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## Breaking Ranks?

Paul Yingling

There is no constitutional principle more important to a democracy than civilian control of the military. Unless the armed guardians of the state remain strictly subordinate to civil authority, no other liberty can long remain safe. In “Breaking Ranks: Dissent and the Military Professional,” (*Joint Force Quarterly*) Lt. Col. Andrew Milburn challenges this vital constitutional principle, arguing that “there are circumstances under which a military officer is not only justified but also obligated to disobey a legal order.”

Milburn bases this argument on three propositions. First, that a military officer’s commission and professional standing “grant him moral autonomy and obligate him to disobey an order he deems immoral.” Importantly, Milburn defines an immoral order as one “likely to harm the institution writ large—the Nation, military, and subordinates.” Second, that “the military professional’s obligation to disobey is an important check and balance in the execution of policy.” Finally, that “the military officer must understand that this dilemma demands either acceptance of responsibility or wholehearted disobedience.”

The first proposition elevates military officers to the status of morally autonomous actors ultimately accountable only to their own consciences. Unlike other government officials, Milburn’s military professional may substitute his judgment for the will of the public as expressed in law and the lawful orders of elected or appointed leaders. The benchmark by which Milburn’s morally autonomous professional makes such a judgment is the individual officer’s morality. Milburn’s moral criteria are particularly interesting – the wellbeing of the Nation, the military and subordinates are co-equal priorities. Indeed, Milburn asserts that military officers have “sworn to defend the Constitution and safeguard the welfare of his subordinates.” The actual terms of the military officer’s oath are instructive:

I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

Unlike Milburn’s oath, the military officer’s oath prescribed by the US Code says nothing about the health of the military institution or the welfare of subordinates. However important these goals may be, no act of law makes them co-equal with the preservation of the Constitution.

Nevertheless, as Milburn's officers must answer first to their own consciences, they may equate the interests of the military with those of the country, and act accordingly.

Milburn's second proposition elevates the military to a fourth branch of government with veto power over the actions of the other three. Milburn uses explicitly constitutional language in arguing that his officers must exercise a "check and balance" against unwise policies. In a particularly telling example, Milburn argues that a military officer would have been justified in refusing to disband the Iraqi Army in 2003. This decision violates at least two of Milburn's criteria in considering whether or not to exercise the "military veto": that such an order may lead to mission failure and that it will needlessly get a service member injured or killed. Under such conditions, Milburn disputes the argument that an officer be is bound to obey "simply because the orders reflected policy decisions." Moreover, such refusal would constitute a veto with no possibility for appeal. Unlike the other branches of government, there are no means to override the veto of Milburn's morally autonomous officers.

The third element of Milburn's argument is less a proposition than a first step into a maze of logical contradictions and dangerous implications. In exploring the consequences of military dissent, Milburn asserts that his argument "does not challenge civilian control of the military. Civilian leaders retain the authority to direct and fire military leaders who prove inept or disobedient." However, dismissal from service is merely another lawful order that Milburn's officer is free to evaluate and veto if necessary. If the president's dismissal of one of Milburn's officers is harmful to the nation, or the military, or its service members, the officer has no obligation to obey. Milburn rejects such a possibility, arguing that "the United States is quite different" from other countries. Milburn is partially right; the United States is different from others to the extent that everyone is equal before the law. American military officers are valued public servants only to the extent that they obey the law. They are after all made of the same genetic material as the centurions who followed Caesar across the Rubicon. If we grant Milburn's morally autonomous officers absolute power, we will corrupt them absolutely.

Perhaps the most chilling passage of Milburn's work deals with my article in the January 2010 *Armed Forces Journal*, "The Founders' Wisdom." In this article I argue that Congress must reassert its war powers to prevent the executive branch from overreaching its authority. Milburn argues that no such legislative check is necessary. Instead, we can entrust our security to "our country's military leaders" so long as they "employ moral and intellectual rigor in adhering to their oath of office and professional ethics."

However regrettable Milburn's arguments may be, we ought to thank him for making these views public. Many others who apparently share his views lack his candor. Anonymous military officers' bitter condemnations of civil authorities have become standard fare in many media outlets. These are the officers we should truly fear – those who skulk sullenly in corners with like-minded victims of alleged civilian malfeasance, drawing their wages while condemning the society that pays them.

After reading "Breaking Ranks," I fear the Rubicon may be closer than we think.

*Lieutenant Colonel Paul L. Yingling is an Army officer who has served three tours of duty in Iraq and is currently a professor of security studies at the George C. Marshall Center in Garmisch, Germany. The views expressed here are the author's own and do not necessarily reflect those of the Army or Defense Department.*

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