

SMITH V. OBAMA: A NEOCLASSICAL AFTER ACTION REVIEW

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I. INTRODUCTION

I . . . do solemnly swear . . . that I will support and defend the Constitution of the United States against all enemies, foreign and domestic . . . and that I will well and faithfully discharge the duties of the office on which I am about to enter.

—Oath of Office¹

Every officer in the United States Armed Forces must swear (or affirm) to uphold the oath of office, an oath to support and defend the Constitution of the United States against all enemies, both foreign and domestic.² The oath of office serves as an important rite of passage into the U.S. military for two reasons. First, as a practical matter, the oath serves as one of the most important prerequisites to af-

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1. 5 U.S.C. § 3331 (2012).

2. *Id.*

firming an officer's loyalty and allegiance to the duly constituted government of the United States of America. Second, the oath is extraordinary because officers in the U.S. military swear allegiance to an *idea*—not, as many countries require, to an individual political leader or military officer.³ That idea, the U.S. Constitution, informs officers that their allegiance is to a republic—“a government devoted to advancing the common good, of which the common defense and the general welfare are inseparable parts.”⁴ This is a particularly crucial point because world history has shown time and again that the loyalty of the military to the government it serves is vital to the maintenance of a free society.⁵

For all of its merits, however, the oath of office also brings with it a host of its own unique legal and professional issues.⁶ Throughout American history, the military officers' oath to support and defend the Constitution has been tested by the secession of southern states,⁷ the political and strategic overreach of senior generals,⁸ and the assignment of U.S. forces to international military commands.⁹ In the recent case of *Smith v. Obama*, however, the consequences of the oath are being tested in a new context and by a new question: can junior military officers leverage their own oath of office to sue their own Commander-in-Chief to determine the constitutionality of their orders?

In *Smith v. Obama*, one junior military officer has done just that, arguing that the President's order for him to deploy in support of Operation Inherent Resolve violates his oath to support and defend the Constitution.¹⁰ Captain Nathan Michael Smith (Captain Smith), an officer in the U.S. Army, filed a lawsuit seeking declaratory relief against his own constitutionally designated Commander-in-Chief.¹¹ Regardless of the court's ultimate legal decision, however, Captain Smith's lawsuit prompts the discussion of a separate normative question: *should* junior military officers sue the President to determine the constitutionality of the orders they have received?

3. R. Davis Younts, *Orders and the Oath: Understanding a Military Officer's Duty to Support and Defend the Constitution*, 39 REPORTER, no. 2, 2012, at 43.

4. ROBERT E. ATKINSON, JR., THE LIMITS OF MILITARY OFFICERS' DUTY TO OBEY CIVILIAN ORDERS: A NEO-CLASSICAL PERSPECTIVE 46 (2015).

5. Younts, *supra* note 3, at 44.

6. See generally Thomas H. Reese, *An Officer's Oath*, 25 MIL. L. REV. 1, 11-38 (1964) (discussing various historical events and circumstances giving rise to legal and professional issues under the oath of office).

7. *E.g.*, *id.* at 22-28.

8. *E.g.*, U.S. DEPT OF DEF., THE ARMED FORCES OFFICER 37 (2007) (1950).

9. *E.g.*, Reese, *supra* note 6, at 33-38.

10. 217 F. Supp. 3d 283 (D.D.C. 2016).

11. *Id.* at 288.

This Note evaluates Captain Smith's decision to sue the President as a professional matter by utilizing a functionalist professional model rooted in neoclassical republican theory. Part II of this Note describes the legal and factual setting of Captain Smith's lawsuit. Part III goes on to outline the functionalist professional model as it applies to military officers. In Part IV, this Note applies the functionalist professional model to analyze and critique Captain Smith's decision to sue the President of the United States. In Part V, this Note seeks to draw lessons from Captain Smith's suit to help determine how junior military officers that find themselves in similar circumstances might proceed a better way.

II. *SMITH V. OBAMA*: THE LEGAL AND FACTUAL SETTING

A. *The Islamic State in Iraq and Syria and Operation Inherent Resolve*

The Islamic State of Iraq and Syria (ISIS) is unique among terror organizations because its history can be traced all the way back to its very beginning.¹² ISIS originally grew out of the al-Qaeda in Iraq (AQI) terror group, which was responsible for much of the resistance the United States encountered between 2003 and 2010 in Operation Iraqi Freedom.¹³ When a 2006 American airstrike killed AQI's leader, Abu Muzab al-Zarqawi, his successor, Abu Ayyub al-Masri, formed the Islamic State of Iraq (ISI) and appointed Abu Omar al-Baghdadi as its leader.¹⁴ President George W. Bush's troop surge in 2007, however, proved successful and significantly degraded ISI's influence in Iraq.¹⁵ By 2011, ISI had suffered such significant losses that they had become virtually nonexistent on the battlefield.¹⁶ Nonetheless, the surge did not completely eradicate the terror group, and from 2011 to 2013, ISI successfully reestablished its influence in Iraq.¹⁷ By 2013, Abu Bakr al-Baghdadi, the group's current leader, had become so confident in ISI's growth that he changed the group's name to ISIS in order to "reflect[] its greater regional ambitions."¹⁸ In January 2014, ISIS

12. Samantha Arrington Sliney, *Right to Act: United States Legal Basis Under the Law of Armed Conflict to Pursue the Islamic State in Syria*, 6 U. MIAMI NAT'L SECURITY & ARMED CONFLICT L. REV. 1, 4 (2016).

13. Lee Ferran & Rym Momtaz, *ISIS Trail of Terror*, ABC NEWS, <http://abcnews.go.com/WN/fullpage/isi-trail-terror-isis-threat-us-25053190> [<https://perma.cc/86DZ-H36T>].

14. S.C. DHIMAN, *ISLAMIC STATE OF IRAQ AND SYRIA (ISIS): RECONCILIATION, DEMOCRACY AND TERROR* 126 (2015).

15. Cameron Glenn, *Timeline: Rise and Spread of the Islamic State*, WILSON CTR., <https://www.wilsoncenter.org/article/timeline-rise-and-spread-the-islamic-state> [<https://perma.cc/YZ63-74S2>].

