

2020.07.28, Case in Point with Professor Claire Finkelstein and General Joseph Votel

[00:00:03] Welcome to a case in point. Produced by the University of Pennsylvania, Kerry Law School. My name is Claire Finkelstein and I'm the Algernon Biddle, professor of law and professor of philosophy here at the law school. I am also the faculty director of Penn's Center for Ethics and the Rule of Law. Joining me today is General Joseph Hotel, retired commander of U.S. Central Command and a member of the executive board of the Center for Ethics and the Rule of Law. He is also the CEO of Business Executives for National Security, or BEND'S. We are here to discuss his recent blog post on the rule of law. Host Searle's blog, which was published on June 6th, entitled An Apolitical Military is essential to Maintaining Balance among American Institutions. Welcome, General Votel.

[00:00:53] Great to be with you. Clara, thanks very much.

[00:00:55] And thanks so much for joining us. So in your blog post, you said there are three key reasons that our military enjoys the high reputation it does and has in general captured the confidence of the American people. And that is, number one, it respects civilian control of the military. Number two, it represents the people it serves. Number three, it remains a political. Can you tell us first with regard to the the civilian control of the military? Why is civilian control of the military important and what does it mean for our democratic system?

[00:01:34] You know, we we recognize that civilians are there, you know, provide the leadership of the military.

[00:01:40] That is a guarantee within our system. And we don't want a we don't want a process whereby military members and leaders are making all the decisions, not just on what happens militarily, but absent on policy wise. And there's a long and well-established tradition in the military that we we are beholden to the civilian leadership. And, you know, this is a protection put in through the Constitution and through all the all the mechanisms are put in place to ensure that that is the case. And so we respect the civilian leadership where they come from this party or that party regardless. And we recognize that the civilian leadership represents the confidence and the vote of the American people and embodies in that that person who holds that particular office, all the authorities that go along with being the commander in chief. And so it's been a long held, you know, not just transition, but certainly a requirement within our system. And I would just say that as a you know, as a as a military officer who's spent a lot of time traveling the world and and working with our international partners, that this is a point that we consistently talk with them about the importance of a military that answers to the civilian control. If you've been someplace where you see it is it is not that is not the case. You can oftentimes see abuse of the system by by the military. You see of a lack of confidence in the military, by the people. The military takes on the role of being an oppressor in these cases. So the civilian control of the military ensures that we don't trip over into those less desirable aspects of that and that we that we keep this grounded in the constitutional authorities.

[00:03:40] Yet it's very complicated sometimes managing that relationship. For example, civilian leadership can be highly political. Things can be very contentious. Yet, as you point out, it's an equally important point that the military remain apolitical. And in fact, a Department of Defense directive from 2008 forbids active duty military from engaging in political activities. So what's the reason for that restriction? And how do we square that restriction with the need to engage so thoroughly with civilian leadership?

[00:04:20] First of all, to do to your first point right up front is this is a very this is very, very complicated. Well, while the military still tries to stay a political not beholden to a particular party or to a particular position or something of that persuasion, but answering to the authorities that are that are put in place by the people. We do recognize we operate in a political environment. Officers in the military are subject to nomination and confirmation. Your nomination by the executive branch of confirmation by the by the legislative. By the Senate, by the legislative branch. So there is. Politics involved. And that the commander in chief is, you know, the president is an elected official. Coming through a political process, the idea of forming policy is as a resource, oftentimes as a result of a political process given take back and forth over things. So, you know, I think it's I think it's fair to recognize that while the military, you know, is an apolitical institution, it does operate in a political environment. It is important for, I think, our leaders to to understand that. But on to the point is why it is critical to be apolitical. The reason it's critical to be apolitical is because we we don't we are we are responsible to carry out the orders of our civilian leaders, regardless of where they come from, one party or the other. And what we would not want is to have a military that is characterized as being Republican or Democratic or up you the line to the Democrat Party, because that would undermine the trust when there is a when there is a change in partizan terms. So our obligation is to operate in the middle and to and to operate in a manual and conduct ourselves in a manner that demonstrates a low level of care and diligence to our profession, regardless of what party happens to be in in in power. And that is why our roads are grounded in the Constitution. Our loyalty is to the Constitution. The Constitution appoints a commander in chief and the man we've rescued respect that and we answer to that. But when you when you step outside of that, for the military to be viewed as partizan to one particular party or another particular position, I think undermines the ability of the people. First of all, the leadership to have confidence and more importantly, of the American people to have confidence in their military, that they're looking out for, looking out for the nation instead of looking out for a particular viewpoint.

