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The Dangers of Undermining U.S. Civil–Military Relations

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A fundamental element of U.S. civil–military relations is the principle of civilian control of the military. This principle pre-dates the Constitution itself. As Commander in Chief of the Continental Army, George Washington deferred to the Continental Congress, despite the severe disabilities of that body. The Constitution codified the principle of civilian control. Civilian policymakers would establish the goals of security policy and provide the material resources. The military would carry out the policy. If military leaders disagree with aspects of the policy, they can express their differences and make recommendations, but they have no right to insist that their advice be accepted. Civil–military relations are healthiest when there is mutual trust between civilians and the military, leading to a respectful give and take.

Historians of civil–military relations often focus their attention on disputes between civilian policymakers and the military, judging healthy civil–military relations in terms of the number of times that one party or the other has its way. By this metric, the more often the civilians prevail, the healthier civil–military relations are assessed to be—at least until the presidency of Donald Trump. During Trump's first term, he and his military advisors clashed over such issues as our relationship with NATO, U.S. military actions in Afghanistan, intervention in Syria, and the appropriate response to domestic disorder. When his military advisors and Trump disagreed, the former frequently responded with subterfuge to undermine the President's ability to implement his agenda: "slow rolling" execution, leaking to the press in an effort to undermine public confidence in the decision, or simply ignoring the policy. Bureaucracies have perfected these kinds of responses to policies with which they disagree, and those in the senior ranks of the military are often no different. But under Trump, the military employed these tactics to an unprecedented extent.

Some went even further. For example, right after Trump's first inauguration, Georgetown Law Professor Rosa Brooks—a respected academic and senior Pentagon appointee from 2009 to 2011—wrote in *Foreign Policy* that Trump's "first week as president has made it all too clear [that] he *is* as crazy as everyone feared. [One] possibility is one that until recently I would have said was unthinkable in the United States of America: a military coup, or at least a refusal by military leaders to obey certain orders." Brooks continued that, for the first time, she could "imagine plausible scenarios in which senior military officials might simply tell the president: 'No, sir. We're not doing that.'"

There is a name for this: praetorianism. From the time of Augustus Caesar until Constantine, a corps of soldiers known as the Praetorian Guard protected the Roman emperor. Over time, the Praetorians became the real power in Rome, appointing and deposing emperors at will. In our time, praetorianism has come to mean despotic military rule, something associated with countries in which the army is the real power behind the government. Praetorianism is incompatible with republican government. A modern failed example was the attempted coup against French President Charles de Gaulle in 1961, which arose from a praetorian bent on the part of French officers who sought to depose him over his intention to grant independence to Algeria.

Seditious Video?

During his second term, many of Trump's political enemies have taken up where Rosa Brooks left off. Perhaps the most troubling example occurred recently when six Democrat members of Congress posted a video aimed at service members. The video features U.S. Senators Elissa Slotkin of Michigan and Mark Kelly of Arizona and U.S. Representatives Maggie Goodlander of New Hampshire, Jason Crow of Colorado, and Chris Deluzio and Chrissy Houlahan of Pennsylvania—all of whom are either military veterans or former intelligence officials.

In the video, the lawmakers "remind" active members of the military and national security community that they swore to protect and defend the U.S. Constitution. "Right now, the threats to our Constitution aren't just coming from abroad, but from right here at home," Deluzio, a former Navy officer, and Crow, a former Army Ranger and paratrooper, say in turn. Kelly, a former Navy Captain, then says, "Our laws are clear: You can refuse illegal orders," which Slotkin, a former CIA officer, repeats. Crow then adds that military members "must refuse illegal orders" before the others say, "No one has to carry out orders that violate the law or our Constitution." And they all pledge that when service members refuse to carry out illegal orders, "We have your back."

Of course, regarding unlawful orders, these members of Congress are correct. All service members learn early in their training that they have an affirmative obligation to refuse unlawful orders. But service members do not get to refuse orders because they disagree with the administration's policies. And this video, at the very least, carelessly blurs the line between these things in a way to undermine trust between civilian policymakers and the military and between seniors and subordinates within the military.

The video was clearly political in nature and is likely to foster confusion within the military ranks. The lawmakers failed to identify any specifics regarding unlawful orders. Nor did they offer examples of the kinds of orders soldiers should refuse to obey. Without context, the phrase "refuse illegal orders" blurs the line between legitimate legal instruction and political signaling. For a system that depends on discipline, clarity, and stability, ambiguity is a real problem.

