

Judge advocate from Naval Special Warfare Command, assigned as Legal Special Projects Officer for special operations command under Combined Joint Task Force—Operation *Inherent Resolve*, conducts special Law of Armed Conflict and rules of engagement training for first graduating company of unique, multiribed Iraqi force, the A'ali Al Furat Brigade, at training ground in Western Iraq, January 4, 2017 (U.S. Navy/John Fischer)



Pardon the Paradox

Making Sense of President Trump's Interventions in Military Justice

By Jeremy McKissack

Army captain and attorney Aubrey Daniel III wrote a blistering letter to President Richard Nixon in April 1971.¹ The lead prosecutor in the court-martial of First Lieutenant William Calley, Captain Daniel

had convinced a military jury at Fort Benning, Georgia, to convict Lieutenant Calley for the murder of at least 22 Vietnamese civilians in the village of My Lai on March 16, 1968.² A day after Calley began serving his sentence of life imprisonment, President Nixon reacted to the public outcry against the verdict and ordered the Army to release Calley and return him to his apartment on post.³ In his letter, Daniel wrote that the President's intervention had

“damaged the military judicial system and lessened any respect it may have gained as a result of the proceedings.”⁴

Nearly 50 years later, echoes of Captain Daniel's criticism of President Nixon could be heard when another President, Donald J. Trump, intervened in military justice proceedings. In just his first term, President Trump has intervened several times in war crime cases brought under the Uniform Code of Military Justice (UCMJ).⁵ He has used

Lieutenant Colonel Jeremy McKissack, USAFR, wrote this paper while attending the Air War College. It won the Strategy Paper category of the 2020 Chairman of the Joint Chiefs of Staff Strategic Essay Competition.



Rear Admiral Collin Green, commander, Naval Special Warfare Command (right), and Force Master Chief William King speak to junior officers and senior enlisted leaders during troop leadership class at Center for SEAL and SWCC, Coronado, California, February 13, 2020 (U.S. Navy/David Schwartz)

his pardon power to terminate one military prosecution, ordered the release of an accused Servicemember from pretrial confinement, and directed the outcome of a military administrative board, all against the recommendations of his senior military advisors.⁶ In total, President Trump has granted executive clemency, or pardons, to four Servicemembers accused or convicted of committing war crimes while deployed to Iraq or Afghanistan.⁷ His decisions in these cases have elicited widespread criticism from academics, journalists, and retired military leaders.⁸

The criticism of President Trump’s war crime pardons has been partially right and partially overstated. The purpose of this essay is to analyze two broad critiques that have emerged from the military pardon cases. It begins with a brief factual and legal overview of the four cases. Next, the essay tackles the first main

argument against the military pardons, which is that President Trump meddled in the military justice process and thereby eroded trust between himself and military leaders. The essay then addresses normative arguments against the pardons that claim they will diminish the military’s moral standing and authority and open the floodgates for Servicemembers to commit war crimes with impunity. In the end, the essay attempts to make sense of President Trump’s decisions, through the Jacksonian tradition in American politics and foreign policy.

The essay concludes with two recommendations. First, in response to the military pardons, the Department of Defense (DOD) should review its law of war policies, address any deficiencies in them, and implement regular training that highlights the “fundamental importance” of the law of war to the Armed Forces of the United States.⁹ Second,

Congress should review the cases to ensure that military law and policy clearly demarcate the role of the commander in chief in the military justice process and that Servicemembers who report war crimes receive full protection from retaliation.

The Military Pardon Cases: A Factual and Legal Overview

The military pardon cases involved four Servicemembers, three from the Army and one from the Navy: Army First Lieutenant Michael Behenna, Army First Lieutenant Clint Lorange, Army Major Mathew Golsteyn, and Navy Chief Petty Officer and SEAL Edward Gallagher. Lieutenant Behenna received his pardon for murder in a war zone in May 2019.¹⁰ Several months later and on the same day, President Trump granted executive clemency to Lieutenant Lorange, Major Golsteyn,

and Chief Petty Officer Gallagher for war crimes.¹¹ All four cases share similarities. First, the four Servicemembers were either convicted or accused of murdering civilians who were out of combat. Second, the cases reportedly made their way to the President's desk through right-wing media coverage and direct lobbying from individuals or organizations outside government.¹² And third, support for the military pardons split along partisan lines, with one poll revealing that 79 percent of Republicans and only 12 percent of Democrats agreed with Trump's pardon of Lieutenant Lorange.¹³

The four cases are also factually and legally distinct. The parameters of this essay do not allow for a complete treatment of the cases. What follows instead is a summary of the important and distinguishing factual and legal circumstances in each case.

First Lieutenant Michael Behenna. Lieutenant Behenna's actions that led to his conviction for unpremeditated murder occurred not within the fog of war but inside the haze of a fast-moving, dynamic situation largely of his own creation while he was deployed to Iraq in 2008. After being directed to return Iraqi detainee Ali Mansur to his village, Behenna instead ordered his platoon to drive Mansur to a remote section of the Iraqi desert near the area of Abu-Toma.¹⁴ Behenna ordered Mansur to strip naked and sit inside a culvert.¹⁵ Behenna then aimed his firearm at Mansur and attempted to interrogate him.¹⁶ When Behenna averted his attention momentarily, he claimed that Mansur lunged for the firearm, forcing him to shoot Mansur in the head and chest in self-defense.¹⁷

At trial, the jury rejected Behenna's self-defense argument, and he was convicted and sentenced to confinement.¹⁸ On appeal, the Court of Appeals for the Armed Forces, the military's highest appellate court, ruled against Behenna in a three-to-two decision, holding that Behenna had forfeited the right to self-defense because of his actions vis-à-vis Mansur.¹⁹ One commentator observed that the court's narrow ruling meant that the legal debate about Behenna's right

to self-defense was anything but "open and shut."²⁰ Furthermore, 37 generals and admirals, along with a former DOD inspector general, had signed a legal brief supporting Behenna's self-defense argument.²¹

In announcing Behenna's pardon, the White House press release did not mention the facts of the case.²² Instead, the announcement highlighted the unsettled debate about Behenna's self-defense argument.²³ The White House also noted that Behenna had the support of some elected officials and had been a model prisoner.²⁴

First Lieutenant Clint Lorange. During his deployment to Afghanistan in 2012, Lieutenant Lorange ordered his troops to fire on three Afghan civilians. At Lorange's court-martial, a platoon member testified to being the first to see three Afghan men riding on a motorcycle enter in "his field of view."²⁵ The platoon member did not perceive a "definitive hostile intent and hostile act" from the three men. Still, Lorange ordered him to fire without asking whether the three men had shown hostile actions, but the shots missed. Aware of the shots, the men got off the motorcycle. "As they returned to the motorcycle, [Lorange], over his portable radio, ordered the platoon's gun truck to engage the men," killing two of them and injuring a third. Afterward, Lorange's actions seemed designed to cover up and disguise the circumstances surrounding the shooting.

A jury convicted Lorange of murder and attempted murder, among other things, and sentenced him to confinement for 20 years. After Lorange's trial, the government discovered information about the motorcycle passengers that perhaps could have been helpful to Lorange's defense. One of the victims "knew someone who was linked to hostile action against U.S. forces." The other slain passenger "was biometrically linked to an [improvised explosive device] incident" that had occurred prior to the shooting. Finally, the government somehow learned that sometime after the shooting, the wounded passenger took hostile action against U.S. forces. Lieutenant Lorange knew none of this at

the time he ordered his Soldiers to fire. The Army appellate court reviewed the facts and legal arguments and upheld Lorange's conviction and sentence.

