

COMMANDER-IN-CRISIS: WHY THE “COUNCIL OF WAR” NEEDS TO RETURN TO THE EXECUTIVE BRANCH AFTER AFGHANISTAN

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If you fail to plan, you plan to fail.¹

INTRODUCTION

“Our military members and veterans deserve our best because that is what we give to America.”² On August 26, 2021, 17:36:52 Kabul Time, the United States was in the midst of a hasty and ill-planned withdrawal from Afghanistan.³ Marine Sergeant Tyler Vargas-Andrews was aiding the evacuation when a bomb detonated, causing him to lose his right arm and left leg.⁴ Over twenty pounds of explosives discharged,⁵ resulting in 185 lives lost.⁶ Chaos ensued after the blast, as many Americans can recall watching safely from their homes on television. Making matters worse, thirteen U.S. servicemembers, none over the age of twenty-three, were killed.⁷ Roughly 150

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1. This quote has been attributed to Benjamin Franklin but may be apocryphal.

2. *During and After the Fall of Kabul: Examining the Administration’s Emergency Evacuation from Afghanistan: Hearing Before the H. Comm. on Foreign Affs.*, 118th Cong. 17 (Mar. 8, 2023) [hereinafter *Kabul Hearing*] (statement of Tyler Vargas-Andrews, Sergeant, U.S. Marine Corps).

3. H.R. COMM. ON FOREIGN AFFS., 118TH CONG., WILLFUL BLINDNESS: AN ASSESSMENT OF THE BIDEN-HARRIS ADMINISTRATION’S WITHDRAWAL FROM AFGHANISTAN AND THE CHAOS THAT FOLLOWED, 25 (2024) [hereinafter *WILLFUL BLINDNESS*] (providing the majority report issued under Chairman Michael McCaul).

4. Jeff Schogol, *Wounded Abbey Gate Marine delivers powerful testimony to Congress*, TASK & PURPOSE (Mar. 9, 2023, at 14:28 PM), <https://taskandpurpose.com/news/marine-wounded-abbey-gate-afghanistan-withdrawal/> (on file with the Ave Maria Law Review).

5. *Id.*

6. *WILLFUL BLINDNESS*, *supra* note 3, at 17, 26.

7. Joshua Kaplan et al., *Hell at Abbey Gate: Chaos, Confusion, and Death in the Final Days of the War in Afghanistan*, PROPUBLICA (Apr. 2, 2022, at 05:00 PM) <https://www.propublica.org/article/hell-at-abbey-gate-chaos-confusion-and-death-in-the-final-days-of-the-war-in-afghanistan> (on file with the Ave Maria Law Review).

Afghans died and countless more were severely injured.⁸ Back in the thick of the carnage, Afghan mothers, motivated by fear and desperation, threw their babies over barbed wire fences.⁹ Some even attempted to cut their own necks on razor wire to avoid being recaptured by the Taliban.¹⁰ The withdrawal from Afghanistan was a “humanitarian disaster.”¹¹ Aside from the tragedy, it also created a position of extreme counterterrorism vulnerability.¹² Afghanistan fell back into the hands of the Taliban, erasing decades of progress.¹³ Seven billion dollars in high-level weapons, defense articles, and roughly \$57.6 million in former U.S. funds were left behind.¹⁴ August 26, 2021, was one of the deadliest days for U.S. troops in Afghanistan since they were initially deployed in 2001.¹⁵ These are just a few of the many catastrophic consequences of the U.S. withdrawal from Afghanistan.

This Note examines the former President’s decision to terminate the U.S. presence in Afghanistan, analyzes the constitutional implications of that decision, and proposes a solution to prevent future presidents from abusing their authority while engaging in hostilities. Parts I and II of this Note detail the operational situation on the ground before and during the withdrawal to provide background and to highlight its significant failures. Part III details the hierarchy between the legal obligations of military officers, the limited war powers of the President, and the tension with Congress during military engagements. Finally, Parts IV and V will compare historical accounts of the President and the military in similar contexts, positioning the withdrawal as a critical failure of presidential authority and leadership. Additionally, Parts IV

8. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, Hum. Rts. and Lab., After Action Review of the U.S. Withdrawal from Afghanistan (June 2023).

9. Shawn Ryan Show, *Tyler Vargas-Andrews- Marine’s Horrific Account of the Disastrous Afghanistan EVAC*, YOUTUBE, 2:26:16 (Sept. 1, 2021), <https://music.youtube.com/podcast/ZZ-JXDoqsnc>.

10. *Id.*

11. Kaplan et al., *supra* note 7 (statement of Brig. Gen. Farrell J. Sullivan, the most senior Marine officer on the ground) (“It was a humanitarian disaster waiting to happen.”).

12. See *Kabul Hearing*, *supra* note 2 (statement of Scott Mann, Lt. Col. (ret.)) (“Relinquishing Afghanistan back into the hands of 20 other violent extremist groups undoes the intelligence and partner capacity we fought for, and it takes us back to pre-9/11 vulnerability. Every veteran knows it, even if no one in our government understands it. It has become a moral injury on our veterans and military families. A moral injury is an injury to the soul. A violation of what we know to be right by leaders whom we trusted.”).

13. WILLFUL BLINDNESS, *supra* note 3 (providing the majority report issued under Chairman Michael McCaul).

14. SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, SIGAR 23-04-IP, U.S.-PROVIDED FUNDS AND EQUIPMENT TO AFGHANISTAN: AN ASSESSMENT OF TALIBAN ACCESS TO ASSETS REMAINING IN COUNTRY WHEN THE AFGHAN GOVERNMENT COLLAPSED 2 (Nov. 9, 2022); see also WILLFUL BLINDNESS, *supra* note 3, at 29.

15. WILLFUL BLINDNESS, *supra* note 3, at 17, 26.

and V will suggest immediate recourse from Congress to address the neglectful abuse of executive authority following the War Powers Act of 1973. This Note concludes that the President's actions in Afghanistan represented a clear overreach of executive authority, which embarrassed U.S. military legitimacy. Similar to George Washington's "Council of War,"¹⁶ this failure cements the urgent need for immediate congressional action to require presidents to consult with their military advisors before engaging in hostilities of any kind.¹⁷

I. THE LEAD-UP TO THE DECISION TO WITHDRAW

The decision to withdraw from post-Bin-Laden Afghanistan began in 2011, when the Obama administration seemingly developed strength and confidence in Afghan government security forces.¹⁸ In 2013, the North Atlantic Treaty Organization (NATO) gave control of their ninety-five remaining districts, and the Afghan forces remained momentarily stable.¹⁹ In 2014, the U.S. aimed to keep 9,800 U.S. troops in Afghanistan, focusing mainly on counterterrorism, counterinsurgency, and special operations.²⁰ The focus on nation-building carried over into the Trump administration, where President Trump dealt with the Taliban hands-on.²¹ After multiple back-and-forth peace talks failed, Taliban-led attacks persisted, including "a series of bold terror attacks in Kabul that kill[ed] more than 115 people amid a broader upsurge in violence. The attacks c[a]me as the Trump administration . . . deploy[ed] troops . . . and launch[ed] air strikes against opium labs to try to decimate the Taliban's finances."²² Eventually, the Taliban promised to avoid collaboration with other terrorist groups on Afghan soil.²³ In return, President

16. See LIBRARY OF CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 101 (Worthington Chauncy Ford ed., 1905).

17. Ideally, military advisors, such as the Secretary of Defense and Chairman of the Joint Chief of Staff (JCS), will certify that they have rendered such consultation to the President, promoting executive accountability.

18. Jim Garamone, *Obama Announces Troop Reductions, Way Forward in Afghanistan*, NATIONAL GUARD (June 23, 2011), <https://www.nationalguard.mil/News/Article/610547/obama-announces-troop-reductions-way-forward-in-afghanistan/> (on file with the Ave Maria Law Review).

