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"So Vast an Area of Legal Irresponsibility"? The Superior Orders Defense and Good Faith Reliance on Advice of Counsel

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NOTES

"SO VAST AN AREA OF LEGAL IRRESPONSIBILITY"? THE SUPERIOR ORDERS DEFENSE AND GOOD FAITH RELIANCE ON ADVICE OF COUNSEL

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This Note argues that the modern superior orders defense represents the most relevant and just paradigm for assessing the potential criminal liability of U.S. interrogators who claim that they were authorized and counseled by government lawyers prior to using techniques that likely constituted torture. However, recent U.S. law, most importantly sections of the Detainee Treatment Act of 2005, constitutes an extension of the superior orders defense as it would apply to interrogators, and may not only fully immunize government officials and agents involved in interrogations, but also disrupt emerging international legal norms surrounding the superior orders defense.

Part I of the Note discusses the development of the modern superior orders defense in international law and its general incorporation into national military laws, including the Uniform Code of Military Justice. Part II analyzes recent U.S. law and practice and concludes that it may deviate from the international legal standard for the superior orders defense. Part III suggests means through which U.S. practice may be brought back into conformity with the international standard, while at the same time contributing to its positive development.

INTRODUCTION

On August 24, 2009, Attorney General Eric Holder made the long-awaited[1] decision to authorize an investigation into the treatment of detainees by CIA interrogators during the early years of the Bush Administration's Global War on Terror.[2] Holder announced that his review of classified materials, including a 2004 investigation into detainee treatment by the CIA Inspector General[3] and a recently completed report

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1. See Daniel Klaidman, Independent's Day: Obama Doesn't Want to Look Back, but Attorney General Eric Holder May Probe Bush-Era Torture Anyway, Newsweek, July 20, 2009, at 35 (chronicling Holder's decisionmaking process in authorizing investigation of CIA detainee interrogations).

2. See Press Release, U.S. Dep't of Justice, Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (Aug. 24, 2009) [hereinafter Holder Press Release], available at http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html (on file with the *Columbia Law Review*).

3. Central Intelligence Agency Inspector General, Special Review: Counterterrorism Detention and Interrogation Activities (Sept. 2001–Oct. 2003) (May 7, 2004) [hereinafter CIA Inspector General Review], available at http://www.aclu.org/oigreport (on file with the *Columbia Law Review*).

by the Department of Justice (DOJ) Office of Professional Responsibility investigating Office of Legal Counsel (OLC) memoranda on coercive interrogation techniques,[4] "warrant[ed] opening a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations."[5] Yet Holder immediately sought to preempt critics[6] of his controversial decision by noting an important limitation on the investigation. Members of the intelligence community who had been involved in interrogations "need to be protected from legal jeopardy when they act in good faith and within the scope of legal guidance."[7] Holder made his position, and DOJ policy, clear: "[T]he Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees."[8]

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4. The initial OPR Report concluded that two lawyers in the OLC in the aftermath of 9/11 committed professional misconduct in the course of providing the CIA with legal advice on the interrogation of detainees. Office of Prof'l Responsibility, U.S. Dep't of Justice, Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 260 (July 29, 2009) [hereinafter OPR Report], available at http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf (on file with the *Columbia Law Review*). That finding would have exposed two lawyers, John Yoo and Jay Bybee, to state bar disciplinary proceedings. Id. at 260 n.211. In a January 2010 memorandum to Attorney General Holder, Associate Deputy Attorney General David Margolis reviewed these findings and criticized Yoo and Bybee for providing the CIA with a memorandum on the federal antitorture statute that "consistently took an expansive view of executive authority and narrowly construed the torture statute while often failing to expose (much less refute) countervailing arguments and overstating the certainty of its conclusions." Memorandum from David Margolis, Assoc. Deputy Att'y Gen., to Eric Holder, Att'y Gen., Re: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 68 (Jan. 5, 2010) [hereinafter Margolis Memorandum], available at http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf (on file with the *Columbia Law Review*). Nevertheless, Margolis reversed the OPR Report's initial finding of professional misconduct and refused to refer the Report to state bar disciplinary authorities. Id. at 2. A finding of professional misconduct requires a showing that the lawyer in question violated "a known, unambiguous obligation that applied" unambiguously to the lawyer's conduct. Id. at 11–12. According to Margolis, the OPR Report failed to identify such a clear obligation that Yoo and Bybee violated in their provision of legal opinions to the CIA. Id.; see id. at 25 ("While I agree with OPR that the Department expects its attorneys to provide thorough, objective, and candid legal advice as a performance matter, OPR has converted this high expectation into a minimum standard for assessing professional misconduct.").

5. Holder Press Release, supra note 2.

6. The most visible critic of the decision to launch a preliminary investigation was former Vice President Richard Cheney. Interviewed six days after Holder's announcement, Cheney characterized it as "clearly a political move." Rachel L. Swarns, Cheney Offers Sharp Defense of C.I.A. Tactics, N.Y. Times, Aug. 31, 2009, at A1.

7. Holder Press Release, supra note 2.

8. Id.

Holder's position made intuitive sense. Interrogators, both civilian and military, faced extreme pressure to make suspects talk; the specter of the 9/11 attacks loomed large in every interrogation cell. Demands for information ran down the chain of command, and policymakers directed interrogators to use whatever legal means available to extract actionable intelligence.[9] The job of ascertaining the line of legality fell, naturally, to lawyers in the national security bureaucracy. Preeminent among these lawyers were those in the OLC, which issues ex ante legal opinions authoritative within the Executive Branch.[10] To the extent that line interrogators had toed the limits approved by some of the most elite lawyers in the nation, it would seem incongruous for the DOJ to later prosecute them for detainee abuse. Holder's announcement, therefore, left open the possibility of prosecuting officials who strayed beyond the limits set out by the OLC, as well as those who did not rely "in good faith" on the memoranda.[11] The decision to immunize good faith reliance on the OLC memos garnered support from even some of the staunchest critics of the Bush Administration's interrogation policies.[12]

Yet there has been a consistent undercurrent of criticism accompanying attempts by both the Bush and Obama Administrations to immunize officials and agents who relied on legal guidance in carrying out post-9/11 interrogation policies. Some of the sharpest criticism has centered on analogies between a "legal authorization" defense for interrogators and the "Nuremberg" defense—the defense invoked by Nazi defendants

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9. Stuart Taylor, Jr. and Benjamin Wittes describe this dynamic between national security policymakers determined to gain information from detainees and line interrogators under pressure to deliver—and its propensity to overcome previous limits on interrogation tactics designed to ensure compliance with the law: "There was . . . a convergence going on between high-altitude policymakers keen to facilitate intelligence-gathering by relaxing the rules that restrain abuse, interrogators in the field who felt encumbered by those rules and some soldiers in the field as well with sadistic impulses of precisely the type such rules are intended to restrain." Stuart Taylor, Jr. & Benjamin Wittes, Looking Forward, Not Backward: Refining American Interrogation Law 7–8 (Series on Counterterrorism & Am. Statutory Law, Working Paper No. 8, 2009), available at http://www.brookings.edu/papers/2009/0510_interrogation_law_wittes.aspx (on file with the *Columbia Law Review*).

10. See Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 Colum. L. Rev. 1448, 1451 (2010) ("For decades, [the OLC] has been the most significant centralized source of legal advice within the Executive Branch."); Note, The Immunity-Conferring Power of the Office of Legal Counsel, 121 Harv. L. Rev. 2086, 2086 (2008) [hereinafter Note, Immunity] ("OLC exercises the Attorney General's opinion-writing function and serves as the executive branch's most authoritative legal voice." (internal quotation marks omitted)).

11. See Letter from Kenneth Roth, Exec. Dir., Human Rights Watch, to Eric Holder, Att'y Gen. (July 20, 2009), available at http://www.hrw.org/en/news/2009/07/20/letter-holder-supporting-criminal-prosecution-counterterrorism-abuses (on file with the *Columbia Law Review*) (urging investigation of government officials who went beyond scope of legal guidance or did not rely in "good faith" on guidance).

12. See, e.g., Andrew Sullivan, Dear President Bush, Atlantic, Oct. 2009, at 58, 60 (arguing it would be "deeply unfair to solely prosecute those acting on [presidential] orders or in [the President's] name").

at the Nuremberg Tribunals that they had merely been "obeying orders" and therefore should be exculpated. Also known as the "superior orders defense," it has become anathema in American law and legal commentary. As early as January 2008, Senator Sheldon Whitehouse addressed parallels between a "good faith reliance" defense and the superior orders defense. Questioning Bush Administration Attorney General Michael Mukasey, Whitehouse noted that Mukasey seemed to be arguing that CIA interrogators would not be investigated for possible use of torture because they had proper "authorization"—a position that raised a possible "Nuremberg defense problem."[13] While Mukasey argued that prosecuting CIA agents who relied on legal authorizations and whose interrogations likely crossed the line into torture would have dangerous consequences for national security, he nevertheless blanched at the comparison to Nuremberg: "['I was only following orders' is] not a fine response. It was a response, at Nuremberg, that was found unlawful, as we both know."[14]

Given this popular opprobrium, it might be thought that analogizing to the superior orders defense is the worst possible way to pursue justice in the case of interrogators who tortured detainees after relying on legal guidance and authorizations from government lawyers.[15] But discussions of the "Nuremberg defense" obscure doctrinal developments in the superior orders defense under both domestic military and international law. These developments have arguably resulted in a just and limited defense for individuals who seek to defend against allegations of war crimes by claiming that they were "following orders."

This Note argues that the modern superior orders defense represents the most relevant and just paradigm for assessing the potential criminal liability of U.S. interrogators who claim they were authorized and

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13. Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 47 (2008) (statement of Sen. Sheldon Whitehouse).

14. Id. at 46 (statement of Michael Mukasey, Att'y Gen.).

15. It is virtually indisputable that American interrogators, working for the CIA as well as the Defense Department, tortured detainees in American custody in order to obtain information on the al Qaeda terrorist network. This is the conclusion of, inter alia, the International Committee of the Red Cross and the former convening authority for military commissions at Guantanamo. See Int'l Comm. of the Red Cross, ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody 26 (2007), available at http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf (on file with the *Columbia Law Review*) ("The allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture."); Bob Woodward, Detainee Tortured, Says U.S. Official, Wash. Post, Jan. 14, 2009, at A1 ("'We tortured [Mohammed al-] Qahtani. . . . His treatment met the legal definition of torture.'"). This Note assumes a scenario in which interrogators relied upon legal guidance that methods authorized for use on detainees did not violate domestic and international law against torture and cruel, inhuman, and degrading treatment, and that this legal guidance was incorrect. At the very least, there is strong evidence that legal guidance facilitated detainee abuse. See infra note 210 and accompanying text (discussing conclusions of Senate Armed Services Committee Report on abuse of detainees in U.S. custody).

counseled by government lawyers prior to using techniques that likely constituted torture. However, recent U.S. law and practice, most notably sections of the Detainee Treatment Act of 2005 (DTA),[16] constitute an extension of the superior orders defense as it would apply to interrogators. This extension may not only fully immunize government officials and agents involved in interrogations, but also disrupt emerging international legal norms surrounding the superior orders defense.

Part I discusses the historical development of the superior orders defense traditionally available to soldiers and assesses the objective test for determining liability that has emerged as the dominant version of the defense in international law. It emphasizes that under the modern superior orders defense, the individual combatant retains at least some responsibility for analyzing the content of superior orders for blatant illegality.

Part II focuses on a section of the DTA that grants a statutory affirmative defense to government interrogators in antiterrorism operations. If interpreted narrowly, this section would mark only a limited extension of the modern superior orders defense. It would remain largely consistent not just with that defense but with other recognized defenses arising when the defendant has received legal advice from government officials. There is a real risk, however, that a broad interpretation of the statutory defense would resemble the discredited "complete" superior orders defense—in other words, the "Nuremberg defense."

Part III addresses the general problem posed when officials and agents involved in sensitive and risky national security operations experience pressure to toe the edge of legality. How should their reliance on the advice of government lawyers be assessed as a defense if prosecutions ensue? This Note concludes by arguing that, as with the modern superior orders defense, the content and context of the action contemplated and "authorized" should be paramount in assessing the reasonableness of the reliance.

I. THE SUPERIOR ORDERS DEFENSE AND "MANIFEST ILLEGALITY"

Addressing the opening of the International Military Tribunal (IMT) at Nuremberg on November 21, 1945, Justice Robert H. Jackson, in his capacity as Chief of Counsel for the United States and the Tribunal's principal prosecutor,[17] offered a vigorous defense of the principles of individual responsibility for international crimes embedded in the IMT Charter's Article 8:[18]

16. Pub. L. No. 109-148, § 1004(a), 119 Stat. 2680, 2740 (2005) (codified as amended at 42 U.S.C. § 2000dd-1 (2006)).

17. See Telford Taylor, The Anatomy of the Nuremberg Trials 167–72 (1992) [hereinafter Taylor, Nuremberg Trials] (describing Jackson's opening address).

18. See Charter of the International Military Tribunal, art. 8, reprinted in 1 Trial of the Major War Criminals Before the International Military Tribunal 10, 12 (1947) ("The fact that the defendant acted pursuant to order of his Government or of a superior shall

> The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state. Under the Charter, no defense based on either of these doctrines can be entertained. Modern civilization puts unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility.[19]

Jackson, however, recognized the limits of efforts to shrink that zone of impunity. Writing to President Harry Truman prior to the IMT's commencement, Jackson avowed that "[t]here is doubtless a sphere in which the defense of obedience to superior orders should prevail."[20]

Popular perceptions to the contrary,[21] the IMT did not signal the demise of the superior orders defense.[22] In a sense, Jackson's apparently contradictory statements set the stage for the confusion and ambivalence that would come to surround the superior orders defense in international

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not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine[s] that justice so requires.").

19. Robert H. Jackson, Chief of Counsel for the United States, Opening Statement Before the International Military Tribunal (Nov. 21, 1945), *in* Robert H. Jackson, The Nürnberg Case 30, 88–89 (1947). The act of state doctrine in this context meant the traditional international legal concept that a national "court could not subject [another State's] sovereign to [its] judicial processes." Gary D. Solis, Obedience of Orders and the Law of War: Judicial Application in American Forums, 15 Am. U. Int'l L. Rev. 481, 504 (1999). That doctrine was extended to include military officers of the sovereign state. See id. ("It was an aspect of the Act of State Doctrine that allowed the United States and the United Kingdom to view military officers as personifications of their states.").

20. Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, 39 Am. J. Int'l L. Supp. 178, 183 (1945) [hereinafter Jackson Report]. Jackson's example of the exception that would prove the rule was "a conscripted or enlisted soldier [who] is put on a firing squad, [and] should not be held responsible for the validity of the sentence he carries out." Id. Ironically, Jackson's paradigmatic fact pattern would result in qualified rejections of the superior orders defense in at least two cases. See infra notes 81–85 and accompanying text (describing convictions in *Sawada* and *Border Guards Prosecution Case*).

21. See, e.g., Jill M. Fraley, The Government Contractor Defense and Superior Orders in International Human Rights Law, 4 Fla. A&M U. L. Rev. 43, 48 (2009) ("The superior orders defense has been discredited in the context of international law as a result of Nazi officers attempting to claim the defense in post-World War II war crimes tribunals.").

22. See Solis, supra note 19, at 516 (noting defense's survival); see also Mark J. Osiel, Obeying Orders: Atrocity, Military Discipline & the Law of War 42 (1999) (pointing out "equivocal" practice of IMT in dealing with defense); Martha Minow, Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence, 52 McGill L.J. 1, 19 (2007) ("[D]espite the popular understanding that the Nuremberg Tribunal flatly rejected the defence, following superior orders did not disappear from consideration.").

law.[23] On the one hand, the defense's rejection, at least at Nuremberg, represented a forceful bulwark in the battle for individual responsibility for violations of international law. On the other hand, a categorical rejection could criminalize the actions of low-ranking soldiers whose conduct bore a very tenuous relationship to culpability. Since the IMT, both domestic and international courts have struggled to reconcile Jackson's sweeping pronouncements with his qualifying asides. The result has been a general gravitation toward the "manifest illegality" standard governing the admissibility of the superior orders defense. This standard would allow a limited superior orders defense, available only if the defendant did not know and could not reasonably have known that the orders followed were unlawful.[24] Part I of this Note discusses the development and general acceptance, in both international and domestic contexts, of a limited superior orders defense. Section A relates the origins of the "manifest illegality" standard in the first half of the twentieth century. Section B discusses subsequent developments under international and domestic law, and the particular conceptual difficulties raised when orders given are legal under domestic law but illegal under international law. Section C considers the current status of the defense under international law.