16. Ferran & Momtaz, *supra* note 13.

17. *Id.*

18. *Id.*

realized those greater ambitions when it conquered the town of Raqqa, Syria, and declared it the capital of its newly established caliphate.¹⁹

ISIS truly commanded the world's attention, however, when it launched a dramatic military offensive in the summer of 2014 that resulted in the capture of two additional cities in Iraq: Mosul, Iraq's second largest city, and Tikrit, the hometown of Saddam Hussein.²⁰ ISIS's offensive continued throughout the year when the group seized gas fields, border crossings, and dams throughout Iraq and Syria.²¹ By August 2014, ISIS had further conquered the Kurdish towns of Sinjar and Zumar, forcing thousands more civilians to flee their homes.²²

Prompted by ISIS's threat and the resultant humanitarian crisis, President Obama authorized the U.S. military to provide humanitarian aid to the threatened populace and to conduct targeted airstrikes against ISIS on August 7, 2014.²³ Less than one week later, the President ordered 130 military advisors to Iraq to "assess the situation."²⁴

On September 10, 2014, President Obama formally outlined his strategy for Operation Inherent Resolve to the American public in a televised speech. The President promised "a systematic campaign of airstrikes against these terrorists," with the strategic objective of "degrad[ing], and ultimately destroy[ing], [the Islamic State]."²⁵ The President went on to note that his administration had "secured bipartisan support for this approach here at home," and that he would "welcome congressional support for this effort in order to show the world that Americans are united in confronting this danger."²⁶

Rather than granting President Obama a specific Authorization for the Use of Military Force (AUMF), however, Congress opted to pass a continuing appropriations resolution for President Obama's plan on September 18, 2014.²⁷ Specifically, the appropriations resolution authorized the Department of Defense to "provide assistance, including training, equipment, supplies, and sustainment, to appropriately vetted elements of the Syrian opposition."²⁸ On September

19. *Id.*

20. Glenn, *supra* note 15.

21. *Id.*

22. *Id.*

23. *Id.*

24. Micah Zenko, *Your Official Mission Creep Timeline of the U.S. War in Syria*, FOREIGN POL'Y (Oct. 19, 2015, 5:26 PM), <http://foreignpolicy.com/2015/10/19/official-mission-creep-timeline-us-war-in-syria-obama-administration/> [<https://perma.cc/86V2-7UR7>].

25. Office of the Press Sec'y, White House, *Statement by the President on ISIL*, OBAMA WHITE HOUSE ARCHIVES (Sept. 10, 2014, 9:01 PM), <https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1> [<https://perma.cc/VXV2-Z5L2>].

26. *Id.*

27. Zenko, *supra* note 24.

28. Act of Sept. 19, 2014, Pub. L. No. 113-164, § 149(a), 128 Stat. 1874 (2014).

23, 2014, President Obama sent a letter to congressional leaders that provided details of his specific legal authority to carry out his plans against ISIS.²⁹ The President stated that he was taking actions “pursuant to [his] constitutional and statutory authority as Commander in Chief,” his authority “as Chief Executive,” and his “constitutional and statutory authority to conduct the foreign relations of the United States.”³⁰ By the end of 2014, the President authorized an additional 2,800 troops to train and advise Iraqi security forces.³¹

In February 2015, President Obama sent another letter to Congress requesting the passage of a new, official AUMF against ISIS for the first time.³² While the President acknowledged in his letter that “existing statutes provide [him] with the authority [he] need[s] to take these actions,” he was requesting the specific AUMF in the spirit of his commitment to work with Congress and against ISIS in a bipartisan manner.³³ After numerous congressional hearings on the proposed legislation, however, Congress failed to pass a new AUMF in any form.³⁴

B. The Legal Foundation for Operation Inherent Resolve

1. The War Powers Resolution

Any time the President introduces U.S. Armed Forces into hostilities or situations where hostilities are imminent, he or she must abide by the provisions of the War Powers Resolution.³⁵ Congress passed the War Powers Resolution in 1973 in response to what it viewed as executive overreach in ordering troop deployments throughout the Vietnam War.³⁶ Congress stated its policy for the resolution as follows:

29. Letter from President Barack Obama to Congressional Leaders Reporting on the Deployment of United States Armed Forces Personnel to Iraq and the Authorization of Military Operations in Syria (Sept. 23, 2014) [hereinafter President’s Letter to Congressional Leaders], <https://www.gpo.gov/fdsys/pkg/DCPD-201400697/pdf/DCPD-201400697.pdf> [https://perma.cc/GDU2-M92U].

30. *Id.*

31. Zenko, *supra* note 24.

32. Letter from Barack Obama, President, United States, on Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant to the Congress of the United States (Feb. 11, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection> [https://perma.cc/7VUW-V84W].

33. *Id.*

34. *See Congressional Hearings on an ISIL AUMF*, CTR. NAT’L SECURITY STUD., <http://cnss.org/pages/congressional-hearings-on-an-isil-aumf.html> [https://perma.cc/TXN2-RCX9].

35. 50 U.S.C. § 1541 (2012).

36. *Id.* §§ 1541-45; *see also* Richard Nixon, Veto of the War Powers Resolution, PUB. PAPERS 893 (Oct. 24, 1973) (“The only way in which the constitutional powers of a branch

It is the purpose of this [joint resolution] to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.³⁷

The War Powers Resolution requires the President to consult with Congress before introducing U.S. Armed Forces into hostilities by submitting a written report to the Speaker of the House of Representatives and the President *pro tempore* of the Senate.³⁸ The President must do so within forty-eight hours after “United States Armed Forces are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”³⁹ The War Powers Resolution also requires the President obtain either a congressional declaration of war or a specific statutory authorization for the continued use of force within sixty days after submitting his initial report to Congress.⁴⁰ Should Congress fail to provide “specific authorization” for the use of force, the President must immediately withdraw U.S. forces from the conflict, unless the President finds that “unavoidable military necessity” exists.⁴¹ In that case, the President has an additional thirty days to withdraw U.S. forces.⁴²

2. *Congressional Authorizations for the Use of Military Force*

When President Obama ordered military action in Iraq and Syria, he relied on two separate congressional AUMFs to legally justify combat operations. First, the President relied on an AUMF that Congress passed in response to al-Qaeda’s high-profile terror attacks against the United States on September 11, 2001 (2001 AUMF).⁴³ Section 2(a) of the 2001 AUMF articulates Congress’s primary grant of authority:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or person he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or per-

of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force.”).

