



NEW YORK
CITY BAR

**COMMITTEE ON
MILITARY AND VETERAN AFFAIRS**

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**TASK FORCE ON THE
RULE OF LAW**

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April 2, 2020

Sent via Facsimile & E-Mail

General Mark A. Milley
Chairman of the Joint Chiefs of Staff
9999 Joint Staff Pentagon
Washington, D.C. 20318-9999

General John E. Hyten
Vice Chairman of the Joint Chiefs of Staff
9999 Joint Staff Pentagon
Washington, D.C. 20318-9999

Re: Condemning Presidential Pardons of Accused and Convicted War Criminals

Dear General Milley and General Hyten:

As the COVID-19 pandemic grips the nation and our attention is focused on the immediacy of protecting our families and communities, supporting our emergency responders, and preserving our collective physical and economic health, it is perhaps more important than ever to recognize and support the institutions that help keep our nation safe.

At a time when collective action and strong leadership are most needed, the New York City Bar Association (City Bar) calls attention to the structures that undergird the United States military and, specifically, the need to support and protect the rules of military engagement that guide our armed forces.

On May 6, 2019 and November 15, 2019, President Trump pardoned three Army officers convicted or accused of war crimes: First Lieutenant Michael Behanna, who was convicted of executing a prisoner he was ordered to release, First Lieutenant Clint Lorange, who was convicted of numerous crimes, including the murder of two men his soldiers agreed posed no threat to them, and Major Mathew Golsteyn, who was about to stand trial for the murder of a suspected Taliban

bombmaker he was ordered to release. The pardoning of military members convicted or accused of battlefield murders appears to be unprecedented in American history, and there was no evidence of innocence or injustice that could support these pardons.

As described more fully in the enclosed report, the City Bar strongly condemns President Trump's pardons in all three cases and urges President Trump, and all those who advise him, to refrain from pardoning accused war criminals before their trials, and from pardoning convicted war criminals absent evidence of innocence or injustice. Such actions increase the potential for more war crimes, chill reporting of such crimes, and undermine military justice, the rules and standards governing the actions of the U.S. military, and its reputation in the international community.

Respectfully,

Erik L. Wilson
Chair, Military & Veteran Affairs Committee

Stephen L. Kass
Chair, Task Force on the Rule of Law

cc:

General James C. McConville
Chief of Staff of the U.S. Army

General David H. Berger
Commandant of the U.S. Marine Corps

Admiral Michael Gilday
Chief of U.S. Naval Operations

General David L. Goldfein
Chief of Staff of the U.S. Air Force

General Joseph L. Lengyel
Chief of the U.S. National Guard Bureau

Hon. James Inhofe
Chair, Committee on Armed Services
U.S. Senate

Hon. Jack Reed
Ranking Member, Committee on Armed Services
U.S. Senate

Hon. Adam Smith
Chair, Committee on Armed Services
U.S. House of Representatives

Hon. Mac Thornberry
Ranking Member, Committee on Armed Services
U.S. House of Representatives

Hon. William P. Barr
Attorney General of the United States
U.S. Department of Justice

Hon. Rosalind Sargent-Burns
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**REPORT BY THE MILITARY AND VETERANS AFFAIRS COMMITTEE AND THE
TASK FORCE ON THE RULE OF LAW CONDEMNING
PRESIDENTIAL PARDONS OF ACCUSED AND CONVICTED WAR CRIMINALS**

On May 6, 2019 and November 15, 2019, President Trump pardoned three Army officers convicted or accused of war crimes: (i) First Lieutenant (“1LT”) Michael Behanna, who was convicted of executing a prisoner he was ordered to release, (ii) 1LT Clint Lorange, who was convicted of numerous crimes, including the murder of two men his soldiers agreed posed no threat to them, and (iii) Major (“MAJ”) Mathew Golsteyn, who was about to stand trial for the murder of a suspected Taliban bombmaker he was ordered to release — and who MAJ Golsteyn repeatedly confessed to killing. The pardoning of military members convicted or accused of battlefield murders appears to be unprecedented in American history.¹