Major Mathew Golsteyn. Major Golsteyn traveled a circuitous path to his pardon from President Trump. While deployed to Afghanistan in 2010, Golsteyn, by his own admission, shot an Afghan civilian and buried him in a shallow grave.²⁶ Golsteyn suspected the civilian of being a Taliban bombmaker.²⁷ The next day, Golsteyn and two other Soldiers exhumed the body, brought the remains back to base, and burned them.²⁸ Golsteyn stated that he took matters into his own hands because there was not enough evidence to detain the suspected bombmaker for more than 24 hours.²⁹ Golsteyn told investigators that he would not have been able to live with himself had the civilian killed more Servicemembers after being released from U.S. custody.³⁰

Golsteyn's actions came to light during a preemployment polygraph for the Central Intelligence Agency.³¹ The Army launched a criminal investigation in 2011 but decided not to prosecute Golsteyn for lack of evidence.³² Then, in October 2016, Fox News ran a feature about rules of engagement and interviewed Golsteyn for the program.³³ Golsteyn admitted to the interviewer that he had killed the civilian.³⁴ Two months later, the Army began investigating Golsteyn once again.³⁵ The investigation ended with Golsteyn being charged with murder, and he was nearing the start of his court-martial when President Trump intervened and pardoned him.³⁶

Chief Petty Officer Edward Gallagher. A Navy SEAL and decorated combat veteran, Edward Gallagher was accused of murdering a wounded captive who belonged to the so-called Islamic State (IS) while deployed to Iraq in 2017.³⁷ After a firefight, Gallagher learned that an IS fighter had been captured, and he directed his unit to drive to the scene where the captive lay injured and barely conscious.³⁸ After the SEALs arrived, someone got video footage of Gallagher kneeling next to the detainee and starting medical treatment. A hand is then seen

covering the camera. While appearing to treat the wounded fighter, Gallagher allegedly stabbed him in the neck with a hunting knife. Afterward, Gallagher and other SEALs took a photograph with the IS fighter's corpse. Gallagher's actions came to light when members of the SEAL team, after returning to the United States, reported them to the chain of command and Navy criminal investigators.³⁹ At the end of the investigation, the Navy charged Gallagher for murdering the IS captive and posing with the corpse.⁴⁰

After Gallagher was charged, evidence came to light that he may have been intimidating or threatening witnesses.⁴¹ Consequently, Gallagher was ordered into pretrial confinement in September 2018.⁴² Gallagher's family and legal defense team went public with the case on Fox News, which helped them garner support from some elected officials and President Trump.⁴³ On March 30, 2019, the President intervened and ordered Gallagher released from jail and into less restrictive confinement on the military installation.⁴⁴

The government's prosecution of Gallagher gradually derailed. First, the judge removed the lead military prosecutor from the case because of "accusations of prosecutorial misconduct."⁴⁵ Second, a key witness changed his story on the witness stand, testifying that he, not Gallagher, killed the IS captive.⁴⁶ The jury acquitted Gallagher of murder but convicted him of taking a picture with the body. Gallagher was sentenced to a reduction in rank from E7 (chief petty officer) to E6 (petty officer 1st class) and four months' confinement.⁴⁷

When President Trump pardoned Lorange and Golsteyn, he also directed that the Navy restore Gallagher's rank to chief petty officer—reversing the sentence of the trial court.⁴⁸ The President, however, did not pardon Gallagher, meaning Gallagher's conviction for posing with the captive's corpse remains undisturbed.⁴⁹ Meanwhile, the SEAL command moved full steam ahead to hold an administrative hearing, called a Trident Review Board, to determine whether Gallagher, who intended to retire from the military, would

remain a SEAL and retain the privilege of wearing the gold Trident pin on his uniform.⁵⁰ President Trump, nonetheless, swooped in once more to aid Gallagher. On November 21, 2019, the President took to Twitter to announce, "The Navy will NOT be taking away Warfighter and Navy Seal Eddie Gallagher's Trident Pin. This case was handled very badly from the beginning. Get back to business!"⁵¹

Then—Secretary of the Navy Richard Spencer was not enthusiastic about President Trump's interference in an administrative process involving the SEALs.⁵² Spencer wanted the board to go forward.⁵³ He attempted to salvage the process by brokering a deal with the White House without first coordinating his proposal with Secretary of Defense Mark Esper.⁵⁴ On learning of Spencer's behind-the-scenes negotiations, Secretary Esper requested Spencer's resignation, which Spencer promptly tendered.⁵⁵ As for Gallagher, he retired from the Navy with his full rank and his SEAL Trident.⁵⁶

Critiquing the Criticism of the Military Pardons Cases

One overarching criticism of President Trump's pardons of Behenna, Lorange, Golsteyn, and Gallagher is that he meddled in predominantly military matters over the recommendations of his civilian and uniformed advisors.⁵⁷ In civil-military relations, the phrase *civilian meddling* denotes unwarranted or unnecessary civilian interference or intrusion in military affairs.⁵⁸ By interfering or intruding in military affairs, civilians risk undermining military professionalism, which chips away at the Huntingtonian model of "objective control"—a theory of civil-military relations that the military tends to favor.⁵⁹

The notion of civilian meddling entered the civil-military lexicon by way of Samuel Huntington's book *The Soldier and the State*. Published in the 1950s, *The Soldier and the State* posited that true civilian control of the American military occurred through "professionalizing the military."⁶⁰ According to Huntington, civilian control increases with "the recognition of autonomous military professionalism."⁶¹ Autonomy

achieved through professionalization not only minimizes military power but also produces a political neutrality or sterility among military officers.⁶² Because military officers have been entrusted with overseeing military affairs with little to no oversight from their civilian leaders, their independence to perform their duties as professionals reduces their political power and increases civilian control of the Armed Forces.⁶³

Professor Eliot Cohen calls Huntington's objective control the "normal theory" of civil-military relations.⁶⁴ For his part, Cohen offered a competing theory to objective control that he labeled "unequal dialogue." In an unequal dialogue, civilian and military leaders engage in frank exchanges and discussions, yet the final authority always rests with the President.⁶⁵ Where Cohen pushes beyond the normal theory is in his argument that civilian leaders also have the authority, even the responsibility, to immerse themselves in military affairs and to constantly interact with and ask questions of military leaders.⁶⁶

The Huntington-Cohen frames are by no means the alpha and omega of the civil-military relations literature on civilian control. But these two influential theories serve as purposeful bookends for evaluating whether President Trump's pardons evidenced civilian meddling.

The military pardons cases often get lumped together and painted with a broad brush. A more evenhanded assessment of President Trump's decisions requires an understanding of each case's procedural posture at the time of the pardons. The distinctions matter to the overall conclusion that President Trump's interventions demonstrate obvious civilian meddling in the Golsteyn and Gallagher cases but no meddling at all in those of Behenna and Lorange.

To begin with, few constitutional powers are as absolute as the power of the President to issue pardons and grant executive clemency. Article II, Section 2, of the U.S. Constitution gives the President the "Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."⁶⁷ Presidential authority



Former Secretary of the Navy Richard Spencer delivers remarks during joint regional discussion on sexual assault and sexual harassment at State University of New York, in New York City, September 5, 2019 (U.S. Navy/Sarah Villegas)

to grant executive clemency extends to Servicemembers punished under the UCMJ.⁶⁸ With this in mind, we first consider the Behenna and Lorange pardons.

Behenna and Lorange had been tried, convicted, and sentenced before President Trump pardoned them.⁶⁹ Their cases had received appellate review. President Trump did not intervene in the cases or direct military authorities to take any particular action with respect to them. The cases, therefore, were ripe for pardon consideration. When viewed as acts of Presidential mercy, the Behenna and Lorange pardons do not evidence civilian meddling. This, of course, does not mean that President Trump *should have* pardoned Behenna and Lorange; that is a separate criticism. Nevertheless, these pardons evidence much less meddling than do the Golsteyn and Gallagher cases. And it is difficult to see why or how the Behenna or Lorange pardons would affect civil-military relations. The

fact that President Trump may have pardoned Behenna and Lorange against the recommendations of his military advisors should not be too alarming, especially when viewed in light of Cohen's unequal dialogue.

In contrast, President Trump's interventions in the Golsteyn and Gallagher cases are good examples of civilian meddling. As for Golsteyn, he was pending trial when the President pardoned him. Granted, the President can pardon anyone charged or convicted of a Federal offense at any stage of a criminal proceeding.⁷⁰ Yet Presidents generally wait until trials have concluded, appeals have been exhausted, and sentences have been served before granting pardons.⁷¹ Months before President Trump pardoned Golsteyn, he told reporters that "it was very possible" that he would allow the trials to proceed and make his decision afterward.⁷² As it turned out for Golsteyn, nevertheless, he never had to face an

actual trial, unlike Lorange, Behenna, and Gallagher.

The Golsteyn outcome is a bit of a mixed bag when it comes to civilian meddling. An argument in favor of President Trump's intervention prior to trial rests on his authority as commander in chief. Under the UCMJ, for example, the President can convene or send charges to a court-martial, just like a military commander.⁷³ By the same token, the President probably could order charges withdrawn and dismissed from a court-martial.

