War Crime Pardons and Presidential (Self-) Restraint

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I. Introduction

In 2008, Army First Lieutenant Michael Behenna executed an unarmed Iraqi named Ali Mansur Mohamed during an unauthorized "field interrogation." Behenna believed Mansur was responsible for an attack that killed two of his troops with a roadside bomb a few weeks earlier. Though he claimed self-defense, a court-martial panel of officers convicted him of unpremeditated murder and assault in 2009 and he was sentenced to twenty-five years in federal prison. His sentence was later reduced to fifteen years by the Army's clemency and parole board. In 2014, he was released on parole after serving less than five years. In May 2019, President Trump pardoned him.[1] In explaining the rationale, the President's press secretary implied that the pardon was meant to rectify a flawed conviction for a deserving former soldier. She said that Behenna had been a model prisoner and that the Army's appellate court had noted concerns about how the trial judge handled the self-defense claim.[2] What the White House chose not to mention was that the same Army appellate court affirmed the court-martial's finding of guilt and sentence anyway, and that the civilian Court of Appeals for the Armed Forces, the nation's highest court for reviewing the legal sufficiency of courts-martial, found that the judge's error was "harmless beyond a reasonable doubt" and that any failure by the government to disclose potentially useful defense evidence was immaterial to the outcome of the case.[3] This was the first time any president had pardoned a former or current soldier for battlefield misconduct that could have been charged as a war crime.[4]

In November 2019, the President followed up his historic act of executive clemency with two more. He pardoned former First Lieutenant Clint Lorance (also convicted of murder in combat, this time in Afghanistan), then serving a twenty-year sentence.[5] And—after much public commentary via Twitter[6]—he pardoned former Army Special Forces Major Matthew Golsteyn, who had been charged with killing a detainee and associated offenses, but who had not yet faced trial by court-martial.[7]

Trump was not the first president to grant clemency to service members who had violated norms, codes of conduct, and criminal law through their actions in combat. President Lincoln famously interjected his vision of justice in cases of Union soldiers accused or convicted of the grave wartime offense of desertion, stopping scheduled executions, to the chagrin of commanding generals.[8] President Andrew Johnson granted general amnesty and pardoned the vast majority of ex-Confederates during the Reconstruction era.[9] President Nixon did not pardon Army Lieutenant William Calley after Calley's conviction for the My Lai Massacre, but—with significant public support—Nixon moved Calley out of prison and into house arrest during his appeals, eventually resulting in an early release after a handful of years for the person chiefly responsible for the deadliest war crime in American history.[10] President Obama controversially commuted the sentence of former Army Private Chelsea Manning, who had been sentenced to thirty-five years in prison for a massive leak of classified and sensitive documents related to the global war on terror.[11] Though not for a war crime, the Manning clemency was another high-profile example of presidential intervention in the military justice process on traditional grounds of official mercy to mitigate what might have been considered unjust prosecutions or unjust punishments.

But the Behenna, Lorance, and Golsteyn pardons are in a category apart—though not officially. One pardon was post-sentence (Behenna); one cut short a sentence then being served (Lorance); and the other stopped an ongoing prosecution not yet brought to trial (Golsteyn). Regardless of the intervention's timing, all three cases shared two important characteristics: (1) they involved conduct incidental to the service member's legitimate military mission in combat, and (2) the conduct victimized a party protected from unlawful use of force by the law of war. This essay will refer to grants of clemency for this kind of offense generically as "war crime pardons" and explain why they should be distinguished and avoided. Importantly, this essay is *not* about other pardons, or any other form of clemency, granted to service members or ex-service members for any other type of offense or court-martial conviction. Whether they had already completed a sentence, were serving a sentence, or had not yet been convicted, such routine cases are not the focus here, for they raise issues generally similar to those raised by pardons of civilians. Not all military crimes are the same; battlefield misconduct (defined by the two characteristics above) implicating the law of war is the sole target of this article.