These pardons were deeply opposed by many top military commanders because there was no justifiable basis for them, such as a legitimate claim of innocence.² As former Marine Corps Commandant Charles Krulak stated before the pardons occurred, “[i]f President Trump follows through on reports that he will . . . pardon[] individuals accused or convicted of war crimes, he will betray [our] ideals and undermine decades of precedent in American military justice that has contributed to making our country’s fighting forces the envy of the world.”³ And as the head of U.S. Army Special Operations Command recently stated in a memo rejecting MAJ Golsteyn’s request to reinstate his Special Warfare tab, President Trump’s preemptive pardon “does not erase or expunge the record of offense charges and does not indicate [MAJ Golsteyn’s] innocence.”⁴

Instead, what underlies these pardons are President Trump’s misguided views that the

¹ The closest example appears to be 2LT William L. Calley, Jr., who was convicted of multiple murders in the My Lai massacre during the Vietnam War—but he was *paroled*, not pardoned. *See infra* n.7.

² Dan Lamothe & Josh Dawsey, *‘Insurgents’ lobbied Trump for war crimes pardons with little Pentagon involvement, officials say*, THE WASHINGTON POST (Nov. 21, 2019), https://www.washingtonpost.com/national-security/insurgents-lobbied-trump-for-war-crimes-pardons-with-little-pentagon-involvement-officials-say/2019/11/21/b6a0c62e-0c75-11ea-bd9d-c628fd48b3a0_story.html. (All links in this report were last visited on March 31, 2020).

³ Mikhaila Fogel, *When Presidents Intervene on Behalf of War Criminals* (May 27, 2019), <https://www.lawfareblog.com/when-presidents-intervene-behalf-war-criminals#>.

⁴ Kyle Rempfer and Todd South, *Army Spec Ops boss won’t reinstate Special Forces tab to officer pardoned by Trump*, ARMY TIMES (Jan. 9, 2020), <https://www.armytimes.com/news/your-army/2020/01/09/army-spec-ops-boss-wont-reinstate-special-forces-tab-to-officer-pardoned-by-trump/>; *see* Department of Justice, Office of the Pardon Attorney, *Frequently Asked Questions* (Dec. 14, 2019), <https://www.justice.gov/pardon/frequently-asked-questions> (“Does a presidential pardon expunge or erase the conviction for which the pardon was granted? No. Expungement is a judicial remedy that is rarely granted by the court and cannot be granted within the Department of Justice or by the President.”).

military justice system is biased against military personnel and does not adequately differentiate unintended collateral damage killings caused by the “fog of war” from unlawful rogue murders committed in direct violation of orders and rules of engagement. As MAJ Golsteyn recently described in an interview about his pre-pardon call with President Trump, the President “talked to [Golsteyn] for nearly 15 minutes, asking questions about . . . the Pentagon’s application of military justice.”⁵ President Trump asked, “‘Did you feel like you were going to get a fair shake or that it was slanted or biased against you?’ . . . I told him, ‘Sir, it was quite clear that the outcome was fixed.’ And he said, ‘Yeah, that was my thoughts, as well.’”⁶

However, the idea that military juries can be unlawfully railroaded into convictions by military investigators, prosecutors, judges, and convening authorities does a disservice to the military justice system, the servicemembers courageous enough to report and testify against them, and the entire chain of professionals involved in these proceedings. In fact, as the prosecutor for the 1968 My Lai⁷ massacre found, the practical burden of proof military prosecutors have to meet in cases where an American officer is tried before a jury of fellow military officers — often those with combat experience themselves — for killing an enemy (or a suspected enemy) during wartime is “not beyond a reasonable doubt, *but beyond possibility*.”⁸ There has to be *no doubt* that what they did was wrong because the military jury will, as a practical matter, resolve all reasonable and unreasonable doubts in favor of the accused.⁹ The wrongdoing has to be clear and unambiguous. Not only were these men convicted with clear and unambiguous evidence, but those convictions were upheld during multiple appellate and military clemency reviews.¹⁰