[00:07:17] And as you wrote in the blog post, when the military is nonpartizan, nature is called into question. It skews the constitutional balance among America's fundamental institutions and threatens our democratic governance. And one of the things that's so important that you pointed out just now is that unlike other militaries around the globe, our military does not swear an oath to defend the country, but it swears an oath to defend and uphold the Constitution so that the loyalty of the military has to be first and foremost to maintaining our legal order.

[00:07:55] Does that ever come into conflict with following the dictates of civilian leadership?

[00:08:02] And can there be harder calls that you have to make if, for example, civilian leadership asks the military to engage in actions that may lead it to conclude it would violate its oath?

[00:08:15] Certainly it can. And in May, we may have seen some of that here recently. I mean, we've seen that you're seeing the chairman, Cheryl Neli, come out and make some comments about his participation at at Lafayette Park and and try to set the record straight on that. I think that's a lot of writing on the system, a correction to the system. And I think that's how that's how this works. You know, this is this is this is imperfect. It's not all science. It's science and art.

[00:08:46] And there's human beings involved and things move very, very quickly. But I think what we correctly saw in this situation was where things began to skew and look at how they were going in one direction. We are in leadership, kind of brought it back to the back to where it needs to be. And that's what we should expect from our from our senior military uniforms, leadership and certainly from our from our senior civilian leadership that are also have a responsibility to the to the institution to preserving it. I did also want to just come, come come in a little bit on this idea of the institutions. And I know in my article I talk about a particular class. I took a West Point, you know, at the time was was was great. I enjoyed it. I liked it a lot, but I didn't know how impactful it would be on me until many, many years later when I found myself in a more senior position. But there is a there is a balance to be achieved between all of our institutions. Everyone every one of our institution has a critical role to play, whether it is the whether it is the executive, whether it is Congress, whether it is the military or whether it is the media, whether it is the courts. These are these are all absolutely critical on when when these get out of balance is when I think. We begin to see we begin to see more and more problems. So this idea of a balance of powers that is so well entrenched in our Constitution, I think is a very, very important.

[00:10:16] I think he supports this idea of institutions of our national institutions operating in balance, back and forth with each other, given take back and forth. And that's what I think is has made this system of governance that we have had now for, you know, 10 or 40 plus years. So successful.

[00:10:36] And of course, the military and military officers in particular have very strong training in the concept of the rule of law, which is itself an apolitical notion.

[00:10:47] And so it is drummed into you from the second you enter military training that the rule of law, which the oath to uphold the Constitution, of course, expresses is the most fundamental commitment that you can make as a member of the military.

[00:11:09] Is that something that can then lead an individual sometimes who is active duty not to speak out in a political way? And this is a fundamental tension.

[00:11:21] So, for example, The New York Times ran a story yesterday, yesterday about a National Guard officer who said that police used excessive force in Lafayette Square in the crackdown on protesters and that, in his opinion, they unleashed and, quote, unprovoked escalation on peaceful protesters in the beginning of June. Was it appropriate for the individual in that question, Major DeMarco, to speak out in this way?

[00:11:57] Thanks. It's a great, excellent question. And let me let me just start with a comment and then I'll come back to back to that to that specific situation.