The civil–military implications are serious. Civilian control of the military rests on a clear hierarchy. Congress passes laws, the executive directs operations, and the military follows lawful commands. By addressing the troops directly about which orders to follow, the participants in the video disrupt that structure. Military leaders, not legislators, are responsible for issuing guidance to troops on how to evaluate or report questionable orders. The seriousness of the issue is underlined by the fact that the video comes from politicians rather than military authorities. The video draws service members into a political dispute, sowing discord, which is especially dangerous during periods of political tension.
The President and his supporters have called the video seditious. There have been suggestions that at least one of the lawmakers in the video, Senator Kelly, be called back to active duty to face a court-martial. Even some conservative lawyers, such as Jonathan Turley and Andrew McCarthy, have argued that a sedition case would be dismissed immediately, because those on the video were exercising their right to free speech. But one's right to oppose a policy does not extend to efforts to interfere with those obligated to execute that policy—which is the effect of the video, intended or not.

The Civil War provides an analogous example. There were many people in the North who disagreed with President Lincoln's policies. But some northern Democrats, who came to be known as Copperheads, crossed the line from dissent to obstruction of the war effort by interfering with recruitment and encouraging desertion. In 1863, anti-war Ohio Democrat Congressman Clement Vallandigham

was arrested and tried by military tribunal for sabotaging the government's war policies. A group of War Democrats wrote to Lincoln, pledging support for the war, but criticizing the prosecution of Vallandigham "merely for his words." Lincoln replied that Vallandigham was encouraging desertion from the army, an act that is punishable by death. "Must I shoot a simple-minded soldier who deserts," Lincoln asked, "while I must not touch a hair of a wily agitator who induces him to desert?" There are some important similarities between the actions of the Copperheads and those of the participants in the recent video.

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When queried, the six lawmakers in the video were unable to identify a single example of an "unlawful order" issued by Trump or his administration. That changed temporarily in late November when *The Washington Post* reported, citing anonymous sources, that Secretary of War Pete Hegseth had ordered an illegal second strike on a drug boat aimed at killing drug traffickers. Accusations of war crimes quickly dissolved, however, as *The New York Times* followed up with a story debunking the *Post*'s account, and Admiral Frank Bradley, who himself ordered the second strike, testified before Congress.

Nonetheless, the question of the legality of military strikes on drug cartels remains a source of the claim that the Trump administration is operating outside the law. Another source for that claim is the administration's use of military force in cases of domestic disorder. In both cases, Trump's policies have historical precedents.

Domestic Disorder

Trump's critics claim that deploying National Guard and regular U.S. military forces to enforce the law in American cities violates civil–military norms, is unconstitutional, and is an irresponsible use of the professional military. But while there may be good reasons to limit the use of the U.S. military in domestic affairs, U.S. troops have been so employed since the beginning of our republic. Indeed, the U.S. Army Historical Center has published three 400-page volumes on the use of federal military forces in domestic affairs.

The authority of the president to use force in response to domestic disorder arises from the Constitution itself. Section 4 of Article IV reads: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

The fundamental purpose of a republican government is to protect its citizens' rights to life, liberty, and property. Although the First Amendment to the Constitution guarantees "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," it does not protect riot, arson, and looting.

Under Article II of the Constitution, the president, as "Commander in Chief of the Army and Navy of the United States"—and of the militia when under federal control—has the authority to act against enemies both foreign and domestic. In 1792, Congress passed two laws pursuant to its constitutional power "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions": the Militia Act and the "Calling Forth" Act, which gave the president limited authority to employ the militia in the event of domestic emergencies.

In 1807, at the behest of President Thomas Jefferson—troubled by his inability to use the regular Army as well as the militia to deal with the Aaron Burr conspiracy to establish an independent country within the U.S.—Congress passed the Insurrection Act. Although intended as a tool for suppressing rebellion when circumstances "make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings," it also enabled the Army to enforce federal laws, not only as a separate force, but also as part of a local *posse comitatus* (a group conscripted to enforce the law). Accordingly, troops were often used in the antebellum period to enforce fugitive slave laws and suppress domestic violence. In 1854, President Franklin Pierce's attorney general, Caleb Cushing, issued an opinion that endorsed the legality of using the Army in a *posse comitatus*:

A marshal of the United States, when opposed in the execution of his duty, by unlawful combinations, has authority to summon the entire able-bodied force of his precinct, as a *posse comitatus*. The authority comprehends not only bystanders and other citizens generally, but any and all organized armed forces, whether militia of the state, or officers, soldiers, sailors, and marines of the United States.

