

ARTICLE

**RETURN TO SENDER?:
ANALYZING THE SENIOR LEADER “OPEN LETTER” ON
CIVILIAN CONTROL OF THE MILITARY**

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ABSTRACT

In response to the September 2022 open letter, “To Support and Defend: Principles of Civilian Control and Best Practices of Civil-Military Relations,” by eight former secretaries of defense and five former chairmen of the Joint Chiefs of Staff, this Article adds a piece to the unsettled puzzle of civil-military relations. The Letter attempts to detail “core principles or best practices” (CP/BP) regarding civil-military relations, and in response, this Article comments on and clarifies these well-intended efforts. This Article sequentially dissects each CP/BP in today’s context of hyper-politicization, partisanship, technology, and more. Where necessary, the Article explains how the law may impact the CP/BPs and identifies areas of potential misunderstandings. In sum, this Article aims to put together the puzzle pieces of legal nuances, practical applications, and societal norms found throughout civil-military relations.

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INTRODUCTION

In September of 2022, eight former secretaries of defense and five former chairmen of the Joint Chiefs of Staff signed an open letter, “To Support and Defend: Principles of Civilian Control and Best Practices of Civil-Military Relations”—hereinafter called the “Letter”—which was published on a popular blog.¹ This Article offers observations and, where necessary, clarifications about the Letter.

To be clear, the Letter is an ambitious effort that makes valuable points—particularly for senior officers operating in the Washington, D.C. area. However, despite its many virtues, the Letter risks leaving its readers, especially the public and junior military personnel, with misunderstandings, including legal ones, that could prove problematic.

According to the *Washington Post*, a pair of formidable intellects organized the Letter: highly-respected Duke University Professor Peter Feaver² and former Chairman of the Joint Chiefs of Staff General Martin Dempsey.³ The *Washington Post* reports, “[Feaver and Dempsey] wanted to define best practices for civil-military affairs after Trump and some of his advisers alarmed Pentagon leaders with their rhetoric and ideas.”⁴ Although the Letter does not explicitly mention former President Donald J. Trump, it does suggest sharp criticisms that Feaver and Dempsey (and other signers) have previously leveled against him.⁵ Research indicates that political preferences do influence perspectives on civil-military

¹ Ashton Baldwin Carter et al., *To Support and Defend: Principles of Civilian Control and Best Practices of Civil-Military Relations*, WAR ON THE ROCKS (Sept. 6, 2022), <https://warontherocks.com/2022/09/to-support-and-defend-principles-of-civilian-control-and-best-practices-of-civil-military-relations/> [https://perma.cc/C42C-B4VT].

² Peter D. Feaver, DUKE SCHOLARS, <https://scholars.duke.edu/person/pfeaver> [https://perma.cc/SJA5-MBNA].

³ General Martin E. Dempsey, U.S. DEP’T OF DEF., <https://www.defense.gov/About/Biographies/Biography/Article/602694/general-martin-e-dempsey/> [https://perma.cc/PPN4-56DD].

⁴ Dan Lamothe, *Past Pentagon Leaders Warn of Strains on Civilian-Military Relations*, WASH. POST (Sept. 6, 2022), <https://www.washingtonpost.com/national-security/2022/09/06/pentagon-civilian-military-relations/> [https://perma.cc/LAQ9-E7V6].

⁵ See, e.g., Peter Feaver & Will Inboden, Opinion, *The National Security Risks of Trump’s Temper Tantrum*, FOREIGN POL’Y (Nov. 17, 2020), <https://foreignpolicy.com/2020/11/17/trump-biden-transition-national-security-risks/> [https://perma.cc/Y3M3-P94Y]; Steve Inskeep, *Former Joint Chiefs Chairman Condemns Trump’s Threat To Use Military At Protests*, NPR (June 4, 2020), <https://www.npr.org/2020/06/04/870004024/former-joint-chiefs-chairman-condemns-trumps-threat-to-use-military-at-protests> [https://perma.cc/Q7AZ-E74U].

relations.⁶ This is so even with respect to the bedrock concept of civilian supremacy. For example, analysts found that during Trump's presidency:

Democrats and Trump disapprovers were more likely to distrust the military, but they distrusted Trump even more. They were deferential to the armed forces because they hoped the military could act as a check on the president, whose policies they detested, whose judgment they found suspect, and whose impulsiveness they feared.⁷

Historically, however, civil-military tensions have been a bipartisan phenomenon.⁸ Both parties have taken actions that could reasonably be construed as politicizing the military. The *Washington Post* noted that in 2016, former generals delivered partisan speeches at *both* political parties' conventions.⁹ Moreover, the *Washington Post* also reported that a few days before the Letter was published, the White House deliberately used uniformed Marine guards as a backdrop to a political speech given by President Joseph R. Biden.¹⁰ The *Washington Post* said that “[f]or some scholars who study civil-military affairs, the use of the Marines as backdrop to the speech was unwise.”¹¹ The report from *Fox*

⁶ Ronald R. Krebs, Robert Ralston & Aaron Rapport, *No Right to Be Wrong: What Americans Think About Civil-Military Relations*, 20 PERSPS. ON POL'Y 606, 607 (2021) (finding that “political partisanship deeply informs how Americans approach the respective roles of civilian officials and military officers”).

⁷ *Id.* at 614.

⁸ Others agree. Kori Schake says military leaders get “relentless hectoring . . . on political issues by politicians.” She also says: “It is politicians who serve up the circumstances, whether it’s the Trump White House orchestrating Lafayette Square, the Biden White House setting marines to flank the president during a political speech, or congressmen and congresswomen scoring political points by dragging uniforms into the political arena.” Kori Schake, *Don’t Drag the Military Into Politics*, WAR ON THE ROCKS (Dec. 13, 2022), <https://warontherocks.com/2022/12/dont-drag-the-military-into-politics/> [<https://perma.cc/PRX2-XJRV>]. See also, Joseph F. Dunford, Jr., Graham Allison, & Jonah Glick-Unterman, *Guardians of the Republic*, FOREIGN AFFS. (Jan. 5, 2023), <https://www.foreignaffairs.com/united-states/guardians-republic> [<https://perma.cc/AGC5-TR55>] (stating that “politicians from both parties have increasingly sought to exploit the public’s trust in the military”).

⁹ Oliver Knox & Caroline Anders, *The U.S. Military Has a Politics Problem*, WASH. POST. (Dec. 1, 2022), <https://www.washingtonpost.com/politics/2022/12/01/us-military-has-politics-problem/> [<https://perma.cc/WT4T-MR3E>].

¹⁰ Dan Lamothe, *Marines at Biden Speech Prompt Debate About Politicizing the Military*, WASH. POST (Sept. 2, 2022), <https://www.washingtonpost.com/national-security/2022/09/02/biden-marines-backdrop-democracy-speech/> [<https://perma.cc/Z72U-SRUU>].

¹¹ *Id.*

News was much harsher.¹² It cited a veterans' organization that "slammed President Biden on Friday for using Marines 'as props' in his partisan speech, warning it 'erodes trust' in the military."¹³

Although the Letter is not as nonpartisan as it aspires to be, it does restate some accepted norms and principles of proper civil-military relations. For example, the Letter stresses the importance of civilian control of the military to American democracy and notes that this control is "wielded by the will of the American people . . . through elections."¹⁴ However, as the Letter broadly lists principles and best practices, it does so without sufficient consideration of the divergent settings and range of actors involved in civil-military issues. For example, what may be prudent and tolerated practice in the Pentagon or on Capitol Hill may not align with what the law wants young troops to do in the field upon receiving an order. Even self-claimed experts in civil-military relations admit that their discipline's canon acknowledges important variances. In a 2021 article, scholars asserted that "[t]heorists of democratic civil-military relations thus generally embrace a large zone of normative consensus" and listed the following as key 'consensus' propositions—each of which notes caveats:¹⁵

- The judgment of civilian politicians should trump that of senior military officers regarding *whether* to undertake military missions. (But some argue that civilian politicians should defer to senior military officers over *how* to conduct military missions.¹⁶)
- Military officers should express their views on military operations in confidential settings, not in public. (But some argue that they should publicly challenge patently illegal and immoral orders and that *retired* military officers should feel free to express their views in public.)¹⁷
- The armed forces should be subject to substantial civilian oversight. (But some argue that civilian oversight should be less intense on

¹² See Houston Keene, *Biden Slammed by Veterans Group for Using Marines 'As Props' in Partisan Speech: It 'Erodes Trust' in Military*, FOX NEWS (Sept. 2, 2022), <https://www.foxnews.com/politics/biden-slammed-veterans-group-using-marines-props-partisan-speech-erodes-trust-military> [<https://perma.cc/Y3AU-YZAB>].

¹³ *Id.*

¹⁴ See Carter et al., *supra* note 1.

¹⁵ Krebs et al., *supra* note 6, at 608 (emphasis added).

¹⁶ *Id.*

¹⁷ *Id.*

matters closest to the military's areas of professional expertise or its organizational prerogatives).¹⁸

Thus, a 'one-size-fits-all' set of "core principles or best practices" (CP/BP) assumes the field is more settled than the important caveats to the consensus propositions noted above indicate. More generally, the Letter at times fails to recognize the nuances of the law, and, thus, invites serious misunderstandings as to how it shapes American civil-military relations. Accordingly, this Article analyzes the Letter and seeks to clarify the issues it raises. It sequentially proceeds through the Letter and addresses its sixteen CP/BPs, which highlight specific aspects of civil-military relations, including its civilian control of the military component.

Readers may observe that the commentary restates, or refers to, observations made about another CP/BP. This is because several CP/BPs raise similar issues, particularly with respect to the complicated law of military orders.¹⁹ What the law says about the time for compliance with orders, the degree to which they can be questioned, the inference of legality, whether military officers have a legal "responsibility" or "obligation" concerning the development and execution of orders, and more, arises in different CP/BPs the Letter identifies.

I. THE INTRODUCTORY PARAGRAPHS

The Letter's first paragraph is aimed at justifying why the signers believe the Letter was necessary. To have a measured discussion of this important topic, context matters. Regrettably, the paragraph could unnecessarily alarm readers, especially those unfamiliar with U.S. law and history regarding civilian control of the armed forces. Specifically, after asserting that the U.S. is in a period of "exceptionally challenging civil-military relations" the signers claim:

Politically, military professionals confront an *extremely adverse environment* characterized by the divisiveness of affective polarization that culminated in the first election in over a century when the peaceful transfer of political power was disrupted and in

¹⁸ *Id.*

¹⁹ See, e.g., Charlie Dunlap, *Have Presidents Ever Given the Military Illegal Orders? Yes; the Surprising List . . . and More About the Law of Military Orders*, LAWFIRE (Mar. 10, 2016), <https://sites.duke.edu/lawfire/2016/03/10/have-presidents-ever-given-the-military-illegal-orders-yes-the-surprising-list-and-more-about-the-law-of-military-orders/> [<https://perma.cc/GY6H-8CB5>]; Charlie Dunlap, *Why the "Orders Project" is Troubling*, LAWFIRE (Oct. 26, 2020), <https://sites.duke.edu/lawfire/2020/10/26/why-the-orders-project-is-troubling/> [<https://perma.cc/85HD-WKYS>].

doubt. Looking ahead, *all of these factors could well get worse before they get better.*²⁰

In these introductory paragraphs, the signers put themselves—perhaps unwittingly—in what this article calls the “crisis school of civil-military relations.” As explained elsewhere,²¹ almost 25 years ago, the “crisis school” started in the aftermath of Professor Richard H. Kohn’s famous essay, *Out of Control: The Crisis in Civil-Military Relations*.²² Since then, the purported “crisis” has been a perennial favorite, mainly with academics and pundits, but also with some in the armed forces.²³ The intellectual problem? Though there have been issues from time to time, a “crisis” *never* materialized. Instead, the military has—despite pressures across administrations of both parties—remained not only dutifully adherent to the Constitution²⁴ but also became a military force considered the world’s finest.²⁵

Rather than using provocative language, the signers could have acknowledged the current civil-military challenges and put them in a broader context for readers. This should include comparing today’s political divisions with past periods of political conflict, understanding how the U.S. population currently perceives the military, and evaluating how these issues fit with the Founders’ core concerns regarding civil-military relations.