A. *Origins of the Objective Test*

The superior orders defense in international law is a balancing act between the recognition that military discipline and the exigencies of combat require prompt and unquestioning compliance with the orders of superior officers on the one hand, and the emerging international consensus that human rights norms should be enforceable against individuals on the other.[25] According to Mark Osiel, that balance has generally been struck "[i]n both international law and the military codes of most states" by a formulation in which a combatant "is excused from

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23. See Osiel, supra note 22, at 41 (observing "international law on the matter . . . is not fully settled"). However, the International Committee of the Red Cross, in a recent study of customary international humanitarian law, does note that state practice appears to be following a general trend toward a customary rule on the limits of the superior orders defense resembling that codified in the Rome Statute of the International Criminal Court. Infra notes 29–33 (identifying relevant portions of Rome Statute); see 1 Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law: Rules 566–67 (2005) (collecting examples of state practice from domestic military manuals and recent cases); Françoise Bouchet-Saulnier, The Practical Guide to Humanitarian Law 392–93 (Laura Brav & Clémentine Olivier eds. & trans., 2d English language ed. 2007) (noting, in handbook published by NGO Medecins Sans Frontieres, that "[c]ombatants are held accountable even if they are carrying out the orders of a superior").

24. See infra Part I.B (discussing trend toward limited superior orders defense in international law).

25. Accord James B. Insco, Note, Defense of Superior Orders Before Military Commissions, 13 Duke J. Comp. & Int'l L. 389, 393 (2003) (arguing proper standard for admissibility of superior orders defense should "promot[e] discipline in the military while not entirely subverting the supremacy of the law"). But cf. Minow, supra note 22, at 54 (doubting balance may in fact be struck).

criminal liability for obedience to an illegal order, unless its unlawfulness is thoroughly obvious on its face."[26] Significantly, and going beyond that articulation, the defense is generally cabined by both subjective and objective limitations: A defendant invoking it not only must establish that he or she did not know the orders were *actually* unlawful as issued, but also that it was not objectively unreasonable to believe that the orders given were lawful.[27]

In international criminal law, the most significant statute currently in force and bearing on the defense is the Rome Statute of the International Criminal Court (ICC).[28] Under the Rome Statute, if a defendant commits an offense pursuant to an order from a superior, "whether military or civilian,"[29] the defendant will be able to invoke the superior orders defense so long as he or she (a) "was under a legal obligation to obey orders of the Government or the superior in question";[30] (b) "did not know that the order was unlawful";[31] and (c) "the order was not manifestly unlawful."[32] The Rome Statute goes on to stipulate that "orders to commit genocide or crimes against humanity are manifestly unlawful," as those crimes are defined in the statute.[33] Critical to the statute's operation is "[t]he element of *mens rea*."[34] Upon introduction of the defense, the prosecutor will have to prove individual culpability by demonstrating that the defendant knew the order to be unlawful, or, more likely, that the defendant had constructive knowledge of its illegality because of its "manifest[ ] unlawful[ness]."[35]

It was not foreordained that a limited superior orders defense, focused on the individual culpability of the defendant, would emerge from the twentieth century as the dominant,[36] although by no means univer-

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26. Osiel, supra note 22, at 1.

27. See, e.g., Dep't of the Army, Field Manual 27-10: The Law of Land Warfare para. 509 (1956) [hereinafter Field Manual 27-10] (stating, in current law of war field manual, that superior orders provide no defense unless defendant carried out illegal act under order and "did not know and could not reasonably have been expected to know that the act ordered was unlawful").

28. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

29. Id. art. 33, § 1.

30. Id. art. 33, § 1(a).

31. Id. art. 33, § 1(b).

32. Id. art. 33, § 1(c).

33. Id. art. 33, § 2.

34. Geert-Jan Alexander Knoops, Defenses in Contemporary International Criminal Law 39 (2d ed. 2008). Knoops notes "[i]ndividual criminal responsibility is, in its operation, closely linked to the element of *mens rea*, i.e., the defense that a subordinate does not have the requisite premeditation, criminal mind or criminal culpability." Id. at 38.

35. See id. at 38–40 (discussing operation of ICC statute).

36. See supra note 26 and accompanying text (discussing significance in international law and national military laws of link between criminal liability and facial unlawfulness of order received).

sal,[37] standard for dealing with the Nuremberg conundrum. Yet a brief survey of defendants' invocations of the defense in both municipal and international courts during the past century reveals a clear and consistent trend in that direction.[38]

Prior to the First World War, the weight of authority in international law stood for the proposition that a combatant who violated the laws of war on direct orders from a superior officer should be immunized; the legally responsible party should be the officer or commander who originated the order.[39] According to the leading international law treatise of the time, obedience to orders constituted an absolute defense to war crimes charges: "If members of the armed forces commit violations *by order* of their Government, they are not war criminals and cannot be punished by the enemy . . . ."[40] This position was consistent with the act of state doctrine, a paramount principle of international law at that time: Courts could not stand in judgment of the acts of a foreign sovereign, and military orders were viewed as an extension of the sovereign's will.[41] Lassa Oppenheim, the author of the aforementioned treatise, soon had the opportunity to incorporate the defense's absolute acceptance into the British Manual of Military Law of 1914.[42] The American military quickly followed suit in its own Field Manual.[43]

An absolute acceptance of the defense held appeal for those primarily concerned with internal military discipline,[44] but its obvious weakness lay in the fact that it barred any attempt to assess the individual culpability of the defendant. If a soldier shared in his commander's criminal

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37. See supra note 23 and accompanying text (noting persisting doctrinal confusion surrounding superior orders defense in international law).

38. What follows is a brief sketch of the modern doctrinal history of the superior orders defense. A comprehensive history of the defense and its invocation is beyond the scope of this Note. For more detailed history, see generally Matthew R. Lippman, Humanitarian Law: The Development and Scope of the Superior Orders Defense, 20 Penn St. Int'l L. Rev. 153 (2001) (chronicling evolution of superior orders defense in twentieth century); Solis, supra note 19 (discussing development of superior orders defense in American law and practice).

39. See Lippman, supra note 38, at 159 (noting scholarly consensus, particularly among British, Americans, and French).

40. 2 Lassa Oppenheim, International Law: A Treatise 264 (1st ed. 1906); see also Jackson Nyamuya Maogoto, The Defence of Superior Orders, *in* Rethinking International Criminal Law: The Substantive Part 89, 99–100 (Olaoluwa Olusanya ed., 2007) (discussing Oppenheim's influence).

41. See supra note 19 and accompanying text (discussing act of state doctrine).

42. Lippman, supra note 38, at 159.

43. See Dep't of War, Rules of Land Warfare para. 366 (1914) ("Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders."). It is important to note that this did not signal complete impunity for war crimes committed under orders. If the commander who had issued the orders fell into the hands of his opponent, he could be lawfully punished. Id.

44. See Insco, supra note 25, at 392–93 (criticizing full acceptance of defense while noting "it favors the principle of military efficiency").

intent in carrying out the order or else knew that the order was unlawful but carried it out anyway, the superior orders defense represented a windfall: acquittal despite the defendant's provable criminal intent.[45]

In several cases heard by the Penal Senate of the German Supreme Court in the aftermath of the First World War,[46] however, defendants charged with violations of the laws of war sought to plead obedience to orders, and in each case the court refused to countenance an absolute acceptance of the defense.[47]

The case of *Llandovery Castle* is particularly noteworthy. The defendants in *Llandovery Castle* were two subordinate officers on a German U-Boat whose commander ordered the torpedoing of a Canadian hospital ship in the mistaken belief that the ship carried munitions and combatants.[48] The defendants subsequently participated, upon orders from the commander, in the shooting from the deck of the U-Boat of survivors in their lifeboats.[49] The court found the defendants guilty as accessories to the war crime of murder.[50] In response to their plea of obedience to orders, the court noted that military subordinates are generally "under no obligation to question the order of their superior officer, and they can

45. As the tribunal in the subsequent proceedings at Nuremberg under Control Council Law No. 10 famously put it: "The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery." United States v. Otto Ohlendorf (*Einsatzgruppen*), 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 470 (1948). Accordingly, no defense of superior orders could be admissible that ignored completely the mens rea of the individual actor. Id. But see Minow, supra note 22, at 25–35 (discussing psychological studies detailing difficulty of questioning authority in hierarchical settings).

46. Following the defeat of the Central Powers in the First World War, the victorious Allied Powers attempted to extradite hundreds of alleged war criminals for trial. The attempt quickly broke down, however, in the face of German resistance and a lack of enthusiasm in the Allied ranks, notably from the United States. As a compromise solution, the Weimar regime in Germany agreed to try the accused before the German Supreme Court. Taylor, Nuremberg Trials, supra note 17, at 14–18. As might be imagined, the few resulting convictions "did not stand the test of time," with short sentences, annulments, and a general quashing of sentences by Adolf Hitler in 1933. Lippman, supra note 38, at 169–70. Nevertheless, several of these trials are still cited for their contribution to the limitation of the superior orders defense. See, e.g., Solis, supra note 19, at 498–505 (discussing Penal Senate cases "involv[ing] the defense of superior orders").

47. See, e.g., Judgment in Case of Lieutenants Dithmar and Boldt: Hospital Ship "Llandovery Castle" (July 16, 1921), reprinted in 16 Am. J. Int'l L. 708, 722 (1922) [hereinafter *Llandovery Castle*] (noting exception to principle of no punishment for obedience to orders when defendant knew orders required criminal act); Judgment in Case of Commander Karl Neumann: Hospital Ship "Dover Castle" (June 4, 1921), reprinted in 16 Am. J. Int'l L. 704, 707 (1922) [hereinafter *Dover Castle*] (acquitting defendant, but noting exceptions to principle of no punishment for obedience to orders when defendant went beyond scope of order or knew orders required criminal act).

48. *Llandovery Castle*, supra note 47, at 710.

49. Id. at 719–20.

50. Id. at 721. The court only found guilt for accessorial liability, because while it found that the defendants "knowingly assisted" their commander in the killings, the court did not find that they had shared his homicidal intent. Id.

count upon its legality."[51] The court nevertheless held that, as in the instant case, an exception existed "if such an order is universally known to everybody, including the accused, to be without any doubt whatever against the law."[52] Scholars refer to an "evolution" in limiting the defense of superior orders commencing with *Llandovery Castle*[53]—and point to its facts as emblematic of a "manifestly unlawful order."[54]

Between the end of World War I and the surrender of the Axis Powers at the end of World War II, the scope of the superior orders defense shifted dramatically. Some commentators continued to assert that superior orders should remain an absolute defense.[55] Others wanted to reject its application to situations where orders were "manifestly" contrary to the laws of war.[56] Still others proposed that superior orders be completely rejected as a defense, although it might be relied upon to mitigate

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51. Id. at 722.

52. Id. The holding of *Llandovery Castle* is open to interpretation, as the court was not entirely clear on the basis for its decision to reject the defense. The killing of the survivors in the lifeboats was evidently perpetrated to cover up the sinking of the hospital ship. Subsequent to the torpedoing, the U-Boat commander learned that his initial instincts had been wrong, and the Llandovery Castle was an illegal target. Id. at 718. In the absence of any direct evidence that the defendant subordinates had actually known that their commander had ordered them to assist in a war crime, the tribunal may have imputed that knowledge to them based on their *acts*, i.e., their participation in an obvious cover-up. That would be consistent with dicta in an earlier judgment. See supra note 47 and accompanying text (discussing *Dover Castle* language noting "a subordinate who acts in conformity with orders is also liable to punishment as an accomplice, when he knows that his superiors have ordered him to do acts which involve a civil or military crime or misdemeanor"). But the court's language may also signal the implementation of a rule that rejects the superior orders defense based on the *content* of the orders in question—the defendants should have known that the orders were illegal because mowing down unarmed noncombatants in lifeboats is a blatant violation of the laws of war. This is the subsequent interpretation that the judgment in *Llandovery Castle* has acquired. See, e.g., Lippman, supra note 38, at 170; Solis, supra note 19, at 502.

53. See Knoops, supra note 34, at 30–31.

54. Osiel, supra note 22, at 77.

55. See, e.g., Clyde Eagleton, Punishment of War Criminals by the United Nations, 37 Am. J. Int'l L. 495, 497 (1943) (arguing "it is repugnant to the average person to think of punishing a soldier who, in the first place, would be ignorant of the legality or illegality of his act, and in the second place, would be shot immediately if he refused to obey the order to perform the illegal act"). The American Field Manual continued to recognize a complete defense until late 1944. Insco, supra note 25, at 404. At that point, perhaps conscious that the standards it applied to soon-to-be-defeated Axis soldiers would have to resemble those it applied to its own, the Army revised the Manual to dramatically limit the scope of the defense. Id.

56. Sheldon Glueck, an influential law professor at Harvard, wrote in 1944 that the American Field Manual's position on the superior orders defense should be revised to block the defense where a subordinate knew or should have known that received orders were illegal. The latter standard should come into play when any reasonable soldier should be able to discern that his orders are unlawful—for example, when his orders are "manifestly" illegal. Lippman, supra note 38, at 173 (quoting Sheldon Glueck, War Criminals: Their Prosecution & Punishment 155–57 (1944)).

punishment.[57] This latter position, with American support,[58] entered the text of the Nuremberg Charter governing the IMT: The superior orders defense "shall not free [the defendant] from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."[59] Under the clear language of the IMT Charter, obedience to orders could not be pled as an independent defense, although it might still be considered by the tribunal in assessing punishment.

The Charter's dramatic rejection of a defense that had hitherto retained great potency must be seen as a function of the IMT's initial twenty-two defendants. Robert Jackson and the other members of the Allied commission tasked with organizing a tribunal and bringing international criminal charges had carefully chosen these particular defendants for their leadership positions and proximity to Adolf Hitler.[60] As Jackson noted in his report to President Truman, the IMT could not tolerate the zone of impunity that would emerge if high-ranking Nazi officials and commanders could hide behind their deceased "Führer."[61] Defense counsel at the IMT nevertheless argued that their clients had been legally obligated to obey Hitler's commands, and that disobedience might well have meant death.[62] The tribunal thoroughly rejected the defense in its final judgment.[63] It held: "The true test . . . is not the exis-

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57. Hersch Lauterpacht, in his 1940 revision of Oppenheim's treatise on international law, significantly altered the former's language on the superior orders defense:

> The fact that a rule of warfare has been violated in pursuance of an order . . . of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent.

2 L. Oppenheim, International Law: A Treatise 453–54 (H. Lauterpacht ed., 6th ed. 1940); see also Maogoto, supra note 40, at 106 (discussing revision). Lauterpacht later revealed that he had changed his position out of disgust at Nazi atrocities, not because of any changes in underlying law or practice. See Osiel, supra note 22, at 58–59 (discussing Lauterpacht's change of view).

58. American support for the rejection of a superior orders defense for Nazi defendants likely helped precipitate the rejection of a complete defense in the American Field Manual, discussed at supra note 55. Solis, supra note 19, at 509–10.

59. Charter of the International Military Tribunal, art. 8, reprinted in 1 Trial of the Major War Criminals Before the International Military Tribunal, supra note 18, at 10, 12.

60. See Taylor, Nuremberg Trials, supra note 17, at 85–86 (discussing criteria for selecting Nuremberg defendants).

61. See Jackson Report, supra note 20, at 182–83 ("Society as modernly organized cannot tolerate so broad an area of official irresponsibility.").

62. United States v. Goering (*IMT Judgment*), 1 Trial of the Major War Criminals Before the International Military Tribunal 171, 223–24, 278–79, 290–91, 325 (1947) (noting several defendants' reliance on superior orders defense); see also Lippman, supra note 38, at 181–82 (describing defense counsel statements).

63. *IMT Judgment*, 1 Trial of the Major War Criminals Before the International Military Tribunal at 223–24 ("That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment.").

tence of the order, but whether moral choice was in fact possible."[64] The IMT Judgment's language, which emphasized the high rank and enthusiastic participation of the defendants, and which seemed to fold the superior orders defense into the duress-type inquiry of "moral choice,"[65] represented the high-water mark for international denial of an independent superior orders defense.

In subsequent proceedings before an American military tribunal in Germany operating under Control Council Law No. 10,[66] which closely tracked the language of the IMT Charter on rejecting the superior orders defense,[67] judges sought to reconcile a bright-line rule with the individual culpability of significant but lower-ranking officers. The result was an allowance, generally in dicta, that the content of the orders issued could have an important bearing on the culpability of the subordinate defendant. In its *Einsatzgruppen* judgment, for instance, the tribunal announced: "To plead superior orders one must show an excusable ignorance of their illegality."[68] In its *Hostages Trial*,[69] the tribunal convicted a Nazi general who carried out an order from German High Command to retaliate for the partisan killing of German soldiers in occupied territory by massacring civilians at a ratio of fifty-to-one.[70] In convicting the general, the tribunal emphasized that a combatant "who distributes, issues, or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character."[71] The Control Council Law No. 10

64. Id. at 224.

65. The IMT's "moral choice" language brings to mind the defense of duress, and suggests that the Tribunal may have intended to fold the defense of superior orders completely into the defense of duress. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was quite clearly influenced by the IMT Judgment's reasoning in its *Erdemovic* decision. See infra notes 93–95 and accompanying text (discussing *Erdemovic* decision); see also Minow, supra note 22, at 19–20 (remarking on similarity of superior orders and duress defenses).

