidential coup. *See* Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 357–61, 386 (1994) (recognizing the potential for a future coup, but the analysis rests on the threat of a military coup performed independently of the president, rather than a presidential coup that utilizes the military to achieve the President's intentions of staging a coup).

military power against the American people. Nonetheless, the increasing use of the military by the Trump Administration to circumvent the constitutional design, followed by President Trump's flirtation with the Insurrection Act to use the military to quell the Black Lives Matters Protest in Washington, D.C.,[23] and then the President's failure to use the military to defend the U.S. Capitol during the January 2021 insurrection[24] suggest that such a threat of a presidential coup is ever-growing and becoming increasingly realistic.[25] President Trump made clear that to effectuate a presidential coup and remain in power at the expiration of his term, he would need the military, asking senior military leadership if they were ready to do so.[26] Thus, legal scholarship needs to engage in the potential of a President using the military to wage a presidential coup with seriousness, examining its risk, the means to protect against it, and whether those means are functioning.

This Article presents a novel framework to do just that. It begins with an understanding that there are two types of presidential coups: an explicit coup where he refuses to leave office and subordinates and compels actions by elected

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23. *See* Rosa Brooks, *Trump Wants to Crush Black Lives Matter With a Law That Fought Segregation*, WASH. POST (June 2, 2020), https://www.washingtonpost.com/outlook/2020/06/02/trump-military-insurrection-act/; *see also* Scott R. Anderson & Michel Paradis, *Can Trump Use the Insurrection Act to Deploy Troopers to American Streets?*, LAWFARE (June 3, 2020, 8:47 AM), https://www.lawfareblog.com/can-trump-use-insurrection-act-deploy-troops-american-streets.

24. *See* Jan Wolfe, *Trump Wanted Troops to Protect His Supporters at Jan. 6 Rally*, REUTERS (May 12, 2021, 10:57 AM), https://www.reuters.com/world/us/congresswoman-says-trump-administration-botched-capitol-riot-preparations-2021-05-12/.

25. *See, e.g.*, Jamie Gangel & Jeremy Herb, *Memo Shows Trump's Lawyer's Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 5:39 AM), https://www.cnn.com/2021/09/20/politics/trump-pence-election-memo/index.html.

26. *See* Glasser, *supra* note 2, (President Trump discussed the January 7, 2021 rally at the Capitol ahead of time with General Milly, telling him, "It's gonna be a big deal. . . . [Y]ou're ready for that, right?").

officials, or an implicit coup where the President sidesteps the constitutional design to achieve his own policy objectives. From that understanding, it asserts the straightforward premise that for a President to effectuate either an explicit or implicit coup he requires the military's power and money to do so. And it proceeds to argue that the formal and informal checks designed to prevent the President from abusing his role as commander in chief to effectuate such a coup are in a state of dysfunction. Consequently, the only potential check on presidential abuse of the military is the President's own benevolent nature, leaving the environment ripe for a future malevolent executive to use this military power to achieve a presidential coup.[27]

To support this argument, this Article proceeds in two parts. Part I explores the primary formal check designed to protect against presidential abuse of military power: the constitutional separation of powers. It argues that after generations of presidential assertions of authority over the military, congressional acquiescence to such assertions, and judicial abdication of checking the President's claims, the President may claim not only plenary constitutional authority in utilizing the military in presidentially claimed emergencies and insurrections, but also that such authority is explicitly authorized by Congress and then potentially unreviewable by the judiciary.

Part II recognizes that the breakdown of formal checks has been present for some time, but a dysfunctional state has been avoided through two prominent categories of informal checks. First, the moral check—that the President will adhere to core democratic values and refuse to abuse the power given to him, and that the military will be constitutionally faithful and refuse any presidential order that amounts to a coup. Second, the political check—that an

27. *See, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125 (1866) ("This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution.").

intra-executive branch separation of powers exists that will prevent the President from having the ability to execute a presidential coup, and that public opinion would prevent the President from abusing the military power entrusted to him. But the growth and acceptance of the unitary executive and the norm-shattering Trump presidency have severely endangered these informal checks, making the United States ripe for a malevolent President to execute a presidential coup.

I. THE FORMAL CHECK: CONSTITUTIONAL SEPARATION OF POWERS

The underlying premise of this Article is that in order to stage a coup, the President requires the support, resources, and power of the federal military. At the same time, however, the Constitution grants the President broad constitutional authority over the federal military.[28] Thus arise the primary questions of this Part: What formal legal checks exist to prevent the President from using the military to stage a presidential coup? And are these legal, formal checks functioning?

This Part answers the first question by asserting that the primary formal check is the constitutional separation of powers. This check diffuses control of military power to the three branches of government with substantial, co-equal authority shared amongst the executive and legislative branches. It then answers the second question by asserting that this formal, legal check is in a state of dysfunction for three primary reasons: (1) generations of Presidents successfully asserting plenary authority to determine national security threats or national emergencies and the authority to respond with military force; (2) congressional acquiescence to such assertions by delegating large swaths of its authority to the President, implicitly and explicitly

28. *See* John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 609–12 (2011).

authorizing the President to declare national emergencies and threats and to respond with military power; and (3) the judiciary's abdication of its responsibility to review these presidential assertions and congressional acquiescence, which in turn allows for the President to claim larger swaths of authority to utilize the federal military domestically. This Part then concludes by addressing the significance of this state of dysfunction—not only are there minimal formal checks against the President utilizing the military, but the current state of dysfunction may even give him the legal authority to do so to effectuate a coup.

A. *Establishing of the Formal Check of Separation of Powers*

The Framers were well-aware of the dangers posed by military power.[29] Arising from the historical examples of Rome[30] and the British monarchs,[31] as well as from their experiences as colonists,[32] they feared a powerful standing army would be a threat to both liberty and to the nascent republic.[33] The risks posed by a standing army were two-fold:

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29. *See* Anthony J. Ghiotto, *Defending Against the Military: The Posse Comitatus Act's Exclusionary Rule*, 11 HARV. NAT'L SEC. J. 359, 371–76 (2020).

30. *See* THE FEDERALIST NO. 41, at 257 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he liberties of Rome proved the final victim to her military triumphs . . . .").

31. *See* David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 515 (2008); Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 16–17 (2002); *cf.* Luther v. Borden, 48 U.S. (7 How.) 1, 62 (1849) (Woodbury, J., dissenting) ("[I]n every country which makes any claim to political or civil liberty, 'martial law,' as here attempted and as once practised in England against her own people, has been expressly forbidden there for near two centuries, as well as by the principles of every other free constitutional government. And it would be not a little extraordinary, if the spirit of our institutions, both State and national, was not much stronger than in England against the unlimited exercise of martial law over a whole people. . . ." (internal citation omitted)).

32. *See* Earl Warren, *The Bill of Rights and the Military,* 37 N.Y.U. L. REV. 181, 184 (1962) ("Our War of the Revolution was, in good measure, fought as a protest against standing armies."); *see also* Turley, *supra* note 31, at 15–17.

33. S*ee* Deborah N. Pearlstein, *The Soldier, the State, and the Separation of*

first, the army itself would conspire to overthrow the republic,[34] or second, the branch of government given control of the army would use the military to subordinate the other branches, and potentially the republic as well.[35]

To protect against both these threats, the Founders placed the federal army under the control of a civilian—the President as the commander in chief[36]—but also subjected this control to the constitutional separation of powers.[37] As noted by Chief Justice John Roberts, "The Framers' inherent distrust of governmental power was the driving force behind

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Powers, 90 TEX. L. REV. 797, 857 (2012) (arguing that to the framers, the presence of standing army "would undermine particular constitutional values, including the protection of individual rights and the maintenance of a noncorrupt, politically accountable system of government"); c*f.* Laird v. Tatum, 408 U.S. 1, 18 (1972) (Douglas, J., dissenting) ("The alarm was sounded in the Constitutional Convention about the danger of the armed services. Luther Martin of Maryland said, '[W]hen a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of standing army.'").

34. *See* Reid v. Covert, 354 U.S. 1, 23–24 (1957) ("The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. . . . The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders."); *see also* Perpich v. U.S. Dep't of Def., 496 U.S. 334, 340 (1990) ("[T]here was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States . . . .").

35. *See* Luban, *supra* note 31, at 518–19 (quoting Centinel II, *To the People of Pennsylvania*, INDEP. GAZETEER (Oct. 24, 1787), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 58, 58–59 (David E. Young ed., 2d ed. 1995)) ("The fear that a standing army would empower a tyrant appears again and again in the ratification debates over the new Constitution. . . . 'A standing army with regular provision of pay and contingencies, would afford a strong temptation to some ambitious man to step up into the throne, and to seize absolute power.'"); *see also* Ghiotto, *supra* note 29, at 374–75.

36. *See* U.S. CONST. art. II, § 2, cl. 1; *see* Luban, *supra* note 31, at 530 ("The fundamental point was that, given the need for civilian control of the military, the choice of making the president commander in chief prevailed because it was universally regarded as better than the alternatives of making Congress the commander in chief or having multiple commanders in chief.").

37. *See* Turley, *supra* note 31, at 22 ("[T]he Framers closely associated unchecked authority over standing armies with the excesses of the British Crown. The division of power in the Madisonian system alleviated this concern to some degree." (footnotes omitted)).

the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty."[38]

As the federal army posed potentially the greatest risk to liberty, the Framers allocated powers over the military to the different branches of government.[39] The Constitution enumerates several powers to the President that can be used in asserting control of the federal military: first, that "[t]he executive Power shall be vested in" the President;[40] second, that the President is commander in chief of the federal military;[41] and third, that the President "shall take Care that the Laws be faithfully executed."[42] But the Constitution also allocates substantial authority to Congress in controlling military power.[43] Namely, the Constitution gives Congress the powers to provide for the common defense, to declare war, to make rules for the government and regulation of the land and naval forces, to raise and support armies, and to "provide for calling forth the Militia to execute the Laws of the Union,

38. Boumediene v. Bush, 553 U.S. 723, 742 (2008); *see* Wellness Int'l Network v. Sharif, 575 U.S. 665, 695 (2015) (Roberts, C.J., dissenting) (positing that the separation of powers "promotes both liberty and accountability"); *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty . . . ."); Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

39. *See* Turley, *supra* note 31, at 22.

40. U.S. CONST. art. II, § 1, cl. 1.

41. *See* U.S. CONST. art. II, § 2, cl. 1.

42. U.S. CONST. art. II, § 1, cl. 8.

43. *See* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) (Chief Justice Marshall noting that Congress holds the "whole powers of war"); *see also* Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 395 (2008) ("Congressional power over warfare also seems logically limitless, and the Constitution seems to provide Congress with substantial power to check virtually all the President's Commander in Chief powers.").

suppress Insurrections, and repel Invasions."[44]

And while the Constitution is silent on the judiciary's allocated powers relative to the federal military, the United States Supreme Court has long recognized the judiciary's role in reviewing both the Executive and congressional use of military power.[45] For instance, in *Duncan v. Kahanamoku*, the Supreme Court considered the then-territorial governor's imposition of martial law in World War II Hawaii, which subjected two citizens to trial by military tribunal.[46] Considering whether a congressional act intended such use of the military in domestic matters, the Court noted that "[p]eople of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule . . . . In this country that fear has become part of our cultural and political institutions."[47] Consequently, the Court affirmed that "[c]ourts and their procedural safeguards are indispensable to our system of government.

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44. U.S. CONST. art. I, § 8.

45. *See, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123–24 (1866) ("When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected . . . but if society is disturbed by civil commotion . . . these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws."); *Ex parte* Quirin, 317 U.S. 1, 19 (1942) (where the Court considered whether the executive branch had the legal authority to try Quirin in a military tribunal because "[i]n view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay"); Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 632 (1952) (Douglas, J., concurring) ("If we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency."); Laird v. Tatum, 408 U.S. 1, 15–16 (1972) ("[W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury . . . .").

46. *See Duncan*, 327 U.S. at 309–12.

47. *Id.* at 319.

They were set up by our founders to protect the liberties they valued."[48]

This shared responsibility over the military among the branches of government purports to provide a formal check against each branch's potential abuse of military power to stage a coup. These formal checks are most evident in *Youngstown Sheet & Tube Co. v. Sawyer*.[49] In *Youngstown*, the United States Supreme Court considered President Truman's seizure of steel mills without congressional authorization.[50] To justify this action, the Truman Administration argued the seizure was a matter of national security. Truman claimed he was acting consistently with his constitutional authority as commander in chief and as the Executive of the United States.[51]

The Supreme Court rejected these arguments.[52] In his concurring opinion, Justice Jackson explained the shared authority between Congress and the executive branch in matters of national security.[53] He highlighted that "[t]he purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."[54] Turning his attention to President Truman's claim that his constitutional authority as commander in chief afforded him the power to seize the steel mills, Justice Jackson stated:

> Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. . . . [N]o doctrine that the Court could promulgate would seem to me more sinister and alarming

48. *Id.* at 322.

49. *See, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2314 (2006) (referring to Justice Jackson's concurring opinion as "the most celebrated judicial opinion of the separation-of-powers canon"); Kristen E. Eichenseher, *The* Youngstown *Canon: Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. 1245, 1249–55 (2021).

50. *Youngstown Sheet & Tube Co.,* 343 U.S. at 582–83.

51. *Id.* at 640–46 (Jackson, J., concurring).

52. *Id.* at 588–89 (majority opinion).

53. *Id.* at 635–38 (Jackson, J., concurring).

54. *Id.* at 640.

> than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.[55]

Justice Jackson also turned to the constitutional authority of Congress to call forth the militia, noting that this allocation of power to Congress, rather than the President, "underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy."[56]

Justice Jackson's concurrence in *Youngstown*, along with the Court's rejection of President Truman's assertion of authority, confirms the formal check against the abuse of military authority—the constitutional separation of powers.[57] As established by Justice Jackson's tripartite framework to resolve disputes over the allocation of military authority, the use of military power is most legitimate when the President and Congress are acting together.[58] In turn, the presidential use of the military is at its weakest when the President is acting in direct opposition to Congress, which in turn affords the judiciary a higher level of scrutiny in

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55. *Id.* at 642.

56. *Id.* at 644.

57. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050 (2005) (arguing that the tripartite framework in Youngstown has been "widely accepted"); *see also* Neal Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1274 (2002) (Justice Jackson's concurrence provides the "three now-canonical categories that guide modern analysis of separation of powers."). *But see* Mark D. Rosen, *Revisiting* Youngstown*: Against the View that Jackson's Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1709 (2007) (arguing that Justice Jackson's tripartite framework does not provide clear guidance to settle disputes between Congress and the President as commander in chief).

58. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

reviewing the presidential action.[59]

Thus, in the context of a presidential coup, should the President use military authority without congressional approval (or in direct opposition to it) to act, the judiciary would have the ability to review and invalidate such conduct. Similarly, should the President begin to assert this authority, Congress could explicitly invalidate such use through its constitutional authority over the military. Nonetheless, for a formal check to protect against potential abuse of military power, Congress and the judiciary must exercise their constitutional authorities. The following Part argues that Congress and the judiciary are unable to assert their own constitutional authority relative to the use of military force because Congress continues to authorize and acquiesce to broader assertions of presidential authority in this realm, and the courts continue to abdicate their role in meaningfully reviewing these assertions.

B. *The First Breakdown of the Separation of Powers: Presidential Assertion of Plenary Power*

Scholars frequently discuss the President's plenary power in national security matters.[60] However, much of the scholarship focuses on the President's plenary power in foreign matters: whether the President can initiate a war, and whether the President has sole authority in how war will

59. *Id.* at 637–38 ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.").

60. *See, e.g.*, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 1, 68 (2006); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 11–12 (2007); JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH, at xiv–xv (2009); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 946 (2008).

be conducted.[61] Scholars have engaged less with the President's use of the military in domestic matters.[62] But it is this authority—domestic use of the military—that invokes the risk and potential of a presidential coup. What if a President claims there is a national emergency, an insurrection, or a crisis? Can he then use the military power at his authority domestically to quell the threat? And can these determinations—the presence of a crisis, national emergency, or insurrection, and whether the use of military force is necessary in response—be reviewed by either Congress or the judiciary?

The constitutional separation of powers and the *Youngstown* framework seems to answer these questions.[63] Congress and the President appear to share concurrent authority over military power, which is seemingly and especially true in the domestic use of the military.[64] Yet, Presidents often assert the plenary authority to identify and respond to national security threats.[65] And these national security threats often involve domestic disturbances, such as

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61. *See, e.g.*, H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 528 (1999); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234–35 (2001); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 262–63 (2009); Louis Fisher, *Presidential Residual Power in Foreign Affairs*, 47 CAP. U. L. REV. 491, 492 (2019).

62. *But cf.* ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878, at 31–40 (1988); Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 357–61 (1994); Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 168–83 (2004).

63. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring); *see also* Sarah H. Cleveland, Hamdi *Meets* Youngstown*: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants,"* 68 ALB. L. REV. 1127, 1128 (2005).

64. *See* John C. Dehn, *War Is More Than a Political Question: Reestablishing Original Constitutional Norms*, 51 LOY. U. CHI. L.J. 485, 501–02 (2019); *see also* Cleveland, *supra* note 63, at 1128–29.

