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Civil-Military Relations: Guidelines in Politically Charged Societies

Patrick Paterson

ABSTRACT: Current events warrant a review of US civil-military relations doctrine. This special commentary examines eight principles of military subordination to elected civilian officials and addresses the fundamental question at the heart of civil-military relations theory and practice, namely, what options, if any, does the military professional have when civilian leadership disregards military advice? Examples drawn from US history can provide an important framework for understanding the complex interrelational dynamics at play.

Keywords: civil-military, apolitical, civilian, defense policy, US Constitution, professionalism

Civil-military relations theories are well developed and readers can examine the works of leading scholars to understand the origins and importance of the interdependence of the armed forces and elected officials. Space limitations prevent a lengthy literature review, but readers interested in the theoretical issues behind the topic should consult the works of US scholars such as Samuel Huntington, Morris Janowitz, Richard Kohn, Eliot Cohen, Peter Feaver, and Marybeth Ulrich. Of note, the 2009 edited collection of essays published by Suzanne C. Nielsen and Don M. Snider, *American Civil-Military Relations: The Soldier and State in a New Era*, is a particularly valuable examination of US military and civilian practices.¹ The field lacks clear, practical rules military officers—particularly senior military officers who work closely with civilian counterparts—can use to guide their interactions with civilian leaders. This special commentary addresses that need.

The military's responsibility is centered on the technical expertise and operational requirements related to the application of military force. While the military serves as a government organization that designs and executes military operations, it does not determine their necessity.² In other words, the role of the military is to advise civilian authorities on how to employ the armed forces to achieve the policymakers' goals, not to make political decisions or to determine

1. Suzanne C. Nielsen and Don M. Snider, eds., *American Civil-Military Relations: The Soldier and the State in a New Era* (Baltimore: Johns Hopkins University Press, 2009).

2. Douglas L. Bland, "A Unified Theory of Civil-Military Relations," *Armed Forces and Society* 26, no. 1 (Fall 1999); and Peter D. Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Cambridge, MA: Harvard University Press, 2003).

when the military should be used. As other scholars have written, a military that can choose its missions is not compatible with the principles of a democratic state.³

The working relationships between senior military leaders and civilian officials are complex. Civilians often make the final decision on whether to employ the armed forces, but they need input from experienced military officers to ensure the force is applied in an effective manner. Since most US military operations are foreign—domestic military operations are permitted only in exceptional cases—the military must ensure it does not get ahead of its State Department counterparts who are responsible for foreign policy.

Fundamental Rules of US Civil-Military Relations

There are eight generally accepted practices military officers should follow when adhering to the expectations of US civil-military relations. Surprisingly, these practices are not written succinctly in a military manual. Instead, they can be extracted from top scholars on the subject, from biographies of senior military officials, and from the advice senior military leaders provide in interviews, essays, and speeches. This analysis of the basic concepts associated with subordination to civilian-elected officials derives the fundamental behavior expected of military officers, explains the rules, and provides examples from US history.

While the eight practices sound simple, even unremarkable, they are difficult to apply. Most security problems are multifaceted due to competing interests, and they offer no clear or calculable costs-benefits analysis on how to proceed. There are diplomatic, economic, and political consequences to each course of action and assessing which one is most beneficial is a difficult task.

Remain Apolitical

The first key principle of the US military, and perhaps the most important characteristic of professional armed forces, is to remain apolitical. The military prides itself on being a disciplined, all-volunteer, professional force that is subordinate to and respectful of civilian leadership. Due deference to the president, the secretary of defense, and other elected civilian officials is part of the military culture. Taking sides in Washington politics, which can be hyper-polarized, could damage the institutional reputation of the armed forces by

3. J. Samuel Fitch, "Military Attitudes toward Democracy in Latin America: How Do We Know If Anything Has Changed?," in *Civil-Military Relations in Latin America: New Analytical Perspectives*, ed. David Pion-Berlin (Chapel Hill: University of North Carolina Press, 2001), 78–96; and Pat Paterson, "Measuring Military Professionalism in Partner Nations: Guidance for Security Assistance Officials," *Journal of Military Ethics* 18, no. 2 (July 2019): 152.

