



FIRE
Foundation for Individual
Rights and Expression



September 21, 2022

Col. (Ret.) Adrian T. Bogart III
Commandant's Office
131 Old Barracks
Virginia Military Institute
Lexington, Virginia 24450

URGENT

Sent via U.S. Mail and Electronic Mail (bogartat@vmi.edu)

Dear Col. (Ret.) Bogart:

FIRE¹ and the SPLC² are concerned by the Virginia Military Institute (VMI) administrators' course of conduct toward the independent student newspaper, *The Cadet*. VMI's cumulative acts seeking to bend the paper to administrative pressure and interfering with its staff's activities squarely contradict the Institute's obligations under the First Amendment, which demands that VMI respect the editorial independence of *The Cadet*.

I. VMI Interferes with *The Cadet's* Operations

The following is based on our understanding of the facts, which we appreciate may not reflect additional information that you could offer and which we invite you to share.

The Cadet is a student-run publication that has operated as an independent student newspaper at VMI since 1907.³ Originally founded in 1871 as a magazine, it has been editorially independent from VMI since its inception, and is published by students with the guidance of alumni and professional journalists.⁴ *The Cadet* is financially independent from VMI, funded

¹ The Foundation for Individual Rights and Expression is a nonpartisan nonprofit dedicated to defending freedom of speech, expression, and conscience, and other individual rights on campus, including freedom of the press.

² Founded in 1974, the Student Press Law Center (SPLC) is the nation's only legal assistance agency devoted exclusively to supporting, defending, and educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in covering important issues free from censorship. The SPLC is a nonpartisan, nonprofit organization.

³ *The Cadet Foundation*, <https://cadetnewspaper.org/> [https://perma.cc/P96S-K7RJ].

⁴ *Id.*

by support from alumni, donors, subscriptions, and advertisements. Following a history of challenges to its editorial independence, *The Cadet* ceased publication in 2016.

After a five-year hiatus, a group of students and alumni revived *The Cadet* in 2021, and the paper has operated continuously since, publishing at least two editions each month of the academic year. The paper is now published by The Cadet Foundation, a non-profit corporation separate from VMI created by students and alumni to support *The Cadet* and ensure its continuity with year-to-year editorial turnover.⁵ The newspaper's student staff members hold exclusive editorial control over the decisions and content of the paper. The present-day *Cadet* is recognized by Virginia Governor and VMI Commander-in-Chief Glenn Youngkin⁶ and the Virginia General Assembly⁷ as an independent, student-run newspaper and the continuation of the original *Cadet*.

The year following *The Cadet's* revival has been marked by numerous challenges to the paper's independence. *Cadet* staff have faced interference from VMI leadership, including pressure to make the paper's content more flattering to the Institute, suppression of its distribution, and demands that the student staff stop working with alumni on publication efforts. Editors have feared that they would be "heavily boned," slang for punished, for engaging in paper-related responsibilities.⁸ Since restarting the paper, student staff at *The Cadet* also no longer receive accommodations to perform duties necessary to publish the paper—accommodations that *Cadet* editors historically were entitled to and which are currently given to other student groups, such as meeting space, permission to leave campus, "hay down,"⁹ and excusal from breakfast roll call and other military duties.

Cadet editors have tried to work with you and your administration to establish a mutual understanding of the paper's rights and operations on campus with little success. The series of facts below and numerous other missteps on the part of VMI's administration, of which there were too many to include in a single letter, reflect a continued failure to respect the rights of *The Cadet* and its staff.

To start, *The Cadet* has on several occasions faced intimidation from VMI administrators to publish content more flattering to the college. On July 20, 2021, several *Cadet* staff and alumnus mentor Colonel Bob Morris met with you to present a plan for *The Cadet's* operations for the upcoming academic year. During this meeting, you voiced disapproval of the paper's content, including a survey on faculty wearing military uniforms, and asked the paper not to report anything that would challenge *Washington Post* journalist Ian Shapira's coverage of

⁵ *Id.*

⁶ Letter from Virginia Governor Glenn Youngkin to *The Cadet* Staff and The Cadet Foundation (Apr. 11, 2021) (on file with author).

⁷ H.J.R. Res. 453, 2022 Reg. Sess. (Va. 2022).

⁸ Email from Michael Tempesta to Bob Morris (Mar. 22, 2021, 1:14 pm) (on file with author).

⁹ Slang for a student being allowed to leave his or her bed down instead of rolled up and stood against the wall as typically required.

racism and sexual assault at VMI.¹⁰ You also recommended the paper report on initiatives implemented by your office and suggested doing so would boost the paper's circulation. Further communication with VMI administrators suggested that requested administrative support for the paper's distribution would be available only if *The Cadet* were to publish content that "aligns with VMI's initiatives."¹¹

This spring, *Cadet* editors faced pressure to publish an op-ed from the VMI administration refuting an article the paper ran about the Institute's counseling center.¹² Following criticism from administrators about the piece, *Cadet* editors maintained the reporting in the paper was accurate but entertained the option of publishing VMI's response. On April 28, Colonel Bill Wyatt, VMI Director of Communications & Marketing, emailed *The Cadet's* then-editor-in-chief James Mansfield urging him to publish the op-ed in full. Wyatt referenced the Society for Professional Journalists' Code of Ethics, stating the code required journalists to promptly correct mistakes, despite the editor's insistence the reporting was accurate. Wyatt also suggested the reporters were acting unethically, even invoking a recent suicide, to pressure *The Cadet* to publish VMI's statement, writing:¹³

Need I remind you that this is an incredibly difficult time for college students. Our neighbors up the road at JMU are reeling from a very public suicide right now. I'd hate to think that cadets in need of support or mental health services may be hesitant to reach out because of your inaccurate reporting.