65. *See* Reid Skibell, *Separation-of-Powers and the Commander in Chief: Congress's Authority to Override Presidential Decisions in Crisis Situations*, 13 GEO. MASON L. REV. 183, 183–84 (2004).

national emergencies or potential insurrections.[66] When responding to these presidential assertions, the judiciary then appears to be accepting of such plenary authority, thus emboldening the President in both declaring a national security threat and then electing to respond to the threat through military power.[67]

This claim of presidential authority—supported by the judiciary—arose with vigor during the Civil War and President Lincoln's assertion of plenary powers in responding to Southern secession. As noted by Saikrishna Prakash, prior to the Civil War, Presidents were largely "impotent" in dealing with emergencies as the Constitution "fashioned something of an imbecilic emergency executive, one lacking constitutional authority to take property, suspend habeas corpus, or impose military rule."[68] Instead, Presidents were left to summon Congress and request forces, funding, and legislation for any potential suspension of civil liberties.[69]

President Lincoln, however, challenged and changed the narrative from one of an "imbecilic Executive" to one "virtually omnipotent" in identifying and responding to

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66. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); *see also* Tara M. Sugiyama & Marisa Perry, Note, *The NSA Domestic Surveillance Program: An Analysis of Congressional Oversight During an Era of One-Party Rule*, 40 U. MICH. J.L. REFORM 149, 149 (2006); Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 394–96.

67. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 670 (1863) (where the scope and scale of the nation's response to the Southern rebellion was "a question to be decided by [the Executive], and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted"); *see also* Rebecca A. D'Arcy, Note, *The Legacy of* Dames & Moore v. Regan*: The Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 293–94 (2003).

68. Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1365 (2013).

69. *Id.* at 1367.

national security threats.[70] He first asserted such authority in what has come to be known as the *Prize Cases*.[71] At the outset of the Civil War, President Lincoln ordered the blockade of Southern ports.[72] Pursuant to this blockade order, Union forces seized several ships and sold the ships and their cargo.[73] President Lincoln claimed the authority to issue such an order from his plenary constitutional powers, specifically, his authority as the commander in chief, his responsibility to execute the laws of the United States, and his oath to execute the presidential office.[74]

In considering the legality of this order and President Lincoln's assertions, the Supreme Court ultimately decided the legality of the Civil War itself. The Court was unanimous "that the president had the right to mobilize the nation to do battle after Sumter, and that an actual state of war existed."[75] But the Court was divided as to whether President Lincoln had the authority to engage in battle without congressional authorization. By a 5–4 vote, the Court held:

> The Constitution confers on the President the whole Executive power. . . . If a war be made . . . , the President is not only authorized but *bound* to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile part be a foreign invader, or States organized in rebellion, it is none the less

70. *Id.* at 1368, 1418.

71. *See* Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1841 (2010) ("Enemy vessels or cargo seized validly under the international laws of war were referred to as 'prizes' of war, because they generally accrued to the financial benefit of the captors—hence the '*Prize Cases*.'").

72. *See* JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 144–45 (2012).

73. *Id.* at 147.

74. Abraham Lincoln, Proclamation by the President of the United States of America on Blockade of Confederate Ports (Apr. 19, 1861), LIBR. OF CONGRESS, https://www.loc.gov/resource/lprbscsm.scsm0582/ (last visited Jan. 22, 2022).

75. DANIEL FARBER, LINCOLN'S CONSTITUTION 141 (2003).

a war . . . ."[76]

Significantly, the Court affirmed that President Lincoln had authority to issue the blockade under his plenary constitutional powers.[77] Although President Lincoln did not view the Civil War as two separate nations in conflict, the Court determined that regardless of what name one chose to "baptize" the hostilities with, a war existed de facto.[78] From there, the President's commander in chief and executive powers flowed.

The Court then affirmed that the President alone, once confronted with the insurrection of the Southern states, had the sole constitutional authority to determine the appropriate response. As the Court phrased it, the scope and scale of the nation's response was "a question to be decided by *him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."[79] It is important to note at this juncture that the Court used the singular form when referring to the constitutional power to make these decisions, and that this power resided in only one branch of government: the executive.

President Lincoln then made similar assertions of plenary authority in his suspension of the writ of habeas corpus. Beginning first under the State Department and then eventually under the War Department, the Lincoln Administration used the military to imprison thousands of civilians.[80] Secretary of War Edwin Stanton, acting with the approval of President Lincoln, allowed for arrested

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76. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 668 (1863) (emphasis added).

77. *Id.* at 666.

78. *Id.* at 669 ("The President was bound to meet [war] in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.").

79. *Id.* at 670.

80. FARBER, s*upra* note 75, at 157.

individuals to be detained indefinitely and without judicial hearings by suspending the writ of habeas corpus.[81]

In May 1861, Union forces arrested and detained John Merryman, under suspicion that he was an officer of pro-secession citizens who conspired to destroy bridges and railway lines throughout Maryland.[82] Merryman challenged his detainment and the President's suspension of the writ of habeas corpus.[83] Chief Justice Roger Taney agreed with Merryman, finding that President Lincoln lacked the plenary power to suspend the writ of habeas corpus.[84] He noted that "the president has exercised a power which he does not possess under the [C]onstitution," and that the executive clause did not grant him such authority as

> [h]e is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution.[85]

Chief Justice Taney's decision failed to persuade President Lincoln that he lacked the plenary power to suspend the writ of habeas corpus.[86] In a special address to Congress following the decision, President Lincoln asserted his plenary power to address national emergencies:

> The provision of the Constitution that "the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it" is . . . a

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81. *Id.*

82. Seth Barrett Tillman, Ex Parte Merryman*: Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 485–87 (2016).

83. *Ex parte* Merryman, 17 F. Cas. 144, 147–48 (C.C.D. Md. 1861) (No. 9,487).

84. *Id.* at 148–49.

85. *Id.*

86. *See* Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 95 (1993) ("Lincoln simply offered a rebuttal to Taney's position *on the merits* of the suspension clause question . . . . But the plain implication of Lincoln's actions is that he believed the President need not enforce such a judgment.").

> provision . . . that such privilege may be suspended when, in cases of rebellion or invasion, the public safety does require it. It was decided that we have a case of rebellion and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power; but the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency . . . .[87]

President Lincoln's assertion—made in direct response to Chief Justice Taney's decision—is significant. He recognized that when a determination is made that the country is in a state of rebellion or invasion, an emergency constitution is unlocked that allows for certain powers, such as suspension of the writ of habeas corpus. Implicit in President Lincoln's assertion is that the President makes the determination that nation is in a state of rebellion and it is then the President that gets to decide what powers the emergency constitution unlocks.[88] Such assertions of authority did not end with President Lincoln.[89] Prakash

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87. President Abraham Lincoln, July 4th Message to Congress (July 4, 1861), UNIV. OF VA.: MILLER CENTER, https://millercenter.org/the-presidency/presidential-speeches/july-4-1861-july-4th-message-congress (last visited Jan. 22, 2022).

88. *See* FARBER, s*upra* note 75, at 159 (Professor Farber discusses a memo from Attorney General Bates that upheld the President's power to suspend the writ, arguing that "under the oath clause as well as the militia act, the president was required to suppress insurrections by use of the militia, the army, and the navy. He must use his discretion in meeting the threat.").

89. The last four administrations have made similar claims of plenary presidential authority. *See, e.g.*, Campbell v. Clinton, 52 F. Supp. 2d 34, 37–38 (D.D.C. 1999) (Despite having Congressional authorization to launch air strikes in Yugoslavia, President Clinton stated in his communications with Congress, "I have taken these actions pursuant to my constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive."); Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 173 (1994); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Couns., to Alberto Gonzales, Couns. to the President, on Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001), https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memomilitaryforcecombatus10232001.pdf; Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Couns. to Robert J. Delahunty, Special Couns., on The President's Constitutional Authority to Conduct Military Operations

highlights the significance, arguing that

> Lincoln's measures clearly were successful in further altering the terms of the constitutional debate. . . . [H]is bold, unilateral actions and the justness of his cause supply fertile ground for broad and vigorous executive power in times of emergency until this day. Any executive who wishes to act expeditiously and unilaterally in times of emergency can now cite Lincoln and attempt to ride his long constitutional coattails.[90]

This presidential assertion of plenary authority in recognizing domestic threats and utilizing the military to respond is especially empowering in terms of executive authority when placed in the *Youngstown* framework. For instance, in *Zivotofsky v. Kerry*, the President and Congress were in direct opposition, with the President refusing to allow United States citizens born in Jerusalem to have "Israel" listed as their place of birth on their United States passport, while Congress passed legislation explicitly allowing them to do so.[91]

Against Terrorists and Nations Supporting Them (Sept. 25, 2001), https://www.justice.gov/file/19151/download; Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 27 (2011) ("[W]e believe that . . . the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad, even without prior specific congressional approval."); Targeted Airstrikes Against the Islamic State of Iraq and the Levant, 38 Op. O.L.C. 82, 82 (2014) ("[T]he President had the constitutional authority to order these military operations because he had reasonably determined that they would further sufficiently important national interests, and because their anticipated nature, scope, and duration were sufficiently limited that prior congressional approval was not constitutionally required."); April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, slip op. at 1 (May 31, 2018), https://www.justice.gov/sites/default/files/opinions/attachments/2018/05/31/2018-05-31-syrian-airstrikes_1.pdf ("Before the strikes occurred, we advised that the President could lawfully direct them because he had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense."); Memorandum from Steven A. Engel, Assistant Att'y Gen., Off. of Legal Couns., to John A. Eisenberg, Legal Advisor to the Nat'l Sec. Council, on January 2020 Airstrike in Iraq Against Qassem Soleimani (Mar. 10, 2020), https://s3.documentcloud.org/documents/21012045/redacted-olc-memo-justification-of-soleimani-strike.pdf.

90. Prakash, *supra* note 68, at 1417.

91. Zivotofsky v. Kerry, 576 U.S. 1, 5–8 (2015).

Recognizing this case resided in the third-tier of the *Youngstown* framework, the Court still determined that as a matter of constitutional design and practical necessity, the President alone had the plenary responsibility for recognition of foreign countries.[92] As such, "[t]he formal act of recognition is an executive power that Congress may not qualify."[93] Thus, under *Zivotofsky,* if courts agree with the President's assertion of *plenary* authority to declare a state of national emergency or insurrection and to use military force to respond to such a threat, then the action will survive judicial scrutiny under *Youngstown*. This is true even if the action taken is without congressional authorization or with explicit congressional disapproval.[94]

The result of these presidential assertions is that

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92. *Id.* at 14–15 ("The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the 'executive Power' shall be vested in the President, provides further support for the President's action here.").

93. *Id.* at 17.

94. *Id.* at 80 (Scalia, J., dissenting) (arguing the Court's reasoning will "*systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs. . . . It is certain that, in the long run, it will erode the structure of separated powers that the People established for the protection of their liberty."); *see also,* Jack Goldsmith, *The Supreme Court 2014 Term–Comment:* Zivotofsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 134 (2015) ("To say that *Zivotofsky II* lacks predictable consequences in the judiciary is not to say that it lacks predictable consequences on presidential power. It will have such consequences in the executive branch, which operates under very different principles and incentives than the judiciary. Unlike judges, executive branch lawyers have an institutional predilection to read presidential power broadly. They will accordingly tend to construe *Zivotofsky II*'s holding, dicta, and ambiguities in the President's favor."); Michael Blackburn, Note, *The Return of the King: How the Supreme Court Distorted the Jackson Concurrence and Expanded Executive Power in* Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015)*, 96 NEB. L. REV. 198, 220 (2017) ("The Court's analytical flaws in *Zivotofsky* also increased the Executive Branch's power. . . . The sum of these increases has moved the Executive Branch in the direction of the expansive executive power wielded by King George III, the example both feared and rejected by Justice Jackson in his famous *Youngstown* concurrence.").

Presidents can make a good faith claim of plenary constitutional authority—under the Commander in Chief and Executive Authority Clauses—that they alone have the authority to declare a domestic national security threat, a national emergency, or an insurrection. And in turn, they can then assert the plenary authority to respond to this threat using domestic military force. By claiming plenary constitutional authority to do so, Presidents can then potentially survive either explicit congressional opposition to such determination or judicial scrutiny under the *Youngstown* framework. Therefore, a President may potentially legally stage a coup by finding political opponents to be a domestic national security threat or an insurrection and then using the military power at his disposal to suppress the alleged threat.

C. *The Second Breakdown of the Separation of Powers: Congressional Acquiescence of Presidential Power*

As Presidents claim broad plenary authority in both the declaration of national emergencies and insurrections and in the use of military power to respond to such declarations, what precludes the President from using such authority to stage a coup? Could the President fabricate a national emergency or insurrection to justify utilizing military power to effectuate a presidential coup? Conceivably, Congress serves as the most effective check against the President doing so. After all, Congress possesses its own plenary power over national emergencies and military power, including the power to declare war and to call "forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[95]

But instead of exercising this authority, Congress has long chosen to acquiesce to the presidential assertions of authority.[96] It has done so through repeated explicit and

95. U.S. CONST. art. I, § 8, cl. 15.

96. *See, e.g.*, Zachary S. Price, *Congress's Power over Military Officers*, 99 TEX.

implicit delegations of congressional authority to both declare emergencies and insurrections and to govern the use of military force in response to these declarations.[97] The result of this acquiescence is that the President is at his most powerful under the first tier of the *Youngstown* framework: He operates with Congressional approval. And when viewed through the lens of the Insurrection Act and National Emergencies Act, Congress has given the President the authority to use the military power at his disposal to stage a presidential coup.

The United States Supreme Court has recognized that Congress does have the ability to delegate authority to the President in both domestic[98] and foreign matters.[99] While the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"[100] the Court has recognized the "Congress may 'obtain the assistance of the coordinate Branches'—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws."[101] The judiciary will allow for such a delegation of authority so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed."[102] And although this interpretation of the nondelegation doctrine has come under frequent attack regarding regulatory agencies, Congress' ability to delegate national security authority—especially

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L. REV. 491, 495 (2021).

97. *See, e.g.*, The Insurrection Act, 10 U.S.C. §§ 251–255; 50 U.S.C. § 1601–1651.

98. *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

99. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 327–28 (1936).

100. U.S. CONST. art. I, § 1.

101. *Gundy*, 139 S. Ct. at 2123 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).

102. *Mistretta*, 488 U.S. at 372 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

when such powers are held concurrently with the President—remains strong.[103]

Congress' ability to delegate authority both domestically and in matters of national security speaks to the difficulty in addressing the potential of a presidential coup. The terms national "threat," "security," and "emergency" are often used interchangeably and appear to be overly broad and ill-defined.[104] When Congress authorizes the President to declare a national emergency, is such an emergency a purely domestic matter, such as a devastating storm? Or is it a national security matter, such as border security?[105] Often, when Congress delegates this authority and when the President asserts this authority, there will be an intersection of all these terms—a domestic matter that triggers national security concerns or a foreign national security matter that triggers domestic concerns. The Court's interpretation of the nondelegation doctrine—allowing Congress to delegate authority both domestically and from a foreign affairs perspective—allows the President and Congress to avoid defining and clarifying these terms.[106]

When Congress elects to delegate authority to the

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103. *See Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (arguing for a stricter adherence to the nondelegation doctrine, but acknowledging that Congress can delegate non-legislative responsibilities when "Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch," (citing among others, *Curtiss-Wright*, 299 U.S. at 320)); *see also* Harlan Grant Cohen, *The National Security Delegation Conundrum*, JUST SEC. (July 17, 2019), https://www.justsecurity.org/64946/the-national-security-delegation-conundrum/; Joseph Postell, *The Nondelegation Doctrine After* Gundy, 13 NYU J.L. & LIBERTY 280, 283–88 (2020).

104. *See* Cohen, *supra* note 103.

105. *See, e.g.*, Maegan Vazquez & Priscilla Alvarez, *White House Extends National Emergency on the Southern Border*, CNN (Feb. 14, 2020, 4:34 PM), https://www.cnn.com/2020/02/13/politics/southern-border-national-emergency-continuation/index.html.

106. *See* Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT'L L. 67, 69 (2017) (discussing the Obama administration's use of the ill-defined, limitless term of "co-belligerent" as a justification to combat new terrorist organizations in locations other than Afghanistan under the 2001 Authorizations for the Use of Military Force).

President, especially if it speaks to national security concerns, courts are likely to interpret such delegation as congressional authorization of presidential action.[107] For example, in *Ex parte Quirin,* President Roosevelt ordered Quirin and his co-conspirators to be tried by military commission.[108] While President Roosevelt claimed he had the plenary authority to do so, the Court sidestepped that issue to find that "[b]y the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war."[109] As such, the Court found President Roosevelt's order to be authorized by Congress and thus constitutional.

Similarly, the Court has shown a willingness to interpret delegations of authority in national security matters broadly.[110] In *Hamdi v. Rumsfeld*, the Court affirmed just how far broadly written statutes may affirm presidential conduct in the realm of national security. Considering Congress' 2001 Authorization for the Use of Military Force (AUMF) after the terrorist attacks on 9/11,[111] the Court noted the following:

> Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations,

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107. *See* Zemel v. Rusk, 381 U.S. 1, 17 (1965) (In reviewing Congress' legislation allowing the President to establish rules for granting and issuing passports, the Court found that there was no impermissible delegation because in areas of national security, Congress must necessarily paint with a broader brush.).

108. *Ex parte* Quirin, 317 U.S. 1, 22 (1942).

109. *Id.* at 28.

110. *See* Robert Knowles, *Delegating National Security*, 98 WASH. U. L. REV. 1117, 1140–50 (2021) (discussing Congress' broad delegation of national security authority to the executive branch and the judiciary's reluctance to review such delegation and the executive branch's exercise of such authority).

111. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

organizations or persons."[112]

Importantly, there were no temporal or physical restrictions placed on the President's authority to act. Congress granted him perhaps the broadest authority absent an actual declaration of war.[113] Although the Court was answering a "narrow question," it made no mention that this AUMF was unconstitutionally broad.[114]

This is important considering the question that was before the Court. Relying on the AUMF, the President detained an American citizen in Afghanistan because he determined the citizen was an enemy combatant.[115] The Court affirmed the president's power to detain enemy combatants as a "fundamental . . . incident to war."[116] Therefore, Congress did not need to give express authorization so that the President could detain enemy combatants (even if they were also American citizens); the broad authorization included those war powers that are "fundamental."[117]

Further, courts have held that Congress authorized presidential action, even if the delegation of authority (or authorization) is not explicit.[118] Consider *Dames & Moore v.*

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112. *Id.*

113. *See* Bradley & Goldsmith, *supra* note 57, at 2057–66. *But cf.* Cleveland, *supra* note 63, at 1139.

114. *Hamdi*, 542 U.S. at 516.

115. *Id.*

116. *Id.* at 517–18 ("[T]he AUMF is explicit congressional authorization for the detention of individuals in the narrow category [of enemy combatant] . . . . We conclude that detention of individuals falling into the limited category [of enemy combatant], . . . is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.").

117. This power also extends to the military detention of American citizens seized on U.S. soil once the President determines the citizen is an "enemy combatant." *See* Padilla v. Hanft, 423 F.3d 386, 391 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006).

118. *See* Haig v. Agee, 453 U.S. 280, 291 (1981) (stating "in the areas of foreign

Regan.[119] There, the Court considered whether two broadly written statutes authorized the President to suspend claims brought by Americans against Iranian companies to secure the release of hostages taken in that country.[120] In interpreting the two statutes at hand, the Court determined that neither gave the President express authorization to suspend claims.[121] However, the Court determined instead, as a matter of legislative history, that Congress intended to provide the President wide latitude in responding to hostage crises—to include the suspension of claims.[122] Thus, even where Congress has not provided express statutory authority for any given executive action and where there is a "zone of twilight" between the two branches of government, the President is still empowered to respond to national security threats where multiple statutes evince a congressional intent to affirm a broad spectrum of available actions.[123]

Taken together, the Court has not only allowed Congress to delegate authority to the President that speaks to national security, national threats, and national emergencies, but has read such delegation broadly to include congressional authorization of presidential action even when such authorization is not explicit.[124] The Court's acceptance of this

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policy and national security . . . congressional silence is not to be equated with congressional disapproval"); *see also* Crockett v. Reagan, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983) (finding that where Congress fails to disapprove of presidential use of military force, implicit approval is appropriate).

119. Dames & Moore v. Regan, 453 U.S. 654 (1981).

120. *See id.* at 675.

121. *Id.* at 675–76.

122. *Id.* at 677–79.

123. *See* Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971) (stating that where there is "any action by . . . Congress sufficient to authorize or ratify the military activity" then the courts should find the use of force Constitutionally valid).

124. Congressional *silence* is even sufficient to find "approval" of Presidential conduct in the area of national security where there is historical practice to support the President's conduct. Haig v. Agee, 453 U.S. 280, 291 (1981) ("[I]n the areas of foreign policy and national security, . . . congressional silence is not to be equated with congressional disapproval.").

congressional acquiescence is especially important in the *Youngstown* framework. If the court determines the President is acting with congressional authorization, he is then at the zenith of his power.[125] And such power is then ripe for abuse.

This state of dysfunction, caused by congressional acquiescence, is especially problematic when viewed through the lens of the Insurrection Act and the National Emergencies Act. Both acts give the President broad authority to manufacture a presidential coup, with both supporting an argument that should the President do so, he is acting under congressional authority and therefore under the most powerful tier in the *Youngstown* framework.

1. The Insurrection Act

Under the Constitution, Congress has the plenary authority to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[126] However, Congress elected to delegate this authority to the President in a series of statutes generally referred to as the Insurrection Act.[127] Invoked numerous times to quell civic unrest,[128] the act authorizes the President to deploy active duty, guard, or reserve military personnel domestically in three situations: (1) when a state

125. *See Dames & Moore*, 453 U.S. at 656; *see also Haig*, 453 U.S. at 291; *Orlando*, 443 F.2d at 1043; Padilla v. Hanft, 423 F.3d 386, 397 (4th Cir. 2005).

126. U.S. CONST. art. I § 8, cl. 15.

127. The Insurrection Act, 10 U.S.C. §§ 251–55.

128. Since 1943, the act has been invoked twelve times. Of those twelve invocations, seven of them involved issues of protesters-turned-rioters whereby the President deployed military forces to enforce domestic law without the request of a state government. President Eisenhower invoked the act once to respond to school integration issues in Arkansas. Exec. Order No. 10,730, 22 Fed. Reg. 7,628 (Sept. 25, 1957). President Kennedy invoked the act three times to respond to integration issues. Exec. Order No. 11,053, 27 Fed. Reg. 9,693 (Oct. 2, 1962); Exec. Order No. 11,111, 28 Fed. Reg. 5,709 (June 12, 1963); Exec. Order No. 11,118, 28 Fed. Reg. 9,863 (Sept. 11, 1963). President Johnson invoked the act on his own authority one time in response to the Civil Rights marches in Alabama. Exec. Order No. 11,207, 30 Fed. Reg. 3,741 (Mar. 23, 1965).

governor or legislature requests it due to an insurrection within the state;[129] (2) when the President independently "considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States";[130] or (3) when the President independently determines "insurrection, domestic violence, unlawful combination, or conspiracy . . . hinders the execution" of federal or state law or "impedes the course of justice under those laws."[131] Once the President finds one of the qualifying conditions exist, he is then given the sole authority to determine how to use military force.[132]

More simply, through the Insurrection Act, Congress delegated to the President the ability to make findings of fact that unlock a significant power: deploying military forces domestically to enforce state and federal law.[133]

This congressional delegation of authority to the President is sweeping.[134] Not only does Congress make the President the finder of fact in both determinations—that there is a state of insurrection, and that military force is necessary—but also such a determination generally is

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129. 10 U.S.C. § 251.

130. 10 U.S.C. § 252.

131. 10 U.S.C. § 253.

132. 10 U.S.C. § 252 ("[H]e may call into federal service such of the militia of any State, and use such of the armed forces, *as he considers necessary* to enforce those laws or to suppress the rebellion." (emphasis added)); 10 U.S.C. § 253 ("The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures *as he considers necessary* to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy . . . ." (emphasis added)).

133. 10 U.S.C. §§ 252–253.

134. *See* Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to Use the Military in Domestic Emergencies*, 91 MARQ. L. REV. 1027, 1057–64 (2008); *see also* Vladeck, *supra* note 22, at 611; Steve Vladeck, *Trump's George Floyd Protest Threats Raise Legal Question. Here's What He Can (and Can't) Do.*, NBC NEWS (June 2, 2020, 3:38 PM), https://www.nbcnews.com/think/opinion/trump-s-george-floyd-protest-threats-raise-legal-questions-here-ncna1222241.

unreviewable.[135] Where Congress gives the President the sole authority to make a finding of fact and includes no standard by which a court could review the finding, the President's determination is final.[136]

While this seems like an extreme menu of options, it is important to remember that the President is at his zenith of power when operating under this statutory scheme because he has congressional authorization. The statutory language is clear: the President may use military force when he alone determines particular conditions are met and as he alone determines is necessary to suppress the threat.[137]

Moreover, the statutory authorization to use military force domestically is coupled with the President's plenary power as commander in chief and his national security and foreign affairs power.[138] Once the military is deployed, the

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135. *See, e.g.*, Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827) (holding that when Congress delegated to the President the authority to respond to an invasion or an imminent invasion that the President's exercise of such authority was unreviewable by the judiciary); Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 95 (1874) (finding that when Congress delegated the authority to the President to determine which state or district was in a state of insurrection, such a determination made by the President was then unreviewable by the judiciary).

136. *See* discussion *infra* Section I.D; *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) (finding that when Congress gives the President broad authority and does not require him to justify his findings, courts should give broad deference to the decisions made by the President).

137. In response to the Trump administration's use of the military against protestors in 2020, several congressional bills were proposed but never made it to a full vote. *See* Curtailing Insurrection Act Violations of Individual Liberties Act, S. 3902, 116th Cong. (2020) (requiring certification to Congress that the state requested military support or one of the conditions in the Insurrection Act actually existed); Stop Using Military Force Against Civilians Act, H.R. 7129, 116th Cong. (2020) (proposing time limits on how long a President may deploy military forces under the Insurrection Act before requiring congressional action); Civil Deployment Notification Act of 2020, H.R. 7215, 116th Cong. § 2(b) (2020) (requiring notification to Congress by the President prior to deploying military forces domestically under the Insurrection Act).

138. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936) ("It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international

President's choices on how to use that force, as a matter of precedent, is unreviewable.[139] Although this is a situation falling within the scope of an "imperfect" war, that does not limit what the President may do with a deployed military—even stateside—if that power is a "fundamental" incident to war.[140]

The impact of the Insurrection Act in addition to Supreme Court precedent regarding the President's plenary power to direct military activities is significant. Congress gave the President the sole authority to determine that a state of insurrection exists and the power to deploy military force domestically. From there, the courts have given the President unreviewable power to employ that force however he sees fit.

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relations—a power which does not require as a basis for its exercise an act of Congress . . . .").

139. DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973) (holding that the court "cannot reasonably or appropriately determine whether a specific military operation constitutes [a change] of the war or is merely a new tactical approach within a [congressionally authorized] strategic plan"); Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 79 (D.D.C. 2014) ("Anwar Al-Aulaqi's classification as a key AQAP leader to target by a drone strike raises fundamental questions regarding the conduct of armed conflict. The Constitution commits decision-making in this area to the President, as Commander in Chief, and to Congress."); Lebron v. Rumsfeld, 670 F.3d 540, 548 (4th Cir. 2012) ("[T]he Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary. . . . [J]udicial review of military decisions would stray from the traditional subjects of judicial competence."); Tarros S.p.A. v. United States, 982 F. Supp. 2d 325, 334 (S.D.N.Y 2013) (holding the decision to use a U.S. Navy ship to divert a commercial vessel from a Libyan port was a "[m]ilitary judgment[] . . . constitutionally committed to the Executive Branch").

140. Once the President has statutory authorization to deploy forces domestically, the Posse Comitatus Act no longer bars the Executive from using military force stateside. *See* Ghiotto, *supra* note 29, at 363; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 517–18 (2004) ("[T]he AUMF is explicit congressional authorization for the detention of individuals in the narrow category [of enemy combatant] . . . . We conclude that detention of individuals falling into the limited category [of enemy combatant], . . . is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.").

2. The National Emergencies Act

Congress further delegated authority ripe for presidential abuse via the National Emergencies Act.[141] The National Emergencies Act allows for the President to "unlock" additional powers in the event of a national emergency.[142] While the existence of a national emergency is the key that unlocks these powers, the National Emergencies Act does not define what constitutes an emergency. Instead, the National Emergencies Act reflects a broad delegation of authority from Congress to the President, providing only that "[w]ith respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency."[143] By failing to define or provide articulable standards for what constitutes a national emergency, Congress makes the President the sole fact finder in determining whether there is a national emergency.[144] When the President exercises this delegated authority, 136 statutory powers become available to him.[145] These statutory powers are extensive, touching not only on matters of military personnel, but also on transportation, public health and safety, and spending authority.[146]

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141. *See* Patrick A. Thronson, Note, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 753–54 (2013); *see also* Samuel Weitzman, Note, *Back to Good: Restoring the National Emergencies Act*, 54 COLUM. J.L. & SOC. PROBS. 365, 370–71 (2021).

142. 50 U.S.C. §§ 1601–1651.

143. 50 U.S.C. § 1621.

144. 50 U.S.C. § 1621(a).

145. *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. (Sept. 4, 2019), https://www.brennancenter.org/analysis/emergency-powers.

146. 42 U.S.C. § 217 (The President can make commissioned members of the public health service military officers.); 10 U.S.C. § 12302(a) (The President can order ready reserve military members to active duty for up to 24 months); 31 U.S.C. § 3727(d) (The Department of Energy can contract without oversight.); 46 U.S.C. § 56309 (The Secretary of Transportation can take title of any merchant vessel lying idle in U.S. waters.); *see also* BRENNAN CTR. FOR JUST., *supra* note 145.

Congress attempted to limit the extent of its delegation of authority to the President by imposing a one year expiration on the declaration.[147] It also requires the President to specify the statutory powers he intends to utilize, issue public notices if he intends to invoke additional powers, make reports to Congress every six months, and meet with Congress every six months to consider a vote on termination.[148] Despite these measures, the National Emergencies Act has "failed" to check presidential authority. Of the fifty-eight emergencies declared since the act's passing, thirty-one remain in effect as of 2021.[149] These presidentially declared emergencies include matters well-connected to national security, including the "war in Syria (since 2004); instability in Iraq (since 2003); Russian election meddling, cyberattacks, and aggression against Ukraine; charcoal exports from Somalia; and the use of child soldiers in the Central African Republic."[150] And these declared emergencies tend to stretch much longer than the one year expiration date, with the average "emergency" lasting nearly ten years.[151] Thus, not only has Congress delegated its national emergency power to the President, but it also elected to not utilize the authority it retained for itself. The sheer volume of "emergencies" that exist and their duration indicate Congress is doing little to curtail executive branch use (or abuse) of this statutory scheme.

When the President elects to invoke his authority under the National Emergencies Act, he unlocks congressional authority to take a number of actions that could be used to authorize a presidential coup. For example, under 50 U.S.C. § 4533(a)(1), the President is authorized to "maintain,

147. 50 U.S.C. § 1601.

148. 50 U.S.C. §§ 1621–1622; *see also* Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers,* ATLANTIC (Jan./Feb. 2019), https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/.

149. BRENNAN CTR. FOR JUST., *supra* note 145.

150. Murphy, *supra* note 16.

151. BRENNAN CTR. FOR JUST., *supra* note 145.

protect, and restore domestic industrial base capabilities essential for national defense."[152] Arguably, such language authorizes him to use the federal military to provide such defense. Further, the Act has been invoked to declare that emergencies require "use of the Armed Forces."[153] And beyond the use of the armed forces, the Act gives the President authority to seize property[154] and to levy economic sanctions.[155]

Generally, these congressional authorizations under the National Emergencies Act establish at a minimum implicit—and arguably explicit—authorization for the President to assert broad and encompassing authority to respond to what he perceives to be a national emergency. Significantly, the Court has previously recognized where multiple statutes create an inference that Congress intended to authorize presidential power in matters of national security, the Court will uphold that conduct.[156] Therefore, a malevolent President may rely on congressional authorization per the National Emergencies Act—buttressed by judicial deference under *Youngstown*—to justify the use of the military in domestic matters to effectuate a coup.[157]

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152. 50 U.S.C. § 4533(a)(1).

153. Proclamation No. 9,844, 84 Fed. Reg. 4,949, 4,949 (Feb. 20, 2019) (relying upon 50 U.S.C. §§ 1601–1651); *see also* Jacqueline Lewis, *The Executive's Power of the Purse in National Emergency: The President's Plan to Poach Defense Funds to Build the Wall,* 34 GEO. IMMIGR. L.J. 825, 826–28 (2020); Scott R. Anderson & Margaret Taylor, *What Authorities Is President Trump Using to Build a Border Wall?*, LAWFARE (Feb. 15, 2019, 2:39 PM), https://www.lawfareblog.com/what-authorities-president-trump-using-build-border-wall.

154. *See, e.g.*, 7 U.S.C. § 4208 (Provisions intended to protect farmland do not apply to acquisition of farmland for national defense purposes.); 46 U.S.C. § 56309 (Secretary of Transportation can take title of any merchant vessel lying idle in U.S. waters.).

155. Murphy, *supra* note 16.

156. Dames & Moore v. Regan, 453 U.S. 654, 677–79 (1981).

157. *See generally* Elizabeth Goitein, *Trump Showed How Easily Presidents Can Abuse Emergency Powers. Here's How Congress Can Rein Them In.*, ATLANTIC (Jan. 22, 2021, 11:15 AM), https://www.politico.com/news/magazine/2021/01/22/trump-presidents-abuse-emergency-powers-congress-rein-in-

3. The Insurrection Act and the National Emergencies Act as Congressional Authorization of the Presidential Coup

Taken together, the Insurrection Act and the National Emergencies Act provide congressional authorization for the President to "manufacture emergencies."[158] Congress has delegated to the President the fact-finding responsibility to declare either an insurrection or a national emergency. And this fact-finding determination is in turn unreviewable by the judiciary. Once the President makes this fact-finding determination, he is then vested with extensive powers, which include utilizing the federal military to respond to the perceived threats. Because the President is then acting with congressional authorization under these statutes, he is at the zenith of his power under *Youngstown*, and the judiciary will provide minimal scrutiny of the actions he takes under this authority.

What then prevents the President from manufacturing these emergencies? Can he manufacture an emergency that enables him to invoke the Insurrection Act and National Emergencies Act? And can he do so to suppress his political opposition or refuse to leave office? This Section has answered all those questions in the affirmative. Not only may the President make the plenary claims to such authority, but he can claim congressional authorization through the congressional acquiescence evidenced in the Insurrection Act and National Emergencies Act.

D. *The Third Breakdown of the Separation of Powers: Judicial Abdication of Review*

But what about the judiciary? While the judicial branch may be the weakest, especially in terms of national security or national threats, the courts retain the responsibility to

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158. Tsai, *supra* note 16, at 594.

