

No. 23-939

In the Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals for
the District of Columbia Circuit

**BRIEF FOR THREE FORMER SENIOR
MILITARY OFFICERS AND EXECUTIVE
BRANCH OFFICIALS AS *AMICI CURIAE*
SUPPORTING PETITIONER**

PAMELA JO BONDI
JESSICA HART STEINMANN
MICHAEL D. BERRY
AMERICA FIRST POLICY
INSTITUTE
1635 Rogers Road
Fort Worth, TX 76107
(571) 348-1802

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
AARON S. GORDON
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
cbartolomucci@schaerr-jaffe.com

Counsel for Amici Curiae

MARCH 19, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION AND INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT.....	4
I. The President’s Broad Power as Commander in Chief Does Not Include the Authority to Order the Military to Commit Murder.	4
II. Military Law and an Executive Order Forbid Murder and Assassination.	7
A. Murder Is a Crime Under the Uniform Code of Military Justice.	7
B. An Executive Order Bars Assassination.....	8
III. Military Officers Are Required Not to Carry Out Unlawful Orders.	9
IV. The Military Would Not Carry Out an Order to Commit Murder.	10
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<i>Ex parte Milligan</i> , 71 U.S. 2 (1866).....	6
<i>United States v. Calley</i> , 48 C.M.R. 19, 1973 WL 14894 (C.M.A. 1973)	12
<i>United States v. Trump</i> , 91 F.4th 1173 (D.C. Cir. 2024)	4, 5
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952).....	5, 6

Constitutional Provisions

U.S. Const. amend. V	5
U.S. Const. art. II, § 1, cl. 8.....	9
U.S. Const. art. II, § 2, cl. 1.....	5
U.S. Const. art. II, § 3	9
U.S. Const. art. II, § 4	7

Statutes

10 U.S.C. § 801 <i>et seq.</i>	7
10 U.S.C. § 892	9
10 U.S.C. § 918	8

Regulation

Exec. Order 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981)	8
---------------------------------------------------------------	---

Rules

<i>Manual for Courts-Martial</i> (2023 ed.), pt. IV.....	10
RCM 916	9

Other Authorities

- Major Jeffrey F. Addicott &
Major William A. Hudson, Jr.,
*The Twenty-Fifth Anniversary of My Lai:
A Time to Inculcate the Lessons*,
139 Mil. L. Rev. 153 (1993)..... 12, 13
- William Blackstone,
Commentaries on the Laws of England 5
- Adam Liptak,
*Trump’s Boldest Argument Yet:
Immunity From Prosecution for
Assassinations*, N.Y. Times (Jan. 10, 2024) 4
- Oral Argument,
United States v. Trump, 91 F.4th 1173
(D.C. Cir. 2024) (No. 23-3228) 4
- Real Time with Bill Maher,
*General Michael Hayden on National
Security and the Election (HBO)*,
YouTube (Feb. 26, 2016) 11
- Sonam Sheth,
*Trump’s lawyer argues that a
president can order SEAL Team Six
to assassinate his political rival if
Congress is cool with it*, Yahoo! News
(Jan. 9, 2024) 4
- Eric Sof,
SEAL Team 6: America’s Secret Warriors,
Spec Ops Mag. (Sept. 29, 2012) 4

**INTRODUCTION AND INTEREST OF
*AMICI CURIAE*¹**

“Could a President order SEAL Team Six to assassinate a political rival?” That question was posed by a member of the panel at oral argument in the court below. *Amici curiae*, who have served as military combat generals and senior officials at the Pentagon and have held other senior Executive Branch positions, submit that the answer to the panel member’s question is a resounding no. A President of the United States enjoys broad authority to direct the military with very few limitations. But one such limitation is that the President’s orders may not contravene the Constitution or the laws of the United States. Accordingly, the President has no authority to order the military to assassinate a political rival. Furthermore, the military is required not to carry out such an unlawful, non-military order, if given. Indeed, any military officer who carried out or issued such an order would be committing the gravest of crimes—murder.

Whether or not a President has the immunity claimed by Petitioner in this case—a question *amici* do not address in this brief—a President cannot order the military to assassinate a political rival and have that order carried out.

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amici curiae* or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Amici curiae are three former high-ranking military leaders. Their military and Pentagon service spans more than a half-century, under ten Presidents of both political parties and widely divergent policy agendas.