[00:12:07] Well, you know, I think one of the things that that we learn early on in the military, particularly officers, noncommissioned officers, is that how you do things when you're doing them in the course of serving the nation is actually more important than the things that you are actually doing.

[00:12:25] And, you know, for example, how you conduct yourselves around civilians when you're in deployed areas, how you comport yourself, how you demonstrate respect for them, not only impacts the mission, but if it impacts the perception of the people on the overall effort, the military effort that's underway. And so this idea of of of rule of law in operating in an ethical manner, I think is something that we do try to ingrain into our military leaders. And we practice it in training and we put people through situational

exercises so they have an opportunity to test this and they can make mistakes and they can learn from it and they can put it in their bank of experiences. So when they get into real situations, they can recall that. So this idea, I think is well, well ingrained into the military leadership meeting. It's seen. It should be it's a very, very important thing, you know, when you're doing sensitive things like detaining people or entering into their homes or you're having to gather civilians and not checkers and you're sorting them out how you do these kinds of things. Easy is it is much more important than the actual things that you're doing. And we can never lose sight of that. And this is a fundamental, important thing that we have to always fall back on, you know, to them to the point that you raise with with the office, the National Guard officer, you know, that I made in my experience, I have always we we routinely conduct after action reviews. We go back and look at the things we've done and we try to identify where where we made mistakes or where we might have done better and things. I don't know how he arrived at that this particular piece here, but I think I think it is always the right thing if somebody identifies something that they don't think is right in this, to try to try to it, to try to flag that up so they can be it can be sorted out. And and, you know, whether that whether that gets over into the political realm or not, I think is another issue with this. But I think we want we want leaders that are professionally curious, that are examining the things that they are doing, making sure that we are always staying above board in nine hour activities and operations and. Operating and in accordance with the intent of that's been conveyed to us, I think is it is a good thing for the military.

[00:15:10] You know, I've been there are there are mechanisms for officers to identify. They can bring there's a chain of command. You can bring things up. You can highlight things that gets you a degree. It gets it into the process. It can be it can be known and it can be examined. I think this is an important thing that we should always do.

[00:15:27] And of course, we do know that when members of the military are asked to engage in actions that violate their oaths, there is a phenomenon that we've identified, known as moral injury can be very damaging to the individual involved is, of course, to members of the public as well. General Mark Milley, the chairman of the Joint Chiefs, participated in Lafayette Square event. He posed for a photograph with the president. And at that event, tear gas and rubber bullets were used to clear the area of peaceful protesters. General Milley then later said that he wishes he had not participated in that event and he apologized for it. Why might he have felt that way? And once he had done that? What was the right thing to do?

[00:16:25] Discussing this and clarifying it was exactly the right thing to do in it. And what it does what it did is it kind of helped bring, you know, help bring things back to the center and in back to back into balance. I think this is this is a you know, it's incredibly important thing for him to do. And I was glad, glad to see that he had he had done that. There's no doubt in my mind that that Mark really takes his oath to the Constitution very, very seriously.

[00:16:54] And he's emphasized that, I think, with the force in his in his role since being the chairman. And I know from my personal experience with him that this is a this is something he's strongly, obviously strongly believes. I won't I won't try to diagnose what exactly happened to him. I wasn't walking in his footsteps. I don't know what he knew or didn't know going into this. But I think he saw what was being perceived out of this, how it was being portrayed to the to the American people and recognized that this was always a danger to the institution.

[00:17:29] And it took took steps to address it.

[00:17:32] I applaud we ask you for a moment about retired military.

[00:17:36] We have in the last year, and especially the last several months, had an unprecedented number of retired military voicing very strong opinions about President Trump's actions.

[00:17:51] Attorney General Barr's actions in a way that we're not really used to hearing. So the general ethos of active duty military not speaking out on political matters has very often carried over to retired military. But that culture may be starting to change. What are your views on retired military speaking out?

