

# The Limits of the Illegal Orders Defense and Possible Alternative Protections Under Military Law<sup>1</sup>

By James M. Branum, Jeff Lake, and Haley Summers    *October 26, 2020*

**Information for attorneys and GI Rights counselors regarding the legal avenues that might be used by military servicemembers seeking to avoid activation against voters or protestors in the coming election and its aftermath.**

During the last four years of the Trump administration, we have seen a growing use of military units in politicized ways against civilian populations in this country, including in the deployments to the US border<sup>2</sup> and the more recent deployments of national guard troops against Black Lives Matter protesters<sup>3</sup> as well as the formation of National Guard “Rapid Response Units”.<sup>4</sup>

In the weeks leading up to the election, it now appears that these same risks may be arising again in the context of administration efforts at voter suppression and possible action against protesters<sup>5</sup> and even legal observers<sup>6</sup> in the aftermath of the election, even if military leadership has repeatedly stated their desire to be apolitical in this election.<sup>7</sup>

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<sup>1</sup> This DRAFT edition of this memorandum was prepared as supplemental materials for an online CLE presentation conducted by the Military Law Task Force of the National Lawyers Guild, but it has not gone through the normal editing process for MLTF publications. The final edited version of this memorandum will be posted soon at [NLGMLTF.org](https://nlgmltf.org).

<sup>2</sup> See Branum, James M. “Deployed to the border: A Test of Conscience for GI’s” *On Watch* (Nov. 2018) online at <https://nlgmltf.org/programs-and-services/military-law-library/memos/unlawful-orders-us-border/>.

<sup>3</sup> See “CLE Training: Help National Guard members avoid deployment against anti-racist protesters in US cities” *NLGMLTF.org* (June 12, 2020) online at <https://nlgmltf.org/military-law/2020/cle-training-help-national-guard-members-avoid-deployment-against-anti-racist-protesters-in-us-cities/>.

<sup>4</sup> See “Minnesota governor activates national guard following developments in George Floyd Case” *Reuters* (Oct. 2, 2020) online at <https://www.reuters.com/article/idUSKBN2772NT>.

<sup>5</sup> See Carter, Mike, Lewis Kamb and Joseph O’Sullivan, “Military, Police in Washington state prepare for possible civil unrest after election” *Seattle Times* (Oct. 25, 2020) online at <https://www.seattletimes.com/seattle-news/crime/military-police-in-washington-state-prepare-for-possible-civil-unrest-after-election/>.

<sup>6</sup> See “Police targeting NLG legal observers at Black Lives Matter protest” *NLG.org* (June 7, 2020), Online at <https://www.nlg.org/police-targeting-nlg-legal-observers-at-black-lives-matter-protests/>.

<sup>7</sup> Bowman, Tom and Martin Kaste “How police, national guard and the military are preparing for election day tensions” *NPR.org* (Oct. 26, 2020) online at: <https://www.npr.org/2020/10/26/926703808/how-police-national-guard-and-the-military-are-preparing-for-election-day-tensio>

The Military Law Task Force of the National Lawyers Guild shares the concerns of many in both the population and the legal community,<sup>8</sup> that US servicemembers may be given illegal orders or face real conflicts with their moral, political, or religious beliefs in the context of the 2020 Presidential election and its aftermath.<sup>9</sup> We are troubled about the lack of effective legal alternatives for servicemembers dealing with possible illegal orders and believe it is essential that members of the military are fully informed about their rights and responsibilities under the law. We are also concerned that servicemembers are given almost no information about options available to them under military regulations to avoid direct orders that threaten the integrity of our democracy and violate the Constitution of the United States. In this memorandum, we will discuss briefly some of the legal challenges that a servicemember might face when deciding whether to disobey a possibly illegal order and other options for those who oppose deployment against voters and protestors in the time leading up to and after the 2020 Presidential Election.