⁵ See Dan Lamothe & Josh Dawsey, ‘*Insurgents’ lobbied Trump for war crimes pardons with little Pentagon involvement, officials say*, THE WASHINGTON POST (Nov. 21, 2019), https://www.washingtonpost.com/national-security/insurgents-lobbied-trump-for-war-crimes-pardons-with-little-pentagon-involvement-officials-say/2019/11/21/b6a0c62e-0c75-11ea-bd9d-c628fd48b3a0_story.html.

⁶ *Id.*

⁷ “On March 16, 1968, roughly a hundred American soldiers stormed the village of My Lai, killing 504 unarmed civilians, including 17 pregnant women and 56 infants.” Mikhaila Fogel, *When Presidents Intervene on Behalf of War Criminals* (May 27, 2019), <https://www.lawfareblog.com/when-presidents-intervene-behalf-war-criminals#>. Only one person, 2LT William L. Calley, Jr. was convicted. He was convicted for 22 murders and sentenced to life in prison. President Nixon quickly moved him from prison to house arrest, where he was paroled after 3.5 years. *Id.*

⁸ Letter from CPT Aubrey M. Daniel to President Nixon (April 1970) (“Daniel Letter”) (emphasis added), accessible at <https://famous-trials.com/mylaicourts/1623-daniels-ltr>.

⁹ Daniel Letter (“The very fact that [these soldiers are] American officer[s] being tried for the deaths of Vietnamese during a combat operation by fellow officers compels this conclusion.”)

¹⁰ Kali Borkoski, *The story of Michael Behenna and Mad Dog 5: “Self-defense” in war*, SCOTUSblog (May 29, 2013, 5:49pm), <https://www.scotusblog.com/2013/05/the-story-of-michael-behenna-and-mad-dog-5-self-defense-in-war/> (1LT Behenna); Maj. Gen. Richard Clarke, then the commander of the 82nd Airborne Division, conducted an in depth review of the facts of the Lorange case after multiple clemency requests were filed, but upheld all convictions. Michelle Tan, *Hero or murderer? Soldiers divided in 1LT Lorange case*, ARMY TIMES (Jan. 12, 2015), <https://www.armytimes.com/news/your-army/2015/01/12/hero-or-murderer-soldiers-divided-in-1lt-lorange-case/>. The Army Court of Criminal Appeals also upheld Lorange’s guilty verdict and denied a petition for a new trial. Adam Linehan, *The Campaign To Free Clint Lorange Was Just Dealt A Devastating Blow* (July 11, 2017), <https://taskandpurpose.com/campaign-free-clint-lorange-just-dealt-devastating-blow>.

The message these convictions and upcoming prosecution sent to warfighters was both necessary and uncontroversial: you are forbidden to (i) execute people you have been ordered to set free,¹¹ (ii) threaten to murder civilians and their families,¹² (iii) shoot into civilian populations to scare them into cooperating with you,¹³ (iv) submit, and order you subordinates to submit, false reports to cover up unlawful conduct,¹⁴ and (v) kill unarmed noncombatants that pose no imminent threat to you.¹⁵

These are not debatable principles. They are core values by which the military must abide. They have to be embraced and embodied by military members of all ranks, especially military officers. Moreover, they must be championed by the top civilian members of the military chain of command, the Commander-in-Chief and the Secretary of Defense. It is their responsibility to educate the public and wayward politicians who have, at least since My Lai, reacted to such convictions and prosecutions “emotionally and without being aware of the evidence that was presented [against them] and perhaps even the laws of this nation regulating the conduct of war.”¹⁶ No American should be led into believing that these trials resulted in “the conviction of an American officer for killing the enemy.”¹⁷ That is a narrative the military’s civilian leadership has an obligation to *correct*, not promote.