Students have also faced interference with paper distribution. In August 2021, *Cadet* staff received permission from the Rockbridge County Chamber of Commerce to distribute issues of the paper from its table at VMI's Matriculation Fair, an event for incoming students and their families during which both community and VMI student organizations tabled. Despite this permission, on August 21, the day of the event, Command Sergeant Major (Ret.) Suzanne Rubenstein, VMI Director of Activities, removed *The Cadet's* papers from their display table and hid them in a different part of the room. *Cadet* staff moved the copies back to the table, and Rubenstein moved them again. When asked why she moved the papers, Rubenstein told *Cadet* staffers the paper was not sanctioned by VMI. When the distribution concerns were brought to your and other VMI administrators' attention, *Cadet* staffers were informed the paper's

¹⁰ Ian Shapira, *Derision, misogyny, sexual assault: VMI women face attacks on campus and online*, WASHINGTON POST (July 12, 2021) <https://www.washingtonpost.com/education/2021/07/12/vmi-women-sex-assault-misogyny>.

¹¹ For example, administrators failed to respond to the paper's concerns about interference with distribution and instead questioned whether there was interest in the paper "among board members or cadets . . . or is the sole focus to exercise free speech?" Email from Catherine Roy to Bob Morris (Aug. 21, 2021, 6:18pm) (on file with author).

¹² Peyton Wiecking, *Does VMI care about the wellbeing of the Cadets? – A Cadet Investigation*, CADET (Apr. 15, 2022) <https://cadetnewspaper.com/news/343/does-vmi-care-about-the-wellbeing-of-the-cadets-a-cadet-investigation>.

¹³ Email from Bill Wyatt, VMI Dir. of Marketing & Communications, to James Mansfield (Apr. 28, 2022, 1:27 pm) (on file with author).

distribution was not of VMI's concern and that Rubenstein would be counseled on the point.¹⁴ But *The Cadet* faced interference with its distribution a second time on November 11, 2021, when editors placed copies of the recent issue on a newspaper rack in the VMI Center for Leadership and Ethics ahead of an alumni dinner held there.¹⁵ An employee of the VMI Alumni Association removed the papers and rack and hid them in another room. Editors recalled that when asked about the copies being moved, Thom Brashears, Chief Operating Officer of the VMI Alumni Association,¹⁶ said the paper was "not appropriate for this type of dinner." VMI administrators have continued to disrupt distribution of *The Cadet* as recently as May 19, 2022, when then-editor-in-chief James Mansfield alleges you removed copies of the paper available in front of barracks after a graduation ceremony and placed them in a box of discarded books.

As noted, *The Cadet* has historically operated as an independent student newspaper with mentorship from alumni and professional journalists providing support to the editors—yet you and VMI's administration have failed to acknowledge this well-established practice. On October 8, 2021, VMI General Counsel Patrick O'Leary met with two *Cadet* editors, three *Cadet* mentors (including one alumnus and two professional journalists), and an advisor from the Student Press Law Center.¹⁷ During this meeting, both the students and *Cadet* mentors repeatedly explained to O'Leary that *The Cadet* was a student newspaper and that students retained editorial control over the paper. Both students and mentors emphasized that mentor support has been a longstanding *Cadet* tradition. Throughout the meeting, O'Leary largely refused to acknowledge the paper as student-run, instead erroneously maintaining it was an alumni-run paper. Later, O'Leary later doubled down on this assertion in an October 26, 2021 letter to *Cadet* Foundation Secretary Debora Hansen,¹⁸ in which he said VMI's administration would not recognize *The Cadet* as it currently operates. A capper came on February 3, 2022, when VMI's Office of the Chief of Staff denied on the Institute's website that *The Cadet*, as of 2021, was a continuation of the historical paper and accused it of being alumni-run.¹⁹

II. The First Amendment Bars VMI from Interfering with the Content, Distribution, and Organizational Structure of *The Cadet*

The influence VMI has exerted over *The Cadet* with regard to its distribution, content, and operations reflects a serious intrusion on the newspaper's independence. While your

¹⁴ Email from Bob Morris to Adrian T. Bogart (Aug. 21, 2021 9:18 am) (on file with author); email from Adrian T. Bogart to Bob Morris (Aug. 21, 2021 at 4:08 pm) (on file with author); email from Bill Wyatt to Bob Morris (Aug. 21, 2021 at 4:17 pm) (on file with author).

