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QUANTUM LAWMAKING: HOW NATIONAL SECURITY LAW HAPPENS WHEN WE'RE NOT LOOKING

Jesse Medlong*

Lower-order laws are increasingly unstable and uncertain the further their authority descends from the Constitution. That is because those laws become susceptible to successively greater constraints from higher-order laws. That uncertainty and instability do not, however, prevent such laws from leaving a mark on the world around them. In many regards, these laws superficially resemble some of the oddities of quantum mechanics, which governs the increasingly odd behavior of particles at the smallest levels. This article contemplates the theoretical and practical implications of the law's metaphorical similarities to quantum mechanics, particularly in the area of national security and military law. Quantum strangeness plays a more salient role in that body of law for several reasons, including the unique legal role of delegated authority and standard operating procedures in the military, how courts resolve legal challenges to military orders, the unusually strong organizational-behavior effect that military orders have on national security policy, and the odd fact that military law is potentially more responsive to "the enemy" than to democratic stakeholders on the home front.

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INTRODUCTION

At a glance, nothing seems terribly strange about national security law—and, in particular, military law. Specifically, the military is among the most longstanding policy instruments by which national governments pursue their interests. Indeed, the military's rigid hierarchy, highly structured bureaucracy, and elevation of culture and tradition might lend the impression that the military and its law are perfectly straightforward and not the sort of place in which abstract legal theories might thrive. That impression would be wrong. Despite a highly ordered legal structure starting with (in the United States) the Constitution and federal statutes, much of what goes on in the context of military law is strange and poorly understood, even by those immersed in it. This article seeks to explore the disparity between that impression and reality.

Beginning with military law's most commonplace attributes, the Uniform Code of Military Justice ("UCMJ") is the statutory framework governing the armed forces of the United States of America. Empowered by this and other statutes and by authority inhering in executive authority, Department of Defense ("DOD") officials and high-ranking military officers promulgate and implement regulations that bind over two million active duty and

reserve military members.[1] Thus far, this closely resembles the mundane and nearly ubiquitous interaction between congressional legislation and the delegation of "quasi-legislative" (and "quasi-judicial") power to executive agencies. But there is an important difference. For administrative lawmaking, the analysis essentially ends there.[2] In the military context, however, this bifurcation between legislation and regulation is merely the beginning.

The UCMJ provides a conduit for further delegation through three of its punitive articles: Article 90 (Assaulting or willfully disobeying a superior commissioned officer); [3] Article 91 (Insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer);[4] and Article 93 (Failure to obey an order or regulation).[5] These articles endow any lawful order—which can be spoken or written, of either general or particular applicability, and

[1] *See* OFFICE OF THE UNDER SEC'Y OF DEF., PERS. AND READINESS, POPULATION REPRESENTATION IN THE MILITARY SERVICES, FISCAL YEAR 2009 REPORT 2 (2009).
[2] *See* Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C. 1986) (acknowledging that "'quasi-legislative' and 'quasi-judicial' functions can no longer be regarded as extraordinary or even unusual activities of executive agencies.").
[3] Assaulting or Willfully Disobeying Superior Commissioned Officer, 10 U.S.C. § 890 (1956) ("Any person subject to this chapter who-- (1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or (2) *willfully disobeys a lawful command of his superior commissioned officer*; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.") (emphasis added).
[4] Insubordinate Conduct Toward Warrant Officer, Noncommissioned Officer, or Petty Officer, 10 U.S.C. § 891 (1956) ("[a]ny warrant officer or enlisted member who-- (1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office; (2) *willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer*; or (3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office; shall be punished as a court-martial may direct") (emphasis added).
[5] Failure to Obey Order or Regulation, 10 U.S.C. § 892 (1956) ("[a]ny person subject to this chapter who-- (1) *violates or fails to obey any lawful general order or regulation*; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, *fails to obey the order*; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct") (emphasis added).

"standing"[6] or *ad hoc*—with the force of law. An affected military service member's failure to follow any such order can result in criminal liability. The orders themselves (much like statutes and agency actions) can be subject to judicial review if they are challenged as unlawful. Thus, a wide range of lawful orders—including actions as varied as intraoffice policies, standard operating procedures ("SOPs"), and battlefield orders—possess many of the characteristics one would commonly ascribe to law. But the authority to issue lawful military orders is no ordinary delegation.

There are profound differences between the processes that produce these orders and the traditional exercise of delegated legislative authority. Rules enunciated in lawful orders are highly dynamic: they can be changed instantly and without prior notice, and they often cease to exist once they are carried out.[7] In these ways, lawful orders (and especially what this article refers to as "battlefield orders") resemble orders delivered in agency adjudications.[8] But lawful military orders—and especially standing and general orders—also closely resemble administrative rules. They have future effect and are, in the words of the Administrative Procedures Act ("APA"), "designed to implement, interpret, or prescribe law or policy or describ[e] the organization, procedure, or practice requirements of" a military organization or unit, or even the conduct of an individual service member.[9] Moreover, whereas legislation and regulation

[6] A standing order is "one of a number of orders which have or are likely to have long-term validity." *Standing Order*, COLLINS ENGLISH DICTIONARY, http://www.collinsdictionary.com/dictionary/english/standing-order (last visited Nov. 29, 2015).
[7] We might therefore think of lawful orders (other than general orders) as containing built-in sunset provisions. *See Sunset Provision*, COLLINS ENGLISH DICTIONARY, http://www.collinsdictionary.com/dictionary/english/sunset-clause (last visited Dec. 1, 2015) (defining "sunset provision" as "a provision of a law that it will automatically be terminated after a fixed period unless it is extended by law.").
[8] *See* Administrative Procedures Act [APA] § 6, 5 U.S.C. § 551 (2011) (defining an order as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making").
[9] *Id.* An interesting debate is currently ongoing in the world of administrative law over whether the APA aptly differentiates rules from orders. The APA differentiates these two kinds of actions according to their effect in time. Specifically, rules have *future* effect, whereas an adjudication is supposedly confined in the amber of the present, its posture affected only by those things that precede it. Thus, because an order is defined in the negative ("final disposition . . . *in a matter other than rule*

should ideally be responsive to the country's citizenry, many military orders are primarily responsive to "the enemy," whose aims presumably run counter to the desires of the public at large.[10]

The kind of law embodied by lawful orders—if it is law at all—departs so radically from our expectations of legally binding rules, that one must either reject its designation as *law* altogether or employ a different conceptual vocabulary to effectively describe it. This article posits that lawful military orders are undeniably law and proposes a framework from which to derive the requisite vocabulary. Specifically, its thesis suggests a continuum of lawmaking activity. At one end of the continuum lies what one might describe as "classical lawmaking." At the other extreme is "quantum lawmaking," in which the oddities described above tend to congregate. In describing this latter extremity, this article uses the language of quantum mechanics. The purpose of this Article is to provide substance for this metaphorical continuum, to apply this conceptual framework to the law of military orders, and to explain why the legal force of military orders matters outside the military itself.

Part I introduces the concept referred to in this article as quantum lawmaking. It explains how this metaphor can deepen our understanding of the law of military orders, as well as where along the proposed continuum this and other kinds of law fit. Part II discusses the legal issues implicated by the quirks of quantum lawmaking in the military setting. Part III describes some of the policy implications of having a body of law that not only maps onto

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making"), the entire distinction seems to be that rules are prospective in effect and that orders are not rules. *See id.* The debate focuses on whether it would be more appropriate to differentiate these two kinds of action based on their applicability. If these would-be reformers have their way, rules would be redefined as agency actions of general applicability, and orders would become agency actions of particular applicability. *See* A.B.A. HOUSE OF DELEGATES, DAILY JOURNAL: 2005 MIDYEAR MEETING 2, 7 (2005), http://www.americanbar.org/content/dam/aba/migrated/leadership/2005/midyear/daily/hod_2005_midyear_meeting_daily_journal.doc. This kind of reform would to some extent lighten the ontological chore of classifying military orders according to the APA's definitions.

[10] *See, e.g.*, *Learn the 11 Military General Orders*, MILITARY.COM, http://www.military.com/join-armed-forces/military-general-orders.html (last visited Dec. 21, 2015) (outlining the 11 General Orders common to all of the U.S. Armed Forces).

the extreme end of the quantum lawmaking continuum but also profoundly affects our national foreign policy. But first, what *is* quantum lawmaking?

I. "QUANTUM LAWMAKING" AND THE SPECIAL CASE OF THE MILITARY

"[T]hose who are not shocked when they first come across quantum theory cannot possibly have understood it." ~ Niels Bohr[11]

Because I endeavor to co-opt the language of quantum physics to illustrate my thesis, a basic survey of that language is due. But before I delve into the quantum lexicon, I must first supply an important caveat: the metaphor has limits. I do not suggest that some platonic "Quantum Form" underlies both the smallest scale of the physical world and some odd species of lawmaking. Rather, I suggest that within the discipline of quantum mechanics resides a vocabulary that, when applied by way of metaphor to certain kinds of law, helps to illuminate otherwise-obscure aspects of that law. This metaphor should not be laid alongside the law of military orders—or, indeed, any kind of law—and compared point by point. Doubtless, such examination would unveil ample disjuncture between the metaphor and reality. But insofar as this borrowed vocabulary helps to fill a hole in our current understanding of the law of military orders, the rhetorical risk seems worth the gain.[12]

[11] WERNER HEISENBERG, PHYSICS AND BEYOND 206 (Ruth Nanda Anshen ed., Arnold J. Pomerans trans., 1971) (quoting Niels Bohr).

[12] Even with this caveat in place, I owe an apology to anyone who would rightly object to such a cursory depiction of those few principles of quantum theory necessary to my metaphor. The theory (including the concepts I briefly explore here) is immensely bizarre and intricate, is wildly successful at predicting experimental outcomes, and is done a disservice by this shortest of shrifts. *See, e.g.*, LISA RANDALL, WARPED PASSAGES: UNRAVELING THE MYSTERIES OF THE UNIVERSE'S HIDDEN DIMENSIONS 119-26 (2005). Sadly, the rest of the theory is well beyond the scope of this article and, I suspect, my own ability adequately to convey.

A. *Quantum Mechanics and the Strange World of the Infinitesimal*

Quantum mechanics is the field of physics concerned with the fundamental building blocks of existence.[13] Until the dawn of the "quantum revolution," scientific models explaining the universe and the forces animating it had been growing increasingly elegant and geometrically coherent. Culminating in Albert Einstein's theory of relativity, "classical physics" had revealed the universe to be a highly ordered place. Classical physics remains to this day the heart of our understanding of the universe's vastest features, from the graceful dance of galaxies to the structure of space-time itself. Classical physics begins to break down, however, when applied to the smallest phenomena. On this Lilliputian scale, one must rely instead on quantum physics.

While classical physics elegantly and continuously connects the outer expanses of the cosmos even to our own daily existence, quantum physics describes the omnipresent infinitesimal as a seething mathematical chaos, defying our basic assumptions not only about how the universe *is*, but also about how it *ought to be*. For a serious science, quantum physics can seem decidedly metaphysical.

Quantum mechanics is a discipline built unabashedly on uncertainty. One of the fundamental rules underlying quantum theory is the *uncertainty principle*,[14] which states that the universe's tiniest constituents invariably elude efforts to measure both their positions and motions at any given time.[15] Although early formulations of this principle suggested that the uncertainty was due to the limitations imposed by the technology available for making

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[13] OXFORD UNIV. PRESS, OXFORD DICTIONARY OF PHYSICS 414-15 (John Daintith ed., 5th ed. 2005) ("[a] system of mechanics based on []quantum theory, which arose out of the failure of classical mechanics and electromagnetic theory to provide a consistent explanation of both []electromagnetic waves and atomic structure.").

[14] Also known as "Heisenberg's uncertainty principle" and the "indeterminacy principle." *See id.* at 553.

[15] BRIAN GREENE, THE ELEGANT UNIVERSE 114 (1999).

such measurements, subsequent experiments reveal the principle to be a fundamental feature of the vanishingly small.[16]

Stranger still, subatomic particles cannot truly be said to *have* either position or motion until an observation is made of one or the other.[17] In an oft-cited experiment to determine whether light consists of particles or waves, researchers placed an opaque surface, with two slits cut into it, between a light source and a photographic plate. When the light source flooded the slits with light, the photographic plate revealed a pattern of parallel lines resulting from the waves of light interfering with one another as they flowed simultaneously through the apertures. This is analogous to two pebbles being dropped simultaneously into water such that the ripples radiating from each pebble's point of impact interfere with those of the other pebble. These interference patterns suggested that light travels in waves. But when the experimenters fired individual photons (which are fundamental units of light) sequentially at the slits, the interference patterns remained. It was as though each photon interfered with itself, going through *both slits at once*. The apparently fractured photon does not collapse into a "single" particle again until it reaches the photographic plate—unless a photon detector is placed so as to observe which slit the photons "select." Experiments revealed that a detector placed in this manner somehow forced a photon to choose one slit or the other. The photons would then behave properly from the slit to the photographic plate and arrive at their destination without interference.[18]

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[16] *Id.*

[17] The passive voice here is no accident. An observation need not be made by any person or device in particular. Rather, virtually *any* imprint left on the universe by a quantum occurrence can serve as an observation. *See generally* Henry Krips, *Measurement in Quantum Theory*, THE STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2013), http://plato.stanford.edu/archives/fall2013/ entries/qt measurement/. For instance, a single photon—the fundamental particle from which the electromagnetic force is composed—can be "observed," among other methods, by a photographic plate, a photon detector, or a measurement of another particle that interacts with the photon.

[18] *See* GREENE, *supra* note 15, at 110. Bizarrely, the detector need only be placed at one slit or the other. When one detector is so placed, the observation that the photon

As though solipsistic subatomic particles were not strange enough, quantum mechanics also describes a mechanism by which the universe can cheat the law of conservation of mass and energy.[19] That is the principle that matter and energy can neither be created nor destroyed, but only converted from one state to another. Hence, mass and energy are conserved. But while no "new" matter or energy can be created, particles can sometimes erupt suddenly into existence by borrowing energy from the universe, as long as they return the energy shortly thereafter.[20] These so-called *virtual particles* bubble up from the chaotic foam of the universe's hidden but highly energetic subatomic depths.