In terms of political conflict, however divisive the signers may think American society is today, it is notable that in the recent past there was significant political *violence*. In 2018, *Time* reported that “[c]ompared to the 1960s and 1970s,

²⁰ Carter et al., *supra* note 1 (emphasis added).

²¹ Charlie Dunlap, *Let’s Temper the Rhetoric About Civil-Military Relations*, LAWFIRE (May 11, 2018), <https://sites.duke.edu/lawfire/2018/05/11/lets-temper-the-rhetoric-about-civil-military-relations/> [<https://perma.cc/36JQ-9F4T>].

²² Richard H. Kohn, *Out of Control: The Crisis in Civil-Military Relations*, 35 NAT’L INT. 3 (1994). *Cf.* Dunford et al., *supra* note 8 (stating that a “narrative that has taken hold among some analysts and members of the media insists that military nonpartisanship and civil-military relations are in crisis because military officers have undermined civilian supremacy”).

²³ *See, e.g.*, Gregory D. Foster, *Failed Expectations: The Crisis of Civil Military Relations in America*, BROOKINGS (Sept. 1, 1997), <https://www.brookings.edu/articles/failed-expectations-the-crisis-of-civil-military-relations-in-america/> [<https://perma.cc/7LNU-8CKC>]; Risa Brooks, Jim Golby & Heidi Urben, *Crisis of Command: America’s Broken Civil-Military Relationship Imperils National Security*, FOREIGN AFFS. (Apr. 9, 2021), <https://www.foreignaffairs.com/articles/united-states/2021-04-09/national-security-crisis-command> [<https://perma.cc/727U-4TMT>].

²⁴ *See supra* note 54.

²⁵ *2023 Military Strength Ranking*, GLOB. FIRE POWER, <https://www.globalfirepower.com/countries-listing.php> [<https://perma.cc/5SQJ-HUGV>] (last visited Feb. 8, 2023).

the U.S. has gotten significantly less violent.”²⁶ It added, “[w]hile the U.S. saw 2,500 bombings in an 18-month period between 1971 and 1972, the number has decreased by the hundreds in the decades since. According to a report from the U.S. Bomb Data Center, there were 335 bombings in 2017, a 24% decrease from the prior year.”²⁷ Many of the bombings of the 1970s were explicitly political, with groups like the Weather Underground waging organized campaigns to draw attention to their radical beliefs.²⁸ Organized political violence certainly occurs today, as seen in incidents like the attempted kidnapping of Michigan Governor Gretchen Whitmer in 2022,²⁹ but it is significantly less widespread.

That said, the signers correctly point to the events of January 6, 2021, as a very disturbing and deeply troubling episode that deserves study and a firm response.³⁰ But is it really a sign of a *civil-military relations* emergency? Some try to say it is. For example, in 2021, three retired generals wrote an op-ed in the *Washington Post* saying they were “increasingly concerned about the aftermath of the 2024 presidential election and the potential for lethal chaos inside our military, which would put all Americans at severe risk.”³¹ They claimed there were “signs of potential turmoil in our armed forces” and pointed to the involvement of what they claimed was a “disturbing number of veterans and active-duty members of the military [that] took part in the attack on the Capitol.”³²

How accurate are the dire predictions proving to be? It is now apparent that the role of veterans and active duty personnel in the January 6th riots was overstated.³³ In contrast to claims that a disproportionate number of servicemembers participated, the number of male veterans who were arrested was *under-*

²⁶ Mahita Gajanan, *This Week’s Attempted Bombings Raise Alarms. But Experts Say It Doesn’t Mean the Country Is More Violent*, TIME (Oct. 26, 2018), <https://time.com/5434756/letter-bombs-us-violence-terrorism/> [<https://perma.cc/SSL4-TPUK>].

²⁷ *Id.*

²⁸ *Id.*

²⁹ Joey Cappelletti, *Whitmer Kidnapping Plot Co-Leader Sentenced to 19 Years in Prison*, PBS (Dec. 28, 2022), <https://www.pbs.org/newshour/politics/whitmer-kidnapping-plot-co-leader-sentenced-to-19-years-in-prison> [<https://perma.cc/4PBF-95ZQ>].

³⁰ See generally Brian Duignan, *January 6 U.S. Capitol Attack*, ENCYC. BRITANNICA (Mar. 18, 2023), <https://www.britannica.com/event/January-6-U-S-Capitol-attack> [<https://perma.cc/5UAE-SU86>] (providing the basic facts of the events of January 6th, 2021).

³¹ Paul D. Eaton, Antonio M. Taguba & Steven M. Anderson, Opinion, *3 Retired Generals: The Military Must Prepare Now for a 2024 Insurrection*, WASH. POST (Dec. 17, 2021), <https://www.washingtonpost.com/opinions/2021/12/17/eaton-taguba-anderson-generals-military/> [<https://perma.cc/64LR-7QM5>].

³² *Id.*

³³ See generally Charles J. Dunlap, On “The Alt-Right Movement and US National Security” and Authors’ Response, 52 THE US ARMY WAR COLL. Q.: PARAMETERS 181 (2022).

representative in comparison to the number of male veterans in the overall American population.³⁴ Only four individuals out of the 1.3 million active-duty servicemembers in the U.S. were charged.³⁵ Furthermore, Johns Hopkins University's Michael Ard concluded that despite the events of January 6th, "American democracy is solid and predictions of a coming civil war [are] overwrought."³⁶ Importantly, Professor Ard also points out that "[o]ur courts, federal bureaucracy, *the military* and the states all sided with democracy and stability."³⁷ He adds that "there was no military support" for the actions of the former president that day.³⁸

Similarly, journalist-turned-historian Thomas E. Ricks took stock of the aftermath of January 6th in a reflective *Washington Post* essay.³⁹ Ricks admitted that after the January 6th riot, he "expected to see widespread political violence."⁴⁰ However, in his op-ed he acknowledged that subsequent events proved he was mistaken:

[N]othing much happened. Rather, with the executive branch crippled and the legislative branch divided, the judicial branch of the federal government held the line. Again and again, both federal and state courts rejected claims of election fraud. Now those who alleged fraud without substantial evidence are themselves being investigated. Hundreds of people who invaded the Capitol, attacked police and threatened lawmakers were tracked down and charged with crimes. It was as if the American system had been subjected to a stress test and, albeit a bit wobbly, passed.⁴¹

³⁴ *Id.* at 181–82.

³⁵ *Id.* at 182. As of August 31, 2023, the Program on Extremism at George Washington University had tracked 1,084 federal cases where people were charged with criminal activities related to the events of January 6th. E-mail from Jonathan Lewis, Rsch. Fellow, Program on Extremism, Geo. Wash. U., to Charles J. Dunlap, Professor, Duke Law (Aug. 31, 2023, 5:22 EST) (on file with author). 128 individuals were veterans, four were in the reserves, four were national guard, two were in basic training, and four were active duty. *Id.*

³⁶ Michael J. Ard, *Was January 6 Really an 'Attempted Coup'?*, DISCOURSE (July 11, 2022), <https://www.discoursemagazine.com/politics/2022/07/11/was-january-6-really-an-attempted-coup/> [<https://perma.cc/4ZPG-R5PT>].

³⁷ *Id.*

³⁸ *Id.*

³⁹ Thomas E. Ricks, Opinion, *Why I've Stopped Fearing America is Headed for Civil War*, WASH. POST (Sept. 5, 2022), <https://www.washingtonpost.com/opinions/2022/09/05/why-ive-stopped-fearing-america-is-headed-civil-war/> [<https://perma.cc/M9CW-383U>].

⁴⁰ *Id.*

⁴¹ *Id.*

More recently, David Brooks wrote in *The Atlantic* that notwithstanding a media disposed “to write stories that make people terrified or furious,” objective data overwhelmingly show optimism about the country.⁴² Additionally, shortly before his retirement in September of 2023, former Chairman of the Joint Chiefs of Staff General Mark Milley explicitly discounted any concerns about a repeat of the Jan. 6th riot. ABC News reported:

“I am confident that the United States and the democracy in this country will prevail and the rule of law will prevail,” Milley said. “These institutions are built to be strong, resilient and to adapt to the times, and I’m 100% confident we’ll be fine.”⁴³

None of these assessments support the notion that the country is enmeshed in a civil-military relations *crisis* or on the verge of one. Some in the “crisis school” might point to the kerfuffle about the results of a poll conducted by the Ronald Reagan Institute asserting that the public’s “trust and confidence” in the military declined from 70% in 2018 to 48% in 2022.⁴⁴ The Reagan Institute says much of the decline is because of the poll respondents’ perception that military and civilian leadership has become “overly politicized.”⁴⁵ The explanation is, however, nuanced: “While [poll respondents] see civilian DOD leaders and uniformed military leaders as contributing to this issue, *they are more likely to blame presidents as Commanders-in-Chief*. Nearly 60% of respondents say that *performance and competence of presidents* has decreased their confidence in the military.”⁴⁶

If the “performance and competence of presidents” is the most often cited cause of the alleged loss of confidence in the armed forces, that is a matter for the voters to address, not military leaders. Indeed, an attempt to do so may itself create

⁴² David Brooks, Opinion, *Despite Everything You Think You Know, America Is on the Right Track*, ATLANTIC (Jan. 13, 2023) <https://www.theatlantic.com/ideas/archive/2023/01/american-optimism-productivity-innovation-rise/672714/> [<https://perma.cc/543V-KGJX>] (emphasis added).

⁴³ Caleigh Bartash, *'We'll be fine': Top US Military Officer Confident There Won't Be a Jan. 6 Repeat*, ABC NEWS (Sep. 17, 2023, 10:21 AM), <https://abcnews.go.com/Politics/fine-top-us-military-officer-confident-jan-6/story?id=103253206> [<https://perma.cc/CWB7-NZNE>] (reporting an interview by journalist Martha Raddatz with U.S. Army General Mark A. Milley)

⁴⁴ *Reagan National Defense Survey*, RONALD REAGAN INST. (2022), <https://www.reaganfoundation.org/media/359970/2022-survey-summary.pdf> [<https://perma.cc/4SQ9-KUWQ>].

⁴⁵ *Id.*

⁴⁶ *Id.* (emphasis added).

a perception of civil-military norm violations.⁴⁷ Regardless, what seems to have been overlooked in reports about the Reagan Institute's survey is that it shows the downward trend is "stabilizing."⁴⁸ According to the Reagan Institute, trust and confidence *rose* from 45% in 2021 to 48% in 2022.⁴⁹ Most importantly, the Reagan Institute survey does not align with the more time-tested Gallup Poll. For example, in 2021, when the Reagan Institute reported a 45% level of public trust and confidence in the military, Gallup's poll showed that a *much* higher percentage (69%) of the public had a "great deal" or "quite a lot" of confidence in the military.⁵⁰ It is true that in 2022, Gallup reported a decline to 64%, but that is still markedly higher than the 48% the Reagan Institute claimed.⁵¹ Further, Gallup evaluated fifteen other public and private entities in American society and concluded that "the military is the only institution besides small business for which a majority of Americans express confidence."⁵² When put in the larger context of the overall decline in Americans' trust in institutions, the modest decrease with respect to the military hardly supports the notion of a "crisis" in civil-military relations.⁵³

In sum, not much suggests that Americans are losing faith in their military; to the contrary, the Gallup poll suggests that the military is more resilient than virtually any other U.S. institution.⁵⁴ As the apocalyptic vision many feared did not

⁴⁷ See Kori Schake, *The Deeper Problem Behind General Milley's 'Secret Phone Calls'*, N.Y. TIMES (Sept. 18, 2021), <https://www.nytimes.com/2021/09/18/opinion/politics/general-milley-woodward.html> [<https://perma.cc/YR4Q-T5ZJ>] ("An unsound president is a danger to democracy, but a military that considers itself the arbiter of elected leaders' lawful authorities is also a danger to democracy.").