37. 50 U.S.C. § 1541(a).

38. *Id.* § 1543(a).

39. *Id.*

40. *Id.* § 1544(b).

41. *Id.*

42. *Id.*

43. President’s Letter to Congressional Leaders, *supra* note 29.

sons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁴⁴

Congress originally passed the 2001 AUMF to allow President George W. Bush to initiate the American war effort in Afghanistan, Operation Enduring Freedom.⁴⁵ Clearly, the 2001 AUMF applied to the al-Qaeda terror group, which was directly responsible for the September 11th attacks, and the Taliban, al-Qaeda's stewards in Afghanistan.⁴⁶ However, the President's use of this AUMF has drawn a number of critiques, namely that (a) the AUMF is now fifteen years old, and (b) not only is the connection between ISIS and al-Qaeda tenuous at best, but al-Qaeda has openly disavowed its association with ISIS.⁴⁷

The second AUMF President Obama relied upon in pursuing Operation Inherent Resolve was passed by Congress in 2002, during the run-up to Operation Iraqi Freedom (2002 AUMF).⁴⁸ This AUMF grants the President authority "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq."⁴⁹ While this authorization is nearly as old as the 2001 AUMF, it has been almost universally understood to include both the threat posed by the government of Saddam Hussein and the national security threat posed by the instability in Iraq that followed Saddam Hussein's ouster.⁵⁰ Nonetheless, the 2002 AUMF remains an imperfect and politically awkward legal basis—not only is it silent on the use of force in Syria, but the Obama Administration even called for its repeal in 2014, prior to launching Operation Inherent Resolve.⁵¹

C. Captain Smith Sues the President

Captain Nathan Michael Smith entered the U.S. Army as a Military Intelligence Officer and took his own oath of office in 2010, be-

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

45. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2109 (2005).

46. *Id.*

47. Olivia Gonzalez, Comment, *The Pen and the Sword: Legal Justifications for the United States' Engagement Against the Islamic State of Iraq and Syria (ISIS)*, 39 FORDHAM INT'L L.J. 133, 163 (2015).

48. President's Letter to Congressional Leaders, *supra* note 29.

49. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a)(1), 116 Stat. 1498, 1501 (2002).

50. See Jack Goldsmith, *The 2002 Iraq AUMF Almost Certainly Authorizes the President to Use Force Today in Iraq (and Might Authorize the Use of Force in Syria)*, LAWFARE (June 13, 2014, 11:29 AM), <http://www.lawfareblog.com/2002-iraq-aumf-almost-certainly-authorizes-president-use-force-today-iraq-and-might-authorize-use> [https://perma.cc/6TVP-Q4W3].

51. William S. Castle, *The Argument for a New and Flexible Authorization for the Use of Military Force*, 38 HARV. J.L. & PUB. POL'Y 509, 525-26 (2015).

believing that the U.S. military was “a force for good in the world.”⁵² “With the people’s representatives in Congress holding the keys to war and peace, he believed that his service as an officer would carry out the will of his fellow Americans.”⁵³ “One of his proudest military assignments,” Smith stated, “was in Afghanistan, where Congress had authorized the President to wage war.”⁵⁴

When Captain Smith embarked on his second deployment in support of Operation Inherent Resolve he was ready, believing that the military operation was justified both legally and morally.⁵⁵ While he “cheer[ed] every airstrike and every setback for ISIS,” he also saw “that people at home were torn about whether President Obama should be carrying out this war without proper authorization from Congress.”⁵⁶ Captain Smith began to wonder: “‘Is this the [Obama] Administration’s war, or is it America’s war?’ The Constitution tells us that Congress is supposed to answer that question, but Congress is AWOL.”⁵⁷

Captain Smith started researching the legality of Operation Inherent Resolve, beginning with the Supreme Court’s 1804 decision in *Little v. Barreme*.⁵⁸ In that case, Chief Justice John Marshall held that “[a] commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution.”⁵⁹ Thinking that Operation Inherent Resolve may not be warranted by law, Captain Smith faced a conundrum: while he recognized that he was part of an important mission, he also knew that he had a duty to adhere to his oath to support and defend the Constitution.

Not long after his reading of *Little v. Barreme*, Captain Smith found an August 2015 *Atlantic* article written by Yale Law School Professor Bruce Ackerman.⁶⁰ The op-ed argued that under existing case law, “individual soldiers can go to court if they are ordered into a combat zone to fight a war that they believe is unconstitutional.”⁶¹

52. Complaint for Declaratory Relief at 4, *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016) (No. 16-843 (CKK)).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Bruce Ackerman, *Is America’s War on ISIS Illegal?*, N.Y. TIMES (May 4, 2016), http://www.nytimes.com/2016/05/05/opinion/is-americas-war-on-isis-illegal.html?_r=0 [https://perma.cc/FAS8-6BS5].

59. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804) (emphasis omitted).

60. Ackerman, *supra* note 58.

61. Bruce Ackerman, *Can the Supreme Court Force Congress to Own the War on ISIS?*, ATLANTIC (Aug. 25, 2015), <http://www.theatlantic.com/politics/archive/2015/08/supreme-court-and-isis/402155/> [https://perma.cc/ET93-UALB].

After consulting with Professor Ackerman, Captain Smith made his decision: since he could not be sure that his involvement in Operation Inherent Resolve actually violated his oath of office, he would continue to serve in Kuwait.⁶² At the same time, however, he would sue President Obama for a declaratory judgment defining the limits of his constitutional responsibilities.⁶³

On May 4, 2016, Captain Smith filed his lawsuit against President Obama in the United States District Court for the District of Columbia.⁶⁴ His complaint alleged five counts against the President regarding both the unconstitutionality and statutory illegality of Operation Inherent Resolve.⁶⁵ Specifically, Captain Smith argued that Operation Inherent Resolve was being waged in violation of (1) the War Powers Resolution; (2) the Take Care Clause of the U.S. Constitution; (3) the 2001 AUMF; (4) the 2002 AUMF; and (5) the President's constitutional power as the "Commander in Chief of the Army and Navy of the United States."⁶⁶

Regardless of the merits of Captain Smith's legal arguments, however, a more important and foundational question remains to be answered: as a junior member of the profession of arms, *should* Captain Smith have sued the President? In Part III, we turn to the neoclassical professional theory as the framework for an answer.