66. Control Council Law No. 10 (1945), reprinted in Telford Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10 app. D, at 250 (1949) [hereinafter Taylor, Final Report].

67. Id. art. II, § 4(b).

68. United States v. Otto Ohlendorf (*Einsatzgruppen*), 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 473 (1948). In *Einsatzgruppen*, the tribunal convicted officers who had led Nazi death squads in Eastern Europe and the Soviet Union. These squads traveled with the German Army as it fought eastward, and had as their orders to liquidate Jews and other "undesirables." See generally Richard Rhodes, Masters of Death: The SS-Einsatzgruppen and the Invention of the Holocaust (2002) (recounting massacres perpetrated by Einsatzgruppen). The tribunal found that no "excusable ignorance" of illegality could exist where orders had been to massacre unarmed civilians in furtherance of a racial cleansing policy. *Einsatzgruppen*, 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 474–80.

69. United States v. Wilhelm List (*Hostages Trial*), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 1230 (1948).

70. Id at 1269–74.

71. Id. at 1271; see also Lippman, supra note 38, at 195 ("The Court stressed that a field marshal with more than forty years of military experience certainly knew or should

cases massaged the rejection of the superior orders defense in the IMT Charter into a strict limitation on its use.[72] As Matthew Lippman has argued, these cases augmented the subjective standard that seemed to dominate analysis in *Llandovery Castle*[73] with "an objective standard which encompassed commands which would be clearly criminal to an individual of the defendant's military experience and status."[74]

B. *Persisting Uncertainties in the Superior Orders Defense*

The objective standard, however, may have obscured as much as it clarified. As in *Llandovery Castle*, proving a defendant's actual knowledge of the illegality of a given order would be extremely difficult absent a confession of knowledge. Accordingly, the focal point of analysis would prove to be whether an order was so manifestly unlawful that an ordinary combatant under the circumstances should recognize it as such.[75] Between Nuremberg and the rediscovery of international criminal tribunals in the 1990s, municipal military courts sought to flesh out the appropriate contours of the superior orders defense.[76] In a widely cited example, arising out of a massacre of Israeli Arabs by Israeli Defense Force (IDF)

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have known of the criminal character of the command."). In a separate case, the tribunal took pains to emphasize that the recipient of the order could not merely rely on the domestic legal authority of its source—in other words, that the recipient could not merely trust his superior's judgment, but was individually responsible for any violations of international law that carrying out the order entailed. See United States v. Wilhelm von Leeb (*High Command*), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 462, 507–09 (1948) ("A directive to violate international criminal common law is . . . void and can afford no protection to one who violates such law in reliance on such a directive."). That case concerned the transmission of illegal orders, namely the "Commissar Order" to summarily execute all captured political officers serving with the Soviet Army. Id. at 463–64.

72. Compare Lippman, supra note 38, at 203 (arguing these decisions "significantly secured and clarified the international law of superior orders"), with Taylor, Final Report, supra note 66, at 206 ("The plea of 'superior orders,' although not a defense, was considered with other circumstances in mitigation in the fixing of punishment.").

73. The essential question posed in the *Llandovery Castle* analysis was whether the defendant had actual knowledge of the criminal nature of the acts specifically ordered. See supra notes 48–54 and accompanying text (discussing *Llandovery Castle* case and attempts to assess subjective knowledge of illegality of orders).

74. Lippman, supra note 38, at 203.

75. In *United States v. Calley*, a case arising out of the My Lai massacre during the Vietnam War, the U.S. Court of Military Appeals upheld the following trial court instruction on the defense:

> 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.

22 U.S.C.M.A. 534, 542 (C.M.A. 1973) (emphasis omitted).

76. See Maogoto, supra note 40, at 118 (positing "[c]ontinuing [i]nterpretive [d]ifficulty").

reservists on the opening evening of the Suez War,[77] the Israeli Military Court of Appeals in 1959 affirmed a trial court decision holding that:

> The identifying mark of a "manifestly unlawful order" must wave like a black flag above the order given, as a warning saying: "forbidden." It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law . . . .[78]

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77. Chief Military Prosecutor v. Malinki (Military Court of Appeals, Isr. 1959), reprinted and translated in 2 Palestine Y.B. Int'l L. 69, 77 (1985). As Israel's Military Court of Appeals described in a lengthy opinion, the IDF had been placed on high alert in the period leading up to the launch of the "Sinai Campaign" in October 1956. Id. at 113 ("That day was the opening of the Sinai Campaign, when the inner tension and preparedness of every IDF soldier reached its peak."). Entrusted to help protect Israel's eastern border with Jordan while fighting raged in the west with the Egyptian army, the IDF colonel in command of forces in a district abutting the eastern frontier instituted a strict military curfew over Israeli Arab villages near the Jordanian border. Id. at 88. The colonel further ordered a subordinate officer that "anyone who left his house [sh]ould be shot," and that forces under his command should fire on villagers found outside after curfew *even if* those villagers were returning "to the village in the evening from the valley, from settlements or from fields, and [d]on't know about the curfew." Id. The officer in turn ordered soldiers about to go on patrol to shoot to kill to enforce the curfew. Id. at 87. In response to questions for clarification, the officer further ordered that as for women, children, and those returning from the fields, "[t]he same applies to them as to everyone." Id. Soldiers in the field carried out the orders, resulting in the massacre of dozens of unarmed Israeli Arab civilians. Id. at 77.

The Military Court of Appeals upheld the trial court's conviction of the subordinate officer and the soldiers under his command, as well as its nearly complete rejection of the superior orders defense as applied to these defendants. See infra note 78 and accompanying text (discussing court's use of "manifestly unlawful order" test). The appellate court did, however, accept that a valid superior orders defense existed for two soldiers suddenly ordered to fire on villagers who immediately and perhaps instinctively responded. *Malinki*, 2 Palestine Y.B. Int'l L. at 112; see infra note 237 (discussing court's consideration of whether "the receiver of the order ha[d] time to clarify to himself whether the order is lawful" in determining whether order was manifestly unlawful).

78. *Malinki*, 2 Palestine Y.B. Int'l L. at 108 (finding order to fire at unarmed persons found breaking curfew to be manifestly unlawful). Mark Osiel notes that "[l]egal systems rarely define 'manifest' any more precisely than did the Israeli court." Osiel, supra note 22, at 77. An Israeli commentator remarks, however, that the indefinite and context-driven nature of the "black flag" language in *Malinki* has resulted in Israeli judges applying inconsistent approaches to determining whether an order was manifestly unlawful. See Ziv Bohrer, Clear and Obvious? A Critical Examination of the Superior Order Defense in Israeli Case Law, 2 IDF L. Rev. 197, 216 (2005–2006) (arguing that "[u]nder the present circumstances, there is no clear test in Israel for identifying manifestly unlawful orders"); see also id. at 218 (describing competing tests focusing on either severity of breach of societal values occasioned by following order or specific factual circumstances putting soldier on notice that order was unlawful).

What would be an example of an order that, while actually illegal, was not "manifestly unlawful"? In the case of *Malinki*, potentially the imposition of the curfew itself. The trial court had questioned whether the curfew was legal, as the colonel who ordered it did not go through the higher-level military channels mandated by statute. *Malinki*, 2 Palestine Y.B. Int'l L. at 104. The appellate court, however, disagreed in dicta but noted that the dispute was irrelevant to the conduct of the colonel's subordinates, who were "entitled to

To the extent that practice gives meaning to the "manifestly unlawful" objective test, it is highly context-driven, viewed through the eyes of the "reasonable" or "ordinary" combatant,[79] and defers significantly to military exigency and the general need for obedience to lawful orders to promote efficiency and discipline.[80]

Applying this standard would prove particularly vexing in cases in which orders illegal under international law were transmitted through domestic legal systems or legal bureaucracies.[81] In the *Border Guards Prosecution Case*,[82] the German Federal Supreme Court considered a case arising out of Germany's reunification and the draconian laws of the German Democratic Republic (East Germany). Under East German law, sentries guarding the Berlin Wall were ordered to prevent escapes over

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assume that the curfew was imposed by [the colonel] legally." Id. at 105. By the court's logic, therefore, a bare order to enforce a technically illegal curfew (by virtue of the colonel's own overreaching) would not be manifestly unlawful, and the soldiers would have been legally bound to obey it. There is, of course, a great gulf between a clearly illegal order to use lethal force against unarmed civilians who make no show of resistance and an order to enforce a curfew that has been declared through improper channels (and is therefore technically illegal). Yet in the latter case, the order presumably carries with it either explicitly or implicitly (and in that case to be made explicit by subordinate officers) a further order to use some reasonable level of force to enforce the curfew. In other words, a soldier following the simple order to enforce the curfew might have used a very high level of force in the service of an illegal end. It seems clearly right to allow this soldier to invoke the superior orders defense—a reasonable soldier under the circumstances would not recognize that a commanding officer's curfew order circumventing proper bureaucratic channels was illegal. On the other hand, internal controls on the use of force are important in ensuring that local commanders do not take aggressive and abusive initiative against vulnerable populations. Cf. Dep't of the Army, Field Manual 3-24: Counterinsurgency para. 7-3 (2006) [hereinafter Counterinsurgency Manual] ("Leaders educate and train their subordinates. They create standing operating procedures and other internal systems to prevent violations of legal and ethical rules."). The question arises whether cutting off the soldier's liability in this scenario will underdeter the abuses that may result when local commanders circumvent internal limits on their own authority. In other words, is recourse against the officer issuing the order sufficient to deter those units that might otherwise take action outside their legal scope of discretion?

79. Compare *Calley*, 22 U.S.C.M.A. at 543 (accepting objective "ordinary sense and understanding" standard), with id. at 547 (Darden, C.J., dissenting) (arguing for "test of palpable illegality to the commonest understanding" to "reinforce[ ] the need for obedience as an essential element of military discipline").

80. See United States v. Wilhelm von Leeb (*High Command*), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 510–11 (1948) (noting it is "not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality"); see also Insco, supra note 25, at 393 ("The presumption that orders are legal helps maintain and promote good order and discipline.").

81. See, e.g., Trial of Lieutenant-General Shigeru Sawada and Three Others, No. 25 (U.S. M. Comm'n 1948), *in* 5 U.N. War Crimes Comm'n, Law Reports of Trials of War Criminals 1, 13 (rejecting superior orders defense in accordance with commission's governing statute but finding heavy mitigating factors in sentencing Japanese soldiers who carried out executions of American airmen following rigged Japanese court-martial).

82. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 3, 1992, 100 Int'l L. Rep. 366 (1997).

the wall, even if it took the use of lethal force against an unarmed individual to do so.[83] The defendants, two young sentries who had shot and killed an attempted escapee, naturally pled superior orders. The court determined that orders to kill an unarmed escapee who posed no physical threat to any other person were manifestly illegal. The court did approve a substantial mitigation of the young defendants' sentences, however.[84] Despite the mitigation, the *Border Guards Prosecution Case* still stands for the proposition that strict compliance with a domestic legal regime does not give rise to a superior orders defense if one's responsibilities under that regime include acts that are manifestly unlawful under international law.[85]

Conversely, the Canadian Supreme Court in *R. v. Finta* determined that a Hungarian police captain, who led an effort ordered by the Nazi puppet regime to arrest and deport all Jews in the city of Szeged, was entitled to jury instructions on the superior orders defense.[86] The court held that the trial record contained sufficient evidence for a jury to conclude that the orders followed were not manifestly illegal. It noted in particular that newspaper announcements of public approval for the policy, coupled with the open manner in which the policy was executed, could have supported the defense of mistaken belief that the orders were lawful.[87] *Finta* is somewhat anomalous in emphasizing circumstances external to the particular contents of the order in assessing whether the order was manifestly unlawful; it suggests an inquiry into the context of the order given to assess the order's legality and legitimacy.[88]

C. *Invoking the Defense*

The Rome Statute, with its codification of the "manifestly unlawful" standard, would thus seem to be a logical capstone to a century of doctrinal development of the superior orders defense.[89] Yet the categorical rejection of the defense in the founding statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[90] and the International Criminal Tribunal for Rwanda (ICTR)[91] muddies the waters. Tacking back toward the IMT Charter standard, the ICTY and ICTR

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83. Id. at 369.

84. Id. at 372, 391–93.

85. See Lippman, supra note 38, at 231 (noting "defendants were found to have strictly complied with the requirements of East German law").

86. [1994] 1 S.C.R. 701, 702, 846–48 (Can.).

87. Id. at 847–48.

88. See id. at 848 (noting "the open and public manner of the confiscations under an official, hierarchical sanction" helps give defense of superior orders "an air of reality").

89. See supra notes 29–35 and accompanying text (discussing Rome Statute provisions on superior orders defense).

90. Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Charter].

91. Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1602 [hereinafter ICTR Charter].

founding statutes state that the fact of a defendant's commission of criminal acts pursuant to the orders of a "government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if . . . justice so requires."[92] Indeed, in ICTY's leading case on the subject, the Appeals Chamber narrowly interpreted its statute to reject superior orders as an independent defense.[93] Harkening back to the "moral choice" test in the IMT Judgment,[94] the tribunal held that "obedience to superior orders does not amount to a defence *per se* but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defense of duress or mistake of fact are made out."[95]

Yet if ICTY and ICTR marked a new effort to spark an international rejection of the superior orders defense, they have been largely unsuccessful. The ICC Statute has codified a limited defense, and most states preserve some version of the defense in their domestic military laws.[96] In general, a combatant wishing to invoke the superior orders defense in the face of accusations of war crimes will benefit from a presumption that he or she believed the orders to be legal. The combatant will have to contend, however, with a countervailing inquiry into whether the contents of the orders were so manifestly unlawful that no reasonable combatant would have misperceived their criminality. While it is not unduly burdensome, the manifest illegality standard does place a limited burden on all individual combatants to ask whether the orders they have received comport with the fundamental tenets of the laws of war.[97]

Critically, a manifest illegality standard does not sacrifice Robert Jackson's emphasis on individual responsibility for war crimes at Nuremberg.[98] It is central not only to the protection of human rights in times of armed conflict,[99] but also to the maintenance of military disci-

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92. Id. art. 6, § 4; ICTY Charter, supra note 90, art. 7, § 4.

93. Prosecutor v. Erdemovic, Case No. IT-92-22-A, Judgment, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

94. See supra note 64 and accompanying text (holding test is "whether moral choice was in fact possible").

95. *Erdemovic*, Case No. IT-92-22-A, at ¶ 34 (Joint Sep. Op. of McDonald & Vohrah, JJ.).

96. See Lippman, supra note 38, at 249 ("The result has been to maintain superior orders as a de facto legal defense. This seems to reflect what appears to be a substantial, but subterranean international consensus supporting a strong superior orders defense." (footnote omitted)); see also 1 Henckaerts & Doswald-Beck, supra note 23, at 566–67 n.90 (listing conforming states).

97. See Fraley, supra note 21, at 59 (arguing limit or ban on superior orders defense imposes individual "duty to examine whether an order violates customary international law before following that order").

98. See supra notes 17–19 and accompanying text (detailing Jackson's interpretation of individual responsibility in IMT Charter).

99. Cf. Fraley, supra note 21, at 59 (noting rejection of superior orders defense at Nuremberg "was deemed necessary to prevent human rights violations").

pline,[100] that soldiers and government operatives cannot simply claim that they were "just following orders." Any limited acceptance of a superior orders defense must hold the individual accountable for examining the contents of an order given, even if such an examination is quick and completed in accordance with the contingencies of the moment. What should not be acceptable, however, is a standard that allows substitution of the sovereign's imprimatur of legality for the discretion of the individual combatant.

II. Redefining the Superior Orders Defense? The Detainee Treatment Act of 2005 and "Good Faith Reliance on Advice of Counsel"

Under the DTA, Congress extended an affirmative defense to U.S. government personnel, including both civilians and members of the armed forces, engaged in operations involving the "detention and interrogation of aliens" associated with international terrorism.[101] The affirmative defense provides that if the "specific operational practices" undertaken "were officially authorized and determined to be lawful at the time that they were conducted" yet were later determined to be unlawful, then the government employee in question may not be held criminally or civilly liable if he or she "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful."[102] The statute enumerates only one specific factor that the factfinder should take into account in assessing the reasonableness of belief that the practices were lawful: "Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful."[103] Subsequently, in the

100. See Peter Rowe, Military Misconduct during International Armed Operations: 'Bad Apples' or Systemic Failure?, 13 J. Conflict & Security L. 165, 184 (2008) ("What the preservation of military discipline cannot accept is the generation of any feelings of impunity . . . on the part of soldiers or their commanders during the course of armed operations.").