⁴⁸ Ronald Reagan Inst., *supra* note 44.

⁴⁹ *Id.*

⁵⁰ Jeffrey M. Jones, *Confidence in U.S. Institutions Down; Average at New Low*, GALLUP (July 5, 2022), <https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx> [<https://perma.cc/A5DH-HN49>].

⁵¹ *Id.*

⁵² *Id.* Gallup evaluated sixteen entities in total: small business, the military, the police, the medical system, the church or organized religion, the public schools, organized labor, banks, large technology companies, the U.S. Supreme Court, the presidency, newspapers, the criminal justice system, big business, television news, and Congress. *Id.* It concludes that "Americans are less confidence in major U.S. institutions than they were a year ago, with significant declines for [eleven] of the [sixteen] institutions tested and no improvements for any." *Id.*

⁵³ See also Gerard Baker, Opinion, *How American Institutions Went from Trust to Bust*, WALL ST. J. (Sept. 8, 2023, 4:24 PM), https://www.wsj.com/articles/american-institutions-went-from-trust-to-bust-media-schools-business-promises-43c8d18#cxrecs_s [<https://perma.cc/SU2Z-4BQ2>].

⁵⁴ *Id.* Further, though released after the Letter was written, Gallup's recent poll still ranks the military as having the second highest approval rating out of public and private entities. Charles J. Dunlap, *Don't Be Misled: A Commanding Majority of Americans Still Solidly Trust the Military*,

transpire, is there really cause to suggest that civil-military relations may “get worse before they get better” as the Letter states?⁵⁵ Senior military and civilian leaders need not be Pollyannaish in describing the current political atmosphere, but they should refrain from adding to the public’s angst with hyperboles insinuating that civilian control of the armed forces is at risk.

As the Letter’s issues are examined, consider that the Founders’ concerns about civilian control of the military were rather different from those that seem to reoccupy the Letter’s signers. The Founders focused on the *physical* threat that the military, and especially a large-standing army, might present to democratic institutions.⁵⁶ Their concerns were never realized, mainly because of the norm established by President George Washington’s handling of what is called the Newburgh Conspiracy of 1783, in which he defused a potential coup by Revolutionary War veterans through an emotional appeal to their sense of duty to country over individual gain.⁵⁷ As a result of his efforts, scholar John R. Miller

LAWFIRE (Aug. 16, 2023), <https://sites.duke.edu/lawfire/2023/08/16/dont-be-misled-a-commanding-majority-of-americans-still-solidly-trust-the-military/> [<https://perma.cc/Z8M8-57DL>].

⁵⁵ Carter et al., *supra* note 1.

⁵⁶ KATHLEEN J. MCINNIS, CONG. RSCH. SERV., IF11566, CONGRESS, CIVILIAN CONTROL OF THE MILITARY, AND NONPARTISANSHIP 1 (Jun. 11, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11566> [<https://perma.cc/WK29-F73P>] (“The designers of the Constitution were deeply skeptical of a standing army, as such a military instrument could also overthrow the government it professed to serve, much like Oliver Cromwell demonstrated in 1653 when he used his army to disband the English Parliament. Consternation regarding British deployment of its military to the American colonies without the consent of local governing officials was among the key grievances listed in the Declaration of Independence. In the context of a new, experimental, and democratic Republic, the Founding Fathers believed that subordination of the military to the authority of civil masters was critically important to prevent the emergence of a new form of tyranny or dictatorship.”).

⁵⁷ Historian John R. Miller explains that troops were “enraged by Congress’s failure to provide promised back pay and pensions [and] [r]umors of mutiny abounded.” As civilian control of the military was not yet an enshrined principle, the risk of a coup was high. 500 officers met to discuss, in part, whether they should “march on Philadelphia and seize the government.” Washington attended the meeting to quell the discontent. He was unsuccessful until, while reading a letter from a congressman, “Washington pulled out a pair of glasses, which even his officers had never seen before. ‘Gentlemen,’ he said, ‘you must pardon me, for I have grown not only gray but blind in the service of my country.’ The officers were stunned. Many openly wept. Their mutinous mood gave way immediately to affection for their commander.” In Miller’s telling, this moment reminded the troops of their deep respect for Washington, even in his civilian position as president, and immediately reduced the risk of a coup. Washington’s immense popularity uniquely fortified civilian control of the military, paving the way for it to be codified in the Constitution six years later. John R. Miller, Opinion, *George Washington’s Tear-Jerker*, N.Y. TIMES (Feb. 14, 2010), <https://www.nytimes.com/2010/02/15/opinion/15miller.html> [<https://perma.cc/V7EW-PUEP>].

says: “In the United States, it was the story of Newburgh and Washington’s iconic status in our early years that so firmly established a tradition of civilian control in the minds of both our military and civilians. That tradition continues, a testament to our first, finest and most political general.”⁵⁸

Accordingly, most contemporary discussions of civil-military relations and civilian control of the military do not orbit around the type of *physical* threat the Founders dreaded. Instead, discussions focus on the military’s popularity and potential influence (especially that of its leaders) on policy decisions, as seen in the controversy surrounding many of General Milley’s actions while he served as Chairman of the Joint Chiefs during Trump’s presidency.⁵⁹ Allegations that Milley secretly called a Chinese general and committed to warning China if President Trump planned to use military force sparked discussion about the Chairman’s sphere of influence in Washington.⁶⁰ Whatever may be the merits of such concerns, they are not necessarily conterminous with those the Founders had.

Moreover, some critics of U.S. civil-military relations can seem nonplussed by the affection and respect, if not deference, the American people have for their armed forces.⁶¹ In 2009, President Obama expressed his own bemusement in a thoughtful way:

What tugs at a person until he or she says, “Send me”? Why, in an age when so many have acted only in pursuit of the narrowest self-interest, have the soldiers, sailors, airmen and Marines of this generation volunteered all that they have on behalf of others? Why have they been willing to bear the heaviest burden?

Whatever it is, they felt some tug; they answered a call; they said, “I’ll go.” That is why they are the best of America, and that is what separates them from those of us who have not served in uniform—their extraordinary willingness to risk their lives for people they never met.⁶²

⁵⁸ *Id.*

⁵⁹ See Schake, *supra* note 47.

⁶⁰ *Id.*

⁶¹ See, e.g., Mara E. Karlin & Alice Hunt Friend, Opinion, *Military Worship Hurts U.S. Democracy*, FOREIGN POL’Y (Sept. 21, 2018), <https://foreignpolicy.com/2018/09/21/military-worship-hurts-us-democracy-civilian-trump> [<https://perma.cc/6WG4-TD5X>].

⁶² The White House Archives, *President Obama on Memorial Day 2009*, WHITE HOUSE (May 25, 2009), <https://obamawhitehouse.archives.gov/video/President-Obama-on-Memorial-Day-2009#transcript> [<https://perma.cc/NZC5-C8PR>].

As discussed elsewhere, most Americans clearly view this form of readiness to sacrifice as something special.⁶³ Polls show that the “selfless actions in putting themselves in harm’s way for the benefit of others” is a key reason the military is an institution in which the public confides.⁶⁴ It may also be the reason Americans believe the military is the institution most likely “to act in the best interests of the public.”⁶⁵ Thus, there is nothing mysterious or nefarious about the public understanding the “selfless actions” military service requires (along with other sacrifices),⁶⁶ which makes it uniquely worthy of esteem. Likewise, it is understandable that the public prefers getting more military expertise and advice from uniformed ranks than from civilians. The public may simply value real-world *military* experience in *military* issues to the party membership and other qualifications political appointees may bring to their positions.

Because the U.S. military has a deeply-ingrained norm of civilian control and has never presented the physical threat that so concerned the Founders, it should not be surprising that studies show Americans “are extraordinarily deferential to the military’s judgment regarding when to use military force, and they are comfortable with high-ranking officers intervening in public debates over policy.”⁶⁷ This does not suggest there should be any retreat from the principle of civilian control of the military, or any endorsement of unbridled military involvement in public debates.⁶⁸ Rather, it suggests that in the 21st century, the American public is generally more receptive of inclusive dialogue on national security issues than the “crisis school” traditionalists or other critics may deem appropriate. Still, as discussed below, there should be careful scrutiny of the data claiming a diminishment of trust and confidence in the military in the last two years.

⁶³ Charles Dunlap, *Can We Talk? The Obligation of Military Service*, WAR ON THE ROCKS (June 20, 2018), <https://warontherocks.com/2018/06/can-we-talk-the-obligation-of-military-service> [<https://perma.cc/F3M2-NX6W>].

⁶⁴ Brian Kennedy, *Most Americans trust the military and scientists to act in the public’s interest*, PEW RSCH. CTR. (Oct. 18, 2016), <https://www.pewresearch.org/fact-tank/2016/10/18/most-americans-trust-the-military-and-scientists-to-act-in-the-publics-interest/> [<https://perma.cc/E6CV-P7LM>].

⁶⁵ *Id.*

⁶⁶ See, e.g., Charlie Dunlap, *Salute All Who Benefit the Public, but Recognize the Uniqueness of Military Service*, LAWFIRE (June 27, 2020), <https://sites.duke.edu/lawfire/2020/06/27/salute-all-who-benefit-the-public-but-recognize-the-uniqueness-of-military-service/> [<https://perma.cc/JR3A-X5RK>].

⁶⁷ Krebs et al., *supra* note 6.

⁶⁸ See generally, Charles J. Dunlap, *Melancholy Reunion: A Report from the Future on the Collapse of Civil-Military Relations in the United States*, 10 AIRPOWER J. 93 (1996) (discussing the need for candor from military leaders and arguing that there should be “a strong presumption that civil-military relations are best served by transparency, and that frequently means public candor” but also listing circumstances when such public expressions would not be appropriate).

So, yes, civil-military issues and tensions do occasionally arise—as will always be the case when a democracy is obliged to maintain a large and powerful military in a dangerous world. But, *no*, civilian control of the military in the U.S. is *not* actually in jeopardy, despite what academics and pundits invested in the “crisis school of civil-military relations” seem to think.

II. THE CORE PRINCIPLES OR BEST PRACTICES (“CP/BP”)

This section will examine *in seriatim* and comment on the sixteen “core principles or best practices.” Each subsection will provide the CB/BP language followed by the Article’s commentary.

A. CP/BP 1:

*Civilian control of the military is part of the bedrock foundation of American democracy. The democratic project is not threatened by the existence of a powerful standing military so long as civilian and military leaders—and the rank-and-file they lead—embrace and implement effective civilian control.*⁶⁹

A frustrating aspect of the Letter is that it ironically never expands on what it means by “civilian control of the military.”⁷⁰ The Congressional Research Service (“CRS”) defines civilian control of the military as referring “to the principle upon which the United States founded its relationship between the military and the civil society it serves. In the United States, the military is ultimately subordinate to civilian authority.”⁷¹

Does the Letter or the CRS report imply that the military is subordinate to every civilian in America? Only in the broadest sense. Rather, the military is subordinate to civilians occupying positions with legal *authority* over the armed forces. Such positions are set out in the Constitution⁷²—starting with the president as commander-in-chief—and in other statutes.

While there is no single comprehensive source identifying all the specific positions with authority, Article 88 of the Uniform Code of Military Justice (“UCMJ”) ⁷³ identifies persons and civilian entities that are part of the civilian

⁶⁹ Carter et al., *supra* note 1.

⁷⁰ *Id.*

⁷¹ See McINNIS, *supra* note 56.

⁷² U.S. CONST. art. 2, §2.

⁷³ 10 U.S.C. § 888.

control architecture.⁷⁴ It criminalizes military officers' use of "contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present . . ." ⁷⁵ Each of the persons or entities enumerated in Article 88 potentially wields directive authority over the armed forces. In short, Article 88 intends to protect the civilian authorities *responsible for civilian control* from activity by military officers that might erode their power to control the armed forces.