## 1. The Defense of Unlawful Orders, as applied in the current context

On the surface, the defense of unlawful orders would seem to provide a legal safe harbor for servicemembers who might be given orders that legally questionable,<sup>10</sup> in that defenses to crimes serve to eliminate guilt for conduct that might otherwise be a crime, however, in practice, this defense is one that is difficult to actually make effective use of.<sup>11</sup>

### a. Definition

UCMJ Article 92<sup>12</sup> states that:

*Any person subject to this chapter who—*

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<sup>8</sup> See “Inside the Orders Project: Giving second opinions on orders to election-wary troops” MilitaryTimes.com (Oct. 12, 2020), *online at* <https://www.militarytimes.com/news/election-2020/2020/10/12/inside-the-orders-project-giving-second-opinions-on-orders-to-election-wary-troops/>, also see Fidell, Eugene R. “Wrestling with Legal and Illegal Orders in the Military in the Months Ahead” *JustSecurity.org* (Oct. 19, 2020) *online at* <https://www.justsecurity.org/72934/wrestling-with-legal-and-illegal-orders-in-the-military-in-the-months-ahead/>, and see Harris, Shane “Volunteer lawyers will advise military personnel who question the legality of orders during protests, election disputes” *Washington Post* (Oct. 9, 2020) *online at* [https://www.washingtonpost.com/national-security/volunteer-lawyers-will-advise-military-personnel-who-question-the-legality-of-orders-during-protests-election-disputes/2020/10/09/f4a04682-0a64-11eb-9be6-cf25fb429f1a\\_story.html](https://www.washingtonpost.com/national-security/volunteer-lawyers-will-advise-military-personnel-who-question-the-legality-of-orders-during-protests-election-disputes/2020/10/09/f4a04682-0a64-11eb-9be6-cf25fb429f1a_story.html).

<sup>9</sup> See “Petition to the Joint Chiefs of Staff: Stop Election Interference” *Couragetoresist.org* (Sept. 25, 2020) <https://couragetoresist.org/petition-refuse-election-interference/>.

<sup>10</sup> Branum, James M., Jeff Lake, Rena Guay “Understanding and dealing with defenses, mitigation Extenuation and aggravation for US military absence offenses - Parts 1-2) *On Watch* (Spring-Summer 2018).

<sup>11</sup> For additional discussion on the difficulty of actually making use of the defense of illegal orders, see Fidell, Eugene R., Brenner M. Fissell, Phillip D. Cave “A sourcebook for advising military personnel” (2020) *online at* <https://www.ordersproject.org/sourcebook.html>.

<sup>12</sup> UCMJ Article 92. The UCMJ can be found as part of the MCM (Manual for Courts-Martial), available *online at* <https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/>.

*(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.*

Article 92 says that a servicemember has an obligation to obey *lawful* orders or regulations, but it does not define what “lawful” means, Part IV of the Rules for Court-Martial<sup>13</sup> (Punitive Articles) paragraph 16 (c)(1)(c),<sup>14</sup> gives us this definition of what a lawful order would be:

*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. See the discussion of lawfulness in paragraph 14c(2)(a).*

**b. Who can make the judgment call as to what is and isn't “lawful”?**

Moving on to paragraph 14c(2)(a) of Part IV of the RCM<sup>15</sup>, we are provided some troubling guidance:

*(a) Lawfulness of the order.*

*(i) Inference of lawfulness. An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime.*

*ii) Determination of lawfulness. The lawfulness of an order is a question of law to be determined by the military judge.*

*(iii) Authority of issuing officer. The commissioned officer issuing the order must have authority to give such an order. Authorization may be based on law, regulation, or custom of the service.*

*(iv) Relationship to military duty. The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military*

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<sup>13</sup> The *Manual for Courts-Martial* provides regulatory interpretation for the statutory provisions of the UCMJ.

<sup>14</sup> *Manual for Courts-Martial* (2016), Part IV, Para. 15(c)(1)(c) Online at <https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/>.

<sup>15</sup> *Manual for Courts-Martial* (2016), Part IV, Para. 4(c)(2)(a) online at <https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/>.

*purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.*

*(v) Relationship to statutory or constitutional rights. The order must not conflict with the statutory or constitutional rights of the person receiving the order.*

This RCM provision leaves a servicemember with a terrible set of choices. A servicemember can refuse to obey an order due to the servicemember's belief that the order is an "unlawful" order, however, the servicemember takes this choice at his or her own peril, since the final decision of lawfulness can only be decided by a military judge in a court-martial.