19. *Timeline of the U.S. War in Afghanistan*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/time-line/us-war-afghanistan> (on file with the Ave Maria Law Review) (last visited Mar. 3, 2025).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

Trump promised to withdraw 7,000 troops.²⁴ After nine hard-fought years of negotiations,²⁵ it seemed like the United States was finally making headway in its plan for a withdrawal.

A. The Doha Agreement: An Agreement for Bringing Peace to Afghanistan

On February 29, 2020, the U.S. and the Taliban entered into a peace agreement (“Doha Agreement”) in an attempt to cease attacks and establish significant drawbacks of U.S. troops.²⁶ Following the completion of the Doha Agreement, Taliban fighters carried out dozens of attacks against Afghan security forces, directly violating its terms.²⁷ In response to the flagrant violation, U.S. forces conducted a defensive strike against the Taliban at an Afghan National Security Forces checkpoint.²⁸ A critical element of the Doha Agreement was the dramatically reduced number of future U.S. airstrikes.²⁹ In 2019 alone, the United States conducted 7,423 airstrikes, helping the Afghan government gain significant ground over the Taliban.³⁰ However, due to the Taliban’s continued acts of bad faith, defensive strikes continued, and President Trump kept 2,500 troops on the ground when he left office on January 20, 2021.³¹

Joseph Biden was inaugurated as the 46th President of the United States, becoming Afghanistan’s newest hope.³² Pivoting from President Trump’s

24. *Id.*

25. *Id.*

26. Agreement for Bringing Peace to Afghanistan, U.S.–TALIBAN, Feb. 29, 2020, U.S. DEP’T OF STATE, <https://2017-2021.state.gov/wp-content/uploads/2020/02/Signed-Agreement-02292020.pdf> (on file with the Ave Maria Law Review).

27. *Timeline of the U.S. War in Afghanistan*, *supra* note 19.

28. Abdul Qadir Sediqi & Charlotte Greenfield, *U.S. Carries Out Air Strike on Taliban, Calls for Halt to Needless Attacks*, REUTERS (Mar. 4, 2020, 9:26 PM), <https://www.reuters.com/article/world/u-s-carries-out-air-strike-on-taliban-calls-for-halt-to-needless-attacks-idUSKBN20R12F> (on file with the Ave Maria Law Review).

29. David S. Cloud, *In Afghanistan, the U.S. weighs a pause in airstrikes to spur Taliban peace talks*, L.A. TIMES (Mar. 23, 2021, 2:38 PM), <https://www.latimes.com/politics/story/2021-03-23/biden-afghanistan-negotiations> (on file with the Ave Maria Law Review).

30. U.S. SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, SIGAR EVALUATION REP. 23-16-IP: WHY THE AFGHAN SECURITY FORCES COLLAPSED 12 (Feb. 2023), https://www.globalsecurity.org/military/library/report/sigar/sigar-23-16-ip_why-the-afghan-security-forces-collapsed.pdf (on file with the Ave Maria Law Review).

31. WILLFUL BLINDNESS, *supra* note 3, at 18.

32. U.S. Embassy San Jose, *Joe Biden Sworn in as 46th U.S. President*, U.S. EMBASSY COSTA RICA (Jan. 22, 2021), <https://cr.usembassy.gov/joe-biden-sworn-in-as-46th-u-s-president/> (on file with the Ave Maria Law Review). This source was chosen because the original White House press release on Biden’s inauguration has since been removed.

original plan of a full withdrawal by May 1, 2021, President Biden announced a new date—September 11, 2021—the twentieth anniversary of the September 11 terrorist attacks on the United States.³³ The President stated his intentions clearly: “[T]he United States will withdraw its troops in a safe, deliberate, and responsible manner and in full coordination with its partners and allies in Afghanistan. Diplomacy and counter-terrorism mechanisms will be reorganized to hold the Taliban accountable.”³⁴ The President’s hollow words aged poorly as the devastating realities of August 2021 unfolded.

B. President Biden’s Preparation for Withdrawal

Upon taking office, President Biden appointed a *civilian* advisor to review and oversee U.S. policies in Afghanistan.³⁵ It was clear from the start that the Taliban was not honoring the terms of their agreement.³⁶ These red flags were raised to the Biden administration but ignored. Indeed, in the face of Taliban aggression, the U.S. took few steps to counteract this, evidenced by limiting “the senior U.S. military official in Afghanistan at the time and longest-serving U.S. commander in the country . . . to attend[ing] a single [National Security Council] deputies meeting.”³⁷ General Austin Scott Miller could have provided insight to the President and his advisor on whether a withdrawal was feasible at its current stage. The war in Afghanistan was in continuation for the last twenty years—nothing happened there without General Miller knowing about it.³⁸ Yet, General Miller was inexplicably kept in the dark as plans for the withdrawal took place.³⁹ In fact, a highly qualified group of personnel disapproved of Biden’s withdrawal mission, yet their expertise was also blatantly ignored.⁴⁰ This included top Pentagon officials and the highest-

33. Terri Moon Cronk, *Biden Announces Full U.S. Troop Withdrawal from Afghanistan by Sept. 11*, U.S. DEP’T OF DEF. (Apr. 14, 2021), <https://www.defense.gov/News/News-Stories/Article/article/2573268/biden-announces-full-us-troop-withdrawal-from-afghanistan-by-sept-11/> (on file with the Ave Maria Law Review).

34. *Id.*

35. WILLFUL BLINDNESS, *supra* note 3, at 18.

36. *Id.* at 18–19.

37. *Id.* (“Warnings were issued from . . . senior U.S. military officials that the Taliban were actively violating the Doha Agreement. Yet, the decision to withdraw was made anyway. . . . As State Department Spokesperson Ned Price admitted to the committee, the Taliban’s adherence to the Doha Agreement was ‘immaterial’ to the administration’s decision to withdraw.”).

38. *See id.* at 14, 18.

39. *Id.* at 18.

40. *Id.* at 19 (explaining that this list included, but is not limited to the “Secretary of Defense, the Chairman of the Joint Chiefs, the Commander of U.S. Central Command (CENTCOM), the Secretary of State, the Office of the Director of National Intelligence (ODNI), . . . the Commander of NATO’s Resolute

ranking military generals, who later testified under oath that they advised the President to keep 2,500 troops on the ground.⁴¹ The absence of military experience and the disregard for military input in the Commander in Chief's preparation were critical factors in the eventual breakdown of strategic operations. This inexplicable approach ultimately resulted in an avoidable tragedy.

The next step towards preparing for a withdrawal was contemplating a noncombatant evacuation operation ("NEO"). The U.S. Navy defines a NEO as the "ordered (mandatory) or authorized (voluntary) departure of civilian noncombatants (and in rare situations nonessential military personnel) to a designated safe haven."⁴² The urgent need for a NEO in Kabul was obvious—troops, citizens, allies, contractors, women, and children all needed refuge from the Taliban. The U.S. military bases were closed, particularly the Bagram Air Base, along with one of the largest U.S. embassies in the world.⁴³ The closest U.S. counterinsurgent force was moved eight hours away to the Persian Gulf.⁴⁴ Due to poor planning, people were inevitably left behind, with the Deputy Homeland Security Advisor later admitting "[t]here was no way we were getting all those people out."⁴⁵ As a result, the Foreign Affairs Committee's investigation estimated that "approximately 1,000 Americans were left behind and over 90% of [Special Visa]-eligible Afghans were still in the country."⁴⁶ The Committee also reported that the ultimate downfall of the NEO was the lack of its contemplation in a Taliban-controlled country.⁴⁷ This critical contemplation was avoided despite warnings—from both Embassy personnel in Kabul and the Department of Defense—that a Taliban takeover was imminent following an American military withdrawal.⁴⁸

Support Mission and United States Forces[,] . . . [t]he Special Inspector General for Afghanistan Reconstruction (SIGAR)[,] . . . NATO allies[,] . . . [and] the British Chief of the Defense Staff[.]"). "[As] [C]hief of [S]taff for Special Operations Command (SOCOM), put it: 'The president decided we're gonna leave, and he's not listening to anybody.'" *Id.*

41. *Hearing to Receive Testimony on the Conclusion of Military Operations in Afghanistan and Plans for Future Counterterrorism Operations: Hearing Before S. Comm. on Armed Servs.*, 117th Cong. 16, 37, 57–58, 118 (2021) (sworn testimonies of General Frank McKenzie, Commander of U.S. Central Command and General Mark Milley, Chairman of the Joint Chief of Staff).

