



FACING WAR IN THE MIDDLE EAST: A TEST OF CONSCIENCE FOR GI'S

Critical legal information for US servicemembers concerned about the legality and morality of deployment to and orders about the Middle East and war against Iran

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URL: nlgmtf.org/unlawful-orders-middle-east

Thinking about Unlawful Orders

The Trump Administration's threats of war in the Middle East raise serious legal and ethical questions for military servicemembers.

The Military Law Task Force of the National Lawyers Guild shares the concerns of organizations such as Veterans For Peace, Courage to Resist, and others, that US servicemembers may be given illegal orders or face real conflicts with their moral, political or religious beliefs about war in the Middle East. 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 or return early from deployment. In this memorandum, we will discuss briefly some 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 to the Middle East.

The Definition of an Unlawful Order

UCMJ Article 92 states that:

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

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*(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.*¹ 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-Martial² (Punitive Articles) paragraph 18c(1)(c),³ 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 16c(2)(a).

Who can make the judgment call as to what is and isn’t “lawful”?

Moving on to paragraph 16c(2)(a) of Part IV of the RCM⁴, we are given 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, custom of the service, or applicable order to direct, coordinate, or control the duties, activities, health, welfare, morale or discipline of the accused.

(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 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

¹ *Uniform Code of Military Justice* (2019), Article 92, online at [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610), page IV-27.

² The *Manual for Courts-Martial* provide regulatory interpretation for the statutory provisions of the UCMJ.

³ *Manual for Courts-Martial* (2016), Part IV, Para. 15(c)(1)(c) Online at [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610), page IV-27

⁴ *Manual for Courts-Martial* (2016), Part IV, Para. 16c(2)(a) online at [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610), page IV-25.

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 his or her 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.

The question of the legality of military deployments to the Middle East⁵

Under the Constitution of the United States, only Congress has the power to declare war. Absent such a declaration, an order to deploy to war is legally questionable.

Since the last declaration of war in 1942, various Presidents have used U.N. declarations or specific Congressional resolutions or authorizations to carry out military actions. Congress has made no specific authorization for military action in the Middle East at this time. Congress passed an Authorization for the Use of Military Force in 2001 following the 9/11 attacks. This authorization was for force to respond against the perpetrators of the attack and al-Qaida. The country of Iran did not perpetrate the 9/11 attacks and is an enemy of al-Qaida. Therefore, the authorization would not apply.

Finally, the United States, like all countries, has the right to act in self-defense. However, this right is recognized in Article 51 of the U.N. Charter as the right to respond to an attack. Where, as is the case currently, there has been no attack, such an attack must be “imminent” in order for the U.S. to legally attack first.

What should servicemembers do?

There is no easy or unambiguous answer. Servicemembers who choose to disobey orders to deploy to the Middle East or to engage in military action there 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

⁵ A more detailed discussion of the illegality of US actions against Iran can be found in a statement from our parent organization, the National Lawyers Guild, at nlg.org/nlg-strongly-condemns-illegal-targeted-assassinations-by-us-increased-repression-of-iranian-nationals-at-us-borders/

international law, as well as the high likelihood of suffering possible moral trauma and PTSD as a long term consequence of their actions.

Other Options

A number of options to avoid a deployment or return from deployment early may be available. It's worth exploring grounds for non-deployment or discharge. Servicemembers with medical problems may be non-deployable or entitled to medical discharge or retirement. The same is true of psychological problems. Some servicemembers face family hardship or dependency because of their military service or their deployment. 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. But 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 and nlgmltf.org.

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,⁶ (2) an IG (Inspector General) complaint,⁷ or (3) the UCMJ Article 138 "redress of grievance" process.⁸ And of course servicemembers enjoy first amendment protections for their speech to the public, and to use petitions or protests to express their concerns, subject to some restrictions based on military regulations and case law.⁹ Servicemembers often join with anti-war veterans organizations like 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.

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 to call us for 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

⁶ 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/>

⁷ See "Grievances: Inspector General Complaints" (GI Rights Network Website) online at <https://girightshotline.org/en/military-knowledge-base/topic/grievances-inspector-general-complaints>

⁸ 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>

⁹ Gespass, David "Military Policies on servicemembers dissent" (NLGMLTF.org May 2017) Online at <https://nlgmltf.org/military-law-library/publications/memos/military-policies-on-dissent/>

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 (619-463-2369)
- girightshotline.org (1-877-447-4487)
- couragetoresist.org
- aboutfaceveterans.org
- veteransforpeace.org
- centeronconscience.org

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