But President Trump did not exercise court-martial convening authority-like powers in Golsteyn's case. He used the power of the pardon to put an end to the Army's prosecution before prosecutors even had the opportunity to present evidence to a jury. By doing so, the President tipped the scales of justice in favor of the accused and denied the government the chance to present its case

in a public trial. With his pretrial pardon, President Trump further signaled that he did not trust the Army to reach a fair and just result “after nearly a decade-long inquiry and multiple investigations.”⁷⁴

A fair criticism, then, is that President Trump meddled unnecessarily in the Golsteyn case. Although the President’s intervention in the case was highly unusual, proponents could counter that he had to get involved given the Army’s handling of the case. Conversely, the Army’s delays in bringing Golsteyn to court-martial may have been the result of other factors, such as the availability of witnesses and the discovery of additional evidence. Even though President Trump asserted civilian control when he overrode his military advisors and pardoned Golsteyn, he should have allowed the trial to move forward. As it stands, Golsteyn, by his own admission, shot an unarmed Afghan, hid the remains, and emerged relatively unscathed.⁷⁵

The multiple interventions in the Gallagher case, however, more clearly opened the President to charges of civilian meddling. First, President Trump, reacting to Fox News reporting and lobbying from some public officials, ordered Gallagher moved into less restrictive confinement.⁷⁶ When he was Secretary of the Navy, Richard Spencer claimed that the President twice asked him “to lift Gallagher’s confinement in a Navy brig,” which Spencer resisted before ultimately being ordered to move Gallagher to the equivalent of enlisted barracks to await trial.⁷⁷ Journalist David Ignatius reported that President Trump even proposed a pretrial pardon for Gallagher, but Spencer talked him out of it.⁷⁸

As commander in chief, President Trump probably had the UCMJ authority to change the conditions of Gallagher’s pretrial confinement.⁷⁹ But not since President Nixon’s intervention in the Calley court-martial had a commander in chief inserted himself in a court-martial proceeding to the extent that President Trump did in Gallagher’s case.⁸⁰ After resigning as Secretary of the Navy, Spencer wrote that “military justice works best when senior leadership stays far away.”⁸¹ Here, the President,

at the behest of political allies, put his thumb on the scales of justice to help a Servicemember accused of war crimes.

Second, when the President ordered the Navy to reverse Gallagher’s demotion, he committed “a shocking and unprecedented intervention in a low-level review,” according to Spencer.⁸² After the trial, Gallagher requested to retire from the military; his court-martial conviction and sentence required the Navy to determine his rank at retirement and the characterization of his discharge from the Service.⁸³ These administrative issues are usually left to the military to sort out and do not warrant a commander in chief’s time or attention. Again, as President, Mr. Trump probably had the authority to commute Gallagher’s sentence—that is, to reduce the severity of the punishment.⁸⁴

The President’s third and final intervention in the Gallagher case may have been the most problematic from a civil-military relations perspective. When President Trump learned about the Navy’s plan to put Gallagher before a Trident Review Board, he tweeted his disapproval. After Secretary Spencer resigned, the President expressed his dissatisfaction with the military’s handling of the Gallagher case: “I was not pleased with the way that Navy Seal Eddie Gallagher’s trial was handled by the Navy. He was treated very badly but, despite this, was completely exonerated on all major charges.”⁸⁵

In a very public fashion, the President excoriated an entire branch of the Armed Forces and prevented the Navy from holding an otherwise routine administrative board. To be sure, the Navy’s criminal prosecution of Gallagher was not beyond reproach.⁸⁶ In fact, the case was part of the basis for then-Secretary Spencer’s decision to order a comprehensive review of the Navy Judge Advocate General and Marine Corps Staff Judge Advocate organizations.⁸⁷ But the Navy’s missteps in prosecuting the case did not warrant such high-level interference in a low-level administrative process.

Even more concerning, President Trump’s intervention in the Navy’s Trident Review Board undermined the

top SEAL commander, Rear Admiral Collin Green.⁸⁸ Rear Admiral Green had made it a priority in his command to stop the SEAL community’s drift from Navy core values of honor, courage, and commitment.⁸⁹ By preventing the SEALs from convening an administrative board, the President’s actions reportedly “angered many senior military officers and Pentagon civilians” and undercut the efforts of Rear Admiral Green to address ethical and disciplinary issues within his command.⁹⁰

The Gallagher case alone risked eroding trust between senior military leaders and the President. With each intervention in the case, President Trump seemed to vindicate Cohen’s theory of unequal dialogue in that the President received the advice and recommendations of his military advisors and decided to go in a different direction. Here, though, the cost of an unequal dialogue may prove to be too high and seems likely to degrade trust between the President and the military.⁹¹ And, as political scientist Peter Feaver has observed: “Trust is the essential ingredient for healthy civil-military relations.”⁹²

Normative Arguments Against the Military Pardon Cases

The second and perhaps most damning criticism of the military pardon cases, broadly speaking, accused President Trump of being a “war crimes President.”⁹³ This line of criticism factors in the President’s previous remarks about the use of torture⁹⁴ and warfighting.⁹⁵ Critics have argued that the military pardons furnish further evidence that President Trump does not understand the law of war or the military he leads.

Although President Trump has made controversial remarks about torture and the conduct of war, his comments reveal something more fundamental than just bluster and bloviation. Rather, the rhetoric sheds insight into his underlying worldview and the reasons he issued pardons to Behenna, Lorange, Golsteyn, and Gallagher. To better understand the President’s aggressive views about warfighting, we must know something about the Jacksonian tradition in



U.S. Air Force General Paul J. Selva, former Vice Chairman of the Joint Chiefs of Staff, departs after speaking to students enrolled in Advanced Ethics Counselor course in Air Force Judge Advocate General's School, at Maxwell Air Force Base, Alabama, April 30, 2019 (DOD/James K. McCann)

American politics—a tradition that traces its heritage back to the sixth President of the United States, Andrew Jackson.⁹⁶ The Jacksonian tradition helps explain President Trump's rationale for pardoning Behenna, Lorange, Golsteyn, and Gallagher, why his supporters endorsed his actions, and why some critics vehemently opposed the pardons.

The Jacksonian Tradition and the Trump Presidency. When Walter Russell Mead first described the Jacksonian tradition in 1999, he posited that it would “continue to enjoy major influence over both foreign and domestic policy in the United States for the foreseeable future.”⁹⁷ With the ascendance of Donald Trump to the U.S. Presidency, Mead's prognostication could not have been more prescient. As a candidate and as President, Mr. Trump has spoken “directly to Jacksonian principles of populism, individualism, honor, and courage.”⁹⁸

Space constraints forbid a full panorama of Jacksonianism. The picture would be incomplete, though, without juxtaposing the Jacksonians with their distant cousins, the Jeffersonians.⁹⁹ Fortunately, Mead tidily distinguishes the two schools of thought this way: “Jeffersonians join the American Civil Liberties Union; Jacksonians join the National Rifle Association.”¹⁰⁰ On foreign policy, Mead asserts that Jeffersonians are more dovish, while Jacksonians are “the most consistently hawkish.”¹⁰¹ During Vietnam, Mead loosely characterizes Jeffersonians as being among those who dodged the draft and “sought exemptions and substitutes,” whereas Jacksonians, as they always have, “soldiered on, if sometimes bitterly and resentfully.”¹⁰²

Jacksonian hawkishness extends to views on the conduct of war. Jacksonians believe fundamentally “that wars must be fought with all available force.”¹⁰³ They

are distrustful of international law and institutions and hew to an honor code that extends favorable treatment to those who live by the same.¹⁰⁴ “But,” as Mead notes, “those who violate the code—who commit terrorist acts in peacetime, for example—forfeit its protection and deserve no consideration.”¹⁰⁵ Honorable enemies get treated honorably; dishonorable enemies, such as IS and al Qaeda fighters, get treated as they deserve.¹⁰⁶

Jacksonians “formed the core of Trump's passionately supportive base.”¹⁰⁷ His brand of “populist nationalism” tapped into what Mead characterizes as a “truly surging force in American politics.”¹⁰⁸ This surging force embraces “Jacksonian conceptions of ‘honor,’ as the Islamic State constitutes an inherently dishonorable adversary justifying the deployment of all and any means to destroy them.”¹⁰⁹

A final and important point about the Jacksonian tradition concerns its



Andrew Jackson, Thomas Sully, 1825 (Library of Congress/Detroit Publishing Company)

instinctive support of the military.¹¹⁰ The degree of support for the military allows Jacksonians to recognize that Servicemembers “on the frontlines protecting society sometimes make mistakes.”¹¹¹ As Mead succinctly

explains, Jacksonians, such as President Trump, firmly believe that it is “unfair and even immoral” for warriors to risk their lives only to have “their choices second-guessed by armchair critics.”¹¹² The Jacksonian tradition, therefore,

illuminates President Trump’s philosophy about warfighting generally and explains why he supported Behenna, Lorange, Golsteyn, and Gallagher. His Jacksonian orientation diverges from cosmopolitan beliefs about limited war, international institutions, and application of international law during *jus in bello*. “When our soldiers have to fight for our country,” President Trump has stated, “I want to give them the confidence to fight.”¹¹³ For critics of the war crime pardons, however, the confidence to fight does not necessitate or contemplate warfighting that deviates from the law of war.