### **c. The question of the legality of military deployments against protestors**

The Posse Comitatus Act (PCA), (18 U.S.C. § 1385)<sup>16</sup> first passed in 1878, states that whoever uses the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined or imprisoned. A "posse comitatus" is an ancient term for conscripting people to help keep the peace. All branches of the military are now included per regulations, as 18 U.S.C. § 1385, construed together with 10 U.S.C. § 375, extends to all active duty members of the armed services.<sup>17</sup> The purpose of the PCA "is to uphold the American tradition of restricting military intrusions into civilian affairs, except where Congress has recognized a special need for military assistance in law enforcement" as stated in *United States v. Al-Talib*.<sup>18</sup>

However, the President's authority to use federal troops is for the most part not impaired by the Posse Comitatus Act. Federal troops can be used for domestic law enforcement under the Insurrection Act (10 U.S.C. §§ 251-255).<sup>19</sup> This Act applies in four situations:

1. When a state asks the president for federal assistance "[w]henver there is an insurrection in any State against its government." (10 U.S.C. § 251);

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<sup>16</sup> 18 USC 1385 online at: <https://www.law.cornell.edu/uscode/text/18/1385>.

<sup>17</sup>United States v. Khan, 35 F.3d 426, 431 (9th Cir.1994), online at: <https://casetext.com/case/us-v-kahn-13>.

<sup>18</sup> United States v. Al-Talib, 55 F.3d 923, 929 (4th Cir.1995), online at: <https://casetext.com/case/us-v-al-talib>.

<sup>19</sup> 10 USC 251, online at: <https://www.law.cornell.edu/uscode/text/10/subtitle-A/part-I/chapter-13>.

2. When the president decides that demonstrations “make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings.” (10 U.S.C. § 252);
3. When any action deprives people of a legal right the results in the denial of Equal Protection (10 U.S.C. §253(1));
4. When any action “opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.” (10 U.S.C. § 253(2)).

This Act has been used on occasion – most often during the Civil Rights struggles of the 1960s. It was used again in 1992 when the Governor of California received federal assistance against demonstrators protesting the Rodney King verdict.

Obviously, the Insurrection Act contains numerous subjective terms.

#### **i. What is an “insurrection”?**

Generally, an insurrection is an act or instance of revolting against civil authority or an established government.<sup>20</sup> For example, the Confederacy of the Civil War was an insurrection against the authority of the United States and the interest of human rights.<sup>21</sup> Insurrections must also be an intent to overthrow a lawfully constituted regime.<sup>22</sup> Bloodshed, or sufficiency to render success, are not necessary for an insurrection to be formed. Rather, only the open and active opposition by a number of persons so as to defy the authority of the government.<sup>23</sup>

#### **ii. When do demonstrations “make it impracticable to enforce the laws”?**

Examples of demonstrations that reached the level of “impracticable to enforce the laws” were seen during the 1960s and the desegregation of schools in the

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<sup>20</sup> From: <https://www.merriam-webster.com/dictionary/insurrection>

<sup>21</sup> *Stevens v. Griffith*, U.S.Tenn.1884, 4 S.Ct. 283, 111 U.S. 48, 28 L.Ed. 348, *online at*: <https://supreme.justia.com/cases/federal/us/111/48/>.

<sup>22</sup> *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, C.A.2 (N.Y.) 1974, 505 F.2d 989, *online at*: <https://openjurist.org/505/f2d/989/pan-american-world-airways-inc-v-aetna-casualty-and-surety-co>.

