

The Good Officer? Evaluating General Milley's Constitutional Dilemma

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INTRODUCTION

Reports that the Chairman of the Joint Chiefs of Staff, General Milley, took steps during the waning days of the Trump administration to prevent a catastrophic strategic miscalculation by China, and a potentially unjustified first-use of nuclear weapons, prompted a [range of responses](#). See BOB WOODWARD & ROBERT COSTA, [PERIL](#). Before the claims were published in full or vetted, some [accused Milley of treason](#) and [called for his court-martial](#). Others [lamented the potential effect of Milley's actions](#) on civil-military relations. Although a retired general officer argued [Milley acted with the scope of his responsibilities](#) when calling his Chinese counterpart, whistleblower Alexander Vindman [asserted that Milley should have resigned](#) rather than undermine the nuclear chain of command. He then called for Milley's resignation or ouster.

When questioned, General Milley [told Congress](#) that his actions toward China were consistent with his responsibilities and coordinated with civilian leadership, including the Secretary of State and the acting Secretary of Defense. General Milley also clarified that he is firmly committed to the Constitution and its subordination of the military to civilian control, and that he would only disobey unlawful orders. *Id.* The book that prompted this attention, however, quotes Milley as telling House Speaker Nancy Pelosi that certain procedures would prevent a President from “illegally, immorally, unethically [or] without proper certification” ordering the launch of a nuclear weapon or other “use of force.” [PERIL](#) (quoting a “transcript of the call” between Milley and Pelosi). Milley also allegedly instructed the National Military Command Center staff to ensure that he was personally involved in “any order for military action, not just the use of nuclear weapons.” *Id.* And Milley had allegedly told Pelosi that he would “prevent” unwarranted use of the military “domestically and/or internationally.” *Id.* Such assurances seem much broader than Milley's limited statutory authority as “the principal military *adviser* to the President, the National Security Council, the Homeland Security Council, and the Secretary of Defense.” 10 U.S.C. § 151(b)(1) (emphasis added). The chain of command for operational orders does not include the Joint Chiefs. See 10 U.S.C. § 162(b) (outlining chain of operational command of armed forces).

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In an essay published by *The Atlantic*, Professor Tom Nichols of the U.S. Naval War College argued that Milley’s interactions with the nuclear launch chain of command were “[a breach of civil-military tradition and an overstepping of his military authority](#).” Nevertheless, Professor Nichols asserted that Milley had “made a judgment call in an unprecedented situation, and we should be glad for it.” Why? Because, Nichols wrote, “[t]he Constitution of the United States has no provision for the control of planet-destroying weapons while the President is losing his mind and trying to overthrow the government itself.” *Id.* That statement is certainly true. If a President ignores his or her oath to “preserve, protect and defend the Constitution,” U.S. CONST. art. II, § 1. and obligation to “take care that the laws be faithfully executed,” U.S. CONST. art. II, § 3. there is little to guide his or her military subordinates. Although all officers of the U.S. government and enlisted members of the armed forces take an oath “to support and defend the Constitution of the United States against all enemies, foreign and domestic,” 5 U.S.C. § 3331 (federal officers); 10 U.S.C. § 502 (enlisted members of armed forces); 32 U.S.C. § 304 (enlisted members of national guard); 32 U.S.C. § 312 (national guard officers). nothing really clarifies what that oath practically requires of them in circumstances like these.

Professor Nichols posited that “the answer” to preventing such constitutional dilemmas in the future “lies in electing better leaders,” but there is no guarantee this will happen, and some indications that it will not. Compare Robert Kagan, [Our Constitutional Crises is Already Here](#) (discussing risk of Donald Trump running for president and chaos in 2024 presidential election), with Ramesh Ponnuru, [U.S. Election Coups? Really? Let’s All Take a Deep Breath](#). Moreover, as Kori Schake has observed, “[\[t\]he failure of other institutional checks and balances to perform as constitutionally intended has left our military leaders with a disproportionate responsibility](#)” to defend the constitutional order. To the extent this is true, it is terribly unfortunate.

The purpose of this brief essay is to suggest a framework for evaluating actions taken in the face of serious constitutional dilemmas like those Milley faced—one that balances an officer’s oath to support and defend the Constitution of the United States with his or her general requirement to obey the constitutionally designated Chief Executive and Commander-in-Chief.