42. U.S. NAVY, NONCOMBATANT EVACUATION OPERATIONS, OPERATION PREPARE (2020).

43. WILLFUL BLINDNESS, *supra* note 3, at 20–21.

44. *Id.* at 21.

45. *Id.* at 22.

46. *Id.*

47. *Id.*

48. *Id.*

The withdrawal's destructive results were no surprise to the people on the ground. The complexities of modern warfare and the need for meticulous preparation necessitate that those with firsthand experience in military operations ought to advise the President on such matters. As President Biden would later recount, this operation hit him much harder than he expected.⁴⁹ The lack of planning for a large-scale operation, such as evacuating thousands of people out of a foreign country, seems unimaginable for the United States—a nation that spent twenty years bravely defending the people who lived there. President Biden's withdrawal strategy only consisted of two rehearsed drills, which were conducted a week before the fall of Kabul.⁵⁰ In addition, "notes from an NSC meeting . . . reveal the U.S. government still had not determined who would be eligible for evacuation, nor had they identified third countries to serve as transit points for an evacuation."⁵¹ There was no "safe-haven" in this story—not even for the families of Afghans who surrendered their lives and fought side-by-side with U.S. troops for twenty years.⁵² One wonders if General Austin Scott Miller had a NEO in his playbook. He stepped down from his role as the Commander of U.S. NATO forces in Afghanistan on July 12, 2021, just one month before the events in Kabul unfolded.⁵³ While the lack of preparation before the bombing is shocking, so are the details of the day itself. These tragic realities mainly occurred at Abbey Gate, the main entrance to the airport in Kabul.

II. THE WITHDRAWAL AT ABBEY GATE

Snipers in a tower overlooking Abbey Gate were told to look for a man with a shaved head and black clothes. Around 8 a.m., they thought they spotted him and passed it up their chain of command. They never heard back. After a couple hours of waiting, they lost sight of him in the crowd.⁵⁴

49. See *Remarks by President Biden on Afghanistan*, (Aug. 16, 2021) ("The truth is: This did unfold more quickly than we had anticipated.") <https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2021/08/16/remarks-by-president-biden-on-afghanistan/> (on file with the Ave Maria Law Review).

50. WILLFUL BLINDNESS, *supra* note 3, at 22.

51. *Id.*

52. See NONCOMBATANT EVACUATION OPERATIONS, *supra* note 42 (discussing definition of a "NEO").

53. Courtney Kube, *Commander of U.S. Forces in Afghanistan Steps Down*, NBC NEWS (July 12, 2021), <https://www.nbcnews.com/politics/national-security/commander-u-s-nato-forces-afghanistan-stepping-down-n1273665> (on file with the Ave Maria Law Review).

54. Kaplan et al., *supra* note 7 (detailing Sergeant Vargas-Andrews's initial identification of the suicide bomber moments before losing him and the following detonation). Sergeant Vargas-Andrews used his experience and training to call this out but was told that he had no authority to engage. The acquiescence

In readiness for a “speed brings safety,” “go-to zero” order, 6,000 troops were deployed to aid in the withdrawal.⁵⁵ At Abbey Gate, Marines were positioned on a high platform satellite tower right outside a civilian airport—Hamid Karzai International Airport (“HKIA”).⁵⁶ The Marines would live out of the tower for approximately two weeks, conducting 24/7 operations to control the processing of Afghans and Taliban threats.⁵⁷ A Marine’s firsthand account vividly details the situation on the ground: “Some Afghans [who were] turned away from HKIA tried to kill themselves on the razor wire we used as a deterrent. They thought this was merciful compared to the Taliban torture they faced. Countless Afghans were murdered by the Taliban 155 yards in front of our position day and night.”⁵⁸ The blatant, murderous execution of civilians was normalized during this time.⁵⁹

On August 22, 2021, Marines spotted an Improvised Explosive Device (IED) test run and reported it up their chain of command.⁶⁰ Days later, Marines were able to identify a suicide bomber based on the description they were provided—it was not too difficult to find the one clean-shaven individual in the crowd.⁶¹ They had a confirmed positive description that was verified by the Psychological Operations Team.⁶² After requesting permission to engage, they were told, “leadership d[oes] not have the engagement authority for us. Do not engage.”⁶³ After seeking engagement authority again out of urgency by the danger presented by an identified suicide bomber, Marines heard back from their battalion commander—“I don’t know.”⁶⁴ One Marine recounts, “[w]e received no update and never got our answer. Eventually, the individual disappeared. . . . Plain and simple we were ignored. Our expertise was disregarded. No one was accountable for our safety.”⁶⁵ Two Marines were

of the command and the lack of clarity on the rules of engagement resulted in Vargas Andrews practically being blown in half.

55. See Remarks by President Biden on Afghanistan, *supra* note 49.

56. *Kabul Hearing*, *supra* note 2, at 14 (statement of Tyler Vargas-Andrews, Sergeant, U.S. Marine Corps).

57. *Id.* at 14–15.

58. *Id.*

59. *Id.* at 15.

60. *Id.*

61. *Id.*

62. *Id.* at 16.

63. *Id.* at 21.

64. *Id.*

65. *Id.* at 16.

waiting on the ground for an Afghan civilian to round up his five family members stuck in the canal when the bomb blew up.⁶⁶

The State Department issued a warning online at 03:00 that day: “U.S. citizens who are at the Abbey Gate, East Gate, or North Gate now should leave immediately.”⁶⁷ Afghan President Ashraf Ghani and his senior advisors quickly fled Afghanistan to avoid “bloodshed.”⁶⁸ Hours later, the Taliban were sitting in his chair.⁶⁹ The deterioration of diplomatic stability in Afghanistan echoed a strikingly comparable situation to the 1983 disaster in Beirut, Lebanon.⁷⁰ In the aftermath of the bombing and the Taliban’s sweeping control of the country, these were the words of President Biden: “The truth is: This did unfold more quickly than we had anticipated.”⁷¹ Far from a *mea culpa*, questions then arose as to exactly who were the “we” in that statement. Put plainly, the President’s lack of familiarity with military operations had immediate, life-altering impacts on service members and countless others, underscoring the critical importance of ignored input from military advisors. Following the botched withdrawal and airport bombing, U.S. Army Major General Chris Donahue was the final military officer to leave Afghanistan on August 30, 2021.⁷² Almost immediately, questions were asked and fingers were pointed. Blame game aside, could the answers for avoiding this type of tragedy again be found in the United States Constitution?

66. *Id.*

67. U.S. Embassy in Kabul, *Security Alert: U.S. Embassy Kabul* (Aug. 27, 2021), <https://af.usembassy.gov/security-alert-u-s-embassy-kabul-august-27-2021/>. [<https://web.archive.org/web/20210827085040/https://af.usembassy.gov/security-alert-u-s-embassy-kabul-august-26-2021/>] (on file with the Ave Maria Law Review).

68. Katie Wadington, *Why did Afghan President Ashraf Ghani Leave?* USA TODAY (Aug. 15, 2021), <https://www.usatoday.com/story/news/world/2021/08/15/president-ashraf-ghani-fled-afghanistan-avoid-flood-bloodshed/8145061002/> (on file with the Ave Maria Law Review).

69. *Id.*

70. JACK CARR & JAMES M. SCOTT, TARGETED BEIRUT: THE 1983 MARINE BARRACKS BOMBING AND THE UNTOLD ORIGIN STORY OF THE WAR ON TERROR 263 (Emily Bestler Books, ed.) (2024) (“With foreign armies in control of 80 percent of his country, [Lebanon President] Gemayel said the Americans were vital to his survival. ‘Without the Marines,’ [then-Vice President] Bush wrote, ‘he suggested the Soviet-backed Syrians would be sitting in his office.’ Not only did Gemayel argue that he could not let the Marines leave, but he also predicted more terrorist attacks in the future.”).