"say what the law is."[159] Should the President assert plenary powers in identifying and responding to a national threat, or should Congress delegate broad authority to the President, the judiciary should have the authority to scrutinize such actions and declare them unconstitutional if warranted. But while courts have sometimes utilized this power, they have largely abdicated it.[160]

The *Youngstown* framework itself reflects this abdication. If the President and Congress are acting together, courts will give broad deference to the presidential action.[161] And while courts will decide questions of which branch has the constitutional authority to act, they will not delve into matters of policy.[162] But courts are eager to label matters of national security as policy questions, leaving examination of presidential action to the news cycle—not the

159. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 7–9 (1983).

160. *See* Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946) (holding that Congress did not give the President authority to subject civilians to military commissions); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588–89 (1952) (holding the President did not have the authority to seize U.S. steel mills under national security concerns); Hamdan v. Rumsfeld, 548 U.S. 557, 651 (2006) (Kennedy, J., concurring) (rejecting President Bush's claims of plenary authority to dictate military commission procedures because they did not comply with an Act of Congress).

161. *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring) ("A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.").

162. *See* Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *see also* Lebron v. Rumsfeld, 670 F.3d 540, 552 (4th Cir. 2012) ("This is a case in which the political branches, exercising powers explicitly assigned them by our Constitution, formulated policies with profound implications for national security. One may agree or not agree with those policies. One may debate whether they were or were not the most effective counterterrorism strategy. But the forum for such debates is not the civil cause of action pressed in the case at bar.")

courts.[163] Under this construct, should the president utilize congressional authorization such as the Insurrection Act to manufacture a crisis and utilize military power to effectuate a coup, the judiciary is likely to stop its review after determining whether Congress properly delegated such authority to the President under the *Youngstown* framework.[164]

Even if courts were to review the President's response, they are unlikely to declare his conduct unconstitutional. First, wide latitude and deference is given to the Executive when a finding of fact must be made to unlock statutory authorization to use military force. Second, because the President is the commander in chief of the military, wide latitude and deference is given to him on how to employ military force.

Because the Supreme Court has affirmed Congress can grant broad authority to the Executive, it has also recognized that its role in reviewing the exercise of that authority is limited.[165] Statutes confer authority upon the President in many ways, but generally the President is required to make a finding of fact to act under the statute's provision, as evidenced by the Insurrection Act and National Emergencies Act.[166] These findings of fact, in matters of national security, tend to be written in broad language as Congress cannot anticipate every national security issue the President might

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163. *See* Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 881–83 (2013).

164. *See* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1362 (2009).

165. *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 675 (2007); *see also* Deborah N. Pearlstein, *A Measure of Deference: Justice Stevens from* Chevron *to* Hamdan, 43 U.C. DAVIS L. REV. 1063, 1065 (2010).

166. 10 U.S.C. § 252 ("Whenever the President considers . . . ."); *id.* ("[T]he President . . . [shall take measures] he considers necessary . . . ."); 50 U.S.C. § 1621 ("[T]he President is authorized to declare such national emergency.").

be faced with.[167] Once the finding of fact is made, however, courts rarely review the merits of the finding.[168]

The Supreme Court provided a clear and unequivocal answer to this question in 1827. In the case of *Martin v. Mott*, the Court considered a 1795 statute whereby Congress authorized the President to respond to national security concerns.[169] The statute provided:

> [W]henever the United States shall be invaded, or be in imminent danger of invasion . . . it shall be lawful for the President of the United States to call forth such number of the militia of the State or States . . . as he may judge necessary to repel such invasion, and to issue his order for that purpose . . . as he shall think proper.[170]

In taking up the issue of whether the President's determinations are reviewable, the Court answered unequivocally: no. "We are all of opinion, that the authority

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167. *See* Zemel v. Rusk, 381 U.S. 1, 17 (1965).

168. *See* Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 864-65 (2019) (arguing that the Take Care Clause requires, at a minimum, the President act faithfully in his fact-finding inquiry; this in turn requires some level of honesty in the fact finding as a check on broad grants of authority to the President); *see also* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 28 (2008) (The Court might have been able to reverse the lower court's injunction against the Navy by reviewing the various statutory schemes granting broad regulatory power over environmental issues to Executive branch officials; but even in reviewing the merits of the preliminary injunction, the Court ruled in favor of the Navy, noting that "[t]he lower courts did not give sufficient weight to the views of several top Navy officers . . . ." In short, even when the Court reviews the merits of the military's claims, it will accord extreme deference to them.); Gilligan v. Morgan, 413 U.S. 1, 10–11 (1973) (Although the case questioned state officials' use of the National Guard to respond to protests at Kent State, the Court's language is unequivocal: "Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. . . . It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers.").

169. *See* 25 U.S. (12 Wheat.) 19, 28–29 (1827).

170. *Id.* at 29.

to decide whether the exigency has arisen, belongs *exclusively* to the President, and that his decision is conclusive upon all other persons."[171] The Court determined by the language of the statute and the evinced congressional intent that the President alone would be the finder of fact and the branch of government responsible for responding to the threat.[172] This early interpretation of congressional authorizations fortifies the President's fact-finding power, especially in matters of national security.[173]

More to the point, the Court addressed presidential fact-finding power in relation to insurrection in *Hamilton v. Dillin*.[174] Although a challenge to presidential power to regulate commerce, the Court also addressed presidential power to determine whether a state was participating in the insurrection against the Union.[175] The Court noted that under congressional authorization the President "clearly had authority" to determine whether an entire state, or just one district of it, was in a state of insurrection.[176] *Dillin* therefore established, in particular, the President has the authority to determine whether and to what extent an insurrection exists within a given state.[177] This is especially true in light of how little the language of the Insurrection Act has changed over time.[178]

The Court addressed presidential fact finding more recently in *Trump v. Hawaii*.[179] There, plaintiffs challenged

171. *Id.* at 30 (emphasis added).

172. *See id.* at 31.

173. The Court did not shy away from the potential for abuse of this type of fact-finding power, but in doing so acknowledged that there is a check on such a broad power: elections. *See id.* at 32.

174. *See generally* 88 U.S. (21 Wall.) 73 (1874).

175. *Id.* at 95.

176. *Id.*

177. *See id.*

178. *Compare* H.R. 1037, 25th Cong. (1839), *with* 10 U.S.C. §§ 252–253.

179. *See* 138 S. Ct. 2392 (2018).

the President's executive orders denying entry to immigrants from majority-Muslim countries.[180] The President acted under congressional authorization to "restrict the entry of aliens whenever he finds that their entry 'would be detrimental to the interests of the United States.'"[181]

President Trump justified the initial ban as a matter of national security.[182] But after challenges to the first round of executive orders, he directed agencies, such as the Department of Homeland Security, to conduct fact-finding inquiries on these issues.[183] Questions of a country's willingness to report criminal and terrorist activity were a specific part of the fact-finding review.[184] After discussing the various fact-finding efforts on the part of executive agencies like the Department of Homeland Security, the Court noted that the President's justification for restricting travel from these particular countries related to issues of national security.[185]

The Court determined that Congress' grant of authority to the President was not just broad,[186] but also contained no requirement that the President justify his findings "with sufficient detail to enable judicial review."[187] *Trump v. Hawaii* therefore confirms that where Congress grants the President broad authority and includes no standard of review, presidential fact finding is conclusive—especially in

180. *Id.* at 2403.

181. *Id.* (citing 8 U.S.C. § 1182(f)).

182. *See id.* at 2403–04.

183. *Id.* at 2403–06.

184. *Id.* at 2404.

185. *Id.* at 2405.

186. *Id.* at 2408 ("By its terms, § 1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry . . . ; whose entry to suspend . . . ; for how long . . . ; and on what conditions. It is therefore unsurprising that we have previously observed that § 1182(f) vests the President with 'ample power' to impose entry restrictions . . . ." (citations omitted)).

187. *Id.* at 2409; *see also generally* Ludecke v. Watkins, 335 U.S. 160 (1948).

the context of national security.[188]

Similarly, the courts have abdicated their responsibilities by consistently finding that once the President has the authority to act and makes the appropriate findings of fact, he alone has the power to decide how to use the force. Specifically, how the President chooses to use the military in light of congressional authorization or as an incident of his plenary power is a political question unreviewable by the courts. In *DaCosta v. Laird*, the Second Circuit considered a challenge to the constitutionality of President Nixon's "unilateral" orders to begin mining North Vietnamese harbors after Congress passed the Mansfield Amendment.[189] This amendment expressly provided that it was the United States' policy "to terminate at the earliest practicable date all military operations of the United States in Indochina" to include the withdrawal of all American forces.[190] However, in response to North Vietnamese military conduct after Congress passed the Mansfield Amendment, President Nixon escalated American military operations in the area.[191]

The Second Circuit refused to consider whether this strategic decision was unconstitutional, although it was not authorized by Congress. The appellant argued that by passing the Mansfield Amendment, Congress only authorized the President to use military force to de-escalate, and ultimately end, the war in Vietnam.[192] The court posited that whether President Nixon's orders amounted to an

188. *See also* Smith v. Obama, 217 F. Supp. 3d 283, 300 (D.D.C. 2016) (finding that President Obama's finding of fact that ISIL fell within the 2001 and 2002 AUMF to be "precisely the type of discretionary military determination that is committed to the political branches and which the Court has no judicially manageable standards to adjudicate").

189. DaCosta v. Laird, 471 F.2d 1146, 1147, 1154 (2d Cir. 1973).

190. *Id.* at 1156.

191. Or, at a minimum, launched new military initiatives. *See id.* at 1148–50.

192. *Id.* at 1154.

unauthorized "escalation"[193] of the war was a question with no justiciable standard of review.[194] Therefore, it held the matter a political question.[195]

Justice Thurgood Marshall, in his capacity as Circuit Justice, addressed presidential power to make military decisions once Congress authorizes the use of military force in *Holtzman v. Schlesinger*.[196] In reviewing whether President Nixon's continued bombing of Cambodia was constitutional in light of Congress' passing of the Fulbright Proviso—which prohibited the use of military funding to "directly or indirectly" support military operations there—he refused to vacate the Second Circuit's determination that such a question was a political question.[197] When initially considering this question, the Second Circuit noted that "if we were incompetent to judge the significance of the mining and bombing of North Vietnam's harbors and territories, we fail to see our competence to determine that the bombing of Cambodia is a 'basic change' in the situation and that it is not a 'tactical decision' within the competence of the President."[198] By accepting the Second Circuit's rationale that a President's decision as to how to use military power was a political question, Justice Marshall strongly suggests that how the President elects to use military force—here the bombing of Cambodia—is outside of judicial review.[199] These holdings in effect, meant the President had the power to make tactical decisions on who to bomb, where to bomb them,

193. *Id.* at 1155.

194. *Id.*

195. Importantly, the court again noted congressional funding of the Vietnam military operations, and it also noted that there was no language in the Mansfield Amendment "prohibit[ing]" the President's conduct. *See id.* at 1157.

196. 414 U.S. 1304, 1304 (1973).

197. *Id.* at 1307–15.

198. Holtzman v. Schlesinger, 484 F.2d 1307, 1310 (2d Cir. 1973).

199. *See Holtzman*, 414 U.S. at 1314–15.

and when.[200]

In sum, the judiciary has severely limited its role in reviewing foreign affairs and national security matters. When determining which branch has the authority to act, courts will utilize the *Youngstown* framework to give broad deference to the Executive, especially when Congress has authorized such action. And then once action is taken, courts will give broad deference to any finding of fact made by the President or to any military action taken by the President in response. As such, should the President declare an insurrection or national emergency under congressional authorization, he is likely acting at the zenith of his power, without any judicial review of his finding that such a state exists or of his utilization of the military to quell the emergency.

E. *The Separation of Powers in a State of Dysfunction*

The constitutional separation of powers is in a state of dysfunction. Presidents have been allowed to assert sweeping plenary powers in declaring and responding to national emergencies and threats. In turn, Congress has delegated much of its authority over these matters to the presidency. Meanwhile, the judiciary has created a framework that gives broad deference to the President when acting under congressional authorization in making findings of fact and electing to utilize military power in response. And as such, the environment is ripe for a presidential coup. A President looking to use military power to suppress his political opponents or to remain in office only needs to declare an insurrection or national emergency and then unlock broad authority to utilize military power to achieve his coup. The President may then not only claim the authority to do so but may also assert that he is acting within his legal authority to use the military power at his disposal

200. *See id.*; *see also* Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 76, 77 (D.D.C. 2014).

to effectuate a coup.

II. THE INFORMAL CHECKS: MORAL AND POLITICAL CHECKS

Much as the Framers feared executive power and domination from their experiences as colonists, the Supreme Court writing in the wake of World War II shared similar concerns.[201] The experiences of Nazi Germany and the Soviet Union were prevalent in the minds of the Court, leading the Court to reimagine "constitutional doctrine in ways designed to prevent a totalitarian regime, communist or otherwise, from arising in the United States."[202] This reimagining was especially noticeable in checking the authority of the President.

In *Youngstown,* while striking down President Truman's seizure of the steel mills, several Justices alluded to the rise of totalitarianism throughout the world.[203] For instance, Justice Frankfurter alluded to the "experience through which the world has passed in our own day has made vivid" the threats posed by an unchecked Executive.[204] Similarly, Justice Jackson posited that "if we seek instruction . . . from the executive powers in those governments we disparagingly describe as totalitarian," that such lesson would be to not

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201. *See, e.g.*, W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 640–41 (1943) ("Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men . . . down to the fast failing efforts of our present totalitarian enemies."); Beauharnais v. Illinois, 343 U.S. 250, 287 (1952) (Douglas, J., dissenting) ("The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. . . . They chose liberty. That should be our choice today . . . .").

202. Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 423 (1996).

203. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (Jackson, J., concurring) (1952); *see also* Primus, *supra* note 202, at 443.

204. *Youngstown Sheet & Tube Co.,* 343 U.S. at 593 (Frankfurter, J., concurring).

leave the Executive unchecked.[205] Justice Douglas added, "[T]he emergency did not create power; it merely marked an occasion when power should be exercised. . . . All executive power—from the reign of ancient kings to the rule of modern dictators—has the outward appearance of efficiency."[206]

However, with the fall of Nazi Germany and the Soviet Union, the fears of totalitarianism faded.[207] And so too did the Court's willingness to check executive authority.[208] As discussed in the prior part, Congress and the judiciary have taken a more deferential and respectful posture towards the presidency. The efficiency of investing large amounts of authority in the executive branch has come to outweigh the fear that the President will utilize this authority to conduct a presidential coup.[209] Implicit in much of Congress' acquiescence to presidential authority—and in the judiciary's abdication of its reviewing authority—is that the President does not have to be feared.

But why? Why do Congress and the judiciary accept that the President can be given large swaths of power without fearing a presidential coup? And why does the President not abuse this trust and power that has been placed in him? This Part argues that with the fall and decline of the formal check of separation of powers came the rise of informal checks protecting against a presidential coup. Specifically, this Part argues that two categories of informal checks emerged that not only protected against a presidential coup, but also justified Congress' and the judiciary's faith in legitimatizing presidential authority: (1) the moral check, and (2) the

205. *Id.* at 641 (Jackson, J., concurring).

206. *Id.* at 629 (Douglas, J., concurring).

207. *See* Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought*, 12 YALE J.L. & HUMAN. 171, 209–10 (2000).

208. *See* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint,* 113 COLUM. L. REV. 1097, 1112–13 (2013).

209. *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 32–33 (1995).

political check. After establishing these checks, this Part argues that both of these categories are also in a state of dysfunction, leaving little protection against a presidential coup.

A. *The Moral Check: The Benevolent President and the Constitutionally Faithful Military*

The first category of informal checks is the moral check. For the President to engage in a presidential coup, he will need to make the choice to violate democratic norms that permeate American political culture. And from there, to execute the coup, the military must elect to follow his orders. The moral check is the belief that neither the President nor the military would make these choices, namely that the President will be benevolent with the power entrusted to him, and that the military will not follow the orders of malevolent President. But the Trump presidency and its aftermath have called into question this moral check, especially the faith in the benevolent President. When coupled with a military that has been trained in what it perceives to be constitutional obedience to the President, the moral check exists in a state of dysfunction.

1. The Benevolent President

When the Supreme Court allowed President Roosevelt and the military to intern Japanese citizens during World War II, Justice Jackson warned that "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, . . . [t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[210] While each President following President Roosevelt held this "loaded weapon" and wielded

210. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

the power entrusted to them, they all drew a line when it came to staging a presidential coup.[211]

In many ways, the refusal of modern Presidents to "cross the Rubicon"[212] and use the military power at their disposal to suppress their political opponents or to remain in office reflects a consistent presidential commitment to what Aziz Huq and Tom Ginsburg identify as the three institutional prerequisites for democracy: "(1) a democratic electoral system, most importantly periodic-and-fair elections in which a losing side cedes power; (2) the liberal rights to speech and association that are closely linked to democracy in practice; and (3) the stability, predictability, and integrity of law and legal institutions—the rule of law."[213] A commitment to these prerequisites forecloses the President from using the military to effectuate a presidential coup. For the American public, they can place their trust in a benevolent President who will not abuse the power at his disposal because of the assumption that American Presidents will also abide by these democratic values and commitments.

The limited use and way the Insurrection Act has been invoked speaks to the presidential commitment to democratic values.[214] Following the Supreme Court's decision in *Brown v. Board of Education*[215]—and the refusal

211. *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 129–34 (2018).