I. LIKELY CAUSES OF CONSTITUTIONAL DILEMMAS

We should first briefly consider how and why these constitutional dilemmas might arise. It is chiefly because the presidency possesses broad and vague constitutional and statutory

powers that are almost always impossible for Congress to check in real time. Because whistleblower statutes initiate investigative processes that do not immediately stop ongoing or imminent abuses of presidential power, *See* Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, 112 Stat. 2397 (Oct. 20, 1998), for a detailed explanation of the ICWPA and implementing guidance. *See* MICHAEL E. DEVINE, CONG. RSCH. SERV., RL45345, INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTIONS 13–15 (Jun. 22, 2021); *see also* 10 U.S.C. § 1034 (whistleblower protections for members of armed forces). For an explanation, *see* DOD Directive 7050.06, Military Whistleblower Protection (2015). Only measures of resistance or outright disobedience within the executive branch can prevent grave and potentially irreparable constitutional harm, such as could result from the unjustified use of a nuclear weapon. Unfortunately, as General Milley’s situation demonstrates, not every abuse of presidential power is clearly “unlawful”—at least in the sense that it plainly violates the text of the Constitution or an applicable statute. The tendency of political appointees in the Office of Legal Counsel [OLC] to write opinions that provide legal cover for presidential caprice exacerbates this legal ambiguity and enables a less than virtuous President to use his or her constitutional powers in ways that might significantly undermine constitutional values. *See, e.g.,* Barry Sullivan, *Reforming the Office of Legal Counsel*, 35 NOTRE DAME J. L. ETHICS & PUB. POL. 723, 730–35 (2021); *see also* Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515 (2021). Hence, presidential actions or orders—such as ordering the launch of a nuclear weapon—may be within a President’s constitutional or statutory powers but nevertheless constitutionally corrupt if they are intended or exceptionally likely to undermine important constitutional principles that a President is obligated to protect and defend.

Emergency and war powers are the most obvious avenue for a significant abuse of presidential power. The presidency’s constitutional and statutory powers in these areas are both extraordinarily robust and exceptionally vague. There are many reasons why. At the most fundamental level, there is substantial disagreement regarding the substance, if any, of the powers conferred by the Constitution’s vesting of “executive power . . . in a President of the United States,” U.S. CONST. art. II, § 1. Opinions range from the assertion that no substantive powers are vested by this clause to the idea that they vest all executive power as understood in the Founding Era, except as allocated to other branches by the text. *Compare* Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020) (asserting clause is not

a substantive grant of power), *with* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L. J. 231 (2001) (arguing clause vests all foreign affairs powers not otherwise allocated by the Constitution). as well as the presidential obligation “to take care that the laws be faithfully executed.” U.S. CONST. art. II, § 3. For an excellent, in-depth examination of this power, see generally Andrew Kent, Ethan J. Lieb & Jed Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019). Similar legal ambiguity permeates issues of presidential power in both domestic and foreign affairs.

A. Domestic Affairs

The Supreme Court has suggested that Presidents possess inherent constitutional power to use force, including the armed forces, to protect federal personnel, instrumentalities, property and functions, *See In re Debs*, 158 U.S. 564, 582–85 (1895); *Cunningham v. Neagle*, 135 U.S. 1, 63–64 (1890). but the precise limits of these powers are unclear. *See, e.g.*, Henry Paul Monaghan, *The Protective Power of Presidency*, 93 COLUM. L. REV. 1 (1993). This vagueness likely accounts for the use of anonymous federal law enforcement agents engaging in [constitutionally questionable conduct](#) near some protests that [followed the murder of George Floyd](#).

Similarly, Congress has granted Presidents virtually unlimited discretion to use the armed forces to enforce federal law. The Insurrection Act, as codified and amended, provides:

Whenever the President considers that unlawful obstructions, combinations, or assemblages . . . make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the [regular] armed forces, as he considers necessary to enforce those laws . . .” 10 U.S.C. § 252 (emphasis added).

It further says “[t]he President,” upon deciding to use the armed forces, “*shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy.*” 10 U.S.C. § 253 (emphasis added). This grants a President broad discretion to use the armed forces in a variety of ways. According to the Supreme Court, such discretion might even include the imposition of “martial law” or resort to the use of war measures against citizens [in some circumstances](#). *See Prize Cases*, 67 U.S. 635, 670 (1862). The Insurrection Act therefore provides a ready avenue for a significant abuse of presidential power.