71. *Remarks by President Biden on Afghanistan*, *supra* note 49.

72. *Timeline of the U.S. War in Afghanistan*, *supra* note 19.

III. THE CONSTITUTION'S WAR HIERARCHY

If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “[t]he tools belong to the man who can use them.” . . . [O]nly Congress itself can prevent power from slipping through its fingers.⁷³

Every officer in the United States military swears an oath by law “to support and defend the Constitution of the United States against all enemies, foreign and domestic.”⁷⁴ The United States entrusts its officers to uphold the Constitution based on their expertise, knowledge, training, and judgment. In the words of then-General George Washington, “[w]hen we assumed the [role of] soldier, we did not lay aside the Citizen.”⁷⁵ In other words, American servicemembers are not mere automata; nor do they have to dispense all of their moral capabilities when they enter into service. However, soldiers are trained to instantly obey direct orders and not substitute their personal views.⁷⁶ Soldiers cannot refuse to obey orders because they do not find them tactically sound.⁷⁷ This highlights the importance of having qualified officers to protect the country, lead the troops, and advise the government.

Articles ninety and ninety-two of the Uniform Code of Military Justice (UCMJ) make it a crime to disobey general lawful orders or those given by a superior officer.⁷⁸ Following the principle of dereliction of duty, in some scenarios a soldier is not allowed to disobey orders—he is required to obey.

73. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (“But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that ‘The tools belong to the man who can use them.’ We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”).

74. 5 U.S.C. § 3331 (“I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”).

75. George Washington, Address to the New York Provincial Congress (June 26, 1775) (transcript in the National Archives).

76. See *United States v. New*, 55 M.J. 95, 98 (C.A.A.F. 2001) (discussing the legality of orders denying soldier’s appeal even though “he did not ‘understand the legal basis’ of the order”).

77. *Id.* at 99.

78. 10 U.S.C. §§ 890, 892 (2024).

However, a soldier may disobey an “unlawful” order in certain situations.⁷⁹ In situations where a direct order is illegal, soldiers are not expected to follow it. These situations may include torture,⁸⁰ treason,⁸¹ or orders to abandon fellow soldiers.⁸² This also extends to “an order that is likely to harm the institution writ large—the Nation, military, and subordinates in a manner not . . . outweighed by its likely benefits.”⁸³ The Founders intended that members of the military serve the *law*, not man—this is prevalent in the idea of a well-regulated militia. This did not include blind obedience to the civilian master. Indeed, the country needs members of the military to play a constitutionally defensive role against the incompetent decisions of men less capable than George Washington or Dwight D. Eisenhower. To recognize the need for checks and balances by those entrusted to uphold the Constitution is long overdue—specifically by military officers who can play a defensive role to avoid tragedy in the wake of incompetence.

A. *Joint Chiefs of Staff*

The most senior military officers are known as general or flag officers.⁸⁴ To reach this level of prestige, the commissioned officer typically holds over thirty years of service.⁸⁵ These accomplished service members, such as those selected for the Joint Chiefs of Staff (JCS), have specific duties under Congress.⁸⁶ They reach their appointment in the JCS by designation from the President and confirmation by the Senate.⁸⁷ The Advice and Consent Clause

79. MANUAL FOR COURTS-MARTIAL, R.C.M. 916(d) (2024 ed.) (“It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”).

80. G.A. Res. 39/46, Art. II, ¶ 3, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Dec. 10, 1984).

81. U.S. CONST. art. III, § 3.

82. Exec. Order No. 10631, 20 Fed. Reg. 6057 (Aug. 17, 1955).

83. Andrew R. Milburn, *Breaking Ranks: Dissent and the Military Professional*, U.S. ARMY (Oct. 26, 2010), https://www.army.mil/article/47175/breaking_ranks_dissent_and_the_military_professional (on file with the Ave Maria Law Review).

84. MICHAEL J. VASSALOTTI ET AL., GENERAL AND FLAG OFFICERS IN THE U.S. ARMED FORCES: BACKGROUND AND CONSIDERATIONS FOR CONGRESS 1 (Cong. Rsch. Serv.) (2024).

85. *U.S. Army Ranks*, U.S. ARMY, <https://www.army.mil/ranks/> (last visited Oct. 24, 2025) (on file with the Ave Maria Law Review).

86. 10 U.S.C. § § 151–154; *see also* VASSALOTTI, *supra* note 84, at 2 (explaining that Congress also has “specified functions . . . for . . . the top two officers of each service[,] . . . the combatant commanders, the Commander of U.S. Special Operations Command, the Commander of U.S. Cyber Command, and the Chief and Vice Chief of the National Guard Bureau,” but this list is not exhaustive).

87. 10 U.S.C. § 601 (2023) (“The President may designate positions of importance and responsibility to carry the grade of general or admiral or lieutenant general or vice admiral. . . . An officer assigned to any

allows Congress to question the rationale for the President's designation and holds the power to confirm or reject the nominee.⁸⁸ Congress also limits the number of general and flag officers appointable by the President.⁸⁹ The Staff evenly consists of officers from the Army, Navy, Marine Corps, and Air Force.⁹⁰ The JCS used to have certain executive authority over the military, which changed after World War II, when Congress amended the controlling laws.⁹¹

In 1953, Congress cut the legs out from under the JCS, abolishing its remaining executive authority to command combatant forces of the U.S. military.⁹² This was later cemented by the Goldwater-Nichols Act of 1986, making the Chairman of the JCS the principal military advisor to the President.⁹³ The Act also clarified the hierarchy of the chain of command; "from the President to the Secretary of Defense; and from the Secretary of Defense to the commander of the combatant command."⁹⁴ The Chairman of the JCS *may* provide advice to the President or the Secretary in military matters, but advice is not required.⁹⁵ This Note takes the position that this is a grave mistake, especially after the handling of the U.S. withdrawal from Afghanistan. While the JCS does not need authority over "the button" on all military operations, it certainly needs to play a larger role than mere advisor. Before beginning any hostilities, the President and the Defense Secretary should be *required* to hear the advice and opinion from the leaders of the armed forces; to refuse this opinion is to be willfully blind in military matters. Following such advice, the Chairman should certify that such an opinion has been made and received. This ensures accountability in all military decisions made by the President.

such position has the grade specified for that position if he is appointed to that grade by the President, by and with the advice and consent of the Senate.").

88. *Id.*; see also U.S. CONST. art. II, § 2, cl. 2.

89. 10 U.S.C. § 525 (2024).

90. See *Joint Chiefs of Staff*, THE JOINT STAFF, <https://www.jcs.mil/About/> (last visited Oct. 24, 2025) (on file with the Ave Maria Law Review).

91. *Id.*

92. See Reorganization Plan No. 6 of 1953, 18 Fed. Reg. 3743, Message of the President, Part III ("The Joint Chiefs of Staff, as provided in the National Security Act of 1947, are not a command body but are the principal military advisers to the President, the National Security Council, and the Secretary of Defense.").

93. Goldwater-Nicholas Department of Defense Reorganization Act of 1986, Pub. L. 99-433, 100 Stat. 992, § 153.

94. *Joint Chiefs of Staff*, *supra* note 90.

95. See *id.*

B. Presidential War Powers

The U.S. Constitution establishes the President as the Commander in Chief of the armed forces.⁹⁶ However, the Constitution arguably left room for interpretation in how much power the President truly exerts over the military.⁹⁷ In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Robert Jackson questioned that “just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends.”⁹⁸ In 1975, a State Department Legal Advisor, while testifying about the War Powers Act, said that “[i]t is almost impossible to give a rigid and precise definition of what the President’s constitutional powers are as Commander in Chief.”⁹⁹ In this age of perpetual war, the question remains as important as it is unanswered.