With particles popping in and out of existence and not being able to decide where they are unless they are being watched, it is understandable that Einstein, the elder statesman of classical physics (and remorseful pioneer of quantum physics),[21] could not accept quantum mechanics' bizarreness. Whereas Einstein saw the elegant geometry residing in the grand forces of the universe's design as "fine marble," he likened the material stuff within the universe—and, importantly, the particles that constitute that material stuff—with "low grade wood."[22] While he had long hoped to unify both classical and quantum physics by finding that the "wood" (that is, matter) is

did not pass through the detector's slit is sufficient to collapse the particle and negate the interference effect. *See id.*

[19] This law provides that the amount of mass (or energy) in a closed system will remain constant over time, though mass can change form (i.e., mass can convert to energy or vice versa). In other words, neither mass nor energy can be created or destroyed, though either can change to the other. Conservation of mass and energy is a bedrock principle of classical physics. *See* OXFORD UNIV. PRESS, *supra* note 13, at 92 ("[a] law stating that the total magnitude of a certain physical property of a system, such as its mass, energy, or charge, remains unchanged even though there may be exchanges of that property between components of that system. . . . [C]onservation of mass is a law of wide and general applicability, which is true for the universe as a whole, provided the universe can be considered a closed system (nothing escaping from it, nothing being added to it). . .. [I]f mass is conserved, the conservation of energy must be of equally wide application.").

[20] GREENE, *supra* note 15, at 115-16.

[21] *See* WALTER ISAACSON, EINSTEIN: HIS LIFE AND UNIVERSE 6-7 (2007).

[22] ALBERT EINSTEIN, OUT OF MY LATER YEARS 83 (1950).

also marble deep down, quantum mechanics attempts to consign the entire universe—marble and all—to wood.[23]

B. Quantum Mechanics and the Law

But what do these odd laws of physics have to do with laws of the man-made variety? At the risk of seeming banal, I will begin to answer that question by citing a dictionary. The first definition of *law* in Black's Law Dictionary is, "[t]he regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society."[24] This is a broad definition (and only one of many even within Black's), but it is instructive in that it forces us to pin down some of the defining characteristics of *law* as examined here. The three most salient features of this definition of law are that it is (1) systematic, (2) societal, and (3) backed by force.[25] Thus, the meaning of law needed here is the sort that Judge Richard Posner terms "law as a source of rights, duties, and powers."[26] The question, then, is how these rights, duties, and powers look in practice.

Definitions aside, we think we have a good idea what law is. As Justice Potter Stewart might have put it, we probably assume we know it when we see it.[27] At the very least, we feel some confidence as to what the law is *not*.

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[23] MICHIO KAKU, HYPERSPACE 112 (1994).
[24] *Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[25] *Id.*
[26] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 220-21 (1990). Other concepts denoted by the word "law," according to Judge Posner, are "law as a distinctive social institution[—]that is the sense invoked when we ask whether primitive law is really law[—and] law as a collection of sets of propositions—the sets we refer to as antitrust law, the law of torts, the Statute of Frauds, and so on." *Id.* at 220-21.
[27] This, of course, is a reference to *Jacobellis v. Ohio*, in which a concurring Justice Potter Stewart famously wrote, concerning hardcore pornography: "[b]ut I know it when I see it . . .". Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

1. *Mead Corp.* and the Intuitive Appeal of Classical Law

This confidence was on proud display in *United States v. Mead Corp*.[28] At stake in *Mead Corp.* was the legal force of United States Customs Service classification "ruling letters." *Ruling letters* are decisions by point-of-entry customs field officers classifying imported goods according to tariff schedules. These ruling letters interpret the statutory customs scheme to determine the classification of incoming goods (day planners, in this case) as subject to or exempt from tariffs. Ordinarily, an executive agency's reasonable interpretation of its enabling statute is entitled to deference so long as it does not contradict Congress's express intent.[29] But these interpretations were different. In an eight-to-one decision, the Court dismissed the notion that these classification rulings—thousands of which issue each year from dozens of widely scattered field offices—could carry the force of law. But why?

Though the Court's conclusion rested primarily on the intricacies of congressional intent and administrative practice, Justice Souter voiced a visceral rejection of the notion that so many rulings issued in such a decentralized fashion could be *law*. "Any suggestion," he wrote, "that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply *self-refuting*."[30] In a lengthy dissent peppered with dire warnings, Justice Scalia railed against the Court's reasoning. But in a moment of grudging agreement, he noted of "[t]he Court's parting shot, that 'there would have to be something wrong with a standard that accorded the status of substantive law to every one of 10,000 "official" customs classifications rulings turned out each year from over 46 offices placed around the country at the Nation's entryways,' . . . *I do not disagree*."[31]

Surely this renunciation goes too far. The Social Security Administration disposes of over eight million claims for benefits

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[28] *See* United States v. Mead Corp., 533 U.S. 218, 234 (2001).
[29] *Id.* at 226-27. This is known as the "*Chevron* doctrine." *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
[30] *Mead Corp*., 533 U.S. at 233 (emphasis added).
[31] *Id*. at 258 n.6 (Scalia, J., dissenting) (quoting Souter, J.) (emphasis added).

every year, with most claims wending their way through a byzantine network of state and federal offices.[32] Yet no one seriously doubts that these dispositions, although subject to review, enjoy legal force. So something else must account for the incredulity expressed by both the majority and the dissent in *Mead Corp.* Very likely, there was something about the process or the "appearance" of this activity that Justices Souter and Scalia found incompatible with their preferred understanding of legally binding norms.[33] After all, society cannot just let some guy with a clipboard on a dock make *law*, can it?

Revealed in this curious dictum is a distaste for the idea that low-level employees in the peripheries of bureaucracy can make prescriptive, prospective, and generally applicable law. This suspicion is not of highly diffuse and prolific lawmaking authority, but rather of highly diffuse and prolific *rulemaking* authority. The fact is that society seems comfortable with Social Security claims being processed at rates vastly outstripping that at which customs rulings were being "churned out" (and at many more than 46 offices). This suggests that agency adjudications (to say nothing of judicial decisions generally) produce no similar suspicion that the fundamental substance of the law is being worked into a froth. When the law is already spelled out, we trust courts and even agency underlings to apply it, even when the effects of those decisions look

[32] *See* SOC. SEC. ADMIN., FISCAL YEAR 2012 BUDGET OVERVIEW 8 (2011). This figure includes "4.6 million retirement, survivor, and Medicare claims; approximately 3.3 million Social Security and SSI initial disability claims; and 349,000 SSI aged claims." *Id.* This claims figure does not speak at all to the number of appeals processed, which the SSA totals as "approximately 744,000 reconsiderations, 823,000 hearings, and 140,000 Appeals Council appeals." *Id.*

[33] An alternative explanation is that Justices Souter and Scalia, while still sweeping too broad in their protestations, did not mean that such rulings cannot have *any* force of law. Rather, we might conclude, they meant to suggest that classifications rulings issued in this manner cannot have *this kind* of legal force. This explanation allows for the possibility that other forms of legal force might proceed from various governmental actions (e.g., informal adjudications by the SSA), but that they must be more clearly adjudicatory in nature. By this formulation, even these very customs rulings might have legal force if they were purely adjudicatory in function and not implicitly creating binding and forward-looking norms. In either event, I feel confident that the "self-refuting" criteria to which the Court adverts cannot be taken literally.

an awful lot like new rules.[34] To allow low-level bureaucrats to *prescribe*, on the other hand, seems beyond the pale. This is not so unlike Einstein's visceral rejection of the principles of quantum mechanics. Just as these justices found it "self-evident" that law cannot be made in such a *vulgar* fashion, Einstein just "knew" on some basic level that the universe could not ultimately be cut from "low grade wood."[35] History has not been kind to Einstein's skepticism; the incredulous dictum from *Mead Corp.* deserves no greater favor.

This discomfort complements (and is likely the progeny of) the simplest narrative of the law: legislators craft laws and judges interpret and apply them. These laws are largely stable, which is to say they remain in force either until the legislature changes them through the same laborious process by which they were forged, or until a court invalidates them. This, then, is "classical" law. And aside from the observation that "laws, like sausages, cease to inspire respect in proportion as we know how they are made,"[36] most people—Supreme Court justices notwithstanding—probably find this a more tasteful sort of law than what might be promulgated by guys on docks with clipboards.

But this polished marble of formalism and stability loses its luster under closer scrutiny. As alluded to above, the stability of even statutory law is not absolute: courts can find a statute unconstitutional. When that happens the law disappears and is no more. Hovering about the tombs of such laws is the philosophical question of whether an unconstitutional law was ever a law at all. It is one thing to make a metaphysical pronouncement such as "an unconstitutional law is void, and is as no law"[37] or that it "is no law at

[34] As Justice Murphy explained in the landmark *Securities and Exchange Commission v. Chenery Corp.*, agencies can use the adjudicatory mechanism to "announc[e] and appl[y] a new standard of conduct" even when such announcement or application has retroactive effect. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). After all, he noted, "[e]very case of first impression has a retroactive effect." *Id.*

[35] *See* ISAACSON, *supra* note 21, at 336–37 (2007).

[36] *An Impeachment Trial*, U. CHRON., U. OF MICH., Mar. 27, 1869, at 4 (quoting poet John Godfrey Saxe).

[37] *Ex parte* Siebold, 100 U.S. 371, 376 (1879).

all."[38] It is quite another to pretend that these laws do not possess all the attributes and produce all the effects—including obedience and reliance—of other systematic and force-backed societal rules until that fateful day when they are pronounced "no law at all."

One need look no further than the Supreme Court's decision in *Stern v. Marshall* to see how a statute long adhered to can be unceremoniously rendered a non-law.[39] *Stern* held that a statutory provision concerning certain bankruptcy-related common-law counterclaims was unconstitutional.[40] So-called *Stern* claims are compulsory counterclaims arising in a bankruptcy that do not constitute core proceedings under the bankruptcy. Congress, pursuant to its bankruptcy power, had granted jurisdiction over such claims to the Article I bankruptcy courts. The Supreme Court held that this jurisdictional provision violated the grant of the judicial power in Article III, meaning that all prior final judgments on *Stern* claims had been, unbeknownst to the litigants, invalid.[41] Can one really say with a straight face that every bankruptcy judge, every party filing a state-law counterclaim, every party abiding by a ruling in such a counterclaim, was merely going through the motions of an elaborate pantomime that had literally *nothing* to do with the law? And if one insists this is the case, is such a formulation anything other than academic?

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[38] Tyler v. Dane County, 289 F. 843, 846 (W.D. Wis. 1923). This is itself a reformulation of the Augustinian axiom that "an unjust law . . . is no law." SAINT AUGUSTINE THE TEACHER: THE FREE CHOICE OF THE WILL, GRACE AND FREE WILL 81 (Robert P. Russell, trans. 1968). American jurisprudence, however, pares back this broader statement as elevating "natural law" above the Constitution. *See, e.g.*, Calder v. Bull, 3 U.S. 386, 398-99 (1798) (opinion of Iredell, J.). Of course, for Saint Augustine natural law *was* fundamental in just the way that the Constitution is to the U.S. government, so it is reasonable to find a certain equivalence in the philosophical postulates these axioms share.

[39] *See* Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011).

[40] Procedures. 28 U.S.C. § 157(b)(2)(C) (2005).

[41] Subsequent cases have softened *Stern*'s impact by clarifying its scope, but these decisions would not necessarily spare these pre-2011 *Stern* claims. *See* Exec. Benefits Ins. Agency v. Arkison *(In re Bellingham Ins. Agency, Inc.)*, 134 S. Ct. 2165, 2168 (2014); Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1946-47 (2015).

2. Virtual Law As an Alternative to Non-Law

There is an alternative formulation. A law passed, codified, and obeyed but later invalidated can be seen as having been a law in every meaningful respect until the point at which it was struck down, at which point it merely vanishes. It is a "virtual law," akin to the "virtual particles" described above, its collapse precipitated by judicial observation. The practical effect is no different from that of a statute repealed through the legislative process. The legal force borrowed from the constitutional universe disappears back into the ether from which it sprang. Its past effects persist, but to all who later act within the virtual law's ambit, the law is mere memory.[42] Thus, the only truly "classical" law (i.e., law that cannot be struck down or changed by terms other than its own) is the Constitution. By definition, there can be no "unconstitutional" provision of the Constitution. Move one step away from that underlying fabric of the legal universe, and laws remain fairly classical by all appearances, but one cannot assume their stability without question. Statutes (as well as treaties passed in accordance with Article II of the Constitution),[43] then, occupy the first step on the spectrum away from classical law and toward what I call *quantum law*.

Key to this model is the role of what I have referred to as *judicial observation*. Judicial observation does not reveal only whether a law is "real" or "virtual." Judicial observation, like an observation in a physicist's laboratory, fixes some quality of its object relative to the world around it. By interpreting the law, judges shake the uncertainty from that law's practical manifestation. If judges are the observers and the laws are what judges observe, then higher-

[42] This formulation might well understate the impact of the ripples created by an invalidated law's past effects. Outcomes in legal disputes do not exist in a vacuum, so when an earlier disposition is premised on a law that is later overturned, the effects emanating from that disposition interact with other occurrences just as they would if the law had never been invalidated. An adverse disposition in a bankruptcy suit can spell the difference between poverty and plenty, and—whatever the Supreme Court says *ex post facto* of the process involved—each of these outcomes would itself produce economic and social effects that are not isolated to the litigants in the proceeding. Thus, even if we accept that "an unconstitutional law is no law at all," this cannot mean that it is *nothing* at all. *See Tyler*, 289 F. at 846.

[43] U.S. CONST. art. VI, cl. 2.

order laws provide constraints much like the slits in our experiment. The legislative process produces a law, the effects of which are felt by those the law governs, including entitlement recipients, regulators, regulated entities, and regulatory beneficiaries. But when a judicial observation is brought to bear on a particular law in a particular situation (the judicial equivalent of an experiment), the law either passes through the obstacle course of superior laws or it does not. And when that law is held to pass within the range (or ranges) permitted by the regimes to which it is subject, we also know whether the particular application under review is permissible. In other words, the court tells us whether the challenged law passes through the "slits" (that is, constraints imposed by higher-order law) and which slit it passes through.