The war crime pardons serve as a notable flashpoint in the country’s continuing conversation about the way Americans fight and win wars, specifically, and the conduct of foreign policy, generally. Where one comes down on the military pardons cases likely depends on his or her ideological proximity to or distance from Jacksonian principles. The debate between Jacksonians and everyone else will almost certainly continue even after the Trump Presidency ends, but the criticism of the military pardon cases may have more to do with the Jacksonian view of warfighting than with President Trump *per se*. President Trump is, after all, a blunt, charismatic, and forceful manifestation of a venerable American tradition, not its progenitor. The beef, then, for many critics of the military pardons is with the underlying beliefs that brought them to President Trump’s attention and compelled him to act.

“Just Cause” as a Related Explanation for War Crime Pardons. A distinct, yet related, explanation for President Trump’s actions in the Behenna, Lorange, Golsteyn, and Gallagher cases concerns his views about the military’s mission to eliminate or reduce the terrorist threat against the United States. The question arises whether Jacksonian support for aggressive warfighting and unconditional surrender equates to public forbearance of war crimes committed by U.S. Servicemembers. Available research suggests an affirmative answer.

A recent study by researchers Scott Sagan and Benjamin Valentino found, among other things, that “Americans

were . . . much more willing to describe soldiers who participate in unambiguous war crimes as behaving ethically when they were fighting for a just cause than when they were fighting for an unjust cause.”¹¹⁴ Sagan and Valentino presented a group of subjects with a story about a country’s just counterattack, but with the added detail of war crimes. Particularly, the “just” side reportedly massacred 48 women and children.¹¹⁵ Subjects exposed to this scenario were twice as willing to describe soldiers’ war crimes as ethical when committed as part of a just cause.¹¹⁶

Sagan and Valentino’s research design did not parse subjects by partisan political affiliation or ideology. Additional research could investigate whether Jacksonian-Trumpian adherents are more likely to excuse grave atrocities in service of a just cause.¹¹⁷ But, as Sagan and Valentino concluded, many Americans “are willing to overlook acts of gratuitous killing by soldiers whose cause they believe to be just.”¹¹⁸ Along with Mead’s argument that Jacksonians are unwilling to extend honor to dishonorable enemies, this finding suggests that President Trump’s worldview envisions Servicemembers fighting with much more leeway against a hated enemy—a position that presumably would find currency among the President’s most ardent supporters.

Finally, moral licensing may further explain why President Trump and many Americans give soldiers the benefit of the doubt when they perceive the military mission as just.¹¹⁹ Sagan and Valentino define *moral licensing* as “the tendency of individuals to allow past moral behavior to excuse subsequent immoral behaviors.”¹²⁰ Recall an instinctive support for the military among Jacksonians, and it becomes more evident why they would tend to excuse, overlook, or explain away crimes committed by Servicemembers on battlefields half a world away.

Against the backdrop of the Jacksonian tradition, President Trump’s support for frontline troops and disgust for the Nation’s enemies further explain why the commander in chief picked up on these particular cases and why, philosophically and politically, he decided to intervene in them. Moral licensing

coupled with Jacksonian fealty to the military could explain in part why President Trump and others were willing to see the actions of Behenna, Lorange, Golsteyn, and Gallagher in a more favorable light than did the journalists, academics, and retired military leaders who criticized the President’s decisions regarding these actions.

Of course, the Jacksonian orientation does not inoculate the President’s interventions in military justice against criticism. The Jacksonian tradition merely offers an ideological, as opposed to a political, explanation for President Trump’s actions. Criticism of the military pardons seemed to dwell on President Trump as a leader, when the greater cause for concern may be the school of thought that undergirds his views about warfighting. The real and unsettled issue, then, is whether the United States wants to fight a war with a Jacksonian or someone else—because the choice is consequential for how Americans fight and how they treat their enemies.

Recommendations

Improve Law of War Guidance and Training. While discussing Richard Spencer’s resignation with the press, Secretary of Defense Esper remarked, “The case of Eddie Gallagher has dragged on for months, and it’s distracting too many. It must end.”¹²¹ When asked about Gallagher, Chairman of the Joint Chiefs of Staff General Mark Milley stated, “The case is now, in my view, closed.”¹²² The cases of Behenna, Lorange, Golsteyn, and Gallagher are indeed closed, legally, but the ramifications of these cases deserve a full accounting within DOD.¹²³

After Spencer’s abrupt resignation, Secretary Esper directed DOD general counsel to “review how the department educates and train [its] Servicemembers about wartime ethics and laws of armed conflict.”¹²⁴ The review will entail “how the department monitors, investigates, reports, and adjudicates its adherence to the laws of armed conflict.”¹²⁵ This review is a meaningful and needed first step toward improving the way DOD implements the law of war in light of the military pardons cases.¹²⁶

When the general counsel completes the review, Secretary Esper should share the findings and recommendations with the Joint Chiefs of Staff. The review should serve as a launchpad for clearer and more robust uniform guidance about the law of war. The Services should then think anew about how they train on the law of war. Law of Armed Conflict (LOAC) training must occur more regularly and more intensively, similar to how the Services now conduct sexual assault and suicide prevention instruction. Servicemembers need more than just another judge advocate general briefing about LOAC; rather, they must be brought into the conversation about the principles of military necessity, humanity, proportionality, distinction, and honor. The Services should draw on the factual scenarios from the military pardon cases and other war crime cases in military history to invite Servicemembers to think more deeply about ethics and morality in the conduct of war.

Lastly, the military does not and should not train its members to be killing machines. Machines are emotionless, unfeeling, impartial, and impervious to the psychological trauma that can occur from killing another human being, even if that human being is an enemy. Servicemembers are not automatons; they are thinking and feeling social creatures. Americans should not want or expect them to kill unflinchingly, reflexively, impulsively, or wantonly. Why this should be so requires deeper thinking, from frontline warriors to strategic leaders, about discipline and self-control in the crucible of combat.

Congressional Review and Whistleblower Protections. Strategic leaders should welcome the ongoing congressional review of the military pardon cases.¹²⁷ They should be prepared to explain to Congress the law of war reforms they intend to implement. Military leaders will have to repeatedly remind and assure Congress that these cases are in no way being interpreted as a license to commit war crimes.

Senior military leaders must be prepared to delineate the protections afforded to whistleblowers who come

forward with allegations of war crimes.¹²⁸ A serious and unintended consequence of the military pardon cases is that Servicemembers may grow reluctant or unwilling to report war crimes for fear that their names will get dragged through the mud in the media.¹²⁹ The mechanisms for reporting war crimes must be clear and understandable to all Servicemembers, just as sexual assault reporting avenues have been strengthened and clarified in recent years.

Finally, Congress may want to review Presidential authority in the military justice process. Congress, of course, passes legislation governing the rules and regulations of the Armed Forces, and the UCMJ is the product of this congressional authority.¹³⁰ The commander in chief is an integral part of the military justice system.¹³¹ That does not mean, however, that the President should have absolute authority to dictate any or all criminal or administrative dispositions within the military. Whether a President should have the power to stop something such as a Trident Review Board deserves further congressional scrutiny.

Conclusion

This essay has not resolved the debate whether President Trump should have pardoned the four Servicemembers for their war crimes. The essay's less lofty aim has been to contribute to the conversation about the military pardon cases through an objective assessment of two main ramifications flowing from them—namely, that Presidential meddling undermined the military justice system and thereby eroded trust between the military and the President, and that the pardons green-lighted a gloves-off approach to warfighting. As we have seen, the pardons cut many ways, paradoxically: They showed both healthy and unhealthy examples of civil-military relations, and they manifested through President Trump a persistent and venerable American philosophy about the conduct of war when waged against enemies perceived as dishonorable.

Returning to Captain Daniel's letter to President Nixon in 1971, the My Lai

prosecutor not only expressed his dissatisfaction with the President's intervention in the Calley case but also conveyed astonishment at the public's backlash against the result of the trial. "For this nation to condone the acts of Lieutenant Calley," Captain Daniel wrote, "is to make us no better than our enemies."¹³² Captain Daniel got it mostly right, but he missed a salient truth. For this nation to condemn the acts of Lieutenant Calley, or Lieutenant Behenna, Lieutenant Lorange, Major Golsteyn, or Chief Petty Officer Gallagher, it must first learn to tame the beast within that strains against its chains to bring unrelenting vengeance—even total war—to its enemies.¹³³ JFQ

Notes

¹ Richard Hammer, *The Court-Martial of Lt. Calley* (New York: Coward, McCann & Geoghegan, Inc., 1971), 50, 381–386.