This view is evident in the only appellate case discussing Article 88, *U.S. v. Howe*.⁷⁶ In that case, the all-civilian Court of Military Appeals noted the offense arose in the context of crimes like mutiny and sedition.⁷⁷ Accordingly, "contemptuous language"—even if protected under the First Amendment for civilians—presents a unique threat to military morale and discipline and, therefore, could be criminalized under the Constitution.⁷⁸ To determine which civilians are referenced in the concept of civilian control of the military, identifying the civilian persons and entities expected to actively exercise that control is vitally important, and the listing in Article 88 is a helpful start.

B. CP/BP 2

*Civilian control operates within a constitutional framework under the rule of law. Military officers swear an oath to support and defend the Constitution, not an oath of fealty to an individual or to an office. All civilians, whether they swear an oath or not, are likewise obligated to support and defend the Constitution as their highest duty.*⁷⁹

Certainly, all officers take an oath⁸⁰ to support and defend the Constitution and "not an oath of fealty to an individual or to an office."⁸¹ The matter is, however, a bit more nuanced. First, the Constitution authorizes the *individual* occupying the

⁷⁴ Hearing on "Civilian Control of the Armed Forces" Before the S. Comm. On Armed Services, (2021) (statement of Kathleen J. McInnis, Specialist in International Security).

⁷⁵ 10 U.S.C. § 888.

⁷⁶ 17 C.M.A. 165, (1967).

⁷⁷ *Id.* at 180.

⁷⁸ *Id.* at 180.

⁷⁹ Carter et al., *supra* note 1.

⁸⁰ 5 U.S.C. § 3331.

⁸¹ *Id.*

office of the president as the commander-in-chief of the armed forces.⁸² That individual is someone to whom officers and all members of the armed forces owe instant obedience with respect to lawful orders, albeit not “fealty.”

Second—and rarely mentioned in these discussions—each uniformed officer accepts a commission from an individual, to wit, the president.⁸³ Here is how the *Armed Forces Officer*, a publication of the National Defense University Press, describes it:

The commission is granted under the President’s powers in Article II, Section 2, of the Constitution. It is a notice of appointment, a grant of executive authority, and an admonition for obedience. It is bestowed, the commission says, because of the “special trust and confidence” reposed by the President “in the patriotism, valor, fidelity and abilities” of the appointee. The officer is enjoined to “carefully and diligently discharge the duties” of his or her office. Subordinates are charged to render the obedience due an officer of his or her station. The officer is admonished to “observe and follow such orders and directions . . . as may be given by” the President or the President’s successors, “or other Superior Officers acting in accordance with the laws of the United States of America.”⁸⁴

Third, as critical as it may be to remind officers of their oath to support and defend the Constitution, it is as crucial to remember there is not *carte blanche* for each officer to interpret the Constitution in exercising their official duties. As Professor James Joyner wrote in August 2020:

Most Constitutional scholars would side with Berkeley law professor Orin Kerr in reading the provision much more narrowly. Wrote Kerr: “The oath is probably best understood” *not as an invitation for millions of Americans to independently enforce their own view of the Constitution*, rooting out domestic enemies as they see fit, but “in its historical context as a promise to oppose political reforms outside the Constitution. You have to stay loyal to the

⁸² U.S. CONST. art. 2, §2.

⁸³ RICHARD M. SWAIN & ALBERT C. PIERCE, *THE ARMED FORCES OFFICER* (2017).

⁸⁴ *Id.* at 1–2.

government that is based on the Constitution, and you can't support a rebellion or overthrow of that government.”⁸⁵

Finally, the signers' belief that all civilians “are likewise obligated to support and defend the Constitution as their highest duty” is understandable and commendable.⁸⁶ However, in this country, there is no general *legal* duty for the citizenry to “defend” the Constitution, at least in a physical way.

For example, there is a *statutory* right to apply for conscientious objector status—which describes someone who “is opposed to serving in the armed forces and/or bearing arms on the grounds of moral or religious principles.”⁸⁷ If successful in obtaining the conscientious objector status, some service may still be required, but not as a combatant.⁸⁸

Moreover, civilians seeking to become naturalized citizens are no longer obligated to agree “[t]o bear arms on behalf of the United States when required by the law” or even to “perform noncombatant service in the U.S. armed forces when required by the law.”⁸⁹ Again, there is apparently no consensus that a *legal* duty exists under current law for all *civilians* to “support and defend the Constitution” or to treat it as their “highest duty.”⁹⁰

⁸⁵ James Joyner, *Who Decides Who Is a 'Domestic Enemy'?*, DEFENSE ONE (Aug. 13, 2020) <https://www.defenseone.com/ideas/2020/08/who-decides-whos-domestic-enemy/167704/> [<https://perma.cc/MG37-7FU4>] (emphasis added).

⁸⁶ Carter et al., *supra* note 1.

⁸⁷ *Conscientious Objectors*, SELECTIVE SERV. SYS., <https://www.sss.gov/conscientious-objectors/> [<https://perma.cc/7K5X-A4HE>].

⁸⁸ *Id.* (“Two types of service are available to conscientious objectors . . . [t]he person who is opposed to any form of military service will be assigned to alternative service . . . [t]he person whose beliefs allow him to serve in the military but in a noncombatant capacity will serve in the Armed Forces but will not be assigned training or duties that include using weapons.”).

⁸⁹ U.S. CITIZENSHIP AND IMMIGR. SERVS., *Policy Manual: Chapter 3 – Oath of Allegiance Modifications and Waivers*, <https://www.uscis.gov/policy-manual/volume-12-part-j-chapter-3> [<https://perma.cc/FE67-5TT2>].

⁹⁰ In the author's experience, for many civilians (and servicemembers) their “highest duty” may be to their religious belief or to their family (or both in some order).

C. CP/BP 3

*Under the U.S. Constitution, civilian control of the military is shared across all three branches of government. Ultimately, civilian control is wielded by the will of the American people as expressed through elections.*⁹¹

Kudos to the signers for recognizing all three branches have a role in civilian control of the military. Many sources who *should* know better fail to acknowledge this. For example, the CRS incorrectly provides, “civilian responsibility and control of the military [is] balanced between the executive and legislative branches of the government.”⁹²

However, as discussed in reference to CP/BP 6, the courts play a role, albeit a limited one, as they have historically often exercised deference to determinations by the *elected* branches of government in national security matters.

D. CP/BP 4

*Civilian control is exercised within the executive branch for operational orders by the chain of command, which runs from the president to the civilian secretary of defense to the combatant commanders. Civilian control is also exercised within the executive branch for policy development and implementation by the interagency process, which empowers civilian political appointees who serve at the pleasure of the president and career officials in the civil service to shape the development of plans and options, with the advice of the military, for decision by the president. The chairman of the Joint Chiefs of Staff is not in the formal chain of command, but best practice has the chairman in the chain of communication for orders and policy development.*⁹³

⁹¹ Carter et al., *supra* note 1.

⁹² McINNIS, *supra* note 56, at 1.

⁹³ Carter et al., *supra* note 1.

This portion of the Letter is not controversial. Note, however, that though not desirable in most circumstances, the president can issue lawful orders *directly* to military personnel even if the formal chain of command is not followed. Additionally, it is true that the chairman is “not in the formal chain of command,” but that understates the law.⁹⁴ In fact, the law *prohibits* the chairman from exercising “military command over the Joint Chiefs of Staff or any of the armed forces,” irrespective of any “chain of communication” the signers believe exists.⁹⁵ In other words, the law explicitly prohibits the concentration of the military *command* over America’s entire armed forces in the hands of a single uniformed officer.

Furthermore, while the signers say it is “best practice” for the chairman to be in the “chain of communication,” the law says that the president “may” choose to direct communications “through the Chairman of the Joint Chiefs of Staff.”⁹⁶ Thus, the best practice actually may be to ensure that the “chain of communication” is consonant with the president’s wishes.

E. CP/BP 5

*Civilian control is exercised within the legislative branch through the extensive powers enumerated in Article I of the Constitution, beginning with the power to declare war, to raise and support armies, and to provide and maintain a navy. Congress determines the authorization and appropriation of funds without which military activity is impossible. The Senate advises and consents on the promotion of officers to the pay grade of O-4 and above. The Senate is also charged with advising and consenting to certain senior-level civilian political appointees. Congress conducts oversight of military activity and can compel testimony from military or civilian officials, subject to narrow exceptions such as executive privilege. Members of Congress empower personal and committee staff to shape the development of policies for decision by the committees and Congress as a whole and thereby play an important role in civilian oversight of policy.*⁹⁷

⁹⁴ See 10 U.S.C. § 163.

⁹⁵ 10 U.S.C. § 152(c).

⁹⁶ 10 U.S.C. § 163(a)(1).

⁹⁷ Carter et al., *supra* note 1.

This CP/BP properly emphasizes what may be Congress' most powerful means of exercising civilian control of the military: its "power of the purse."⁹⁸ However, this power is not as unchecked as the Letter suggests. For example, if Congress sought to end a military operation by eliminating funding, the president is empowered to veto such an effort.⁹⁹

The Letter assumes that executive privilege can bar communications between uniformed military leaders and Congress. But this supposed application of executive privilege in the national security context is nuanced.¹⁰⁰ Considering the civilian control responsibilities of all three branches of government, it is unclear whether the privilege applies in situations where, for example, Congress is plainly acting within its investigatory and oversight responsibilities.¹⁰¹ It is reasonable that Congress may want—and need—to know exactly what advice military leaders give to the president in a particular situation.

Furthermore, there is explicit statutory authority that military members can rely on when speaking to Congress. The U.S. Code states that "[n]o person may restrict a member of the armed forces in communicating with a Member of Congress . . ."¹⁰² Beyond legalities, it is prudent for military leaders to advise both elected branches of government to prevent favoritism of one co-equal branch of government over another.

The Letter's recitation of Congress' role in military promotions is accurate, but it fails to acknowledge the significant civil-military relations issues that can arise. For example, the Constitution calls upon the Senate to give "advice and consent" on military promotions,¹⁰³ but some legislators use this power not to assess a particular individual for promotion but rather as leverage to extract concessions from the Pentagon or the Administration on unrelated defense

⁹⁸ Compare U.S. HOUSE OF REPRESENTATIVES, HISTORY, ART & ARCHIVES, *Power of the Purse*, <https://history.house.gov/institution/origins-development/power-of-the-purse/> [<https://perma.cc/BE58-NQHV>], with Molly E. Reynolds, *Reforming Congress's Power of the Purse*, LAWFARE (May 10, 2021), <https://www.lawfareblog.com/reforming-congresss-power-purse> [<https://perma.cc/7KJM-5LLY>].

⁹⁹ *The Veto Power*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-1/section-7/clause-1%E2%80%9333/the-veto-power> [<https://perma.cc/JXV3-WVAV>].

¹⁰⁰ Aziz Huq, *Background on Executive Privilege*, BRENNAN CTR. (Mar. 23, 2007), <https://www.brennancenter.org/our-work/research-reports/background-executive-privilege> [<https://perma.cc/A5Z4-MVK6>].

¹⁰¹ See, e.g., Katherine Yon Ebright, *The Pentagon Must Submit to Congressional Oversight*, BRENNAN CTR. (Feb. 11, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/pentagon-must-submit-congressional-oversight> [<https://perma.cc/6HB5-PAYL>].

¹⁰² 10 U.S.C. § 1034.

¹⁰³ U.S. CONST. art. 2, §2.

matters.¹⁰⁴ The potentially deleterious effect on civil-military relations is obvious: it involves military officers in a political dispute that is delaying their promotion.