Indeed, there is historical evidence in the United States of multiple Commanders in Chief working together to shoulder the responsibilities of leading the Army and the Navy, leaving the President without operational autonomy.¹⁰⁰ Alexander Hamilton, in offering an originalist definition of the President’s role over the military, preferred the title “first General and Admiral.”¹⁰¹ The Continental Congress agreed and required General Washington to “advis[e] with [his C]ouncil of [W]ar to order and dispose of the said Army under [his] command as may be most advantageous for the obtaining the end for which these forces have been raised.”¹⁰² Thomas Jefferson continued this tradition, “presid[ing] over courts-martial and

96. U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into actual Service of the United States. . . .”); *see also* U.S. CONST. art. I, § 8, cl. 11–14.

97. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (“But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends.”).

98. *Id.*

99. *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on Int’l Sec. & Sci. Affs. of the H. Comm. on Int’l Rels.*, 94th Cong. 1, 90 (1975) (statement of Rep. Clement J. Zablocki, Chairman, H. Subcomm. on Int’l Sec. & Sci. Affs.).

100. *See* Saikrishna Bangalore Prakash, *Deciphering the Commander-in-Chief Clause*, 133 YALE L.J. 1, 41–47 (2024) (discussing the best evidence of the “multiplicity of CINCs” coming from state militias, regular military, statutes, and other Congressional enactments).

101. THE FEDERALIST NO. 69 (Alexander Hamilton) (YALE: AVALON PROJECT, 2008).

102. *See* LIBRARY OF CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 101 (Worthington Chauncy Ford ed., 1905).

councils of war.”¹⁰³ Surely, Commander in Chief Biden did not possess the tactical ability of General George Washington and Thomas Jefferson, who, even in their time, recognized the necessity of consulting a Council of War for wartime operations.¹⁰⁴ It is traditional knowledge among leaders that the more opinions a commander receives, the more thought-out and responsible a decision will be.¹⁰⁵ The President, as the nation’s foremost military decision-maker, should ideally possess a foundation in military strategy, or, at a minimum, be closely advised by those with the requisite ability in such matters. When the President’s tunnel vision blocks his awareness for this type of necessary council, Congress must step in.

C. Congressional War Powers

Article I of the Constitution provides Congress with broad powers over the military, including the power to declare war, provide funding, and make rules for its regulation.¹⁰⁶ Congress also has the power to regulate the forces given to the Commander in Chief.¹⁰⁷ This authority extends to giving “advice and consent” on nominations of military officers.¹⁰⁸ While the Constitution firmly establishes Congress’s authority over military matters, history reveals multiple instances of Presidents testing its limits.¹⁰⁹ The executive branch has “deployed the [Commander in Chief] Clause to usurp congressional power to declare wars, to thwart laws that regulate and govern the armed forces, and to ignore statutory conditions on the use of military funds.”¹¹⁰ This runs contrary

103. *Thomas Jefferson*, NAT’L GUARD <https://www.nationalguard.mil/Resources/Image-Gallery/Historical-Paintings/Presidential-Series/Thomas-Jefferson/> (on file with the Ave Maria Law Review) (last visited Jan. 18, 2026).

104. *Id.*

105. *Luke* 14:31 (King James) (“Or what king, going to make war against another king, sitteth not down first, and consulteth whether he be able with ten thousand to meet him that cometh against him with twenty thousand?”); *see also* CARL VON CLAUSEWITZ, *ON WAR* 84 (Michael Eliot Howard & Peter Paret eds., trans., Princeton Univ. Press 1984) (1832) (discussing the dangers of imperfect knowledge of a situation during wartime).

106. U.S. CONST. art. I, § 8, cl. 1, 11–16 (“The Congress shall have Power To . . . provide for the common Defence . . . declare war . . . grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . . raise and support Armies . . . provide and maintain a Navy . . . To make Rules for the Government and Regulation of the land and naval Forces; . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; . . . To provide for organizing, arming, and disciplining, the Militia. . .”).

107. U.S. CONST. art. I, § 8, cl. 14; *id.* art II, § 2, cl. 1.

108. U.S. CONST. art. II, § 2, cl. 2.

109. *See* Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RESV. L. REV. 1237 (1997).

110. Prakash, *supra* note 100, at 13.

to what the Constitution says. In addition, presidents have repeatedly dodged the requirements of the War Powers Act,¹¹¹ a federal law passed by Congress limiting the President's war powers without congressional approval.¹¹²

The War Powers Resolution of 1973 was enacted after the withdrawal of U.S. forces from Vietnam, barring the veto of President Richard Nixon.¹¹³ Now roughly 50 years later with the withdrawal from Afghanistan, this law must be revisited. The Resolution provided that Congress must be consulted when introducing or removing U.S. forces from "hostilities."¹¹⁴ Due to the ambiguous language, past Presidents have used the Resolution as a fixed way to circumvent proper congressional consultation for military operations.¹¹⁵ This is exactly the type of monarchical-like actions the Founders feared; especially when the circumvention comes from hesitant leaders who refuse the advice of counsel who may provide sound, tactical military aid.¹¹⁶

The War Powers Act reflects the originalist interpretation of Article I as was expressed in the 1863 *Prize Cases*.¹¹⁷ In the *Prize Cases*, the Supreme Court upheld President Lincoln's blockade of the South after the bombardment of Fort Sumter.¹¹⁸ The Court neglected to answer whether the power to use the blockade came from the Constitution, legislation from 1795 and 1807, or both.¹¹⁹ In dicta, however, the Court made clear that the President needs Congressional approval to begin hostilities, reflecting the modern interpretation of the War Powers Act and the originalist justification of the

111. Katherine Yon Ebright, *A Bipartisan Bill to Rein in Presidential War-Making*, BRENNAN CTR. FOR JUST. (Sept. 30, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/bipartisan-bill-rein-presidential-war-making> (on file with the Ave Maria Law Review).

112. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

113. See *War Powers Resolution of 1973*, NAT'L ARCHIVES (July 27, 2021) (discussing the relevance of President Nixon's veto) <https://www.nixonlibrary.gov/news/war-powers-resolution-1973>.

114. War Powers Resolution, 87 Stat. at 556.

115. Ebright, *supra* note 111 (referring to President Reagan's avoidance of congressional consultation in Lebanon and El Salvador's civil war, President Bill Clinton in Kosovo, and the Obama administration in 2011 in Libya). In addition, Congress has been avoided with intervention in "Africa, Asia, Europe, and Latin America. . . ."; see also CARR & SCOTT, *supra* note 70, at 98 ("The president, who was loath to cede his constitutional authority over foreign policy to Congress, attempted to dance around that new reality in an Aug. 30, 1983, update to lawmakers.").

116. See *supra* Section I.B, for discussion on General Austin Scott Miller.

117. See *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635 (1863).

118. *Id.* at 671.

119. *Id.* at 668.

Constitution.¹²⁰ This concern, as expressed in Federalist No. 69,¹²¹ provides the basis for requiring consultations with military leaders before conflicts. If presidents are going to continue to reach around Congress, they need to at least have an intermediary in place, such as their military staff, to provide a buffer from the threat of going to war. The power to declare war is vested in Congress, not the President.¹²² Therefore, it follows that a legislative role or at least a military council appointed by Congress must bridge the gap. If the President's power is less than a king's, the President should not engage in military conflicts without aid from experts, especially in modern times when the President lacks the personal military experience that was more common at the Founding.¹²³

IV. HISTORY REPEATS: LESSONS FROM THE PAST

As a result of the September 11 attacks on the World Trade Center and the Pentagon, Authorizations for Use of Military Force (AUMFs) were enacted in 2001 and 2002, ultimately allowing the President free reign in detaining suspects of terrorism.¹²⁴ In 2001, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."¹²⁵ After President Bush concluded that the Taliban supported Al Qaeda in these attacks, U.S. forces were sent to invade Afghanistan, beginning Operation Enduring Freedom.¹²⁶ Military officers carried out the AUMF, capturing and

120. *Id.* at 665, 670 ("Was it capture? Blockade is a belligerent right. There must be war, before there can blockade in the international sense, giving jurisdiction in prize. . . . But this is the exercise of the legislative power, and is purely municipal. . . . [T]his legislative power does not reside in the President. The Constitution, in its first section, lays the corner-stone of the edifice it was erecting. . . . Therefore, it only remains to inquire, was there war?").