III. THE NEOCLASSICAL PROFESSIONAL THEORY: A FUNCTIONALIST APPROACH TO THE PROFESSION OF ARMS

A. *The Functionalist Thesis and Neoclassical Professional Theory*

The professional ideology of service goes beyond serving others' choices. Rather, it claims devotion to a transcendent value which infuses its specialization with a larger and putatively higher goal which may reach beyond that of those they are supposed to serve.

—Eliot Freidson⁶⁷

Classic functionalist theory "rests on two closely related theses, the first about professions' essential function, the second about their necessary form."⁶⁸ First, functionalist theory maintains that members of professions share a particularized and "socially essential kind of

62. Ackerman, *supra* note 58.

63. *Id.*

64. Complaint for Declaratory Relief at 1-3, *supra* note 52.

65. *Id.* at 11-13.

66. *Id.*

67. ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC 122 (2001).

68. Rob Atkinson, *The Foundations of Neo-Classical Professionalism in Law and Business*, 10 GEO. J.L. & PUB. POL'Y 429, 439 (2012).

knowledge and virtue.”⁶⁹ Second, it argues that in order to maintain the kind of professional knowledge and virtue necessary to society, autonomous institutions are necessary for their control.⁷⁰

1. *The Function of Professions: Knowledge and Virtue*

Different kinds of professions serve readily identifiable, yet distinct, social functions.⁷¹ What unites them, however, is that in each respective context professions “provide a kind of specialized knowledge and an associated virtue that society cannot secure from either the market . . . or the state.”⁷² With respect to the market, professions provide a solution to two separate and well-known capital market issues.

First, there is a significant information asymmetry in the market between professionals and consumers of their services.⁷³ Services provided by professions are often so complex or difficult to understand that ordinary consumers could not, without a significant cost to themselves, make fully informed decisions about the quality of the service that any particular profession provides.⁷⁴ This is the role of professional knowledge—providing services that the public vitally needs. However, on the opposite side of the transaction, professional service providers are presented with the perverse incentive “to trade on their superior knowledge—and their consumers’ relative ignorance—to the consumers’ disadvantage.”⁷⁵

Second, transactions between consumers and professionals threaten to impose external costs on parties outside of the individual professional-consumer transaction.⁷⁶ Since these costs are not taken into account by the parties to the transaction themselves, they “tend to produce and consume the service in socially non-optimal amounts or kinds; the costs of their less than ideal decisions fall on others.”⁷⁷ With respect to professions like law and medicine, these kinds of costs are illustrated well by problems like under competence and ex-

69. *Id.*

70. *Id.*

71. *Id.* at 440.

72. *Id.*

73. *Id.*

74. *Id.*; see also FREIDSON, *supra* note 67, at 79 (“The requirement of discretionary specialization . . . and most particularly those based on esoteric, abstract theory, poses a serious problem to prospective labor consumers. How are they to judge whether a prospective worker is able to perform tasks adequately?”).

75. Atkinson, *supra* note 68, at 441.

76. *Id.*

77. *Id.*

cessive zeal.⁷⁸ In the face of these problems, neoclassical (and functionalist) theory provides a solution in the form of two requisite professional virtues: first, that the professional place his client's needs above his own; and second, that the professional place society's needs above both his client's and his own.⁷⁹

2. *Professional Institutions: Form Follows Function*

Having identified the necessary function of classical professions in response to market failures, the next task is to identify their necessary form. "The [usual] response to . . . market failure[] is governmental intervention"⁸⁰ In the context of professional services (like law and medicine), these measures often include special educational requirements, fiduciary duties, or third-party monitoring.⁸¹ Generally speaking, these measures are designed to "ensure that the unqualified do not deliver services and that the qualified deliver them as promised, at an appropriate level of quality, and without excessive cost to either clients or third parties."⁸²

Nonetheless, expounding crystal clear standards of professional conduct through governmental regulation is difficult.⁸³ Not only do lay persons in government lack the ability to know whether professionals have the requisite knowledge but they also lack the ability to determine whether the professional is using his knowledge well.⁸⁴ Compounding the problem of the layperson's inability to set forth clear standards for professionals is the additional problem that professional knowledge requires a significant amount of discretion.⁸⁵ Hence, traditional professions claim that in order to secure professional virtue,

78. See *id.* at 441-43 (describing under competence and excessive zeal as externalities in the legal profession); Rob Atkinson, *Medicine and Law as Model Professions: The Heart of the Matter (And How We Have Missed It)*, 22 HEALTH MATRIX 345, 360-62 (2013) (discussing under competence and excessive zeal as externalities in the medical profession).

79. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 125 (1998) (noting that the self-regulatory regime of the "Progressive-Functionalist project" enforced two basic norms, which "are primarily concerned with the adequacy of service to clients, and secondarily with fairness to third parties"); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 66 (1992) ("Good lawyers . . . must sometimes ignore their own self-interest, or the self-interest of their clients.").

80. Atkinson, *supra* note 68, at 445.

81. Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 272-73 (1995).

82. Atkinson, *supra* note 68, at 445.

83. See SIMON, *supra* note 79, at 123 ("Because such services depend on technical knowledge and resist standardization, they are not readily compatible with market or bureaucratic organization.").

84. Atkinson, *supra* note 68, at 446.

85. *Id.*

they must have a “significant measure of autonomy from state regulation as well as protection from market competition.”⁸⁶

Where neoclassical professional theory departs from the traditional functionalist model, however, is in the functionalist idea that autonomous professional institutions are needed to guarantee the kind of socially necessary professional knowledge and virtue.⁸⁷ Instead, neoclassically republican professions rely “on more basic institutions of classical republicanism, education and deliberation . . . [and are] best situated in a neoclassical republic.”⁸⁸ In turn, that republic would be guided by professionals schooled as both philosophers and technocrats, where each of its citizens have the opportunity to become the best possible professional, where “‘best’ means most knowledgeable of the public good and most committed to, and successful in, its service.”⁸⁹

B. The Neoclassical Profession of Arms

You, the officers, the men and women of the Armed Forces of today, are the Nation’s Guardians, Guardians of today.