associating it with the dishonest and corrupt practices many Americans connect with Washington policymakers. The political gridlock, disorder, and inefficiency are anathema to military officers who value honor, order, sacrifice, and patriotism over politics. According to public opinion polls, US constituents hold the military in high esteem while regarding political parties and Congress with contempt. The politicization of the armed forces could also taint the advice senior officers provide to civilian members of the defense community because the military might be seen as having a political agenda. Department of Defense regulation and the Hatch Act forbid active-duty military members from political participation and campaigning for candidates during election campaigns.⁴

Consider, the posture of the Joint Chiefs of Staff during the president's annual State of the Union address. The chairman, vice chairman, and chiefs of staff of the branches of the armed forces sit in a place of honor in Congress near the front row. Rather than applaud when the president makes points, they do not react and sit attentively but unemotionally in their chairs. Any reaction, if made, could be construed as political advocacy.

Most senior military officers maintain this apolitical practice throughout their active-duty service. General Joseph Dunford, the first chairman of the joint chiefs of staff under President Donald J. Trump stayed out of the political infighting in the nation's capital. "I've worked very hard to remain apolitical and not make political judgments," he said. Taking a political position is just "not in my lane," he added.⁵ Dunford served as chairman from May 2015 to September 2019 when he turned the position over to General Mark Milley. When asked if he would remain silent on the political turmoil once he retired, Dunford emphatically said, "I will not now nor will I, when I take off the uniform, make judgments about the President of the United States or the Commander in Chief. I just won't do it."⁶

Provide Candid Military Advice

The second fundamental practice is that senior military officers are required to provide objective advice about military policy. The counsel should be nonpartisan, nondeliberative, and, if required, include advice contrary to what politicians want to hear or that goes against current policy. The information

4. Active-duty military personnel are prohibited from engaging in partisan political activity. See Department of Defense (DoD) Standards of Conduct Office, "Guidance on Political Activity and DoD Support," July 6, 2016; and DoD, "Political Activities by Member of the Armed Forces, DoD Directive 1344.10, February 19, 2008.

5. Dan Lamothe and Missy Ryan, "Top General Defends Behavior of U.S. Troops in a 'Very Politically Turbulent Time'" *Washington Post* (website), August 28, 2019, https://www.washingtonpost.com/world/national-security/top-general-defends-behavior-of-us-troops-in-a-very-politically-turbulent-time/2019/08/28/8ef919ba-c9c1-11e9-8067-196d9f17af68_story.html.

6. Lamothe and Ryan, "Top General Defends Behavior."

should include an explanation of what the military operations will entail, the military objectives, the number of personnel and equipment required for mission success, and the limitations of such actions. The rule is to advise on how to use the armed forces, not to advocate for a specific course of action. Civilian decisionmakers should not feel the military is exerting undue influence on one course of action over another.

Candidness is the key requirement. Former Defense Secretary Robert Gates advised cadets at the US Military Academy at West Point, New York, “If as an officer you don’t tell blunt truths—or create an environment where candor is encouraged—then you’ve done yourself and the institution a disservice.”⁷ Former Marine General Anthony Zinni says such counsel is a military obligation regardless of the politics of the moment. “It is the obligation to give unvarnished professional military advice, despite administrative preferences . . . it is an obligation that comes with the uniform.”⁸ Retired Admiral James Stavridis, the most prolific military author of recent history, advised officers to express their opinions in military journals: “Don’t be afraid—have the moral courage to vet your ideas responsibly and sensibly. In virtually every case of which I am aware, even the most controversial articles are respected as attempts to contribute.”⁹

Civilian Authorities Retain Control over All Aspects of Defense Policy

The third practice has to do with authorities. Many students of US national security believe there are two distinct spheres of authority between civilian and military officials. Civilian-elected officials oversee the larger strategic interests of the country, including the decision of when to deploy the military, while the armed forces make operational and tactical decisions if the military is called to action.¹⁰

Theory is one thing while the practice can be entirely different. Today, most scholars agree civilians have extensive control over nearly all aspects of military policy. In other words, the relationship between civilian leaders and military officers is not equal. Civilians have most of the authority and can make decisions, even ones affecting the traditional authorities of the armed forces: promotions, personnel assignments, and operational and tactical issues, for example. Some authorities may be delegated

7. Thom Shanker, “Defense Chief Advises Cadets on Disagreeing with Leaders,” *New York Times*, April 22, 2018, A18.

8. Anthony Zinni, Remarks at the Center for Defense Information, March 27, 2006. Also reported in Marybeth Ulrich and Martin Cook, “US Civil Military Relations since 9/11: Issues in Ethics and Policy Development,” *Journal of Military Ethics* 5, no. 3 (2006): 169.