101. Pub. L. No. 109-148, § 1004(a), 119 Stat. 2680, 2740 (codified as amended at 42 U.S.C. § 2000dd-1 (2006)).

102. Id.

103. Id. The full provision, under the heading "Protection of United States Government personnel," reads:

> In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the

Military Commissions Act of 2006 (MCA),[104] Congress made the DTA defense retroactive, extending it to cover acts committed between September 11, 2001, and December 30, 2005.[105]

The DTA's defense provision was a somewhat controversial last-minute addition to the bill, included as part of a deal between the Bush Administration and Senator John McCain, the DTA's chief sponsor.[106] It has remained controversial, as the scope of the defense offered to government personnel is unclear from the statute's text. Some commentators have argued that it effectively immunizes American interrogators and promotes impunity for torture and other abuses.[107] Others see it as one component in a broad swath of legal protections that make it extremely difficult to hold U.S. officials accountable for detainee abuse.[108]

Furthermore, the DTA defense currently has an ambiguous relationship with the limited superior orders defense recognized under U.S. mili-

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practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

Id.

104. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

105. Id. § 8(b)(3), 120 Stat. at 2636 (codified at 42 U.S.C. § 2000dd-1); see Carlissa R. Carson, Comment, The Military Commissions Act of 2006: How Its Inability to Curb Abusive Interrogations Threatens the Future Treatment of Detainees and the United States' Reputation, 57 Emory L.J. 695, 710–11 (2008) (criticizing retroactivity provision).

106. See David Abramowitz, Taking the Bull by the Horns: Congress and International Humanitarian Law, 38 Geo. Wash. Int'l L. Rev. 599, 612–13 (2006) ("Th[is] provision[ ], undoubtedly included at the request of the administration, w[as] part of an agreement announced by Senator McCain and President Bush in the Oval Office.").

107. See, e.g., Carson, supra note 105, at 710–11 (arguing DTA and MCA retroactivity provision send "undeniably clear [message that] the machinery of the judiciary is not geared up to deter abusive interrogations"); Arsalan M. Suleman, Recent Development, The Detainee Treatment Act of 2005, 19 Harv. Hum. Rts. J. 257, 263–65 (2006) (discussing provision and concluding "[s]ection 1004 of the DTA helps to immunize officials from accountability"); John Wesley Hall, Column From the President, Torturing the Geneva Convention, Champion, Sept. 2008, at 5, 6, available at http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/c6be921ee51576d9852574fd00619595?OpenDocument (on file with the *Columbia Law Review*) ("Our government's anticipatory use of the defense of advice of counsel to justify repeated, affirmative acts of violence on defenseless prisoners is repugnant to normal sensibilities."); cf. Michael J. Matheson, The Amendment of the War Crimes Act, 101 Am. J. Int'l L. 48, 51 (2007) (noting that with enactment of DTA "Congress took a further step to preclude the possibility of . . . prosecutions").

108. See, e.g., John Sifton, United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps, 43 Harv. J. on Legis. 487, 509 (2006) (discussing DTA section 1004(a) in context of other obstacles to prosecution of U.S. officials).

tary law—and under international law. Similarities between the superior orders defense and the defense recognized under the DTA suggest that the latter is merely an extension and clarification of the former, and that proper use of the DTA's "official authorization and lawful determination defense" is best analyzed through the lens of principles governing use of the superior orders defense. The DTA's strong emphasis on "good faith reliance" on legal guidance marks a departure from the limited superior orders defense, however, and critics have rightly noted that, read broadly, the DTA may immunize a wide range of official misbehavior in a manner wholly inconsistent with the limited superior orders defense's emphasis on personal culpability.[109]

In Part I, this Note analyzed the modern superior orders defense under international law, and described its proper application and limited role. Now, in Part II, this Note seeks to demonstrate that DTA section 1004(a) represents an expansion of the superior orders defense under American law, but that read narrowly it may still be interpreted as largely consistent with the "manifest illegality" standard for the superior orders defense that remains dominant in international law. Sections A and B will analyze the DTA defense in the context of the superior orders defense: Section A will examine the strong similarities, and section B will identify ways in which the DTA defense extends beyond the modern superior orders defense and other previously available affirmative defenses that interrogators may invoke. Section C will examine the tension between U.S. superior orders law following the DTA and the international legal regime on the superior orders defense, as best exemplified by the Rome Statute of the ICC.

A. *A Limited Superior Orders Defense for Interrogation and Detention Activities*

Section 1004(a) of the DTA creates, in effect, a statutory affirmative defense that may be invoked by "an officer, employee, member of the Armed Forces, or other agent of the United States Government"[110] for

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109. See Hall, supra note 107, at 6 (equating DTA defense with "Nuremberg" defense); see also supra notes 13–14 and accompanying text (describing confrontation between Senator Whitehouse and Attorney General Mukasey over parallels between a "good faith reliance" defense and the superior orders defense).

110. DTA § 1004(a), 42 U.S.C. § 2000dd-1. The question arises whether the DTA's affirmative defense applies to civilian contractors engaged by the U.S. military or intelligence community to participate in detention and interrogation operations. Although the language of the statute is not entirely clear, the inclusion of "other agent[s]" suggests that the defense does extend to contractors, insofar as the categories of "officer[s], employee[s], [and] member[s] of the Armed Forces" would seem to fully cover official government personnel. Cf. Ryan P. Logan, Note, The Detainee Treatment Act of 2005: Embodying U.S. Values to Eliminate Detainee Abuse by Civilian Contractors and Bounty Hunters in Afghanistan and Iraq, 39 Vand. J. Transnat'l L. 1605, 1639 (2006) ("[T]he Detainee Treatment Act allows for a defense by U.S. government personnel accused of torture or abuse in interrogation, *including contractors*." (emphasis added)). The Congressional Research Service's summary of DTA provisions, however, notes merely that the defense covers "U.S. personnel." Michael John Garcia, Cong. Research Serv., RL

actions arising out of antiterrorism interrogation or detention activities.[111] In several significant respects, the section 1004(a) defense resembles the superior orders defense, and it would be invoked in similar situations and for similar purposes. This section will analyze three such similarities. First, there is significant overlap between the set of actors that may invoke the section 1004(a) defense and the set of actors that may invoke the superior orders defense. Second, both defenses serve a similar purpose—to immunize actors who are placed in high-risk situations involving blurred lines between legal and illegal behavior, and who must rely to some degree on the judgment of superiors in assessing legal exposure. Finally, both defenses use the same basic subjective and objective tests for determining individual culpability in circumstances where soldiers or agents take directions from superiors.[112]

33655, Interrogation of Detainees: Requirements of the Detainee Treatment Act 5 (2009), available at http://www.fas.org/sgp/crs/intel/RL33655.pdf (on file with the *Columbia Law Review*).

The foregoing is meant merely to raise the question of DTA defense application to contractors. This Note focuses on the defense's application to members of the U.S. military and employees of its intelligence agencies—and its relationship to existing defenses under domestic and international law. The consequences of extending an affirmative defense to contractors on the basis of officially authorized interrogation or detention activities, with good faith reliance on counsel's assurances that the conduct was legal as a key factor in the inquiry, is beyond this Note's scope. Given the great and growing importance of civilian contractors to U.S. military and intelligence operations, particularly with respect to the detention and interrogation of suspected terrorists and insurgents, this may be a question worthy of further exploration. See George R. Lucas, Jr., "This is Not Your Father's War"—Confronting the Moral Challenges of "Unconventional" War, 3 J. Nat'l Security L. & Pol'y 329, 330 (2009) ("It is wholly impossible at present to deploy the military forces of any of our allied nations for *any purpose whatsoever* without the logistical and security support provided by [private security firms] and their contract personnel."); see also Counterinsurgency Manual, supra note 78, at para. 2-34 ("Recently, private contractors from firms providing military-related services have become more prominent in theaters of operations."); cf. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1075 (9th Cir. 2010) (en banc) ("Plaintiffs contend that . . . Jeppesen Dataplan, Inc., a U.S. corporation, provided flight planning and logistical support services to the aircraft and crew . . . transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture."); United States v. Passaro, 577 F.3d 207, 211–12 (4th Cir. 2009) (affirming conviction of contractor working with CIA whose brutal interrogation led to detainee's death). See generally Logan, supra, at 1609–13 (surveying burgeoning role of civilian contractors in war zones). In particular, one might ask whether a contractor could introduce evidence of reliance on the opinions of nongovernment counsel (the private security firm's own lawyers, for instance) on the legality of officially authorized interrogation or detention activities.

111. See Sifton, supra note 108, at 509 ("The McCain Amendment extended a legal defense to U.S. personnel, both military and non-military, involved in interrogations of terror suspects overseas."); see also Jonathan Hafetz, Torture, Judicial Review, and the Regulation of Custodial Interrogations, 62 N.Y.U. Ann. Surv. Am. L. 433, 460–61 (2007) ("[T]he DTA establishes an affirmative defense in civil and criminal prosecutions available to U.S. officials and agents for alleged mistreatment of detainees.").

112. See supra Part I.C (discussing current status of superior orders defense in international law).

There is a strong correspondence between the government actors who may invoke the superior orders defense and those who may invoke the DTA defense. Prior to the enactment of the DTA, the superior orders defense in American law remained firmly entrenched in the military justice system.[113] Indeed, the DTA's application to civilian government employees as well as members of the armed forces is an important distinction between the DTA defense and the superior orders defense as traditionally conceived.[114] Yet at the outset, it is important to recognize the limitations placed on the DTA defense's potential usage. To gain the benefit of the defense, both soldiers and civilians must demonstrate that any illegal "specific operational practices" committed involved "detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies."[115] Detention and interrogation of terrorism suspects are absolutely crucial functions in the U.S. government's counterterrorism campaign. Indeed, one commentator has asserted that they are two legs of a "triangle" that forms a "critical core of counterterrorism."[116] Any civilian (as well as any member of the armed forces) that asserts the defense must prove that he or she was involved in activities bearing on one of the "legs" of this "triangle"; this is consistent with the superior orders defense, which arises in the context of military activity, often under wartime pressure.[117]

There is also a strong similarity between the purpose served by the DTA's statutory defense and a limited superior orders defense in military law. The superior orders defense in international law is a balancing act between the need for military discipline on the one hand and individual responsibility under international humanitarian law on the other.[118] Soldiers face situations in wartime where the line between legal and illegal behavior may be blurry and uncertain, and where there is intense pressure coming down the chain of command to take a certain action or

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113. See Field Manual 27-10, supra note 27, at para. 509 (specifying that defense of superior orders is not available to member of U.S. Armed Forces unless "he did not know and could not reasonably have been expected to know that the act ordered was unlawful").

114. See Sifton, supra note 108, at 509 (noting extension of military law defense to civilian context). In the international context, at least one commentator has argued that the superior orders defense should be available to civilian defendants if "the person was, considering the factual situation or circumstances, under an obligation to obey orders." Knoops, supra note 34, at 42.

115. DTA § 1004(a), 42 U.S.C. § 2000dd-1.

116. Amos N. Guiora, American Counterterrorism: The Triangle of Detention, Interrogation and Trial 8 (Dec. 23, 2009) (unpublished manuscript), available at http://ssrn.com/abstract=1527314 (on file with the *Columbia Law Review*).

117. See, e.g., United States v. Calley, 22 U.S.C.M.A. 534, 538–39, 544 (C.M.A. 1973) (finding unsuccessful invocation of superior orders defense arising out of platoon's massacre of villagers during Vietnam War).

118. See supra notes 25–27 and accompanying text (discussing tension between military exigency and individual responsibility).

accomplish a particular objective. Under these circumstances, soldiers may *reasonably* rely on the legality of the orders they receive, and so long as the content of the orders received is not manifestly unlawful, they may carry them out without incurring legal jeopardy.[119] In fact, implicit in Article 92 of the Uniform Code of Military Justice's (UCMJ) requirement that soldiers carry out "any lawful general order" is the recognition that soldiers have some independent capacity to determine whether an order is "lawful"—and that they may and indeed should defy *unlawful* orders.[120]

Section 1004(a) of the DTA recognizes a similar principle, and aims to fulfill a similar purpose. Under section 1004(a), government agents have an affirmative defense to prosecution for practices during antiterrorism interrogations or detentions if those practices "were officially authorized and determined to be lawful at the time they were conducted."[121] In effect, this language allows for a superior orders defense when "authorization," rather than an "order," has been given.[122] Yet, while an "authorization" to use a certain set of interrogation techniques may not have the same legally binding force as an order in the military context, the practical effect of an authorization may be sufficiently similar to merit an extension of the superior orders defense. In the national security context, both military and civilian agencies participate in the detention and interrogation of terror suspects.[123] In both cases, pressure may be brought to bear on frontline officers to gain intelligence from detainees. An "authorization" to use a set of techniques, combined with assurances of legality, may lead to intense pressure to use all techniques authorized during interrogation.[124] Certainly, there is a legal distinction

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119. Indeed, they have a legal obligation to carry out lawful orders. See 10 U.S.C. § 892 (2006) ("Any person subject to this chapter who . . . violates or fails to obey any lawful general order or regulation . . . shall be punished as a court-martial may direct.").

120. Id.

121. DTA § 1004(a), 42 U.S.C. § 2000dd-1 (2006).

122. See Sifton, supra note 108, at 509 (noting "military's strict obligation to follow orders generally is not found in non-military contexts").

123. See generally S. Comm. on Armed Servs., 110th Cong., Inquiry into the Treatment of Detainees in U.S. Custody (Comm. Print 2008) [hereinafter Armed Services Committee Report] (discussing role of military in detention and interrogation of terror suspects); CIA Inspector General Review, supra note 3 (chronicling role of CIA in detention and interrogation of terror suspects).

124. For example, the Senate Armed Services Committee Report chronicles the authorization of the use of coercive interrogation techniques on detainees at the Guantanamo Bay Naval Station (GTMO), a facility where suspected al Qaeda and Taliban operatives are held by the military. Armed Services Committee Report, supra note 123, at xiii–xix. It notes that by October 2002, "there was increasing pressure to get tougher with detainee interrogations" from leaders in the Department of Defense (DOD). Id. at xvii (internal quotation marks omitted). This pressure led the commanding officer at the base to "request[ ] authority to use aggressive interrogation techniques." Id. After review by DOD lawyers, Secretary of Defense Donald Rumsfeld "authorized the techniques without apparently providing any written guidance as to how they should be administered." Id. at xix. Senior staff at GTMO then drafted a "Standard Operating Procedure" for interrogators, listing a number of the approved coercive techniques. Id. at xx.

between an authorization and an order,[125] but practically speaking line interrogators may experience a similar level of pressure to use a set of techniques in both cases. Accordingly, the section 1004(a) extension of the superior orders defense may serve a similar purpose of balancing the need for quick action and official discipline with individual responsibility to operate within the confines of the law.

Lastly, and most obviously, both the superior orders defense and section 1004(a)'s statutory defense use the same combination of subjective and objective tests for determining whether a defendant may validly invoke the defense.[126] Under the superior orders defense guidelines in

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Interrogators were then trained in the use of these methods. Id. The Armed Services Committee Report suggests that no specific order was given to use these techniques. However, the effect of the pressure to "break" detainees during interrogations combined with the "authorization" of a set of coercive techniques would surely have placed intense pressure on the interrogators to justify not using these techniques.

125. See 10 U.S.C. § 892 (requiring, in UCMJ, a court martial for failure to obey lawful *order*).

126. It may be argued that the section 1004(a) defense has a clear antecedent in the doctrine of qualified immunity articulated by the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982). The Court in *Harlow* held that "government officials performing discretionary functions . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. Certainly, there is substantial common ground between the section 1004(a) defense and qualified immunity doctrine in providing a liability shield for government employees who have acted reasonably but nevertheless may have violated the law. In the context of the section 1004(a) defense, interrogators essentially get the benefit of a reasonable mistake of law defense—notwithstanding the general criminal law maxim that "ignorance of the law is no excuse." Cf. United States v. Barker, 546 F.2d 940, 973 (D.C. Cir. 1976) (Leventhal, J., dissenting) (discussing "situations where the law has gingerly carved out exceptions permitting reasonable mistake of law as a defense" in criminal cases). By the same token, qualified immunity doctrine protects government employees from civil liability when they should not reasonably have known that an action taken violated a constitutional or statutory right. See Anderson v. Creighton, 483 U.S. 635, 640 (1987) (holding that for right to be "clearly established . . . [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" (internal quotation marks omitted)). Both, in other words, incorporate an objective test in reference to the defendant's awareness at the time of commission of the laws alleged to have been violated. The interplay between good faith reliance on advice of counsel and the qualified immunity doctrine is significant and complex. For a good discussion of qualified immunity and legal guidance from the OLC, see Daniel L. Pines, Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees From Civil Litigation and Criminal Prosecution, 43 Wake Forest L. Rev. 93, 121–31 (2008). Pines concludes that:

> [It would be] logical for virtually any court to find that a government employee relying on an [OLC] opinion fulfills the second prong in *Harlow*—that a reasonable person would have believed that he or she was not violating a clearly established . . . right by following the guidance . . . and is entitled to qualified immunity.

