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MacArthur Society of West Point Graduates

POSITION PAPER

TO RESTORE PURPOSE, UNITY & TRUST IN THE US MILITARY

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Stand Together Against Racism and Radicalism in the Services (STARRS) is concerned about the divisive racist and radical CRT/DEI ideology infiltrating the military and service academies and seeks to expose, stand up against, and eliminate it in order to keep our country safe.

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MacArthur Society of West Point Graduates

To preserve, defend, and advocate for West Point's history, purpose, and principles of Duty, Honor, Country.

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Support and defend the Constitution of the United States, the Navy and Marine Corps and the U.S. Naval Academy

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POSITION PAPER

Ineffectiveness and Interference by Executive Branch (President/DoD) With Structure, Operations and Oversight Functions of Congressionally Created West Point, Naval Academy and Air Force Academy Boards of Visitors ("BoVs")

PROBLEM: The academy BoVs do not provide effective, meaningful oversight over the academies, but serve instead to give the erroneous appearance they are doing so. In addition, during the Biden Administration the President and DoD undermined the effectiveness of the BoVs by interfering with their statutorily mandated structure, operations and oversight functions by (1) "suspending" the BoVs; (2) firing all appointees of former President Trump and replacing them with appointees of President Biden—not for cause, but solely because the Trump appointees allegedly were not "aligned with the President's values [and] with the values of this administration," and "stood idly by" while President Trump led an "insurrection" against the Capitol; and (3) authorizing the creation of "subcommittees" to the BoVs populated by non-members of the BoVs, thereby "packing" the BoVs. President Biden and his agents have worked to reshape, dilute, and circumvent the BoVs to advance a far left political agenda.

FACTS:

- The Academy BoVs are oversight advisory boards created by Congressional statutes to investigate, oversee and make recommendations regarding the academies to the House Armed Service Committee, the Senate Armed Services Committee, and the President. 10 U.S.C. § 7455, § 8468, § 9455.

- The administration and management of the BoVs is governed by the Federal Advisory Committees Act ("FACA"), 5 U.S.C. § 1004, set out in App. 43a–44a, and its implementing regulations, 41 C.F.R. Part 102-3 (2023). FACA's implementing regulations require that the BoVs "must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed," 41 C.F.R § 102-3.30(c), and that the Secretary of Defense "[d]evelop procedures to assure that the advice or recommendations of [BoVs] will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the [BoVs'] independent judgment. Id., § 102-3.105(g). Moreover, DoDI 5105.04, Para 4.6, sets forth as DoD policy "Committee membership, as a whole, shall be balanced in terms of points of view and the functions to be performed." *Id.*

- Ten members of the BoVs are appointed by Congress; five are appointed by the President. 10 U.S.C. § 7455(a)(1-5); § 8468(a)(1-5); § 9455(a)(1-5). Each Presidential appointee has a three-year term. 10 U.S.C. § 7455(b); § 8468(b); § 9455(b). The terms are staggered so that each year the President may appoint persons to succeed the members whose terms expire. 10 U.S.C. § 7455(b); § 8468(b); § 9455(b)(1).

1 https://www.nytimes.com/2021/09/08/us/politics/trump-appointees-military-academy-boards.html
2 https://www.dailymail.co.uk/news/article-9973659/Jen-Psaki-insists-Joe-Biden-right-kick-Trump-picks-military-academy-advisory-boards.htm

- On or about February 2, 2021, the Secretary of Defense illegally suspended the BoVs. No purported suspension of a BoV had occurred previously. Those suspensions were challenged in a lawsuit filed on July 15, 2021, in which a Fourth Amended Complaint was filed on April 7, 2022.

- On September 8, 2021, President Biden unilaterally fired all the presidential appointees on the BoVs who had been appointed to three-year terms by President Trump, and to replace them with new appointees who purportedly shared President Biden's values.

  No President had terminated a Presidential BoVs appointee previously before expiration of the appointee's three-year term. None of the three statutes governing a BoVs appointee provides for termination of a Presidential appointee by a sitting or successor President.

- On September 17, 2021, the Secretary of Defense issued three memoranda purporting to reinstate from suspension the BoVs, and authorizing the creation of "subcommittees" to the BoVs staffed with appointees "separate and distinct" from the lawfully appointed members of the BoVs.

  None of the governing BoVs statutes provides for the creation of BoVs subcommittees; nor do they authorize the Secretary of Defense or his Deputy to staff such subcommittees with appointees selected at their sole discretion or who are not members of the respective BoVs.