Here is a quick illustration. Suppose Congress passes and the President signs a bill banning the use of subversive physics metaphors in law-review articles. Until someone instigates an "experiment" (that is, challenges the statute in court), the effects of the law multiply and interact with one another unimpeded. Even before the experiment, the Constitution is a theoretical slit to which the law must conform. Before launching the experiment, however, no one is manning the slit: maybe the law finds its way through, and maybe it does not. But once some oppressed author sues over this content-based restriction on expression, the court brings its sensors to bear on the question whether this law has in fact passed through the independent constraint. If the court's observation finds this law to be improperly calibrated, the law is overturned, and its failure to navigate the obstacles is confirmed. But just as a photon can have the effect of going through both slits at once despite its inability to perform the underlying feat when observed, the law can have the effects associated with having conformed to its own constraints even though it was invalidated as "no law at all." Put another way, the past effects of this law were real, and they do not go away, but the law has no further effect going forward.

So potent a force is judicial observation in our legal reality—and so pervasive is uncertainty—that even the paradigmatic classical law of the Constitution can be forced to conform to its strictures. To cite a famous example, one might ask what is meant by the term

"privileges or immunities of citizens of the United States."[44] The vast majority of Americans might understand the phrase one way, and many meanings—each conveying a slightly different nuance—are possible. But the Court's interpretative observation in the *Slaughter-House Cases* confirmed only one.[45]

Admittedly, at this level of analysis, a quantum model adds little to our understanding of judicial interpretation. But describing higher-order laws as mile markers at which a law can be observed and its inherent uncertainty collapsed sets the stage for the layers of law that lie far beneath the Constitution's "classical" veneer.

Beyond statutory law, administrative regulations are yet another step further down this spectrum. Regulatory laws vary from higher-order laws in several regards. First, courts can strike down a regulatory law for constitutional infirmity, as well as for violating its enabling statute or even some other statute. Second, the processes for creating legislative rules in the administrative context are less centralized and less formal than legislation. Third, regulations are more vulnerable to repeal than statutes: whereas only another statute can repeal a statute,[46] regulations are subject to repeal both by statutes and by the rulemaking process that created them.

Then there is state law. State constitutions are subject to all of the previously mentioned breeds of federal law, so they are theoretically even less stable. Nevertheless, there are large areas over which these separate authorities do not overlap. So, for instance, courts seldom confront federal regulation that preempts a state's constitution.[47] State statutory and regulatory laws are subject to still

[44] U.S. CONST. amend. XIV, § 1, cl. 2.

[45] Slaughter-House Cases, 83 U.S. 36, 74 (1872). Note that it would go too far to say that the Court invalidated all but one. In reality, the Court foreclosed many, if not most, readings of the Privileges or Immunities Clause, but some residual uncertainty inevitably remains. Because this clause is viewed essentially as a dead letter, that remaining modicum of uncertainty will likely persist into the foreseeable future, like a jurisprudential Schrodinger's cat, indefinitely suspended between living and not.

[46] That is, by bicameral passage and presentment to the President. U.S. CONST. art. I, § 7, cl. 2.

[47] The rarity of this situation is doubtless augmented by substantive canons of interpretation that erect presumptions against implicit preemption of state law. *See,*

more overriding legal constraints to which they must conform if they are to survive. Thus the image that emerges is of a linear relationship among different bodies of law and their distance from pure classical law (the Constitution).[48] That distance corresponds to relatively greater degrees of instability accompanied by relatively less pomp in their formation.[49] Nevertheless, the congeries of legislative activity described thus far still constitutes a mundane sort of law. Although a hint of quantum character begins to show through, nothing is particularly bizarre about the theoretical fraying that occurs when legislative authority is delegated or, as is the case in our federal system, divided between two distinct political spheres. But these

e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). Canons such as this—as well as those erecting presumptions against derogation of common law and derogation of customary international law absent express intent—have the effect of maximizing the instability of higher-order laws vis-à-vis lower-order laws in that they broaden the sweep of judicial discretion when interpreting laws that force consideration of difficult jurisprudential questions. The result is that it can often be difficult to know the effects of federal laws on state laws. Presumably, this provides a bulwark of stability in state laws.

[48] A particular kind of law's relative "quantumness" seems to bear very little relationship to the amount of democratic accountability or legitimacy it possesses. Considering the onerous (and often fruitless) process that must be undertaken to amend it, the Constitution is perhaps the least democratic of all American law, even when compared with the oft-assailed federal judiciary, which at least requires that judges be appointed and confirmed by democratically accountable branches. Of course, the Constitution makes up with legitimacy what it lacks in democratic responsiveness.

[49] This description may give short shrift to the pomp, as I have called it, of ratifying state constitutional law. This would not be fair of me to do without at least an acknowledgement of the widely different sets of practice implicated by the constitutional laws of different states. Although state constitutional law in many instances might be an exception to this observation, there are at least a couple of examples that support such a generalization. Many states allow for constitutional amendment through ballot initiative, which is as decentralized a way of making law as exists. *See State-by-State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST. AT THE UNIV. OF SOUTHERN CAL., http://www.iandrinstitute. org/statewide_i&r.htm (last visited Nov. 21, 2015). Moreover, states are smaller and more insular, and their electorates share more common interests and are divided by fewer cleavages. This may obviate the more difficult formal requirements in a way that is less likely to happen at the federal level.

examples do not occupy the entire field, and they certainly do not populate its outer bounds.

With a paper and pen, any two individuals can write a binding law as between themselves. A contract binds its signers as surely as any statute, albeit without the criminal statute's concomitant threat of punishment for violation.[50] In fact, even paper and pen are unnecessary if the contract does not trigger the Statute of Frauds.[51] And while a contract is—ostensibly, at least—a creature of individual consent, an agreement to be bound engages the state's legal apparatus and can impose limits on the legal relationships that others can enter into. But there remain certain trappings of formalism, especially in the formation of a contract.[52]

A contract must conform in all ways with each type of law described above.[53] It must also conform to the common law within the jurisdiction where enforcement is sought.[54] Beyond that, a contract is governed by its own internal rules: its duration, its objects, and the manner of its execution are all dictated—within the bounds permitted by higher-order laws—by its own terms. Myriad contracts are entered into every day—even the docks and clipboards are gone—and in as many places, and each contract carries the force of

[50] To be sure, however, this is not to say that violation does not bring to bear the state's coercive powers.

[51] U.C.C. § 2-201(1) (AM. LAW INST. & UNIF. LAW COMM'N 2002) (explaining that contracts for the sale of goods in excess of $500 require some form of writing).

[52] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981) (describing the formal requirements of consideration).

[53] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 179 (AM. LAW INST. 1981) (describing bases of public policy against judicial enforcement of contracts). Note that a contract that "violates" the Constitution is not invalid per se, but a court cannot enforce a contract in such a way as to violate the Constitution. *Id.* Thus, the analysis is nearly identical to that of *Shelley v. Kraemer*. *See* Shelley v. Kramer, 334 U.S. 1, 10-14 (1948).

[54] *See, e.g.*, VA. CODE ANN. § 11 (2006) (listing contract requirements for the Commonwealth of Virginia). *See also*, Flores v. Am. Seafoods Co., 335 F.3d 904, 910 (9th Cir. 2003) (applying the parties' jurisdictional choice of law). Choice of law adds another wrinkle to this manner of "lawmaking." Though not the topic of this article, issues pertaining to contractual choice of law amplify the uncertainty associated with the legal ripples emanating outward from any contract, thus making such issues appropriate considerations in determining which end of the quantum spectrum a particular contract lies within.

law but somehow manages to escape even a hint of the epithet "simply self-refuting."

A similar analysis can be applied to property transactions. At the simplest level, a property transaction is a purely private affair, even when one of those private parties is a public entity like a state.[55] But if one accepts the well-worn adage that property is a bundle of legal rights,[56] then a property transaction reconfigures those rights by redefining the legal relationships between the parties and of the parties to the property. So we might say a property transaction changes the law as to its parties. Put another way, one can see property laws as canals through which legal rights flow, and a property transaction serves to reroute the canals that connect the parties and the property. Just as contract law allows parties to make binding law as between themselves, property law behaves similarly, especially where the transaction involves land with covenants running to it. And just as parties may not contract so as to violate the Constitution, federal law, state law, or the common law of their jurisdiction, so too are their covenants restricted by the entire panoply of laws that take precedence over the whims the parties would conscript the judiciary to uphold.[57] Under the rules of property law, the dock and clipboard are themselves up for grabs and the agreement of the parties—lacking even the formality of consideration—undoubtedly possesses the force of law. Again, it

[55] "[L]ike other associations and private parties, a State is bound to have a variety of proprietary interests. Alfred L. Snapp & Son, Inc. v. Puerto Rico, *ex rel.,* Barez, 458 U.S. 592, 601 (1982). A State may, for example, own land or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors." *ex rel., Barez*, 458 U.S. at 601.

[56] *See, e.g.*, Kaiser Aetna v. United States., 444 U.S. 164, 176 (1979) ("the bundle of rights that are commonly characterized as property . . .").

[57] *See, e.g.*, Shelley, 334 U.S. at 19-20. The Court in *Shelley* splits hairs over the legality of the covenant itself by technically proscribing only judicial enforcement of a constitutionally repugnant covenant. *Shelley*, 334 U.S. at 19-20. Chief Justice Vinson wrote that "judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement." *Id.* at 20 (footnote omitted). This quotation from *Shelley* is doubly illustrative in that it also demonstrates the relative position of the relevant common law on the quantum continuum.

seems Justice Souter left out something tacitly understood but quite important in his sweeping pronouncement.

C. Military Law

The relatively more quantum species of law described above are still familiar, despite the gradually increasing proliferation of "slits." These forms are fixed features in what we think of as the normal or traditional legal motif. Military law is, to the vast majority of Americans, significantly less familiar. Even seasoned jurists treat it as downright exotic. The Supreme Court itself has described military law with a deference approaching awe. "An army," wrote Justice Brewer for a unanimous court, "is not a deliberative body. It is the executive arm. Its law is that of obedience."[58] But this truism offers no help in understanding the nature of that unquestionably executive law. It leaves open questions of whether obedience is legal per se, and what manner of limits can operate on a commander's discretion to issue a directive. Justice Brewer elaborated but still left little room for these inquiries:

> No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer, and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other. So, unless there be in the nature of things some inherent vice in the existence of the relation [between the soldier and the army], or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed.[59]

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[58] United States v. Grimley, 137 U.S. 147, 153 (1890).

[59] *Grimley*, 137 U.S. at 153. *Grimley* centered about the court martial of John Grimley for desertion. *Id.* at 149. Grimley had falsified his enlistment, though, and had attempted to use this fact as a shield on the theory that he had never been enlisted at all and hence could not have deserted. *Id.* at 149-50. Justice Brewer's comment regarding "inherent vice in the existence of the relation" is a reference to the defect in Grimley's enlistment, which was nothing more than that he had claimed to be younger than he was in fact. *Id.* at 153. This did not amount to the sort of vice to which the Court referred, and it was thus insufficient reason in the eyes of the Court to disturb the relationship between Grimley and the Army that was premised on "the law . . . of obedience." *Id.* at 153-54.

Despite this almost mystical relationship of command and obedience described by the Court, it is well established that unreasonable obedience to an unlawful order is neither legal nor defensible.[60] Further, a commander's authority to govern his or her subordinates by fiat has definite limits. It is the sources of this authority to command by order and the contours of its constraints that truly define military law, and these features provide the context necessary for placing military orders along our quantum spectrum of legal activity.

1. The Uniform Code of Military Justice ("UCMJ")

At the highest level, a body of statutory law called the UCMJ governs the military.[61] Congress passed the UCMJ under its constitutional authority to "make Rules for the Government and Regulation of the land and naval Forces."[62] Beyond the UCMJ, there are numerous other statutes by which Congress exercises power over

[60] This has famously been described as the "Nuremberg defense," which provides that disobedience of some orders can be seen as not only lawful but as obligatory if the orders violate some higher-order law. *See* United States v. Huet-Vaughn, 43 M.J. 105, 114 (C.A.A.F. 1995) (explaining that the Nuremberg defense applies "only to individual acts committed in wartime . . . 'that constitute[] a crime . . . [leaving] no rational doubt of [] unlawfulness.'"). It is an affirmative defense to disobedience, and it is so named for the principle that those tried at Nuremberg should have disobeyed certain military orders because of duties arising under international law. *See, e.g.*, *Huet-Vaughn*, 43 M.J. at 114-15 (explaining that "[t]he duty to disobey an unlawful order applies only to 'a positive act that constitutes a crime' that is 'so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.' ") (citing United States v. Calley, 22 C.M.A. 534, 543 (1973)). The standard in *Huet-Vaughn* is a steep one indeed, but its pedigree is unquestionable. Using language not at all unlike that of Justice Brewer in *Grimley* (but predating *Grimley* by more than two decades), Judge Deady in *McCall v. McDowell* enunciated the core concern with empowering soldiers with discretion to disobey their superiors' orders. The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. McCall v. McDowell, 15 F. Cas. 1235, 1240 (C.D. Cal. 1867). One might ask whether this leaves a gap sufficient for even the narrow edge of the *Huet-Vaughn* standard.

[61] *See generally* Uniform Code of Military Justice, 10 U.S.C. Subt. A, Pt. II, Ch. 47. The Constitution itself provides some degree of even more fundamental law governing the military. *See, e.g.*, U.S. CONST. amend. III. But the Constitution is strictly classical in nature, which means a discussion of these provisions would add very little to this discourse.