212. *See* 2 PLUTARCH, THE LIVES OF NOBLE GRECIANS AND ROMANS 199–244 (Arthur Hugh Clough ed., John Drydon trans., Random House Publ'g Grp. 2001).

213. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 87 (2018).

214. *See, e.g.*, Isaac Tekie, Note, *Bringing the Troops Home to a Disaster: Law, Order, and Humanitarian Relief*, 67 OHIO ST. L.J. 1227, 1258 (2006); Michael Greenberger, *Yes, Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City from a Devastating Natural Catastrophe*, 26 MISS. C. L. REV. 107, 107–14 (2007); *see also* Thaddeus Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 STETSON L. REV. 861, 884–90 (2010).

215. *See* 347 U.S. 483 (1954).

of several southern states to desegregate their schools—both Presidents Eisenhower and Kennedy invoked the Insurrection Act to deploy federal military forces to enforce federal law.[216] President Eisenhower's declaration authorized the Secretary of Defense to deploy forces, specifically stating the military was required to remove "the obstruction of justice with respect to enrollment at Little Rock school district."[217] President Kennedy's invocation to support integration of state universities in Mississippi and Alabama read much the same, authorizing military commanders to "remove all obstructions of justice" preventing integration.[218] Of note, each of these invocations authorized the Department of Defense to activate the National Guard to enforce these orders for an "indefinite period."[219]

But despite the broad grants of authority in these invocations of the Insurrection Act, they were predicated upon the enforcement of federal law, a unanimous Supreme Court decision, and the protection of civil liberties for African Americans in the South.[220] Further, the military refrained from utilizing lethal force, the elected governors remained in power—free to voice dissent and opposition to desegregation,

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216. *See* F.E. Guerra-Pujol, *Domestic Constitutional Violence*, 41 U. ARK. LITTLE ROCK L. REV. 211, 213, 229–30 (2019); *see also* Elizabeth M. Iglesias, *Trump's Insurrection: Pandemic Violence, Presidential Incitement and the Republican Guarantee*, 11 U. MIA. RACE & SOC. JUST. L. REV., no. 2, Spring 2021, at 7, 29–30.

217. Exec. Order No. 10,730, 22 Fed. Reg. 7,628 (Sept. 25, 1957).

218. Exec. Order No. 11,053, 27 Fed. Reg. 9,693 (Oct. 2, 1962); Exec. Order No. 11,111, 28 Fed. Reg. 5,709 (June 12, 1963); Exec. Order No. 11,118, 28 Fed. Reg. 9,863 (Sept. 11, 1963).

219. Exec. Order No. 11,053, 27 Fed. Reg. 9,693 (Oct. 2, 1962); Exec. Order No. 11,111, 28 Fed. Reg. 5,709 (June 12, 1963); Exec. Order No. 11,118, 28 Fed. Reg. 9,863 (Sept. 11, 1963).

220. *See* Mark Stern, *Eisenhower and Kennedy: A Comparison of Confrontations at Little Rock and Ole Miss*, 21 POL'Y STUD. J. 575, 576-78 (1993); *see also* Kasey S. Pipes, *Eisenhower Was Key Desegregation Figure,* POLITICO (Sept. 18, 2007, 7:10 PM), https://www.politico.com/story/2007/09/eisenhower-was-key-desegregation-figure-005885.

and the military shortly exited upon achieving its limited purpose of enforcing federal law.[221] Perhaps most telling, President Eisenhower invoked the Insurrection Act to enforce *Brown*, which he generally did not support.[222]

A commitment to democratic values is also present when a President elects to not invoke the Insurrection Act. When Hurricane Katrina devastated New Orleans in 2005, President George W. Bush considered invoking the Insurrection Act to provide both services and law and order capabilities through the military to New Orleans.[223] He first encouraged Louisiana's governor to request such assistance, but when she refused to do so, he still refused to invoke the act.[224] To President Bush, by unilaterally declaring an insurrection and then deploying the federal military to New Orleans, "the world would see a male Republican president usurping the authority of a female governor by declaring an insurrection in a largely African-American city."[225] Believing that invoking the Insurrection Act "could unleash holy hell,"[226] President Bush recognized the limitations of the authority given to him, considering that his wielding of such authority could be seen as an attack against democratic values.

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221. *See* Michael S. Mayer, *With Much Deliberation and Some Speed: Eisenhower and the* Brown *Decision*, 52 J.S. HIST. 43, 50 (1986); *see also* Sheldon M. Stern, *John F. Kennedy and the Politics of Race and Civil Rights*, 35 REVS. AM. HIST. 118, 120 (2007) (reviewing NICK BRYANT, THE BYSTANDERS: JOHN F. KENNEDY AND THE STRUGGLE FOR BLACK EQUALITY (2006)).

222. LEVITSKY & ZIBLATT, *supra* note 211, at 130.

223. *See* Joshua M. Samek, Note, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U. MIA. L. REV. 441, 460–65 (2007); *see generally* Sean McGrane, Note, *Katrina, Federalism, and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, 108 MICH. L. REV. 1309, 1322–23 (2010).

224. *See* Bruce Alpert, *Bush Recalls Katrina Aftermath in 'Decision Points' Memoir*, NOLA (Nov. 9, 2010, 6:10 AM), https://www.nola.com/news/politics/article_e011f389-6125-57d3-b16c-b5977453c25d.html.

225. *Id.*

226. *Id.*

Even outside of the contours of the Insurrection Act, Presidents throughout the "imperial presidency" timeframe have pulled back in their assertions of authority.[227] President Roosevelt halted his plan to pack the Supreme Court;[228] President Truman complied with the Supreme Court's decision in *Youngstown*;[229] President Nixon conceded to President Kennedy in 1960 despite potential election irregularities and then, after pushing the limits of his authority during the Watergate scandal, provided his Oval Office recordings to Congress and eventually resigned from office;[230] Presidents Reagan and Clinton tolerated special prosecutors;[231] Vice President Gore respected the Supreme Court's decision in *Bush v. Gore* and conceded to President Bush;[232] and the majority of Presidents have enforced laws that they personally did not support.[233] Underlying these presidential actions or inactions is a choice to be made by the President. Each President had to decide whether to cross the proverbial Rubicon with the power entrusted to him. And as they made their decisions, they were driven in part by their commitment to the democratic prerequisites.

Although President Trump may not have staged a coup,

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227. *See* LEVITSKY & ZIBLATT, *supra* note 211, at 129–34. *See generally* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

228. *See* LEVITSKY & ZIBLATT, *supra* note 211, at 132–33.

229. *Id.* at 130.

230. *See id.* at 130, 141–43; *see also* Hal Brands, *Burying Theodore White: Recent Accounts of the 1960 Presidential Election*, 40 PRESIDENTIAL STUD. Q. 364, 364–67 (2010) (book review).

231. *See* Ron Elving, *Potent But Unpredictable: How Special Counsels Have Posed a Special Threat*, NPR (Mar. 21, 2019, 3:33 PM), https://www.npr.org/2019/03/21/699982049/potent-but-unpredictable-how-special-counsels-have-posed-a-special-threat. *See generally* BOB WOODWARD, SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE (1999).

232. *See* 531 U.S. 98 (2000); *see also* Andrew Rice, *The 2000 Election Never Ended*, N.Y. MAG. (Nov. 5, 2020), https://nymag.com/intelligencer/2020/11/bush-v-gore-and-the-2000-election-never-ended.html.

233. *See* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2200–03 (2018).

he and his administration perhaps approached the Rubicon more closely than any prior President.[234] President Trump not only disregarded several presidential norms and political conventions, but he also appeared to have little concern or adherence to the democratic values or prerequisites required to sustain the moral check entrusting the President not to abuse the power at his disposal. While much has been written regarding the breakdown of norms during the Trump presidency, the breakdown is especially problematic in discussing the prerequisites for democracy.[235]

First, although President Trump did leave office at the end of his term, his presidency was marked by an apparent disregard for the democratic electoral system. Prior to the November 2020 election, he made several comments suggesting that he would not leave office and that any election would likely be wrought with fraud. Consider the following comments, all made between July and September 2020: "Well, we're going to have to see what happens. . . . And the ballots are a disaster"; "[T]his scam the Democrats are pulling—it's a scam—this scam will be before the United States Supreme Court"; "[T]he Democrats are trying to rig this election"; "We are going to win four more years. And then after that, we'll go for another four years"; and finally when asked whether he would accept the election results, he

234. *See* Jamie Gangel et al., *'They're Not Going to F**king Succeed': Top Generals Feared Trump Would Attempt a Coup After Election, According to New Book*, CNN (July 14, 2021, 9:03 PM), https://www.cnn.com/2021/07/14/politics/donald-trump-election-coup-new-book-excerpt/index.html; *see also* Quint Forgey, *Trump Denies Coup Attempt in Latest Attack on Milley*, POLITICO (July 15, 2021, 12:48 PM), https://www.politico.com/news/2021/07/15/trump-deny-coup-mark-milley-499763 ("[I]f I was going to do a coup, one of the last people I would want to do it with is General Mark Milley.").

235. *See generally* Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177 (2018); David Orentlicher, *Political Dysfunction and the Election of Donald Trump: Problems of the U.S. Constitution's Presidency*, 50 IND. L. REV. 246 (2016); Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA. L. REV. 1430 (2018); Ben Gittleson, *How Trump Obliterated Norms and Changed the Presidency*, ABC NEWS (Jan. 19, 2021, 2:29 PM), https://abcnews.go.com/Politics/trumps-legacy-obliterated-norms-chipped-institutions-end/story?id=75275806.

responded, "No. I have to see . . . . I'm not going to just say 'yes.'"[236]

President Trump continued to question the credibility of the election after it appeared Vice President Biden won.[237] Between November 2020 and January 2021, President Trump and his supporters filed over sixty lawsuits alleging election fraud.[238] Beyond lawsuits, he immediately claimed victory and continued to assert these claims through President Biden's inauguration.[239] Perhaps most dramatically, he encouraged large-scale protests at the U.S. Capitol in support of his claims of electoral victory and voting fraud.[240] And when these protests became increasingly violent, resulting in an insurrection at the Capitol, President Trump appeared to remain supportive and delayed any sort

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236. Kevin Liptak, *A List of the Times Trump Has Said He Won't Accept the Election Results or Leave Office if He Loses*, CNN (Sept. 24, 2020, 9:59 AM), https://www.cnn.com/2020/09/24/politics/trump-election-warnings-leaving-office/index.html; *see also* Molly Jong-Fast, *What Happens if Trump Actually Refuses to Accept Election Results?* VOGUE (Oct. 2020), https://www.vogue.com/article/what-if-donald-trump-refuses-to-accept-the-2020-election-results.

237. *See* Andrew Higgins, *Trump's Post-Election Tactics Put Him in Unsavory Company*, N.Y. TIMES (Nov. 11, 2020), https://www.nytimes.com/2020/11/11/world/europe/trump-autocrats-dictators.html (quoting Serhii Plohky, who claimed "Trump's behavior is without precedent among leaders in Western democracies").

238. William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election,* USA TODAY (Jan. 6, 2021, 5:01 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/.

239. *See* Kevin Liptak, *Trump Seeks to Delegitimize Vote Even as His Campaign Says Math Will Turn His Way*, CNN (Nov. 4, 2020, 8:47 PM), https://www.cnn.com/2020/11/04/politics/trump-election-results/index.html; *see also* Brian Naylor, *Trump Won't Attend Inauguration; Congress Pushes Ahead With Capitol Ceremony,* NPR (Jan. 8, 2021, 2:10 PM), https://www.npr.org/sections/biden-transition-updates/2021/01/08/954865776/trump-wont-attend-inauguration-congress-pushes-ahead-with-capitol-ceremony.

240. *See* Rebecca Ballhaus et al., *Trump and His Allies Set the Stage for Riot Well Before January 6*, WALL ST. J. (Jan. 8, 2021, 8:38 PM), https://www.wsj.com/articles/trump-and-his-allies-set-the-stage-for-riot-well-before-january-6-11610156283; *see also* Dan Barry & Sheera Frenkel, *'Be There. Will be Wild!': Trump All but Circled the Date*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html.

of official government response.[241] His rhetoric, actions, and support for the Capitol insurrection were alarming enough that the Chairman of the Joint Chiefs of Staff, General Mark Milley, feared that the President would take some military action—including deploying the military domestically—to dispute the election.[242]

Second, President Trump displayed an aversion to the liberal rights to speech and association that are closely linked to democracy in practice. This aversion was especially apparent in President Trump's response to the Black Lives Matter protests that arose in the summer of 2020 after a white police officer shot and killed George Floyd, an African American man.[243] President Trump frequently referred to these protestors as "thugs" or violent, when in fact the majority of protests were peaceful in nature.[244] Further, President Trump encouraged governors to "dominate" protestors and then contemplated invoking the Insurrection

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241. *See* Chris Cillizza, *The Devastating Silence of the Trump Administration on the Capitol Riot*, CNN (Jan. 12, 2021, 11:42 AM), https://www.cnn.com/2021/01/12/politics/federal-government-silent-attacks-riot/index.html; *see also* Brakkton Booker, *House Democrats Use Trump's Own Words to Argue He Showed No Remorse After Attack*, NPR (Feb. 11, 2021, 4:19 PM), https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/11/967034292/house-democrats-use-trumps-own-words-to-argue-he-showed-no-remorse-after-attack.

242. CAROL LEONNIG & PHILIP RUCKER, I ALONE CAN FIX IT: DONALD J. TRUMP'S CATASTROPHIC FINAL YEAR 363–66 (2021).

243. *See generally* Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS, (June 4, 2021, 7:39 PM), https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/.

244. *See* Philip Bump, *Over and Over, Trump Has Focused on Black Lives Matters as a Target of Derision or Violence*, WASH. POST (Sept 1, 2020), https://www.washingtonpost.com/politics/2020/09/01/over-over-trump-has-focused-black-lives-matter-target-derision-or-violence/; *see also* Christina Wilkie, *Trump Cranks Up Attacks on the Black Lives Matter Movement for Racial Justice*, CNBC (June 26, 2020, 7:31 AM), https://www.cnbc.com/2020/06/25/trump-attacks-black-lives-matter-racial-justice-movement.html; Tommy Beer, *Trump Called BLM Protestors 'Thugs' But Capitol-Storming Supports 'Very Special,'* FORBES (Jan. 6, 2021, 6:53 PM), https://www.forbes.com/sites/tommybeer/2021/01/06/trump-called-blm-protesters-thugs-but-capitol-storming-supporters-very-special/.

Act to quell the protests when they reached in Washington, D.C.[245] Although he declined to invoke the Insurrection Act, President Trump did ready the federal military to potentially quell the protests and then used military resources as a "show of force" against the protestors.[246]

Third, President Trump largely disregarded the stability, predictability, and integrity of law and legal institutions—the rule of law. As noted by Neil Siegel, President Trump consistently "undermine[d] public confidence in the federal judiciary by disparaging the federal courts and particular federal judges in ways that are unprecedented in modern times."[247] He displayed extra disdain to the Supreme Court following his election loss, claiming "[t]he Supreme Court had ZERO interest in the merits of the greatest voter fraud ever perpetrated on the United States."[248]

In sum, President Trump's rejection of the basic prerequisites for democracy calls into question the expectation of a benevolent President who will respect democratic values and refuse to abuse the power at his discretion. Instead of solidifying the moral check, the Trump

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245. Matt Perez, *Trump Tells Governors to 'Dominate' Protestors, 'Put Them in Jail for 10 Years*,*'* FORBES (June 1, 2020, 1:56 PM), https://www.forbes.com/sites/mattperez/2020/06/01/trump-tells-governors-to-dominate-protesters-put-them-in-jail-for-10-years/; *see also* Richard Altieri & Margaret Taylor, *How Presidents Talk About Deploying the Military in the United States*, LAWFARE (June 16, 2020, 8:14 AM), https://www.lawfareblog.com/how-presidents-talk-about-deploying-military-united-states.

246. Thomas Gibbons-Neff et al., *Former Commanders Fault Trump's Use of Troops Against Protestors*, N.Y. TIMES (July 2, 2020), https://www.nytimes.com/2020/06/02/us/politics/military-national-guard-trump-protests.html.

247. Siegel, *supra* note 235, at 193.

248. Jeff Mason, *Trump Castigates Supreme Court, Barr as Election Challenges Sputter*, REUTERS (Dec. 12, 2020, 1:02 PM), https://www.reuters.com/article/us-usa-election/trump-castigates-supreme-court-barr-as-election-challenges-sputter-idUSKBN28M0T7; *see also In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUST. (Feb. 14, 2020), https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts (providing a thorough collection of President Trump's attacks against the judiciary).

Administration placed it in a state of dysfunction, suggesting the real possibility of a future malevolent President who will push further than President Trump and abuse the power at his disposal to stage a coup.

And while President Trump is no longer in office, the dysfunction in this moral check remains. Consider the aftermath of the January 6, 2021, insurrection at the U.S. Capitol. Since the Capitol insurrection, Republican leaders have largely diminished the events of that day, with some even suggesting it was a "normal tourist visit."[249] Similarly, his disparagement of the electoral process remains in place, with over fifty percent of Republicans believing the election "was stolen" and that President Trump remains the true President.[250] Therefore, the Trump Administration continues to stand for a decay in the moral check that the President can be trusted to abide by democratic values and not use the military power at his disposal to effectuate a coup.