[00:18:14] Well, you know, I think you've seen it. As you pointed out, you've seen a number of different retired military officers make some make some comments. I want to try to I won't try to answer for them why they did that.

[00:18:26] But I would share with you is why I did. Why I wrote why I wrote for the film. So Block, you know, first and foremost, you provided me the platform to do that. And I thought it was an important, important topic to write about it. And the one that I had been certainly thinking about for a long time and in this provided an opportunity to do that.

[00:18:46] And we certainly thank you for writing it.

[00:18:48] But as you recall, I had several stipulations that I wanted to put in place with this, and these were my rules for this one. I didn't want to get engaged in personal attacks on anyone, the president and another military leader or anybody else. That was not what I was interested.

[00:19:04] And I didn't want to find myself critiquing my former colleagues in uniform or dealing with situations that for which I don't have all the knowledge in the details of what, you know, what they're walking this footsteps or walking into. I don't want to be one to be critiquing them. I didn't want to make things harder for people in the military to do the very difficult job and already have. And I wanted to make sure that if I was going to write, I was going to add clarity. I was going to add information that I was going to add an understanding to what is arguably and I think and we have a very complex topic in that. So that's that's the reason I wrote. So I think everybody has different different motivations behind why they why they are doing this. I think I think the retired military I don't you know, I think retired military officers can engage and in writing and speaking. And afterwards, I, I certainly have I, I am I have a way of doing it. Myself, that, I think is it seems to work for me and keeps me out of the broader political realm, but it helps me draw in my interest and on my expertise to come in and hopefully help inform the public about some of the important things that we're dealing with.

[00:20:20] Let's pivot for a moment to the events in Portland. Now, while these are law enforcement actions in Portland, not the military, there might be confusion in the minds of some Americans because here we see federal agents who were dressed in combat fatigues. Yet they're in unmarked uniforms, uniforms where they're not wearing their nametags, where they're in sort of nonstandard military style gear. And the role with respect to civilians is not completely well-defined. Do you have concerns about whether or not there will be confusion between these forces and military forces?

[00:21:10] And also any thoughts about the appropriateness of the actions taking place there?

[00:21:14] Well, I think as some have noted, I think maybe the secretary of defense said something a few days ago on this matter. You know, there's a little bit of concern that they look at. You mean these law enforcement officers look like the military? I mean, no, we shouldn't be surprised by that. You know, some of the same equipment, uniforms, all that kind of stuff are very, very common between. So that that's that is an aspect of it. So I certainly take the point on not the confusion aspect of this.

[00:21:43] My, my, my my view on this is that I think when we enter into these situations, I you know, I just kind of draw back on my malter experience. And what I think is really important are a couple of things really stand out. I think coordination between federal, state, local authorities is absolutely essential in this. And and, you know, they've signed I regret if you know, the polarity in our current environment here has prevented that. I think it's been to the detriment of our people understanding what is happening out there. But this is absolutely essential. We would not step into a military operation without making sure that we were fully coordinated. We would not move I would not move my forces into somebody else's area of responsibility without making sure that we had done everything we could to be coordinated and minimize the risk not only to our forces, but to others in the area to get to the maximum extent that was operationally feasible. And so I think the idea of coordination is really important. I also think that the communication is very, very important and very confusing situations. I mean, it is my observation that the more you can add clarity to what is happening, who is doing what in these situations, the better it is for people to understand. The American people have the right to understand what is happening in their city and overseas with the military forces. And I would suspect in their communities back home as well, as I said, in the community up here in the Twin Cities. I certainly want to know what's happening around me. And I think that that is something we we we should be striving to do to communicate as clearly as we can. And I understand the important role that law enforcement as a species plays in this one, that the local or the federal level of this, and they have a responsibility as as well. And so we do know the coordination, communication helps them in terms of doing this. I think everybody is certainly sees the importance of American citizens having the right to peacefully protest. This is a right guaranteed to all of us by the Constitution, and we absolutely support that. You know, when violence steps into this and I think it becomes more of a complex situation and in most cases, the coordination and communication becomes even more important. So, I mean, that's that's that's how I look at look at these situations. Clear.