121. Alexander Hamilton, *supra* note 101.

122. U.S. CONST. art. I, § 8, cl. 11.

123. The United States has not had a President who served in the military in three decades. While military experience is not the cornerstone trait of a competent Commander in Chief, it certainly contributes towards leadership in times of crisis. When the nation shifts from electing Presidents like Washington, Jackson, and Eisenhower to Obama, Biden, and Trump, the need for professional military consultation becomes more critical than ever.

124. Ebright, *supra* note 111.

125. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

126. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006); *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013).

transporting suspects as detainees to Guantánamo Bay.¹²⁷ The capturing of the detainees was justified under military order if the President had reason to believe they engaged in terrorist activities against the U.S. or were members of Al Qaeda.¹²⁸

Salim Ahmed Hamdan was a suspect who was detained and considered eligible for trial under conspiracy charges by the Bush administration via military commission.¹²⁹ Hamdan challenged the basis for the commission, and the Court found in his favor.¹³⁰ The charges against Hamdan were not clear, and thus “risk[ed] concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution.”¹³¹ Furthermore, the Court found that the procedures by the President’s administration violated the Geneva Conventions for over four years,¹³² ultimately constituting war crimes.¹³³ This case, by finding a violation of the UCMJ and the Geneva Conventions, highlighted the limits on presidential war powers and thus raised questions about the role of military officers in following orders to enforce controversial policy decisions. In a later case involving the other Guantánamo detainees, the Supreme Court held that the Bush administration did not have authority under the Constitution to suspend writs of habeas corpus.¹³⁴

Although heavily redacted, a court order was publicly released in June 2022, ordering the U.S. to release a longtime Guantánamo Bay detainee, Asadullah Haroon Gul, back to the Taliban.¹³⁵ The opinion includes that Gul

127. *Hamdan*, 548 U.S. at 568.

128. *Id.*

129. *Id.* at 566.

130. *Id.* at 567, 622.

131. *Id.* at 602 (citing *Loving v. United States*, 517 U.S. 748, 771 (1996) (acknowledging “that Congress may not delegate the power to make laws”); *Reid v. Covert*, 354 U.S. 1, 23–24 (1957) (“The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds.”); *THE FEDERALIST* No. 47, at 324 (James Madison) (J. Cooke ed. 1961) (“The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”)).

132. *Hamdan*, 548 U.S. at 629–30 (“Article 3 . . . provides that in a ‘conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,’ certain provisions protecting ‘[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention.’”).

133. *Id.* at 642 (Kennedy, J., concurring) (“By Act of Congress, moreover, violations of Common Article 3 are considered ‘war crimes.’”).

134. *Boumediene v. Bush*, 553 U.S. 723, 798 (2008); see U.S. CONST. art. I, § 9, cl. 2.

135. *Gul v. Biden*, 573 F. Supp. 3d 148, 175 (D.D.C. 2021); see also *Guantanamo Bay Detainee Transfer Announced*, U.S. DEP’T OF WAR (June 24, 2022),

assisted Al Qaeda and helped their leader, Osama bin Laden, “to hide in the Chitral Region of Konar, Afghanistan throughout 2002.”¹³⁶ The release of Gul was yet another victory for the Taliban. The release highlighted that authorizations may fail in aiding the executive branch in carrying out its limited war power abilities when they are not rooted in sound military strategy or clear legal authority. Due to the possibility that authorizations against foreign adversaries may be viewed as a declaration of war, implementing a Council of War would be much more favorable and discrete.

The extensive cases of the Guantánamo detainees underscore the possibility—and probability—that a sitting U.S. President may make short-sighted policy decisions in response to emotional events that affect the country. While the decisions may be lawful, how they are executed may not be. Once these orders are handed down to the military, officers are expected to carry them out without question in the name of constitutional duty.¹³⁷ Indeed, because the Commander in Chief holds vested power to appoint or remove any military officer, it is more likely that officers will not question these orders.¹³⁸ However, as a check on the executive branch, this is a situation that can be avoided in the future with a Council of War. An experienced and knowledgeable Council of War can mediate between officers and the President to authorize the individual moral autonomy granted to them by the Founders. This makes room to prevent orders that “likely . . . harm the institution writ large—the Nation, military, and subordinates in a manner not clearly outweighed by its likely benefits.”¹³⁹ Mistakenly detaining an illegitimate suspect who turned out to not be involved in the September 11 terrorist attacks would not have constituted such a situation; however, many preventable short-sighted executive decisions were present during the Afghanistan withdrawal.

Another strikingly similar account of a lack of a military council and inexperienced diplomats pulling the strings behind massive military decisions occurred in Beirut, Lebanon, in 1983.¹⁴⁰ There, 1,600 Marines were assigned as a multinational peacekeeping force trying to help the people of Lebanon

<https://www.war.gov/News/Releases/Release/Article/3073210/guantanamo-bay-detainee-transfer-announced/> (on file with the Ave Maria Law Review).

136. *Gul*, 573 F. Supp. 3d at 154.

137. *United States v. New*, 55 M.J. 95, 99 (C.A.A.F. 2001).

138. U.S. CONST. art. II, § 2, cls. 1, 2.

139. Milburn, *supra* note 83.

140. See generally CARR & SCOTT, *supra* note 70 (describing how mismanagement and inexperience led to the tragic loss of life in Beirut).

restore order and stability to their government.¹⁴¹ On October 23, 1983, Hezbollah terrorists drove a truck carrying approximately 12,000 tons of TNT into a Marine Corps Battalion HQ barracks at a Lebanese airport while the Marines were sleeping.¹⁴² The resulting explosion killed “241 soldiers, sailors, and Marines . . . that Sunday morning.”¹⁴³ Colonel Geraghty was the Commander of the 24th Marine Amphibious Unit (MAU) in Beirut and expressed his frustration in the chillingly parallel situation: “Geraghty’s frustration mounted. No one appreciated his dire circumstances. The colonel needed only to step outside his command center to glimpse his vulnerability. The airport was tactically unsound . . . ‘President Reagan’s national security advisers were not thinking through the implications of their decisions.’”¹⁴⁴ In an indefensible position, Commander Geraghty took orders from civilian diplomats with zero experience or insight into the best course of action on the ground.¹⁴⁵ As the 24th MAU Commander further expressed, “[b]eyond the vulnerability, what infuriated Geraghty was the total breakdown in the chain of command. Why was he, as the on-scene commander, expected to take orders from the deputy national security advisor and special envoy to the Middle East? It made no sense.”¹⁴⁶ This is exactly the situation that reappeared in Afghanistan—a lack of chain of command, inexperienced diplomats ordering experienced military officers, and the resulting catastrophe of the loss of innocent lives.

Unlike Afghanistan, U.S. forces did not withdraw at once from Lebanon, fearing that giving credence to “terror as an instrument of policy” would strengthen the motivations of other terrorist groups.¹⁴⁷ The intent of the bombing in Lebanon, as was the intent in Afghanistan, was to “weaken American will and force the withdrawal of U.S . . . forces[.]. The clear intent of the terrorists was to eliminate [U.S.] support . . . and to destroy the ability of the . . . people to determine their own destiny.”¹⁴⁸ Unfortunately, in Beirut,

141. President Ronald Reagan, Address to the Nation on Events in Lebanon and Grenada (Oct. 27, 1983) (transcript available in the Ronald Reagan Presidential Library & Museum).

142. CARR & SCOTT, *supra* note 70, at 173.

143. *Id.* at 275.