9. James Stavridis, “Read, Think, Write, and Publish,” *Proceedings*, August 2008, 16–19.

10. Paterson, “Measuring Military Professionalism,” 151.

to military officials, but civilians retain a veto power over military decisions. Richard Kohn stated the issue succinctly when he wrote, “the military possesses no autonomy of any kind not derived from civilian political institutions.”¹¹

Strategic planning is based on assumptions and when those assumptions are incorrect, military operations can go awry very quickly. As Peter Feaver says, “the civilians have the right to be wrong.”¹² When civilians make these strategic errors, military servicemembers must accept the mistakes as part of the difficulty of managing complex military operations in a democracy. An example of this type of error is the 2004 US Marine Corps assault on Fallujah, Iraq. Three days into the battle, civilian leaders in Iraq ordered the marines to cease operations in order to seek a peaceful solution and to prevent unnecessary bloodshed. The decision was unpopular with the marines who realized it arrested their operational momentum and permitted the enemy to rearm and refortify their positions. Marine Corps leaders dutifully complied but chided civilians about operational interference. “I would simply say that when you order elements of a Marine division to attack a city, you really need to understand the consequences of that, and not, perhaps, vacillate in the middle of that. Once you commit to do that, you have to stay committed,” said Lieutenant General James Conway, the commander of US Marine forces during the operation.¹³

Provide Congressional Testimony Prudently

The fourth rule concerns the dual responsibility the military has to the executive and legislative branches. According to the US Constitution, the US military serves at the direction of the president (in his role as commander in chief) and certain designated officials in the executive branch. To maintain the checks and balances so critical to the US system, Congress approves the military budget, determines the size of the armed forces, provides valuable oversight, and has the authority to declare war.

For these reasons, senior military officers can be called before the elected leaders of Congress to testify on military strategy and operations. For instance, the commanders of the regional and functional combatant commands, such as US Central Command or US Cyber Command, provide testimony on an annual basis to the Senate Armed Services Committee and House

11. Thomas E. Ricks, “Richard Kohn Fires a Warning Flare about a *Joint Force Quarterly* Article,” *Foreign Policy* (website), September 29, 2010, <https://foreignpolicy.com/2010/09/29/richard-kohn-fires-a-warning-flare-about-a-joint-force-quarterly-article/>.

12. Peter Feaver, *Armed Servants*, 5.

13. Anne Barnard, “Commander Disagreed with Invasion,” *Boston Globe* (website), September 13, 2004, http://archive.boston.com/news/world/articles/2004/09/13/commander_disagreed_with_invasion/; and Rajiv Chandrasekaran and Karl Vick, “US Opts to Delay Fallujah Offensive,” *Washington Post*, April 26, 2004, A1.

Armed Services Committee as part of the dual accountability of the armed forces according to the US Constitution.

The requirement to serve two co-equal branches of government—the executive branch represented by the president and secretary of defense on one side and the legislative branch represented by the armed services committees on the other—can present serious civil-military relations problems. Since disputes between the president, the secretary of defense, and senior military officers about military strategy and operational decisions frequently occur, these differences can often surface during testimony to Congress. Congressional opponents of the president can exploit disagreements between the president and his military advisers to their political advantage, portraying the president as being at odds with his generals and admirals. President Eisenhower referred to the requirement for congressional testimony as “legalized insubordination.”¹⁴

What should senior officers do when they are required to testify before Congress on a policy the secretary of defense or the commander in chief disputed? Their principal responsibility is to follow the institutional requirement to provide candid advice and options to civilian leaders of the defense community and National Command Authority.