[00:24:19] General, I wanted to cover up a last area, which is the concept of the military not engaging in law enforcement activities with civilians.

[00:24:32] And this is a principle called Posse Comitatus. It's also the subject of a federal act, the Posse Comitatus Act. What is the reason for the principle of Posse Comitatus and why is it important?

[00:24:46] Well, I mean that the principle behind this is that the military can't be used for law enforcement and our citizens in our communities and cities against our own citizens.

[00:24:56] That's essentially what we're trying to prevent here in the posse. Come on. Harness that supports a very strong presumption of keeping the military out of law enforcement in our cities and streets. So for that purpose, it it serves at the very, very key function for us.

[00:25:16] One of the things you say in your blog post is that you were never asked to deploy troops for civilian purposes, with one exception, which wasn't enormous, a storm that occurred in northern New York. Would that be a typical form of assistance that the military might be asked to render? And should we be concerned about that?

[00:25:39] Yeah, I. Well, first of all, I think it is. I mean, you know, in a situation that that I've gone I found myself in I mean, we had a significant regional event.

[00:25:49] We had communities that had been stranded and were having difficulties. So we provided some some assistance to that. And in those cases, you know, the military chain of command, 10th Mountain Division in the organization I belong up in northern New York, I think had had well-established relationships with many the communities. And so a key part of our my job as a battalion commander at that time was making sure that I took that relationship down at my particular level as well. And so, you know, people knew what we were doing. We were responding to their requests. We weren't doing things outside of the of the mandate that they had expected us to do. And when we were done, we we went away and didn't try to just try to linger and try to exert any type of authority out there that we might not might not have already been, you know, wasn't accrued to us. And we didn't try to operate. This was not a situation where we have we're having to operate like police. We were really just trying to help people. So I think that's a fairly common thing that we could see, not our anger. Certainly the National Guard finds themselves in this position very, very often. But when you trip over into something else where you know, where we do have to see the military use potentially type of love law enforcement, then this is where the Insurrection Act kicks in. I mean, Congress has as established for this particular reason, and the president in his authority as commander in chief, can can invoke it in those in those particular situations. But again, in these cases, I think it is absolutely critical that, you know, returning to something we talked about earlier. Coordination is important. Communication is really important in getting the best advice of of the military in in how to employ military forces in these situations. I think is is really, really important. National Guard forces do have do have, you know, civil disorder training. Many of them have that because it's it is something that they are prepared for active duty military. You don't normally have that. We did not spend a lot of time doing that type of stuff. You know, I will say we never did it. We we occasionally do. But we certainly didn't have any level of expertize that I was comfortable with in terms of doing that. So, you know, if I was given those instructions, that would definitely be something I would want to have some time to make sure that, you know, the soldiers that were under my command. Understood. You know, what that meant and what the best techniques and procedures were for bribe for actually doing that, if that's what we were required to required to do. Coming in age, your age, your neighbors to help your community out. I mean, that's that's that's that's one thing and another thing to come in and in, you know, enforce enforce aspects of the law and and and things in our communities. Much, much, much different in my view.

[00:28:53] That's right. Especially against the wishes, say, of local law enforcement agents would make it even more complex still.

[00:29:02] That's right. Matter of last resort, I think, as the secretary of defense said. I think that's exactly right.

[00:29:07] General Votel, thank you so much for being with us today. This has been a fascinating conversation. And thank you also for serving on the board of the Center for

Ethics and the Rule of Law and all you do to contribute to our community and to help us understand so many of the topics and national security that we're grappling with today.

[00:29:26] Great. Well, good. Claire, thanks. It's great to be with you. And I'm really very proud of my association with Cheryl and I. And I am glad to glad to have an opportunity to talk today. So thanks for. Thank you.