Amicus Secretary Robert Wilkie served in the Pentagon as Assistant Secretary of Defense under President George W. Bush, then Under Secretary of Defense for Policy—the third-highest-ranking position in the Pentagon—under President Donald Trump. He served in the United States Navy and the United States Air Force Reserves, attaining the rank of Colonel. He concluded his public service as a Cabinet-rank official in the Trump Administration, serving as Secretary of the Department of Veterans Affairs. He is currently a Distinguished Fellow for American Security at the America First Policy Institute.

Amicus Retired Lieutenant General Keith Kellogg is a Vietnam veteran who was the Commander of the 82d Airborne Division, and served as Commander of Special Operations Command Europe. He later served in the Trump Administration as Executive Secretary and Chief of Staff of the National Security Council in the White House, as National Security Advisor to the Vice President, and as Acting National Security Advisor to the President of the United States. He is currently Co-Chair of the Center for American Security at the America First Policy Institute.

Amicus Retired Lieutenant General William Gerald “Jerry” Boykin had a distinguished combat career that included the attempted rescue of Americans in the Iranian Hostage Crisis under President Jimmy Carter. As a Colonel, he was

Commander of the Army's elite Delta Force, and commanded all the Green Berets and the JFK Special Warfare Center, which trains the Green Berets. He also served in the Pentagon in the civilian role of Deputy Under Secretary of Defense for Intelligence, and served a tour with the Central Intelligence Agency. He is currently the Executive Vice President of the Family Research Council.

SUMMARY OF ARGUMENT

The President has broad authority to issue military orders, with some noteworthy limitations. One such limitation is that the President has no authority to order the military to assassinate someone because he is a political rival. Nor would the military carry out such an unlawful order. Under the Uniform Code of Military Justice (UCMJ), any military officer who carried out or issued such an order would commit the crime of murder. In addition, Executive Order 12333 prohibits any person employed by the U.S. government from engaging in, or conspiring to engage in, assassination. Thus, no military officer has the legal authority to issue or carry out an order requiring murder or assassination.

Accordingly, the answer to the panel member's question is no—the President *cannot* order SEAL Team Six to assassinate his political rival and have the military carry out such an order.

ARGUMENT**I. The President’s Broad Power as Commander in Chief Does Not Include the Authority to Order the Military to Commit Murder.**

At oral argument in the court below, a panel member posed this question to Petitioner’s counsel: “Could a President order SEAL Team Six to assassinate a political rival? That’s an official act, an order to SEAL Team Six.” Oral Argument at 7:31, *United States v. Trump*, 91 F.4th 1173 (D.C. Cir. 2024) (No. 23-3228), <https://tinyurl.com/2j94zw54>, *cert. granted*, No. 23-939, 2024 WL 833184 (U.S. Feb. 28, 2024).² In response to the question, counsel for Petitioner stated that a President “would have to be and would speedily be impeached and convicted before the criminal prosecution.” *Id.* at 7:40.

Numerous media outlets seized on the exchange. *See, e.g.*, Sonam Sheth, *Trump’s lawyer argues that a president can order SEAL Team Six to assassinate his political rival if Congress is cool with it*, Yahoo! News (Jan. 9, 2024), <https://tinyurl.com/3kcjek4z>; Adam Liptak, *Trump’s Boldest Argument Yet: Immunity From Prosecution for Assassinations*, N.Y. Times (Jan. 10, 2024). The D.C. Circuit’s opinion seemingly referred to the exchange, stating that Petitioner’s “proposed interpretation still would leave a President free to commit all manner of crimes with impunity, so

² SEAL Team Six is an elite Navy special operations unit, often engaged in counter-terrorism operations. Eric Sof, *SEAL Team 6: America’s Secret Warriors*, Spec Ops Mag. (Sept. 29, 2012), <https://special-ops.org/devgru-seal-team-6-shadow-warriors/>.

long as he is not impeached and convicted.” *Trump*, 91 F.4th at 1204.

In *amici*’s view, the panel member’s question may be answered with a firm no. To be clear, there may be circumstances in which a President may order the military to use lethal force against particular individuals to protect national security. But no such circumstances were referenced in the panel member’s question and therefore are not the subject of this brief, or this case. The answer to the question the panel member asked is that a President cannot simply order an elite military unit to kill a political rival.