B. Foreign Affairs

In foreign affairs, federal courts and the State Department have asserted that a President has inherent and independent constitutional authority to defend U.S. instrumentalities, nationals, and their property and other interests abroad. *Durand v. Hollins*, 8 F. Cas. 111 (C.C.D.N.Y. 1860); DEP'T OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES 38–48 (3rd ed. 1933) (theorizing President's independent, exclusive power to protect instrumentalities and citizens abroad). Moreover, modern executive branch legal advisors claim that Presidents possess independent constitutional authority to use armed force abroad whenever they deem it to be in the national interest and anticipate that it will not precipitate a “war in the constitutional sense”—meaning a major armed conflict that should require a Congressional declaration of war. *See* April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C., at 1 (May 31, 2018) [hereinafter Engel Memo]; Authority to Use Military Force in Libya, 35 Op. O.L.C., 20, 27–31 (Apr. 1, 2011). Moreover, despite a constitutional obligation to “take care that the laws be faithfully executed,” Presidents often issue statements when signing legislation in which they vaguely proclaim that they will narrowly construe or ignore any law that might be thought to excessively limit a President's constitutional authorities, particularly as Commander-in-Chief. *See, e.g.,* Curtis A Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMM. 307 (2006). The Office of Legal Counsel (“OLC”) asserts that Presidents have significant discretion over both determinations, *See* Engel Memo (recognizing “broad set of interests” permitting “great deal of discretion,” and perhaps naively stating that “[OLC] would not expect that any President would use this power without a substantial basis for believing that a proposed operation is necessary to advance important interests of the Nation”); *id.* at 18–22 (noting use of force “will likely rise to the level of a war only when characterized by “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period”). so much so that presidential power scholars have opined that the “[national interests](#)” test is “[meaningless](#).” Commentators have also questioned the propriety of military actions that risked escalation to “[war in the constitutional sense](#).” Nevertheless, when the sitting President does not anticipate escalation, OLC has opined that a use of force is lawful. *See, e.g.,* Engel Memo (asserting that “the fact that there is some risk to American personnel or some risk of escalation does not itself mean that the operation amounts to a war” and noting “[w]e were advised that escalation was

unlikely (and reviewed materials supporting that judgment), and we took note of several measures that had been taken to reduce the risk of escalation by Syria or Russia”). In this area of constitutional law, we may be approaching the point where OLC believes that “when the President does it . . . that means it is not illegal.” Interview by David Foster with Richard Nixon, Former U.S. President, in Monarch Bay, Cal. (1977). *But see* Stephen Pomper, *Has War Become Too Humane?* (asserting “executive branch lawyers can and do say “no” to policymakers’ questions about whether and how the United States can use force”).

C. The National Emergencies Act (“NEA”)

The NEA is instructive as it regulates emergencies arising in both domestic and foreign affairs. The NEA grants presidents broad discretion to declare national emergencies and to continue them in perpetuity. 50 U.S.C. § 1621, § 1622(d). Doing so permits presidents to rely upon various statutory powers, some of which are constitutionally assigned to Congress. 50 U.S.C. § 1621(a). Although Congress retained power to terminate these emergencies by joint resolution, 50 U.S.C. § 1622(a)(1). its ability to do so is constitutionally limited. Article I, Section 7 of the Constitution requires that all joint resolutions be presented to the President, who may disapprove them. U.S. CONST. art. 1, § 7 (“Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives . . .”). If disapproved, they must be repassed by two thirds of both chambers to take effect. *Id.*; *see also* *INS v. Chadha*, 462 U.S. 919, 944–51, 959 (1983) (holding statute authorizing legislative veto without presentment to President for approval or disapproval is unconstitutional). In other words, there are virtually no limits to a President’s ability to proclaim and to perpetuate an emergency, but a supermajority of Congress is needed check abuses of that power. Alternatively, when faced with presidential abuses of constitutional or statutory powers, a majority of the House of Representatives may impeach the President, U.S. CONST. art. 1, § 2 cl. 5. but a supermajority of the Senate is required to convict. U.S. CONST. art. 1, § 3 cls. 6 & 7. By the time any of these legislative processes play out, grave and potentially irreparable constitutional harm might be done.