Id. at 131; see also Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 1004 (6th ed. 2009) (querying proper application of qualified immunity doctrine when "a lawyer advises an official that contemplated action would be lawful even though under the precedents it clearly would not be").

Field Manual 27-10 for the U.S. Army, the fact that a soldier committed a war crime on the orders of a superior officer does not constitute a defense "unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful."[127] In other words, the soldier must show that he neither *actually* knew that the order was unlawful, nor should he *reasonably have known* that the order was unlawful. In *United States v. Calley*, the U.S. Court of Military Appeals clarified that the latter objective test for reasonableness should use a person "of ordinary sense and understanding" as its point of reference.[128] U.S. government personnel who invoke the section 1004(a) defense, in addition to demonstrating that the practice for which they are being prosecuted was officially authorized and determined to be lawful, must also convince a jury that they "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful."[129] One commentator has noted that the DTA "defined the defense by borrowing language from the same rule in military law."[130]

The superior orders defense clearly influenced section 1004(a) of the DTA. Given the similarities in terms of actors who may invoke these defenses, the purposes these defenses serve, and the common set of subjective and objective tests, there is a strong argument that section 1004(a) represents a federal statutory extension of the modern superior orders defense.

It may also be argued, however, that significant differences exist between the section 1004(a) defense and the qualified immunity doctrine. Most importantly, the latter doctrine is a shield against civil, not criminal, liability. Indeed, the *Harlow* Court specifically grounded its formulation of the qualified immunity test on a balance between two competing values: the "vindication of constitutional guarantees," on the one hand; and, on the other, the fact that "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814. In other words, qualified immunity doctrine is a recognition of the social costs inherent in subjecting public servants to potentially innumerable private claims, distracting and taxing to defend, without some probability of quick dispensation before trial. See Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) ("[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."). In the criminal context, the prospect of prosecution and conviction for official action would almost certainly chill and distract any official laboring under such a cloud. But this scenario is rarer than civil suits against public employees and at the discretion of state, federal, and military prosecutors rather than private plaintiffs. It may be more appropriate, therefore, to compare the reach of the section 1004(a) defense to narrow, limited defenses to criminal prosecution premised at least in part on reasonable mistakes of law, such as the superior orders defense, see supra Part I, entrapment-by-estoppel, see infra Part II.B.2.a, and the public authority defense, see infra Part II.B.2.b.

127. Field Manual 27-10, supra note 27, at para. 509.

128. 22 U.S.C.M.A. 534, 543–44 (C.M.A. 1973).

129. DTA § 1004(a), 42 U.S.C. § 2000dd-1 (2006).

130. Sifton, supra note 108, at 509.

B. *The Centrality of Legal Guidance*

The key aspect of the DTA section 1004(a) defense is the paramount role it affords good faith reliance on legal guidance in establishing the objective reasonableness of a government agent's belief in the lawfulness of his or her actions. It is the sole enumerated, although not exclusive, criterion, and under section 1004(a) it must be considered as part of an inquiry into whether the agent's mistake of law was reasonable.[131] Section 1004(a)'s emphasis on legal guidance distinguishes its statutory defense from the modern superior orders defense. While the statutory text is not in and of itself inconsistent with the contours of the superior orders defense, it nevertheless raises questions as to whether its application will go far beyond the superior orders defense and effectively immunize a broader spectrum of official misbehavior. This is particularly so given the role that national security and military lawyers played in facilitating potentially illegal activities in the War on Terror.[132] Read narrowly, the section 1004(a) statutory defense provides a justifiable affirmative defense consistent with the modern superior orders defense. Interpreted broadly, however, the DTA defense echoes discredited versions of the superior orders defense that insufficiently deterred violations of international humanitarian law.

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131. See DTA § 1004(a), 42 U.S.C. § 2000dd-1 ("Good faith reliance on advice of counsel should be an important factor . . . to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.").

132. See Taylor & Wittes, supra note 9, at 8 ("The first 'torture memo,' as it has been called since it leaked in June 2004, went to astonishing extremes to tell the CIA that it could legally do just about anything, including torture, to get information out of suspected terrorists."); Margolis Memorandum, supra note 4, at 67 (concluding flaws in OLC memoranda suggest author "failed to appreciate the enormous responsibility that comes with the authority to issue institutional decisions that carried the authoritative weight of the Department of Justice"). See generally Jane Mayer, The Dark Side (2008) (describing formulation of interrogation policies that led to torture and involvement of high-ranking government lawyers). Some commentators have even gone so far as to argue that criminal sanctions would be proper for high-ranking Bush Administration lawyers. See, e.g., Philippe Sands, Torture Team: Rumsfeld's Memo and the Betrayal of American Values 182 (2008) (arguing lawyers in DOD could be prosecuted for war crimes for role in promulgating legal guidance that led to detainee abuse); M. Cherif Bassiouni, The Institutionalization of Torture Under the Bush Administration, 37 Case W. Res. J. Int'l L. 389, 396–97 (2006) (discussing "legal opinions and other government memoranda [that] were drafted and presented in order to allow the Administration's leaders to establish a policy that these legal advisors knew or should have known was in violation of U.S. and international law"); Jens David Ohlin, The Torture Lawyers, 51 Harv. Int'l L.J. 193, 194 (2010) (discussing "Administration lawyers who wrote or approved memos analyzing the legality of torture and harsh interrogation methods"). But see Julian Ku, The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice, 42 Case W. Res. J. Int'l L. 449, 451 (2009) ("Insisting on prosecuting lawyers for their good-faith legal advice, even threatening prosecution, will chill the ability of future government lawyers to give legal advice on complex and important questions implicating U.S. national security.").

1. *Distinguishing the Superior Orders Defense.* — As previously noted, an interrogator invoking the superior orders defense or the DTA's affirmative defense would need to demonstrate that he or she did not unreasonably lack knowledge that his or her actions were unlawful.[133] The DTA specifically stipulates that "[g]ood faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful."[134] In essence, this is a directive that factfinders must consider evidence of good faith reliance on advice of counsel in determining whether the defendant's lack of knowledge of illegality was reasonable.[135] By the very terms of the statute, the defendant must demonstrate both "reliance"—i.e., that he or she actually relied on advice of counsel in forming an opinion as to the legality of the action contemplated—and "good faith." The latter phrase in this context is somewhat problematic,[136] but should probably be interpreted to mean that the defendant honestly sought legal guidance in order to actually avoid breaking the law.[137]

If a soldier-defendant invokes the superior orders defense,[138] however, the factfinder will inquire whether a given order was so manifestly unlawful that no person of ordinary sense and understanding would fail

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133. See supra Parts I.C, II.A (discussing prevailing scope of superior orders defense and DTA section 1004(a) defense provision).

134. DTA § 1004(a), 42 U.S.C. § 2000dd-1.

135. See Garcia, supra note 110, at 5 (noting "good faith reliance on the advice of counsel is specified" as a key fact for factfinder to consider). While the statute directs the factfinder to consider evidence of good faith reliance on advice of counsel, this presumes that the defendant is able to admit the legal guidance (or at least sufficient evidence that it existed and that the defendant relied upon it) into evidence at trial. The specific mechanics of introducing government legal guidance into evidence for purposes of invoking the DTA section 1004(a) defense or other possible defenses are beyond the scope of this Note. For a discussion of two potentially significant barriers to the introduction of such evidence, see Pines, supra note 126, at 139–43 (discussing admissibility problems associated with classified opinions and attorney-client privilege of federal government).

136. Jack Goldsmith, former head of the OLC in the DOJ, has noted that high-ranking government officials would seek out the OLC's assistance to demarcate the edges of the law. Jack Goldsmith, The Terror Presidency 96 (2007). Goldsmith quotes a DOJ prosecutor as explaining that it is DOJ policy not to prosecute officials who rely on OLC opinions. Id. In other words, officials may come to the OLC in "good faith" attempts to follow the law, but relatively secure in the knowledge that an OLC opinion will function as an "advance pardon" even if it later turns out to be incorrect. Id.; see also Note, Immunity, supra note 10, at 2086 (noting "widespread belief in OLC's immunity-conferring power").

137. Cf. John T. Parry, Culpability, Mistake, and Official Interpretations of Law, 25 Am. J. Crim. L. 1, 28 (1997) ("[T]o determine the reasonableness of a defendant's reliance on an official interpretation of law, the judge or jury inevitably and appropriately will consider . . . whether the defendant was acting in good faith or was consciously skating close to the legal edge.").

138. See supra note 127 and accompanying text (discussing superior orders defense that may be pled in U.S. courts-martial).

to recognize its illegality.[139] The defendant may submit evidence that he or she relied in good faith on legal guidance; there is certainly no rule against admitting such evidence. But there is likewise no rule requiring the factfinder to consider this evidence.

The DTA's statutory defense may therefore be strongly distinguished from the superior orders defense for the emphasis it places on the legal determinations of government lawyers. An interrogator who does not seek legal guidance prior to using aggressive techniques may face criminal charges if he or she oversteps the bounds of legality. But an interrogator who does seek both authorization and legal guidance prior to using aggressive techniques will have a strong section 1004(a) defense.[140] In practice, this will have the effect of strengthening three already existent trends noted by Jack Goldsmith, former head of the OLC. First, agents will actively seek legal advice from counsel on specific limits for action.[141] Second, because agents engaged in operations critical to national security, like interrogation of terror suspects, face pressure to do everything within the limits of the law to accomplish their objectives, government lawyers dispensing guidance will effectively set policy in these areas.[142] As a consequence, national security lawyers face pressure to give advice that pushes the limits of the law and lets agents "do their jobs."[143]

2. *Parallels to Existing Affirmative Defenses.* — The DTA's emphasis on government lawyers is also reminiscent of a set of constitutional and common law defenses that revolve around authoritative interpretations of the law that turn out to be wrong. Commentators have suggested the potential applicability of entrapment-by-estoppel and public authority defenses to interrogators who relied on OLC legal guidance.[144] The doctrine of entrapment-by-estoppel may come into play where a defendant reasonably relied on mistaken government assurances of legality;[145] public authority potentially applies in situations where defendants believed that

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139. See supra notes 75–80 and accompanying text (discussing operation of "manifestly unlawful" test).

140. This also applies to interrogators who acted between September 11, 2001, and December 30, 2005. See supra note 105 and accompanying text (noting retroactivity of DTA as amended by MCA).

141. Goldsmith, supra note 136, at 91–92.

142. Id. at 130–31.

143. Id. at 92–93.

144. See, e.g., Sifton, supra note 108, at 510 (noting defenses that are "frequently raised when . . . defendants claim to have been told by government officials that their conduct was lawful, when in fact it was not"); Note, Immunity, supra note 10, at 2092 (noting "narrow doctrinal exceptions" to legal heuristic that ignorance of law is no excuse); Marty Lederman, A Dissenting View on Prosecuting the Waterboarders, Balkinization (Feb. 8, 2008, 3:33 AM), at http://balkin.blogspot.com/2008/02/dissenting-view-on-prosecuting.html (on file with the *Columbia Law Review*) (describing doctrine of "reasonable reliance").

145. See, e.g., Raley v. Ohio, 360 U.S. 423, 426 (1959) (overturning conviction where defendants relied on government official's mistaken statement that they had right to remain silent).

otherwise unlawful activity was rendered lawful by government authorization.[146] There are important distinctions, however, between the role that "good faith reliance" on legal guidance plays in the DTA section 1004(a) defense and the role of legal guidance in these narrow defenses.[147]

a. *Entrapment-by-Estoppel.* — Of these two defenses, entrapment-by-estoppel bears the strongest resemblance to the DTA section 1004(a) defense's emphasis on legal guidance. In three seminal cases, the Supreme Court held that the Due Process Clause prohibits the conviction of a defendant for "exercising a privilege which the State had clearly told him was available to him."[148] A defendant may seek to estop the government if he or she reasonably relied on an official misrepresentation of the law governing the conduct in question.[149] Commentators have identified sev-

146. See, e.g., United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994) ("With this affirmative defense, the defendant seeks exoneration based on the fact that he reasonably relied on the authority of a government official to engage him in a covert activity."); United States v. Barker, 546 F.2d 940, 945 (D.C. Cir. 1976) (reversing conviction because public authority defense jury instruction was not given).

147. In the civil context, claims of good faith reliance on legal guidance may also come into play when assessing invocations of qualified immunity by government employees. See supra note 126 (discussing qualified immunity doctrine).

148. *Raley*, 360 U.S. at 426. In *Raley*, the defendants were convicted of contempt after refusing to answer questions under oath at a state commission hearing. Id. at 426–34. The commission chairman had incorrectly informed the defendants that they could invoke their right to remain silent, without suggesting the existence of a state immunity statute that nullified the privilege. Id. at 429–32. The Court held that the convictions should be overturned even absent evidence that the chairman had sought to deceive the defendants as to the state of the law. Id. at 438; see Parry, supra note 137, at 37 (noting *Raley* Court's "inquiry set aside questions of government intent to focus on whether the defendants were objectively deceived"). In Cox v. Louisiana, 379 U.S. 559 (1965), the Court overturned convictions for demonstrating "near" a courthouse because demonstrators had relied upon representations by top city police officials that the site of their demonstration was not illegally "near" the city courthouse. Id. at 568–71. Finally, in United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973), the defendant was convicted for dumping industrial pollutants into a local river. Id. at 656–60. The defendant claimed that he had relied on guidance promulgated by the Army Corps of Engineers that affirmatively represented that the dumping in question was legal. Id. at 672–74. This guidance, however, was erroneous in light of court constructions of the relevant statute. Id. at 671–72. The Court overturned the conviction, holding that to the extent the Corps's guidance affirmatively misled the defendant, "there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution." Id. at 674.

149. See, e.g., United States v. Tallmadge, 829 F.2d 767, 776 (9th Cir. 1987) ("To qualify, the defense must establish very clearly three elements: (1) that the official involved was authorized to enforce or interpret the statute; (2) that the official's statements affirmatively misled the defendant; and (3) that the defendant reasonably relied on them."); see also SueAnn D. Billimack, Note, Reliance on an Official Interpretation of the Law: The Defense's Appropriate Dimensions, 1993 U. Ill. L. Rev. 565, 567–68 ("In determining whether the entrapment by estoppel defense is applicable, courts generally have required the defendant to show that the official both actively misled the defendant and expressly authorized the conduct in question.").

eral "prerequisites" for a successful entrapment-by-estoppel claim.[150] First, the defendant must demonstrate "the involvement of a government agent with authority over the area in question."[151] Second, that official must have made an affirmative misrepresentation of the law governing the area.[152] Third, there must have been reasonable reliance on that advice by the defendant.[153] Finally, given the doctrine's grounding in substantive due process, prosecution under the circumstances must be fundamentally unfair.[154] The influential Model Penal Code offers a similar formulation of the defense.[155]

Given these requirements, it is at least possible that an interrogator who relied on legal guidance may successfully invoke the entrapment-by-estoppel defense.[156] Fulfilling the first requirement would depend on the source of legal guidance. An OLC memorandum would almost certainly fulfill the requirement, as that office issues legal interpretations that are internally binding on executive branch officials.[157] A lower-ranking lawyer, for example a staff Judge Advocate General (JAG) attorney, might also fulfill the requirement, especially if that attorney had an opportunity to consult with superiors on proper legal guidance.[158] Insofar as the interrogator conformed his or her conduct to the legal guidance, that interrogator relied upon an affirmative misrepresentation of

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150. See Sean Connelly, Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law, 48 U. Miami L. Rev. 627, 633–34 (1994) (drawing on case law to identify four prerequisites); Note, Immunity, supra note 10, at 2092–93 (listing prerequisites).

151. Connelly, supra note 150, at 633.

152. Id.

153. Id. at 634.

154. Id.

155. The Model Penal Code provides in relevant part:

> A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when: . . . (b) [the defendant] acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in . . . (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

Model Penal Code § 2.04(3) (1985); see also Parry, supra note 137, at 16 ("[The MPC] remains a good starting point for discussing the elements of entrapment by estoppel.").

156. See Lederman, supra note 144 (arguing prosecution of agents who relied upon OLC legal guidance would be of "dubious constitutionality" because of entrapment-by-estoppel doctrine). But see Kevin Jon Heller, Why I Disagree with Marty Lederman About Prosecuting Waterboarders, Opinio Juris (Feb. 8, 2008, 11:40 PM), at http://opiniojuris.org/2008/02/08/why-i-disagree-with-marty-lederman-about-prosecuting-waterboarders/ (on file with the *Columbia Law Review*) (countering that entrapment-by-estoppel doctrine does not apply when reliance on legal guidance is not "reasonable").