—General John W. Vessey, Jr.⁹⁰

Our Founders acknowledged in the Preamble to the Constitution the dual imperatives to “insure domestic [t]ranquility” and to “provide for the common defence.”⁹¹ By doing so, our fundamental law has thus recognized a precondition to civil society that has been known since at least the time of Plato: the need to watch over “enemies without and friends at home.”⁹² For the United States and Plato alike, the solution to this precondition is straightforward, at least on the surface: the establishment of a military that stands ready to provide security against the nation’s enemies, both foreign and domestic.⁹³

86. *Id.* at 445; *see also* MODEL RULES OF PROF’L CONDUCT pmbl. (1983) (AM. BAR ASS’N, amended 2016) (arguing that “[s]elf-regulation also helps maintain the legal profession’s independence from government domination,” which is important to the rule of law because “abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice”).

87. Atkinson, *supra* note 68, at 487.

88. *Id.* at 490.

89. *Id.*

90. Gen. John W. Vessey, Jr., Remarks to the Combined 1984 Graduating Classes of the Naval War College: A Concept of Service (June 21, 1984).

91. U.S. CONST. pmbl. (“We the People of the United States, in Order to form a more perfect Union . . . provide for the common defence, [and] promote the general Welfare . . . do ordain and establish this Constitution for the United States of America.”).

92. PLATO, *THE REPUBLIC* bk. III, at 94 (A.D. Lindsay trans., Everyman’s Library ed. 1992) (1906).

93. *See* U.S. CONST. art. I, § 8, cls. 11-14; *id.* art. II, § 2.

1. *The Function of the Profession of Arms: Guardians of the Republic*

Officers take on immense responsibilities . . . unlike anything in civilian life, for they have in their control the means of death and destruction. The higher their rank, the greater the reach of their command, the larger their responsibilities.

—Michael Walzer⁹⁴

The function of the profession of arms in the United States is, first and foremost, “to win the nation’s battles and campaigns and to sustain the peace.”⁹⁵ Put another way, the profession of arms is fundamentally concerned with the fighting and prosecution of wars on behalf of the will of the people.⁹⁶ Implicit in the profession’s domain are two necessary competencies. First, the military “officer [must] hone his or her own [individual warfighting] skills to the sharpest edge.”⁹⁷ Standing alone, however, becoming a skilled warfighter as an individual is not enough for members of the military profession. After all, the “military practice is group practice. The military art is deeply concerned with the performance of the human group under stress.”⁹⁸ Consequently, and most importantly, the military officer must also demonstrate a mastery of organizational leadership—of sharpening the collective unit’s skills and applying them in combat.⁹⁹

The gravity of an officer’s competency as an organizational leader is immense.¹⁰⁰ At the most senior levels, military officers shoulder the burden of articulating strategy and planning campaigns, often receiving orders directly from civilian officials themselves.¹⁰¹ At the more junior levels, the military officer is responsible for “the teaching skills to train subordinates, the executive skills to set performance standards and to evaluate their achievement, and the leadership skills to direct execution under combat conditions.”¹⁰²

Finally, military officers are ethically responsible for applying their technical expertise according to the code of the Just War Tradition.¹⁰³ That tradition has two aspects—*jus ad bellum*, the morality underlying

94. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 316 (5th ed. 2015).

95. U.S. DEP’T OF DEF., *supra* note 8, at 29.

96. *Id.* at 11.

97. *Id.* at 14.

98. *Id.*; see also HAROLD G. MOORE & JOSEPH L. GALLOWAY, *WE WERE SOLDIERS ONCE . . . AND YOUNG* 215 (1993) (describing the group practices of soldiers in the field).

99. U.S. DEP’T OF DEF., *supra* note 8, at 14.

100. See *id.* at 12 (“Because [an officer’s] responsibilities include the potential wholesale taking and losing of life, the military profession stands alone, in its own eyes and in the eyes of those it serves.”).

101. WALZER, *supra* note 94, at 316-17.

102. U.S. DEP’T OF DEF., *supra* note 8, at 24.

103. *Id.* at 14-15.

ing the rationale for going to war, and *jus in bello*, the morality of how a war is conducted.¹⁰⁴ The profession of arms is concerned primarily with *jus in bello*, because they are the ones responsible for the conduct of war.¹⁰⁵ Under the norms of *jus in bello*, the military officer assumes two crucial responsibilities: the responsibility to take positive steps to limit the infliction of civilian casualties and the responsibility to hold his or her subordinates to the Just War Tradition itself.¹⁰⁶

2. *The Institution of the Military Profession: A Model Neoclassical Profession*

The profession of arms is unique among professions in the sense that it operates as a kind of monopsony facing a monopoly—in the “market” for the sanctioned use of armed force, there is but one buyer (the government) and one seller (the military). Consequently, the military institution constitutes a de facto model neoclassical profession, necessarily situated within the American Republic. However, the simple establishment of a military institution is no panacea to the necessary preconditions of civil-society because it immediately poses a derivative problem: how should a society ensure the loyalty of the group that it provides a complete monopoly on the lawful use of violent force?¹⁰⁷

The supposed “best” answer to this dilemma has plagued political societies since Plato’s own and continues to be a matter of debate to this day.¹⁰⁸ For our Founders, the “best” answer lied within the government’s primary purpose itself.¹⁰⁹ After all, our government “is a republic—a government devoted to advancing the common good.”¹¹⁰ Under this definition, our Founders elected to “radically transform[] the role of the military in society” by subordinating it not to a partic-

104. See WALZER, *supra* note 91, at 21.

105. U.S. DEPT OF DEF., *supra* note 8, at 15.

106. WALZER, *supra* note 91, at 317.

107. See THE FEDERALIST NO. 26, at 140 (Alexander Hamilton) (Robert A. Ferguson ed. 2006).

108. See, e.g., SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 84-85 (1957) (arguing that an objective control model of military professionalism is the most appropriate path to keeping the military subservient to the state without diminishing its capacity to defend the state against violent attacks); MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT (2d ed. 1971) (arguing that unless the military is supplemented with divergent liberal civilian values, the military will not only threaten civilian values but will suffer in its core defensive mission); PLATO, *supra* note 92, at bk. II, at 51-52 (“[W]ith such [spirited] natures as these, how are they to be prevented from behaving savagely towards one another and the other citizens? . . . [W]e must have them gentle to their fellows and fierce to their enemies. If we can’t effect that, they will prevent the enemy from destroying the city by doing it first themselves. . . . Where shall we find a character at once gentle and high-spirited?” (interlocutor’s responses omitted)).