Even when congressional members are acting in individual capacities, abuse can occur as illustrated by the case of Lt. Gen. Susan Helms. In a 2013 article, Professor Robert Turner explains how a single senator, who manipulated internal Senate procedures, was able to derail the promotion of Lt. Gen. Helms over a disagreement about her handling of a military justice case, even though the General lawfully acted within her discretion.¹⁰⁵ The senator's action prevented Helms from getting the full vote in the Senate as the Constitution contemplates. Turner says the situation was aggravated when the senator put a "permanent hold" on the officer's nomination. He says:

Neither a single senator, nor a unanimous Senate through its internal rule-making powers, nor a unanimous Senate and House—through a statute signed by the President—can amend or otherwise alter the Constitution. And when Sen. McCaskill declares that she will impose a "permanent hold" to block this nomination, she seeks to usurp the constitutional powers of both the Senate and the president. The Constitution did not vest the Senate's veto on executive appointments in a single senator.¹⁰⁶

The Helms case is an example of executive and legislative civilian leadership failing—in both elected branches of government—to ensure that the full Senate could vote on the officer's nomination as the Constitution anticipates, and as members of the armed forces could reasonably expect.¹⁰⁷

¹⁰⁴ See, e.g., Reuters Staff, *U.S. Senator to block military promotions until assurances on former White House Aide*, REUTERS (July 2, 2020), <https://www.reuters.com/article/us-usa-military-promotion/u-s-senator-to-block-military-promotions-until-assurances-on-former-white-house-aide-idUSKBN2432ZD> [<https://perma.cc/F5RK-FMZY>].

¹⁰⁵ Robert F. Turner, Opinion, *In holding up nomination, McCaskill oversteps her bounds*, KANSAS CITY STAR (June 12, 2013), <https://web.archive.org/web/20130615211224/https://www.kansascity.com/2013/06/12/4289305/mccaskill-oversteps-her-bounds.html> [<https://perma.cc/M4DD-68TF>].

¹⁰⁶ *Id.*

¹⁰⁷ More recently, Senator Tommy Tuberville used Senate procedures to put a hold on hundreds of military promotion confirmations because of his objections to a new Pentagon abortion policy. See Tommy Tuberville, Opinion *The Pentagon Shouldn't Wage Culture War*, WALL ST. J. (Apr. 2, 2023, 5:24 PM), https://www.wsj.com/articles/the-pentagon-shouldnt-wage-culture-war-military-abortion-travel-vaccine-mandate-woke-recruitment-drop-congress-senate-nomination-1e64f57b?mod=opinion_lead_pos9 [<https://perma.cc/TQ9M-2TXS>].

F. CP/BP 6

*In certain cases or controversies, civilian control is exercised within the judicial branch through judicial review of policies, orders, and actions involving the military. In practice, the power to declare a policy/order/action illegal or unconstitutional is decisive because the military is obligated (by law and by professional ethics) to refuse to carry out an illegal or unconstitutional policy/order/action.*¹⁰⁸

This section implies that the judiciary regularly adjudicates the propriety of “policies, orders, and actions involving the military.” That is simply not the case. Actually, the courts often employ justiciability concepts including what is known as the “political question doctrine” to avoid adjudicating military issues. This doctrine “instructs that federal courts should forbear from resolving questions when doing so would require the judiciary to make policy decisions, exercise discretion beyond its competency, or encroach on powers the Constitution vests in the legislative or executive branches.”¹⁰⁹

For example, in the 1973 case of *Gilligan v. Morgan*,¹¹⁰ the Supreme Court considered whether “judicial review and continuing judicial surveillance over the training, weaponry, and standing orders” of the military was appropriate in the aftermath of the May 1970 civil disorder incident at Kent State University, which resulted in the killing and wounding of several students.¹¹¹ The Court found that the requested oversight was not a proper judicial activity.¹¹² It explained:

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible -- as the Judicial Branch is not -- to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive

¹⁰⁸ Carter et al., *supra* note 1.

¹⁰⁹ JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10759, THE POLITICAL QUESTION DOCTRINE: FOREIGN AFFAIRS AS A POLITICAL QUESTION (PART 4) (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10759>, [<https://perma.cc/2SW8-GR54>].

¹¹⁰ 413 U.S. 1 (1973).

¹¹¹ *Id.* at 7.

¹¹² *Id.* at 10.

Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.¹¹³

Morgan remains a vital precedent, and Justice Kavanaugh recently cited it in his concurring decision to stay an injunction that sought to preclude the Navy from “considering respondents’ [COVID-19] vaccination status in making deployment, assignment, and other operational decisions.”¹¹⁴ Kavanaugh emphasized that:

Under Article II of the Constitution, the President of the United States, not any federal judge, is the Commander in Chief of the Armed Forces. In light of that bedrock constitutional principle, “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”¹¹⁵

Thus, the signers should be cautious in recommending the courts as a ready solution to the controversial issues that bedevil civil-military relations. Finally, the use of the disjunctive in the statement that the military is obligated to “refuse to carry out an illegal or unconstitutional policy/order/action” is confusing. Experience has shown that precision of language is imperative when speaking to the force as a whole. The phrase “illegal or unconstitutional” could encourage an understanding gap regarding necessary compliance with orders, a theme further explored in CP/BP 7.¹¹⁶

G. CP/BP 7

Civilian control is enhanced by effective civil-military relations. Civil-military relations are comprised of a dynamic and iterative process that adjusts to suit the styles of civilian leaders. Under best practices, civil-military relations follow the regular order of the development of policy and laws, which protects both the military and civilian control. Under regular order, proposed law, policies, and orders are reviewed extensively by multiple offices to ensure their legality, appropriateness, and likely effectiveness. However, regardless of the process, it is the responsibility of senior military

¹¹³ *Id.*

¹¹⁴ *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301, 1301 (2022).

¹¹⁵ *Id.* at 1302 (Kavanaugh, J., concurring).

¹¹⁶ *See* discussion *infra* Section G.

*and civilian leaders to ensure that any order they receive from the president is legal.*¹¹⁷

This is a CP/BP that should be caveated as it captures processes that may be typical at the senior level (especially in Washington D.C.) but atypical in the field. It is often the case that in the Pentagon, the White House, and the halls of Congress, proposed laws, policies, and orders are “reviewed extensively by multiple offices to ensure their legality, appropriateness, and likely effectiveness.”¹¹⁸

However, at lower levels, and especially in combat situations, there is no opportunity for “multiple offices” to review orders. In fact, as further explained in CP/BP 12,¹¹⁹ delaying obedience of orders that are not patently illegal is *not* the “regular order” in the armed forces. To the contrary, *immediate* compliance is the “regular” order. Unfortunately, the CP/BP could be interpreted to suggest otherwise.

The Letter also insists that “it is the responsibility of senior military and civilian leaders to ensure that any order they receive from the president is legal.”¹²⁰ This is another example of a CP/BP that has a germ of truth, but could be misapplied, particularly by junior personnel who want to emulate this CP/BP. Certainly, the military must not obey an unlawful order—whether it comes from the president or anyone else.

That said, the Supreme Court points out the military’s purpose is to “fight or be ready to fight wars should the occasion arise.”¹²¹ Because decisions in war, and especially in today’s technology-accelerated conflicts, often must be made at “warp speed,”¹²² it is foreseeable that situational exigencies may not present much—or even any—opportunity to question orders. The law recognizes this reality and creates something, which may be a safe harbor, for military members. Specifically, the Manual for Courts-Martial¹²³ states: “An order requiring the performance of a military duty or act *may be inferred to be lawful and it is*

¹¹⁷ Carter et al., *supra* note 1.

¹¹⁸ *Id.*

¹¹⁹ See discussion *infra* Section K.

¹²⁰ Carter et al., *supra* note 1.

¹²¹ United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955).

¹²² Caroline Steel, *Hyperwar: How Militarized AI is Transforming the Decision-Making Loop*, AM. SEC. PROJECT (Dec. 15, 2021), <https://www.americansecurityproject.org/hyperwar-how-militarized-ai-is-transforming-the-decision-making-loop/> [<https://perma.cc/S5KY-BTXJ>].

¹²³ JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.) [hereinafter MCM].

disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime."¹²⁴

So, what are “patently illegal orders” for which the presumption of lawfulness does not apply? The all-civilian Court of Military Appeals (“CMA”)—¹²⁵—addressed this issue in the case of U.S. Army Lt. William Calley,¹²⁶ who was accused of murder in one of the most horrifying incidents of the Vietnam-era: the My Lai massacre.¹²⁷ The trial judge in Calley’s case instructed the court to determine beyond a reasonable doubt if “under the circumstances, *a man of ordinary sense and understanding would have known the order was unlawful.*”¹²⁸ *The CMA upheld the conviction finding that even if Calley’s claim that he was ordered to kill was true, and that even if he were “the most ignorant person in the United States Army in Vietnam,” any “order to kill infants and unarmed civilians who were so demonstrably incapable of resistance to the armed might of a military force as were those killed by Lieutenant Calley [was] so palpably illegal” that it overcame the inference of lawfulness.*¹²⁹

Simultaneously, the CMA recognized that such obvious illegality was rare and emphasized that in “the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement.”¹³⁰ Most importantly for the purposes of assessing this and related CP/BPs in the Letter, the CMA addressed the degree to which a military member may go to ensure a facially-valid order was legal without risking liability for insubordination. Tellingly, the CMA cited this quote from Colonel William Winthrop (1831-1899), who the Supreme Court calls the “The Blackstone of Military Law”¹³¹:

But for the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a

¹²⁴ *Id.* at part IV, ¶ 14 (c)(2)(a)(1) (emphasis added).

¹²⁵ The CMA was the predecessor to today’s all-civilian Court of Appeals for the Armed Forces. *See About the Court*, U.S. CT. OF APPEALS FOR THE ARMED FORCES, <https://www.armfor.uscourts.gov/about.htm> [<https://perma.cc/LUX3-K8GN>].

¹²⁶ *United States v. Calley*, 22 U.S.C.M.A. 534 (1973).

¹²⁷ *My Lai Massacre*, HISTORY (Oct. 4, 2022), <https://www.history.com/topics/vietnam-war/my-lai-massacre-1> [<https://perma.cc/SW7K-96JY>].

¹²⁸ *See Calley*, 22 U.S.C.M.A. at 542.

¹²⁹ *Id.* at 544.

¹³⁰ *Id.* at 543–44.

¹³¹ *See* JOSHUA E. KASTENBERG, *THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP* (2009).

general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline. *Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.*¹³²

To reiterate, the military can only obey lawful orders. And, of course, where possible, the colloquy CP/BP 7 discusses is certainly desirable. However, especially for troops in the field, they can rely on the inference of lawfulness absent a showing of patent illegality. The concern is that the CP/BP undermines these truths: (1) that the “regular order” of military law requires *immediate* obedience to facially-lawful orders and (2) that a decision to not rely on the inference of lawfulness of such orders is “at the peril of the subordinate.”¹³³

Regrettably, the CP/BP omits any explanation of these critical aspects of military law; indeed, it could be interpreted as encouraging the questioning of orders. As the commentary on CP/BP 12 makes clear, the “regular order” is that “the habit of immediate compliance with military procedures and orders must be virtually reflex.”¹³⁴

H. CP/BP 8

*The military has an obligation to assist civilian leaders in both the executive and legislative branches in the development of wise and ethical directives but must implement them provided that the directives are legal. It is the responsibility of senior military and civilian leaders to provide the president with their views and advice that includes the implications of an order.*¹³⁵

This CP/BP makes solid, valuable points (and relates to CP/BP 10). However, note that it is the *president*, not “senior military and civilian leaders,” who decides from whom they receive advice, if at all. Though it is a beneficial practice, there is no legal “responsibility” to present the president with views and advice, nor is there a responsibility on the president’s part to receive it, however

¹³² See *Calley*, 22 U.S.C.M.A. at 543 (emphasis added).

¹³³ MCM, *supra* note 123, at pt. IV, ¶ 14.b.(2)(a)(i).

¹³⁴ See discussion *infra* Section K.

¹³⁵ Carter et al., *supra* note 1.

prudent it may be to do so. Moreover, as explained in the commentary to CP/BP 7 and CP/BP 12,¹³⁶ the desire of senior military and civilian leaders to present the president with their “views and advice” is not a legal rationale to delay an order’s implementation.