  Indeed, no such subcommittee had ever been authorized or staffed at the directive of any previous Secretary, because DoD had previously determined that any such subcommittees were not lawfully authorized, as the Secretary of Defense acknowledged in his three above referenced memoranda.

  Moreover, DoD 5105.04, Para 5.6.2, expressly states that "no DoD-Supported Committee establish[] Subcommittees unless specifically authorized by statute, executive order, or the Committee's Charter." *Id.*

- The suspension of the BoVs, the firing and replacement of President Trump's appointees and the authorized "packing" of the BoVs with non-appointees interfered with the BoVs' abilities to oversee and advise regarding the service academies, on matters including but not limited to

  1. alleged "systemic racism" and the role of Critical Race Theory (CRT) at the academy;

  2. the resolution of unprecedentedly large cheating scandals at the academies;

  3. the implementation of policies governing the surveillance, detection and purging of "radical extremists" from the academies;

  4. the handling of sexual assaults at the academies;

  5. the response to and further prevention of an unprecedently large number of cadet or midshipman suicides at one or more academies; and

  6. the implementation of pre- and post-COVID-19 protocols, including the suspension of cadets' and midshipmens' attendance at church and synagogue services, and discrimination against/punishment of cadets and midshipmen who chose not to receive a COVID vaccine.

  Countless decisions concerning these vitally-important issues were made without any input, advice or recommendations to them from any BoV member.

- On July 15, 2021, a lawsuit (Case No. 21-cv-1893, Dkt. Nos. 45 and 46) was filed with the United States District Court for the District of Columbia challenging the suspension of the BoVs. Amended complaints added parties and challenges to the termination of the BoV members appointed by President Trump and the allowance of BoV subcommittees populated by non-members of the BoVs. On March 21, 2023, the District Court dismissed the case in

3 See text accompanying footnotes 1 & 2 *supra*.
4 Memorandum for the Secretary of the Air Force, September 17, 2021, from Department of Defense; Memorandum for the Secretary of the Army, Septembrer17, 2021, from Department of Defense; and Memorandum for the Secretary of the Navy, September 17, 2021, from Department of Defense.
5 Id.

part for lack of subject-matter jurisdiction and in part for failure to state a claim, 662 F. Supp 3d 12. An appeal was filed with the United States Court of Appeals for the District of Columbia Circuit on September 8, 2023. The D.C. Circuit affirmed in part and vacated in part on June 7, 2024. A Petition for a Writ of Certiorari was filed with the United States Supreme Court on September 5, 2024, and denied.

- Amendments to the BoVs statutes to exclude Presidential appointments to the BoVs in the future, leaving only Congressional appointments to the BoVs, were introduced and passed by the House of Representative in NDAA legislation.

DISCUSSION:

- Courts have refused to stop or remedy the Executive Branch's interferences with the BoVs stated above.
- The effectiveness of the BoVs needs to be greatly improved. The BoVs need to be independent, politically balanced, and free from conflicts of interest, control and undue influence by the academies and military regarding which the BoVs provide oversight.
- Only new legislation excluding the Executive Branch from making appointments to the BoVs and/or establishing new requirements/procedures for the BoVs will prevent interference with the BoVs by the President and DoD in the future and improve the effectiveness of the BoVs. By excluding Presidential appointees in the future, the ability of the President and DoD to interfere with the BoVs oversight functions/capabilities by suspending their operations, firing their appointees or "packing" the BoVs by appointing non-members of the BoVs to "subcommittees" would be eliminated.

RECOMMENDATIONS:

- The POTUS should fire the Biden appointees who replaced Trump appointees and replace them with the same or similar Trump appointees that Biden fired, pending legislation to restructure BoV member composition.
- Independent, politically balanced oversight scrutiny of the academies by the BOVSs should be greatly improved.
- New legislation should be considered to permanently accomplish the above, including avoiding future Executive Branch interference with the BoVs by excluding Presidential appointments to the BoVs, requiring the Executive Branch to cooperate fully with BoVs scrutiny of the academies and requiring courts to protect, with injunctions if necessary, the BoVs from Executive Branch interference. The academy BoVs should be separate and independent of the Executive Branch, to enable Congress to fulfill its Constitutionally mandated role to make rules regulating the military, free of undue Executive Branch obstruction/interference.
- What works and does not work, and what should be changed, about the BoVs need to be examined and changes made to improve the effectiveness of the BoVs.

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