² Chris Bray, *Court-Martial: How Military Justice Has Shaped America from the Revolution to 911 and Beyond* (New York: Norton, 2016), 337; Hammer, *The Court-Martial of Lt. Calley*, 17–18.

³ Two days later, President Richard Nixon intervened in the case once again. This time, he announced that "[b]efore any sentence took effect . . . he would personally review the whole matter and decide whether the judges had come to the right sentence or whether he would reduce it." Hammer, *The Court-Martial of Lt. Calley*, 380. William Calley would remain under house arrest until his parole in 1974, after being convicted and sentenced for mass murder. Bray, *Court-Martial*, 338.

⁴ Hammer, *The Court-Martial of Lt. Calley*, 385.

⁵ Some commentators have labeled the four cases collectively, and somewhat imprecisely, as the "war crime cases" or the "war-crime pardons." For example, Andrew M. Bell and Thomas Gift, "War Crime Pardons and What They Mean for the Military," *War on the Rocks*, December 5, 2019, available at <<https://warontherocks.com/2019/12/war-crime-pardons-and-what-they-mean-for-the-military/>>; Kori Schake, "Trump's War-Crime Pardons Undermine the Military," *Defense One*, November 17, 2019, available at <www.defenseone.com/ideas/2019/11/trump-pardons-war-criminals/161354/>. However, the four Servicemembers were not charged with "war crimes" or "law of war" violations under international law, domestic law, or the Uniform Code of Military Justice (UCMJ). Instead, and probably for sound prosecutorial reasons, the military elected in each case to charge the

Servicemembers with "standard criminal violations" of the UCMJ. See Charlie Dunlap, "No, the 'Laws of War' Are Not 'History,'" *Lawfare*, November 18, 2019, available at <<https://sites.duke.edu/lawfare/2019/11/18/no-the-laws-of-war-are-not-history/>>. Still, "war crimes" aptly and concisely describe the offenses underlying the four cases. For ease of description, this article at times uses the term *war crime* in a nontechnical, nonlegal sense as shorthand. For the most part, though, the author refers to the four cases collectively as the *military pardon cases*.

⁶ Dan Lamothe and Josh Dewey, "Insurgents' Lobbied Trump for War Crimes Pardons with Little Pentagon Involvement, Officials Say," *Washington Post*, November 21, 2019, available at <www.washingtonpost.com/national-security/insurgents-lobbied-trump-for-war-crimes-pardons-with-little-pentagon-involvement-officials-say/2019/11/21/b6a0c62e-0c75-11ea-bd9d-c628fd48b3a0_story.html>.

⁷ These four were not the only Servicemembers to receive pardons from President Donald Trump. In 2018, he pardoned ex-Sailor Kristian Saucier, who had been convicted in Federal District Court for unlawfully retaining photographs he took of classified areas on a nuclear submarine. See Ryan Lucas, "Trump Pardons Ex-Navy Sailor Sentenced for Photos of Submarine," National Public Radio (NPR), March 9, 2018, available at <<https://www.npr.org/2018/03/09/592440282/trump-pardons-ex-navy-sailor-sentenced-for-photos-of-submarine>>.

⁸ Andrew Exum, "How to Really Honor the Troops," *Defense One*, May 13, 2019, available at <www.defenseone.com/ideas/2019/05/how-really-honor-troops/156950/?oref=d-skybox?oref=d1-related-article>; Schake, "Trump's War-Crime Pardons Undermine the Military"; Elliot Ackerman, "President Trump's Pardons of Soldiers Show How Little He Knows About War," *Time*, November 18, 2019, available at <<https://time.com/5731655/trumps-pardons-soldiers-war/>>; Pauline M. Shanks Kaurin and Bradley J. Strawser, "Disgraceful Pardons: Dishonoring Our Honorable," *War on the Rocks*, November 25, 2019, available at <<https://warontherocks.com/2019/11/disgraceful-pardons-dishonoring-our-honorable/>>; "What Powers Does Trump Have as Commander in Chief?" *Morning Edition*, NPR, November 26, 2019, available at <<https://www.npr.org/2019/11/26/782867266/what-powers-does-trump-have-as-commander-and-chief>>; Peter Feaver, "Trump Battled the Navy. Here Are the Casualties," *Foreign Policy*, November 26, 2019, available at <<https://foreignpolicy.com/2019/11/26/trump-gallagher-case-navy-seal-war-crimes-casualties-spencer/>>; Andrew Sullivan, "Donald Trump Is the War Crimes President," *New York Magazine*, January 10, 2020, available at <<https://>>

nymag.com/intelligencer/2020/01/andrew-sullivan-donald-trump-is-the-war-crimes-president.html>; Martin Dempsey, Twitter post, May 21, 2019, 8:15 a.m., available at <https://twitter.com/Martin_Dempsey/status/1130809276191035392>; Barry McCaffrey, “Pardoning Convicted Troops Would Tell the World America No Longer Has a Disciplined Military,” *Washington Post*, May 24, 2019, available at <www.washingtonpost.com/opinions/pardoning-convicted-troops-would-tell-the-world-america-no-longer-has-a-disciplined-military/2019/05/24/f289bf2-7e3a-11e9-a5b3-34f3edf1351e_story.html>; James Stavridis, “We Trust the Navy SEALs to Protect America. Trump Should Trust the Navy SEALs to Judge Themselves,” *Time*, November 25, 2019, available at <https://time.com/5739037/navy-seals-trump-trust/>; “Gen. Krulak Statement on Trump’s Military Pardons,” *Human Rights First*, November 15, 2019, available at <https://www.humanrightsfirst.org/press-release/gen-krulak-statement-trumps-military-pardons>.

⁹ Stephen W. Preston, *Department of Defense [DOD] Law of War Manual* (Washington, DC: Office of the General Counsel, June 2015, updated December 2016), ii. The manual defines the *law of war* this way: “The *law of war* is that part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States.” The manual also explains that the “*law of war* is often called *the law of armed conflict*.” This essay uses *law of war* and *law of armed conflict* interchangeably, but both terms refer to *jus in bello*: “justice in war.” See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th ed. (New York: Basic Books, 2015), 21.

¹⁰ “Statement of the Press Secretary Regarding Executive Clemency for Michael Behenna,” The White House, May 6, 2019, available at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-executive-clemency-michael-behenna/>.

¹¹ “Statement from the Press Secretary,” The White House, November 15, 2019, available at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-97/>.

¹² Andrew Dyer, “All the SEAL’s Men: The Fox News Campaign That Made Eddie Gallagher Untouchable,” *San Diego Tribune*, November 29, 2019, available at <www.sandiegouniontribune.com/news/military/story/2019-11-29/all-the-seals-men-the-fox-news-campaign-that-made-eddie-gallagher-untouchable>; Lamothe and Dewey, “Insurgents Lobbied Trump for War Crimes Pardons with Little Pentagon Involvement, Officials Say.”

¹³ Scott D. Sagan and Benjamin A. Val-

entino, “Do Americans Approve of Trump’s Pardons for Court-Martialed Military Officers?” *Washington Post*, December 16, 2019, available at <www.washingtonpost.com/politics/2019/12/16/do-americans-approve-trumps-pardons-court-martialed-military-officers/>. In their YouGov survey, Sagan and Valentino used the Clint Lorange case because they believed it was “the most clear-cut case in the recent pardons” because a court-martial had found Lorange guilty of second-degree murder. Overall, Sagan and Valentino reported that 41 percent of survey subjects approved of the pardon and 59 percent did not.

¹⁴ *United States v. Behenna*, 71 M.J., 228, 231 (United States Court of Appeals for the Armed Forces 2012), available at <https://www.armfor.uscourts.gov/newcaaf/opinions/2011SepTerm/12-0030.pdf>.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*, 229.

¹⁹ *Ibid.*, 234–235. A second issue raised on appeal addressed whether the government failed to disclose exculpatory or favorable information to Behenna’s trial defense attorneys. A government expert told the prosecutors that the theory presented by defense experts was plausible. After First Lieutenant Behenna testified, the same government expert determined he was telling the truth. Before leaving the trial, the expert told defense counsel that he would have been a great witness for them. Neither the trial court nor appellate courts granted relief to Behenna on this particular issue.

²⁰ Charlie Dunlap, “The Behenna Pardon: Some Answers (and Much More!),” *Lawfare*, May 19, 2019, available at <https://sites.duke.edu/lawfare/2019/05/19/the-behenna-pardon-some-answers-and-much-more/>.