Second, officers should avoid being led into politically explosive dialogue. Congressional committees—particularly publicly broadcast ones watched by voters—are public forums where political grandstanding often occurs. Few actions are more impactful than for the public to hear generals and admirals admit they do not agree with the president’s strategy or policy. With that in mind, senior military officials must exercise tact, discretion, and agility when testifying before Congress.

Senior military officers must understand the executive and legislative branches are co-equal branches of the government and, regardless of either’s political ideology, both serve important roles in the employment of the nation’s armed forces. Testifying without whitewashing or misrepresenting the facts should be the goal of all military officers. Congressional leaders have an important right to hear unvarnished analysis about military capabilities and operations. As Nielsen and Snider state, “honest and open testimony to Congress is obedience to a constitutional principle and an officer’s allegiance is not just to the state, but to the democratic nature of the state.”¹⁵

14. *Public Papers of the Presidents of the United States: Dwight D. Eisenhower*, January 1 to December 31, 1958 (Washington, DC: Office of the Federal Register: 1958), 122.

15. Suzanne C. Nielsen and Don M. Snider, eds., *American Civil-Military Relations: The Soldier and the State in a New Era* (Baltimore: Johns Hopkins University Press, 2009), 187.

Avoid Publicly Criticizing Defense Policy and Policymakers

Active-duty officers should not publicly criticize civilian defense officials nor defense policy. To do so is a form of insubordination and disrespect that may undermine the authority of the civilian leader and the confidence other servicemembers have in him or her. Once a senior military officer has provided complete advice to civilian leaders, the military officer must trust the civilian policymaker to make the best decision possible. Furthermore, it is against Article 88 of the Uniform Code of Military Justice (UCMJ) for officers to use contemptuous words against the president, the vice president, the secretary of defense, or the civilian service secretaries, and they may be subject to court-martial for speaking in a derogatory manner about civilian leaders. The rule is designed to maintain discipline within the military services and ensure subordination to civilian authorities.

Remaining respectful to civilian counterparts is easier to do in theory than in practice. Tensions between military and civilian officials are normal as they wrestle with difficult decisions regarding force employment, budget, acquisitions, and operations. Disputes over military courses of action are common, and civilian officials often opt for strategies that run contrary to the military leadership's recommendations.

Senior military officers have been fired from their posts or forced to retire for making disparaging remarks about civilian leaders. In June 1993, Air Force Major General Harold Campbell was forced to retire after calling President Clinton a "dope smoking, draft dodging" Commander in Chief.¹⁶ Admiral William Fallon, commander of US Central Command from 2007–08, was forced to retire early when he spoke critically and publicly against the Bush administration's policy toward Iran. General Stanley McChrystal was forced to resign after his personnel staff made derogatory comments about civilian leaders in the Obama administration.¹⁷

Even If Retired, Avoid Criticizing Civilian Defense Officials

The sixth principle is the most debated. Should military officers remain apolitical once they retire from active-duty service? Retired senior military officers continue to wield political influence and are normally held in high esteem by the public. Hence, conventional thinking is retired officers should avoid criticizing defense policy or civilian defense officials just as they did while on active duty.

16. Eric Schmitt, "General to Be Disciplined for Disparaging President: The *Rolling Stone* Profile of Stanley McChrystal That Changed History," *New York Times*, June 16, 1993.

17. Michael Hastings, "The Runaway General: The Profile That Brought Down McChrystal," *Rolling Stone* (website), July 13, 2010, <https://www.rollingstone.com/politics/politics-news/the-runaway-general-the-profile-that-brought-down-mcchrystal-192609/>.

Following retirement, however, they are technically civilians, and unlike their active-duty counterparts, no Department of Defense regulations prohibit them from openly criticizing civilian defense officials. Certain categories of retired military personnel are still accountable under the Uniform Code of Military Justice though prosecutions are rarely pursued. Following the January 6, 2021, attack on the Capitol, in which many retired and active-duty military servicemembers participated, this policy is in the spotlight again.