Though Trump's acts of judicial mercy toward service members may not be wholly original, they have made him the first president to pardon soldiers—in these cases, officers—for offenses that could have been charged as violations of the international law of war. Like most presidential pardons, his acts garnered both partisan applause and substantial criticism.[12] One notable source of criticism

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came from within the current and former military ranks, as well as scholars studying traditional military ethos. Naval War College and Naval Postgraduate School ethics professors wrote: "The pardons of our war criminals by Trump, and his interference in and disrespect of our own military justice system is unprecedented and should trouble all Americans. We will not pull punches—they are shameful and a national disgrace."[13] Two retired judge advocate officers turned law professors wrote of Trump's "reckless dismissal of the judgments of his military commanders and his misunderstanding of the profession of arms."[14] Retired Lieutenant General David Barno argued that President Trump did not give sufficient consideration to the views of his advisers, the unambiguous results of due process under military law, the collateral consequences for soldiers on the battlefield, or obligations under the law of war.[15]

The nature of these battlefield crime pardons should give caution to presidents claiming their moral duty or constitutional prerogative to grant clemency at will and without judicial or congressional review. This article highlights a series of legal and prudential considerations that justify thinking of war crimes as categorically different from offenses conventionally considered for clemency.

II. Why War Crimes (and Their Pardons) Are Different

First, war crimes implicate the well-known and universally accepted expectations, duties, and rights of international law. Rules founded on basic principles of humanity, chivalry, and honor regulate who may use force, against whom such force may be used, what places or things may be attacked, and what weapons may or shall not be used in those attacks.[16] These expectations, duties, and rights are also encoded in military doctrine.[17] How Americans—as a nation through public discourse and as a military on the battlefield—address violations of these rules will signal something to the larger international community of current and potential allies, partners, competitors, and enemies. It signals the tactical and political valuation by the United States of humanitarian practices and standards in conflict.

Second, war crimes also violate core customs, traditions, and standards of conduct and ethics that (when obeyed) further positive goals of self-regulation within the profession of arms.[18] The "Army Values" of loyalty, duty, respect, selfless service, honor, integrity, and personal courage[19] are ignored—or at best grossly misapplied—when a soldier commits an act punishable as a war crime. These values not only reflect the profession's moral code of expectations, they reflect ideals that Congress has told military leaders to enforce.[20]

Third, the president as the military's commander-in-chief has a different moral, legal, and practical *standing* in relation to both the military offender and the war crime offense itself. The president is the ultimate superior in the chain of command. The service member convicted of a war crime (whether charged as such or not) could not have acted when and where he did *but for* the president's express order or tacit acceptance of the military operation within which the service member dutifully executed a mission. While the president is clearly not legally complicit in the wrongful act, his constitutional duty as commander-in-chief implies a moral responsibility for the enabling context of the wrongful act. In that sense, pardoning a war criminal of one's own military appears to be a conflict of interest, broadly understood.[21]

A possible consequence of failing to properly account for these legal and practical realities and authorities is a strong disagreement between the military and the civilian political principal who pardons.[22] When this disagreement reflects fundamental differences over what is morally permissible conduct on the battlefield, the civilian political leader's "right to be wrong"—if exercised over the objections of four-star service chiefs of staff and the civilian service secretaries—risks at least four considerable penalties and costs.[23] First, it risks alienating those in uniform, or who have been in uniform, who believe that such conduct was immoral or illegal and therefore beneath them, damaging the institution and its professional reputation.[24] Second, it risks undermining the confidence the military agent has in the civilian principal's knowledge, intentions, and good faith.[25] Third, it risks signaling civilian disregard for the very military due process that the commander-in-chief is responsible for managing as a specialized criminal justice system.[26] And fourth, it risks signaling preapproved permission[27] to engage in similar acts with similar intentions to those in uniform who are facing or who may face circumstances risking moral injury. This combination of risks is too strong for a civilian principal to ignore.[28] For all these reasons, war crimes and war crime pardons are categorically different than any other pardons and ought not be permitted—or at least ought to be limited in some sensible way.