In short, Congress is a deliberative body with limited powers and cannot check serious abuses of presidential power in real time (and often lacks sufficient political will to do so at all). Although it has enacted whistleblower protections, the processes it created are also reactive and time consuming, *See Vindman*. and can be corrupted by a President or well-placed loyalists in the Executive Branch. As is well documented, Alexander Vindman exposed President Trump's 2019 efforts to pressure Ukraine into investigating his political rival, President Biden, and Biden's son. Although the acting Director of National Intelligence was statutorily obligated to disclose the whistleblower complaint to Congress, the White House Counsel made overbroad assertions of executive privilege and a political appointee in OLC drafted a dubious opinion that rejected the conclusions of the Intelligence Community Inspector General. MICHAEL E. DEVINE, CONG. RSCH. SERV., RL45345, INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTIONS 13–15 (Jun. 22, 2021). This OLC opinion was roundly criticized by a group of federal inspectors general. OLC is reported to have forwarded the matter to Attorney General William Barr's Department of Justice Criminal Division, which allegedly found no grounds to investigate campaign finance law violations. In the event of an impending threat of grave constitutional harm, any meaningful check on a President's abuse of power must come from others within the Executive Branch. If we are to contemplate this, the important issues become who may act to check such abuses, how, and under what circumstances.

II. CONSTITUTIONAL DILEMMAS AND THE "GOOD OFFICER"

As noted above, Vindman and others asserted that General Milley subverted the constitutional principle of civilian control of the military. After lauding his own actions, which were taken under much different circumstances, Vindman stated that General Milley should have resigned, as former Secretary of Defense Jim Mattis did, rather than undermine the chain of command. *See Vindman*. Recall that Mattis had resigned when President Trump abruptly ordered U.S. troops out of Syria, which was a significant and problematic foreign policy decision but not one that threatened to undermine the important constitutional values or principles.

Milley, on the other hand, was faced with sycophantic presidential advisors suggesting that he use the military to overturn the election results, as well as the prospect of a completely unjustified nuclear or conventional strike that might result in a devastating war. PERIL, at 193–95; *id.* at xxv–xxvii. We must also remember that Trump had placed loyalists in key positions

within the Department of Defense and the Intelligence Community after summarily firing their predecessors, and the effect this likely had on Milley's perception of the events unfolding around him. As Vindman admits, Milley tried working with other Trump loyalists, like Chief of Staff Mark Meadows, to no avail. *See* Vindman. One can understand, even if Vindman does not, that Milley might have reasonably believed that his resignation would make it easier for Trump to abuse power and misuse the armed forces. Vindman confidently claimed that if Milley resigned, other generals would serve as a necessary check on the President. *Id.* Curiously, Vindman also asserted Milley's resignation could have various positive effects before deriding him as a controversial figure. *Id.* It seems odd to suggest that the resignation of a controversial figure would have the positive effects Vindman claimed. The issue to consider here is whether law or legal principles can help us understand Milley's situation and actions, and distinguish them from Vindman and Mattis. This section briefly attempts that task.

A. Constitutional Fidelity

The suggestion that a senior military officer might disobey or countermand a plausibly lawful order from the constitutionally-designated commander-in-chief may seem absurd on its face. One must recall, however, that an officer's oath is to the Constitution rather than the President. In a recent edition of *The Armed Forces Officer*, a guide published by the Department of Defense, military officers are reminded that they are "defenders of the Constitution and servants of the nation." DEP'T OF DEFENSE, *THE ARMED FORCES OFFICER* 33 (2007) [hereinafter 2007 AFO]. Despite its status as an official publication, the cover material for the 2007 (and 2017) editions of this book contain the following disclaimer: "The opinions, conclusions, and recommendation expressed or implied within are those of the authors and do not necessarily reflect the views of the Department of Defense or any other agency of the Federal Government." *Id.*, at iv; RICHARD M. SWAIN & ALBERT C. PIERCE, *THE ARMED FORCES OFFICER* viii (2017). They are told that their "oath to support and defend the Constitution means swearing to uphold the core values that define the essence of American citizenship." 2007 AFO, at 2. And they are counselled that officers "are required to embody the values we have taken an oath to defend" and that "courage is not a matter of heroism or extraordinary strength, but of inner conviction and faith—the decision to do the right thing for the right reason, no matter the cost." *Id.* at 3. These ideals suggest a legal and moral basis for taking measured actions to prevent the execution of unlawful or otherwise constitutionally corrupt presidential orders.

B. Public Necessity

Of course, government officials should almost always follow and ensure others comply with the Constitution and laws of the United States. But as Thomas Jefferson wrote:

[A] strict observance of the written laws is doubtless one of the high duties of a good citizen: but it is not the highest. [T]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. [T]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property & all those who are enjoying them with us; thus absurdly sacrificing the end to the means. Letter from Thomas Jefferson, Former U.S. President, to John B. Colvin, Author (Sep. 20, 1810) (on file with National Archives).