[62] U.S. CONST. art. I, § 8, cl. 14.

the military.[63] But the UCMJ is the basic kernel of military law in that it sets forth the relationship between the service member and all other military law, and its edicts form an essential part of every service member's basic military education.[64]

Many provisions of the UCMJ are quite specific. The UCMJ prescribes strictures for many kinds of personal and professional conduct, with prohibitions against such sundry offenses as sodomy,[65] misbehavior before the enemy,[66] absence without leave ("AWOL"),[67] mutiny,[68] malingering,[69] and dueling.[70] The UCMJ also defines and proscribes common criminal offenses such as rape,[71] assault,[72] murder,[73] and arson.[74] It also carefully circumscribes the sorts of proceedings (both judicial—i.e., court-martial[75]—and non-judicial[76]) that are appropriate for adjudicating alleged violations of the UCMJ's punitive articles, and the sentences that may be awarded upon conviction.[77]

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[63] *See, e.g.*, Department of the Army, Organization, 10 U.S.C. § 3011 (providing that the Department of the Army is organized under the Secretary of the Army).
[64] *See, e.g.*, U.S. ARMY TRAINING AND DOCTRINE COMMAND, INITIAL ENTRY TRAINING SOLDIER'S HANDBOOK (2008), http://www.tradoc.army.mil/tpubs/pams/p600-4.pdf.
[65] Forcible Sodomy; Bestiality, 10 U.S.C. § 925 (1956).
[66] Misbehavior Before the Enemy, 10 U.S.C. § 899 (1956).
[67] Absence Without Leave, 10 U.S.C. § 886 (1956).
[68] Mutiny or Sedition, 10 U.S.C. § 894 (1956).
[69] Malingering, 10 U.S.C. § 915 (1956).
[70] Dueling, 10 U.S.C. § 914 (1956).
[71] Rape and Sexual Assault Generally, 10 U.S.C. § 920(a) (1956).
[72] Assault, 10 U.S.C. § 928 (1956).
[73] Murder, 10 U.S.C. § 918 (1956).
[74] Arson, 10 U.S.C. § 926 (1956).
[75] *See* Courts-Martial Classified, 10 U.S.C. § 816 (1956).
[76] *See* Commanding Officer's Non-Judicial Punishment, 10 U.S.C. § 815 (2002). Non-judicial punishment ("NJP") is a less formal adjudicatory option that is available to commanding officers when dealing with alleged offenses by members of their commands. But someone accused in such a proceeding can demand a trial by court-martial unless attached to an embarked vessel. Although less formal, NJP is a legal proceeding, and "awards" at NJP can include correctional custody, extra duties, demotion, forfeiture of pay, and "confinement on bread and water . . . for not more than three consecutive days." 10 U.S.C. § 815(b)(2)(A) (2002).
[77] *See* 10 U.S.C. §§ 855-58b (approved 2015).

Among the UCMJ's punitive articles, there are also several broadly defined substantive offenses that are unique to the customs and traditions of the military. For instance, "conduct unbecoming an officer and a gentleman" is punishable if committed by a commissioned officer or a candidate for commission.[78] Additionally, the UCMJ's "General Article" covers any residual offenses not mentioned. It forbids "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital."[79] Beyond these "catch-all" provisions, there are also punitive articles that delegate legal authority over subordinates to superiors. Article 90 makes willful disobedience of any superior commissioned officer an offense punishable by death in time of war and at any other time by "such punishment, other than death, as a court-martial may direct."[80] Article 91 extends this offense to the willful disobedience of a lawful order given by "a warrant officer, noncommissioned officer, or petty officer."[81] Finally, article 92 provides for punishment of violating or failing "to obey any lawful general order or regulation," as well as knowingly failing to obey "any other lawful order issued by a member of the armed forces, which it is his duty to obey."[82] As noted above, the fact that these articles make the failure to obey lawful orders punishable as substantive offenses has the effect of legal delegation.

2. Delegation of Military Authority Beyond the UCMJ

Once past the statutory framework that Congress has furnished to govern and regulate the military, it is delegation all the way down. The President is designated the commander in chief of

[78] Conduct Unbecoming an Officer and a Gentleman, 10 U.S.C. § 933 (1956).
[79] General Article, 10 U.S.C. § 934 (1956).
[80] Assault or Willfully Disobeying Superior Commissioned Officer, 10 U.S.C. § 890 (1956).
[81] Insubordinate Conduct Toward Warrant Officer, Noncommissioned Officer, or Petty Officer, 10 U.S.C. § 891 (1956) (extending only punishments other than death to willful disobedience offenses). This article also criminalizes contemptuous and disrespectful behavior toward warrant officers, noncommissioned officers, and petty officers. 10 U.S.C. § 891(2) (1956).
[82] Failure to Obey Order or Regulation, 10 U.S.C. § 892 (1956). This article also defines as a substantive offense dereliction in the performance of duties.

the armed forces by the Constitution,[83] and Congress has specifically authorized the President to "prescribe regulations to carry out his functions, powers, and duties" relating to military affairs.[84] It is not entirely clear how much daylight, if any, exists between the powers delegated to the President by the Constitution and those delegated by Congress.[85] Indeed, considering the Supreme Court's view of the commander in chief power, the statutory authorization might have little more significance than an approving nod by Congress.[86]

[83] U.S. CONST. art. II, § 2, cl. 1. *See, e.g.*, United States v. Eliason, 41 U.S. 291, 301 (1842) ("[t]he power of the executive to establish rules and regulations for the government of the army, is undoubted.").

[84] Regulations, 10 U.S.C. § 121 (1956). Congress has by statute also authorized the President to prescribe regulations for the Army (Department of the Army: Regulations, 10 U.S.C. § 3061 (1956)) and Air Force (Department of the Air Force: Regulations10 U.S.C. § 8061 (1956)), as well as in a few other specific capacities. It is difficult to imagine what work these authorizations do that 10 U.S.C. § 121 does not, but Congress has nonetheless seen fit to at least voice its acquiescence to the exercise of such power from time to time. *See generally* 6 C.J.S. *Armed Services* § 25 (2015) (describing the President's commander-in-chief powers).

[85] Historically the President and other members in the chain of command were considered to have regulatory power only insofar as such power was confined to executive prerogatives. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 33-34 (2d ed. 1920). Though now disfavored, the doctrine of nondelegation was long considered fundamental to understanding the contours of executive authority to regulate the military. "A regulation which assumes to prescribe in regard to a matter which is properly the subject for original legislation, departs from 'the range of purely executive or administrative action,' is in a just sense a regulation no longer, and can have no legal effect as such." *Id.* at 33 (footnote omitted) (quoting 6 ROBERT FARNHAM, OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES 15 (1856)). However, it is an open secret that the distinction between executive regulatory power and constitutionally defined legislative power is largely illusory. *See*, *e.g.*, Whitman v. Am. Trucking Associations, 531 U.S. 457, 488 (2001) (Stevens, J., concurring).

[86] *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3160 (2010) ("[m]ilitary officers are broadly subject to Presidential control through the chain of command and through the President's powers as Commander in Chief."). One possible explanation is that Congress, like the Court, is more concerned with the potential for turning the military into a "debating school" than with granting to the President too much discretion in matters concerning the regulation of the military. In that case, it might be Congress's intent to provide the President with the benefit of a unified command voice by preemptively placing the President's power at its zenith. As Justice Jackson put it in *Youngstown Sheet & Tube Co. v. Sawyer*, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he

Nevertheless, both forms of delegation obtain, and either is sufficient in itself to allow the President to make rules governing the military.[87]

The President has the authority to delegate his own powers to certain officers chosen "with the advice and consent of the Senate."[88] Congress has also delegated, subject to Presidential approval, rulemaking authority over the military to the Secretary of Defense,[89] to a host of deputies and undersecretaries,[90] and to the secretaries of each military branch over their respective components.[91] Then, operating under the "authority, direction, and control" of their respective secretaries, the staff offices of the Military Service Chiefs are empowered to develop plans for "recruiting, organizing, supplying, equipping. . . training, servicing, mobilizing, demobilizing, administering, and maintaining" their departments and providing "detailed instructions for the execution of the approved plans and supervis[ing]" their implementation.[92] But while the Service Chiefs are technically the military's highest-ranking commissioned officers, the Combatant Commanders enjoy effective operational "authority, direction, and control"—subject only to direction by the President and Secretary of Defense—over the vast Combatant Commands they head.[93]

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possesses in his own right plus all that Congress can delegate." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

[87] Note, however, that such rules are at least one, and perhaps two, steps away from the classical bedrock of the Constitution. *See, e.g.*, *Youngstown*, 343 U.S. at 635-39.

[88] General Authorization to Delegate Functions; Publication of Delegations, 3 U.S.C. § 301 (1951).

[89] Secretary of Defense, 10 U.S.C. § 113 (2014) (narrowly defining the authority delegated to the Secretary of Defense, absent delegation from the President).

[90] *See generally* 10 U.S.C. §§ 131-44 (1956) (creating the Deputy Secretary of Defense, 14 Assistant Secretaries, Inspector General, Director of Operational Test and Evaluation, General Counsel, ODS personnel, Director of Small Business Programs, and Under Secretaries of Defense for Acquisition, Policy, Comptroller, Personnel and Readiness, Intelligence, and Chief Information Officer).

[91] 10 U.S.C. §§ 3013, 5013, 8013 (1956). Similar authority exists for the Secretary of Homeland Security over the Coast Guard (14 U.S.C. § 633 (1949)).

[92] *See* 10 U.S.C. §§ 3032, 5032, 8032 (1986). The Military Service Chiefs occupy extremely influential positions, they do not exercise operational command over their services.

[93] Commanders of Combatant Commands: Assignment; Powers and Duties, 10 U.S.C. § 164 (2008). A Combatant Command is either a Unified Combatant

3. Delegation of Military Authority As a Gap Filler

Further down the authority to regulate the military goes. But let's return now to those three delegative articles—10 U.S.C. sections 890, 891, and 892. As noted above, the UCMJ enumerates the failure to obey a general order as a substantive offense,[94] but the UCMJ does not define the term "general order." Nor does the UCMJ define who has the authority to promulgate such orders. These gaps have been filled in by accretion; military case law constitutes a common law of its own, and, "to maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or 'general usage of the military service.'"[95] Regarding general orders, this usage is distilled in the United States Manual for Courts Martial, which states:

> General orders or regulations are those orders or regulations generally applicable to an armed force which are properly published by the President or the Secretary of Defense, of Homeland Security, or of a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by: (i) an officer having general court-martial jurisdiction; (ii) a general

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Command or a Specified Combatant Command. *See* 10 U.S.C. § 161 (2011). A Unified Combatant Command is defined by statute as "a military command which has broad, continuing missions and which is composed of forces from two or more military departments." 10 U.S.C. § 161. A Specified Combatant Command is "a military command which has broad, continuing missions and which is normally composed of forces from a single military department." *Id.* These are often massive commands and include such newsworthy names as CENTCOM, PACOM, and the newly inaugurated AFRICOM. *See generally*, *About U.S. Central Command (CENTCOM)*, U.S. CENT. COMMAND, http://www.centcom.mil/en/ about-centcom (last visited Dec. 7, 2015).

[94] 10 U.S.C. § 892 (1956).

[95] Parker v. Levy, 417 U.S. 733, 744 (1974) (quoting Martin v. Mott, 25 U.S. 19, 35 (1827)). *See also* WINTHROP, *supra* note 85, at 17 ("[m]ilitary law proper is that branch of the public law which is enacted or ordained for the government exclusively of the military state, and is operative equally in peace and in war…Like [civil] law, it consists of a Written and an Unwritten law.").

> or flag officer in command; or (iii) a commander superior to (i) or (ii).[96]

This imposes a qualitative limit on who can issue these very rule-like orders, but it imposes no quantitative ceiling.[97] In fact, the President and the secretaries of the various military departments are authorized to designate "any. . . commanding officer" as having general court-martial jurisdiction, so the only limits are the number of commanding officers and the executive's policy choices regarding how widespread the authority ought to be.[98] This is a large pool from which to choose. The upshot is that "general orders and regulations," which bear all the hallmarks of a legislative rule, can be "churned out" at an astonishing rate at literally hundreds of commands around the globe.[99] When combined with the "law of obedience," one cannot help but notice the ever-advancing territory of the "self-refuting" proposition that vexed Justice Souter in *Mead Corp*.[100]

But the sheer promiscuity of this rulemaking authority is hardly its most shocking feature. The rules promulgated within the military do not govern only issues of "national security." Few organizations are as purely bureaucratic as the military,[101] so it

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[96] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV-23, ¶ 16.c.(1)(a) (2008) [hereinafter MCM].

[97] This is not, however, no limit at all. The authority to convene courts-martial is nondelegable; those who possess such authority do so from its source, and those not empowered by this font of authority cannot otherwise receive it. *See* 10 U.S.C. § 113 (2011); MCM, *supra* note 96, at II-48, R.C.M. 504(b)(4).

[98] Who May Convene General Courts-Martial, 10 U.S.C. § 822 (2006).

[99] And the reach of this jurisdiction is unquestionably global. The UCMJ's provision for extraterritoriality is sublimely succinct: "This chapter applies in all places." Territorial Applicability of this Chapter, 10 U.S.C. § 805 (1980).

[100] United States v. Mead Corp., 533 U.S. 218, 233-34 (2001).

[101] Max Weber, a celebrated sociologist and early organizational behavior theorist, famously enumerated "six features that characterize a bureaucracy: (1) it covers a fixed area of activity, which is governed by rules; (2) it is organized as a hierarchy; (3) action that is undertaken is based on written documents (preserved as files); (4) expert training is needed, especially for some; (5) officials devote their full activity to their work; and (6) the management of the office follows general rules which can be learned." RICHARD SWEDBERG & OLA AGEVALL, THE MAX WEBER DICTIONARY 19 (2005) (citing MAX WEBER, ECONOMY & SOCIETY (1922)). These criteria also characterize the military.

should come as little surprise that many of the rules governing the military are primarily bureaucratic in nature. Office policies, safety procedures, grooming standards, and dress codes are just a few of the categories of rules that apply generally to command personnel. And provided such policies and standard operating procedures ("SOPs") are reasonably understood as implicating disciplinary consequences (i.e., "punitive orders"),[102] their resemblance to the law as defined by Black's is uncanny: these rules are applied systematically; they apply to military society (and are accepted by society at large); and they are backed by the threat of coercive force.[103]

D. The Informality of Military Law

The military's rulemaking and enforcement authority stands in contrast to managerial policies in other executive agencies. Absent another substantive legal violation, agency SOPs and office policies do not ordinarily bind employees such that they face criminal liability. At most, low-level bureaucrats are typically subject to no

[102] "[I]f a regulation does not contain language establishing that it is a punitive regulation, a violation of the regulation is not a criminal offense. . . ". United States v. Shavrnoch, 49 M.J. 334, 336 (C.A.A.F. 1998). *See also* United States v. Hughes, 48 M.J. 214, 217 (C.A.A.F. 1998) ("[a]ny ambiguity in construing a punitive regulation should be resolved in appellant's favor.").