But how to deny a president the power to pardon service members accused or convicted of war crimes by courts-martial when that constitutional discretion is seemingly absolute? The most obvious route would be to amend the Constitution. But this is, of course, highly improbable, even if Congress or the States believed that the reasons above were strong enough to justify it. Instead, the method of restraint most respectful to the principle of separation of powers is to amend not the Constitution, but rather the Uniform Code of Military Justice (UCMJ).[29] Article I, § 8, clause 14 authorizes Congress to "make rules for the government and regulation" of the military, and the UCMJ establishes what conduct shall constitute an offense triable by court-martial, establishes a tiered system of courts-martial and appellate courts, grants certain law enforcement, prosecutorial, and judicial authorities to the military chain-of-command and to the president, and guarantees that certain due process rights—like right to counsel and privilege against self-incrimination—are protected.[30] Amending the UCMJ to limit or prohibit war crime pardons recognizes that criminal activity through combat actions raises the interests of *both* Congress *and* the commander-in-chief, both of whom have constitutionally prescribed responsibilities for the regulation and use of

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those service members. The Supreme Court has repeatedly acknowledged that military justice's unique elements—primarily the role of the commander, exercising both prosecutorial and judicial functions—justify different applications of civil liberties and generally do not violate constitutional protections.[31] With this in mind, it is *not impossible* to imagine a UCMJ amendment that imposes a limited restraint on presidential discretion but that still passes the Supreme Court's scrutiny.

Nevertheless, the probability of amending the UCMJ over a likely presidential objection is near zero. After all, the president would likely (and correctly) argue that the text of the Constitution does not forbid such pardons and that the Court has long blessed an expansive scope of the pardon power.[32] He might further argue that his position as commander-in-chief dictates a need for more, not less, discretion for judging the conduct of service members engaged in combat; just as Congress does not interfere with tactical and operational command decisions about the use of armed force, Congress ought not to interfere with tactical criminal justice decisions involving the armed forces (or so the argument would go). With a formal statutory or constitutional mechanism implausible, the better way to understand a possible restraint is as a presidential self-denial of otherwise unilateral discretion.

But this denial is conditional and triggered by various presumptions. In the granting of pardons, presumptions should depend on the timing of the possible pardon decision in relation to when that intervention would occur in the military justice process. This conditional framework accounts for the fact that pardons for individuals' actions during combat implicate not only the president's Article II pardon power but also the president's Article II role as commander-in-chief, the president's role in executing the congressionally enacted and regulated military justice system under Article I, the principal-agent character of the civil-military fiduciary-like relationship,[33] and the duties and rights the United States has subscribed to under the international law of war.[34] Pardoning a civilian for something like obstruction of justice, tax evasion, illegal campaign contributions, or even murder is categorically and normatively different from pardoning a war criminal.

Military crimes and their sanctions, established by Congress in the UCMJ and managed by the president[35] down through individual judicial and prosecutorial discretion of subordinate commanders, are fundamentally different from other crimes and sanctions. They apply to a specific and narrow community employed for specific purposes.[36] These criminal proscriptions are only constitutionally lawful, even when they seemingly breach constitutional norms or otherwise sacrosanct civil liberties, to the extent that they ensure that this specialized community is able to accomplish its mission on behalf of the nation.[37]

The resulting justice system reflects Congress's judgment about what conduct is criminal, and Congress by law delegates to the president the authority to control the court-martial procedure and prescribe punishments for violations, and even act as a court-martial convening authority as if he were a senior uniformed commander.[38] (This is not a role the president plays in any other criminal justice system.) Congress has provided the military chain-of-command discretion in individual cases to determine whether some conduct is "service-discrediting" or "prejudicial to good order and discipline" to the extent that it should be criminally prosecuted, even if it could *never* have been in an ordinary criminal court.[39]