<sup>23</sup> *In re Charge to Grand Jury*, N.D.Ill.1894, 62 F. 828. *also see* *Presser v. Illinois*, Ill. 1886, 6 S.Ct. 580, 116 U.S. 252, 29 L.Ed. 615, *online at*: <https://www.law.cornell.edu/supremecourt/text/116/252>.

south.<sup>24</sup> An example of a demonstration that made it impractical to enforce the law can be found when a violent conspiracy to deprive “Freedom Riders” of their right to travel formed. The use of the militia or armed forces to suppress conspiracy and prevent beatings of “Freedom Riders.” would have been appropriate.<sup>25</sup> Such a demonstration would have authorized the President to call the National Guard into the federal service and, together with the use of the Armed Forces, could use those forces to suppress domestic violence, obstruction, and resistance to federal law and federal court orders.<sup>26</sup> The President may direct the use of military forces might be warranted in an instance of an organized, armed, and fortified resistance to the execution of the law.<sup>27</sup>

**d. What should servicemembers do if they believe they have been given unlawful orders?**

There is no easy or unambiguous answer. Servicemembers who choose to disobey orders to deploy in this context may face serious consequences, acting “at their own peril” that their judgment of the unlawfulness of the orders will in fact be affirmed by a military judge if they are forced to stand trial, yet those who chose to take this course will be freed from possible future prosecutions for the commission of violations of federal and/or international law, as well as the personal guilt of having participated in an immoral action in support of a racist imperial regime.

Servicemembers who choose to obey orders to deploy or engage in war will not be facing punishment in the short-term but may find themselves placed in terrible situations that will test their personal conscience and may lead to future prosecution for the commission of crimes under federal and/or international law, as well as the high likelihood of suffering possible moral trauma and PTSD as a long term consequence of their actions.

**e. What about other kinds of domestic activations (such as in the case of natural disasters or the COVID-19 pandemic response)?**

There have been calls by some right-wing activist organizations that have urged national guard members to refuse to perform duties in response to the COVID pandemic, such as in enforcing quarantines<sup>28</sup> but due to the dual federal/state

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<sup>24</sup> Executive Orders No. 10730, No. 11053, No. 11111, and No. 11118. These can be found online at: <https://www.archives.gov/federal-register/executive-orders>.

<sup>25</sup> Bergman v. U.S., W.D.Mich.1983, 565 F.Supp. 1353, *online at*: <https://law.justia.com/cases/federal/district-courts/FSupp/565/1353/1458191/>.

<sup>26</sup> 1957, 41 Op.Atty.Gen., Nov. 7.

<sup>27</sup> 1878, 16 Op.Atty.Gen. 162.

<sup>28</sup> See <https://www.facebook.com/2anys/posts/2691843831071041>, also see [https://medium.com/@jmb\\_20114/open-letter-to-organizations-calling-for-national-guard-members-to-see-k-discharge-on-the-grounds-bd47898872d5](https://medium.com/@jmb_20114/open-letter-to-organizations-calling-for-national-guard-members-to-see-k-discharge-on-the-grounds-bd47898872d5).



nature of the national guard, these kinds of missions are likely lawful, unless there is an issue under state law.<sup>29</sup> Servicemembers who object to this kind of military service would not be able to use the defense of unlawful orders but may be able to avoid service under other grounds, as discussed below, particularly if said service would be medically contraindicated for the servicemember to participate in (such as if the servicemember has a medical condition that makes them especially vulnerable to COVID complications).

## **2. Alternative methods of avoiding compliance with illegal and/or immoral orders**

A number of options to avoid a deployment or return from deployment early may be available. It is worth exploring grounds for non-deployment or discharge.

### **a. Conscientious Objection**

Some servicemembers discover that they are opposed to participating in war for religious, moral, or ethical reasons, and may seek discharge as conscientious objectors. These and other grounds may show that servicemembers are not capable of being deployed and/or are eligible for a discharge. Note that conscientious objection only applies to war duties and that only objecting to the duty assigned is not enough. One must show that they are opposed to *all* acts of war, not just a specific instance they disagree with.<sup>30</sup>

### **b. Medical Disqualification or Injury and Family Hardship/Dependency**

Servicemembers with medical problems may be non-deployable or entitled to medical discharge or retirement.<sup>31</sup> The same is true of psychological problems. Some servicemembers face family hardship or dependency because of their military service or their deployment. Likewise, if a servicemember has a qualifying injury, they may be able to be re-assigned to a non-combat duty to avoid activation.

These cases are often very fact-driven and hinge on having documentation of the medical concerns, ideally from both military and civilian providers. One good resource for seeking this evidence is the Civilian Medical Resources Network.<sup>32</sup>

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<sup>29</sup> A discussion of the legal basis for government mandated quarantines and similar public health measures can be found online at:

<https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>.