The reference to “wise and ethical directives” may seem uncontroversial, but it can be more complicated than it may appear. A pluralistic democracy may have a range of deeply held views as to what is “wise” and, especially, what is “ethical.” Nevertheless, in the military setting, such personal opinions cannot lawfully trump an individual’s *professional* obligations. For example, the Manual for Courts-Martial clearly states that under military law, “the dictates of a person’s conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.”¹³⁷

To what extent then do senior military leaders have, as the CP/BP suggests, an “obligation” to inculcate their own (possibly idiosyncratic) views into the armed forces as to what is “ethical?” It is a mistake to assume, as the CP/BP seems to do, that military leaders have a uniform interpretation of what is—or is not—“ethical.”¹³⁸ Consider, for example, that on Inauguration Day in 2021, Archbishop José Gomez, the President of the United States Conference of Catholic Bishops stated:

I must point out that our new President has pledged to pursue certain policies that would advance moral evils and threaten human life and dignity, most seriously in the areas of abortion, contraception, marriage, and gender. Of deep concern is the liberty of the Church and the freedom of believers to live according to their consciences.¹³⁹

Is it then a “best practice” to tell members of the armed forces that they have an undifferentiated “obligation” with respect to assisting in the development of “wise and ethical” directives? This could readily lead to ethical conundrums for many religiously faithful and other persons of conscience on a range of controversial issues. To illustrate, since the Pope has reiterated Catholic doctrine

¹³⁶ See discussion *infra* Section K; see discussion *supra* Section G.

¹³⁷ MCM, *supra* note 123, at pt. IV, ¶ 14.b.(2)(a)(iv).

¹³⁸ See, e.g., DAVID COPP, ED., THE OXFORD HANDBOOK OF ETHICAL THEORY (2007) (discussing the wide variety of ethical theories).

¹³⁹ USCCB *President's Statement on the Inauguration of Joseph R. Biden, Jr., as 46th President of the United States of America*, U.S. CONF. OF CATH. BISHOPS (Jan. 20, 2021), <https://www.usccb.org/news/2021/usccb-presidents-statement-inauguration-joseph-r-biden-jr-46th-president-united-states> [<https://perma.cc/ZQS3-XS33>].

by declaring that “abortion is murder,”¹⁴⁰ how should that play with devout Catholics and other abortion opponents in a Pentagon that is paying for its employees to travel for abortions deemed “murder” by the Pope?¹⁴¹ Brigadier Linell Letendre and Dr. Martin Cook explain that resolving these kinds of ethical issues requires an in-depth analysis that involves the law, profession of arms, and practicalities.¹⁴² The end result may require a military member to make hard career choices, including leaving the military altogether.¹⁴³

That said, this Article is not saying that military advice about the “wisdom and ethics” of directives is irrelevant or necessarily out of order in a given situation; rather, it suggests that the Letter’s reference to that process, however understandable to persons with the experience of the signers, might be a bit too glib and not sufficiently thorough for useful implementation across the armed forces.

I. CP/BP 9

*While the civil-military system can respond quickly to defend the nation in times of crisis, it is designed to be deliberative to ensure that the destructive and coercive power wielded by the U.S. armed forces is not misused.*¹⁴⁴

This seems to be a thinly-veiled reference to the controversy that arose during the Trump administration about the president’s authority to order the use of nuclear weapons and how military officers might respond.¹⁴⁵ This led some to

¹⁴⁰ Courtney Mares, *Respect Life: Pope Francis’ 8 strongest statements against abortion*, CATH. NEWS AGENCY (Oct. 4, 2021), <https://www.catholicnewsagency.com/news/249172/pope-francis-abortion-statements> [<https://perma.cc/3S7M-ZMDT>].

¹⁴¹ See, e.g., Becky Sullivan, *The Pentagon will pay for service members to travel for abortions*, NPR (Oct. 20, 2022), <https://www.npr.org/2022/10/20/1130316976/pentagon-abortion-travel> [<https://perma.cc/ZU8S-SRP7>].

¹⁴² Linell A. Letendre & Martin L. Cook, *Right vs. Right: Personal Beliefs vs. Professional Obligations*, 48 PARAMETERS 7 (2018), <https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=2846&context=parameters> [<https://perma.cc/583J-BUPV>].

¹⁴³ *Id.* at 9. “[I]t is perfectly possible any individual member of the profession might think that he or she has a personal moral belief that is fundamentally at odds with those professional obligations. But when that occurs, if that individual strongly feels he or she can not or will not subordinate those beliefs to his or her professional obligations, the proper conclusion should cause the individual to leave the profession.”

¹⁴⁴ Carter et al., *supra* note 1.

¹⁴⁵ See, e.g., Daren Gregorian & Jesse Rodriguez, *Milley acted to prevent Trump from misusing nuclear weapons, war with China, book says*, NBC NEWS (Sept. 14, 2021), <https://www.nbcnews.com/news/military/milley-acted-prevent-trump-misusing-nuclear-weapons-war-china-book-n1279187> [<https://perma.cc/F5SD-2JW4>].

propose “introducing checks into the process for nuclear first-use.”¹⁴⁶ As explained in detail elsewhere, such proposals may be unlawful and impossible to operationalize in the context of what easily could be extremely time-sensitive decisions as to whether to use nuclear weapons, especially when an adversary is preparing to strike.¹⁴⁷

Nonetheless, we live in an age where artificial intelligence and other technologies are enabling hyper war, which can require decision-making at “warp speed.”¹⁴⁸ Although it is unlikely that the use of strategic weaponry will be abdicated to machines,¹⁴⁹ military and civilian leaders must plan for circumstances where the “deliberative” system is too slow to react to potential, existential threats that 21st century technologies create.¹⁵⁰ Of course, no one wants the “destructive and coercive power” of the U.S. military to be “misused” in *any* circumstance. However, in a world where the necessary velocity of military decision-making is ever increasing, the best way of achieving the proper use of force may not be to rely on military officers engaging in a bureaucratic, “deliberative” process, but rather to elect thoughtful and reliable order-giving civilian leaders in the first place.¹⁵¹

J. CP/BP 10

Elected (and appointed) civilians have the right to be wrong, meaning they have the right to insist on a policy or direction that proves, in hindsight, to have been a mistake. This right obtains even

¹⁴⁶ Richard K. Betts & Matthew Waxman, *Safeguarding Nuclear Launch Procedures: A Proposal*, LAWFARE (Nov. 19, 2017), <https://www.lawfareblog.com/safeguarding-nuclear-launch-procedures-proposal> [https://perma.cc/6FTU-XRV5].

¹⁴⁷ Charlie Dunlap, *The Danger of Tampering with America’s Nuclear Command and Control System*, LAWFIRE (Nov. 22, 2017), <https://sites.duke.edu/lawfire/2017/11/22/the-danger-of-tampering-with-americas-nuclear-command-and-control-system/> [https://perma.cc/K4RG-W8LM].

¹⁴⁸ See Steel, *supra* note **Error! Bookmark not defined.**

¹⁴⁹ See DEP’T OF DEFENSE, 2022 NUCLEAR POSTURE REPORT 13 (2022) (“In all cases, the United States will maintain a human ‘in the loop’ for all actions critical to informing and executing decisions by the President to initiate and terminate nuclear weapon employment.”).

¹⁵⁰ KELLEY M. SLAYER, CONG. RSCH. SERV., R45811, HYPERSONIC WEAPONS: BACKGROUND AND ISSUES FOR CONGRESS (2021), <https://sgp.fas.org/crs/weapons/R45811.pdf> [https://perma.cc/9YMR-WHHN] (discussing how the use of a hypersonic missile “compresses the timeline for decision makers”).

¹⁵¹ Cf. Rosa Brooks, Opinion, *The military wouldn’t save us from President Trump’s illegal orders*, WASH. POST (Mar. 4, 2016), https://www.washingtonpost.com/opinions/the-military-wouldnt-save-us-from-president-trumps-illegal-orders/2016/03/04/9ef8fd44-e0ea-11e5-846c-10191d1fc4ec_story.html [https://perma.cc/8C2J-RXYF] (arguing that military commanders must obey the orders of their civilian leaders even when the legality of an operation is questionable and concluding by urging the citizenry not to “forget to vote”).

*if other voices warn in advance that the proposed action is a mistake.*¹⁵²

Incontestably, civilian authorities have the “right” to the final say as to policies and directions given to the armed forces—even if, as the CP/BP suggests, they are “wrong” or a “mistake.” However, challenges arise when the policy or direction is more than a mere “mistake” but is, in the sincerely held opinion of the military member, *immoral* (albeit legal).¹⁵³ As previously noted, the Manual for Courts-Martial provides that, “the dictates of a person’s conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.”¹⁵⁴

Ironically, Professor Feaver—one of the Letter’s organizers—retreated from the right-to-be-wrong mantra in a 2016 article:

However, one can easily conjure up hypotheticals that are worse than a temporary loss of civilian control—say a direct nuclear attack on the homeland. If all that was needed to stop a nuclear attack on the homeland was for the military to refuse to implement a legal but unwise policy, then in that case I would certainly prefer the temporary interruption in civilian control followed by the rapid reinstatement of the constitutional order.¹⁵⁵

As admirable as Professor Feaver is, his proposal is a mistaken and, ultimately, an unworkable proposition. Simply because the stakes are high—even existential—does not mean that a “temporary interruption in civilian control” is an acceptable path for proper professional conduct. There are also practical issues, including that the military may not be privy to information that the president or another civilian authority finds dispositive. For example, in reacting to a 2010 article where a military officer insisted that there were circumstances where a “military officer is not only justified but also obligated to disobey a legal order,”¹⁵⁶ Professor Kohn vigorously disputed the idea on legal, philosophical, and practical grounds:

¹⁵² Carter et al., *supra* note 1.

¹⁵³ See discussion *supra* Section G.

¹⁵⁴ MCM, *supra* note 123, at pt. IV, ¶ 14.b.(2)(a)(iv).

¹⁵⁵ Peter Feaver, Opinion, *Will the Military Obey President Trump’s Orders?*, FOREIGN POL’Y (Feb. 29, 2016), <https://foreignpolicy.com/2016/02/29/will-the-military-obey-president-trumps-orders-hayden-bill-maher/> [<https://perma.cc/AUD6-GLVE>].

¹⁵⁶ Andrew R. Milburn, *Breaking Ranks: Dissent and the Military Professional*, U.S. ARMY (Oct. 26, 2010), https://www.army.mil/article/47175/breaking_ranks_dissent_and_the_military_professional [<https://perma.cc/YF7F-TS3R>].

How would an officer know all the considerations involved, and by what authority or tradition is it legitimate to violate the will of the people's elected or appointed officials? Against what standard would even the most senior officer judge? Whose morality, whose definition of what's good for the country, a service, or subordinates?¹⁵⁷

Unfortunately, this CP/BP does not address the hard questions that can bedevil civil-military relations: other than disobedience or resignation,¹⁵⁸ what should a senior military officer do when a civilian in authority gives direction that is inarguably wrong albeit legal? What if it will inevitably cause unnecessary deaths? An example of the dilemma was highlighted in a *Washington Post* article examining the fraught withdrawal from Afghanistan in 2020.¹⁵⁹ The *Post* reports:

Senior White House and State Department officials failed to grasp the Taliban's steady advance on Afghanistan's capital and resisted efforts by U.S. military leaders to prepare the evacuation of embassy personnel and Afghan allies weeks before Kabul's fall, placing American troops ordered to carry out the withdrawal in greater danger, according to sworn testimony from multiple commanders involved in the operation.¹⁶⁰

The issue could then be this: do civilian leaders embarking on a dangerous, ill-considered plan have a "right" to the silence of military leaders? Or would the "best practice" be in such cases to inform Congress, so it can fulfill *its* civilian-control responsibilities? The answer may well be "yes," but it would have been helpful if the signers had used the Letter to share their views as to a "best practice" for such not unimaginable situations.