2. The Constitutionally Faithful Military

What about the military? If a malevolent President manufactures an insurrection and orders the military to secure the instruments of national power to allow the President to remain in office at the expiration of his term, would the military follow those orders? The belief that the military would refuse such an order serves as a secondary moral check against a presidential coup. As the most trusted

249. *See* Grace Segers, *"Normal Tourist Visit": Some Republicans Downplay January 6 Riot Amid Democratic Objections*, CBS NEWS (May 13, 2021, 12:04 PM), https://www.cbsnews.com/news/capitol-riot-january-6-hearing-lawmakers-clash/; *see also* Colby Itkowitz, *Republicans Case Jan. 6 Attack on Capitol by Pro-Trump Mob*, WASH. POST (May 12, 2021, 5:51 PM), https://www.washingtonpost.com/politics/trump-riot-capitol-republicans/2021/05/12/dcc03342-b351-11eb-a980-a60af976ed44_story.html.

250. Chris Kahn, *53% of Republicans View Trump as True U.S. President*, REUTERS (May 24, 2021, 5:06 PM), https://www.reuters.com/world/us/53-republicans-view-trump-true-us-president-reutersipsos-2021-05-24/.

institution in the United States,[251] there is a widespread and common belief that the military's loyalty belongs to the Constitution and not the President as the commander in chief.[252] Because of that constitutional faithfulness, the assumption is that the military would refuse any orders from the President which it perceives to be antithetical to the Constitution and its values.[253] Thus, should the President attempt to use the military to effectuate a coup, the military would refuse to do so, and the President will lack the tools to carry out his coup.

However, this Section challenges the assumption of a constitutionally faithful military. While the military is far from a monolithic entity, with myriad sub-cultures and sub-loyalties, there have been sufficient trends prevalent throughout the military, especially at a senior military officer level, which suggest this informal moral check is also

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251. *See* Polina Beliakova, *Erosion by Deference: Civilian Control and the Military in Policymaking*, 4 TEX. NAT'L SEC. REV., no. 3, Summer 2021, at 56, 58; *see also* Rosa Brooks, *Serving in the Military Doesn't Make You Special*, L.A. TIMES (Aug. 10, 2016), https://www.latimes.com/opinion/op-ed/la-oe-brooks-military-sacred-20160810-snap-story.html.

252. *See, e.g.*, Tom Kolditz, *Military's Loyalty to the Constitution is Saving Our Democracy from Trump Right Now*, HOUS. CHRON. (Nov. 10, 2020), https://www.houstonchronicle.com/opinion/outlook/article/Opinion-Military-s-loyalty-to-the-Constitution-15717023.php; Jesse Hamilton, *The Military's Allegiance to the Constitution Should Comfort Americans*, TAMPA BAY TIMES (Jan. 19, 2021), https://www.tampabay.com/opinion/2021/01/19/the-militarys-allegiance-to-the-constitution-should-comfort-americans-column/.

253. *See generally* Raphael S. Cohen, *Looking Beyond the Generals in the Room: The Real Cause of America's Civil-Military Malaise*, WAR ON THE ROCKS (Mar. 29, 2018), https://warontherocks.com/2018/03/looking-beyond-the-generals-in-the-room-the-real-cause-of-americas-civil-military-malaise/ ("This isolation has led to a romanticization of the military. . . . Americans paint the military as a paragon of patriotism, selflessness, and efficiency . . . ."); Jim Golby & Peter Feaver, *The Military Would Put Down Michael Flynn's Proposed Insurrection*, MIL. TIMES (Jan. 3, 2021), https://www.militarytimes.com/opinion/commentary/2021/01/03/the-military-would-put-down-michael-flynns-proposed-insurrection/ ("The best outcome is for civilian officials, starting with President Trump, to rule any use of the military to determine the outcome of the election strictly out of bounds. But if there is any doubt, senior military leaders may be forced to make clear that Flynn does not speak for them.").

in a state of dysfunction.[254] These trends are: (1) the ambiguity in defining what constitutes a legal order; (2) an acceptance of a commander in chief-centric view of civilian control of the military; and (3) the rise of careerism and extremism within the military.

First, the ambiguity in defining what constitutes a legal order suggests dysfunction in the moral check offered by military constitutional faithfulness. All military members have a duty to obey lawful orders; the inverse is also true as they have a legal duty and defense to disobey unlawful orders.[255] But what constitutes a lawful or an unlawful order is often unclear.[256] This ambiguity is especially concerning in the realm of presidential orders.[257] When the President orders military action, the constitutional nature of his action is often contested and unclear.[258] Whether the presidential order involves large scale deployments of military force or limited deployments such as airstrikes, a good faith argument is made that the President lacks constitutional

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254. *See* Karen O. Dunivin, *Military Culture: A Paradigm Shift?*, MAXWELL PAPERS, Feb. 1997, at i, 10 (1997); *see also* Paul D. Eaton, Antonio M. Taguba & Steven M. Anderson, *3 Retired Generals: The Military Must Prepare Now for a 2024 Insurrection,* WASH. POST (Dec. 17, 2021, 5:05 PM), https://www.washingtonpost.com/opinions/2021/12/17/eaton-taguba-anderson-generals-military/; Geoff Colvin, *Retired Brigadier General Says Trump Loyalists in Military Need Rooting Out*, FORTUNE (Jan. 8, 2021, 8:52 AM), https://fortune.com/2021/01/08/trump-support-military-capitol-coup-attempt/.

255. *See* 10 U.S.C. § 892; *see also* Eugene R. Fidell, *Wrestling with Legal and Illegal Orders in the Military in the Months Ahead*, JUST SEC. (Oct. 19, 2020), https://www.justsecurity.org/72934/wrestling-with-legal-and-illegal-orders-in-the-military-in-the-months-ahead/.

256. *See* Shane Reeves & David Wallace, *Can US Service Members Disobey an Order to Waterboard a Terrorist?*, LAWFARE (Apr. 6, 2016, 9:56 AM), https://www.lawfareblog.com/can-us-service-members-disobey-order-waterboard-terrorist; *see also* James E. Baker, *Good Governance Paper No. 21: Obedience to Orders, Lawful Orders, and the Military's Constitutional Compact*, JUST SEC. (Nov. 2, 2020), https://www.justsecurity.org/73221/good-governance-paper-no-21-obedience-to-orders-lawful-orders-and-the-militarys-constitutional-compact/.

257. *See* Keith A. Petty, *Duty and Disobedience: The Conflict of Conscience and Compliance in the Trump Era*, 45 PEPP. L. REV. 55, 83–93 (2018).

258. *Id.* at 84.

authority when acting absent a declaration of war.[259] But the lawfulness of these military actions often is rendered moot by the President either establishing the legality of these actions himself via an Office of Legal Counsel memorandum or by courts refusing to address the constitutionality of the President's use of military force.[260]

A similar conundrum arises when it comes to following the President's orders to effectuate a military coup. As discussed in the previous Part, a President's use of the military to enforce a coup may be legally justified. A President can use his plenary authority along with congressional authorization through the Insurrection Act or the National Emergencies Act to legally justify his order. His Office of Legal Counsel can then draft an opinion supporting

259. *See* J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 36–39 (1991); *see also* David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda*, 41 PEPP. L. REV. 685, 754–60 (2014); Brian Finucane & Stephen Pomper, *War Powers Guard Rails Can Keep the U.S. From Sliding into a New Middle East War*, JUST SEC. (July 2, 2021), https://www.justsecurity.org/77304/war-powers-guard-rails-can-help-the-u-s-from-sliding-into-a-new-middle-east-war/ (discussing the constitutionality of airstrikes in Iraq and Syria absent congressional authorization); Stephen Pomper, *The Soleimani Strike and the Case for War Powers Reform*, JUST SEC. (Mar. 11, 2020), https://www.justsecurity.org/69124/the-soleimani-strike-and-the-case-for-war-powers-reform/ (discussing whether airstrike against Iranian General Soleimani was constitutional); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 253 (2004) (discussing the role of Congress in validating President Bush's decision to invade Iraq).

260. *See generally* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 33–39 (2007) (providing a summary of the duties and functions of the Office of Legal Counsel, specifically, that "[t]he Supreme Court has never resolved whether the President can use force abroad unilaterally without congressional authorization" and "[w]hen OLC writes its legal opinions supporting broad presidential authority in these contexts . . . they cite executive branch precedents . . . as often as court opinions"); *see also* Prakash, *supra* note 68, at 1428–29 ("Presidents often can readily secure an opinion from the Office of Legal Counsel supporting their actions." (citing Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J.L. & PUB. POL'Y 213, 227–31 (2012))); *see also* Petty, *supra* note 257, at 95 ("[N]o U.S. federal court has ever found a U.S. war to be unlawful.").

the legality of the order.[261] What then is a military member to do? The President has asserted his authority to issue the order and has determined it to be legally sufficient. Should the military member violate the order, she may be subject to a court-martial.[262] Subsequently, if the order is found lawful in the court-martial, she is then subject to potential confinement.[263] This ambiguity in what constitutes a lawful order establishes what ultimately serves as the presumption that any order of the President is a lawful one. And the effect of that presumption is that military members are left to follow those orders, even if they desire to remain faithful to the Constitution.[264]

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261. *See, e.g.*, Conor Friedersdorf, *How Obama Ignored Congress, and Misled America, on War in Libya*, ATLANTIC (Sept. 13, 2012), https://www.theatlantic.com/politics/archive/2012/09/how-obama-ignored-congress-and-misled-america-on-war-in-libya/262299/ (discussing an OLC opinion that President Obama had the legal authority to initiate airstrikes in Libya absent congressional authorization); Andrew Cohen, *The Torture Memos, 10 Years Later*, ATLANTIC (Feb. 12, 2012), https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/ (discussing the OLC memos written for President Bush that found torture during the War of Terror to be constitutional assertions of presidential authority).

262. *See* John Ford, *When Can a Soldier Disobey an Order*, WAR ON THE ROCKS (July 24, 2017), https://warontherocks.com/2017/07/when-can-a-soldier-disobey-an-order/.

263. *Id.*

264. Another potential option for the officer would be to resign. For instance, when General Milley believed there was a threat of a presidential coup at the end of the Trump Administration he considered resigning in response. The other Joint Chiefs would then resign in turn, comparable to the events at the Nixon White House when President Nixon ordered the Attorney General to fire the Special Watergate Prosecutor. *See* LEONNIG & RUCKER, *supra* note 242, at 367. A study surveying senior officers seems to suggest this is a common strategy in wake of a legal, but immoral order. *See* Steven Katz, *What Do Future U.S. Generals Think About Dissent, Disobedience, and Resignation?*, JUST SEC. (May 28, 2021), https://www.justsecurity.org/76676/what-do-future-u-s-generals-think-about-dissent-disobedience-and-resignation/ (showing a survey of military officers revealed that "forty-three percent of officers were likely or very likely to resign" when given a legal order affirmed by the Supreme Court to detain all American citizens originally from high risk countries). But of course, a Department of Justice official did end up firing the Watergate Special Prosecutor, and mass military resignations would likely have the same result in the Department of Defense.

Second, the military embraced a commander in chief-centric view of civilian control of the military that prioritizes near complete military subordination to the President, resulting in further uncertainty as to whether the military will refuse to participate in a coup.[265] The principle of civilian control of the military remains a bedrock of American politics.[266] This principle is seemingly straightforward: the Framers subordinated the military to civilian leadership[267] to protect against a military coup[268] and ensure that a "specified, politically accountable civilian authority has the final say on national security and defense policy."[269] But as the principle of civilian control of the military is applied and practiced through civilian-military relations, it is often difficult to decipher what constitutes the "civilian" component of civilian control of the military and how the military must respect and adhere to that civilian component,

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265. *See* Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations,* 50 S. TEX. L. REV. 617, 622–24 (2009) (summarizing the "commander in chief-centric" view of civilian control of the military, and criticizing such a view because "[w]e cannot accept at face value . . . broad assertions that any time a member of the military, whether on active duty or retired, disagrees with the views of a civilian member of the Department of Defense or other member of the executive branch, including the President, that such disagreement or difference of opinion equates to either a tension or a crisis in civil-military relations").

266. *See generally* Risa Brooks et al., *Crisis of Command: America's Broken Civil-Military Relationship Imperils National Security*, FOREIGN AFFS. (May/June 2021), https://www.foreignaffairs.com/articles/united-states/2021-04-09/national-security-crisis-command ("Civilian control over the military is deeply embedded in the U.S. Constitution . . . . But over the past three decades, civilian control has quietly but steadily degraded.").

267. *See* Luban, *supra* note 31, at 530 ("The fundamental point was that, given the need for civilian control of the military, the choice of making the president commander in chief prevailed because it was universally regarded as better than the alternatives of making Congress the commander in chief or having multiple commanders in chief.").

268. *See* Dunlap, *supra* note 22, at 386.

269. Andrew Radin & Thomas Szayna, *Another "Crisis" in Civil-Military Relations?*, WAR ON THE ROCKS (July 8, 2021), https://warontherocks.com/2021/07/another-crisis-in-civil-military-relations/; *see also* Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1410–11 (2008).

whatever it might entail.[270]

From this uncertainty comes two primary views of civilian-military relations: (1) the commander in chief-centric view, which portrays the President and the executive branch as the sole organ of civilian control of the military;[271] and (2) the separation of powers-centric view, which sees the constitutional design—and the diffusion of military power between Congress and the President—as the shared organ of civilian control of the military.[272] And while both views tend to assert civilian supremacy—the idea that civilian leaders have the authority to be right or wrong, and that the military must in turn follow the civilian orders even if they are wrong, unwise, or immoral so long as they are legal[273]—they differ in who constitutes the civilian leader component and how the

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270. *See* Pearlstein, *supra* note 33, at 801, 804–05.

271. *See* Luban, *supra* note 31, at 507–31 (discussing the historical formation of civilian control of the military solely in authority granted to the President as commander in chief); *see also* Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1826–31 (2007).

272. *See* Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power of the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOUS. L. REV. 553, 571–72 (2007) ("The principle of import for this Article is that control over the military falls into the latter category of constitutional powers, with both the executive and legislative branches of government vested with shared authority . . . . [T]he key to successful use and control of national military power is that each branch of government remains engaged in its role . . . ."); *see also* Pearlstein, *supra* note 33, at 803 ("[T]his Article suggests that the degree of threat to civilian control posed by a particular exercise of military advice may be better evaluated in light of whether or not it violates the formal constitutional structure and whether or not it serves an identifiable set of functional constitutional goals."); Hansen, *supra* note 265, at 625–29 (2009) ("[B]y placing the President as the head of the armed forces there is still the risk that the President would use the military for his own adventurist motives or to threaten and cower the other branches of government. Additional checks within the Constitution would be required to ensure that, along with the civilian commander in chief to check the military, other civilian controls were created to check the commander in chief.").

273. *See* Peter D. Feaver, *The Right to Be Right: Civil-Military Relations and the Iraq Surge Decision*, 35 INT'L SEC., no. 4, Spring 2011, at 87, 117, https://www.belfercenter.org/sites/default/files/files/publication/ISEC_a_00033-Feaver_proof2_updated.pdf.

military manifests its subordination.

In the commander in chief-centric view, it is the President and executive branch that represents civilian leadership, and any disobedience, whether it be expressing public dissent, a refusal to follow orders, or to even engage with the other branches of government, constitutes a violation of civilian control of the military.[274] Glenn Sulmasy and John Yoo fashion this view as a "principal-agent" model, with the executive branch—especially the President—serving as the principal and the military serving as the agent.[275] For such a relationship to be successful, they argue that the principal must be unitary in nature.[276] And that any involvement by Congress or the judiciary—including being a forum for the military to voice opposition to executive branch orders—disrupts this unity and thus violates the principle of civilian control of the military.[277]

In contrast, the separation of powers-centric view allows for a role for both Congress and the judiciary.[278] Under this approach, the military remains subordinate to the civilian, but here the different branches of government represent the civilian component.[279] A military officer who receives an order from the President that she believes to be unwise or immoral may not only voice internal dissent but may also engage with Congress or the judiciary in opposition to the order.[280] Such conduct is not perceived as insubordination but rather a recognition of the role of both Congress and the judiciary in civilian control of the military.[281]

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274. Sulmasy & Yoo, *supra* note 271, at 1845.

275. *Id.* at 1826–30.

276. *Id.* at 1836.

277. *See* Pearlstein, *supra* note 33, at 824.

278. *See* Kramer & Schmitt, *supra* note 269, at 1419–34.

279. *See* Hansen, *supra* note 265, at 625–29.

280. *Id.*

281. *Id.*

These views are significant in the context of a presidential coup and whether the military can be trusted to follow a potentially legal, but likely immoral, presidential order to execute his coup.[282] The commander in chief-centric view requires complete subordination to the President and his orders, with no involvement from Congress or the judiciary. The only choice for a dissenting officer is to follow the orders or resign. While the separation of powers-centric view requires military subordination to the civilian, this civilian component includes Congress and the judiciary, thereby allowing the military officer to voice concerns both to Congress and the judiciary if she believes a presidential order amounts to an attempted coup.[283]

Concerningly, however, the military has largely accepted the commander in chief-centric view.[284] This embrace manifests itself in how military officers voice dissent for immoral but legal presidential actions.[285] A recent study surveyed military officers on how they would respond to an order found legal by the Supreme Court but believed by many to be immoral.[286] The example used was a presidential order to detain citizens from countries determined by the President to be national security threats.[287] While most officers expressed a willingness to dissent, they achieved this

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282. *Id.* at 627 ("The risk that a president, as commander in chief, could use the military in ways that would threaten our democratic system existed at the time the nation was established and it remains a risk today. Hence, the Constitution creates a very significant role for Congress and makes the military answerable not just to one executive department . . . .").