<sup>30</sup> For more details on the requirements for seeking conscientious objector status, we recommend consulting with the Center on Conscience and War ([centeronconscience.org](http://centeronconscience.org)) or the GI Rights Hotline ([girights.org](http://girights.org)).

<sup>31</sup> For DOD-wide regulations, see DODI 6130.03 (online at: [https://www.med.navy.mil/sites/nmotc/nami/arwg/Documents/WaiverGuide/DODI\\_6130.03\\_JUL\\_12.pdf](https://www.med.navy.mil/sites/nmotc/nami/arwg/Documents/WaiverGuide/DODI_6130.03_JUL_12.pdf)). Each branch of the military also has its own regulations. For the US Army and Army National Guard specifically, see AR 40-501 (online at: [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/ARN8673\\_AR40\\_501\\_FINAL\\_WEB.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN8673_AR40_501_FINAL_WEB.pdf)).

<sup>32</sup> CMRN's website is at [www.civilianmedicalresources.net](http://www.civilianmedicalresources.net). Most servicemembers who work with CMRN are referred to them by the GI Rights network.

### **c. Communicating with one's command**

Particularly in a National Guard context, many commands may be sympathetic to the issues raised by servicemembers who do not want to be deployed, hence it can sometimes be possible for a servicemember to ask if they can be excused from these duties and/or given alternative duties.<sup>33</sup> Generally, it works best if the servicemember first approaches their NCO about their concerns, but if the reception is hostile and/or the concern is ignored, the servicemember may next want to speak directly to their commander using the Open Door policy.<sup>34</sup>

### **d. Creative Approaches**

By creative approaches, we are referring to less-commonly utilized approaches, but which might achieve a servicemember's desired goals.

#### **i. Retirement**

According to 10 USCA 1201, a secretary of a military branch may permit a servicemember to be retired, if the said servicemember is "unable to perform the duties of the member's office, grade, rank or rating because of physical disability incurred while entitled to basic pay or while absent as described in subsection (c)(3)." Normally this method of discharge is not one that can be executed quickly, but in some cases, it might be useful, particularly if the servicemember had already begun the process of seeking retired status.

#### **ii. Discharge Upon Becoming an Ordained Minister**

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<sup>33</sup> We have received several reports of this strategy being successful during the summer of 2020, with some guard members either being taken off of activation/deployment rosters or being sent to serve as part of an unarmed rear detachment.

<sup>34</sup> Most components of the military have an "Open Door Policy" which allows an individual servicemember to speak directly with their commander about any concern they might have. These policies are often posted bulletin boards on post or on the post website. Sadly, very few servicemembers ever make use of these policies due to the atmosphere of intimidation that exists in many units. For the US Army, Open Door policies are mandatory. See AR 600-20, *online at* [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/ARN30132-AR\\_600-20-001-WEB-2.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN30132-AR_600-20-001-WEB-2.pdf). For further discussion, see Alvarado, SFC Miguel "Policy helps commanders resolves issues" *Army.mil* (June 12, 2014)[https://www.army.mil/article/127871/policy\\_helps\\_commanders\\_resolves\\_issues](https://www.army.mil/article/127871/policy_helps_commanders_resolves_issues) .



To our knowledge, a largely untested provision, 10 U.S.C.A. § 12682<sup>35</sup> provides that: “Under regulations to be prescribed by the Secretary of Defense, a Reserve who becomes a regular or ordained minister of religion is entitled upon his request to a discharge from his reserve enlistment or appointment.”

### iii. **Pregnancy**

Due to recent changes in the regulations for voluntary discharges on the grounds of pregnancy, we encourage servicemembers for whom this discharge might be relevant to seek guidance from the GI Rights Network.