157. See Ross L. Weiner, Note, The Office of Legal Counsel and Torture: The Law as Both a Sword and Shield, 77 Geo. Wash. L. Rev. 524, 528 (2009) (noting internally binding nature of OLC opinions).

158. Cf. Billimack, supra note 149, at 575 (noting controversy over "which low-level government officials can bind the government with their interpretations of the law").

the state of the law. The "reasonableness" inquiry is a function both of the source of the guidance and the content of the guidance.[159]

There are important distinctions, however, between the "paradigmatic"[160] use of entrapment-by-estoppel and the position of interrogators who relied on legal guidance. First, the due process grounding of the Court's entrapment-by-estoppel doctrine and the facts of the key cases on point suggest that it is a matter of fundamental fairness to preclude prosecution of a private citizen who has detrimentally relied on assurances of authoritative government officials.[161] That citizen has dealt at arm's length with the government, and has made an active effort to conform his or her behavior to the law. By contrast, interrogators do not deal at arm's length with government lawyers. There is less danger that the lawyers have misstated the law to purposefully entrap interrogators. Also, because the interrogator and the lawyer are on the same "team," there is the real and ever-present risk of collusion to immunize interrogators, a risk that many believe was realized through the OLC "Torture Memos" in 2002.[162] Second, traditional entrapment-by-estoppel cases generally deal with regulatory offenses, as opposed to "acts that transgress the basic moral values of a society."[163] This is a far cry from legal guidance like the OLC memoranda, which attempted to draw a line between legitimate interrogation techniques and torture in violation of domestic and international law.[164] Finally, not all actors within the national security bureau-

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159. Cf. Heller, supra note 156 (arguing MPC formulation of defense "makes clear that the reasonableness of reliance cannot simply be inferred" from source of guidance).

160. Note, Immunity, supra note 10, at 2094–95.

161. See id. at 2092–93 (discussing key entrapment-by-estoppel cases and observing that "punishing citizens whom the state has 'active[ly] misle[d]' violates principles of fundamental fairness grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments" (alteration in original)).

162. Recent reporting has revealed that CIA interrogators had begun to use interrogation techniques that were subsequently sanctioned by the OLC at least several months prior to the issuing of the August 2002 "Torture Memos." Mayer, supra note 132, at 155. A top CIA official subsequently revealed in a sworn statement in court that "'[t]he requests for advice' . . . 'were solicited in order to prepare the CIA to defend against future criminal, civil, and administrative proceedings that the CIA considered to be virtually inevitable.'" Barton Gellman, Angler: The Cheney Vice Presidency 177 (2008).

163. Parry, supra note 137, at 24.

164. See, e.g., Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003), available at http://www.justice.gov/olc/docs/memo-combatantsoutsideunited states.pdf (on file with the *Columbia Law Review*) (discussing, in OLC memorandum, the domestic and international "legal standards governing military interrogations of alien unlawful combatants held outside the United States"); Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 34 (Aug. 1, 2002), available at http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug2002.pdf (on file with the *Columbia Law Review*), subsequently withdrawn and replaced by Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att'y Gen., Re:

cracy have direct access to authoritative legal guidance. Defendants raising entrapment-by-estoppel defenses have typically received direct affirmative misrepresentations.[165] Indeed, interrogators may not have had access to the relevant legal representations; accordingly, the interrogator will have to establish the relevant authority from whom authorization was actually received and make the case that reliance on this authority was reasonable under the circumstances.[166]

b. *Public Authority.* — The "public authority" defense is distinguishable from the entrapment-by-estoppel defense in that it does not rely on a mistaken belief in the underlying lawfulness of the conduct in question. A defendant invoking the public authority defense must show that his or her otherwise illegal acts were authorized by a "government agent [who] in fact had the authority to empower the defendant to perform the acts in question."[167] Under the "actual authority" approach favored by the "clear weight of . . . case law,"[168] the defense may only succeed if the defendant reasonably relied on the actual authority of a government official to authorize otherwise illegal action.[169] The defense is sometimes referred to as the "CIA defense," "because it has most often arisen in cases where defendants believed their acts to be intelligence- or national security-related operations authorized by the CIA."[170]

In *United States v. Barker*, one judge on a fractured panel of the D.C. Circuit reversing the defendants' convictions argued that a defendant might invoke the public authority defense based on "apparent authority."[171] *Barker* arose out of the prosecution of former CIA agents for their role in breaking into the office of Daniel Ellsberg's psychiatrist at the behest of Nixon White House operative E. Howard Hunt. The defendants claimed that they had worked with Hunt when the latter was at the

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Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), available at http://www.justice.gov/olc/18usc23402340a2.htm (on file with the *Columbia Law Review*) (discussing, in OLC memorandum, potential criminal liability for interrogators under U.S. statute prohibiting torture).

165. See Note, Immunity, supra note 10, at 2095 (noting that under entrapment-by-estoppel doctrine "misrepresentations are made *directly* to the defendant who acts in reliance on that misrepresentation" (internal quotation marks omitted)).

166. Cf. id. at 2095 (arguing since OLC advice is conveyed "by General Counsels down indeterminate chains of communication," executive branch officials "[m]ore often than not" receive "direct authorization . . . from immediate superiors—upon whom reliance may not be . . . reasonable" (internal quotation marks omitted)). But cf. Ohlin, supra note 132, at 198 ("[T]he issue is moot because the advice in the memos made its way down the chain of command to agency and department supervisors who then authorized the agents to commit torture because of the content of the legal reasoning.").

167. United States v. Pitt, 193 F.3d 751, 758 (3d Cir. 1999).

168. Sifton, supra note 108, at 512.

169. See, e.g., United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994) ("The validity of [the public authority defense] depends upon whether the government agent in fact had the authority to empower the defendant to perform the acts in question.").

170. Note, Immunity, supra note 10, at 2096.

171. 546 F.2d 940, 949 (D.C. Cir. 1976) (Wilkey, J.).

CIA, and that they believed that Hunt continued to work at the CIA and that the Agency had authorized the break-in.[172] The D.C. Circuit held that the defendants were entitled to a jury instruction on a limited mistake of law test;[173] according to Judge Malcolm Wilkey's opinion, the defendants could make out the defense of "apparent public authority" if they could show "(1) facts justifying their reasonable reliance on . . . apparent authority and (2) a legal theory on which to base a reasonable belief" that the source of purported authorization in fact possessed the authority to do so.[174] In language that echoes the policy rationale behind a broad superior orders defense,[175] the *Barker* court argued that "there is an overriding societal interest in having individuals rely on the authoritative pronouncements of officials whose decisions we wish to see respected."[176]

However, the D.C. Circuit has subsequently frowned upon a broad application of *Barker*'s "apparent authority" defense. In *United States v. North*, the defendant, a White House operative implicated in illegal arms sales during the Iran-Contra Affair sought a jury instruction that it would constitute a complete defense if he had "acted in good faith on a superior's apparent authorization of his action, and that his reliance was reasonable based on the facts as he perceived them."[177] The court refused, noting that North's suggested instruction "goes so far as to conjure up the notion of a 'Nuremberg' defense . . . . [W]e refuse to hold that following orders, without more, can transform an illegal act into a legal one."[178] Perhaps wary of an expansive application of *Barker*, the court stated that no "coherent principle can be gleaned from the *Barker* case,"[179] and a footnote suggested that future attempts to invoke the "apparent authorization" defense would be analyzed in terms more closely akin to the entrapment-by-estoppel doctrine—in other words, did the defendant reasonably rely on an "official misstatement of law"?[180]

Part of the *North* court's concern with the implications of *Barker* may have stemmed from *Barker*'s potential immunization of a government official acting on the "authorization" of superiors. The allure of an "apparent authority" defense is strong when private citizens reasonably, but mis-

172. Id. at 943–44.

173. Id. at 957 (Merhige, J.).

174. Id. at 949 (Wilkey, J.) (emphasis omitted).

175. See supra note 25 and accompanying text (discussing importance of military efficiency and disclipine in formulating superior orders defense).

176. *Barker*, 546 F.2d at 947 (Wilkey, J.). But see Thomas W. White, Note, Reliance on Apparent Authority as a Defense to Criminal Prosecution, 77 Colum. L. Rev. 775, 801 (1977) ("Reliance on a government official's apparent status as carrying with it all the legal authorization necessary for the operation is inconsistent with an affirmative effort to know the law.").

177. 910 F.2d 843, 879 (D.C. Cir. 1990).

178. Id. at 881.

179. Id.

180. Id. at 881 n.10.

takenly, rely on apparent government authority to authorize otherwise illegal actions. However, it is hard to conceive of a "reasonable" mistake that one government agent might make as to another's apparent authority to authorize illegal action.[181]

The public authority defense may appeal to interrogators charged with detainee abuse because it does not require proof of reliance on an affirmative misrepresentation of the *law*. Rather, the emphasis lies on the legal powers of the authorizing official or agency. However, the limits of the public authority defense under these circumstances were made clear in *United States v. Passaro*[182]—the first federal prosecution that followed from allegations of detainee abuse by CIA agents and contractors.[183] *Passaro* concerned a CIA contractor who had allegedly beaten a detainee to death in 2003 during a prolonged interrogation at a base in Afghanistan.[184] The defendant sought to invoke the public authority defense by claiming that his "interrogation" of the detainee was authorized by CIA and DOJ officials. However, the district court denied the defendant's request for discovery from the CIA on the defense,[185] and the Fourth Circuit affirmed the subsequent conviction.[186] The defendant's invocation of the public authority defense was unsuccessful for several reasons. First, expansive arguments for executive branch authority in the 2002 OLC memos notwithstanding, courts were absolutely unwilling to say that the CIA and DOJ had the actual authority to override statutory bans on assault and authorize an interrogator to assault a detainee in the course of interrogation.[187] Second, the defendant was unable to establish his awareness of any specific legal guidance that, even if incorrect, might have formed the basis for a separate entrapment-by-estoppel defense.[188] Finally, the evidence at trial pointed to brutal interrogation of the de-

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181. Cf. Note, Immunity, supra note 10, at 2098 (noting weakness of defense when "two government officials are involved"). Indeed, one commentator has argued that "apparent authority" should only be applicable in "mistake of fact" situations—as in *Barker*, where defendants reasonably but erroneously believe that the "authorizing" individual works for a government agency that does have the authority to authorize the otherwise illegal action. Sifton, supra note 108, at 512. If so, then the public authority defense ceases to be a mistake of law defense—either the conduct was properly authorized by "actual authority" or the defense is one of mistake of fact.

182. 577 F.3d 207 (4th Cir. 2009).

183. See Sifton, supra note 108, at 490 (noting CIA contractor David Passaro was first CIA employee or contractor indicted by federal prosecutors for detainee abuse).

184. *Passaro*, 577 F.3d at 210–12.

185. Id. at 220–21 (affirming district court's quashing of subpoenas to CIA because defendant made no proffer that "someone with *actual authority* sanctioned an otherwise unlawful act").

186. Id. at 219–21.

187. Cf. Sifton, supra note 108, at 512 ("The defense seems likely to fail because it requires that Passaro prove that CIA or DOJ officials, as a matter of law, have the legal authority to authorize criminal activities.").

188. *Passaro*, 577 F.3d at 220 n.7.

tainee; even if the defendant had been privy to legal guidance, it is highly unlikely that the court would have found good faith reliance.[189]

3. *Reliance on Content or Bare Authority?* — The DTA section 1004(a) defense resembles a hybrid of the superior orders, entrapment-by-estoppel, and public authority defenses. If an interrogator relied in good faith on legal guidance in using coercive techniques during an interrogation, and those techniques were later found to constitute torture, he or she might seek to rely on one or all of those three defenses. As discussed above, however, each of those defenses would prove to be a stretch. A civilian agent would not receive the benefit of the superior orders defense, and it is unlikely that the defense could be successfully invoked following an "authorization" rather than a legally binding order. The entrapment-by-estoppel defense emphasizes good faith reliance on erroneous legal advice, but its roots in due process considerations suggest that a government agent may not be "entrapped" by government lawyers. The public authority defense allows the defendant to argue that his otherwise illegal conduct was authorized by government officials with the legal power to do so, but its weakness lies in forcing the defendant to argue that the executive branch maintains the actual authority to authorize torture and other forms of detainee abuse. Under the DTA defense, however, the deference reserved for superior officers in the chain of command under the superior orders defense is extended—a government agent engaged in detention and interrogation activities now has a strong affirmative defense if he or she reasonably relied upon legal guidance from government lawyers.

However, there is an important conceptual distinction between the superior orders defense on the one hand, and the entrapment-by-estoppel and public authority defenses on the other. The superior orders defense emphasizes the *content* of orders received; some orders are so "manifestly unlawful" that no reasonable combatant would believe them to be legal. The entrapment-by-estoppel and public authority defenses, on the other hand, place great emphasis on the *identity* of the individual or body giving legal advice or authorization. A large part of the reasonableness inquiry in these defenses concerns the reasonableness of relying on that particular source of guidance. The DTA defense's core inquiry into whether or not the government agent "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know that the practices were unlawful"[190] suggests a correspondence to the superior orders defense's emphasis on content. But the emphasis on considering "good faith reliance on legal guidance" is ambiguous. How important is the identity of the particular source of legal guidance in the central reasonableness inquiry?

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189. Id. at 211 (discussing evidence of Passaro's "brutal attacks" during interrogation).

190. DTA § 1004(a), 42 U.S.C. § 2000dd-1 (2006).

C. *The Interrogators' Defense and International Law*

U.S. law now recognizes both a limited superior orders defense and a potentially more expansive legal authorization defense for antiterrorism interrogation and detention operations. The potential uses of these defenses may be illustrated by two hypothetical scenarios.

1. *Superior Orders Defense.* — A military interrogator has custody and control over a detainee who is suspected to possess vital intelligence about an at-large insurgent cell. The interrogator's superior officer orders the interrogator to use stress positions on the detainee. To assuage the interrogator's concern over the legality of the action, the superior officer requests legal guidance from a staff JAG officer, who avers that, under the circumstances, using stress positions on the detainee is legal and not a war crime. The interrogator follows the order. Subsequently, the interrogator is court-martialed—the prosecution accuses the interrogator of committing a war crime by torturing the detainee. The interrogator will naturally invoke the defense of superior orders. She will argue that she did not know that the order to use stress positions on the detainee was unlawful. Most significantly, she will argue that a person of ordinary sense and understanding in the circumstances would not have known that the order was unlawful; after all, the staff JAG specifically advised that doing so was not illegal. Under domestic law, the interrogator has a colorable defense. This is consistent with the international law of superior orders: At the ICC, the interrogator would argue that coercively and aggressively interrogating the detainee may have constituted a war crime, but superior orders should exculpate her. Legal guidance in hand, the interrogator could argue that the interrogation was not "manifestly unlawful"—it was reasonable to follow the orders given in light of additional legal guidance stressing the legality of the ordered action. The interrogator's defense would not be airtight, but it would be consistently argued under both domestic and international law.

2. *DTA Section 1004(a) Defense.* — The picture changes, however, when the interrogator is no longer a member of the armed forces subject to the chain of command, and does not receive a specific order. The DTA defense seems tailor-made for a second scenario: A CIA agent has custody of a suspected terrorist, and wants to interrogate him to extract information about impending attacks. The agent requests guidance from CIA lawyers as to what coercive techniques he may legally use to interrogate the detainee. The lawyers consult with lawyers at the DOJ, and return with a set of "enhanced interrogation techniques" that they believe are lawful under both domestic and international law.[191] The agent is

191. These may include the use of stress positions, temperature manipulation, and sleep deprivation. See Physicians for Human Rights & Human Rights First, Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality 9, 15, 22 (2007) (discussing authorization of these techniques by U.S. military and intelligence officials for use on detainees).

then authorized by his superiors to use these techniques. If the agent were subsequently to be prosecuted for violating U.S. statutes against committing war crimes[192] and torture,[193] the agent would invoke a defense under DTA section 1004(a). He would argue that the techniques used were "authorized and determined to be lawful," that he did not know them to be unlawful, and that a person of ordinary sense and understanding would not know them to be unlawful. The reasonableness of his belief would be buttressed by his reliance on the advice of CIA lawyers, who he would know had consulted with DOJ lawyers prior to delivering their legal guidance. Under the DTA's statutory defense, it is quite likely that this defense would succeed in exculpating the interrogator.[194]

3. *Possible Divergence Between U.S. and International Law.* — The interrogator does not, however, have a defense under international law—the superior orders defense does not apply to the second interrogator's actions. This divergence between domestic and international law is significant for at least three reasons. First, interrogators may face exposure under international law even though they may be exculpated under domestic law. While the United States is not currently a party to the ICC, other countries may seek to prosecute American agents for operations that occur on their territory,[195] or alternatively under universal jurisdiction.[196] Second, the United States has international legal obligations under the Convention Against Torture (CAT) to investigate incidents of torture and other "cruel, inhuman, and degrading" treatment.[197] The DTA defense may make it impossible for U.S. law enforcement to effectively prosecute incidents of torture by government operatives when the

192. See 18 U.S.C. § 2441 (2006) (prohibiting commission of "war crime[s]," defined with reference to international treaties including Geneva Conventions.).