The Office of the President of the United States has broad authority when it comes to the conduct foreign policy and military affairs. But ordering the military to bring about the death of a political rival for political or personal gain is not one of the prerogatives of the Office. Under the British form of government from which the United States won independence, “The king can do no wrong.” 1 William Blackstone, *Commentaries on the Laws of England* *246, <https://tinyurl.com/mr4a2mny>. But that is not the American form of government under our Constitution. Under the Constitution, no one in the national government—no one—may deprive another “of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

That fundamental guarantee is not repealed by the constitutional provision stating that “[t]he President shall be Commander in Chief of the Army and Navy of the United States.” U.S. Const. art. II, § 2, cl. 1. In his influential concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice

Jackson agreed that this clause “undoubtedly puts the Nation’s armed forces under Presidential command.” *Id.* at 641. But he rejected the notion that it provides “support for any Presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.” *Id.* at 641–42. It “seems obvious from the Constitution and from elementary American history,” he wrote, that the “military powers of the Commander-in-Chief were not to supersede representative government of internal affairs.” *Id.* at 644. The President’s “command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic.” *Id.* at 645.

The Constitution gives the President no authority to declare martial law or suspend the Bill of Rights. As this Court stated in *Ex parte Milligan*:

Martial law * * * destroys every guarantee of the Constitution, and effectually renders the “military independent of and superior to the civil power”—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish. [71 U.S. 2, 124–25 (1866).]

In short, the President cannot commandeer SEAL Team Six into using lethal force against his political rival for personal reasons.

II. Military Law and an Executive Order Forbid Murder and Assassination.

Even if a President attempted to order the death of a rival—a “high Crime[]” demanding impeachment and removal if there ever was one, U.S. Const. art. II, § 4—the military would not carry it out. Murder is a crime under military law. And an executive order prohibits assassination.

The United States Armed Forces embody cherished American values and principles. Respect for innocent life and severely punishing those who take it without justification or excuse, codified in federal law, are basic manifestations of those values and principles. The U.S. military is the most effective fighting force in the world, but with that awesome power comes the solemn duty to use force only when necessary, and the purpose of using deadly force is to protect the lives of the innocent, especially our fellow citizens. Every servicemember who raises his or her hand to take the oath to serve—especially for officers, whose oath is to “support and defend the Constitution of the United States against all enemies, foreign and domestic”—regards this principle as a solemn obligation.

A. Murder Is a Crime Under the Uniform Code of Military Justice.

Murder is a crime under the UCMJ, which includes the criminal code for the Armed Forces, and is codified as Chapter 47 of Title 10, 10 U.S.C. § 801 *et seq.* The

crime of murder appears in Article 118 of the UCMJ, which provides:

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being when he—(1) has a premeditated design to kill; [or] (2) intends to kill or inflict great bodily harm; ... is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) * * *, he shall suffer death or imprisonment for life as a court-martial may direct.

10 U.S.C. § 918. That a person is a political rival of the President is neither a justification nor an excuse for an unlawful killing. And deliberately carrying out an order to murder such a person would be acting upon a premeditated design to kill or an intent to kill. Therefore, any officer engaged in murder on the orders of a President would be subject to the death penalty or life in prison—and the officer would know it.

B. An Executive Order Bars Assassination.

Beyond the UCMJ's prohibition on murder, there is also a presidential order prohibiting assassination: Exec. Order 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981). Section 2.11 of that Executive Order—captioned “Prohibition on Assassination”—provides: “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.” *Id.* at 59952. Executive Order 12333 has been in force since it was signed by President Reagan, and it can be repealed or amended only by a subsequent executive order, which would be published in the *Federal Register* for all the world to see.

III. Military Officers Are Required Not to Carry Out Unlawful Orders.

Any presidential order to the military to use lethal force without legal justification would be an order calling for the commission of a grave felony crime. And any military officers who knowingly issued or carried out such an unlawful order would themselves be criminally liable. The Rules for Courts-Martial (RCM) are promulgated by the President as Commander in Chief, and are a mechanism by which the Commander in Chief implements the UCMJ. A servicemember may assert as an affirmative defense to a crime that the servicemember was carrying out an order, but that defense is valid only if the order is lawful. *See* RCM 916(d).

This is seen in Article 92 of the UCMJ, 10 U.S.C. § 892, which is the crime of disobeying a lawful order. The military is, by design and necessity, hierarchical. Thus, while it is a crime to disobey a lawful order, an order is lawful only if it does not contravene superior authority. Accordingly, no person in the chain of command, including the Commander in Chief, may issue an order that violates the Constitution or the laws of the United States. Indeed, the constitutionally prescribed form of the Oath of Office requires the President to swear or affirm that he will “faithfully execute the Office of President of the United States” and will to the best of his ability “preserve, protect and defend the Constitution of the United States.” U.S. Const. art. II, § 1, cl. 8. The Constitution also imposes on the President the duty to “take Care that the Laws be faithfully executed.” *Id.* art. II, § 3.