### iv. **Emergency Psychiatric hospitalization**

Many servicemembers facing activation/deployment orders may suffer from severe mental distress, particularly if the servicemembers were already asking difficult questions about the morality of their mission. In some extreme cases, this mental distress might be of a nature that might lead a servicemember to consider harming (or even killing) themselves or others. In such circumstances, an attorney would be strongly advised to encourage their client to seek to be admitted to a civilian hospital<sup>36</sup> on psychiatric grounds.<sup>37</sup>

Such a hospitalization can serve several purposes: (1) it can help document the need for the patient to be medically disqualified from future activations/deployments, (2) it might help to make the case for why a servicemember should be medically discharged, and (3) it can help to show evidence that the servicemember was unable to comply with deployment/activation orders.<sup>38</sup> At the same time, a psychiatric hospitalization comes with its own costs: (1) literally costs (as in possible medical bills), (2) the

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<sup>35</sup> 10 USCA 12682, *online at*:

<https://www.govinfo.gov/content/pkg/USCODE-2018-title10/html/USCODE-2018-title10-subtitleE-partII-chap1221-sec12682.htm>. Contrary to the statutory provision, there does not appear to be any DOD instructions implementing this statute, but there are some branch specific regulations such as AR 135-175 (which applies to Army and Army National Guard Reserve officers, *online at*: [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/ARN18027\\_AR135-175\\_FINAL.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN18027_AR135-175_FINAL.pdf)) and AR 135-178 section 14-1 (which applies to enlisted reservists and guardmembers, *online at*: [https://ssilrc.army.mil/wp-content/uploads/2020/08/AR\\_135\\_178\\_ARNG\\_and\\_USAR\\_Enlisted\\_Administrative\\_Separations\\_20171107.pdf](https://ssilrc.army.mil/wp-content/uploads/2020/08/AR_135_178_ARNG_and_USAR_Enlisted_Administrative_Separations_20171107.pdf)).

<sup>36</sup> We recommend a civilian hospital because unfortunately most military hospitals will not take such a situation seriously and/or might immediately turn the guardmember over to their command without receiving any actual medical care.

<sup>37</sup> The legal ethics questions involved if, when and how an attorney could report a client’s suicidal or homicidal ideations to medical personnel and/or law enforcement go beyond the scope of this article. Generally though, this strategy works best with the full cooperation of the client.

<sup>38</sup> One scenario might be one in which a national guard member has a “mental breakdown” (to use layperson’s language) on the night before a deployment/activation. If the servicemember ends up going to a hospital emergency room that night reporting suicidal ideation, they will likely be held for several hours or even days. During a forced hospitalization, the servicemember cannot legally leave the facility, so they arguably could be found to be “unable” to comply with the activation order.

trauma of being practically incarcerated, and (3) some danger of a loss of certain civil rights, depending on state law, which varies widely from state to state.<sup>39</sup>

These alternate paths to avoid deployment may be somewhat limited due to the suddenness of deployment, so civilian legal help can be important. Information about the most common discharges can be found at [girightshotline.org](http://girightshotline.org) and [nlgmltf.org](http://nlgmltf.org).

### **3. Other options for seeking redress**

#### **a. Reporting illegal orders**

Whether or not servicemembers decide to refuse an order, they have the right to report possible illegal orders through the use of (1) a congressional inquiry,<sup>40</sup> (2) an IG (Inspector General) complaint,<sup>41</sup> or (3) the UCMJ Article 138 “redress of grievance” process.<sup>42</sup> None of these processes are easy or simple, but they do have some degree of legal protections added to them, most notably the new anti-retaliation provision of the UCMJ.<sup>43</sup> Servicemembers who are considering taking this action are strongly encouraged to seek legal assistance.

#### **b. Exercise of First Amendment Rights**

Servicemembers enjoy first amendment protections for their speech to the public, and to use petitions or protests to express their concerns, subject to some

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<sup>39</sup> Some examples include California which largely takes away all gun ownership rights for a period of time after certain kinds of psychiatric admissions - see Ca. Welf. & Inst. Code § 8100 (a) online at: [https://leginfo.ca.gov/faces/codes\\_displayText.xhtml?lawCode=WIC&division=8.&title=&part=&chapter=3.&article=](https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=8.&title=&part=&chapter=3.&article=) and Oklahoma which does not automatically take away gun ownership for *voluntary* psychiatric admissions - see Wylie, John “Requiring Mental Health Treatment and Involuntary Commitment” Oklahoma Bar Journal, Sept. 2020) online at <https://www.okbar.org/barjournal/september2020/obj9107wylie/>.