193. See 18 U.S.C. § 2340A (prohibiting torture committed by U.S. nationals outside U.S. territory); cf. Bassiouni, supra note 132, at 393–94 (enumerating domestic and international laws alleged to have been violated by interrogators post-9/11).

194. It is important to note, however, that in the recent *Passaro* decision, the Fourth Circuit in dicta appeared to reject the application of any mistake of law defense to an interrogator who relied on legal guidance. *Passaro*, 577 F.3d at 220 n.7. The defendant in *Passaro* did not attempt to invoke the DTA; it is therefore possible to read the Fourth Circuit's dicta as only applicable to previously existing common law mistake of law doctrine, rather than the DTA's specific statutory defense.

195. See Francesco Messineo, "Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture in the Light of the *Abu Omar* Case in Italy, 7 J. Int'l Crim. Just. 1023, 1025–26 (2009) (discussing how states may operationalize Convention Against Torture commitments to prevent and punish acts of torture on their territory).

196. See, e.g., Katharine Gallagher, Universal Jurisdiction in Practice, 7 J. Int'l Crim. Just. 1087, 1089 (2009) (discussing application of universal jurisdiction to bring prosecutions in Europe against U.S. officials for complicity in torture).

197. See Jose E. Alvarez, Torturing the Law, 37 Case W. Res. J. Int'l L. 175, 184–85 (2006) (discussing U.S. responsibilities under CAT); cf. Bassiouni, supra note 132, at 392–93 (discussing proscription of torture in international law).

perpetrators relied upon legal guidance from the government.[198] Because this defense is not recognized under international law, however, that might constitute a breach of U.S. CAT commitments.

The final and most important consequence of the divergence is the effect that developing U.S. law and practice may have on the international legal regime surrounding the superior orders defense. Under current U.S. law, embodied by DTA section 1004(a), good faith reliance on legal guidance is a key factor in exculpation for war crimes. There is strong reason to believe that this emphasis may migrate into international law. Indeed, the United States has sought—and so far failed—to insert similar language into an international convention under negotiation.[199] Given the heavy involvement of lawyers at all levels of the U.S. military and national security bureaucracies,[200] it is not hard to see why an international legal regime that gives strong deference to good faith reliance on advice of counsel appeals to American policymakers. Such a regime, however, would be ripe for abuse.

Generally speaking, the more "authoritative" the source of legal guidance, the more likely an individual would be to defer to its interpretation of the law. In the U.S. context, the DOJ's OLC represented an extremely authoritative source of legal guidance, and its opinions proved largely dispositive in internal debates over the legality of policies and courses of action.[201] Yet the indicia of legal authority of the source of guidance may override qualms about the content of guidance. Under the modern superior orders defense, individuals are still accountable for limited content-based analysis of the legality of ordered actions; soldiers cannot simply take the authority of their superiors as a given. But legal guidance specifying that a certain course of action is legal may obviate the

198. Cf. Goldsmith, supra note 136, at 96 (quoting DOJ prosecutor that "[i]t is practically impossible to prosecute someone who relied in good faith on an OLC opinion, even if the opinion turns out to be wrong").

199. During international negotiations over a treaty intended to prevent and punish "enforced disappearances" between 2003 and 2006, State Department negotiators sought to soften treaty language and insert defense provisions to protect CIA officials involved in the detention and interrogation of suspected top al Qaeda operatives at secret prisons. R. Jeffrey Smith, U.S. Tried to Soften Treaty on Detainees: Bush White House Sought to Shield Those Running Secret CIA Prisons, Wash. Post, Sept. 8, 2009, at A3. A declassified State Department cable reports: "The United States was isolated in urging retention of the good soldier defense to ensure fairness and due process for the accused. . . . Our point was that innocent actors following lawful, or *ostensibly lawful*, orders should not be prosecuted as accomplices to a crime." Unclassified Cable from U.S. Mission Geneva to Sec'y of State, Subject: Reporting Cable on Forced Disappearances Treaty Negotiations para. 10 (2003) (emphasis added), available at http://www.washingtonpost.com/wp-srv/nation/documents/declassified_assessment_of_negotiations.pdf (on file with the *Columbia Law Review*).

200. Cf. Goldsmith, supra note 136, at 129–30 ("[N]ever in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11.").

201. See supra note 10 and accompanying text (discussing influence of OLC in binding government actors to particular legal interpretations).

need for even limited individual analysis of what a soldier or agent is asked to do. It may, in effect, turn a "manifestly unlawful" order into one whose illegality is no longer clear to the individual receiving it.[202]

In the United States, we may be comfortable encouraging deference to legal guidance in national security operations. There is danger, however, in allowing national legal authority to stand between individuals and accountability under international law. That, of course, is a central lesson of Nuremberg.[203] It is therefore important that U.S. law surrounding good faith reliance on legal guidance in the conduct of interrogations be interpreted to be as consistent as possible with the current international law surrounding superior orders. Part III suggests how consistency might best be achieved.

III. Proper Limitations on a "Good Faith Reliance" Defense

The foregoing suggests that U.S. law now recognizes an affirmative defense allowing interrogators to argue that illegal acts should be excused because of good faith reliance on legal guidance, and that this defense, if interpreted broadly, is not consistent with the contemporary international legal regime surrounding the superior orders defense. There are ways in which DTA section 1004(a) may be interpreted, however, that would minimize these inconsistencies. Part III examines several possible approaches to interpreting the role of "good faith reliance" on advice of counsel, and what criteria may be used to assess whether reliance on advice would lead to an objectively "reasonable" mistake of law.

A. *Counsel's Legal Authority*

One potential way to assess the reasonableness of reliance on legal guidance may be to focus on the source of the guidance. This approach would echo entrapment-by-estoppel doctrine, in which an individual may reasonably rely upon "an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense."[204] The focus here would be on authority and competency. There are lawyers spread across the national security bureaucracy, with various ranks and focuses.[205] This

202. Cf. Alvarez, supra note 197, at 194–95 ("[S]ince the [OLC] memoranda themselves have strongly implied that many interrogation techniques short of those causing the most intensive physical pain do not offend fundamental precepts of justice, the stage is set for the memoranda's presumption that U.S. interrogation orders will never be patently unlawful.").

203. See supra note 19 and accompanying text (discussing Robert Jackson's argument that national political authority and command structures should not operate to foreclose criminal liability under international law).

204. Model Penal Code § 2.04(3)(b)(iv) (1985); see supra Part II.B.2.a (discussing entrapment-by-estoppel defense).

205. Cf. James E. Baker, In the Common Defense: National Security Law for Perilous Times 216 (2007) ("Whether you are a small unit leader applying rules of engagement on an index card, or a national actor in Washington reviewing the Geneva Convention

approach would find reasonableness of reliance in rough proportion to the rank and authority of counsel operating in the legal field in question.[206]

There are several problems with this approach. First, if reliance on a particular legal authority is seen as almost presumptively reasonable by virtue of that authority's status, then, as Jack Goldsmith has described, that legal authority will likely determine policy in the area in question.[207] In 2002, Bush Administration officials approached the OLC for legal opinions on permissible interrogation techniques. Because the OLC generates legal opinions binding on the executive branch, officials believed that conduct sanctioned by OLC guidelines, even if ultimately found to be illegal, would not be prosecuted.[208] As the highest legal authority in the executive branch, the OLC's opinion on the state of the law seemed unassailable, no matter the content of the specific OLC opinion.[209]

Second, it is likely that higher-ranking officials will have direct access to legal opinions from more senior government lawyers, and may more easily argue that they "relied" on these opinions. In contrast, while broad legal guidance obviously influences legal advice at lower operational levels, agents in the field are less likely to have direct access to the legal guidance of top-ranking lawyers. There is strong evidence that legal guidance generated at the top levels of the DOJ and DOD filtered down to affect interrogations and detention practices at prisons in Afghanistan and Iraq.[210] However, interrogators at these facilities were not directly

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commentaries before clearing strategic targets, these are the [legal] principles military decisionmakers apply.").

206. The temptation has been especially great to see the OLC as an institution with the stature to make reliance on its guidance per se reasonable. See Pines, supra note 126, at 153 (arguing "effective immunity established by" OLC guidance "increases the comfort level of the employees who undertake the activity because they know that their actions are legally permissible and have been approved by not just an outside agency, but indeed by the *highest legal office in the executive branch*." (emphasis added)); see also Harold Hongju Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair 162 (1990) ("Ideally, [interagency review of legal opinions that authorize covert actions] would be conducted by the [OLC] of the Justice Department, which is not only farther from the president, but should also be less prone to influence by any particular agency's policy mission." (first alteration in the original)).

207. Goldsmith, supra note 136, at 129–31 (discussing how "what the lawyers said about where [the edges of the law] were ended up defining the contours of the policy").

208. Id. at 96 ("If OLC interprets a law to allow a proposed action, then the Justice Department won't prosecute those who rely on the OLC ruling.").

209. Indeed, according to Marty Lederman:

> [E]specially given (i) the official and historical role of OLC in providing authoritative legal advice within the Executive branch; and (ii) the continued insistence of the President and subsequent Attorneys General that the advice was not mistaken, I think it is almost certainly the case that no court would find the reliance by CIA operatives and contractors on OLC's advice to have been so unreasonable as to justify prosecution.

Lederman, supra note 144.

210. See Armed Services Committee Report, supra note 123, at xii ("The fact is that senior officials in the United States government solicited information on how to use

privy to this top-level legal guidance.[211] An emphasis on pure legal authority in assessing reasonable reliance seems likely to perpetuate a pattern of prosecutions at the lowest levels of the military and national security bureaucracy while sparing top policymakers.

Third, the reliability of legal advice does not necessarily correlate with the bureaucratic seniority or prestige of the issuing office. Indeed, there is ample evidence that lawyers in the OLC and the DOD General Counsel's Office interpreted the laws of war loosely while cutting the government's top authorities on these subjects—namely, lawyers at the State Department and the uniformed JAG Corps—out of the loop.[212]

B. *Quality of Legal Analysis*

It is tempting to argue that reasonableness of reliance should be a function of the quality of legal guidance. Much of the controversy surrounding the OLC "Torture Memos" arises from criticism of their quality.[213] As previously noted,[214] the Justice Department's Office of Professional Responsibility found professional misconduct on the part of OLC attorneys who had prepared the memoranda.[215] Although these findings were eventually overturned, a top DOJ official nevertheless noted in his final report that "these memoranda represent an unfortunate chapter in the history of the Office of Legal Counsel."[216]

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aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.").

211. See Sands, supra note 132, at 77 (reporting that legal advisors, commanders, and interrogators at Guantanamo were not directly privy to OLC memoranda and analysis of legality of interrogation techniques).

212. See David W. Bowker, Unwise Counsel: The War on Terrorism and the Criminal Mistreatment of Detainees in U.S. Custody, *in* The Torture Debate in America 183, 187 (Karen Greenburg ed., 2006) (discussing purposeful exclusion of State Department and military lawyers from key discussions of legal policy).

213. See generally Alvarez, supra note 197, at 179–98 (criticizing memos); Ohlin, supra note 132, at 199–207 (same); Ofer Raban, Dissecting the Torture Memos 1–5 (May 13, 2009) (unpublished manuscript), available at http://ssrn.com/abstract=1404105 (on file with the *Columbia Law Review*) (same). But cf. Ku, supra note 132, at 453 (disagreeing with memoranda's conclusions but noting internal consistency and rigor of analysis); Michael Lewis, Rebuttal: Torture Memos? What the Bush Administration Lawyers Really Authorized and Why It Does Not Clearly Constitute Torture, *in* Debate: Should Bush Administration Lawyers be Prosecuted for Authorizing Torture?, 158 U. Penn. L. Rev. PENNumbra 195, 205, 208–09 (2010) (analyzing and generally praising use of legal precedent and qualification of conclusions in memorandum written by John Yoo).

214. See supra note 4 (discussing OPR Report).

215. OPR Report, supra note 4, at 260–61.

216. Margolis Memorandum, supra note 4, at 67. Indeed, commentators have charged that the legal analysis in the memos, permitting the use of waterboarding, "stress positions," and sleep deprivation in the interrogation of detainees, is so inadequate as to be misleading—and inferred that the memoranda were written specifically to attempt to immunize officials contemplating illegal behavior. Cf. Ohlin, supra note 132, at 196 ("At first glance, their conduct appears to meet the basic standards for either criminal accomplice liability or criminal facilitation.").

The quality of the legal guidance may have a strong bearing on the potential liability, criminal or professional, of the lawyers preparing the guidance. It is also clear that an official or agent would have no *good faith* reliance claim if he or she knew that the legal reasoning in the guidance was fraudulent. But the quality of the legal reasoning itself is not an adequate basis for assessing the reasonableness of reliance by a nonlawyer official, agent, or soldier. To be sure, both domestic and international law charge all individuals with a basic knowledge of what the law requires.[217] But this does not extend to an independent ability to analyze the reasoning of complex legal guidance.[218]

C. *DTA Defense as Dead Letter?*

If a focus on counsel's legal authority or on the quality of legal analysis in defining the scope of the DTA defense would do too little to minimize inconsistencies with international law, then there are also interpretations of the defense that might move too aggressively to limit it. One such approach would use the *Charming Betsy* canon of statutory interpretation[219] to neutralize invocation of the DTA defense in a prosecution for torture.

The point of departure for this argument would be the Convention Against Torture and its requirement that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[220] As noted above, the United States is a state party to the CAT[221] and has operationalized international commitments under this treaty through the enactment of a criminal statute targeting torture committed overseas by U.S. nationals.[222] The CAT takes a clear position in Article 2(3) on the applicability of a superior orders defense to acts of torture committed under orders: "An order from a superior officer or a public authority may not be invoked as a justification of torture."[223] In other words, the United States is in breach of its international commitments under the CAT if the govern-

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217. See Heller, supra note 156 ("We expect a soldier . . . to have at least a basic understanding of the laws of war. Why should we expect any less of a CIA officer?").

218. Accord Pines, supra note 126, at 145 (arguing "vast majority of government employees and even lawyers . . . will have difficulty assessing the validity of the complicated legal issues and extensive discussions in an [OLC] opinion").

219. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .").

220. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

221. See supra note 197 and accompanying text (discussing U.S. obligations as signatory to CAT).

222. 18 U.S.C. § 2340A (2006).

223. Convention Against Torture, supra note 220, art. 2(3).

ment allows a superior orders defense to be invoked by a defendant as justification for acts of torture.[224]

CAT's Article 2(3) could become significant to the operation of the DTA defense through application of the *Charming Betsy* canon of statutory interpretation. Announced by the Supreme Court in 1804, the doctrine requires that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[225] Professor Curtis Bradley notes that the *Charming Betsy* canon is used as a "braking mechanism,"[226] and that "courts sometimes have gone to great lengths to construe a statute to avoid a violation of international law."[227] That said, under the Supremacy Clause,[228] treaties and statutes have equal legal status. Thus, to the extent that a statute's language clearly supersedes a previous treaty obligation, the statutory law will be given effect notwithstanding any ensuing treaty violation.[229] The crux of the inquiry is how far any particular court will be willing to go to construe a statute to avoid a violation of international law, and how it chooses to do so.[230] Some courts have required that Congress "clearly and unequivocally" state that it is exercising its power to abrogate international legal commitments before allowing a statute to have that effect.[231]

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224. Cf. Scholars' Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change, 47 Colum. J. Transnat'l L. 339, 348 (2009) ("[N]o official acting as an agent of the government . . . is authorized to commit or to instruct anyone else to commit torture." (emphasis omitted)).

225. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); see Weinberger v. Rossi, 456 U.S. 25, 32 (1982) ("It has been a maxim of statutory construction since the decision in [*Charming Betsy*] that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." (citation and internal quotation marks omitted)); Restatement (Third) of Foreign Relations Law of the United States § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

226. Curtis A. Bradley, The *Charming Betsy* Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 Geo. L.J. 479, 490 (1997).

227. Id. at 491.

228. U.S. Const. art. VI, cl. 2.

229. See Louis Henkin, Foreign Affairs and the United States Constitution 235 (2d ed. 1996) (noting Congress, consistent with constitutional powers, may enact law superseding and violating treaty commitments); see also Note, The *Charming Betsy* Canon, Separation of Powers, and Customary International Law, 121 Harv. L. Rev. 1215, 1221 (2008) ("Congress . . . is able to choose both whether the nation's domestic laws will conform to its international obligations and whether the United States will repudiate international law on the international plane."). In general, courts have more recently shown a reluctance to apply the canon unless a statute really is "susceptible to multiple interpretations." United States v. Yousef, 327 F.3d 56, 92 (2d Cir. 2003); see also Serra v. Lappin, 600 F.3d 1191, 1199 (9th Cir. 2010) (noting "'*Charming Betsy* canon comes into play only where Congress's intent is ambiguous'" (quoting *Yousef*, 327 F.3d at 92)).