This criminal law system also deliberately and self-consciously incorporates international humanitarian law (also known as the law of war, or the law of armed conflict).[40] Under the "combatant's privilege," international humanitarian law permits nations and individuals to engage in some conduct that would be impermissible and criminalized even under the UCMJ.[41] But this body of law imposes additional layers of duties and prohibitions that apply only in the circumstances of armed conflict. For this reason, what constitutes a war crime under military justice is highly contextual. Because of the general default presumption of combatant immunity, that context is even more relevant than the context associated with typical issues of "excuse" and "justification" that shape criminal prosecutions. The actions that could be labeled as "criminal" are often taken under extraordinary pressures of time, responsibility for the lives of others, a mission dictated by a superior chain-of-command, and possibly being engaged by a hostile force at the time the decision in question is made or in the immediate aftermath of such decisions. Moreover, the action (or failure to act) that could constitute a crime could not have been committed but for the fact that the service member was in a particular place, doing a particular job, under the lawful authority, responsibility, and direction of the commander-in-chief.

If law holds individual agency to be a key factor in determining a person's criminal culpability, behavior in combat reflects a kind of shared agency. This shared agency does not diminish the soldier's culpability. Rather, it accentuates the president's role for the sole and express purpose of diminishing his unilateral discretion to forgive and remove the stain of that culpability.

All of this means that the decisions to pardon war crimes should be *distinct* from those that guide pardons of any other crime in a civilian justice system,[42] or even pardons for another *non*–war crime offense under the UCMJ. One of the main purposes of pardons is to erase or preclude punishment when the criminalization of behavior is unjust;[43] another is to signal that systematic reform is needed.[44] But in the context of a war crime, virtually nobody can say that it is unjust to criminalize the killing of unarmed detainees without due process. Rather, a pardon signals (intentionally or not) that the president as commander-in-chief has validated, excused, or justified the particular conduct that was so highly contextualized in the military combat domain. And that conduct was possible

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only because the president ordered the service member's participation in that context.

The risk of such a pardon is that other service members facing similar contextual facts, operating under similar pressures and constraints, may view that validation from their *commander-in-chief* as permissive precedent. The pardon communicates an unexpected endorsement of behavior that is expected to be deemed morally and criminally wrong. Not only that, but such pardons go beyond merely disrespecting the law of war. They actively undermine well-known customary practice and treaty law–imposed duties to investigate and hold responsible parties accountable for violations.[45]

III. How Presidents May Self-Restrain

Per Congress's direction in Article 33 of the UCMJ, the president and the secretary of defense have published "disposition guidance" to military commanders exercising their prosecutorial discretion under the UCMJ (for literally any kind of offense), which includes a handful of "inappropriate considerations" not to be taken into account when weighing a potential prosecution.[46] These factors deliberately mirror prosecution guidance from the Department of Justice, National District Attorney's Association, and American Bar Association.[47] Likewise, there are inappropriate *pardon* considerations: rank of the service member; character of the service member's combat experience; previous professional awards or recognition for performance of duties; results of the combat incident that served as context for the offense; collateral misconduct by the service member unconnected with the conduct constituting a war crime; the range of potential punishments available to the court if convicted; the actual punishment adjudged by the trial court or affirmed by the appellate court; and probability or promise of partisan political support from the military at large or specific individuals. The irony is that in pardoning Behenna, Lorance, and Gallagher, Trump appeared to be violating the text—if not the spirit—of the very guidance he gave to military commanders and the judge advocate prosecutors.

The following set of additional factors would serve as grounds for presidential *self*-restraint, rather than external constraints imposed by a court or statute. Self-restraint is—at least arguably so—the most realistic method of reforming this narrow corner of the pardon power. Sensibly, the factors are time- and procedure-responsive too, not merely offense- or sentence-responsive. In this way, the factors might be more uniformly employed, avoiding the case-specific or fact-intensive reasons that historically ground our visceral objections to (or support for) the most controversial pardons. Note that the "restraints" are more confining the further along in the military justice process the case is. Unlike the civilian context, presidential discretion is widest *after* the service member has been charged but trial has not yet occurred. And under all circumstances involving battlefield misconduct, the presumption is against granting a pardon.