¹¹ ILT Behenna was ordered to release a prisoner. Instead, he marched him into a ditch, made him strip, and questioned him at gunpoint about his involvement in two compatriots’ deaths before shooting him in the chest and head. Kali Borkoski, *The story of Michael Behenna and Mad Dog 5: “Self-defense” in war*, SCOTUSblog (May 29, 2013, 5:49pm), <https://www.scotusblog.com/2013/05/the-story-of-michael-behenna-and-mad-dog-5-self-defense-in-war/>. MAJ Golsteyn was being prosecuted on a similar charge: MAJ Golsteyn admitted to a murdering and burning the body of an unarmed suspected Taliban bombmaker during the polygraph portion of a job interview with the CIA and later admitted to killing that bombmaker in a television interview with Fox News. Rowan Scarborough, *Mathew Golsteyn faces murder in bomb-maker Rasoul death*, AP News (Dec. 19, 2018), <https://apnews.com/2593c49415172c6a8b2ac8ef66a98f25>; Caitlyn Foster, *Watch the Fox News interview that launched the murder investigation of an Army hero*, Business Insider (Dec. 19, 2018), <https://www.businessinsider.com/watch-the-interview-that-launched-murder-investigation-of-an-army-hero-2018-12>. MAJ Golsteyn’s later story, repeated in a White House press release, also pointed to an unauthorized murder: MAJ Golsteyn claims he released a suspected bombmaker that he could not hold and “later shot the [suspected] terrorist because he was certain that the [suspected] terrorist’s bombmaking activities would continue to threaten American troops and their Afghan partners.” Press Release, White House Press Secretary, *Statement from the Press Secretary* (Nov. 15, 2019), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-97/>.

¹² See, e.g., Michelle Tan, *Hero or murderer? Soldiers divided in ILT Lorange case* (Jan. 12, 2015), <https://www.armytimes.com/news/your-army/2015/01/12/hero-or-murderer-soldiers-divided-in-1lt-lorange-case/>; James Clark, *A new documentary series about Clint Lorange pits the infantry officer convicted of murder against his former soldiers*, Task & Purpose (Oct. 18, 2019, 1:46pm), <https://taskandpurpose.com/leavenworth-clint-lorange-documentary-series>; Adam Linehan, *Why I Think Lt Clint Lorange Is A Murderer*, Task & Purpose (Feb. 21, 2017, 4:25pm), <https://taskandpurpose.com/think-lt-clint-lorange-murderer>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; *supra* n.10.

¹⁶ Daniel Letter.

¹⁷ *Id.*

America has made great strides to combat battlefield lawlessness since My Lai and the Vietnam War.¹⁸ Contrary to President Trump's and others' assertions, we do not "train our boys to be killing machines,"¹⁹ nor do we "then prosecute them when they kill"²⁰ or "throw people in jail for going to war for us."²¹ We train our military to kill *certain* people under *certain* circumstances. We also train every servicemember that deadly force is illegal outside those circumstances. Every servicemember is trained on the laws of armed conflict and rules of engagement. They are told why these laws and rules are in force, why they are necessary, and why they must follow them. They are also ordered to follow them. These officers defied those orders and broke the law. They went rogue and their actions were plainly wrong.

In 1LT Lorange's case, nine of his soldiers testified against him, and not one for him.²² No one agreed with his call to open fire, and his subordinates initially refused to carry out his orders to shoot the men he was convicted of murdering.²³ As one of 1LT Lorange's soldiers testified, after the shooting "[n]o one was really talking . . . We'd look at each other, and there was just a mutual feeling that what just happened was wrong, very wrong. There was a heavy feeling. I personally felt betrayal."²⁴ Other combat veterans have echoed those sentiments, stating that "[t]o call Lorange a hero is either to say that those nine men conspired to ruin him, or that a bunch of people who weren't on the ground that day are better equipped to decipher what happened than those who actually lived it. I simply cannot accept that. Because if anyone knows the 'tactics and actions of the enemy' that Lorange claims he was trying to protect his subordinates from, it's them. And if anyone knows the difference between a clean kill and cold-blooded murder, it's them."²⁵