[103] It should be understood that military personnel with the authority to order subordinates do not have carte blanche. Orders that are "broadly restrictive of private rights must have some connection to military need." 57 C.J.S. *Military Justice* § 83 (2015). Thus, the specific elements of a lawful order or regulation are: "(1) issuance by competent authority – a person authorized by applicable law to give such an order; (2) communication of words that express a specific mandate to do or not do a specific act; and (3) relationship of the mandate to a military duty." United States v. Deisher, 61 M.J. 313, 317 (C.A.A.F. 2005). Relationship to military duty has, however, been interpreted quite broadly. *See, e.g.*, United States v. Lugo, 54 M.J. 558, 559 (N-M. Ct. Crim. App. 2000) (holding a general order prohibiting Marines from wearing earrings while off-duty and in civilian attire sufficiently related to military conduct to constitute a lawful order); Goldman v. Weinberger, 475 U.S. 503, 503 (1986) (holding a general order forbidding the wearing of yarmulkes in uniform to be lawful). Additionally, a properly issued general order is presumed to be lawful, and the accused violator bears the burden of demonstrating the unlawfulness of the order. United States v. Hughey, 46 M.J. 152, 155 (C.A.A.F. 1997).

worse than disciplinary termination.[104] But even if egregious lapses coupled with a related criminal offense might result in harsher forms of discipline, it is unthinkable that they might result, in and of their own force, in incarceration, let alone a three-day stint of subsistence on bread and water. Put simply, office rules outside the military context are not backed by force, so they fall short of our working definition of law.

In fact, it is not even clear that agencies themselves will be bound by their internal policies. Falling under the APA's rubric of "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," internal agency rules do not go through the same process as "legislative" rules, and courts have been reluctant to find in them binding legal force.[105]

By contrast, for the military, which is not subject to the procedural rigors of the APA,[106] properly formulated general orders and regulations governing a military unit's "organization, procedure, or practice" have the force of law, and subject service members ignore those laws at their own peril.[107]

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[104] *See generally* U.S. MERIT SYSTEMS PROTECTION BOARD, WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT? (May 2013) (describing in detail the disciplinary penalties and procedures for federal civil service employees).

[105] *See* Nina A. Mendelson, Agency Burrowing: Entrenching Policies and Personnel Before A New President Arrives, 78 N.Y.U. L. REV. 557, 666 n.71 (2003).

[106] *See* Rule Making, 5 U.S.C. § 553(a)(1) (1978) (exempting from rulemaking procedures those matters involving "military or foreign affairs function[s] of the United States").

[107] 5 U.S.C. § 553(b)(3)(A) (1978). Though dated, Colonel Winthrop's analysis of the lawfulness of military regulations fleshes the concept out nicely. "It is indeed somewhat loosely said of the army regulations by some of the authorities that they have 'the force of law,' but this expression is well explained by the court in U.S. v. Webster, as follows: 'When it is said that they have the force of law, nothing more is meant than that they have that virtue *when they are consistent with the laws established by the Legislature*.' That is to say, while they have a legal force, it is a force quite distinct from, and inferior and subordinate to, that of the statute law." (footnotes omitted) (emphasis added). WINTHROP, *supra* note 85, at 32 (quoting United States. v. Webster, 28 F. Cas. 509, 515 (D. Me. 1840)). Colonel Winthrop thereby establishes the legal obligation residing in military regulations while simultaneously noting the precarious position it occupies with respect to its superior law.

Even general orders promulgated in this fashion bear enough resemblance to other administrative rules that their increasingly quantum nature might not be unsettling. These "laws" are subject to ever more intricate legal constraints as they occupy ever-lower strata in the legal hierarchy. But general orders also affect a relatively small group of individuals. And the more a general order or regulation is susceptible to invalidation by the levels of law rising above it, the smaller the group of affected individuals grows.

The UCMJ's delegative articles do not stop at the level of general orders and regulations, and the correlation between smaller effective delegations of legal authority and increasing quantum uncertainty persists. Any military member of pay grade E-4 or above is endowed by the UCMJ with the authority to issue orders to their subordinates.[108] As with general orders and regulations, failure to obey these orders can result in criminal liability.[109] And, as with general orders and regulations, much of what transpires in the form of direct orders amounts to little more than office management. Nevertheless, the temptation to dismiss the notion that seemingly insignificant orders are "law" simply because they most often contemplate the mundane should be resisted. The workaday nature of many lawful direct orders stands in stark contrast to the most highly dynamic subset of such orders that occur on the battlefield.

With each successively more quantum form of lawmaking, the formality required decreases accordingly. To pass a statute that is

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[108] 10 U.S.C. § 891 (1956). There is an exception to this statement as I have formulated it. By a quirk of ranking structure, the Army employs some E-4 service members who are not noncommissioned officers; these are Specialists, and they typically work in technical fields. All members from the pay grade of E-5 and above are considered noncommissioned officers. *See generally*, *Enlisted Army Ranks*, MILITARY.COM, http://www.military.com/army/enlisted-ranks.html (last visited Dec. 21, 2015).

[109] *See, e.g.*, 10 U.S.C. § 890 (1956). But an order not to commit another substantive offense under the UCMJ is preempted by the other substantive offense. Thus, an order not to violate another punitive article cannot result in charges both for the underlying conduct and for the failure to obey the order. *See, e.g.*, United States v. Curry, 28 M.J. 419, 424 (C.M.A. 1989) ("[a]rticle 93, the punitive article which proscribes maltreatment of subordinates, preempted the conviction under Article 92 for disobedience of an order not to maltreat subordinates.").

subordinate only to the Constitution and that constitutes "the Supreme Law of the Land," [110] Congress must fulfill its constitutionally required procedures and navigate an obstacle course of internally created procedural rules. [111] To pass a generally applicable rule governing enormous swaths of American life and industry, an executive agency must, at the very least, undertake the years-long process of "informal" rulemaking, [112] which includes publication of the proposed rules and opportunity for interested parties to comment on the proposal, and the agency must respond to all major comments received.[113] Even following these formalities, statutes and regulations are nearly always subject to judicial review, provided they meet all requirements of justiciability. Military regulations governing a multi-million-volunteer fighting force, which spring from some combination of legislative delegation and the black box of intra-executive power, can be promulgated without resort to the APA.[114] General orders (other than those issuing from the uppermost reaches of the military's civilian leadership) require only promulgation by a properly designated commanding officer or other high-ranking officer.[115] An especially forward service member might challenge a general order or regulation, but typically only after having already run afoul of it. Finally, with direct orders from commissioned officers, warrant officers, noncommissioned officers, and petty officers, nearly all formality is stripped away. The ordering supervisor's rank and a clear statement that her full authority is being

[110] U.S. CONST. art. VI, cl. 2.
[111] U.S. CONST. art. I, §§ 5, 7.
[112] *See* 5 U.S.C. § 553 (1978) (providing for a number of exceptions, including the unctuously titled "good cause exception.") In order to issue a "legally binding norm," an agency must go through the formalities prescribed by the APA. *Id.*
[113] *See* United States v. Nova Scotia Food Corp., 568 F.2d 240, 249 (2d Cir. 1977) (interpreting 5 U.S.C. § 553 (1978) as requiring a reasonably developed record, including the data relied on by the agency and responses to pertinent questions from the public).
[114] 5 U.S.C. § 553(a)(1) (1978).
[115] *See* 10 U.S.C. § 892(1) (2015); MCM, *supra* note 96, at PT. IV, ¶ 16b. Note that no knowledge of the order is required. Neither, for that matter, is there a requirement that a service member reasonably should have known of the existence of a properly promulgated order. Promulgation includes publication, which presumably serves the purpose of giving notice to those subject to the order. But just as ignorance of the law is no defense, neither is ignorance of a lawful general order. *See* 10 U.S.C. § 892(1) (2015); MCM, *supra* note 96, at PT. IV, ¶ 16b.

invoked by the order are sufficient to satisfy the procedural requirements. And a challenge to such an order, absent a showing such as that required in *Huet-Vaughn* (that is, that the order is manifestly unlawful beyond any rational doubt),[116] must almost certainly come only after it has been obeyed. Nowhere is this truer than on the field of battle.

Combat footage from Fallujah on the Internet illustrates the two basic kinds of communication one is likely to encounter on a battlefield: operational information flowing both up and down the chain of command, and orders flowing exclusively down.[117] As to the former, soldiers on the ground continuously relay information about their surroundings to one another. The need for this kind of communication in combat is self-evident. But a combat unit is not run according to an abstract egalitarian ideal. It is not a committee. So although information flows omnidirectionally, the other form of communication does not: orders radiate from those with higher rank or positional authority to those with lower rank or positional authority. And if you watch enough of this footage, you will notice other patterns that emerge. Combat happens quickly. It is dynamic. It is chaotic. But the communication is fluid. It is seamless. Amid a flurry of "get out of here!" and "go, go, GO!" and "get up on the roof!" you will not find a "but" or a "why?" And this is probably how it should be. But that does not tell us what the law is doing in such a perilous environment.

In such environments, the delegative power conferred by the UCMJ is at its peak. This is attributable to more than just the unquestioned "right to command in the officer, or the duty of obedience in the soldier," although it is both.[118] It is law. And a soldier is not permitted the time to check an order against a table populated by all the international and domestic laws potentially

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[116] *See, e.g.*, United States v. Huet-Vaughn, 43 M.J. 105, 114-15 (C.A.A.F. 1995).
[117] *See*, *e.g.*, Avidanofront, *Iraq Fallujah – Intense Combat Footage Straight from the Frontlines*, YOUTUBE (Sept. 2, 2013), https://www.youtube.com/watch?v=hHr48aEhQh8&oref=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3DhHr48aEhQh8&has_verified=1(graphic content).
[118] *See id.*

implicated by an order. Hence, even if unlawful, to the soldier the order is law.

On the field of battle, uncertainty is so different in amount as to also be different in kind. Not only are these orders subject—in practice, of course, only ex post facto—to a multitude of higher-order laws to which they must conform, but they are also based on rapidly changing contemporaneous information. Whereas the legislative and regulatory processes typically allow for a leisurely influx of information, and even direct orders in an office environment can be issued as time permits (as in a memo or email), battlefield orders are affected by events immediately preceding them, and they will affect events that immediately follow. Even the speed with which informal adjudications sort claims into denied and approved piles does not approach the rapidity with which combat orders must issue. In other words, if normal law has a quantum character that is comparable to the releasing and eventual observation of individual photons, battlefield orders are more like the splashes of undifferentiated light: they come in waves.

E. Interactivity of Orders

The issue of how orders interact (and with what) is also important. Laws change circumstances to which they are addressed. Sometimes multiple laws affect the same objects, or a single law affects multiple facets of society. But the point is that laws tend to interact with one another. In the regulatory setting, it is not difficult to imagine how rules relating to water treatment might affect rules about agricultural water use, which might in turn interact with rules about cattle ranching, and so on.

Another, adversarial form of interaction occurs in the making and enforcing of laws. Some laws contemplate their own violation *ex ante*.[119] And while regulatory laws are crafted in part with the violator in mind, criminal law perfectly instantiates the notion that the law must impose consequences for its breach.

[119] This is, of course, the case with any law that prescribes a penalty. *See, e.g.*, Mitigating and Aggravating Factors to be Considered in Determining Whether a Sentence is Justified, 18 U.S.C. § 3592 (2006).

Criminal law focuses almost exclusively on its own violation, so one could say it is a body of law crafted in response to its enemy. The citizenry, to whom law should ideally be responsive, have directed the legislator, the prosecutor, and the judge to keep us safe by being "tough on crime." Criminal law thus embodies a fitful, slow-motion version of the battlefield calculus: the "good guys" know the "bad guys" are out there; they respond—either proactively or reactively—to what the "bad guys" do; and when the enemy adapts and responds, the soldier responds to that, too.[120] Hence, instead of laws that are ploddingly responsive primarily to the citizenry and its other "stakeholders" (e.g., regulated entities), battlefield orders are rapid-fire and unpredictable matters literally of life or death, and they respond primarily to an enemy whose interests are counter to those of the ordering commander's own nation.

In sum, the outer limits of the group of phenomena constituting lawful military orders are an expanse unlike any other area of law. Erupting from and informed by the vagaries of combat, lawful orders bind with all the force of any law (and more force than most),[121] albeit typically for only a few individuals and for only brief periods. Lawful orders are creatures of uncertainty; they cannot be lawful save by deftly avoiding conflict with the complex of laws superior to them in stature, but they can almost never be found unlawful (or confirmed as lawful) until after the fact. Moreover, as these bursts of lawmaking activity arise, they become entangled with other orders—of both friend and foe—in a web of interference, not unlike the chaotic interaction of ripples resulting from a fistful of

[120] Of course, the enemy on the battlefield is not, strictly speaking, breaking these laws. Rather, the enemy is likely to be operating in very similar ways such that enemy combatants are themselves enmeshed in webs of quantum lawmaking. This is decidedly less likely with "unconventional" enemies, but in either event, the "violation" that this law contemplates and responds to is countervailing quantum law. Disobeying a lawful battlefield order would be the actual violation, and the analysis of how such breach fits into the legal process involved is indistinguishable from that relating to criminal law above. *See, e.g.*, 10 U.S.C. § 890(2) (1956).

[121] Indeed, lawful orders given in time of war can be enforced with the harshest punishment available to the law. *See id.* (providing for the death penalty in the event of assaulting or willfully disobeying a superior commissioned officer in times of war). Thus, this is law's extremity in more ways than one.

pebbles being thrown into pond. If some law is deserving of the quantum metaphor, this is it.

This species of law is a far cry from the customs rulings in *Mead Corp*. In fact, attributing legal force to classifications "churned out" at 46 widely scattered brick-and-mortar customs offices can seem almost mundane in comparison. Even sausage making begins to seem a civilized and tidy endeavor. Nevertheless, the Court has held that—for whatever reason—customs rulings so promulgated do not have the force of law,[122] whereas the legal force of military orders is beyond serious cavil. But given their exotic nature, it is all the more important to examine the legal issues that lawful orders implicate.