109. U.S. DEPT OF DEF., *supra* note 8, at 1.

110. ATKINSON, *supra* note 4, at 46.

ular individual but to the will of the people, as embodied by the Constitution.¹¹¹ Hence, the focal point of allegiance for all citizens, both military and civilian alike, was a body of “‘self-evident’ truths”—“life, liberty, and the pursuit of happiness”—that our government is designed to protect.¹¹²

By taking the oath of office, then, military officers are sworn to support and defend the *ideals* embodied in our Constitution, both explicit and implicit. Explicitly, the Constitution delegates powers over the military to both the President and Congress.¹¹³ Implicitly, the Constitution subordinates the military to complete civilian control, “in recognition of the ultimate source of political sovereignty asserted in the Declaration of Independence.”¹¹⁴ Importantly, the military is an apolitical institution, duty-bound to obey lawful and moral orders of elected officials, and has no ability to act as a check or balance to any other branch of the government.¹¹⁵

Nonetheless, the military officer’s duty to obey comes with one important caveat. As both Plato and the American Founders recognized, the common defense and the general welfare are inseparable parts of a proper republic.¹¹⁶ Thus, as a neoclassical profession, members of the profession of arms are imbued with a duty even more crucial than the general duty to obey: the duty of knowing and advancing the common good.¹¹⁷ This means that in the republic they serve, “the factors military officers are to consider in both making [the determination to obey] and in deciding how to respond to it—the professional, legal, and moral factors—must all ultimately be reducible to the common good, the common denominator of both civilian and military service.”¹¹⁸

111. U.S. DEP’T OF DEF., *supra* note 8, at 1.

112. *Id.* (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

113. U.S. CONST. art. I, § 10, cl. 3; *id.* art. II, § 2, cl. 1.

114. U.S. DEP’T OF DEF., *supra* note 8, at 33.

115. Kenneth Keskel, *The Oath of Office: A Historical Guide to Moral Leadership*, 26 AIR & SPACE POWER J. 47, 51-52 (2002).

116. ATKINSON, *supra* note 4, at 45.

117. *Id.*

118. *Id.* This is not to say that military officers have an inherent duty to act upon independent assessments of the merits of political or strategic decisions made by elected civilian officials. Rather, as a neoclassical profession, military officers must be knowledgeable of the public good and be committed to its service. Almost always, military officers act to advance the common good by obeying those authorities as they have been constitutionally designated. See U.S. DEP’T OF DEF., *supra* note 8, at 38 (“The American officer must refrain from individual interpretations of the Constitution. To be a ‘Defender of the Constitution and Servant of the Nation,’ officers must promptly and effectively obey the chain of command, regardless of political party or ideological bent. An officer’s duty must be to implement state policy and to execute without challenge the lawful orders of elected leadership, reserving advice for legitimate forums and restricting it to matters of professional competence.”); Younts, *supra* note 3, at 47 (“[T]he decision to defy an order is a serious one which may lead to court-martial.”).

IV. CRITIQUE OF CAPTAIN SMITH'S DECISION TO SUE THE PRESIDENT: CAPTAIN SMITH'S LAWSUIT AS AN UNPROFESSIONAL ACT

With the factual and theoretical setting established, we can at long last address the ultimate question: Did Captain Smith get it right? Do junior military officers, by filing a lawsuit to determine the legal and constitutional validity of a war, promote the common good? This Part analyzes the merits of Captain Smith's decision to sue the President and ultimately concludes that in this case, he did not.

Before we begin, however, we must note that Captain Smith's decision to sue the President is not a legally insubordinate act.¹¹⁹ In fact, Captain Smith never refused to obey any of the President's orders, and he has consequently received no legal punishment.¹²⁰ Further, Captain Smith's decision to sue the President is unique in the sense that his motive for the lawsuit appears to have nothing to do with any particular ideological bent; rather, he seems to earnestly have questioned whether his participation in Operation Inherent Resolve violated his oath to support and defend the Constitution.¹²¹ Nonetheless, as the following analysis provides, there is something deeply unsettling about a junior military officer taking it upon himself to sue his very own Commander-in-Chief.

A. *Captain Smith's Position in the Hierarchy of Military Command*

All commanding officers and others in authority in the Army are required—

(1) to show in themselves a good example of virtue, honor, patriotism, and subordination.¹²²

First, due to his deeply subordinate status as a junior military officer, Captain Smith's actions impliedly question the judgment of many other officers in the profession of arms. Unlike a general of-

119. See 10 U.S.C. § 888 (2012) ("Any commissioned officer who uses contemptuous words against the President . . . shall be punished . . ."); *id.* § 890 ("Any person subject to this chapter who . . . willfully disobeys a lawful command of his superior commissioned officer . . . shall be punished . . ."); *id.* § 892 ("Any person subject to this chapter who—(1) violates or fails to obey any lawful general order or regulation; [or] (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 . . . shall be punished . . .").

120. Matt Ford, *Is the U.S. War Against ISIS Illegal?*, ATLANTIC (May 5, 2016), <http://www.theatlantic.com/politics/archive/2016/05/is-the-us-war-against-isis-illegal/481377/> [<https://perma.cc/SJ3C-3PS6>] (noting that Captain Smith remained on active military service while the lawsuit was pending).

121. See Steven Nelson, *Soldier Suing Obama Over ISIS War Is Doing Fine, Lawyer Says*, U.S. NEWS (May 6, 2016, 4:45 PM), <http://www.usnews.com/news/articles/2016-05-06/soldier-suing-obama-over-isis-war-is-doing-fine-lawyer-says> ("There's no name-calling . . . He's not saying the president is a this-and-a-that and that he's not going to follow orders . . . He's addressing the policy rather than the president.").