283. *See generally* Corn & Jensen, *supra* note 272, at 571–85 (discussing the investigative role of Congress and "the importance of an informed Congress for the maintenance of constitutional balance").

284. *See* Jim Golby, *Beyond the Resignation Debate: A New Framework for Civil-Military Dialogue*, 9 STRATEGIC STUD. Q., no. 3, Fall 2015, at 18, 19; *see also* Daniel Maurer, *The Generals' Constitution*, JUST SEC. (June 9, 2020), https://www.justsecurity.org/70674/the-generals-constitution/; *see also* Pearlstein, *supra* note 33, at 801.

285. *See* Katz, *supra* note 264.

286. *Id.*

287. *Id.*

dissent through resigning and not involving Congress or the judiciary.[288] Much as General Milley threatened to resign when faced with an order from President Trump that he believed to be immoral as opposed to turning to the other branches, this survey reflects the belief that when a presidential order is given, the officer has two choices: follow the order or resign.[289]

Further, not only has the military embraced the commander in chief-centric view, but the executive branch has punished military officers who have adhered to the separation of powers-centric view.[290] President Bush issued several orders during the War on Terror that military attorneys felt violated both the Constitution and the law of armed conflict.[291] Most dramatically, the military attorneys opposed the methods used by the Bush Administration to interrogate suspected terrorists.[292] In response, the military lawyers expressed concerns within the executive branch.[293] But when these concerns were not addressed, the military

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288. *Id.*

289. *See* LEONNIG & RUCKER, *supra* note 242, at 330 ("If the president ordered a military action they considered a disaster . . . if the president rejected Milley's counsel, the chairman would resign . . . the Joint Chiefs could demand in turn to give the president their military advised . . . . They concluded they might rather serially resign than executed the order. It was kind of Saturday Night Massacre . . . .").

290. *See, e.g.*, Missy Ryan & Shane Harris, *Lt. Col. Alexander Vindman Retires, Citing Campaign of 'Bullying' and 'Retaliation' by Trump After Impeachment Testimony*, WASH. POST (July 8, 2020), https://www.washingtonpost.com/national-security/lt-col-alexander-vindman-retires-citing-campaign-of-bullying-intimidation-and-retaliation-by-trump/2020/07/08/934bc6ba-c12e-11ea-864a-0dd31b9d6917_story.html (discussing how following Lt. Col Vindman's testimony in President Trump's impeachment trial, he retired from military service "over alleged 'bullying' and 'retaliation' by the president").

291. *See* Pearlstein, *supra* note 33, at 799–01.

292. *Id.* at 801.

293. *See* Neil A. Lewis, *Military's Opposition to Harsh Interrogation is Outlined*, N.Y. TIMES (July 28, 2005), https://www.nytimes.com/2005/07/28/politics/militarys-opposition-to-harsh-interrogation-is-outlined.html.

attorneys engaged directly with Congress.[294] In response, the Bush Administration then "punished" the military lawyers by attempting to strip different branches' Judge Advocate General Corps of much of their independence and authority.[295]

As such, the military's embrace of the commander in chief-centric view—buttressed by executive branch punishment of the separation of powers-centric view—mandates near complete subordination of the military to the President. When the President issues an order, military officers must respond accordingly. A refusal to do so may then be perceived as a military coup, with the military refusing to follow the orders of the civilian commander in chief—a perception that military officers are trained and incentivized to fear. Consequently, military officers trained, rewarded, and punished under this system cannot be relied upon to serve as a moral check by refusing any order they believe to be legal but immoral.

Third, the rise of careerism and extremism in the military casts doubt on the constitutional faithfulness of the military. Regarding careerism, a central component of military service is self-sacrifice and dedication to the mission as opposed to professional advancement.[296] Nonetheless, as the modern military has transitioned from a small, war-time force to a permanent all-volunteer institution, there has been

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294. *Id.*; *see also* Sulmasy & Yoo, *supra* note 271, at 1832.

295. *See* Hansen, *supra* note 265, at 633–34; *see also* Charles J. Dunlap, Jr., *A Tale of Two Judges: A Judge Advocate's Reflections on Judge Gonzalez's Apologia*, 42 TEX. TECH. L. REV. 893, 897–99 (2010) (detailing the Bush Administrations disdain for military lawyers and steps taken to isolate them from the decision making process).

296. *See, e.g.*, *The Army Values*, U.S. ARMY, https://www.army.mil/values/ (last visited Jan. 22, 2022) ("Put the welfare of the nation, the Army and your subordinates before your own. . . . In serving your country, you are doing your duty loyally without thought of recognition or gain."); *The Air Force Core Values*, U.S. AIR FORCE, https://www.airforce.com/mission/vision (last visited Jan. 22, 2022) ("An Airman's professional duties take precedence over personal desires. Every Airman is expected to have the discipline to follow rules, exhibit self-control and possess respect for the beliefs, authority and worth of others.").

a rise in the "profession of arms."[297] And much like in other professions, there is an increased focused on careerism, that is an "individual's propensity to achieve their personal and career goals through non-performance-based activities."[298]

For a junior military officer, this careerism manifests itself through a personal drive for promotion, assignments, and access to decision-makers.[299] For a senior military officer, these career desires remain in place, but they are also joined by post-military opportunities, prestige, and national fame.[300] Military officers need only look to both the Trump and Biden presidencies as examples of how senior military officers can quickly transition from military positions to senior and prestigious government positions.[301]

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297. *See* John Q. Bolton, *The Price of The Price of Professionalization*, SMALL WARS J. (Dec. 25, 2015, 4:38 AM), https://smallwarsjournal.com/jrnl/art/the-price-of-professionalization; *see also* Mick Ryan, *Mastering the Profession of Arms, Part I: The Enduring Nature*, WAR ON THE ROCKS (Feb. 8, 2017), https://warontherocks.com/2017/02/mastering-the-profession-of-arms-part-i-the-enduring-nature/.

298. *See* Dan S. Chiaburu et al., *How to Spot a Careerist Early On: Psychotherapy and Exchange Ideology as Predictors of Careerism,* 118 J. BUS. ETHICS 473, 473 (2013); *see also* William L. Hauser, *Careerism vs. Professionalism in the Military*, 10 ARMED FORCES & SOC'Y 449, 449 (1984).

299. *See* Richard Halloran, *Air Force and Marines Battle 'Ticket-Punchers,'* N.Y. TIMES, Apr. 25, 1988, at A18, https://www.nytimes.com/1988/04/25/us/washington-talk-military-careers-air-force-and-marines-battle-ticket-punchers.html; *see also* Tim Kane, *Why Our Best Officers Are Leaving*, ATLANTIC (Jan./Feb. 2011), https://www.theatlantic.com/magazine/archive/2011/01/why-our-best-officers-are-leaving/308346/; Ned Stark, *Being or Doing in the Air Force,* WAR ON THE ROCKS (Feb. 21, 2019), https://warontherocks.com/2019/02/being-or-doing-in-the-air-force/.

300. *See* James Fallows, *Chickenhawk Chronicles, No. 12: Careerism and Competence*, ATLANTIC (Jan. 15, 2015), https://www.theatlantic.com/politics/archive/2015/01/chickenhawk-chronicles-no-12-careerism-and-competence/384561/ (When discussing general officers, a lower ranking officer noted the problems in rewarding competency, but warned "nobody in the flag [general] ranks will admit this because they are direct benefactors and creators of the current culture. A careerist is incapable of critical thought."); *see also* David Barno & Nora Bensahel, *The Increasingly Dangerous Politicization of the U.S. Military*, WAR ON THE ROCKS (June 18, 2019), https://warontherocks.com/2019/06/the-increasingly-dangerous-politicization-of-the-u-s-military/.

301. *See* Phillip Carter & Loren DeJonge Schulman, *Trump is Surrounding Himself with Generals. That's Dangerous.*, WASH. POST (Nov. 30, 2016),

The rise of careerism in turn calls into question the loyalty of these military officers. As junior officers compete and position themselves for promotion, assignments, and access, they may prioritize placating their immediate officers or senior military or government officials.[302] Similarly, for senior military officers hoping to advance and secure post-military positions, they must become political officers.[303] And becoming political officers entails loyalty to the President and the political party which controls access to these government positions.[304] The President and senior military leaders can both reward compliance and punish incompliance.[305]

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https://www.washingtonpost.com/opinions/trump-is-surrounding-himself-with-generals-thats-dangerous/2016/11/30/e6a0a972-b190-11e6-840f-e3ebab6bcdd3_story.html; *see also* Bryan Bender, *Biden's Reliance on Retired Military Brass Sets Off Alarm Bells*, POLITICO (Dec. 7, 2020, 7:41 PM), https://www.politico.com/news/2020/12/07/biden-retired-military-443546; Brakkton Booker & Claudia Grisales, *House and Senate Approve Waiver for Lloyd Austin, Biden's Pick to Head Pentagon*, NPR (Jan. 21, 2021, 3:47 PM), https://www.npr.org/sections/president-biden-takes-office/2021/01/21/959232498/house-approves-waiver-for-lloyd-austin-bidens-pick-to-head-pentagon.

302. *See* David Barno & Nora Bensahel, *Loyalty and Dissent: Getting Flag Officers to Hear the Truth*, WAR ON THE ROCKS (Mar. 19, 2019), https://warontherocks.com/2019/03/loyalty-and-dissent-getting-flag-officers-to-hear-the-truth/.

303. *See* Lawrence J. Korb, *Political Generals*, 86 FOREIGN AFFS., no. 5, Sept./Oct. 2007, at 152, 152–53.

304. *See* Jim Golby, *America's Politicized Military is a Recipe for Disaster*, FOREIGN POL'Y (June 18, 2020), https://foreignpolicy.com/2020/06/18/us-military-politics-trump-election-campaign/ (noting that Presidents actively began trying to identify and appoint officers who shared their beliefs and that finding these officers became much easier because the military elite joined the political elite in becoming more polarized); *see generally* Jim Golby, *Uncivil-Military Relations: Politicization of the Military in the Trump Era*, 15 STRATEGIC STUD. Q., no. 2, Summer 2021, at 149.

305. *See, e.g.*, Brian Palmer, *Fire at Will?*, SLATE (June 23, 2010, 5:07 PM), https://slate.com/news-and-politics/2010/06/does-president-obama-have-the-power-to-fire-gen-mcchrystal-from-the-army.html (discussing President Obama removing General McChrystal from command after he made critical remarks of President Obama in an interview); Sarah Gray, *Alexander Vindman Believed He Wouldn't Be Punished for Telling The Truth in America. Trump Proved Him Wrong.*, BUS. INSIDER (Feb. 7, 2020, 9:01 PM), https://www.businessinsider.com/vindman-opening-statement-punished-truth-trump-proved-wrong-2020-2 (discussing President Trumps removal of National Security aide Lieutenant

Both junior and senior officers are then placed in a compromised situation should the President issue a military order to effectuate a coup: do they follow their oaths to defend and protect the Constitution, or do they satisfy the orders of the President and officers appointed over them?[306] Careerism allows them to potentially benefit from following the President's orders, or alternatively to be punished for following their oaths. As such, careerism at a minimum calls into question whether the military will disobey military orders that call for a presidential coup.

Beyond careerism, there is also a continuing trend of extremism within the military.[307] This trend is significant enough that Secretary of Defense Lloyd Austin addressed it in his confirmation hearings, vowing to "rid our ranks of racists and extremists, and to create a climate where everyone fit and willing has the opportunity to serve this country with dignity."[308] A recent Air Force investigation substantiated his concerns. The investigation revealed that not only are African American airmen "far more likely to be investigated, arrested, face disciplinary actions and be discharged for misconduct," but also that they are less likely to be promoted and one-third of them believe they do not receive the same opportunities as white airmen.[309]

Colonel Vindman after he testified in President Trump's impeachment trial).

306. *See* U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.") The oath for military officers provides that "I will support and defend the Constitution of the United States against all enemies, foreign and domestic." 5 U.S.C. § 3331.

307. *See* Keith S. Gibel, *Why Defining 'Extremism' Matters to the U.S. Military*, LAWFARE (June 30, 2021, 8:01 AM), https://www.lawfareblog.com/why-defining-extremism-matters-us-military.

308. Todd South, *Extremism in the Ranks Is a 'Threat,' But the Pentagon's Not Sure How to Address It*, MIL. TIMES (Feb. 21, 2021), https://www.militarytimes.com/news/your-military/2021/02/21/extremism-in-the-ranks-is-a-threat-but-the-pentagons-not-sure-how-to-address-it/.

309. Lolita C. Baldor, *Air Force Investigation Finds Black Service Members Investigated, Punished More Often,* USA TODAY (Dec. 22, 2020, 7:46 AM), https://www.usatoday.com/story/news/nation/2020/12/22/air-force-black-people-

Even more alarming, there was a strong military presence amongst the protestors at the U.S. Capitol insurrection. Not only were military flags, tactical gear, and patches present throughout the crowd, but more than two dozen individuals charged in the insurrection had military connections.[310] A retired Air Force lieutenant colonel appeared on the Senate floor, dressed in military gear and holding zip ties.[311] And it is a veteran who leads the far-right, anti-government group, the Oath Keepers.[312] The presence of such extremism suggests that some military members may be sympathetic and even supportive of a presidential coup.[313] As the President may only need some of the military to execute his presidential coup, this pocket of extremism may serve his malevolent purpose.[314]

Taken together, these three trends represent dysfunction in the moral check of a constitutionally faithful military. While most military officers likely do not support a presidential coup or desire to participate in one, the current state of what constitutes a lawful order and what civilian control of the military requires places military officers in a precarious position. As an order from the President is likely to be a legal one, disobeying it subjects the officer to punishment—either professional or criminal—and endangers norms of civilian control of the military. And while

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more-often-investigated-punished/4004919001/.

310. *See* South, *supra* note 308.

311. *Id.*

312. *Id.*

313. *See* Golby & Feaver, *supra* note 253, (noting that "[t]hose who had served in the military were more likely than civilians to support the use of troops on domestic soil"); *see, e.g.*, Geoff Colvin, *Retired Brigadier General Says Trump Loyalists in Military Need Rooting Out*, FORTUNE (Jan. 8, 2021, 8:52 AM), https://fortune.com/2021/01/08/trump-support-military-capitol-coup-attempt/ (arguing that the number of Trump supports in the military who supported the January 6 insurrection remain a threat).

314. *See, e.g.*, LEONNIG & RUCKER, *supra* note 242, at 365–66 (General Milley feared that President Trump had installed loyalists in the Department of Defense that would advise and support President Trump in using the military in a way he "considered illegal, or dangerous and ill-advised.").

military officers may resign in the wake of a lawful but immoral order, the President may then continue to issue the order until he finds military officers willing to support and enforce the order. With the rise of careerism and extremism within the military, there is a sufficient risk of the President eventually finding a supportive military. Thus, the moral check of a constitutionally faithful military serving to protect against a presidential coup is in dysfunction.

B. *The Political Checks: Intra-Executive Branch Restraint and Public Opinion Opposition*

The second category of informal checks discussed is the political check. With the fading fear of totalitarianism within the United States coupled with the fears of first the Soviets during the Cold War and then the threats of international terrorism in a post-9/11 world, government officials amongst all three branches and academics increasingly supported a strong unitary executive branch.[315] Led by a President empowered by the judiciary and Congress, the executive branch was best positioned to effectively and quickly handle national security and any crisis that emerged.[316]

But this investment of power in the executive branch came with some guardrails that generally had a more visible check on the presidency then the moral check: specifically, the political check. A strong President still does not function in a vacuum; instead, he is at the head—and at times the mercy—of the executive branch, a sprawling bureaucracy with countless agencies, subcultures, competing interests, all with their own congressionally delegated authority and funding. Similarly, the President remains the only government official nationally elected, keeping him

315. *See* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 29–35 (2012) (discussing the historical trend of increasing presidential authority in national security matters).

316. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 304 (1996).

democratically accountable to the electorate. While these political checks—intra-executive branch restraint and public opinion opposition—were operating and at times effective in checking President Trump's potential use of the military to enhance his power and position, President Trump tested them and produced templates for how future more malevolent Presidents may exploit the nascent dysfunctions in the political check to use the military power congressionally entrusted to them to achieve a coup.

1. Intra-Executive Branch Restraint

The President requires the tools of the executive branch to effectively use the military to effectuate his coup. To sanction his legal authority to do so, he needs the Department of Justice. To carry out this military mission, he needs the Department of Defense. To ensure money continues to flow to the Department of Defense and the military, he needs the Treasury Department. To enable the military with intelligence, surveillance, and law enforcement capabilities, he needs the national and domestic intelligence machinery of the FBI, CIA, and Department of Homeland Security. Should any of these agencies suggest a refusal to comply or assist with the President's orders, a military coup may be avoided. And should they refuse to follow these orders or take actions which they feel are immoral and represent a departure from democratic values, they may then terminate a coup once the President orders or commences it.

This ability of the executive branch agencies to deter or prevent a presidential coup speaks to a theory of executive branch restraint commonly referred to as the "internal separation of powers."[317] Under this, the unitary executive may be checked through "internal review structures,

317. *See generally* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).

involvement of multiple agencies, inspectors general, agency-generated procedural and substantive limitations, professional commitments and reputational concerns, and executive branch adherence to governing law."[318]

While some critics have suggested that this internal check has never truly checked the President,[319] there have been some recent examples of it at least serving as a consideration or roadblock for Presidents considering using the military domestically. When President Bush considered invoking the Insurrection Act in the wake of Hurricane Katrina, he considered it from a normative moral perspective, but also faced opposition from his Secretary of Defense, Donald Rumsfeld, which ultimately factored in his decision to not invoke the Act.[320] Somewhat comparably, President Trump faced opposition from his Acting Secretary of Defense, Mark Esper, when he suggested invoking the Insurrection Act to quell the Black Lives Matter protests.[321]

President Trump also found the Department of Justice to be unresponsive and unwilling to support his agenda at times during his presidency. He saw first Attorney General Jeff Sessions recuse himself from an investigation regarding President Trump's ties to Russia, thus allowing the investigation to proceed with some independence, and then Attorney General William Barr refuse to endorse and pursue his theories of rampant and widespread election fraud.[322]

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318. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1858 (2015).

319. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 139–41 (2010).

320. *See* McGrane, *supra* note 223, at 1329.

321. *See* Amanda Macias, *Defense Secretary Mark Esper Opposes Using Insurrection Act for George Floyd Protest Unrest, Angering White House*, CNBC (June 3, 2020, 11:15 AM), https://www.cnbc.com/2020/06/03/esper-does-not-support-invoking-the-insurrection-act.html.

322. Burgess Everett, *Jeff Sessions Grapples with New Round of Trump Attacks*, POLITICO (May 8, 2020, 4:16 PM), https://www.politico.com/news/2020/05/08/sessions-grapples-with-new-round-of-trump-attack-s-244991; *see also* Jonathan D. Karl, *Inside William Barr's Breakup with Trump*, ATLANTIC (June

Ultimately, following his electoral loss, President Trump requested top Justice Department officials "just say the election was corrupt and to leave the rest to me."[323] They did not comply with President Trump's request.[324]

Despite the apparent intra-executive branch check operating within the Trump Administration, President Trump pushed this check into a mild case of dysfunction. He also provided a template for future Presidents to increase the dysfunction to further diminish this check. Specifically, President Trump used his authority to remove disloyal executive agency chiefs and then appoint loyal chiefs, many of whom remained in an "acting" capacity.[325] Most noticeably, after Secretary of Defense Esper refused to support the use of military domestically during the Black Lives Matter protests, President Trump "terminated" him.[326] And while he did not directly terminate Attorney Generals Sessions and Barr after their apparent opposition, President Trump did assert pressure upon them until they resigned.[327] President Trump then exercised his removal authority

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27, 2021), https://www.theatlantic.com/politics/archive/2021/06/william-barrs-trump-administration-attorney-general/619298/.

323. *Former Top Justice Dept. Official's Notes Say Trump Asked Him to Call Election "Corrupt,"* CBS NEWS (July 31, 2021, 12:03 PM), https://www.cbsnews.com/news/trump-2020-election-corrupt-calls-jeffrey-rosen-richard-donoghue/.

324. *Id.*

325. *See* Peter Baker, *Trump's Efforts to Remove the Disloyal Heightens Unease Across His Administration*, N.Y. TIMES (Feb. 22, 2020), https://www.nytimes.com/2020/02/22/us/politics/trump-disloyalty-turnover.html; *see also* Natasha Bach, *All the Acting Heads of Trump's Presidency*, FORTUNE (Nov. 27, 2019, 5:00 AM), https://fortune.com/2019/11/27/trump-acting-heads-cabinet-presidency/.

326. Tom Bowman, *Trump 'Terminates' Secretary of Defense Mark Esper*, NPR (Nov. 9, 2020, 2:01 PM), https://www.npr.org/2020/11/09/933105262/trump-terminates-secretary-of-defense-mark-esper.

327. *See* David A. Graham, *Trump Fired His Most Effective Lieutenant*, ATLANTIC (Nov. 7, 2018), https://www.theatlantic.com/politics/archive/2018/11/jeff-sessions-resigns-his-legacy-attorney-general/575245/ (discussing the forced resignation of Jeff Sessions); *see also* Ryan Lucas, *William Barr to Step Down as Attorney General Before Christmas,* NPR (Dec. 14, 2020, 5:45 PM), https://www.npr.org/2020/12/14/811276917/william-barr-to-steps-down-as-attorney-general.

beyond agency chiefs. Following his impeachment trials, where the testimony of federal officers frustrated him, he requested lists of disloyal agency staffers.[328] He then proceeded to exercise mass termination of those agency employees whom his closest aids and supporters found to be disloyal, including top Pentagon aides, Homeland Security officials, and the head of the agency safeguarding nuclear weapons.[329]

This removal authority for executive branch members—a powerful tool the President can use to ensure loyalty and punish disloyalty—is especially strong in the wake of the Supreme Court's decision in *Seila Law LLC v. Consumer Financial Protection Bureau.*[330] In *Seila Law,* the Court considered whether Congress exceeded its authority when it required the President to have good cause to remove the single director of the Consumer Financial Protection Bureau.[331] By a 5–4 decision, the Court held that Congress did exceed its power, holding that "the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties.'"[332] To the Court, because the Constitution vests this authority solely in the President, "the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead."[333] The Court further refused to place limits on the President's authority when it comes to principal officers as "[t]he Constitution requires that such officials remain dependent on the

328. Josh Dawsey et al., *In Trump's Final Days, a 30-Year-Old Aid Purges Officials Seen as Insufficiently Loyal*, WASH. POST (Nov. 13, 2020, 9:19 PM), https://www.washingtonpost.com/politics/trump-white-house-purge/2020/11/13/2af12c94-25ca-11eb-8672-c281c7a2c96e_story.html.

329. *Id.*

330. 140 S. Ct. 2183 (2020).

331. *Id.* at 2191.

332. *Id.* (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010)).

333. *Id.* at 2211.

President, who in turn is accountable to the people."[334] Thus, future Presidents may not only rely upon President Trump's exercise of his removal authority to ensure loyalty and compliance, but such an assertion is supported quite explicitly by the Supreme Court.

Once he exercised his removal authority to remove disloyal agency members, President Trump was then able to exercise his appointment authority to appoint loyal officials.[335] He regularly replaced career professionals with expertise and deep ties to the agency with individuals whose "tenure has been marked by questions about their qualifications and competency or whose appointments appeared to be improper or even illegal."[336] And while Senate confirmation is intended to be a check for such conduct, only undersecretaries and above require confirmation.[337] President Trump also made frequent use of the Vacancies Act provision that allows the President to have a non-Senate confirmed appointee serve as an acting undersecretary or higher in certain situations.[338] His exercise of this exception was especially problematic at the end of his administration, after he terminated several Department of Defense officials he viewed as disloyal and replaced with his loyal members.[339] General Milley observed waves of new Department of

334. *Id.*

335. David E. Sanger & Eric Schmitt, *Trump Stacks the Pentagon and Intel Agencies with Loyalists. To What End?*, N.Y. TIMES (Nov. 11, 2020), https://www.nytimes.com/2020/11/11/us/politics/trump-pentagon-intelligence-iran.html.

336. Danielle Schulkin & Julia Brooks, *Loyalty Above All: The "Shallow State" of the Trump Administration*, JUST SEC. (Nov. 2, 2020), https://www.justsecurity.org/73226/loyalty-above-all-the-shallow-state-of-the-trump-administration/.

337. Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 659–62 (2020).

338. *See* Lara Seligman, *Trump Skirting Congress to Install Loyalists in the Pentagon*, POLITICO (July 17, 2020, 4:30 AM), https://www.politico.com/news/2020/07/17/trump-loyalists-pentagon-366922 (discussing the Vacancies Act and the exceptions to Senate confirmation: "someone confirmed to a position at a different agency; the 'first assistant'; and someone who has been employed by the agency for at least 90 days and paid at least at a GS-15 rate").

339. LEONNIG & RUCKER, *supra* note 242, at 359–68.

Defense appointees that were President Trump loyalists and supportive of extreme measures to ensure he remained in office, causing him to have a good faith and reasonable fear of a presidential coup.[340]

While President Trump and these loyalists did not cross the Rubicon and proceed with a coup, he did provide a template for how a future, more malevolent President may exploit the dysfunction in the intra-executive branch check to ensure he has the necessary tools and executive branch support to succeed in his coup. He may appoint only loyal executive branch officers. If the Senate is not supportive of these officers, he may then appoint them as acting officers to avoid confirmation battles. Should these officers express disloyalty, he could then remove them or attack them with sufficient private and public rhetoric that they resign. And this template is not limited to agency officers—he can identify disloyal agency staffers and assert his authority to remove them and then appoint them with loyal staffers. All the while, the President ensures he has a unitary executive branch willing and able to carry out his presidential coup.

2. Public Opinion Opposition

For supporters of a unitary executive, especially in matters of national security, a strong feature and benefit of allocating power in the presidency is electoral accountability.[341] As the only nationally elected official, the President is the most democratically elected federal government official, and thus is most likely to be responsive and accountable to public opinion.[342] Eric Posner and Adrian Vermeule posit that it is public opinion which serves as the most effective check against presidential adventurism.[343] A democratically elected President will want to obtain and

340. *Id.*

341. *See* POSNER & VERMEULE, *supra* note 319, at 15–16.

342. *See id.*

343. *See id.*

retain public approval to ensure he remains in office.[344] As such, a President will not deviate beyond the guardrails of popular opinion in flexing the authority granted to him by the Constitution, Congress, and the judiciary. Quite simply—the President will not use the military to effectuate a coup, because the public will not support it.

Placed in the context of a presidential coup, however, this theory falls short. There is something inherently anti-democratic and oppositional to public opinion in a presidential coup. If the President were to contest the results of a presidential election—or perhaps manufacture an insurrection prior to the expiration of his term—and then use the military to remain in office, he is actively opposing public opinion as manifested through election results. He is openly and notoriously disregarding public opinion to execute his complete coup. Thus, not only does public opinion do little to protect against a complete presidential coup, it may also incentivize a presidential coup when he loses public support.

There may be instances where the President attempts to effectuate a more limited coup, or perhaps an "elected" coup where he maintains the semblance of free elections, while simultaneously using military power to suppress his political enemies and ensure his continued electoral success. For example, he may choose to detain his political opponents or to declare limited insurrections in American cities that he believes to be disobedient to his directives.[345] In this limited coup, public opinion may serve as a check as the electorate can vote to remove him from office. But again, this check assumes that the President will continue to have free

344. *See id.*

345. *See, e.g.*, Nick Miroff & Mark Berman, *Trump Threatens to Deploy Federal Agents to Chicago and Other U.S. Cities Led by Democrats*, WASH. POST (July 20, 2020), https://www.washingtonpost.com/national/defending-portland-crackdown-trump-pledges-to-deploys-feds-to-chicago-and-other-us-cities-led-by-democrats/2020/07/20/fda42b8a-caaa-11ea-89ce-ac7d5e4a5a38_story.html; *Myanmar Coup: Aung San Suu Kyi Detained as Military Seizes Control*, BBC NEWS (Feb. 1, 2021), https://www.bbc.com/news/world-asia-55882489 (discussing the Myanmar coup and the military's seizure and detainment of the elected president).

elections. A President willing to effectuate a limited coup is unlikely to be deterred by public opinion.

The Trump Administration also raises the specter that perhaps there is public opinion and support for a complete or limited presidential coup. In this scenario, public support would enable the President to effectuate the coup as opposed to checking his ability to do so. Beginning in his initial presidential campaign, with calls to "lock up" his opponent, Hillary Clinton, President Trump and his loyalists appeared willing to resort to extreme measures to obtain and remain in office.[346]

In exchange for this rhetoric, he received support from his party to actively challenge election results, by suggesting that states not submit their electoral college results consistent with voting results, diminishing the significance of the January 6 Capitol insurrection, and continuing to suggest that President Trump won the 2020 presidential election.[347] He was able to engender this party loyalty, because large segments of the population continue to support President Trump and believe that the election was stolen

346. *See* Chris Cillizza, *How 'Lock Her Up!' Just Blew Up*, CNN (Jan. 10, 2020, 10:52 AM), https://www.cnn.com/2020/01/10/politics/hillary-clinton-donald-trump-justice-department/index.html; *see also* Zeynep Tufekci, *'This Must Be Your First,'* ATLANTIC (Dec. 7, 2020), https://www.theatlantic.com/ideas/archive/2020/12/trumps-farcical-inept-and-deadly-serious-coup-attempt/617309/; Donie O'Sullivan, *Echoing QAnon Forums, Michael Flynn Appears to Suggest a Myanmar-Style Coup Should Happen in the United States*, SAN BERNARDINO SUN (May 31, 2021, 12:27 PM), https://www.sbsun.com/2021/05/31/echoing-qanon-forums-michael-flynn-appears-to-suggest-a-myanmar-style-coup-should-happen-in-the-united-states/.

347. *See* Jonathan Chait, *A Disturbing Number of Republicans Support Trump's Coup Attempt*, N.Y. MAG. (Nov. 17, 2020), https://nymag.com/intelligencer/2020/11/trump-election-coup-lindsey-graham-ron-desantis-fraud-vote.html; Domenico Montanaro, *Poll: Just a Quarter of Republicans Accept Election Outcome*, NPR (Dec. 9, 2020, 12:00 PM), https://www.npr.org/2020/12/09/944385798/poll-just-a-quarter-of-republicans-accept-election-outcome; *see also* Alex Shephard, *Trump's Republicans Want a Coup*, NEW REPUBLIC (June 1, 2021), https://newrepublic.com/article/162586/michael-flynn-trump-myanmar-coup.

from him.[348] As evidenced by the insurrection at the U.S. Capitol on January 6, 2021, enough of these followers are willing to resort to extreme measures to "restore" President Trump to the presidency.[349] Significantly, President Trump and future malevolent Presidents may tap into this public support for a coup, along with the growing acceptance of authoritarianism within the United States, to gain public opinion in favor of extreme military actions domestically.[350] When public opinion begins to support a coup, it can no longer be a check against the presidential coup and then instead requires a counter-majoritarian check to protect against it.

Therefore, public opinion is ineffectual in protecting against a presidential coup. A President is likely to execute a presidential coup for the very reason that he does not have public support for remaining in office or for his policies. Further, there runs the risk that public opinion may even inflame the possibility of a presidential coup, with the President currying public opinion to support him in the extreme measures necessary—such as using the military domestically—to succeed in his coup.

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348. *See* David A. Graham, *Republicans Back Trump Because of the Insurrection, Not Despite It*, ATLANTIC (Feb. 17, 2021), https://www.theatlantic.com/ideas/archive/2021/02/republicans-support-trump-because-not-despite-insurrection/618034/; *see also* Jonathan Chait, *When Trump's Next Coup Happens, the Republican Party Will Fully Support It*, N.Y. MAG. (May 6, 2021), https://nymag.com/intelligencer/article/trumps-next-coup-cheney-purge-riot-insurrection-democracy.html.

349. Graham, *supra* note 348.

350. *See* Matthew C. MacWilliams, *Trump Is an Authoritarian. So Are Millions of Americans*, POLITICO (Sept. 23, 2020, 5:45 PM), https://www.politico.com/news/magazine/2020/09/23/trump-america-authoritarianism-420681 (discussing research that suggests 18 percent of Americans are highly disposed to authoritarianism and an additional 23 percent are also disposed to it).

CONCLUSION

This Article began with a simple question—what stops the President from using the military power at his disposal from effectuating a presidential coup? It ends with an even simpler answer: nothing. The military now serves as a "loaded weapon" for the President to use at his will with little formal structural checks. Congress has acquiesced in this authority by delegating broad powers to the President, which in turn the judiciary has blessed through an abdication of its review authority. Any President may manufacture an emergency, insurrection, or national security threat and then rely on congressionally authorized and judicially recognized powers to use the military to quell any threat.

And beyond this lack of formal checks, the informal checks—the moral belief that the President would not abuse this power and that the military would refuse any such orders, and the political check that the executive branch and public opinion will deter a President from using the military to effectuate a coup—are also in a state of dysfunction.

The lack of formal and informal checks leaves only the benevolence of the President as a protection against the presidential coup, specifically, the President's choice not to use his power in an immoral manner. However, the lessons of the Trump Administration must warn the United States of the dangers of relying upon presidential benevolence. While President Trump did not effectuate a coup, he approached the Rubicon like no other President before him. And in a political environment where incrementalism is the norm, future Presidents are likely to continue to push those boundaries to the point of malevolence.

There is a risk with the Biden Administration that these dangers will be forgotten. President Biden campaigned and has governed from a perspective of returning to norms and civility.[351] There is a sense that, since President Trump left

351. *See* Andrew Solender, *At Close of a Brutal Campaign, Biden Campaign*

office, the nation can return to normal.[352] But that belief is predicated upon the benevolence of President Biden and of future Presidents. The reality remains that the Trump Administration occurred, it stretched formal and informal checks to the breaking point, and it remains a template for future Presidents. To protect against a future malevolent President who finally fires the loaded weapon at his disposal, there must be real and tangible reform, predicated upon restoring both the formal and informal checks. Should the United States fail to establish lasting reforms—independent of the personality of the individual in the White House—the real possibility of a presidential coup will only increase, leading to a true constitutional crisis.

Urges a Return to Civility, FORBES (Oct. 27, 2020. 3:54 PM), https://www.forbes.com/sites/andrewsolender/2020/10/27/at-close-of-a-brutal-campaign-biden-campaign-urges-a-return-to-civility/; *see also President* Joseph R. Biden, Jr., Inaugural Address (Jan. 20, 2021, 11:52 AM), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/.

352. Joe Garofoli, *Biden Promises a Return to Normalcy. Is American Ready to Go There?*, S.F. CHRON. (Jan. 20, 2021, 10:57 AM), https://www.sfchronicle.com/politics/article/Biden-promises-a-return-to-normalcy-Is-America-15883179.php.