Troops were used to suppress domestic violence between pro- and anti-slavery factions in "Bloody Kansas," and federal soldiers and Marines participated in the capture of John Brown at Harpers Ferry in 1859. After the Civil War, the U.S. Army was involved in supporting the Reconstruction governments in the southern states. Presidents invoked the Insurrection Act on five occasions during the 1950s and 1960s to counter resistance to desegregation decrees in the South. And during

the Los Angeles riots of 1992, elements of U.S. Army and Marine divisions augmented the California National Guard.

Those who have criticized President Trump for threatening to use the National Guard and possibly the Marines "against the will of state governors" might want to consider what happened when some southern governors refused to execute the 1954 Supreme Court mandate to integrate schools. In 1957, Arkansas Governor Orval Faubus deployed his state's National Guard to defy federal authority by preventing the integration of a high school in Little Rock. President Dwight D. Eisenhower responded by placing the Arkansas National Guard under federal control and deploying soldiers of the 101st Airborne Division to enforce the law. In a letter to Eisenhower, Democrat U.S. Senator Richard Russell of Georgia compared soldiers of the 101st Airborne Division to Hitler's "storm troopers," illustrating that the *argumendum ad Hitlerem* often deployed against Trump is nothing new.

Many today claim that the Posse Comitatus Act of 1878 (PCA) prohibits the use of the military in domestic affairs. But they completely misunderstand that law.

In the election of 1876, President Ulysses S. Grant deployed Army units as a *posse comitatus*—under the authority of local law enforcement officials—to protect the rights of black citizens and Republicans in general at southern polling places. In that election, Rutherford B. Hayes defeated Samuel Tilden with the disputed electoral votes of South Carolina, Louisiana, and Florida. Southerners claimed that the Army had been misused to "rig" that election, which led to the passage of the PCA two years later. But the PCA only prohibits federal troops from being placed under lesser authorities than that of the president. It does not constitute a bar to the use of the military in domestic affairs, and it certainly does not limit the president's authority as Commander in Chief of the U.S. military.

As John Brinkerhoff, an authority on the use of the military in domestic affairs, wrote in 2002: "The president's power to use both regulars and militia remained undisturbed by the Posse Comitatus Act."

Drug Trafficking

Trump's critics charge him with violating both domestic and international law by using the U.S. military to target drug cartels and drug runners, claiming that his actions are unprecedented. But as far back as the Reagan administration in 1986, U.S. Army infantry and aviation assets operated with Bolivian forces against drug producers in that country. And in 1993, President Bill Clinton issued a Presidential Decision Directive on Counternarcotics in the Western Hemisphere, assigning a substantial role in drug interdiction to the military.

The National Defense Authorization Act of 1995 authorized use of military assets in drug interdiction: 14 USC Section 526 authorizes firing on vessels carrying drugs, and 8 USC Section 1189 authorizes the designation of narco-terror groups as Foreign Terrorist Organizations, unlocking powers used by every administration since 9/11. As for international law, the United Nations Convention on the Law of the Sea authorizes military force against suspected stateless vessels engaged in piracy and slave trafficking, essentially labeling them *hostis humani generis*, meaning enemies of mankind.

The Trump administration has proceeded in accordance with legal prudence. Admiral Alvin Holsey, Commander of U.S. Southern Command, properly sought legal justification for the strikes on suspected drug boats. Subsequently, the Justice Department Office of Legal Counsel advised the Pentagon that the strikes were legal under both U.S. and international law, that all strikes have been conducted in "complete compliance with the law of armed conflict," and that U.S. troops would not be exposed to prosecution for carrying out the orders. It is legitimate to argue that Trump's policy regarding these strikes is wrongheaded, but it is not unprecedented. Indeed, his interpretation of what constitutes the boundary of his military authority is historically ordinary.

But what about the lack of congressional approval for the use of force against narco-traffickers? In this regard, Trump's policy is comparable to the Obama administration's war in Libya and extensive drone attacks, the Biden administration's attacks on Houthi targets in Yemen, and indeed, going way back, President Jefferson's attack on the Barbary Pirates. All these were undertaken without congressional approval. Trump's actions in the Caribbean are well within U.S. political norms.

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I am on record opposing the use of the military in the war on drugs and the normalization of using U.S. forces in domestic law enforcement. But the fact is that President Trump has the constitutional and legal authority to do these things. Any arguments against his policies must be made in terms of prudence, not the Constitution or the law. Also, it should be needless to say—although today, sadly, it isn't—that opposition to Trump's policies should be expressed in a way that is careful not to undermine the principle of civilian control of the military that is fundamental to U.S. civil–military relations.