122. 10 U.S.C. § 3583 (2012).

ficer, who may take his orders directly from the President or other civilian authorities, junior military officers, like Captain Smith, are situated under multiple levels of superior commands. Given his position in the chain of command, then, Captain Smith's allegation that his orders are unconstitutional begs the question: has every other officer above him with the same orders failed to ensure that they are acting in adherence with their own oaths? In a military that prides itself on avoiding blind obedience to orders, its members almost certainly have not.¹²³ Vis-à-vis the chain of command, then, Captain Smith's suit effectively questions the judgment of each of his many superiors, military and civilian alike.

Moreover, commanders and staff officers at every level are afforded the legal counsel of the military's own Judge Advocate General's (JAG) Corps.¹²⁴ Armed with this resource, junior military officers can rest assured that proper legal analysis of their orders is being conducted not only at their own level of command but also at the many levels of authority placed above them. Hence, if a junior military officer questions the explicit legal basis of his or her orders, he or she has the necessary legal professional readily available to provide an answer. Consequently, Captain Smith's decision to go outside the profession of arms to seek both legal counsel and a legal remedy not only questions the judgment of his own chain-of-command, but the judgment of his own JAG advisors as well.

B. Captain Smith's Relevant Expertise: Officers' Legal Knowledge

As we have seen, the profession of arms is concerned first and foremost with the nation's ability to wage its wars, not its ability to zealously defend the nation's constitutional doctrine. Consequently, Captain Smith's foray into his own legal research and subsequent decision to sue the President took him out of the realm of his own professional expertise and into the realm of a wholly separate professional expertise—that of the law. Here, the threat that a lawsuit like Captain Smith's poses to the common good may be more easily seen were the situation reversed: just as we presumably would not want our nation's junior lawyers involved in the application of force on the battlefield, we also do not want junior military officers weighing in on complex constitutional matters in a court of law.

123. U.S. DEPT OF DEF., *supra* note 8, at 34 (“[T]oday’s Soldiers, Sailors, Marines, Coastguardsmen, and Airmen, must understand not only what they must do, but why they must do it.”).

124. *See, e.g.*, HEADQUARTERS, DEPT OF THE ARMY, FIELD MANUAL 1-04: LEGAL SUPPORT TO THE OPERATIONAL ARMY 1-1 (2013) (“The mission of the Judge Advocate General’s Corps . . . is to develop . . . one team of proactive professionals . . . who deliver principled counsel and mission-focused legal services to the Army and the Nation.”).

Admittedly, Captain Smith's legal basis for suing the President was rooted in the theory of a relatively well-known and widely cited Yale Law School professor, Bruce Ackerman. Regardless of the validity of Professor Ackerman's theory, however, significant normative and practical problems remain. First, Captain Smith's decision to adopt (and sue under) his own unique interpretation of the Constitution is exactly what the Department of Defense counsels military officers not to do.¹²⁵ Second, the lawsuit improperly injects a degree of uncertainty into an area where certainty is of the utmost importance—the legal validity of theatre-wide combat operations. Given these circumstances, the junior military officer's legal judgment is best deferred to his superiors—the senior civilian, military, and legal officials making the ultimate decision to go to war in the first place.¹²⁶

C. Federal Courts as the Wrong Forum for Junior Military Officer Dissent

Next, we turn to the issues posed by the fact that Captain Smith has elected to voice his dissent in a federal court. History and case law show that military officers have generally settled on choosing one of three options when faced with a potentially unlawful order: "they can (1) obey the order, (2) disobey the order and accept the consequences or, if possible, (3) resign."¹²⁷ Notably absent from this menu is the option of suing the person issuing the order in a federal court, and for good reason: public dissent by military officers threatens to undermine the public's trust and confidence in both the profession of arms itself and the politically elected leaders above them.¹²⁸

Within the profession of arms, Captain Smith's suit undermines the fundamental precepts necessary for an efficient and capable military profession.¹²⁹ As the Department of Defense counsels:

125. See U.S. DEP'T OF DEF., *supra* note 8, at 38 ("The American officer must refrain from individual interpretations of the Constitution.").

126. The military profession is by no means alone in recognizing the necessity of coherent command and control between superiors and subordinates. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 5.2 cmt. 2 (1983) (AM. BAR ASS'N, amended 2016) ("When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. . . . [I]f the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly.").

127. Younts, *supra* note 3, at 48; see also U.S. DEP'T OF DEF., *supra* note 8, at 28 ("[P]rofessionals are bound by their oath to execute legal civilian decisions as effectively as possible—even those with which they fundamentally disagree—or they must request relief from their duties, or leave the service entirely, either by resignation or retirement.").

128. U.S. DEP'T OF DEF., *supra* note 8, at 26.

129. *Id.* at 38.

An officer's duty must be to implement state policy and to execute without challenge the lawful orders of elected leadership, reserving advice for legitimate forums and restricting it to matters of professional competence. Officers must not publicly question the effectiveness or validity of national policy.¹³⁰

The federal courts, of course, are not generally accepted forums within the profession for providing either advice or dissent.¹³¹

Outside the profession, Captain Smith's allegation that the President is acting without legal authority in Iraq and Syria places the legitimacy of those orders at the front and center of political debate. Given the relative social prestige the military profession enjoys, officers' "views are likely to gain substantial attention from a population that tends to respect military opinion," whatever the level of command.¹³² Consequently, the action poses a number of significant risks, not only to the military's social standing but also by undermining the nation's confidence in their elected leaders on matters of policy and strategy.¹³³ Of course, this is enough to give even senior military officers pause before voicing their dissent, let alone an officer far more their junior.

D. What's (Possibly) Really Happening: Beware the Political Wolf in Sheep's Clothing

Let civilian voices argue the merits or demerits of our processes of government; whether our strength is being sapped by deficit financing, indulged in too long, by federal paternalism grown too might, by power groups grown too arrogant, by politics grown too corrupt, by crime grown too rampant, by mortals grown too low, by taxes grown too high, by extremists grown too violent; whether our personal liberties are as thorough and complete as they should be. These great national problems are not for your professional participation or military solution.

—General of the Army Douglas MacArthur¹³⁴

In Professor Ackerman's initial *Atlantic* article, he argued that "individual soldiers can go to court if they are ordered into a combat zone to fight a war that they believe is unconstitutional."¹³⁵ Regard-

130. *Id.*

131. See Younts, *supra* note 3, at 48.

132. Risa A. Brooks, *Militaries and Political Activity in Democracies*, in *AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA* 213, 232 (Suzanne C. Nielsen & Don M. Snider eds., 2009).