Therein lies the rub: the military did not betray 1LT Behanna, 1LT Lorange, or MAJ Golsteyn by attempting to hold them to the standards they were supposed to exemplify. These officers betrayed (or allegedly betrayed in the case of MAJ Golsteyn) those who looked to them for leadership. President Trump's decision to pardon them for their actions is another type of betrayal. The military is founded upon rules, codes, and standards. Ignoring those standards and

¹⁸ See, e.g., Mikhaila Fogel, *When Presidents Intervene on Behalf of War Criminals*, Lawfare (May 27, 2019), <https://www.lawfareblog.com/when-presidents-intervene-behalf-war-criminals#>.

¹⁹ See James Robinson, *Trump announces 'review' of Green Beret murder case: 'We train our boys to be killing machines'*, NBC NEWS (Oct. 12, 2019), <https://www.nbcnews.com/politics/donald-trump/trump-announces-review-green-beret-murder-case-we-train-our-n1065421>; Adam Serwer, *The War-Crimes President*, THE ATLANTIC (Nov. 27, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/trump-war-crimes/602731/>.

²⁰ *Id.*

²¹ See Dan Lamothe & Josh Dawsey, *'Insurgents' lobbied Trump for war crimes pardons with little Pentagon involvement, officials say*, THE WASHINGTON POST (Nov. 21, 2019), https://www.washingtonpost.com/national-security/insurgents-lobbied-trump-for-war-crimes-pardons-with-little-pentagon-involvement-officials-say/2019/11/21/b6a0c62e-0c75-11ea-bd9d-c628fd48b3a0_story.html.

²² *Supra* n.10.

²³ *Id.*

²⁴ *Id.*

²⁵ Adam Linehan, *Why I Think Lt Clint Lorange Is A Murderer*, Task & Purpose (Feb. 21, 2017, 4:25pm), <https://taskandpurpose.com/think-lt-clint-lorange-murderer> (Mr. Linehan served as an Army Combat Medic between 2006 and 2012 and is a veteran of the wars in Iraq and Afghanistan).

impugning those who uphold them undermines the entire American military system. Doing it for apparent political gain, and then seeking to exploit these pardoned murderers for further political gain,²⁶ damages it even further. These actions undermine good order and discipline, degrade the military justice system, and erode the very foundation of civilian military leadership.

As CPT Aubrey Daniel, who prosecuted 2LT Calley for his 22 murders at My Lai, wrote to President Nixon after Nixon's ill-advised transfer of Calley from prison to house arrest: "Your intervention has . . . damaged the military judicial system and lessened any respect it may have gained as a result of the proceedings. You have subjected a judicial system of this country to the criticism that it is subject to political influence, when it is a fundamental precept of our judicial system that the legal processes of this country must be kept free from any outside influences. What will be the impact of your decision upon the future trials, particularly those within the military?"

We know from experience that the impacts of these pardons will not be theoretical or abstract: they will embolden more warfighters to act in the same way and undercut the military's hard-won respect amongst our allies. As Retired Chairman of the Joint Chiefs Gen. Martin Dempsey stated: "Absent evidence of innocence or injustice the wholesale pardon of US servicemembers accused of war crimes signals our troops and allies that we don't take the Law of Armed Conflict seriously. Bad message. Bad precedent. Abdication of moral responsibility. Risk to us."²⁷ In the words of the UN High Commissioner for Human Rights, the pardons "run against the letter and the spirit of international law which requires accountability for such violations," and "send a disturbing signal to military forces all around the world."²⁸