¹⁵⁷ Thomas E. Ricks, Opinion, *Richard Kohn fires a warning flare about a Joint Force Quarterly article*, FOREIGN POL'Y (Sept. 29, 2010), <https://foreignpolicy.com/2010/09/29/richard-kohn-fires-a-warning-flare-about-a-joint-force-quarterly-article/> [<https://perma.cc/NTU9-5PJJ>] (quoting Dr. Richard H. Kohn).

¹⁵⁸ See Richard H. Kohn, R. H., *On Resignation*, 43 ARMED FORCES & SOCIETY 41, 41 (2017) (contending that "[a]rguments in favor of the topmost senior officers exercising 'principled resignation' in opposition to policies, decisions, or orders that they find immoral, unethical, or disastrous for the country weaken the military profession and endanger American national security").

¹⁵⁹ Dan Lamothe and Alex Horton, *Documents reveal U.S. military's frustration with White House, diplomats over Afghanistan evacuation*, WASH. POST (Feb. 8, 2022), <https://www.washingtonpost.com/national-security/2022/02/08/afghanistan-evacuation-investigation/> [<https://perma.cc/EFV3-WEV8>].

¹⁶⁰ *Id.*

K. CP/BP 11

*Military officials are required to carry out legal orders the wisdom of which they doubt. Civilian officials should provide the military ample opportunity to express their doubts in appropriate venues. Civilian and military officials should also take care to properly characterize military advice in public. Civilian leaders must take responsibility for the consequences of the actions they direct.*¹⁶¹

This CP/BP follows from CP/BP 10, but it raises more questions than it answers. What are the “appropriate venues” for military officials to express their doubt about “legal orders” as this CP/BP suggests?¹⁶² This could be complex ground for military officers. In the 1974 landmark case *Parker v. Levy*,¹⁶³ the Supreme Court discussed Article 133 of the Uniform Code of Military Justice, which criminalizes “conduct unbecoming an officer.”¹⁶⁴ The Court noted:

The armed forces depend on a command structure that, at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.¹⁶⁵

Similarly, it is unclear what the Letter meant by “[c]ivilian and military officials should also take care to properly characterize military advice *in public*.”¹⁶⁶ Does this mean that the public should know that military authorities disagreed with the civilian leaders’ decision? The Letter could also suggest military leaders should publicly correct civilian leaders when their advice has been mischaracterized. While there may be times when this is appropriate,¹⁶⁷ the context does matter, so military officers would be well-advised to proceed with great caution.

¹⁶¹ Carter et al., *supra* note 1.

¹⁶² *Id.*

¹⁶³ 417 U.S. 733 (1974).

¹⁶⁴ 10 U.S.C. § 933.

¹⁶⁵ *Levy*, 417 U.S. at 759.

¹⁶⁶ Carter et al., *supra* note 1 (emphasis added).

¹⁶⁷ Charlie Dunlap, *Servicemembers and public debates: Ideas for navigating today’s rocky political environment*, LAWFIRE (Mar. 29, 2018), <https://sites.duke.edu/lawfire/2018/03/29/servicemembers-and-public-debates-ideas-for-navigating-todays-rocky-political-environment/> [https://perma.cc/7PSJ-XJEU].

Finally, stating that civilian leaders “must take responsibility for the consequences of the actions they direct” is an understandable impulse.¹⁶⁸ However, the law does not require them to do so. What are the signers suggesting military members do when it does not happen? Furthermore, “must” military leaders likewise take similar responsibility for the consequences of the actions *they* take? If not, why not? In either situation, how should the “take responsibility” process this CP/BP discusses be accomplished? If there is no practical way to effectively accomplish that, the signers ought to be cautious about raising the expectations of the military, especially among junior personnel.

L. CP/BP 12

*The military reinforces effective civilian control when it seeks clarification, raises questions about second-and third-order effects, and proposes alternatives that may not have been considered.*¹⁶⁹

Again, like several other CP/BPs, junior personnel could misconstrue this CP/BP if it is applied to lawful orders, which is not clear from the text. There are undoubtedly times when such deliberations can take place but not always. As a reminder, the Supreme Court cautioned: “An army is not a deliberative body. It is the executive arm. Its law is that of obedience.”¹⁷⁰

Frankly, military members should not expect to take time to “seek clarification” or “raise questions” about orders. The Manual states:

*Time for compliance. When an order requires immediate compliance, an accused’s declared intent not to obey and the failure to make any move to comply constitutes disobedience. Immediate compliance is required for any order that does not explicitly or implicitly indicate that delayed compliance is authorized or directed.*¹⁷¹

Similarly, in the 1983 case of *Chappell v. Wallace*,¹⁷² the Supreme Court observed:

¹⁶⁸ Carter et al., *supra* note 1.

¹⁶⁹ *Id.*

¹⁷⁰ *In re Grimley*, 137 U.S. 147, 153 (1890).

¹⁷¹ MCM, *supra* note 123, at pt. IV, ¶ 14.b.(2)(a)(v)(g) (emphasis added).

¹⁷² 462 U.S. 296 (1983).

The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; *the habit of immediate compliance with military procedures and orders must be virtually reflex, with no time for debate or reflection.*¹⁷³

While seeking clarification of an order can certainly be a best practice when authorized in a certain circumstance, there is no evidence that the “military reinforces effective civilian control” when the law regarding the time for compliance of lawful orders is undermined.

M. CP/BP 13

*Mutual trust—trust upward that civilian leaders will rigorously explore alternatives that are best for the country regardless of the implications for partisan politics and trust downward that the military will faithfully implement directives that run counter to their professional military preference—helps overcome the friction built into this process. Civil-military teams build up that reservoir of trust in their day-to-day interactions and draw upon it during times of crisis.*¹⁷⁴

Undoubtedly, mutual trust is a valued element of any relationship. But to merely call for trust that “civilian leaders will rigorously explore alternatives that are best for the country regardless of the implications for partisan politics” obfuscates the real problem for the military. Civilian leaders, specifically, the elected representatives in the legislative branch who are of the opposite party to that of the president—may hold different visions of what is “best for the country.” Walking that political tightrope presents a challenge for those in uniform. One person’s well-intended trust-building activity with political appointees of the current administration may be perceived as partisan pandering to other observers, such as influential members of the opposite party in the Legislative branch or the public.

The only solution the signers offer for military members is to “build up that reservoir of trust in their day-to-day interactions and draw upon it during times of ‘crisis.’” The problem here is complicated. Whatever merit this CP/BP may have within the Pentagon and other high-level venues, many in the armed forces do not have “day-to-day interactions” with political leaders in the defense establishment, let alone those of the opposite party or that of the Executive.

¹⁷³ *Id.* at 300 (emphasis added).

¹⁷⁴ Carter et al., *supra* note 1.

Consequently, establishing a “reservoir of trust” with specific individuals to draw upon “during times of crisis” with respect to rank-and-file troops, who are often at the proverbial “pointy-end of the stick,” is impossible in most circumstances. Preparation for “times of crisis” ought to emphasize planning and creating a resilient governance *architecture* that does not depend on the personalities of the current leadership.

To be clear, trust-building is important and obviously desirable. Yet the national defense enterprise must function at an extraordinarily high level in times of crisis. This is so even if key leaders are unfamiliar or, if known, are not necessarily persons for whom military leaders have much confidence. In the national security setting, leaders who may dislike each other *must* be professional enough to work collaboratively. In sum, trust needs to be built about the *system*, as much as with individuals within it.

N. CP/BP 14

*The military—active-duty, reserve, and National Guard—have carefully delimited roles in law enforcement. Those roles must be taken only insofar as they are consistent with the Constitution and relevant statutes. The military has an obligation to advise on the wisdom of proposed action and civilians should create the opportunity for such deliberation. The military is required ultimately to carry out legal directives that result. In most cases, the military should play a supporting rather than a leading role to law enforcement.*¹⁷⁵

The “carefully delimited roles in law enforcement” are more about policy preference than a legal limitation. True, there is the Posse Comitatus Act, the 1878 criminal statute that generally prohibits the military from being used “as a posse comitatus or otherwise to execute the laws,”¹⁷⁶ but charged violations are rare. In fact, prior to the Act, the military performed law enforcement duties, notwithstanding the Founders aversion to “standing armies.”¹⁷⁷ Today there are

¹⁷⁵ *Id.*

¹⁷⁶ 18 U.S.C. § 1385.

¹⁷⁷ See JENNIFER K. ELSEA, CONG. RSCH. SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 5–6 (2018), <https://sgp.fas.org/crs/natsec/R42659.pdf> [<https://perma.cc/AG2R-QLJN>]. The Congressional Research Service points out: “Notwithstanding the founders’ aversion to the use of a standing army to control the civilian populace, the Constitution nowhere explicitly prohibits it, and Congress lost no time in authorizing the President to call out the militia for the purposes permitted

numerous exceptions to the Act,¹⁷⁸ and there are many instances where the military has been lawfully deployed domestically to restore order.¹⁷⁹

Notably, it is important to recall that the current “delimited role” sourced in the Posse Comitatus Act has a decidedly racist origin.¹⁸⁰ During Reconstruction, Federal troops remained in the South to protect the rights of freed slaves, essentially, a law enforcement role. This infuriated southern Democrats since it enabled Black voters to be instrumental in keeping Republicans in power throughout the former Confederacy. The issue arose in the hotly contested election of 1876 between Democrat Samuel Tilden and Republican Rutherford B. Hayes. Eventually, a deal was struck where Hayes received the presidency, and the Democrats received the troops withdrawn from the South as well as the Posse Comitatus Act.¹⁸¹ A scholar described the disturbing result: “Not only did the Act virtually end the Reconstruction era, but it promoted Jim Crow Laws while foreclosing the progression towards racial tolerance the 13th, 14th and 15th Amendments encouraged within the Southern States.”¹⁸²

Beyond the numerous exceptions to the Act,¹⁸³ the assessment of the degree to which the military’s role may be “delimited,” should consider the view Congress expressed in legislation in 2002.¹⁸⁴ At that time Congress acknowledged the importance of the Posse Comitatus Act but also expressed this “sense of Congress”:

under the Constitution. Despite the retention of most police powers by the several states, Congress quickly established a law enforcement capability in the federal government in order to effectuate its constitutional powers and provide a means to enforce the process of federal courts. This authority was vested through the President in federal marshals, who were empowered to call upon the posse comitatus to assist them, an authority similar to that enjoyed by the sheriff at common law, and which was understood to include the authority to call for military assistance.”
Id.

¹⁷⁸ *Id.* at 31–36.

¹⁷⁹ See, e.g., PAUL J. SCHEIPS, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945–1992*, CTR. OF MIL. HIST., U.S. ARMY (2012).

¹⁸⁰ The author draws on his previous work to inform this discussion. Charlie Dunlap, *General dissent: examining a case study of “retired officer activism,”* LAWFIRE (Nov. 1, 2020), <https://sites.duke.edu/lawfire/2020/11/01/general-dissent-examining-a-case-study-of-retired-officer-activism/> [https://perma.cc/34XH-DG4Y].

¹⁸¹ See generally MATT MATTHEWS, *THE POSSE COMITATUS ACT AND THE UNITED STATES ARMY: A HISTORICAL PERSPECTIVE* (2006).

¹⁸² Axel Melkonian, *The Posse Comitatus Act: its Reconstruction Era Roots and Link to Modern Racism*, SYDNEY U. L. SOC’Y (Sept. 2, 2020), <https://www.suls.org.au/citations-blog/2020/8/28/the-posse-comitatus-act-its-reconstruction-era-roots-and-link-to-modern-racism> [https://perma.cc/AQQ8-XQL4].

¹⁸³ See ELSEA, *supra* note 177, at 31–36.

¹⁸⁴ 6 U.S.C. § 466.