- *Contingent Factor 1:* If the service member has been convicted by court-martial, and the appellate process through the Court of Appeals for the Armed Forces (C.A.A.F.)[48] is complete (i.e., any remedy for the soldier has been granted or denied by the military's *judicial* process), do not pardon.
- *Contingent Factor 2:* If the service member has been convicted, but the appellate process is not yet complete, presume no pardon. Grant *only* if an objective and prudent person, knowing the relevant facts, would likely not think that the United States tolerates conduct that could constitute a war crime; *and* the rationale *for* clemency outweighs the recommendations of the relevant civilian and military chain-of-command; *and* if an objective and prudent military commander would agree that an enemy belligerent, under similar circumstances, would deserve a pardon from his or her own government for conduct committed against a U.S. civilian or service member.
- *Contingent Factor 3:* If the service member has been charged, but court-martial adjudication at trial is not yet complete, presume no pardon. Grant only if doing so satisfies any of the three conditions above.
- *Contingent Factor 4:* If not yet charged, do not grant a pardon, and do not engage in or seek to influence the UCMJ disposition decision. Doing so raises the specter of undue influence, if not "unlawful command influence" that unjustifiably taints the public's perception of the system's fairness and due process.[49]

This prudential framework is generally backwards from conventional pardon decision-making: presidential intervention via clemency is bureaucratically funneled, and more reasonable and likely, *after* the justice system has finally adjudicated a case, and normatively undesirable early on in the criminal investigation or prosecution. But as we have seen, the role from which a president—as commander-in-chief—addresses combat-related behavior of troops, the civil-military relationship this political leader has with his expert military agents, and the myriad professionalism interests involved indicate that conventional pardon theories and frameworks are not particularly helpful or wise ways to think about either battlefield misconduct or the presidential acts of mercy for offenders. These kinds of offenses are categorically different than those normally ripe for pardons; these kinds of offenders are categorically different (in their relationship to the president) than those typically seeking a pardon. The self-imposed presumptions against granting war crime pardons, *unless certain conditions exist*, recognize this. But they also recognize the president's plenary power to pardon, his duty to faithfully execute the laws, his role as a civilian commander-in-chief for the military, and the nation's ever-present duty under international law of armed conflict.

Assuming there is a rational, nonarbitrary calculus,[50] this decision ought not to be colored predominantly by the moral judgment of the president as chief magistrate of the laws, much less by the judgment of how such a pardon

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might be politically advantageous, or as a pure show—what Bernadette Meyler calls the "theater of pardoning."[51] Alexander Hamilton called clemency a "benign prerogative" and argued that a wise president would wield this authority as a matter of case-by-case compassion to mitigate "unfortunate guilt," or as a means to put the cork back in a potentially explosive public passion.[52] But war crimes are faulty mirrors of "normal" crimes. Just as images are distorted by physical gravity, we see and understand war crimes as shaped by their severity and their weighty implications. Their differences also demand that the decision to pardon those crimes be justified or denied in a different way.

Notes

* (The author, a Lieutenant Colonel in the U.S. Army, is a Fellow in the Modern War Institute, West Point, and a Judge Advocate. Special thanks to Margaret Colgate Love and Eugene Fidell. This Article is a lightly expanded version the author's *Should There Be a War Crime Pardon Exception?*, Lawfare, Dec. 3, 2019, https://www.lawfareblog.com/should-there-be-war-crime-pardon-exception. The opinions and analysis here do not reflect the official positions or policies of any element or organization of the U.S. government, including the Department of Defense, the U.S. Army Judge Advocate General's Corps, and the U.S. Military Academy.

1 Mihir Zaveri, *Trump Pardons Ex-Army Soldier Convicted of Killing Iraqi Man*, N.Y. Times, May 6, 2019, https://www.nytimes.com/2019/05/06/us/trump-pardon-michael-behenna.html?module=inline.