The *Manual for Courts-Martial* (2023 ed.) (*MCM*), which includes, *inter alia*, the UCMJ and the RCM, further discusses 10 U.S.C. § 892. It sets forth the regulatory aspects of lawfulness pertaining to orders, including the inference of lawfulness, authority of the issuing officer, relationship to military duty, and relationship to constitutional or statutory rights. See *MCM*, pt. IV, ¶¶ 16c(2)(a)(i)–(v), 18c(1)(c), <https://tinyurl.com/373dkjrk>. The *MCM* explains that it is a defense to any offense that the accused was acting pursuant to orders, unless the accused knew or reasonably should have known the orders to be unlawful. *Id.* ¶¶ 16c(2)(a), 18c(1)(c). Paragraph 18c(1)(c) states:

(c) *Lawfulness.* A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it.

Id. ¶ 18c(1)(c).

Every servicemember, from the newest private to the Chairman of the Joint Chiefs of Staff, would know or must reasonably know that they may not carry out the unlawful order to murder or assassinate someone, even if the order comes from the Commander in Chief.

IV. The Military Would Not Carry Out an Order to Commit Murder.

Through rigorous instruction and tragic lessons from history, military officers are trained not to carry out unlawful orders, and they know they may be held criminally liable if they did carry out such orders.

In a televised interview during the presidential campaign of 2016, retired General Michael Hayden, who served as Director of the Central Intelligence Agency and as Director of the National Security Agency, was asked what would happen if Petitioner, then a candidate for President, ordered the military to kill the families of terrorist targets:

Hayden: If he were to order that once in government, the American Armed Forces would refuse to act.

Maher: What? Well, that's quite a statement, sir.

Hayden: It's a violation...

Maher: I thought that the whole thing was you have to follow orders.

Hayden: You cannot, you are not committed, you are not required, in fact, you are required not to follow an unlawful order. That would be in violation of all the international laws of armed conflict.

Real Time with Bill Maher, *General Michael Hayden on National Security and the Election (HBO)*, YouTube, at 1:30–2:08 (Feb. 26, 2016), <https://tinyurl.com/4pf777n8>.

Amici concur with General Hayden's assessment. The military would not carry out a patently unlawful order from the President to kill non-military targets. Indeed, servicemembers are required not to do so.

Fortunately, examples of military officers carrying out unlawful orders and murdering civilians are exceedingly rare in modern American history. One such example is the tragic case involving Lieutenant

William Calley, who executed civilians in Vietnam in what history calls the “My Lai Massacre.” The trial judge’s instructions included the following:

Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him *unless the superior’s order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.*

United States v. Calley, 48 C.M.R. 19, 26–27, 1973 WL 14894 (C.M.A. 1973) (emphasis added).

Several American soldiers under Calley’s command refused to obey his orders at My Lai. “Although ordered by Calley to shoot, Private First Class James J. Dursi refused to join in the killings, and Specialist Four Robert E. Maples refused to give his machine gun to Calley for use in the killings.” *Id.* at 24. Neither Dursi nor Maples was ever charged in connection with the My Lai killings. See Major Jeffrey F. Addicott & Major William A. Hudson, Jr., *The Twenty-Fifth*

Anniversary of My Lai: A Time to Inculcate the Lessons, 139 Mil. L. Rev. 153, 160–61 & nn.31–33 (1993) (listing the 25 members of the armed services against charged in connection with My Lai, of whom neither Dursi nor Maples was one).

The crimes committed by Calley over 50 years ago have not been forgotten. Military officers would know that a presidential order to assassinate a civilian for political ends proposes a grave criminal act, and such an order would not be carried out.

CONCLUSION

A President cannot order an elite military unit to kill a political rival, and the members of the military are required not to carry out such an unlawful order; it would be a crime to do so. To the extent that the judgment of the Court of Appeals was based on a contrary understanding, the judgment should be vacated or reversed.

14

Respectfully submitted,

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record

AARON S. GORDON
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
cbartolomucci@schaerr-jaffe.com

PAMELA JO BONDI
JESSICA HART STEINMANN
MICHAEL D. BERRY
AMERICA FIRST POLICY INSTITUTE
1635 Rogers Road
Fort Worth, TX 76107
(571) 348-1802

*Counsel for Amici Curiae
Robert Wilkie, Keith Kellogg,
and William Gerald Boykin*

MARCH 19, 2024