During the 2016 presidential election, retired Marine Corps General John Allen campaigned for Hillary Clinton, and retired Army Lieutenant General Michael Flynn spoke at the Republican National Convention in support of Trump. The political advocacy of these and other retired officers prompted former Chairman of the Joint Chiefs of Staff General Martin Dempsey to write an editorial in the *Washington Post* reminding retired military officers “they have an obligation to uphold our apolitical traditions.”¹⁸

Furthermore, retired former senior military officers frequently become defense-policy guest experts on news shows. Their observations as “military analysts” carry weight even though they do not officially represent the Department of Defense. Retired officers can criticize current defense policy, or they can become paid advocates for the same defense policy to bolster public support for an administration’s defense strategy.¹⁹

Trump’s rhetoric during the 2016 presidential campaign drew criticism from several retired officers before the November 2016 election. In March 2016, about 122 senior foreign affairs officials—eventually labeled “never Trumpers”—signed a letter stating in unequivocal terms that Trump was unfit to hold the office of the president. In August 2016, an additional 50 officials signed another public letter declaring him unfit.²⁰

One of the first retired flag officers to criticize Trump was Admiral William H. McRaven, former commander of Special Operations Command. In February 2017, a little more than a month after Trump’s inauguration, McRaven said, “the President’s attack on the media is the greatest threat to our democracy

18. Martin Dempsey, “Letters to the Editor: Military Leaders Do Not Belong at Political Conventions,” *Washington Post* (website), July 30, 2016, https://www.washingtonpost.com/opinions/military-leaders-do-not-belong-at-political-conventions/2016/07/30/0e06fc16-568b-11e6-b652-315ae5d4d4dd_story.html.

19. David Barstow, “Behind TV Analysts, Pentagon’s Hidden Hand,” *New York Times* (website), April 20, 2008, <https://www.nytimes.com/2008/04/20/us/20generals.html>; and James Golby et al., “Brass Politics: How Retired Military Officers Are Shaping Elections,” *Foreign Affairs* (website), November 5, 2012, <https://www.foreignaffairs.com/articles/2012-11-05/brass-politics>.

20. War on the Rocks Staff, “Open Letter on Donald Trump from GOP National Security Leaders,” War on the Rocks (website), March 2, 2016, <https://warontherocks.com/2016/03/open-letter-on-donald-trump-from-gop-national-security-leaders/>; and David E. Sanger and Maggie Haberman, “50 G.O.P. Officials Warn Donald Trump Would Put Nation’s Security ‘at Risk,’” *New York Times* (website), August 6, 2016, <https://www.nytimes.com/2016/08/09/us/politics/national-security-gop-donald-trump.html>.

in my lifetime.”²¹ In August 2018, McRaven wrote a scathing *Washington Post* editorial criticizing Trump for what he considered unethical and truculent policies, stating, “Through your actions, you have embarrassed us in the eyes of our children, humiliated us on the world stage and, worst of all, divided us as a nation.”²² While he was referring to the revocation of the security clearance of former Director of National Intelligence John Brennan, he was also upset about some Trump policies—the Muslim travel ban, the revocation of security clearances of former officials who had criticized the president, his referral to the press as the “enemy of the state,” his unexplainable support for Vladimir Putin, and his backing of White supremacists in Charlottesville, Virginia.

McRaven—at least, initially—was one of the few retired officers to castigate the president publicly. For example, following his resignation as secretary of defense on December 20, 2018, retired General James Mattis was reticent to speak out against the president.²³ He preferred to remain silent and honor the time-bound tradition of retired military officers not criticizing the president or secretary of defense, claiming, “You need to give the people [in the Trump administration] as much opportunity as possible to defend the country . . . without me adding my criticism to the cacophony that is right now so poisonous.”²⁴

Mattis defended his reluctance to abandon his political neutrality. “You don’t endanger the country by attacking the elected commander in chief,” he said. “I may not like a commander in chief one fricking bit, but our [democratic

21. Jake Tapper and Devan Cole, “Architect of bin Laden Raid: Trump ‘Threatens the Constitution’ When He Attacks the Media,” CNN (website), November 19, 2018, <https://www.cnn.com/2018/11/18/politics/donald-trump-william-mcraven/index.html>; and Kristine Phillips, “‘Greatest Threat to Democracy’: Commander of bin Laden Raid Slams Trump’s Anti-media Sentiment,” *Washington Post* (website), February 24, 2017, <https://www.washingtonpost.com/news/checkpoint/wp/2017/02/23/greatest-threat-to-democracy-commander-of-bin-laden-raid-slams-trumps-anti-media-sentiment/>.