Not only will these pardons increase the potential for more war crimes, they will also likely chill the reporting of those crimes.²⁹ As former Marine company commander, military judge, and longtime professor of the law of war, Gary Solis³⁰ recently opined, "those enlisted kids, those Marines, soldiers, SEALs who see a war crime committed are going to think twice

²⁶ Spencer Ackerman & Asawin Suebsaeng, *Trump Tells Allies He Wants Absolved War Criminals to Campaign for Him* (Nov. 25, 2019), <https://www.thedailybeast.com/trump-tells-allies-he-wants-absolved-war-criminals-to-campaign-for-him>; Maggie Haberman, *Trump Brings 2 Officers He Cleared of War Crimes Onstage at Fund-Raiser*, N.Y. TIMES (Dec. 8, 2019), <https://www.nytimes.com/2019/12/08/us/politics/trump-war-crimes-pardons.html>.

²⁷ Dan Lamothe & Josh Dawsey, *'Insurgents' lobbied Trump for war crimes pardons with little Pentagon involvement, officials say*, THE WASHINGTON POST (Nov. 21, 2019), https://www.washingtonpost.com/national-security/insurgents-lobbied-trump-for-war-crimes-pardons-with-little-pentagon-involvement-officials-say/2019/11/21/b6a0c62e-0c75-11ea-bd9d-c628fd48b3a0_story.html. The then-current Chairman of the Joint Chiefs of Staff, Army Gen. Mark A. Milley, also warned President Trump "that the pardons would damage U.S. relationships around the world." *Id.*

²⁸ U.N. News, *US pardons for accused war criminals, contrary to international law: UN rights office* (Nov. 19, 2019), <https://news.un.org/en/story/2019/11/1051761>.

²⁹ See, e.g., Dan Maurer, *Should There Be a War Crime Pardon Exception?*, Lawfare (Dec. 3, 2019, 9:31am), <https://www.lawfareblog.com/should-there-be-war-crime-pardon-exception#>.

³⁰ Professor Solis has taught Law of War at West Point; he is now an Adjunct Professor of Law at Georgetown University; Transcript: All Things Considered, NPR (Nov. 16, 2019, 5:16pm), <https://www.npr.org/2019/11/16/780160297/trump-pardons-2-service-members-in-war-crimes-cases>.

about reporting it.”³¹ These pardons have “made it much more difficult for those who witness war crimes to report those war crimes because they know that even if the individual gets convicted, the president or some higher authority who is not in their direct military chain of command can set him free.”³² Additionally, “Leaders may not be as willing in the future to bring war crime charges to trial,” and “[t]he officers who charge the individual with a war crime and send him to a court-martial are going to be much more reluctant to charge the war crime [] because they know that the president is going to be looking over their shoulder and he is not going to look favorably on those who make a court martial happen.”³³ In short, President Trump’s pardons have “undermined military justice, undermined commanders, undermined military courts and undermined the reputation of our nation in the international community.”³⁴

We strongly condemn the pardons in all three cases and urge President Trump, and all those who advise him, to refrain from pardoning accused war criminals before their trials, and from pardoning convicted war criminals “[a]bsent evidence of innocence or injustice.”³⁵ No such evidence — and no rational basis for pardon — has been shown in these three cases.

Military and Veterans Affairs Committee
Erik L. Wilson, Chair

Task Force on the Rule of Law
Stephen L. Kass, Chair

April 2020

³¹ *Id.*

³² *Id.*

³³ Matthew Cox, *Trump Issued Pardons in Soldiers' War Crimes Cases. What Now?*, Military.com (Nov. 19, 2019), <https://www.military.com/daily-news/2019/11/19/trump-issued-pardons-soldiers-war-crimes-cases-what-now.html>.

³⁴ *Id.*

³⁵ The same principles govern pardons under international law. See U.N. News, *US pardons for accused war criminals, contrary to international law: UN rights office* (Nov. 19, 2019), <https://news.un.org/en/story/2019/11/1051761> (“pardons exist in international law, and can properly address issues of injustice or unfairness”).