230. See Bradley, supra note 226, at 490 (noting "the precise *strength* of the canon today is somewhat uncertain").

231. E.g., United States v. Palestine Liberation Org. (*PLO*), 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988) ("[U]nless [Congress's power to enact statutes abrogating prior treaties] is

A court might apply the *Charming Betsy* canon to disarm the possible conflict between the DTA defense and U.S. commitments under Article 2(3) of the CAT. Recall the hypothetical CIA officer from Part II.C—that agent received authorization to use a set of coercive methods to interrogate a detainee, and received guidance from government lawyers to the effect that these techniques were legal under the circumstances. In an ensuing prosecution for torture, the agent might raise the DTA section 1004(a) statutory defense, and argue that he did not know and a person of reasonable sense and understanding under the circumstances would not have known that the methods constituted torture. A court encountering this defense, however, might analyze the defense in the same terms as this Note has done—emphasizing its similarities to the superior orders defense. If the court finds that allowing the statutory defense in a prosecution for torture conflicts with U.S. obligations under the CAT, and that Congress did not clearly intend to override CAT obligations,[232] it might invoke the *Charming Betsy* canon to construe DTA section 1004(a) in a manner that does not clash with the CAT. It might, for instance, follow the lead of the Rome Statute in stipulating that orders or authorizations to take certain actions are always "manifestly unlawful."[233] To the extent that the methods that the agent is accused of using constitute torture in legal terms, the court might hold that the DTA defense is not available because as a default legal rule "a person of ordinary sense and understanding" in the circumstances would know that the methods used were unlawful. The *Charming Betsy* application, in other words, would preclude a DTA defense in prosecutions for torture in order to give effect to both CAT Article 2(3) and DTA section 1004(a).

While conceivable, this approach seems problematic as a legal matter. Most importantly, it is not clear that there is a clash between the CAT and the DTA in this case; the DTA defense certainly resembles a superior orders defense, but it is not a superior orders defense per se. A court might easily characterize it as a statutory mistake of law defense, negating mens rea—this would prevent a direct clash with the precise terms of CAT Article 2(3), and prevent a *Charming Betsy* situation from arising. Courts have applied *Charming Betsy* in a manner that cuts directly against the apparent purpose of Congress in passing a statute,[234] but it would

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clearly and unequivocally exercised, this court is under a duty to interpret statutes in a manner consonant with existing treaty obligations.").

232. Cf. Jordan J. Paust, Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power, 2007 Utah L. Rev. 345, 379 ("Congress expressed no intent to override either treaty-based or customary international legal rights and duties when it enacted [the DTA].").

233. See supra note 33 and accompanying text (noting that under Rome Statute, orders to commit genocide and crimes against humanity are always manifestly unlawful).

234. In *PLO*, for example, the government sought an injunction to close the PLO's observer mission at the United Nations, supported by recently enacted legislation that forbade the PLO from maintaining offices in the U.S. The court, citing *Charming Betsy* and

certainly give a court pause to deny a statutory defense in the very situation for which it was enacted to apply.[235]

D. *Content, Context, and Manifest Unlawfulness*

The DTA defense is best viewed as an extension of the modern superior orders defense. Indeed, under DTA section 1004(a), good faith reliance on advice of counsel is not an independent means of exculpation; rather, it is simply a factor that must be considered in assessing whether a person of ordinary sense and understanding would have known that the authorized interrogation- or detention-related action was unlawful.

Under the superior orders defense, combatants are entitled to a presumption that orders received are legal, but this presumption is rebutted if the orders are so manifestly unlawful that a reasonable combatant would not fail to recognize their illegality. Under this conception of the superior orders defense, there are two classes of orders: those that are manifestly unlawful, and those that are not. Perhaps the key question raised by legal guidance is whether there is a third category of orders—orders that would be recognized as unlawful by a reasonable combatant, but that a reasonable combatant would no longer recognize as unlawful if accompanied by legal guidance attesting to their legality. If it actually exists, this category of orders should be very narrow.

The DTA defense extends the presumption of legality associated with legally binding military orders to a narrow set of authorized actions occurring in the interrogation and detention context.[236] The role of reliance on legal guidance should be analyzed in similar terms here. To be sure, DTA section 1004(a) allows a mistake of law defense when an interrogator uses a technique that is unlawful, but not manifestly so. However, some conduct should remain so manifestly unlawful that no legal guidance, no matter the authority, can induce reasonable reliance. As with the superior orders defense, the inquiry should focus on the conduct itself, and whether a reasonable person under the circumstances would have recognized its illegality, rather than the indicia of legal authority that accompanies the order or authorization to commit the act.

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the United States's treaty obligations not to impair observer missions at UN headquarters, construed the statute to refer to all PLO offices *except for* the UN observer mission. *PLO*, 695 F. Supp. at 1471.

235. Indeed, this goes back to the question of whether DTA section 1004(a) is in fact sufficiently ambiguous to allow operation of the *Charming Betsy* canon at all. See supra note 229 and accompanying text (noting recent courts have held that *Charming Betsy* is only implicated when statute is open to multiple interpretations). The stronger argument is probably that Congress clearly intended DTA section 1004(a) to stand as a truly robust protection for U.S. interrogators. Cf. Taylor & Wittes, supra note 9, at 15 (describing effect of DTA defense as "immuniz[ation]" of officials).

236. See supra notes 115–117 and accompanying text (discussing authorized activities for which defense may be invoked).

As with the superior orders defense, the proper application of the DTA defense should be highly context-dependent.[237] Both, after all, rely upon a classic objective test for reasonableness of reliance[238]—in both cases, the reasonableness of reliance on the legality of an order or an authorization is partially driven by the circumstances in which it is received. The international legal regime surrounding the superior orders defense had, by Nuremberg at the very latest, rejected a per se approach, justifying absolute reliance on the legality of orders. By the same token, anything resembling a per se approach to interpreting the DTA defense should be rejected; this would be the case if courts took the DTA defense's statutory instruction that good faith reliance on advice of counsel should be considered as a factor in the reasonableness analysis as the de facto test for proving up the affirmative defense.[239] The modern superior orders defense relies on a totality of the circumstances approach, in which courts consider a wide variety of factors including the content of the orders, the circumstances in which they were given, and the imminence of the necessity to act upon those orders. An appropriately contoured DTA defense would be measured in much the same way.[240]

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237. In the superior orders context, the Israeli court in *Malinki* listed a number of helpful factors to consider in determining whether a specific order was "manifestly illegal." Chief Military Prosecutor v. Malinki (Military Court of Appeals, Isr. 1959), 2 Palestine Y.B. Int'l L. 69, 109–10 (1985). As key factors, the court considered: "[t]he military rank of the issuer of the order and its receiver, and the difference between their ranks"; whether the receiver of the order had reasonable grounds for believing that the issuer knew facts bearing on the order's legality that were unknown to the receiver; whether "the receiver of the order ha[d] time to clarify to himself whether the order is lawful"; whether the order "was issued in normal times or during a special emergency"; whether the receiver had grounds for believing he would suffer death or grievous harm if he refused to execute the order; and whether such fear impaired his ability to determine whether the order was lawful. Id. The *Malinki* framework is helpful in that it allows for and considers reasonable a measure of deference to lawful authority (the first and arguably the fourth factors), while also considering the extent to which the defendant exercised his own individual responsibility to engage in a limited inquiry into the lawfulness of the orders received.

238. See supra notes 127–130 and accompanying text (discussing similarity between objective tests in superior orders and DTA section 1004(a) defenses).

239. The biggest danger in this regard is the chilling effect on investigations and prosecutions. The DTA defense should not be seen to immunize officials and agents solely because of their access to legal guidance. This is the position Jack Goldsmith seems to describe (and advocate). See Goldsmith, supra note 136, at 96 (characterizing OLC legal guidance on criminal statutes as "advance pardon[s]").

240. At least one court in the qualified immunity context, see supra note 126 (discussing qualified immunity doctrine), has attempted to lay out a framework for evaluating whether reliance on the advice of counsel should shield public employees from civil liability for constitutional or statutory violations. See V-1 Oil Co. v. Wyo. Dept. of Envtl. Quality, 902 F.2d 1482, 1489 (10th Cir. 1990) ("Whether reliance upon legal advice bars our imputation to [the defendant] of constructive knowledge concerning the laws allegedly violated by his conduct depends upon the circumstances of each case." (internal citation and quotation marks omitted)). The Tenth Circuit in *V-1 Oil* held: "Relevant factors include how unequivocal, and specifically tailored to the particular facts giving rise to the controversy, the advice was, whether complete information had been provided to the advising attorney(s), the prominence and competence of the attorney(s), and how

Recall our hypothetical soldier from Part II.C, under orders to interrogate a detainee, and advised by the staff JAG that using certain coercive techniques would be legal under the circumstances. She is under a legal obligation to obey these orders so long as they are lawful, and she has been advised by counsel that they are in fact lawful. Given the circumstances, and the sanctions incident to making the wrong decision, there is a strong case to be made that our hypothetical soldier has acted reasonably under the circumstances and should be exonerated.[241]

The hypothetical CIA officer, on the other hand, is not legally obligated to use coercive methods authorized by superiors,[242] and our frame of reference for assessing reasonableness of reliance should shift accordingly. Certainly, reliance on the advice of government lawyers that an authorized activity is legal should be a factor in the analysis of whether a reasonable person would not have known that the activity was unlawful. But "reliance" is conditioned on the requirement of "good faith," and even good faith reliance may not be reasonable under the circumstances. A full analysis of the reasonableness of reliance would truly require a totality of the circumstances approach. It would take into account both the content of the authorized activity and the context and circumstances of the authorization received (and potentially requested).

For example, there are certain interrogation techniques that a person of ordinary sense or understanding would consider to be torture and therefore illegal, notwithstanding formal legal guidance saying otherwise.

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soon after the advice was received the disputed action was taken." Id. (internal citations omitted). According to Daniel Pines, OLC opinions "should fulfill most of the factors outlined in *V-1 Oil*," including quite clearly the third factor focusing on attorney stature. Pines, supra note 126, at 127.

The *V-1 Oil* factors help illustrate the tension in this area of the law. On the one hand, an official attempting to conform her conduct to the law could scarcely do better than seek specific guidance from a fully informed, high-ranking government attorney. On the other hand, the *V-1 Oil* majority's test has the effect of shifting the inquiry from the official's own responsibility to know and respect "clearly established" constitutional and statutory rights to what is effectively an inquiry into the source of legal advice and the process by which it was procured. The *V-1 Oil* dissent, picking up this thread, argued that "attorney's advice is one, *but only one*, factor to be considered" in assessing whether a reasonable official would have known that they were violating clearly established rights. *V-1 Oil*, 902 F.2d at 1490 (Ebel, J., dissenting) (emphasis added). There is great tension between a government actor's (whether an official or a soldier) individual obligation to know and obey the law and the attraction of shielding the actor from liability when he or she has relied upon an individual or institution supposedly better situated to know and interpret the law. This tension is clearly present in the context of the superior orders defense—and it is apparent also in the DTA section 1004(a) defense. As the dissent in *V-1 Oil* observed, in words that ring true beyond the qualified immunity context, "[r]eliance upon attorney's advice is solely within the control of defendants and, if that is all that were required, is vulnerable to manipulation by defendants in order to broaden their qualified immunity . . . ." Id.

241. See supra Part II.C.1 (discussing viability of superior orders defense when military interrogator has received legal guidance).

242. See supra notes 123–125 and accompanying text (discussing differences and similarities between authorizations and orders).

A paradigmatic example might be waterboarding.[243] Another might be exploiting a detainee's phobias—placing a detainee terrified of insects in a small, dark box with an insect he is told will sting him. These, of course, were tactics authorized by the OLC for use by the CIA in August 2002.[244] Coercive techniques including sleep deprivation, stress positions, and temperature manipulation, especially if used for long durations of time and in combination, are a closer case under this analysis.[245]

Similarly, context is important in determining the reasonableness of reliance. It would be probative to know whether the interrogator proposed new techniques for use and actively sought legal guidance on his or her own initiative, or whether legal discussions played out at a higher pay grade. In the case of the notorious OLC "Torture Memos," there is strong evidence that the CIA already in mid-2002 had begun using techniques on detainees later approved by the OLC, before the issuance of the memoranda in August 2002.[246]

In short, the content and context of the authorized activity should serve as critical factors in assessing the individual culpability of an interrogator invoking DTA section 1004(a) as an affirmative defense. This is analogous to the highly context-driven analysis of the superior orders defense. For DOJ investigators and prosecutors to afford a single factor in a complex statutory defense dispositive weight—and to allow a set of discredited legal opinions full effect as a shield from the force of the law—

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243. "Waterboarding" refers to "[i]nterrogation techniques using water to induce the sensation of drowning in the person under questioning." Evan Wallach, Drop by Drop: Forgetting the History of Water Torture in U.S. Courts, 45 Colum. J. Transnat'l L. 468, 469 (2007).

244. See Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel, CIA, Re: Interrogation of al Qaeda Operative 14–15 (Aug. 1, 2002), available at http://www.aclu.org/accountability/released.html (on file with the *Columbia Law Review*) (advising, in OLC memo, legality in some circumstances of, inter alia, waterboarding and placing detainee in box with insect).

245. Compare Taylor & Wittes, supra note 9, at 36 (arguing CIA should retain "a range of mildly coercive methods," including "yelling, making threats, disrupting sleep patterns in a carefully limited manner, denying hot rations and comfort items, and perhaps forcing prisoners to stand for long enough to make them uncomfortable but not so long as to put them in agony"), with Physicians for Human Rights & Human Rights First, supra note 191, at 4, 9–34 (describing then-authorized "enhanced interrogation techniques" including sleep deprivation, stress positions, and temperature manipulation, and concluding all may "implicate legal prohibitions and . . . result in felony criminal prosecutions").

246. See Mayer, supra note 132, at 155 ("[I]t appears that in May, June, July [2002]—in other words, months before the infamous torture memo provided legal cover—the CIA had already begun to treat [a high-level detainee] in ways that were deeply troubling."). Jane Mayer's book also provides strong evidence that within the CIA, there was widespread recognition that treatment of detainees constituted torture, and that OLC memoranda existed solely to provide legal cover. Id. at 275 ("'Laws? Like who the fuck cares?'" (quoting former high-level CIA official describing internal attitude)); see also Goldsmith, supra note 136, at 144 (discussing CIA characterization of OLC memos as "golden shield[s]").

risks resurrecting an approach to the liability of military personnel and government agents that has been buried at least since Nuremberg.[247]

CONCLUSION

The question of whether to prosecute U.S. interrogators who relied in good faith on the advice of government counsel and subsequently may have tortured detainees in violation of federal and international law is among the most politically sensitive that have emerged from the post-9/11 years. The issue of what defenses would be available to those interrogators has likewise proven to be one of the most legally complex. While most commentary has focused on the contents of the OLC "Torture Memos," the issue of possible legal jeopardy extends far beyond officials who relied directly on those memos. Indeed, legal guidance played a key role in an expansive interrogation policy—from White House officials to line interrogators, actors at every level looked first and foremost to lawyers to define the legal limits of interrogation.

This Note aims to establish the modern superior orders defense as the appropriate paradigm for analyzing defenses available to agents and soldiers who acted in reliance on legal guidance. The modern superior orders defense, discussed in Part I, provides a framework for establishing individual responsibility under international law where combatants must act expeditiously to defend national security. DTA section 1004(a), discussed in Part II, extends a version of the defense to U.S. interrogators, but, if interpreted broadly, would immunize interrogators in a manner reminiscent of Nuremberg's "complete" superior orders defense. Finally, Part III suggests that a focus on the techniques and conduct at issue, through the lens of an objective test for "manifest unlawfulness" may be the best option for preserving individual responsibility when officials and agents may be tempted to seek "advance pardons" from government lawyers. In the final estimation, political realities will likely foreclose prosecution of interrogators whose reliance on legal guidance caused them to cross the line that separates interrogation from torture. Given the active role of counsel at all levels of the national security bureaucracy, however, it is imperative to delineate the proper scope and application of the legal defenses agents will raise when their actions, duly authorized by superiors and conducted after consultations with legal counsel, nevertheless break the law.

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247. See supra notes 39–45 and accompanying text (discussing early twentieth century authority for absolute superior orders defense); see also supra notes 13–14 and accompanying text (noting Whitehouse-Mukasey exchange recalling echoes of "Nuremberg defense"); cf. Pines, supra note 126, at 147 ("That employee should not be able to rely on a Nuremberg defense in taking such action, claiming that the employee was merely following orders from the highest legal authority in the executive branch to commit a knowingly illegal act.").