22. William H. McRaven, “Opinion: Revoke My Security Clearance, Too, Mr. President,” *Washington Post* (website), August 16, 2018, https://www.washingtonpost.com/opinions/revoke-my-security-clearance-too-mr-president/2018/08/16/8b149b02-a178-11e8-93e3-24d1703d2a7a_story.html; see also William H. McRaven, “Opinion: William McRaven: If Good Men Like Joe Maguire Can’t Speak the Truth, We Should Be Deeply Afraid,” *Washington Post* (website), February 21, 2020, https://www.washingtonpost.com/opinions/william-mcraven-if-good-men-like-joe-maguire-cant-speak-the-truth-we-should-be-deeply-afraid/2020/02/21/2068874c-5503-11ea-b119-4faabac6674f_story.html; and John Nagl, “Opinion: Retired Generals Warned Us about Rumsfeld. Now They’re Warning Us about Trump,” January 9, 2019, *Washington Post* (website), https://www.washingtonpost.com/opinions/retired-generals-warned-us-about-rumsfeld-now-theyre-warning-us-about-trump/2019/01/09/98dbae94-1430-11e9-803c-4ef28312c8b9_story.html.

23. Julian E. Barnes and Eric Schmitt, “Trump Orders Withdrawal of US Troops from Northern Syria,” *New York Times* (website), October 13, 2019, <https://www.nytimes.com/2019/10/13/us/politics/mark-esper-syria-kurds-turkey.html>; and Helene Cooper, “Jim Mattis, Defense Secretary, Resigns in Rebuke of Trump’s Worldview,” *New York Times* (website), December 20, 2018, <https://www.nytimes.com/2018/12/20/us/politics/jim-mattis-defense-secretary-trump.html>.

24. Quint Forgy, “Mattis Says He Owes Trump Silence but Won’t Keep Quiet Forever,” Politico (website), August 29, 2019, <https://www.politico.com/story/2019/08/29/mattis-trump-criticism-1477663>; and Katie Shepherd, “‘I Earned My Spurs on the Battlefield’: Mattis Jabbed Trump. Critics Say He Hasn’t Gone Far Enough,” *Washington Post* (website), October 18, 2019, <https://www.washingtonpost.com/nation/2019/10/18/i-earned-my-spurs-battlefield-mattis-jabbed-trump-critics-say-he-hasnt-gone-far-enough/>.

election] system puts the commander in chief there.”²⁵ He resigned a day after the president announced an abrupt troop withdrawal from Syria, a decision contrary to the advice of top military advisers who were not consulted by Trump nor informed of the decision before the public announcement. Trump later walked back the decision when Chairman of the Joint Chiefs of Staff Milley persuaded him to leave a smaller force of US Special Forces in the area. In his resignation letter, Mattis wrote the president has, “the right to have a Secretary of Defense whose views are better aligned with yours on these and other subjects, I believe it is right for me to step down from my position.”²⁶

Execute Legal Orders

As Huntington wrote, “When the military man receives a legal order from an authorized superior, he does not hesitate, he does not substitute his own views; he obeys instantly.”²⁷ Military officers must comply with orders from civilians even if they have reservations about the logic of the command and whether it is militarily prudent. Obedience is one of the principal pillars of military norms; one can disagree but not disobey.