144. *Id.* at 128.

145. *Id.* at 127–28.

146. *Id.* at 128.

147. Reagan, *supra* note 141 (“If we were to leave Lebanon now, what message would that send to those who foment instability and terrorism? If America were to walk away from Lebanon, what chance would there be for a negotiated settlement, producing a unified democratic Lebanon?”); *see also* CARR & SCOTT, *supra* note 70, at 307 (“‘Simply put, if we yield to pressure for withdrawal now, we will tacitly condone the use of terror as an instrument of policy’ . . . Reagan followed that advice.”).

148. *Id.*

the terrorists had too strong of a grip on the capital, and it was lost to Muslim militia.¹⁴⁹ In response, President Reagan carefully and safely ordered the withdrawal of the Marines.¹⁵⁰ Reagan executed this withdrawal without any casualties and left a remaining contingency force to guard the U.S. embassy.¹⁵¹ Reagan also had the courage to hold himself personally responsible for the attacks.¹⁵² This did not happen in the withdrawal from Afghanistan; the diplomatic opportunity for the U.S. to protect its Afghan allies was within reach—and is now unrecoverable.¹⁵³

Back in Afghanistan, the Biden administration's plan and strategy for withdrawal was not led by senior military officials, nor those with extensive experience in diplomatic relations with the Afghan government or Islamist jihadist terrorist organizations.¹⁵⁴ Instead, the *civilian* committees and National Security Advisors took charge to avoid accountability from the Secretary of Defense and the JCS.¹⁵⁵ Relying solely on *civilian* ability for *military* decisions is unacceptable when the situation involves complex military operations such as a withdrawal. The President, and therefore the country, is better off when the President consults with military officials who understand the nuances of hostile international dynamics. President Biden's foreign policy decisions were shaped by the opinions of Secretary of State Antony Blinken and National Security Advisor (NSA) Jake Sullivan—two individuals with little to no experience in military strategy or the intricacies of Afghanistan's political landscape over the last twenty years.¹⁵⁶ Relying on these two positions is also a significant leap in the chain of command, an integral structure that upholds the separation of powers.

149. *Lebanon—They Came in Peace*, NAVAL HISTORY AND HERITAGE COMMAND (June 21, 2024, 1:51 PM), <https://www.history.navy.mil/browse-by-topic/wars-conflicts-and-operations/middle-east/lebanon.html> (on file with the Ave Maria Law Review).

150. *Id.*

151. *Last U.S. Marines Leave Beirut*, HISTORY (May 27, 2025), <https://www.history.com/this-day-in-history/last-u-s-marines-leave-beirut> (on file with the Ave Maria Law Review).

152. CARR & SCOTT, *supra* note 70, at 307 (“If there is to be blame, it properly rests here in this office and with this president. And I accept responsibility for the bad as well as the good.”).

153. See Zoe Strozewski, *Al-Qaida Attempting to Rebuild Presence In Afghanistan With U.S. Out, Commander Says*, NEWSWEEK (Dec. 10, 2021, 11:12 AM), <https://www.newsweek.com/al-qaida-attempting-rebuild-presence-afghanistan-us-out-commander-says-1658215> (on file with the Ave Maria Law Review).

154. See WILLFUL BLINDNESS, *supra* note 3, at 23.

155. *Id.*

156. Matt Spetalnick & Arshad Mohammed, *Explainer: In Biden's foreign policy duo, he has a team – but not of rivals*, REUTERS (Nov. 23, 2020, 4:47 PM), <https://www.reuters.com/world/china/bidens-foreign-policy-duo-he-has-team-not-rivals-2020-11-23/> (on file with the Ave Maria Law Review).

NSA Sullivan included his assessment of the Taliban's compliance under the Doha Agreement with the Defense Department Press Secretary and concluded they would "make informed decisions for the strategic decisions to come."¹⁵⁷ Yet, General McKenzie, General Milley, and General Miller all agreed that the Taliban would never follow the terms of the agreement.¹⁵⁸ General Milley stated they needed "to maintain a minimum force of 2,500 troops on the ground . . . in order to sustain the Afghan national security forces and its government until the diplomatic conditions of the Doha Agreement were met."¹⁵⁹ This contingency plan was one shared by senators as well; as an Oklahoma senator on the Senate Armed Services Committee put it: "[I]t was never an exclusive choice between a forever war and total withdrawal."¹⁶⁰ As was clear from those with military insight, this did not have to be a go-to zero order. The three generals were also in agreement about preserving the usage of Bagram Air Base, the United States' largest air base in Afghanistan at the time, another recommendation that was abandoned by the administration.¹⁶¹ There were obvious reasons for the preferability of a withdrawal out of Bagram as opposed to HKIA, as were outlined and ignored by another military official, Command Sergeant Major Smith.¹⁶² Military officials were not the only ones against abandoning Bagram, with President Biden's staff also finding errors in the decision.¹⁶³ Not only did President Biden neglect to incorporate key war generals into his decision to withdraw, but he also waited

157. See WILLFUL BLINDNESS, *supra* note 3, at 49.

158. *Id.*

159. *Id.* at 49, 51.

160. Jim Inhofe, *Afghanistan Was a Predictable, Preventable Disaster*, FOREIGN POL'Y (Aug. 5, 2021, 12:39 PM), <https://foreignpolicy.com/2022/08/15/afghanistan-withdrawal-pullout-military-taliban-chaos-evacuation-biden-ihofe/> (on file with the Ave Maria Law Review). Senator Inhofe was one of many senators that joined the military advisors in advocating for a group of special operators to remain behind until the Doha agreement conditions were met. Unfortunately, according to the senator, "Biden chose not to listen. The result was a disastrous and deadly withdrawal . . . that has left Afghans, Americans, and the world worse off than they were before." *Id.*

161. WILLFUL BLINDNESS, *supra* note 3, at 72, 74.

162. *Id.* at 76 ("(1) Bagram could house 35,000 people, HKIA could only house 4,000; (2) HKIA was a shared civilian airfield that was not controlled by the U.S. military, (3) HKIA was surrounded by an urban environment, making it 'exceptionally difficult to undertake and control;' (4) Bagram had the logistical capability to hold 130,000 people, and HKIA did not; (5) Bagram had a Role 3 hospital, whereas HKIA had a Role 2 hospital with degraded capabilities; and, finally, (6) Bagram had two operating industrial incinerators to destroy U.S. equipment, and HKIA did not.").

163. MICHAEL MCCAUL, HOUSE REPUBLICAN INTERIM REPORT: A "STRATEGIC FAILURE:" ASSESSING THE ADMINISTRATION'S AFGHANISTAN WITHDRAWAL 32 (2022) (statement by Pentagon Press Secretary John Kirby on July 2nd—the day Bagram was abandoned) ("Bagram was a key hub for air support for everything that we were doing over there for the last 20 years.").

until the withdrawal was underway to notify other possible allies.¹⁶⁴ After the Taliban had seized Kabul, Biden's team reported that he "ha[d] not yet spoken with any other world leaders."¹⁶⁵ They later admitted that "these calls did not begin until August 22, 2021—more than one week into the evacuation operation."¹⁶⁶ These world leaders, including the United Kingdom, did not support the unconditional withdrawal, as NSA Sullivan has since admitted that "many allies disagreed with the result of the decision [to withdraw]."¹⁶⁷ Additionally, Biden did not consult Congress as required by the War Powers Act.¹⁶⁸ In sum, he wielded the executive authority to engage in extremely fragile hostilities that cost the lives of thirteen servicemembers and roughly 170 Afghan allies, shattering diplomatic relations and leaving an ugly stain on U.S. military legitimacy.

V. CONSEQUENCES OF THE WITHDRAWAL AND RECOMMENDATIONS
FOR THE FUTURE

A. *Legislative Recommendations*

The Senate Armed Services Committee needs to recall Goldwater-Nichols, the War Powers Resolution, and the National Security Act. These key pieces of legislation should mandate that the executive branch receives a formal recommendation from a Council of War before engaging in future hostilities. This is justified under the intent of the Founders and in alignment with the plain language of the Constitution.¹⁶⁹ It is also desperately needed, considering the trend of presidents with no military experience being elected in our country today. Congress has the power and justification to do this through a myriad of ways.