²¹ “Statement of the Press Secretary Regarding Executive Clemency for Michael Behenna.”

²² *Ibid.* For a more detailed discussion of the facts and legal issues in Behenna’s case, see Kali Borkoski, “The Story of Michael Behenna and Mad Dog 5: ‘Self Defense’ in War,” *SCOTUS*, May 29, 2013, available at <www.scotusblog.com/2013/05/the-story-of-michael-behenna-and-mad-dog-5-self-defense-in-war/>.

²³ “Statement of the Press Secretary Regarding Executive Clemency for Michael Behenna.”

²⁴ *Ibid.*

²⁵ The following discussion of the Lorange case is from *United States v. Lorange*, ARMY 20130679, 2017 CCA LEXIS 429 (unpublished opinion), 2–13, available at <https://www.jagcnet.army.mil/Apps/ACCAOpinions/ACCAOpinions.nsf/MODD/331E0265D-C59E54F8525814E006BA1DC/%24FILE/mo-lorange,%20ca.pdf>.

²⁶ U.S. Department of the Army, *Crim-*

inal Investigation Division (CID) Report of Investigation (Fort Bragg, NC: U.S. Army Criminal Investigation Command [redacted FOIA version], November 27, 2013), 000035. Dan Lamothe, “See Document Excerpts in the Army’s War Crimes Case Against a Green Beret Hero,” *Washington Post*, May 19, 2015, available at <www.washingtonpost.com/news/checkpoint/wp/2015/05/19/see-document-excerpts-in-the-armys-war-crimes-case-against-a-green-beret-war-hero/>. Lamothe posted the redacted Mathew Golsteyn investigation report on May 15, 2015, at <www.scribd.com/doc/265668561/Golsteyn-Army-CID-investigation?secret_password=PNNptwfNQ2XM-sAsZqkBF>.

²⁷ *CID Report*.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.* Also, while held in detention by U.S. forces, the murdered victim had seen the witness against him. According to Golsteyn, the witness feared that the victim would kill him and his family if released from detention.

³¹ Dan Lamothe, “Inside the Stunning Fall and War-Crimes Investigation of an Army Green Beret War Hero,” *Washington Post*, May 19, 2015, available at <www.washingtonpost.com/news/checkpoint/wp/2015/05/19/inside-the-stunning-fall-and-war-crimes-investigation-of-an-army-green-beret-war-hero/>.

³² *Ibid.* In 2015, an Army Board of Inquiry (not a court-martial or criminal tribunal) did not substantiate the allegation that Golsteyn violated the Law of Armed Conflict, but nonetheless recommended his discharge from the Army with a General (Under Honorable Conditions) characterization for engaging in conduct unbecoming an officer and a gentleman. See Dan Lamothe, “Former Green Beret War Hero, Investigated in Killing, Survives Army Hearing with His Benefits,” *Washington Post*, June 29, 2015, available at <www.washingtonpost.com/news/checkpoint/wp/2015/06/29/former-green-beret-war-hero-investigated-in-killing-survives-army-hearing-with-his-benefits/>.

³³ Dan Lamothe, “Army Reopens Probe into Suspected Bomber’s Death After Special Forces Soldier’s Fox News Interview,” *Washington Post*, December 8, 2016, available at <www.washingtonpost.com/news/checkpoint/wp/2016/12/08/army-reopens-investigation-of-special-forces-soldier-accused-of-killing-unarmed-detainee/>.

³⁴ Barnini Chakraborty and Jennifer Griffin, “Army Opens Probe into Green Beret, Detainee’s Death After FNC Interview,” Fox News, December 9, 2016, last modified January 12, 2017, available at <www.foxnews.com/politics/army-reopens-probe-into-green-beret-detainees-death-after-fnc-interview>.

³⁵ Lamothe, “Army Reopens Probe into Suspected Bomber’s Death After Special Forces Soldier’s Fox News Interview.”

³⁶ “Statement from the Press Secretary.”

³⁷ Dave Philipps, “Who Is Eddie Gallagher, the SEAL the Navy Wants to Expel?” *New York Times*, November 24, 2019, available at <www.nytimes.com/2019/11/24/us/edward-gallagher-navy-seals-trump.html?action=click&module=RelatedLinks&pgtype=Article>.

³⁸ The following discussion of the Eddie Gallagher case is from “The Gallagher Effect,” *The Weekly*, season 1, episode 23, December 27, 2019, available at <www.hulu.com/watch/330e9ea3-7aa9-439d-b206-f33b6487a9c3?>. Subscription required to view.

³⁹ Philipps, “Who Is Eddie Gallagher, the SEAL the Navy Wants to Expel?”

⁴⁰ George Petras, “Timeline: How Trump Intervened in the Navy SEAL Eddie Gallagher’s War Crimes Case,” *USA Today*, November 28, 2019, available at <www.washingtonpost.com/context/read-navy-secretary-richard-spencer-s-letter-to-president-trump/2bf70c2a-f811-43be-9e21-b02f1fe54a26/>. Gallagher was also “accused of firing a sniper rifle at civilians, striking a girl wearing a flower-print hijab as she walked along a riverbank and an old man carrying a water jug,” but was acquitted of those allegations. Philipps, “Who Is Eddie Gallagher, the SEAL the Navy Wants to Expel?”

⁴¹ “The Gallagher Effect,” clip approx. at 14:56.

⁴² *Ibid.*, clip approx. at 15:14. The UCMJ does not allow for a bail system; instead, commanders can order Servicemembers accused of military crimes into confinement while they await trial only after certain criteria are met and a hearing is held. See Part II, Chapter II, “Rule 305, Pretrial Confinement,” 305(a)-(m), in *Manual for Courts-Martial, United States* (Washington, DC: Department of Defense), II-22–II-27.

⁴³ Dyer, “All the SEAL’s Men.”

⁴⁴ Donald J. Trump, Twitter post, March 30, 2019, 8:14 a.m., available at <<https://twitter.com/realdonaldtrump/status/1111965027483951105>>. President Trump tweeted, “In honor of his past service to our Country, Navy Seal #EddieGallagher will soon be moved to less restrictive confinement while he awaits his day in court. Process should move quickly! @foxandfriends@RepRalphNorman.”

⁴⁵ Philipps, “Who Is Eddie Gallagher, the SEAL the Navy Wants to Expel?”

⁴⁶ *Ibid.*

⁴⁷ Petras, “Timeline.” The sentence also included four months’ confinement, but Gallagher received credit for time already served before trial, meaning he walked out of the courthouse a free man.

⁴⁸ “Statement from the Press Secretary.”

⁴⁹ *Ibid.* The relevant portion reads, “Today, President Donald J. Trump signed . . . an order directing the promotion of Special Warfare Operator First Class Edward R. Gallagher to the grade of E-7, the rank he held before he was tried and found not guilty of nearly all of the charges against him.”

⁵⁰ Carl Prine, “Navy Secretary Backs Admirals in Tussle with Trump over SEAL Trident, Report Says,” *Navy Times*, November 22, 2019, available at <www.navytimes.com/news/your-navy/2019/11/23/report-navy-secretary-backs-admirals-in-tussle-with-trump-over-seal-trident/>.

⁵¹ Donald J. Trump, Twitter post, November 21, 2019, 8:30 a.m., available at <<https://twitter.com/realdonaldtrump/status/1197507542726909952?lang=en>>.

⁵² Richard Spencer, “I Was Fired as Navy Secretary. Here’s What I’ve Learned Because of It,” *Washington Post*, November 27, 2019, available at <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>.

⁵³ *Ibid.*

⁵⁴ “Remarks by Secretary Esper in a Press Gaggle,” Department of Defense, November 25, 2019, available at <<https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2026000/remarks-by-secretary-esper-in-a-press-gaggle/>>; Richard V. Spencer, Letter to President Trump, *Washington Post*, November 24, 2019, available at <www.washingtonpost.com/context/read-navy-secretary-richard-spencer-s-letter-to-president-trump/2bf70c2a-f811-43be-9e21-b02f1fe54a26/>.

⁵⁵ “Remarks by Secretary Esper in a Press Gaggle.”

⁵⁶ Petras, “Timeline.”