Military officers have several unprofessional tactics, although contrary to military obedience, they can use to ignore or block a superior’s orders. Richard Kohn lists a few them: taking an inordinate amount of time to comply with the command, leaking information to the press in the hopes public exposure will force the withdrawal of the order, getting congressional leaders involved, or purposely failing to complete the task in an effective manner.²⁸

Refuse to Execute Illegal Orders

The final fundamental principle considers the options military officers have when given illegal orders. To many military officers, refusing to follow illegal orders may sound like a simple, black-and-white decision: military personnel must not abide by orders that are illegal. However, what constitutes “illegal” is often ambiguous and confusing. Subordinates who receive dubious orders may

25. Dan Lamothe and Greg Jaffe, “Emerging from His Silence, Mattis Faces Criticism for Trying to Take the ‘Middle Road’ on Trump,” *Washington Post* (website), August 29, 2019, https://www.washingtonpost.com/national-security/after-months-of-silence-mattis-faces-criticism-for-trying-to-take-the-middle-road-on-trump/2019/08/29/7f4c0e10-ca8d-11e9-be05-f76ac4ec618c_story.html.

26. Julian E. Barnes and Eric Schmitt, “Trump Orders Withdrawal of U.S. Troops From Northern Syria,” *Washington Post*, October 16, 2019; and Helene Cooper, “Jim Mattis, Defense Secretary, Resigns in Rebuke of Trump’s Worldview,” *New York Times*, December 20, 2018.

27. Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge, MA: Belknap Press of Harvard University Press, 1957), 73.

28. Richard H. Kohn, “The Erosion of Civilian Control of the Military in the United States Today,” *Naval War College Review* 55, no. 3 (Summer 2002): 15–16, <https://digital-commons.usnwc.edu/nwc-review/vol55/iss3/2/>.

find it challenging to determine if the order is truly contrary to an established legal precedent. The legality of an order may be much more nuanced than a clear delineation between legal and illegal orders that are easily distinguishable to the junior party.

Certainly, there are some orders that should not be obeyed: intentionally killing civilians, mistreating prisoners, torture, unnecessarily destroying civilian property, using human shields, rape, and hostage taking, for example. These incidents constitute war crimes and are illegal in accordance with US law, the Geneva Conventions, and customary international law. Clear violations of the principles of armed conflict (humanity, moderation, discrimination, and military necessity) should also be rejected, although there is much more subjectivity in these definitions. Some non-derogable human rights are never permitted to be suspended or denied under any circumstances.²⁹

The strict codes of military obedience and discipline implicitly discourage juniors from questioning orders. According to Article 92 of the Uniform Code of Military Justice, it is a crime to disobey a lawful order, and doing so during wartime is punishable by death. Rosa Brooks, former Department of Defense senior counsel, asserts the military's culture of obedience and subordination to civilian leadership inhibits the military's ability to reject illegal orders.³⁰ Brooks observes, "Officers rarely respond with a flat-out 'no' when senior civilian officials start playing fast and loose with the law."³¹ Soldiers are more likely to defer to the orders of superiors rather than question their legality, especially during times of conflict when hesitation could mean operational failure or risk to one's unit.

To understand the propensity of military personnel to defer to senior officials, consider the following example from recent US military history. When the Bush administration chose to use torture against detainees in Iraq and elsewhere in 2003—a decision that clearly violated international and US law—military officers raised objections that such actions were illegal and unethical. Yet, no military servicemembers refused the orders, resigned in protest, or raised the

29. Patrick Paterson, *The Blurred Battlefield: The Perplexing Conflation of Humanitarian and Criminal Law in Contemporary Conflicts* (Tampa, FL: Joint Special Operations University, March 2021), 15–16, 27; and see also Non-Derogable Rights and Freedoms under Article 4(2) of the International Covenant on Civil and Political Rights, Article 29(2) of the Universal Declaration of Human Rights (UDHR), and articles 27(1) and 27(2) of the American Convention on Human Rights.

30. Rosa Brooks, "The Military Wouldn't Save Us from President Trump's Illegal Orders," *Washington Post*, March 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.htm.

31. Rosa Brooks, "If Trump Orders War Crimes, the Military Will Face an Impossible Task," *Washington Post* (website), January 8, 2020, <https://www.washingtonpost.com/outlook/2020/01/08/if-trump-orders-war-crimes-military-will-face-an-impossible-choice/>.

issue with congressional leaders. Despite serious reservations about illegal orders, they followed the orders of their civilian superiors.³²

If a civilian superior insists a military officer comply with an illegal order, what options are available? The servicemember has three choices. First, comply with the illegal order. Second, agree to follow the order but move slowly, hoping someone intervenes to correct the situation or the incident gets resolved before action is required. Third, refuse to follow the order and keep a clear conscience.