II. THE LAW OF MILITARY LAW

In his seminal treatise on military law, Colonel William Winthrop had this to say of military regulations:

> To the student, as well as in practice, army regulations are the most unsatisfactory element of our written military law. Presented in connection with statutes from which they are sometimes imperfectly discriminated; not infrequently themselves partaking of the character of legislation and thus of doubtful validity; and fatally subject, as we have seen, to constant and repeated modification, their effect too often is to embarrass and mislead where they should assure and facilitate. . . . [T]hey should, in the opinion of the author, be reduced to the smallest available bulk; all that are really statutes and all that are of a legislative quality should be eliminated; only those should be included that are purely *general*. . . ; and the authority to amend should be most rarely exercised.[123]

In this single paragraph, Winthrop touched on many features of what I have called the quantum character of military regulation. To be sure, some of his concern is outdated. Winthrop wrote when the nondelegability of the legislative power was virtually

[122] United States v. Mead Corp., 533 U.S. 218, 233-34 (2001).
[123] WINTHROP, *supra* note 85, at 35-36 (footnote omitted) (emphasis in original).

unquestioned orthodoxy. So he found statute-like military regulations particularly suspect. But even as a manifestation of unadulterated executive power, this career military officer describes military regulations with a certain mistrust or unease.[124]

Despite the dust being long settled on the nondelegation doctrine,[125] the issue remains pertinent in the context of military law. Administrative law is undeniably legislative, no matter how one might cling to the Court's soothing "quasi-legislative" gloss.[126] And

[124] Given Winthrop's now-anachronistic view of the supposedly insuperable barrier between executive and legislative power, it is worth a moment's thought as to what is meant by the former. If there is such a thing as unadulterated executive power, instances of it are rare. Absent any kind of regulation or systematized interpretation, the main executive functions can likely be enumerated on a single hand: disbursement and collection; investigation, prosecution, and punishment of crime; intelligence gathering and the conduct of war; diplomacy; perhaps a few others. For Winthrop, even those regulations that govern only the military are invalid if too legislative in character. It is because this understanding ignores the necessary discretionary incidents of executive power that the Supreme Court eventually found a rigid nondelegation doctrine unworkable. *See, e.g.,* J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394, 406 (1928) ("[i]n determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government coordination."). Be that as it may, a strain of it seems still to apply to the military. Rather than concede that much of what governs the military exclusively from within the Executive Branch is legislative in character, there is a tendency to mystify the executive power in this context and fancy it imbued with an authority *sui generis*. *See*, *e.g.*, United States v. Grimley, 137 U.S. 147, 153 (1890). If legal governance of the military from within "the executive arm" were really such an impenetrable article of faith, then this examination would be unnecessary. *See Grimley*, 137 U.S. at 153. It would also be no more satisfying to the enquiring mind than other dogmas of metaphysics.

[125] *See*, *e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001) ("[i]t is, after all, a commonplace that the nondelegation doctrine is no doctrine at all."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("[w]e might say that the conventional [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).").

[126] Justice Stevens, for one, has advocated abandoning this pretense. "We could . . . conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not 'legislative power.'…I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is 'legislative

much of the law within the corpus of military regulation is "not infrequently . . . partaking of the character of legislation," as well.[127] The question, then, is from where this authority arises.

As mentioned above, fundamental authority over the military is a thing divided by the text of the Constitution itself.[128] According to the current state of affairs with the nondelegation doctrine, Congress can delegate its legislative authority over the military (or any other legislative authority, for that matter) to the executive branch provided it has enunciated an "intelligible principle" to guide the delegation.[129] Whether an intelligible principle is also necessary to guide the delegation of executive authority within the executive branch is less clear. The doctrine itself is premised on an inability of one branch to confer on another the powers granted to it by the Constitution. But the divide between those regulations that are legislative in character and those that are "simply . . . executive, administrative, instrumental rules and therefore distinguished from statutory enactment" is poorly defined,[130] so it is difficult to generalize too broadly. Despite these uncertainties, the traditional view is that the

> authority for army regulations proper is to be sought—primarily—in the distinctive functions of the President as Commander-in-chief and as Executive. His function as Commander-in-chief authorizes him to issue, personally or through his military subordinates, such orders and directions as are necessary and proper to ensure order and discipline in the army.[131]

power.'" Whitman v. Am. Trucking Associations, 531 U.S. 457, 488 (2001) (Stevens, J., concurring) (footnote omitted).

[127] WINTHROP, *supra* note 85, at 35-36.

[128] U.S. CONST. art. I, § 8, cl. 14; U.S. CONST. art II, § 2, cl. 1.

[129] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise legislative power] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

[130] WINTHROP, *supra* note 85, at 32 (footnote omitted).

[131] *Id.* at 27 (footnote omitted).

Whether necessary or not, an intelligible principle of sorts emerges from this view.

Winthrop's words echo in those of the UCMJ's General Article ("all disorders and neglects to the prejudice of good order and discipline").[132] Rules to effectuate "order and discipline," then, lie within the breadth of the President's power to regulate (and to delegate).[133]

But there remains a question whether this principle is sufficiently intelligible to justify such delegations as Congress expressly granted. The UCMJ's punitive articles delegating the authority to issue orders to subordinates are statutory law. As discussed above, the orders they empower can cascade beyond mortal powers of prediction. Whether an intelligible principle can survive this atomization whereby lawful orders are issued and passed on again is a subject the courts have not specifically addressed.[134]

One possible concern with allowing delegation at progressively lower levels is that it shifts the risk associated with lawful actions further and further down the chain of command. If a subordinate carries out an unlawful order, that subordinate cannot escape liability simply by pointing a finger up the chain of command.[135] If an order is lawful but a subordinate finds it questionable, the subordinate can be punished for failure to obey. Only where the subordinate correctly discerns that the order is unlawful *and* refuses to obey can she escape liability.[136] As suggested

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[132] 10 U.S.C. § 934 (1956).

[133] WINTHROP, *supra* note 85, at 27.

[134] However, the Supreme Court has generally afforded substantial deference to the judgment of military commanders. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("when evaluating whether military needs justify a particular restriction…courts must give great deference to the professional judgment of military authorities . . .").

[135] *See, e.g.*, United States v. Carr, 25 F. Cas. 306, 308 (S.D. Ga. 1872). Though neither can the service member who issued the order escape liability by claiming that he did not commit the unlawful act. *Id.*

[136] Note that ignorance of the law is no more a defense in military law than it is in civil law. In fact, even ignorance of a lawful general order is no defense, so without notice a service member might find herself subject to—and in violation of—a general order. *See* MCM, *supra* note 96, at II-114, ¶ R.C.M. 916(k)(3)(C)(1) ("(1) *Ignorance*

earlier, even experienced judges may have difficulty navigating the legal labyrinth to determine how an order aligns with the constellation of higher-order laws. And the deferential approach to military orders in civilian courts implies that, more often than not, a service member stricken by dread that an order is unlawful will rarely find a sympathetic audience in a courtroom.

Part of the problem is that soldiers should not be amateur jurists, questioning and wondering when they ought to obey and act.[137] Moreover, jurists should not be amateur (or armchair) commanders. This is the wide pass most military orders must march through—between the steep walls of a perceived need for absolute obedience within the military's ranks on one side, and the reluctance of judges to interfere in "'the customary military law' or 'general usage of the military service'" on the other.[138] This is not to say that these complementary principles are not reasonable, nor even that they are not essential. But there is reason for caution. As Justice Jackson noted in dissent in the now-infamous *Korematsu* case, "the Court . . . has no choice but to accept [a commander's] own unsworn, self-serving statement. . . . And thus it will always be when courts try to look into the reasonableness of a military order."[139]

Consider again the highly deferential standard articulated in *Huet-Vaughn*.[140] Even this standard is susceptible of the possibility

or mistake of law. Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense."). This raises the question of how a subordinate could possibly go through the above analysis to ascertain the legality of that order. *See id.* at R.C.M. 916(d). Fortunately, when a general order is unlawful, it tends to be of the sort that a service member's observation of its mandate will not cause her to incur liability.

[137] In the Navy, an enlisted sailor who is ever vigilant in asserting his rights (or advising others of their rights) and citing regulations in defiance of his supervisors is referred to as a "sea lawyer." It is not typically considered a compliment. *See* Steven F. Momano, *Wegmans Incident is Sign of a Bigger Problem in America*, DEMOCRAT & CHRON. (Apr. 25, 2015), http://www.democratand chronicle.com/story/opinion/guest-column/2015/04/25/wegmans-incident-sign-bigger-problem-america/26324715/.

[138] Parker v. Levy, 417 U.S. 733, 744 (1974) (quoting Martin v. Mott, 25 U.S. 19, 35 (1827)).

[139] Korematsu v. United States, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).

[140] United States v. Huet-Vaughn, 43 M.J. 105, 114-15 (C.A.A.F. 1995).

that a soldier might permissibly violate an order—even that there might be a "duty to disobey" such an order.[141] In practice, though, courts apply this standard in one of two ways, and neither encourages the view that courts will willingly explore the contours of that narrow forbidden zone. The first and most common way that courts have applied this standard is to punish disobedience of orders that were insufficiently unreasonable.[142] In fact, on review, courts tend to find orders not only reasonable enough not to be disobeyed, but lawful in their own right.[143] The same is typically true when service members challenge orders or regulations in court as unlawful, including when the challenge is for unconstitutional vagueness[144] or for violating a constitutionally protected privilege.[145] Leaning heavily on the twin pillars of order and discipline, Justice Stewart wrote in *Greer v. Spock* that "a military commander [can act] to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of [those] under his command," even when such action chafes against constitutionally protected liberties.[146] For instance, this was all the

[141] *Id.*

[142] *See*, *e.g.*, United States v. New, 55 M.J. 95, 107-08 (C.A.A.F. 2001) (upholding conviction against service member for failing to wear United Nations accoutrements in Macedonia despite personal belief in the illegality of the order to don those accoutrements).

[143] *Id.* at 107.

[144] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 756-57 (1974) (holding UCMJ articles authorizing court-martial for charges arising under Articles 133 and 134 not unconstitutionally vague). This case is also apposite in that the Court addresses the uncertainty inhering in these vague—though not unconstitutionally so—articles. Justice Rehnquist explains that "even though sizable areas of uncertainty as to the coverage of the articles may remain after their official interpretation by authoritative military sources, further content may be supplied even in these areas by less formalized custom and usage." *Id.* at 754 (citing Dynes v. Hoover, 16 U.S. 65, 82 (1857)).

[145] Brown v. Glines, 444 U.S. 348, 358 (1980) (finding constitutional a regulation requiring prior approval from commanders to circulate petitions, and holding that regulation did not violate federal statute stating that no person may restrict any service member from otherwise lawfully communicating with a member of Congress). *See generally* Nicole E. Jaeger, *Maybe Soldiers Have Rights After All! Loving v. United States, 116 S. Ct. 1737 (1996)*, 87 J. CRIM. L. & CRIMINOLOGY 895 (1997) (describing the development of the Supreme Court's standard of review for service member claims of constitutional violations).

[146] Greer v. Spock, 424 U.S. 828, 840 (1976) (holding that military regulations forbidding partisan political speeches and demonstrations and distribution of

specificity needed to justify a prohibition against circulating political literature on base.[147]

The other circumstance in which a court might apply the "no rational doubt" standard of *Huet-Vaughn* is when such an order was plainly issued and then followed. Convictions in American courts for war crimes are notoriously difficult to obtain. Following the My Lai massacre, only one soldier, the officer in charge, was convicted despite his having had numerous enlisted soldiers under his command. His life sentence was later reduced to a short term of years under house arrest.[148] More recently, Marines who were convicted or had reached plea deals relating to their roles in atrocities committed in Hamdania, Iraq, either had their convictions reversed or received clemency reducing their sentences.[149] The aftermath of the massacre at Haditha, Iraq, paints a similar picture of prosecutorial and judicial impotence to assign responsibility to soldiers near the field of battle.[150] Thus, one is left with the distinct impression that a soldier's perceived risk of obedience, even to an order providing "no rational doubt" of its illegality, is outweighed by the perceived risk arising from a failure to obey.[151]

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political literature without approval from post headquarters was not a violation of the First and Fifth Amendments).

[147] *Id.* at 107.

[148] KENDRICK OLIVER, THE MY LAI MASSACRE IN AMERICAN HISTORY AND MEMORY 232 (Manchester Univ. Press 2006).

[149] Teri Figueroa, *General Frees Another Marine Convicted of War Crimes*, NORTH CTY. TIMES (Aug. 11, 2007), http://www.nctimes.com/news/local/general-frees-another-marine-convicted-of-war-crimes/article_b68ce24a-c3c7-5a3c-8ba3-633ed9f334a0.html; Teri Figueroa, *No Jail for Corporal in Hamdania Killing*, NORTH CTY. TIMES (Aug. 3, 2007), http://www.nctimes.com/news/local/article_ 1a92df09-ebda-5ea3-9253-883b77864a98.html; Mark Walker, *Military: Court Throws out Hamdania Conviction*, NORTH CTY. TIMES (Apr. 22, 2010), http://www.nctimes.com/news/local/military/article_5c4f1616-8c6e-5c0d-9500-3e63464e695b.html.

[150] Tony Perry, *Court-Martial to Begin for Marine in Iraqi Killings*, L.A. TIMES (Jan. 6, 2012), http://www.latimes.com/news/local/la-me-court-martial-20120106,0,4957742.story.

[151] Perhaps this stark choice serves at least to reduce some of the effective uncertainty in the process by constraining outcomes (or at least perceived outcomes) within the context of courts-martial.

Simply put, low-ranking military service members in the heat of combat are expected to make complex evaluations regarding the legality of the orders they are given and expected to obey or face the consequences. To further complicate matters, the potential consequences for failure to obey are maximized, and the practical consequences for obeying even plainly illegal orders are almost negligible. This has the effect of making even egregiously errant battlefield orders more legitimate than general orders and regulations. "All orders, written or oral" Colonel Winthrop explained, "made or given by any competent authority, from the commander-in-chief to an acting corporal, are indeed in a general sense a part of the law military; their observance by inferiors being strictly enjoined and their non-observance made strictly punishable."[152] This is the ever-present admonition embedded in Lord Tennyson's observation: "Theirs not to make reply; theirs not to reason why; theirs but to do and die."[153]

As though in an afterthought, the end of Winthrop's chapter on military regulations and orders includes a single unnumbered, paragraph-long subsection entitled "Principles Governing Orders." Here Winthrop provides a lonely caveat to the obedient soldier.