2 White House Press Release, Statement from the Press Secretary Regarding Executive Clemency for Michael Behenna (May 6, 2019), https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-executive-clemency-michael-behenna [https://perma.cc/JE9Q-M5HC].

3 United States v. Behenna, 71 M.J. 228 (C.A.A.F. 2012).

4 The common criticism of Trump's clemency almost universally referred to the pardons of Behenna, Lorance, and Golsteyn as "war crime" pardons or stated that these men were accused or convicted of being "war criminals." *See, e.g.,* Noor Zafar, *Trump's War Pardons Are Sabotaging the Military Justice System*, ACLU News & Commentary, Dec. 13, 2019, https://www.aclu.org/news/national-security/trumps-war-pardons-are-sabotaging-the-military-justice-system/. This is not, as a matter of technical legal jargon, accurate: they were not formally charged with violating the U.S. "war crimes" statute (18 U.S.C. § 2441) or any specific law of war either codified by treaty or understood under Customary International Law norms.

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10 Mikhaila Fogel, *When Presidents Intervene on Behalf of War Criminals*, Lawfare, May 27, 2019, https://www.lawfareblog.com/when-presidents-intervene-behalf-war-criminals; John Darnton, *Decision by Nixon on Calley Hailed*, N.Y. Times (Apr. 3, 1971), https://www.nytimes.com/1971/04/03/archives/decision-by-nixon-on-calley-hailed-protests-over-conviction.html.

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20 *See* 10 U.S.C. § 7233 ("Requirement of exemplary conduct").

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[24] *See, e.g., GEN(R) Martin R. Dempsey*, Twitter, May 21, 2019, https://twitter.com/Martin_Dempsey/status/1130809276191035392? ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1130809276191035392&ref_url=https%3A%2F%2Fwww.lawfareblog.com%2Fwhen-presidents-intervene-behalf-war-criminals.

[25] Richard Spencer, *I Was Fired as Navy Secretary. Here's What I've Learned Because of It*, Wash. Post, Nov. 27, 2019, https://www.washingtonpost.com/opinions/richard-spencer-i-was-fired-as-navy-secretary-heres-what-ive-learned-because-of-it/2019/11/27/9c2e58bc-1092-11ea-bf62-eadd5d11f559_story.html.

[26] Leo Shane III, *Clemency for War Criminals an 'Insult' to the Military, Lawmaker Argues*, Mil. Times, Nov. 22, 2019, https://www.militarytimes.com/news/pentagon-congress/2019/11/22/clemency-for-war-criminals-an-insult-to-the-military-lawmaker-argues/.

[27] Graeme Wood, *War Crimes Are Not Difficult to Discern*, Atlantic, Nov. 17, 2019, https://www.theatlantic.com/ideas/archive/2019/11/trumps-latest-pardons-reveal-his-military-doctrine/602137/.

[28] David Lapan, *President Trump Is Damaging Our Military: War Crimes Cases Are the Latest Example*, Just Security, Nov. 18, 2019, https://www.justsecurity.org/67310/president-trump-is-damaging-our-military-war-crimes-cases-are-the-latest-example/.

[29] Uniform Code of Military Justice, Pub. L. No. 81–506, 64 Stat. 107 (1950) (codified at 10 U.S.C.§ 801–946a (2019)). I focus on this statute, rather than the federal "war crimes statute" of 18 U.S.C. § 2441 because all three of Trump's "war crimes" pardons were addressed through the military justice system, not federal district court.

[30] *See generally* Eugene R. Fidell, Military Justice: A Very Short Introduction (2016); Walter T. Cox III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 Mil. L. Rev. 1 (1987); David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 Mil. L. Rev. 1 (2013).

[31] Donald W. Hansen, *Judicial Functions for the Commander?*, 41 Mil. L. Rev. 1 (1968); Parker v. Levy, 417 U.S. 733 (1974).