Congress can amend the War Powers Resolution of 1973 to require a Council of War, such as requiring consultation with the Chairman of the JCS and the Secretary of War. This would alleviate the concern that Founding Fathers like James Madison and Charles Pinckney shared—that in times of

164. *Id.* at 73.

165. *Id.*

166. *Id.*

167. *Id.* at 8–9.

168. See Jim Sciutto, Kevin Liptak & Kylie Atwood, *How Biden went his own way on Afghanistan withdrawal*, CNN POLITICS (Apr. 14, 2021, 10:40 PM), <https://www.cnn.com/2021/04/14/politics/biden-overrules-advisers-afghanistan-withdrawal/index.html> (on file with the Ave Maria Law Review).

169. See *supra* Part III.B (discussing Washington, Hamilton, and Jefferson).

war, the legislature need not be “too slow.”¹⁷⁰ Congress can also further define “hostilities,” along with what qualifies as a “specific statutory authorization.”¹⁷¹ This is an originalist justification, and would reinforce the effectiveness of the separation of powers, ensuring the President does not abuse unilateral war-making power or circumvent the War Powers Act itself, which presidents have repeatedly done in the past.¹⁷² It also would allow an outside perspective into the executive branch through a primary advisor who is not directly in the chain of command.¹⁷³ These amendments could have changed the outcome in Afghanistan by forcing the President to produce evidence that a withdrawal process was properly planned, allies were consulted, and U.S. and Afghan citizens were not in danger of abandonment.

B. *Constitutional Justifications*

Other proposals for Congress to require a Council of War for the Commander in Chief are justified by the Declare War Clause, the Appointments Clause, and the Necessary and Proper Clause.¹⁷⁴ Addressing the Declare War Clause, “many key founders, including Alexander Hamilton, George Washington, and James Madison, referred to the clause’s importance as a limit on presidential power.”¹⁷⁵ U.S. presidents have not acknowledged it as so, asserting independent authority over attacks when they do not neatly fit within the formal definition of “war.”¹⁷⁶ Due to this trend, there needs to be a check on executive authority during such military engagements. To ensure this check, Congress can pass a law *explicitly* requiring the President to consult with the military council if they are to engage in hostilities of any kind. To neglect this abuse of power by the executive branch would be to accept an authority that is, in Alexander Hamilton’s words, “nominally the same with

170. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318 (Max Farrand ed., 1911).

171. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

172. See Fisher, *supra* note 109 (discussing presidential war power and historical accounts of Presidents “do[ing] the ‘right thing,’” instead of following the laws of Congress and the Constitution; “Bush in Iraq, Clinton in Haiti and Bosnia. . . .”); see also CALVIN R. MASSEY & BRANNON P. DENNING, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 356–57 (7th ed. 2023) (discussing Presidential War-Making after the War Powers Resolution).

173. 10 U.S.C. § 152; see also CARR & SCOTT, *supra* note 70, at 98 (discussing Reagan’s avoidance of Congress and the War Powers Act while using forces in Lebanon).

174. U.S. CONST. art. I, § 8, cls. 11, 18; *id.* art. II, § 2, cl. 2.

175. Michael D. Ramsey & Stephen I. Vladeck, *Declare War Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-i/clauses/753> (on file with Ave Maria Law Review) (last visited Nov. 2, 2025).

176. See Fisher, *supra* note 109.

that of the king of Great Britain.”¹⁷⁷ It was not the Founders’ intent to have it so, but rather “much inferior” to the King of England.¹⁷⁸ Aside from command and direction, the remaining duties would “appertain to the legislature.”¹⁷⁹ Given this interpretation of the limited executive power, a military council is the perfect answer for providing reasonable and well-balanced aid.

The requirement of invoking membership into the President’s Council of War could be invoked during an executive appointment under the Appointments Clause in Article II.¹⁸⁰ As Gouverneur Morris expressed at the Constitutional Convention, “[a]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”¹⁸¹ The vehicle Congress could use for this security is the Advice and Consent Clause.¹⁸² While this clause has not been interpreted to bar the President from his nominations, it does not prohibit invoking requirements for that nominee once appointed. In the form of “advice,” Congress could require that the President’s nominations for the War Secretary or Chairman of the Joint Chiefs of Staff provide him aid in engagement with hostilities and certify that they have done so.

Finally, the Necessary and Proper Clause grants Congress the authority to exercise its oversight function in carrying out its enumerated powers.¹⁸³ Because Congress has the power to declare war and to regulate the military, requiring a Council of War is an allowable and necessary means to ensure that the executive branch follows these powers. This is not a statutory restriction on the President, but rather a weapon of discretion to increase battle readiness.

177. Alexander Hamilton, *supra* note 101.

178. See *Fleming v. Page*, 50 U.S. (9 How.) 603, 618 (1850) (“But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question.”); see also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chief Justice Chase describing the responsibilities of the President as “the command of the forces and the conduct of campaigns”).

179. Alexander Hamilton, *supra* note 101 (“It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.”).

180. U.S. CONST. art. II, § 2.

181. Edward A. Fallone, *The Senate Must Consider Supreme Court Nominations in Due Course*, MARQ. UNIV. L. SCH. FAC. BLOG (Feb. 23, 2016), <https://law.marquette.edu/facultyblog/2016/02/the-senate-must-consider-supreme-court-nominations-in-due-course/> (on file with Ave Maria Law Review).

182. U.S. CONST. art. II, § 2, cl. 2.

183. U.S. CONST. art. I, § 8, cl. 18.

As stated by Justice Sutherland in *Curtiss-Wright*, “[i]t is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion. . . .”¹⁸⁴ By legislating a consultative process, Congress claims an informed and deliberative decision-making process regarding war and national defense.

The consequences of the withdrawal continue to linger, as issues for America are seemingly without end. The U.S. Defense Department’s inspector general reports that there are at least “[fifty] Afghan personnel in the United States with information in DoD records that would indicate potentially significant security concerns.”¹⁸⁵ These individuals extend to those “whose latent fingerprints have been found on improvised explosive devices and known or suspected terrorists and for which the NGIC sends derogatory information notifications to appropriate DoD personnel.”¹⁸⁶ As for U.S. intelligence, Marine General Frank McKenzie estimates, “[w]e’re probably at about 1 or 2 percent of the capabilities we once had to look into Afghanistan.”¹⁸⁷ The adverse consequences also extend to the treatment of women and children: “[T]he Taliban closed classrooms from sixth grade and above to all girls in March. In May, the Taliban decreed that all women must wear head-to-toe coverings in public, just like the last time they ruled Afghanistan, and should leave their homes only when necessary.”¹⁸⁸ The personnel that deployed to Afghanistan throughout the twenty-year mission knew these vulnerabilities, and a president should have had to hear them.

CONCLUSION

The lessons learned from the chaotic withdrawal in Afghanistan highlight the need for a Council of War grounded in the lived experiences of military professionals who can offer firsthand knowledge and insight into possible situations of no return. A president without military counsel is like a captain without navigation skills—no matter how well-intentioned, the ship stands no chance in a perfect storm. That will be the case until he has a competent group of experienced military officers who can navigate diplomatic relations in

184. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

185. U.S. DEP’T OF DEF. INSPECTOR GEN., DODIG-2022-065, EVALUATION OF THE SCREENING OF DISPLACED PERSONS FROM AFGHANISTAN 10 (2022).

186. *Id.*

187. Strozewski, *supra* note 153.

188. Inhofe, *supra* note 160.

situations of dire conflict. In an age where our Commanders in Chief are no longer accomplished war generals with military experience under their belt, it is time to ensure that military leaders have a say in what the President orders the troops to do. This will lead to more informed decision making and prevent the repeated tragedies that occurred in its absence.