Although this language seems to refer to some sort of existential necessity, in the sense that without taking extralegal action the nation would cease to exist, President Lincoln similarly argued, “[a]re all laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?” WILLIAM H. REHNQUIST, [ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME](#) vii (1998) (citing Abraham Lincoln, Message to a Special Session of Congress (July 4, 1861)). Jefferson provided several examples of what he meant. They included the wartime invasion of the private rights of U.S. citizens that would otherwise be unconstitutional, which is essentially a principle of “public necessity” endorsed in Supreme Court decisions. *Id.* (“[I]n the battle of Germantown, Gen Washington’s army was annoyed from Chew’s house, he did not hesitate to plant his cannon against it, altho’ the property of a citizen.”); *Mitchell v. Harmony*, 54 U.S. 115, 134 (1851) (affirming doctrine of necessity as defense to commander’s personal liability in war). *See also* John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599 (2011) (distilling from Supreme Court precedent and other literature three legal doctrines of “necessity” applicable to war measures, including “public necessity”).

Jefferson also clarified who may claim this authority. It is not available to “persons charged with petty duties, where consequences are trifling, and time allowed for a legal course.” Instead, it is available only to those “who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of it’s [sic] very high interests are at stake.” Although, “the line of discrimination between cases may be difficult . . . the good officer is

bound to draw it at his own peril, [and] throw himself on the justice of his country and the rectitude of his motives.” Jefferson.

Some presidential scholars believe that Jefferson’s letter argues for executive prerogative or emergency executive powers. *See, e.g.*, Julian Davis Mortenson, *A Theory of Republican Prerogative*, 88 S. CAL. L. REV. 45, 63–66 (2014); Jeremy David Bailey, *Executive Prerogative and the “Good Officer” in Thomas Jefferson’s Letter to John B. Colvin*, 34 PRES. STUD. QUART. 732 (2004). Criminal law professors might recognize Jefferson’s argument as a “necessity” or “lesser evils necessity” defense. Although not universally adopted in the U.S., a necessity defense justifies an otherwise criminal act when performed to prevent a greater evil. JOSHUA DRESSLER, [UNDERSTANDING CRIMINAL LAW](#) 287 (6th ed. 2012). Its conceptual cousins, public and private necessity, are defenses to tort liability in some jurisdictions. DAN B. DOBBS, ET AL. [THE LAW OF TORTS](#) § 117, 119 (2d ed. 2017). Jefferson clearly suggested that a public necessity of the highest order may justify violating the written law, including the Constitution. Jefferson (suggesting president might purchase land without a congressional appropriation under some circumstances). This implies the first basic principle for “the good officer” facing a serious constitutional dilemma created by an impending abuse of presidential power: the constitutional harm one seeks to prevent must be greater than the constitutional harm caused by one’s actions.

The necessity defense in criminal law has several elements that are also instructive in this context. According to Professor Joshua Dressler, they are as follows. “First, [the person performing the otherwise criminal act, known as] the actor[,] must be faced with a clear and imminent danger.” Dressler, at 287. Second, the actor must reasonably believe that their action(s) “will be effective in abating the danger that he seeks to avoid.” *Id.* “Third, there must be no effective legal way to avert the harm.” *Id.* at 288. “Fourth, the harm . . . [caused] by violating the law must be less serious than the harm that [t]he [actor] seeks to avoid.” *Id.* Dressler mentions two additional elements unrelated to this discussion. Lawmakers must not have already “anticipated the choice of evils and determined the balance to be struck” in an existing law specifically applicable to the situation. And the person seeking to invoke necessity must not have “substantially contributed to the emergency.” *Id.* at 288–89. Each of these elements is determined from the standpoint of the actor, who must behave reasonably under the circumstances. *Id.* at 287–89. The situations to which these principles might apply are potentially limitless, though it is not clear whether necessity is a defense to intentional killing. *Id.* at 291–92.

Applying these principles to the constitutional dilemmas of the type Milley faced suggests the outlines of a potential “constitutional necessity” defense for one’s actions. First, those actions must be directed to preventing the execution of an unlawful or constitutionally corrupt order. Because any such acts would interfere with a President’s explicit constitutional designation as Chief Executive and Commander-in-Chief, U.S. CONST. art. II, § 2. they must be directed toward preventing criminal acts or constitutional harms of a higher magnitude. Any federal government official who would consider taking measures to resist, undermine, or disobey an existing or anticipated unlawful or constitutionally corrupt presidential order (or set of orders/plan) must:

- (1) reasonably believe (to a moral certainty) that execution of the presidential order or plan would be intrinsically unlawful or would otherwise clearly violate or seriously impair constitutional principles or values of the highest order, and
- (2) take only those measures the official reasonably believes to be necessary to prevent the issuance or execution of that order or plan.