> As in the making of Regulations, so in the framing of Orders, the principles heretofore laid down to the effect that executive acts may not trench upon the province of legislation, or conflict with the existing constitutional or statutory law, are to be strictly observed. Further, Orders should not conflict with established Regulations. And Orders issued by commanders of departments or armies, or other military authorities inferior

[152] WINTHROP, *supra* note 85, at 38. Note that "an acting corporal" holds the pay grade of E-4, which is the lowest noncommissioned officer rank. Some enlisted members hold this rank before reaching their first non-training command.
[153] Alfred Tennyson, *The Charge of the Light Brigade*, POEMS OF THE ENGLISH RACE 119 (Raymond M. Alden ed., 1921). Though not Lord Tennyson's original wording (and corrected in all later printings), his wife's error in the poem's first printing was not inapposite: "theirs but to do *or* die" (emphasis added). CHRISTOPHER B. RICKS, TENNYSON 359 (2d ed. 1989).

> to the President, may not contravene the orders of the latter as Commander-in-Chief.[154]

In short, orders must be consonant with the Constitution, statutes, and regulations, as well as superior orders—all bodies of law that might not be familiar to a newly minted private. But if the order conforms, it is to be unquestioningly obeyed. The obvious problem is in getting from unquestioning obedience of orders to thoughtful discernment of an order's legal virtue.

That problem of moving from unquestioning obedience of orders to discerning the lawfulness of an order is the paradox of law at this most quantum end of the spectrum. Prospective assessment of an order's legality is a Gordian knot of overlapping law and, as a result, is a highly unpredictable process. But a semblance of certainty is restored because courts, when retrospectively examining the legality of an order *vel non*, are likely to cut the knot in favor of obedient subordinates. Society entrusts the power to issue orders to the commissioned officers, warrant officers, noncommissioned officers, and petty officers because these military personnel are in a much better position to judge what is necessary in a given situation and are more accustomed to making decisions of a variety most common to the military and most alien to civilians. Nonetheless, efforts to ensure that military personnel are more conscientious of the law necessarily have the side effect of deterring obedience (or at least of delaying it) because it places the burden of legal analysis onto the subordinate. Hence, there is a tradeoff between knowledge of the law and the surety of obedience. Just as the rules governing quantum phenomena in the physical world resist any effort to significantly reduce indeterminacy, so too does quantum lawmaking resist such efforts.

Not only does quantum lawmaking limit the predictability of an order's legality and of the potential consequences for obedience or disobedience, but its sheer chaos and strangeness also numb us to its implications. Just as quantum mechanics is irrelevant to a soldier on the field, society might forgive a soldier for asking who really cares

[154] WINTHROP, *supra* note 85, at 33.

whether a sergeant's order is more like quantum law or more like classical law. The foregoing discussion certainly suggests that military members gain no particular advantage in worrying over the direct consequences to themselves stemming from the strangeness of the law they are immersed in. But a discussion of consequential concerns portrays the soldier as only the grammatical object of our inquiry. The most important policy implications of quantum law on the battlefield, though, emanate from the soldier's preeminence in the quantum calculus. It is not unlike how an average person, never having heard of quantum mechanics, can go her whole life without thinking about it. But our modern life depends inescapably on quantum-mechanics-informed technology (to say nothing of the fact that our very existence is possible because of quantum phenomena). One can ignore the very small, but it does not go away. And it is probably important to us even if we do not know it.

III. HOW POLICY GETS TIED DOWN BY LILLIPUTIAN LAW

Our soldiers, sailors, and Marines are, as the saying goes, the "tip of the spear." But this description's instrumental flavor fails to reflect an important facet of the military's function. At the disposal of our forward-deployed military is the not-insignificant power permeating the legal quanta of their profession. Order-issuing authority in the sensitive zone of engagement occupied by the military is not only an instrument of policy; it can also force policy on the military's civilian leadership and on the public at large. In fact, the legal constraints on authority in its ranks notwithstanding, the military's specialized and systematized nature makes the military a potent sensory organ of a state's policymaking apparatus. Information flows into and out of a state's decision-making process through its operational military, and no part of a state's government is so designed for action as its armed forces. And even as a thoroughly explored phenomenon in classically understood policymaking and decision making, this can be an unnerving fact to confront. The idea that a poorly understood legal uncertainty pervades our military evokes images of restless seismic activity rumbling hidden beneath the surface of our national security environment. Nevertheless, as described below, policy sometimes

makes its way from "the front" to a decision maker situated to the rear.

A. Policy Creation in Conflict – the Rational Actor Model

For thirteen excruciating days in October of 1962, the world was about to end.[155] Since then, volumes of history have been written about the Cuban missile crisis, mostly in the form of gripping narratives brimming with real-life, existential suspense. Nine years later, one author, though, went beyond the *story* of what happened; Graham Allison instead fashioned a *theory* of what happened in his influential book entitled Essence of Decision.[156] In doing so, Allison revolutionized how scholars think about decision making.

The primary target in Allison's sights was the rational actor model ("RAM") of decision making.[157] RAM describes the world of states, organizations, and individuals as unitary black boxes. Stimuli enter the box through whatever means are available, the mysterious internal clockwork conducts a cost–benefit analysis using the available data, and from the black box of the decision-making state, organization, or individual springs a decision carefully weighed to produce what the actor sees as an optimal result. Then the process begins anew. This analytical method is a powerful tool. By positing a world based on RAM, a clever analyst can reverse engineer every

[155] This was, of course, the Cuban missile crisis. The American discovery of Soviet missiles in Cuba precipitated a standoff between the two nuclear superpowers. President Kennedy instituted a blockade against Cuba to prevent further shipments of missiles from the U.S.S.R. At the same time, the Kennedy Administration sought a compromise through diplomatic back channels with Soviet Premier Khrushchev. Despite heated public rhetoric and the fear in Washington that a coup of hardliners had overthrown Khrushchev, the countries were able to negotiate a deal to remove the missiles from Cuba in exchange for a later, ostensibly unrelated removal of NATO missiles from Turkey. Equally important, the United States did not have to sacrifice NATO presence in West Berlin, which was likely the extraction the Kremlin truly sought with its Cuban gambit. *See generally* ROBERT F. KENNEDY & ARTHUR SCHLESINGER, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 7-15 (1999).

[156] *See generally* GRAHAM ALLISON & PHILIP ZELIKOW, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (2d ed. 1999).

[157] Though his analysis targeted this theory as inadequate to the task of explaining away major political events, Allison himself is credited with coining the term RAM in ESSENCE OF DECISION itself. *Id.* at 3–4.

decision. The more bizarre or irrational an action seems, the cleverer the analyst must be, and success means erecting a bridge, however structurally tenuous, between the information available to the decision maker and the action finally decided upon. This was the good news preached by evangelical economists.[158] Political scientists, eager to apply their craft to the problem of understanding the interplay of power, principles, and agents, were eager converts. Thus, when Allison wrote Essence of Decision, RAM—by one name or another—was the prevailing orthodoxy. And it was this orthodoxy Allison's work expanded upon and, in many senses, displaced.

"Among the most remarkable features of current life," Allison wrote, "is how much behavior of how many individuals is influenced by the controlling purposes of the organizations to which they belong."[159] Thus Allison began to describe how the procedures that organizations create for themselves embody Weberian principles of organization. To be clear, creating procedures is a purposive activity. The heads of organizations see a goal and attempt to effect (or at least *affect*) policies to achieve the goal.[160] Allison was not saying that rationality is not a real phenomenon. Rather he was saying that rationality is but one aspect of the story.[161] More important, he was saying that what happens inside the black box is not just a complex equivalent to a set of scales on which decision makers weigh and divide costs and benefits. Multifarious factors affect what happens inside the black box, and the standard operating procedures (SOPs) that organizations adopt are a significant part of the machinery that interprets those factors. Quite often, Allison concluded, SOPs are themselves factors in this calculation.[162]

Allison's analysis, like the principles of quantum mechanics described above, cannot receive adequate justice here. But for this discussion, two aspects of Allison's view of what he called the Organizational Behavior Paradigm (OBP) of decision-making theory

[158] *Id.* at 19.
[159] *Id.* at 147.
[160] *Id.* at 148.
[161] *Id.* at 3.
[162] ALLISON & ZELIKOW, *supra* note 156, at 169.

are of particular value. First, it is important to understand that organizations like the military are no more monolithic than they are structureless. A military (like its subordinate units) is an organizational actor comprising many constituents and residing within a greater "constellation of loosely allied organizations on top of which government leaders sit."[163] An organization is a complex machine continuously abuzz with both autonomous and automated components. Action is the output of organizational machines, but organizational output is conceptually incompatible with RAM; no matter how we would like to look at an organization as an irreducible black box, its constituents, their actions, and their motives cannot be ignored.[164]

This conception of "action as organizational output"[165] is the other element essential for understanding the broader implications of quantum uncertainty in the military context. "The preeminent feature of organizational activity is its programmed character: the extent to which behavior in any particular case is an enactment of pre-established routines."[166] Allison identified seven characteristics of organizational activity: (1) objectives (where compliance with targets and constraints defines acceptable performance); [167] (2) sequential attention to objectives (whereby "conflicts among operational targets and constraints [are] resolved," [168] (3) SOPs (conventions for performing regular or coordinated activity that are "grounded in the . . . norms of the organization or the basic attitudes, professional culture, and operating style of its members"); [169] (4) programs and repertoires (formal "clusters" of rehearsed SOPs that are essential for performing an organization's special capacities);[170] (5) uncertainty avoidance (organizational efforts to "maximize autonomy and regularize the reactions of other actors

[163] *Id.* at 166.
[164] *See*, *e.g.*, *id.* at 307 ("The diverse demands on each player [in the organizational command structure] influence priorities, perceptions, and stands.").
[165] *Id.*
[166] *Id.* at 168.
[167] *Id.*
[168] ALLISON & ZELIKOW, *supra* note 156, at 169.
[169] *Id.*
[170] *Id.* at 170.

with whom they must deal");[171] (6) problem-directed search (organizational efforts to apply existing routines or capacities to novel or atypical problems for which those routines and capacities were not designed);[172] and (7) organizational learning and change (the process by which new problems are incorporated into regularized practices and procedures).[173] In other words, an organization makes procedures based on its culture and resources, assembles these SOPs into assorted programs for action, and attempts to apply those programs to problems. If the problem is unlike those the organization planned for, those programs that best fit the problem are deployed, and the new problem is then incorporated into the organization's procedures along with the lessons learned from applying those "close-enough" programs to it.[174]

What this had to do with the Cuban missile crisis (and what it has to do with the law of military orders, as well) is that military action is the product of the process described above. That holds true whether examining activities accompanying the clandestine installation of Soviet missiles less than one hundred miles from American shores, the failure to camouflage those missiles,[175] the practice of observing Cuba from U2 spy planes,[176] or the procedures for handling film taken of Cuba in those missions.[177] The cybernetic process by which organizations routinely operate and act literally makes history. Hence, the members of a military that form its operational tendrils are not only agents of their government, their military, and their unit, but are also the media through which those organizations respond to their environments. Despite the veneer of

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[171] *Id.*
[172] *Id.* at 171.
[173] *Id.*
[174] *See* Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCHOL. REV. 129, 129-30 (1956). This is a departure from RAM's search for "optimal" choices in favor of those that merely "satisfice." Satisficing is a decision-making theory term of art that refers specifically to how thinking entities (originally individual humans, but more commonly today referring to organizations) seek out *any* solution to a problem and opt for the first that will work. This formulation makes order in time, rather than optimality, the determinative consideration. *See id.*
[175] ALLISON & ZELIKOW, *supra* note 156, at 212-13.
[176] *Id.* at 219.
[177] *Id.* at 222.

rationality one might imagine over military decision making, some decisions are made by procedure alone, some are made because of the repertoire of procedures available, and some cannot be made were it not for the policies in place. This is the essence of the OBP, and it is an important analytical tool for understanding the complex of organizational actions that populate the national security operating environment (and, for that matter, the business, diplomatic, and political environments to which these principles also apply).[178]

But this article examines SOPs as Graham Allison did not. For him, an SOP is an SOP, whether aimed at selling one million Big Macs in a certain amount of time while keeping labor and food costs below a certain level, or at monitoring a tiny neighboring island for signs of potential danger while avoiding a nuclear holocaust. And this is a perfectly respectable way of thinking about organizational behavior itself. But the military SOP as described here is more than just a procedural duct by which organizational capacities flow more or less perfectly to organizational problems. With criminal penalties to back them, military SOPs are also a kind of law according to this article's working definition.

When viewed together, organizational decision-making theory and the delegation of lawmaking authority to all but the lowest echelons of the military suggest that these servicemen and women are doing something more than merely promulgating an odd kind of law. They are also making policy. A poor understanding of the mechanisms that underlie the authority they wield means something more than an inability to comprehend the potential for punitive consequences. It also means an inability to comprehend the power entrusted to what are essentially low-level organizational employees—armed bureaucrats.

[178] Though not particularly relevant to the subject of this article, note that RAM and OBP were not the only models covered by Allison. *See id.* at 255. He also enunciated a model he called the Governmental Politics Model, which places more emphasis on individuals within an overarching bureaucratic structure. *See id.* Thus, to the OBP model is added the wrinkle of autonomous political actors who head governmental organizations and who, therefore, have at their disposal the organizational capacities to serve their agendas.