<sup>40</sup> For information on the protected nature of communications between servicemembers and US Congressional offices, see Von Behren, Becca “Servicemembers rights under Military Whistleblowers Protection Act” (NLGMLTF.org 2013) online at: <https://nlgmltf.org/military-law/2013/servicemember-rights-under-military-whistleblowers-protection-act/>

<sup>41</sup> See “Grievances: Inspector General Complaints” (GI Rights Network Website) online at <https://girightshotline.org/en/military-knowledge-base/topic/grievances-inspector-general-complaints>

<sup>42</sup> See Gilberd, Kathleen “Article 138 complaints: Servicemembers tools for redress” (NLGMLTF.org 2013) online at <https://nlgmltf.org/military-law-library/publications/memos/article-138/>. Also see “Grievances : Article 138 Complaints (GI Rights Network Website) <https://girightshotline.org/en/military-knowledge-base/topic/grievances-article-138-complaints>, and see generally UCMJ Article 138. (The UCMJ can be found as part of the MCM (Manual for Courts-Martial), available online at <https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/>. Also see Gilberd, Kathleen "Article 138 Complaints; Servicemembers' tool for redress" NLGMLTF.org (2013) online at: <https://nlgmltf.org/programs-and-services/military-law-library/memos/article-138/>.

<sup>43</sup> UCMJ Article 132. The UCMJ can be found as part of the MCM (Manual for Courts-Martial), available online at <https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/>

restrictions based on military regulations and case law.<sup>44</sup> Servicemembers often join with anti-war veterans organizations like Courage to Resist, About Face/Iraq Veterans Against War, and Veterans for Peace in speaking out against the war. While commands may not like this, military regulations allow servicemembers to engage in a wide range of protest activities. Since some commands don't understand the regs, and since they're complicated, it's valuable to talk with a military counselor or an attorney experienced in military law before taking action.

## Conclusion

The Military Law Task Force wants servicemembers to be fully informed as they make these choices and urges anyone who is deployed or might be facing a future deployment<sup>45</sup> to call us for a referral to a civilian attorney or counselor to discuss your options. Many of our member lawyers will be willing to do an initial pro-bono (free) consultation, and if additional legal defense assistance is needed organizations like Courage to Resist, About Face Veterans Against the War, and Veterans for Peace stand ready to help raise needed funds.

For more information and resources, please visit:

- [nlgmtf.org](http://nlgmtf.org) (619-463-2369)
- [girightshotline.org](http://girightshotline.org) (1-877-447-4487)
- [couragetoresist.org](http://couragetoresist.org)
- [aboutfaceveterans.org](http://aboutfaceveterans.org)
- [veteransforpeace.org](http://veteransforpeace.org)
- [centeronconscience.org](http://centeronconscience.org)

*James M. Branum is a member of the NLG Military Law Task Force Steering Committee and a long-time military law attorney. He also serves as pastor of The Oklahoma Objector Church, a religious humanist community.*

*Jeff Lake is an attorney in private practice in San Jose, and the chairman of the Military Law Task Force.*

*Haley Summers is a student of law at the McGeorge School of Law at the University of the Pacific.*

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<sup>44</sup> The nutshell version of provisions are that servicemembers can exercise free speech rights as long as they are: (1) not on duty, (2) out of uniform, (3) off post, (4) inside the United States, and (5) not in a situation that might lead to violence. There are also additional restrictions and concerns for partisan/electoral speech and for free speech/associational activity involved with "extremist activities." [https://nlgmtf.org/programs-and-services/military-law-library/memos/unlawful-orders-middle-east-2/#\\_ftn9](https://nlgmtf.org/programs-and-services/military-law-library/memos/unlawful-orders-middle-east-2/#_ftn9) and see <https://nlgmtf.org/programs-and-services/military-law-library/memos/military-policies-on-dissent/>

<sup>45</sup> One issue that we did not discuss is the collateral consequences in the immigration law context for non-citizen members of the US military. Due to the complexity and pitfalls present in the immigration context, we urge any non-US citizen member of the US military to also consult with an immigration lawyer when considering their options.