[T]he Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress *or the President determines* that the use of the Armed Forces is *required to fulfill the President's obligations under the Constitution* to respond promptly in time of war, insurrection, *or other serious emergency*.¹⁸⁵

This should not suggest that the armed forces be the first recourse in the event of civil disorders.¹⁸⁶ Rather, it is to put the “delimited” role in a larger historical context. Military leaders should also note that the antipathy some leaders, scholars, and pundits hold about the use of the military during domestic disorders is not necessarily widely held among the public.¹⁸⁷ This may be useful for military leaders concerned about the “optics” of using the military during domestic strife.¹⁸⁸

O. CP/BP 15

*There are significant limits on the public role of military personnel in partisan politics, as outlined in longstanding Defense Department policy and regulations. Members of the military accept limits on the public expression of their private views—limits that would be unconstitutional if imposed on other citizens. Military and civilian leaders must be diligent about keeping the military separate from partisan political activity.*¹⁸⁹

¹⁸⁵ *Id.* (emphasis added).

¹⁸⁶ See, e.g., Charles J. Dunlap, Opinion, *Putting Troops on the Beat*, WASH. POST (Sept. 30, 2006), <https://www.washingtonpost.com/wp-dyn/content/article/2006/09/29/AR2006092901518.html> [<https://perma.cc/9EYD-6XS6>]; Charles J. Dunlap, *The Police-ization of the Military*, 27 *J. OF POL. & MIL. SOCIO.* 217 (1999).

¹⁸⁷ Nicholas Reimann, *58% Of Voters Support Using Military To Help Police Control Protests, Poll Finds*, FORBES (June 2, 2020), <https://www.forbes.com/sites/nicholasreimann/2020/06/02/58-of-voters-support-using-military-to-help-police-control-protests-poll-finds/?sh=340319942417> [<https://perma.cc/9APG-LF3D>].

¹⁸⁸ Rebecca Kheel, *DC Guard chief agrees ‘optics’ slowed deployment during Capitol riot*, THE HILL (Mar. 3 2021), <https://thehill.com/policy/defense/541409-dc-guard-chief-backs-up-law-enforcement-account-of-key-jan-6-call/> [<https://perma.cc/8JGD-T2U2>].

¹⁸⁹ Carter et al., *supra* note 1.

There is absolutely nothing wrong with advocating that the military be kept separate from partisan political activities. After all, the Supreme Court counseled: military policies that keep the military “insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes . . . [are] wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control.”¹⁹⁰

However, applying this truism is difficult in a world where virtually everything is politicized. Accusations of partisanship may arise when a military leader’s views about a military matter align with a political party. Yet, the silence of military leaders may also be interpreted as partisan support in a hyper-polarized world. Consequently, while the law recognizes that the military must “accept limits on the public expression of their private views,” it is imperative, this Article contends, that *civilian* leaders accept that military leaders have an independent responsibility for public candor (in the appropriate circumstances) about military matters within their purview. Civilian leaders must accept this even if such candid expression would be something intolerable from an employee in a civilian company.¹⁹¹

Finally, the CP/BP is correct to reference “partisan” political activity and avoid a call for an “apolitical” military as the concern as opposed to politics itself. In a 2020 article, civil-military relations scholars Jim Golby and Mara Karlin put it this way:

We don’t want a military that is “apolitical”; we instead want a military that avoids partisanship, institutional endorsements, and electoral influence. Those topics should stay off-limits, but politics are too critical to be entirely ignored by the military. The military is a political creature—it’s time for it to consider what that means in a more practical and appropriate manner.¹⁹²

Indeed, Professor Risa Brooks similarly warns that the “problem is not, as many might suspect, that officers are too political; it is that they think they can

¹⁹⁰ Greer v. Spock, 424 U.S. 828, 839 (1976).

¹⁹¹ See Charlie Dunlap, *Servicemembers and public debates: Ideas for navigating today’s rocky political environment*, LAWFIRE (Mar. 29, 2018), <https://sites.duke.edu/lawfire/2018/03/29/servicemembers-and-public-debates-ideas-for-navigating-todays-rocky-political-environment/> [https://perma.cc/457P-ZKTH].

¹⁹² Jim Golby and Mara Karlin, *The case for rethinking the politicization of the military*, BROOKINGS (June 12, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/06/12/the-case-for-rethinking-the-politicization-of-the-military> [https://perma.cc/PNR7-88SW].

ignore politics altogether.”¹⁹³ She adds that the “dominant culture of professionalism in the military today maintains a strict separation between the military and civilian spheres and bars officers from thinking about politics.”¹⁹⁴ Brooks believes the current military culture undercuts military effectiveness and calls for revised professional education and other corrective measures. She says:

Rather than distancing themselves from engagement with politics altogether, officers should strive to become politically aware and astute. This will prepare them to constructively engage with politics when necessary, such as during strategic assessment, and to cultivate the mindset needed to keep the military out of the partisan fray.¹⁹⁵

P. CP/BP 16

*During presidential elections, the military has a dual obligation. First, because the Constitution provides for only one commander-in-chief at a time, the military must assist the current commander-in-chief in the exercise of his or her constitutional duty to preserve, protect, and defend the Constitution of the United States. Second, because the voters (not the military) decide who will be commander-in-chief, they must prepare for whomever the voters pick—whether a reelected incumbent or someone new. This dual obligation reinforces the importance of the principles and best practices described above.*¹⁹⁶

The wording of this CP/BP inadvertently invites application of the axiom, *expressio unius est exclusio alterius*, which holds that when “one or more things of a class are expressly mentioned others of the same class are excluded.”¹⁹⁷ Thus, this clarification may be in order: The military’s obligation to “assist the current commander-in-chief in the exercise of his or her constitutional duty to preserve, protect, and defend the Constitution of the United States” *always* applies, *not* just during “presidential elections” as the CP/BP 16 references.

¹⁹³ Risa Brooks, *The Real Threat to Civilian Control of the Military*, FOREIGN AFFS. (Jan. 18, 2021), <https://www.foreignaffairs.com/articles/united-states/2021-01-18/real-threat-civilian-control-military> [<https://perma.cc/899Z-YLWG>].

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Carter et al., *supra* note 1.

¹⁹⁷ *Expressio unius est exclusio alterius*, MERRIAM-WEBSTER (last visited Feb. 8, 2023), <https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius> [<https://perma.cc/MZC9-CZ8H>].

Furthermore, the statement that “the voters (not the military) decide who will be commander-in-chief” could suggest that military members are not also voters.¹⁹⁸ Indeed, there is a notion among some military members and civilians that voting is itself a partisan act that should be avoided by those in uniform. As detailed elsewhere, this is an unfortunate and unwise idea.¹⁹⁹ Accordingly, military and civilian leaders ought to remind the public, including media organizations and public opinion surveyors, of the federal law provisions that make it a crime to poll members of the armed forces:

. . . with reference to his choice of or his vote for any candidate, or states, publishes, or releases any result of any purported poll taken from or among the members of the Armed Forces of the United States or including within it the statement of choice for such candidate or of such votes cast by any member of the Armed Forces of the United States . . .²⁰⁰

As noted elsewhere, “Americans should not have to even think about the possible implications for themselves of a survey of active-duty military personnel that shows a preference by the nation’s most physically powerful institution for a candidate different from their own.”²⁰¹ In sum, the CP/BP is correct in insisting that the military must be prepared to support whoever is elected commander-in-chief.

¹⁹⁸ The U.S. Department of Defense (DoD) actively encourages military members to vote and considers doing so a civic duty. *See, e.g.,* Terry Moon Crock, *Service Members, Civilians Bound by DOD Rules During Election Campaigns*, DEP’T OF DEF. NEWS (Sept. 8, 2020), <https://www.defense.gov/News/News-Stories/Article/Article/2208332/service-members-civilians-bound-by-dod-rules-during-election-campaigns/> [<https://perma.cc/AZU6-4CTG>] (stating that DoD “encourages and actively supports its personnel in their civic obligation to vote”).

¹⁹⁹ Charles J. Dunlap, Opinion, *It’s wrong to suppress the military vote*, THE HILL (Oct. 20, 2016), https://thehill.com/blogs/pundits-blog/defense/302082-its-wrong-to-suppress-the-military-vote/#disqus_thread [<https://perma.cc/ZJ89-5C46>].

²⁰⁰ 18 U.S.C. § 596.

²⁰¹ Charlie Dunlap, *Are surveys of electoral preferences of active-duty military cause for concern?*, LAWFIRE (Oct. 29, 2020), <https://sites.duke.edu/lawfire/2020/10/29/are-surveys-of-electoral-preferences-of-active-duty-military-cause-for-concern/> [<https://perma.cc/AFF7-8JHP>].

CONCLUSION

The Letter's organizers, drafters, and signers deserve much credit for attempting to address the vital issue of civilian control of the military. One can only imagine the many challenges of trying to get thirteen senior military and civilian leaders from administrations of both political parties to agree upon a text. However, the proverbial 'devil' is in the details. Those details can significantly impact how particular norms and best practices regarding civil-military relations can—or should—be employed. Broad generalities without context or details are problematic when trying to instruct about these sensitive topics in today's complicated civil-military relations ecosystem.

Furthermore, the apparent lack of an acute legal editing eye causes an easily avoidable lack of clarity in the phrasing of the CP/BPs. As noted above with respect to CP/BP 6 and CP/16, there are instances where presumably unintended inferences of wording could lead readers astray. While these critiques are certainly minute, they indicate a failure to appreciate the difficulty of fully implementing this Letter. A document distributed to an audience as large as the entire US military and with inevitable impact requires especially comprehensive revision.

So, what to do? The great military theorist Carl von Clausewitz may be a helpful resource.²⁰² He says “[e]verything is very simple in war, but the simplest thing is difficult” and adds that “[t]hese difficulties accumulate and produce a friction, which no man can imagine exactly who has not seen war.”²⁰³ He argues that “to give a clear conception of the host of small difficulties to be contended with in war, we might go on heaping up illustrations, if we were not afraid of being tiresome.”²⁰⁴ Clausewitz contends that these illustrations which “give a clear conception” of the difficulties are most effective when they are drawn from actual experience.²⁰⁵ As he explains:

[T]he correct theorist is like a swimming master, who teaches on dry land movements which are required in the water, which must appear grotesque and ludicrous to those who forget about the water. This is also why theorists, who have never plunged in themselves, or who cannot deduce any generalities from their experience, are

²⁰² Azar Gat, *Carl von Clausewitz*, ENCYC. BRITANNICA (Jan. 17, 2023), <https://www.britannica.com/biography/Carl-von-Clausewitz> [<https://perma.cc/JUJ6-GDJ3>].

²⁰³ Carl von Clausewitz, *VOM KRIEGE* (1832), *translated in* J.J. Graham, *ON WAR* 77 (1873).

²⁰⁴ *Id.* at 79.

²⁰⁵ *Id.*

unpractical and even absurd, because they only teach what everyone knows—how to walk.²⁰⁶

Therefore, despite the Letter's noble intentions, it represents a missed opportunity. The signers are, ironically, people who have "plunged . . . themselves" into the choppy waters of civil-military relations. But instead of relying on their actual experiences to effectively illustrate and provide context for their points, they overly rely on academic-style bromides that are too broad and nebulous for practical implementation in the complex environment of modern civil-military relations.

To reiterate, this Article acknowledges that this Letter is a highly valued contribution to civil-military relations literature. As previously stated, it succeeds in making several valuable points, and it will no doubt be particularly prized by senior officers operating in the Washington, D.C. area. Moreover, it gives insight into the views that this exceptionally high-level group was willing to agree upon *en masse*. Even if that is its only contribution (which clearly is not the case), it alone would make the Letter worthy of study, as such collective expressions are rare.

Although the Letter seemingly aspired to be a stand-alone document suitable for wide distribution, some of the assertions are too vulnerable to misinterpretation and misapplication, especially in the legal context. The Letter is better suited as an indispensable adjunct to a more fully inclusive discussion of what can be convoluted civil-military relations issues in today's America.

²⁰⁶ *Id.*