B. Policy Making by Combatants—an Example

To illustrate this point, consider a hypothetical scenario wherein U.S. ground forces are patrolling a stretch of border between Afghanistan and Pakistan. Governing these soldiers' on-duty actions are a network of interrelated and overlapping laws. The Constitution prevents them from seizing, without due process, property from American humanitarian workers or journalists. The statutory framework of the UCMJ does not permit them to desert their posts and search for greener pastures in the tribal regions of Waziristan. Department of Defense ("DOD") regulations would define their rules of engagement ("ROE") such that they can use deadly force only if they confront imminent, life-threatening danger. Army regulations might dictate how they wear their distinctive combatant insignias. The General Orders of a Sentry require that they not leave their assigned posts until properly relieved.[179] Perhaps their commander directed that no patrol group may have fewer than three soldiers. Maybe their officer in charge needs them to return early to attend a briefing, and so she ordered them to rendezvous at their checkpoint thirty minutes earlier than scheduled.

Every step in the chain above has legal force as to these soldiers. That a violation of any of these orders might invite legal consequences is unquestionable. Taking the scenario a step further, suppose the patrol comprises five soldiers: one sergeant, two specialists, and two privates. The group takes fire, which triggers their ROE. Their attackers stop firing and run for a small border village nearby. If these soldiers comply with all the laws described above,[180] the gamut of permissible actions is broad. The soldiers might pursue the attacker, they might call for reinforcements, or they

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[179] *See, e.g.*, THOMAS J. CUTLER, THE BLUEJACKET'S MANUAL 153 (Naval Inst. Press 2002).

[180] The exception, perhaps, is the order to return early. It is hard to imagine that a commander would charge a subordinate soldier with—let alone get a conviction for—absence without leave or failure to report in the event that the subordinate had come under hostile enemy fire. *See generally* ALLISON & ZELIKOW, *supra* note 156, at 154-57.

might return to base to report the incident.[181] But whatever happens next, what the sergeant says to the four junior-enlisted personnel will be law. Considering only their first option, alarming potentialities spring to mind. Following attackers into a village means possible civilian casualties. It also spells the possibilities of house-by-house searches, booby traps, ambushes, and a civilian population sympathetic to the attackers. If the village were in Pakistan instead of Afghanistan, conflict between the United States and Pakistan might be implicated.

In short, the decisions made by our hypothetical unit of five soldiers have suddenly become a catalyst for national policy. The civilian leadership in Washington will be bound to respond to the hand dealt them by a single noncommissioned officer and the lawful orders he issued to his subordinates. The more discretion that sergeant has, the more difficult it is to predict the outcomes of his action, the legal effects on him and his subordinates, and the extent to which the organizations to which he belongs—all the way up to the federal government—will have to respond to restore a policy in equilibrium.

We should not heap all the blame on our hypothetical sergeant, though. He is partly the victim of policies that failed to see far enough ahead. Further, he was responding to an enemy, with the legal force entrusted to him by his lawful superiors. Thus, not only has our sergeant entangled us in an "international incident," but so for that matter have our enemies. Parties whose interests are diametrically opposed to those of the soldiers' nation had a hand in devising a situation that has led to a diplomatic crisis with our allies in Pakistan, who are already ill at ease with the proximity and character of our "support."[182] In essence, the action associated with quantum law on the battlefield turns the usual relationship between law and policy on its head. Whereas some assume that law follows

[181] Of course, their course might be dictated by preexisting SOPs, but this serves at least as an illustration of what might happen when reality progresses beyond the scope of the SOP. *See generally id.* at 154-57.

[182] *See* Joshua Foust, *U.S. Drones Make Peace With Pakistan Less Likely*, THE ATLANTIC (July 12, 2012), http://www.theatlantic.com/international/archive/2012/07/us-drones-make-peace-with-pakistan-less-likely/259756/.

from policy, this model suggests that sometimes policy follows from the action of law.

This represents a fundamental problem in any theory that proposes to justify the legal force of military orders. The philosophical underpinnings of "law" as used in this article require a societal basis. I have largely skirted this criterion by referring to law affecting only "military society" or by invoking our civil society's acquiescence to the manner in which the military is organized. One might even note that in a democracy defended by an all-volunteer force, the divide between the military and civilian societies is semipermeable. Yet these arguments are eroded by the revelation that our enemies may have as much to say about some of our law as our citizens do. Obviously, laws and policies shaped in part—even if unconsciously—by actors bent on our annihilation might not reflect our societal values all that well.

Once one accepts the possibility that poorly reflected societal values in military law matter, other examples, lurking furtively in the wings, subtly insinuate themselves into the analysis. Military orders are a form of public law. But as compared to other bodies of public law in the United States, military orders are antidemocratic. To fully appreciate this democratic deficiency, one needs only to consider the uniformity of military orders from one society to the next. Orders issued in the Chinese military are similar in purpose and kind to those of the Russian military, those of the Dutch military, those of the Cuban military, and those of our own. What those orders authorize does not vary significantly among national militaries, regardless of whether that military serves a democratic state or an authoritarian one. It is often noted that our military's mission is to defend democracy, not to be one.[183] And as Justice Rehnquist put it, "military society has been a society apart from civilian society, so '(m)ilitary law . . . is a jurisprudence which exists separate and apart

[183] During my ten-year enlistment I heard this phrase more often than I can readily tally, and from a variety of authority figures. *See also* Deborah Grays, *Army to Celebrate 234 of 'Service Commitment'*, U.S. ARMY, June 5, 2009, http://www.army.mil/article/22210/army-to-celebrate-234-years-of-service-commitment/ (explaining that the U.S. army has worked to "guarantee freedom, preserve peace and defend democracy" since 1775).

from [civilian law].'"[184] That this unpredictable subset of law is so *proudly* antidemocratic is a provocative fact, and it suggests a tension not wholly unrelated to that more notorious tension prevailing between the values of democracy and the so-called military-industrial complex.[185]

Unpredictability itself may be an unseemly feature for any form of law to embrace. Although unpredictability besets all laws—whether in terms of unforeseen consequences or of a law's efficacy before its implementation—laws are intended essentially to reduce uncertainty. After all, one of the basic justifications for issuing law in a systematic way and publicizing it is to provide our society with the benefits conferred by a predictable regime and well-founded expectations on which to rely. Even military law, according to Graham Allison, is constructed to reduce uncertainty.[186] But by embracing as law activity that thrives in and propagates uncertainty in the military context, society defiantly rejects the logical desire for predictability that motivates nearly all other forms of law.

Other forms of law in the United States must meet certain procedural standards, and in this regard, military law is theoretically no different. But because evaluating the validity of orders is an endeavor steeped in uncertainty, courts may be ill equipped to review them. Indeed, it is to a lack of expertise that judges often adduce when demurring to intervene in matters involving a commander's discretion to regulate subordinates.[187] Even before judicial review

[184] Parker v. Levy, 47 U.S. 733, 744 (1974) (quoting Burns v. Wilson, 346 U.S. 137, 138 (1953)) (alteration in original).

[185] President Dwight D. Eisenhower, Farewell Address to the Nation (Jan. 17, 1961) ("[t]his conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every Statehouse, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.").

[186] ALLISON & ZELIKOW, *supra* note 156, at 170.

[187] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986). In cases involving peculiarly military offenses, like that of Article 134, perhaps this reluctance is akin to the analysis pertaining to the APA's exemption of judicial review for "agency action…committed to agency discretion by law." Application; Definitions, 5 U.S.C. § 701 (1978). The judicial gloss on this portion of the APA has evolved so as to be

becomes a possibility, process in this context is minimal compared with other instances of law and lawmaking. As discussed above, a subordinate has almost no opportunity when given an order to consider its validity or potential consequences. And because issuing orders is itself lawmaking, it is a form of prescription untethered from process. This represents a significant practical difference between "normal" rulemaking and prescription in the military context. Consider the difference between a regulation held to be an acceptable interpretation of a statute but arrived at arbitrarily or capriciously,[188] and an order that seems legal in every way but that is *in fact* arbitrary or capricious.[189] The former will be struck down; the latter must be obeyed.

To summarize, the United States military has a body of law and a method of lawmaking that, when viewed together, are bizarre (even foreign) to our system of justice and jurisprudence, but that are nonetheless fundamental to the fabric of our republic. This law—and I hope I have sufficiently established that it *is* law—is antidemocratic, nearly devoid of meaningful process, [190]

largely coterminous with the doctrine of "no law to apply," which was first enunciated in *Citizens to Pres. Overton Park, Inc. v. Volpe.* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). But civilian courts make up only part of the story. Though it may be implicitly evident, it should be understood that most active-duty service members are not tried in civilian courts for military related offenses, but rather by military officers presiding over courts-martial. *See* MCM, *supra* note 96, at II-10, R.C.M. 201(d). Thus, even setting aside the issue of diffidence in civilian judges, important institutional biases may well inhere in the process. Courts-martial are not kangaroo courts; the procedural rights of defendants in courts-martial, in fact, can be so rigidly applied as to seem bizarre to the uninitiated. For instance, an accused service member who pleads guilty is subjected to an inquiry of the facts to ensure the plea is honest. *See id.* at II-100, R.C.M. 910. Nevertheless, the way in which military officers arrive at verdicts cannot help but be shaped by the military culture in which a court-martial's more regular participants are immersed.

[188] *See, e.g.*, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30 (1983).

[189] This assertion follows naturally from the highly deferential *Vaugh-Huet* standard, by which only "manifestly unlawful" orders may be lawfully disobeyed. United States v. Huet-Vaughn, 43 M.J. 105, 114-15 (C.A.A.F. 1995).

[190] This refers only to the lawmaking embedded within lawful orders. The adjudicatory branch of military law embodied by courts-martial provides ample

unpredictable, and partly forced on us by those against whom it is designed to protect. More troubling still, this law is the software for a military that functions as a tactile organ of national policy. Just as humans use their hands to learn about the world around them and to impose their will on that world, a military conveys information to its government and is called on to carry out the policy formulated in response to this information. The special role of the military and the organizational culture that role engenders shape how data arrive (and sometimes which data arrive). Information from "the front" thus carries with it a faint scent of the military's organizational biases. Though Justice Brewer perhaps did not have these facts and this metaphor in mind, they certainly complement his view of the military as "the executive arm."[191]

Just as the easily ignored scintillae of the quantum world can, despite our inattention, produce profound effects on the world around us, the tiniest quanta of military activity can change the course of nations and history. This activity is governed by a body of military law that spans from everyday regulation to the seething particulate chaos of battlefield orders. This latter category exemplifies quantum lawmaking. Although quantum lawmaking is typically hidden from sight, its effects on our society and our national policies can be profound. One cannot begin to understand those effects without understanding the causes that give them rise.

IV. CONCLUSION

In sum, quantum lawmaking is as important as it is strange. Its essence abides in all law, but we typically fail to perceive it, just as we fail to perceive the chaotic universe of the infinitesimal that abides in all the physical things whose predictability and stability we take for granted. This phenomenon superficially resembles in many regards the manner in which the smallest constituents of matter behave. Like quantum particles, quantum laws are unstable and contain unknown qualities until a judicial observation occurs and affirms their validity or snaps them back into the legislative ether.

procedure, and this should not be interpreted in any way as derogating that procedure. *See*, *e.g.*, MCM, *supra* note 96, at pt. IV-23, ¶ 16.c.(1)(a).

[191] United States v. Grimley, 137 U.S. 147, 153 (1890).

Before an observation, these "virtual laws" interact in various ways with one another and with other, already-observed laws in a way reminiscent of how unobserved quantum particles interact and interfere in the absence of observation. The vicissitudes of quantum lawmaking affect higher-order laws in ways that the legal community has come to expect, and so the strangeness seems mundane. But, as this article details, quantum lawmaking is not distributed uniformly across the varieties of legally binding norms.

The effects of quantum lawmaking amplify as laws descend further from the most general and stable legal norms of constitutional law. Thus, statutes are more quantum in character—and less classical—than constitutional law, and the level of instability increases down through federal regulation and various levels of state laws. Quantum lawmaking is increasingly difficult to ignore in the context of the law's narrowest and most specialized extremes, such as the contexts of private contracts and property transactions. But nowhere are these effects more pronounced than in the domain of national security law, and especially such laws as govern and pervade the armed forces. Military law is both extreme in its quantum character and powerful in its effect. Because an order formulated in an instant on the field of battle is inherently keyed to engage the criminal-legal apparatus if disobeyed, even the least formal breeds of military law can sometimes more closely resemble the force and generality of statutory law. Nevertheless, such orders still theoretically represent the least stable (that is, most quantum) legal norms in our system. The oddities that crowd around that extremity are compounded by how little society at large knows about military law and by the profound policy implications of such uncertainty in a context that so strongly affects national security and foreign policy.

These implications to national security and foreign policy are particularly profound given the invisible interactions and feedback effects that arise in large organizations. Studies of governmental organizational behavior in the national security environment reveal how efficiency-driven contrivances such as SOPs shape policy even as they are shaped by it. Military SOPs, however, unlike (for instance) most civil-service bureaucratic SOPs, are backed by force in a way that goes beyond simple policy or procedure and that instead

fit within this article's working definition of law. Military orders, including SOPs, are therefore an example of how legally binding norms can create channels that guide policy in ways that policymakers do not perceive. Moreover, because the military is responsive in some respects to hostile agents, one must conclude that "the enemy" potentially influences policy in similarly unseen ways.

Our collective reluctance to recognize this kind of activity as law further frustrates our ability to understand the implications of quantum lawmaking when we encounter it. When confronted with a legal phenomenon that frays the veil over this hidden quantum essence, courts and legal scholars equivocate. They declare that such a phenomenon is not law at all (and even that its quantum character makes the notion of its legal force "simply self-refuting"). Or they explain that it is only law in some abstract or hypothetical sense. They avert their eyes. This article proposes that the judiciary and the legal academy face this oddity head-on. In examining this extremity of quantum lawmaking, we as a society might ultimately decide that the practical necessities of the military's special responsibilities to the country, or that the military's highly insulated position within the executive in fulfilling the most executive of functions, justify this vertiginous heterodoxy. Indeed, these arguments might justify them fully. But by glossing over the most bizarre attributes of quantum lawmaking, especially in the context of national security law, we systematically fail to understand this narrowest scope of military activity for what it is. It is law, and law with important national security policy implications, at that. It may lack the doctrinal neatness of some areas of law—although those other areas perhaps have a beauty that is only skin deep. But it is law nonetheless. It emanates, albeit distantly, from the same constitutional fabric from which our other laws are fashioned. And it affects society in important ways, whether we see it or not.