133. *Id.* at 235.

134. Douglas MacArthur, General, U.S. Army, Sylvanus Thayer Award Acceptance Address at the U.S. Military Academy (May 12, 1962), <http://www.americanrhetoric.com/speeches/douglasmacarthurthayeraward.html> [<https://perma.cc/2488-4KS5>].

135. Ackerman, *supra* note 61.

less of whether a soldier legally can or cannot go to court, however, he has missed the mark on the more important question we are currently addressing: whether junior military officers *should* go to court if they believe the war they are ordered to fight is unconstitutional. At least in the context of Captain Smith's lawsuit, to which Professor Ackerman serves as an advisor, the answer is no.

Most problematically for Captain Smith, the original impetus for Professor Ackerman's theory was purely political. As a policy matter, Professor Ackerman initially argued that Congress was failing in its duty to provide legal authorization for Operation Inherent Resolve, and that in doing so it is setting a "terrible precedent" by allowing the operation to go on without proper congressional approval.¹³⁶ One way to get Congress to act, he argued, would be to go to the courts.¹³⁷ However, having to rely on the courts posed a significant problem. After all, who could even get into court? If ordinary Americans, or even members of Congress themselves wanted to sue, they would certainly be denied constitutional standing.¹³⁸ Not to be deterred, Professor Ackerman ultimately found someone that arguably could get into court—the American military officer.¹³⁹ In this context, Captain Smith's lawsuit (at least for Professor Ackerman) pares down to nothing more than a political stratagem, leveraging Captain Smith's oath of office as a check on the executive branch—a proposition anathema to the apolitical values of the profession of arms.¹⁴⁰

Of course, Captain Smith's legal complaint refrains from making any such policy-type arguments.¹⁴¹ However, the overarching rationale that Professor Ackerman publicly forwards as a justification for Captain Smith's lawsuit should give junior military officers reason for pause. At best, Captain Smith is honestly seeking a determination of the constitutional validity of his orders. At worst, he has fallen victim to a political wolf in sheep's clothing. Whether his own intentions were pure or not, he appears to have been used as nothing more than a means to achieving one scholar's political end.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. See Ackerman, *supra* note 58 (arguing that Captain Smith's lawsuit is necessary to allow individuals to prevent future Presidents from treating the War Powers Resolution with impunity); see also Younts, *supra* note 3, at 47 ("[T]he military is not only subject to the control of elected officials, it is without authority or imperative to act as a check or balance to the power of any branch of the government.").

141. See Complaint for Declaratory Relief, *supra* note 49.

V. WHAT WE HAVE LEARNED AND HOW WE CAN IMPROVE IN THE FUTURE

Those soldiers who feel they cannot, in good conscience, fight a war—yet cannot leave military service—are admittedly faced with a difficult choice: fight the war they feel is wrong or be punished. This has the potential to result in punishment of otherwise honorable and loyal individuals. Allowing any alternative, however, would create the potential for a massive breakdown of military discipline and a serious crisis of national security.

—Captain Robert E. Murdough¹⁴²

The real value in conducting After Action Reviews “come[s] from taking the results and applying them to future training.”¹⁴³ Part IV of this Note sought to identify and evaluate the professional issues raised by Captain Smith’s lawsuit. In this Part, we address how to utilize our evaluation to guide future conduct.

Under the neoclassical professional model, we have seen that military officers bear the burden of not only prosecuting our nation’s wars, but of understanding and advancing the common good. With respect to the circumstances of Captain Smith’s lawsuit, we have also seen that there are serious drawbacks to junior military officers electing to sue their very own Commander-in-Chief. In light of those issues, how ought junior military officers in circumstances like Captain Smith’s proceed?

First, junior military officers can take comfort in the fact that as a prerequisite to entering the profession of arms, every superior officer above them has taken the same oath as they have: to support and defend the Constitution of the United States. Consequently, when a junior military officer questions the constitutionality of his orders, they can look first to see if anyone else in their own profession has the same doubts—if they do not, it may be an importantly telling sign that either (a) the order is well-founded, or (b) the decision to voice dissent does not conform with the common good.

Second, if junior military officers continue to harbor doubts about the constitutionality of their orders, we found that they have a ready and reliable resource available to them inside of their own profession—their very own JAG Corps. As a result, the junior military officer would do well to seek legal counsel within his own profession before going to the civilian sector for constitutional legal advice. Almost always, the matter should be put to rest here. If the JAG officer

142. Robert E. Murdough, *“I Won’t Participate in an Illegal War”: Military Objectors, the Nuremberg Defense, and the Obligation to Refuse Illegal Orders*, ARMY LAW., July 2010, at 14.

143. HEADQUARTERS, DEP’T OF THE ARMY, TRAINING CIRCULAR 25-20: A LEADER’S GUIDE TO AFTER ACTION REVIEWS 22 (1993).

finds the war is being waged illegally (or even on a shaky legal footing) he can raise those concerns up the chain-of-command. If he finds the order to be perfectly legal, the matter is over—at least for the junior military officer.

Third, we learned what a junior military officer ought not to do. For officers in Captain Smith's circumstances, at least—don't sue the Commander-in-Chief in federal court. Not only does the lawsuit potentially hurt the social standing and legitimacy of the profession of arms, it hurts the legitimacy of the government military personnel are sworn to defend.

Finally, a lesson of caution: before adopting the legal arguments of an individual outside of the profession, junior military officers should consider the underlying motives for that legal interpretation. If they are clearly motivated by a domestic political agenda, there is no value in playing into to the partisan's hands.

VI. CONCLUSION

The role of the Guardian of the Republic is complex and challenging, but there is none more important to society. This Note has sought to evaluate one Guardian's actions, determining whether or not he had done the "right" thing by publicly questioning the legality of his orders. While we have determined that he did not, we have nonetheless learned a few helpful lessons along the way. To the extent our Guardians may debate or apply these lessons in the future, then, "[t]hat is likely enough."¹⁴⁴

144. PLATO, *supra* note 92, at bk. IX, at 281.