⁵⁷ Understandably, civilian and uniformed military leaders have not revealed the particular advice and recommendations they gave to the President about the military pardon cases. But their public comments coupled with concomitant reporting suggest they advised the President against intervening. See Lamothe and Dewey, “‘Insurgents’ Lobbied Trump for War Crimes Pardons with Little Pentagon Involvement, Officials Say”; “Remarks by Secretary Esper in a Press Gaggle”; “ICYMI: Rep. Moulton Grills Military’s Most Seniors Leaders on Trump’s Pardons, Retreat from Iran Deal,” December 13, 2019, available at <<https://moulton.house.gov/press-releases/icymi-rep-moulton-grills-militarys-most-seniors-leaders-on-trumps-pardons-retreat-from-iran-deal>>; Meghann Myers, “Esper: ‘Robust’ Conversation with Trump About Proposed Pardons for SEAL, Two Soldiers,” *Military Times*, November 6, 2019, available at <www.militarytimes.com/news/your-military/2019/11/06/esper-will-ask-trump-to-reconsider-pardons-for-service-members-charged-with-convicted-of-war-crimes-report-says/>.

⁵⁸ Peter D. Feaver, “The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control,” *Armed Forces & Society* 23, no. 2 (Winter 1996), 160, available at <<https://journals.sagepub.com/doi/10.1177/0095327X9602300203>>.

⁵⁹ *Ibid.*, 158.

⁶⁰ Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge: Belknap Press of Harvard University Press, 1957), 84.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Eliot Cohen, *Supreme Command: Soldiers, Statesmen, and Leadership in Wartime* (New York: Anchor Books, 2003), 4.

⁶⁵ *Ibid.*, 208–209.

⁶⁶ *Ibid.*, 209.

⁶⁷ U.S. Const., Art. 2, § 2, cl. 1.

⁶⁸ “Submission of Petition; Form to Be Used; Contents of Petition,” 28 C.F.R. § 1.1 2020, available at <<https://www.law.cornell.edu/cfr/text/28/1.1>>.

⁶⁹ Gallagher, likewise, had been tried, convicted, and sentenced when he received his executive clemency. As we have seen, though, the President also intervened in the case before trial, and intervened once more *after* restoring Gallagher’s rank. For these reasons, his case is distinguishable from the others, procedurally.

⁷⁰ The Web site for the Department of Justice’s Office of the Pardon Attorney includes a section for frequently asked questions. One question asks whether the President can issue a pardon before someone has been indicted, convicted, or sentenced. The response is that “it would be highly unusual,” but notes that President Gerald Ford, President Jimmy Carter, and President George H.W. Bush issued pardons outside of the customary sequence. See Department of Justice, Office of the Pardon Attorney, available at <<https://www.justice.gov/pardon/frequently-asked-questions>>.

⁷¹ *Ibid.*

⁷² John Wagner, “Trump Says Pardoning War Criminals ‘a Little Bit Controversial,’ Suggests Delay in Deliberations,” *Washington Post*, May 24, 2019.

⁷³ For example, the President of the United States is authorized to convene courts-martial under Article 22, UCMJ (10 USC § 22).

⁷⁴ “Remarks by Secretary Esper in a Press Gaggle.”

⁷⁵ By “relatively unscathed,” the author means that Major Golsteyn avoided a trial and possible sentence to confinement, unlike Lorange and Behenna. Golsteyn did endure a lengthy criminal investigation, a board of inquiry, and other collateral consequences, which continued after his pardon. Even after being pardoned, the Army denied Golsteyn’s request to be reinstated into the Green Berets. See Dave Philipps, “Army Denies Request by Soldier Pardoned by Trump, Setting Up Showdown,” *New York Times*, January 9, 2020, available at <www.nytimes.com/2020/01/09/us/mathew-golsteyn-army-war-crime.html>.

⁷⁶ Dyer, “All the SEAL’s Men.”

⁷⁷ Spencer, “I Was Fired as Navy Secretary.”

⁷⁸ David Ignatius, “Trump’s Meddling in a SEAL Disciplinary Case Risks a Collision with the Navy,” *Washington Post*, November

21, 2019, available at <www.washingtonpost.com/opinions/trump-is-sabotaging-his-military/2019/11/21/6b46199e-0cad-11ea-97ac-a7ccc8dd1ebc_story.html>.

⁷⁹ Rules for Court-Martial 304 and 305, in *Manual for Courts-Martial*, are touchstones for a President's authority to change the conditions of confinement for a military member. As President Nixon weighed options in the Calley case, he reportedly rejected the advice of White House Counsel John Dean. Dean argued that the President "could not exercise piecemeal the powers of a court-martial convening authority." Furthermore, "Dean considered it unwise for the President to take some action as a convening authority because this would make him the convening authority for all future aspects of the case." See Michal R. Belknap, *The Vietnam War on Trial: The My Lai Massacre and Court-Martial of Lieutenant Calley* (Lawrence: University Press of Kansas, 2002), 197–199. In Gallagher's case, President Trump appears to have withheld a military commander's authority and directed a lesser form of restriction. But had Gallagher committed an additional offense prior to trial, but after the President's order, it seems unlikely, yet not improbable, that the commander in chief would have wanted to referee a request to return Gallagher to more restrictive confinement.

⁸⁰ David Martin, "Eddie Gallagher, Navy SEAL Acquitted of Stabbing Wounded ISIS Prisoner to Death, Tells His Story," CBS News, March 1, 2020, available at <www.cbsnews.com/news/eddie-gallagher-navy-seal-isis-prisoner-60-minutes-interview-2020-03-01/>. After the court-martial, President Trump congratulated Gallagher, tweeting, "Congratulations to Navy Seal Eddie Gallagher, his wonderful wife Andrea, and his entire family. You have been through much together. Glad I could help!" Donald J. Trump, Twitter post, July 3, 2019, 10:47 a.m., available at <<https://twitter.com/realDonaldTrump/status/1146430380981067777>>.

⁸¹ Spencer, "I Was Fired as Navy Secretary."

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ According to the Department of Justice's Office of the Pardon Attorney, commutation "reduces a sentence, either totally or partially, that is then being served, but it does not change the fact of conviction, imply innocence, or remove civil disabilities that apply to the convicted person as a result of the criminal conviction." Commutation typically reduces a person's prison sentence, but in Gallagher's case it had the effect of restoring his military rank. See Department of Justice, Office of the Pardon Attorney, available at <<https://www.justice.gov/pardon/frequently-asked-questions>>.

⁸⁵ Donald J. Trump, Twitter post, November 24, 2019, 6:32 p.m., available at <<https://twitter.com/realdonaldtrump/status/1198746358091530241>>.

⁸⁶ Carl Prine, "SECNAV Orders Compre-

hensive Review of Navy, Marine Corps JAGs," *Military Times*, August 22, 2019, available at <www.militarytimes.com/news/your-navy/2019/08/22/navsec-orders-comprehensive-review-of-navy-marine-corps-jags/>.

⁸⁷ Zachary D. Spillman, "SECNAV Orders a Review of the Navy and Marine Corps Legal Communities," *CAAFlog*, August 23, 2019, available at <www.caaflog.com/2019/08/23/secnav-orders-a-review-of-the-navy-and-marine-corps-legal-communities/>.

⁸⁸ Ignatius, "Trump's Meddling in a SEAL Disciplinary Case Risks a Collision with the Navy."

⁸⁹ *Ibid.* Rear Admiral Collin P. Green, Naval Special Warfare Command, to Major Commanders, Naval Special Warfare, memorandum, subject: Guidance from the Commander, August 20, 2019, available at <<http://cdn.cnn.com/cnn/2019/images/08/23/radm.green.guidance.directive.pdf>>.

⁹⁰ Ignatius, "Trump's Meddling in a SEAL Disciplinary Case Risks a Collision with the Navy."

⁹¹ Morning Edition, "What Powers Does Trump Have as Commander in Chief?"

⁹² *Ibid.* During this show, in the interview section, Feaver explains further: "But under the principle of civilian control, President Trump has the right to do these things. That doesn't make them right. He has the right to be wrong, in other words. But when a President exercises that right to be wrong on matters that the military care deeply about, the President tends to pay a price. And I do think there—the price will be paid in terms of a loss of trust between the military and the President. And that trust is the essential ingredient for healthy civil-military relations."

⁹³ Sullivan, "Donald Trump Is the War Crimes President"; Adam Serwer, "The War-Crimes President," *The Atlantic*, November 27, 2019, available at <www.theatlantic.com/ideas/archive/2019/11/trump-war-crimes/602731/>.