The first option, compliance—even if one suspects the order is illegal—is the default option under normal circumstances. For reasons explained previously, military officers often do not have, nor are they expected to have, a comprehensive understanding of the many factors that may have gone into the decision-making process followed by civilian officials.

If an officer chooses incorrectly and complies with the illegal order, he will have to live with his conscience and any subsequent investigation that might find him morally or criminally complicit in an illegal action. If the officer knows the order is illegal and decides to comply with it regardless, he could be intentionally committing a crime. The defense, “I was only following orders,” is not a valid justification and has been rejected in many famous military trials, including the Nuremberg Trials, the trial of William Calley for the 1968 My Lai Massacre, and the trial of military guards at the Abu Ghraib detention facility in Iraq.

The second option, agreeing with the order but failing to comply with it, is counter to the military values of obedience and discipline. “Shirking” or “slow rolling” is also considered insubordinate because officers are expected to comply with orders promptly without delay.

The third option is for the officer to refuse the order and explain to the person who issued the dubious command why he will not comply with it. To make that weighty decision, he must have knowledge about why the action is illegal. This raises a requirement to educate military officers on ethics and actions forbidden by law (for example, war crimes or crimes against humanity). Recent incidents demonstrate at least some US servicemembers do not clearly understand those issues.³³ In sum, professional military officers must

32. Rosa Brooks, “Military Wouldn’t Save Us”; and Neil A. Lewis, “Military’s Opposition to Harsh Interrogation Is Outlined,” *New York Times* (website), July 28, 2005, <https://www.nytimes.com/2005/07/28/politics/militarys-opposition-to-harsh-interrogation-is-outlined.html>.

33. Paterson, *Blurred Battlefield*, 86–87.

have a significant level of ethical and legal awareness to perform their jobs effectively and honorably.

The subject of resignation comes up frequently in these instances. Some civil-military scholars believe resigning is a form of protest that could undermine civil authority. According to Kohn, for example, there is no place in a professional military for resignations in protest. In nearly all cases, military officers should always “salute and obey.” Anything other than an officer’s unconditional compliance with orders could subvert the military obedience critical to good order and discipline. According to Kohn, “nothing would undermine (the civil-military balance) more than a resignation by a senior military officer.” For this reason, “there is no tradition of military resignation in the United States, no precedent—and for good reason,” he wrote.³⁴

Throughout US military history, few (if any) senior military officers have resigned to protest civilian defense policy. General Milley, during testimony to Congress, explained the military’s perspective:

As a senior military officer, resigning is a really serious thing and it’s a political act if I’m resigning in protest. It would be an incredible act of political defiance for a commissioned officer to just resign because my advice is not taken. This country doesn’t want generals figuring out what orders we’re going to accept and do or not. [Enlisted service members] don’t get a choice to resign and I’m not going to turn my back on them. They can’t resign, so I’m not going to resign. If the orders are illegal, we’re in a different place, but if the orders are legal from civilian authority, I intend to carry them out.³⁵

Conclusion

Neither civilians nor military officers should blindly defer to the other. Both groups have important expertise to contribute to security solutions that often require a whole-of-government response. The interrelational chemistry must be sufficiently healthy to permit a constructive civil-military relations dialogue.

To ensure all senior military officers understand the liberties and limits of apolitical armed forces, service war colleges should teach these functional guidelines. It is necessary but insufficient to examine only the theories and histories of US civil-military relations. Practical codes of behavior supported by real-world examples are essential to illustrate the complex relations with civilian decisionmakers. This article is not a siren’s call for a politically active military.

34. Richard B. Myers and Richard H. Kohn, “Salute and Disobey? The Civil-Military Balance, before Iraq and After,” *Foreign Affairs* (website), September/October 2007.

35. General Mark Milley, testimony to Senate committee, September 28, 2021.

It is the opposite. The guidelines proposed here are meant to help the next generation of senior military officers successfully navigate Washington's contentious political environment.

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