[32] Ex parte Garland, U.S. 333, 380 (1866); Biddle v. Perovich, 274 U.S. 480, 486 (1927); William Howard Taft: Essential Writings and Addresses 189 (David H. Burton ed., 2009); William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475, 530 (1977) ("President is free to exercise the pardoning power for good reason, bad reason, or no reason at all").

[33] For important and original theoretical work on this framework, *see* Peter D. Feaver, Armed Servants: Agency, Oversight, and Civil-Military Relations (2003).

[34] U.S. Dep't of Defense, Law of War Manual (2016); U.S. Dep't of Army, Field Manual 6–27 (The Commander's Handbook on the Law of Land Warfare) (2019).

[35] 10 U.S.C. § 836.

[36] Orloff v. Willoughby, 345 U.S. 83, 94 (1953) (describing how the military constitutes a specialized community governed by a separate discipline from that of the civilian).

[37] *See generally* Parker v. Levy, 417 U.S. 733 (1974).

[38] 10 U.S.C. § 833; *see also* 10 U.S.C. §§ 822, 853a, 860a, and M.C.M., Rules for Court-Martial (hereinafter R.C.M.) 401, 601, and 604. The M.C.M. is a series of Executive Orders promulgating the Rules for Courts-Martial procedure, military rules of evidence, and explanations of the punitive articles (including defining the offense elements).

[39] 10 U.S.C. § 934.

[40] 10 U.S.C. § 818(a); Fidell, *supra* note 30, at 83–88 (2016); *see generally* Michael W. Meier & James T. Hill, *Targeting, the Law of War, and the Uniform Code of Military Justice*, 51 Vand. J. Trans. L. 787 (2018).

[41] IHL Database, *Customary International Law*, "Practice Relating to Rule 3. Definition of Combatants," https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule3.

[42] U.S. Dep't of Justice, Justice Manual, 9–140.112 (Standards for Considering Pardon Petitions), https://www.justice.gov/jm/jm-9-140000-pardon-attorney#9-140.112.

[43] Ex parte Grossman, 267 U.S. 87, 120–21 (1925); Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 Fed. Sent'g Rep. 5, 8–10 (2007).

[44] Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 835–38 (2017).

[45] Gabor Rona, *Can a Pardon Be a War Crime? When Pardons Themselves Violate the Laws of War*, Just Security, Dec. 24, 2020, https://www.justsecurity.org/64288/can-a-pardon-be-a-war-crime-when-pardons-themselves-violate-the-laws-of-war/. Customary International Law imposes a duty on states whereby the deliberate shielding of criminal consequences for war criminals (by choosing not to investigate or prosecute or punish) is a violation of the law of war. *See* International Committee of the Red Cross, *IHL Database*, "Customary IHL" (especially Rules 158 and 159), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44.

[46] 10 U.S.C. § 833; M.C.M., app. 2.1.

[47] M.C.M. app. 2.1, at A2.1–4 ("Analysis").

[48] The C.A.A.F. is an Article I court, not an Article III court, but consists of five civilian judges nominated by the president and confirmed by the Senate; the U.S. Supreme Court has definite, though narrow, review jurisdiction over the C.A.A.F. and thus over courts-martial. *See* Ortiz v. United States, 138 S. Ct. 2165, 2171 (2018).

[49] 10 U.S.C. § 837; M.C.M., Rule for Court-Martial 104; United States v. Bergdahl, 80 M.J. 230 (C.A.A.F. 2020) (holding that a president is capable of engaging in "unlawful influence" in violation of the Rules for Courts-Martial because he is, per 10 U.S.C. § 822, a General Court-Martial Convening Authority).

[50] *See* P. S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development, and Analysis* (1900–1993), 27 Pres. Stud. Q. 251 (1997). This may be assuming too much.

[51] Bernadette Meyler, *Trump's Theater of Pardoning*, 72 Stan. L. Rev. Online 92, 93 (2020), https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/03/72-Stan.-L.-Rev.-Online-Meyler-2.pdf.

[52] The Federalist No. 74 (Alexander Hamilton).

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