⁹⁴ Jenna Johnson, "Donald Trump on Waterboarding: 'If It Doesn't Work, They Deserve It Anyway,'" *Washington Post*, November 23, 2015, available at <www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/>; Jenna Johnson, "Donald Trump on Waterboarding: 'Torture Works,'" *Washington Post*, February 17, 2016, available at <www.washingtonpost.com/news/post-politics/wp/2016/02/17/donald-trump-on-waterboarding-torture-works/>. As a Presidential candidate, Mr. Trump announced his support for killing the families of terrorists. See Tom LoBianco, "Donald Trump on Terrorists: 'Take Out Their Families,'" CNN, December 3, 2015, available at <www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html>. More recently, President Trump suggested the United States could attack cultural heritage sites

inside Iran: ". . . targeted 52 Iranian sites (representing the 52 American hostages taken by Iran many years ago), some at a very high level & important to Iran & the Iranian culture, and those targets, and Iran itself, WILL BE HIT VERY FAST AND VERY HARD. The USA wants no more threats!" Donald J. Trump, Twitter post, January 4, 2020, 5:52 p.m., available at <<https://twitter.com/realdonaldtrump/status/1213593975732527112>>.

⁹⁵ Donald J. Trump, Twitter post, October 12, 2019, 9:49 a.m., available at <<https://twitter.com/realdonaldtrump/status/1183016899589955584?lang=en>>. The President tweeted, "The case of Major Mathew Golsteyn is now under review at the White House. Mathew is a highly decorated Green Beret who is being tried for killing a Taliban bombmaker. We train our boys to be killing machines, then prosecute them when they kill! @PeteHegseth."

⁹⁶ Walter Russell Mead, "The Jacksonian Tradition: And American Foreign Policy," *The National Interest*, no. 58 (Winter 1999/2000), 5–29, available at <<https://www.jstor.org/stable/pdf/42897216.pdf>>.

⁹⁷ *Ibid.*, 9.

⁹⁸ Michael Clarke and Anthony Ricketts, "Donald Trump and American Foreign Policy: The Return of the Jacksonian Tradition," *Comparative Strategy* 36, no. 4 (2017), 367, available at <<https://doi.org/10.1080/01495933.2017.1361210>>.

⁹⁹ Besides Jacksonian and Jeffersonian traditions, Mead identifies the Hamiltonian and Wilsonian schools of thought as rounding out the overarching perspectives in American foreign policy. This essay focuses almost exclusively on the Jacksonian tradition, with an occasional nod toward the Jeffersonians.

¹⁰⁰ Mead, "The Jacksonian Tradition," 8. Mead further explains Jacksonianism as "less an intellectual or political movement than an expression of the social, cultural, and religious values of a large portion of the American public" (9). And Jacksonians rely on "an instinct rather than ideology—a culturally shaped set of beliefs and emotions rather than a set of ideas" (17).

¹⁰¹ *Ibid.*, 8.

¹⁰² *Ibid.*, 14.

¹⁰³ *Ibid.*, 23.

¹⁰⁴ *Ibid.*, 18.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, 21.

¹⁰⁷ Walter Russell Mead, "The Jacksonian Revolt: American Populism and the Liberal Order," *Foreign Affairs*, March/April 2017, 3, available at <www.foreignaffairs.com/articles/usa/2017-01-20/jacksonian-revolt>.

¹⁰⁸ *Ibid.*

¹⁰⁹ Clarke and Ricketts, "Donald Trump and American Foreign Policy," 373.

¹¹⁰ Mead, "Jacksonian Revolt," 5. Mead includes the police as being among the groups receiving instinctive support from Jacksonian voters.

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Strategic Forum 305
Just Another Paper Tiger? Chinese Perspectives on the U.S. Indo-Pacific Strategy
By Joel Wuthnow



Chinese officials have responded to the U.S. “free and open Indo-Pacific” strategy through a regional

counternarrative that raises doubts about the motives and sustainability of U.S. leadership. Chinese analysts perceive the strategy as a form of containment. They assess that the strategy will reduce China’s influence and increase regional tensions. Chinese observers identify weak regional support as the primary constraint on U.S. strategy in Asia and advocate responding by improving China’s own relations throughout the neighborhood. U.S. messaging needs to offer assurances of U.S. commitments and evidence of regional contributions, and Washington needs to maintain key relationships in the region but need not respond in kind to every Chinese overture. The strategy may also create new opportunities to negotiate with China on certain issues from a position of strength.



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¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ “Remarks by Secretary Esper in a Press Gaggle.”

¹¹⁴ Scott D. Sagan and Benjamin A. Valentino, “Just War and Unjust Soldiers: American Public Opinion on the Moral Equality of Combatants,” *Ethics & International Affairs* 33, no. 4 (2019), 414, available at <<https://doi.org/10.1017/S0892679419000431>>. In their study, Sagan and Valentino constructed four hypothetical scenarios about a war between the fictional countries of “Eastland” and “Westeria” and assigned about 150 participants “to each condition and each subject read only one story.” In each scenario, Sagan and Valentino varied an aspect of the conflict “to isolate the effects of beliefs about the justice of the war’s cause on the public’s ethical judgments about the conduct of combatants and the moral responsibility of leaders.” Sagan and Valentino, “Just War and Unjust Soldiers,” 420–421.

¹¹⁵ Ibid., 444.

¹¹⁶ Ibid., 427.

¹¹⁷ Ibid., 433.

¹¹⁸ Ibid., 432.

¹¹⁹ Ibid., 433.

¹²⁰ Ibid.

¹²¹ “Remarks by Secretary Esper in a Press Gaggle.”

¹²² Idrees Ali, “Navy SEAL Case Closed as Far as Top U.S. General Concerned,” Reuters, November 25, 2019, available at <www.reuters.com/article/us-usa-military-seals-milley/navy-seal-case-closed-as-far-as-top-u-s-general-concerned-idUSKBN1XZ0ZZ>.

¹²³ According to some reporting, President Trump may be considering pardons for others convicted of war crimes. See Spencer Ackerman and Asawin Suebsaeng, “Justice Department Stonewalls Senate Democrats on Trump’s War-Crimes Clemency,” *The Daily Beast*, January 16, 2020, available at <www.thedailybeast.com/justice-department-stonewalls-senate-democrats-on-trumps-war-crimes-clemency>.

¹²⁴ “Remarks by Secretary Esper in a Press Gaggle.”

¹²⁵ Ibid.

¹²⁶ John C. Dehn, “Why a President Cannot Authorize the Military to Violate (Most of) the Law of War,” *William & Mary Law Review* 59, no. 3 (2018), 816, available at <<https://scholarship.law.wm.edu/wmlr/vol59/iss3/3>>.

¹²⁷ Ackerman and Suebsaeng, “Justice Department Stonewalls Senate Democrats on Trump’s War-Crimes Clemency.”

¹²⁸ DOD Directive (DODD) 2311.01E, *DOD Law of War Program*, February 22, 2011, 8. DODD 2311.01E, para. 6.3, mandates that “all military . . . personnel shall report reportable incidents” of war crimes through their chain of command. Later in the paragraph, the directive allows for reports to be made through other channels outside the chain of command. Servicemembers need to know their

avenues for reporting war crimes, especially the agencies outside the chain of command eligible to receive a report. Junior members may feel reluctant to report a war crime through their chain of command, especially in circumstances where someone in the chain allegedly committed the act.

¹²⁹ Dave Phillips, “Navy Reduces Punishment for SEAL in War Crimes Case,” *New York Times*, October 29, 2019, available at <<https://www.nytimes.com/2019/10/29/us/navy-seal-gallagher-clemency.html?action=click&module=RelatedLinks&pgtype=Article>>.

¹³⁰ U.S. Const., art. 1, § 8, cl. 14.

¹³¹ For example, the President issues the Rules for Court-Martial and the Military Rules of Evidence that establish court-martial procedure.

¹³² Hammer, *The Court-Martial of Lt.*

Calley, 385. One poll “showed that nearly 80 per cent of Americans bitterly opposed the finding.” Hammer, *The Court-Martial of Lt. Calley*, 374; see “Poll Finds Majority Think Calley Was a Scapegoat,” *New York Times*, April 17, 1971, available at <www.nytimes.com/1971/04/17/archives/poll-finds-majority-think-calley-was-a-scapegoat.html>. Additionally, a separate 1971 Gallup/Newsweek poll found that 11 percent of Americans approved of the verdict. Sagan and Valentino, “Do Americans Approve of Trump’s Pardons for Court-Martialed Military Officers?”

¹³³ Sagan and Valentino, “Just War and Unjust Soldiers,” 435. Sagan and Valentino’s article quotes George C. Marshall as stating, “Once an army is involved in war, there is a beast in every fighting man which begins tugging at its chains. And a good officer must learn early on how to keep the beast under control, both in his men and himself.” George C. Marshall, quoted in Luke Mogelson, “A Beast in the Heart of Every Fighting Man,” *New York Times*, April 27, 2011, available at <www.nytimes.com/2011/05/01/magazine/mag-01KillTeam-t.html>.