It would seem that taking specific, reasonable measures to prevent a President from using the military to overturn an election, or to start an unnecessary war, would meet these requirements. This may explain Professor Nichols’ intuition that we should be glad for what General Milley did.

That these principles would apply to situations where constitutional principles or values of the highest order are imperiled further indicates the narrowness of their potential application. Regarding the first proposed element, an official must be in a position to sufficiently understand the entire factual and legal context in which the order or plan would be executed in order to reasonably assess its purpose, likely effect, legality, and constitutional import. The relatively small number of officials involved in high-level national security decision-making substantially limits the scope of those who could plausibly claim a constitutional necessity for otherwise disloyal actions. As I have argued elsewhere, those executing orders issued by a much higher headquarters seldom possess adequate contextual information to fully evaluate the legality of the orders they have received. John C. Dehn, *Why a President Cannot Authorize the Military to Violate (Most of) the Law of War*, 59 WM. & MARY L. REV. 813, 892–95 (2018). Any claim of constitutional necessity would therefore be limited to those in high positions of great responsibility who possess sufficient information to understand and assess both the context of the

orders or plans and the constitutional harms they would likely produce. This is just as Jefferson posited.

With respect to the second element, there should be reasonable discretion for an official to determine how best to prevent the execution of a potential unlawful or corrupt order in a large, complex organization like the U.S. federal government. While in criminal law the harm to be avoided must be imminent, the timing and nature of actions taken to prevent grave and potentially irreparable constitutional harm should be assessed in relation to the likelihood, imminence and magnitude of the harm. Milley took limited preventive measures to avert rash actions that seemed quite plausible to many in and out of the government. Drastic acts, like a military coup, would almost if not always cause more constitutional harm than they would prevent. Criminal acts, like the unauthorized dissemination of classified information, must be carefully considered. Their evaluation of their propriety should be limited by the requirement that the official believe the act is truly necessary to avert constitutional harm. At bottom, the prospect of explaining one's actions to Congress, to a jury, and/or to the nation should serve as an adequate constraint on officials contemplating such actions.

A final note about the feasibility of resignation. One might argue that if one's resignation or threatened resignation might prevent the issuance or execution of unlawful or otherwise constitutionally corrupt orders, then that alternative to disobedience or other resistance is required. But the issue under the necessity principles articulated above is not what we, or what Vindman, believe might have prevented the execution of such orders, but what General Milley reasonably believed to be necessary and effective under the circumstances. Milley may reasonably have believed that his resignation would not prevent the potential constitutional harms he perceived, but that ensuring he was consulted by those tasked to execute such orders would. Without more information, we are not in a position to assess the reasonableness of Milley's beliefs.

CONCLUSION

It is sometimes said that 'the Constitution is not a suicide pact.' *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159–60 (1963) ("The powers of Congress to require military service for the common defense are broad and far-reaching, for while the Constitution protects against invasions of individual rights, it is not a suicide pact."); *Terminiello v. Chicago*, 337 U.S. 1, 37

(1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”); *see also* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257 (2004) (“The Constitution is not a suicide pact . . . [and] should be construed to avoid constitutional implosion. . .”). Perhaps that notion should be extended to the constitutional principle of military subordination to presidential authority. If a President attempts or appears likely to abuse his or her powers in ways that violate constitutional principles or values of highest importance, senior military officers or other officials may need to take prudent actions to prevent that harm. Many of the attention-seeking politicians and pundits who immediately and harshly criticized General Milley’s alleged actions were probably secretly thankful for them. While the situations in which a government official might need to “pull a Schlesinger” (This refers “to an edict by former secretary of defense James Schlesinger to military leaders in August 1974 not to follow orders that came directly from President Nixon, who was facing impeachment, . . . without first checking with Schlesinger and his JCS Chairman. . .” PERIL, at xxv–xxvi.) will hopefully be quite rare, we can only hope that those confronted with such circumstances will have the courage to “do the right thing for the right reason, no matter the cost” and then “throw [themselves] on the justice of [their] country and the rectitude of [their] motives.” *See Dep’t of Defense*; Letter from Thomas Jefferson. As Vindman poignantly said, in America, “[right matters](#).” Let us hope that will always be so.