¹⁵ The following series of facts is based on *Cadet* editors' recollection of events; we invite you to correct any inaccuracies.

¹⁶ The VMI Alumni Association is a separate corporation from VMI. However, Brashears previously stated he was working to make *The Cadet* a part of the VMI Alumni Association's communications team in accordance with its existing relationship with the VMI English Department. Email from Thom Brasher to Bob Morris (May 17, 2021, 2:54 pm) (on file with author).

¹⁷ Telephone Conversation Between Mike Hiestand, James Madison, Joseph Malazo, Bob Morris, Patrick O. O'Leary, Matt Paxton, and Tod Robberson (Oct. 8, 2021) (transcript on file with author).

¹⁸ Letter from Patrick O'Leary to Debora Hansen (Oct. 26, 2021) (on file with author).

¹⁹ *VMI Statement on The Cadet Newspaper*, VA. MIL. INST. (Feb. 3, 2022) <https://www.vmi.edu/news/headlines/2021-2022/vmi-statement-on-the-cadet-newspaper.php> [<https://perma.cc/K6PA-2LVV>].

administration has stated its intention is not to control the content of *The Cadet*,²⁰ the current pattern of unconstitutional overreach into the paper’s dealings demonstrates otherwise.

The First Amendment sharply circumscribes VMI’s authority to regulate an independent student publication. Treating a student media outlet differently from other student organizations—that is, imposing “differential treatment” that “singles out the press”—violates the First Amendment.²¹ Denying access to resources that were historically available to the paper and which are made available to other similarly situated organizations, including provision of meeting space, excusal from certain military duties, and permission to leave campus, on the implied condition that *The Cadet* subject itself to the will of your administration is an unconstitutional restraint on core expressive activity. While VMI can certainly make recommendations to *The Cadet*’s editors, the Institute’s administrators cannot use their positions of authority to force, intimidate, or coerce editors to do their bidding. The Institute must make clear that its officials will no longer make unconstitutional demands of *The Cadet*.

A. *The First Amendment Governs VMI’s Relationship with The Cadet and its Editorial Decisions.*

It is well established that the First Amendment is binding on public colleges.²² This includes senior military colleges, like VMI.²³ Accordingly, the decisions and actions of a public college—including interactions with student journalists,²⁴ the pursuit of disciplinary sanctions,²⁵ recognition and funding of student organizations,²⁶ conduct of police officers,²⁷ and maintenance of policies implicating student and faculty expression²⁸—must be consistent with the First Amendment.

²⁰ O’Leary, *supra* note 18 (“VMI understands the value of independent journalism and does not seek to control the content of a cadet newspaper.”).

²¹ *Minneapolis Star & Trib. Co. v. Minn. Comm’r of Rev.*, 460 U.S. 575, 586–591 (1983); *see also Grosjean v. Am. Press Co., Inc.*, 297 U.S. 233, 244–250 (1936) (surveying history of efforts to tax circulation, and noting that if the tax “were increased to a high degree . . . it well might result in destroying both advertising and circulation.”); *Koala v. Khosla*, 931 F.3d 887, 904 (9th Cir. 2019).

²² *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

²³ *Mellen v. Bunting*, 327 F.3d 355, 369 n.8 (4th Cir. 2003) (applying First Amendment analysis to VMI on the question of school-sponsored prayer, stating, “VMI has no First Amendment interests that it can wield against the constitutional rights of its cadets.”).

²⁴ *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

²⁵ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

²⁶ *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

²⁷ *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

²⁸ *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

These First Amendment obligations protect the independence of student publications like *The Cadet* and strictly limit any censorial acts targeted at the paper by VMI's administration. As helpfully explained by the United States Court of Appeals for the Fourth Circuit, the decisions of which are binding upon VMI, censorship of college newspapers might include (but is not limited to) "suspending the editors, suppressing circulation, [and] requiring imprimatur of controversial articles."²⁹ A college may regulate student publications only if the content would lead to material and substantial disruption of the educational environment or incitement of imminent lawless action, neither of which can be said to apply to *The Cadet's* reporting.³⁰

As an independent organization, *The Cadet* is ultimately responsible for its own operations, including legal liabilities,³¹ operational structure, and business decisions, such as which content and advertisements to publish³² and how often it should publish online and in print. We remind you that "the state is not necessarily the unrestrained master of what it . . . fosters."³³ In other words, the Institute's support for forums for student expression—such as an independent student newspaper—does not allow VMI to make decisions on behalf of student leaders within such forums. Accordingly, VMI's role vis-à-vis independent student publications is limited to one of *support* rather than one of *authority*.

Simply stated, VMI lacks authority to make *any* decision on behalf of *The Cadet*. VMI also lacks the authority to penalize *Cadet* editors for those decisions. Your and other administrators' insistence that the paper publish content more flattering to the Institute, demands that the paper disaffiliate from its tradition of mentorship, and interference with its distribution impermissibly encroach upon the student editors' right to make decisions about the content and operations of the paper.

B. VMI Must Restore the Accommodations Historically Available to The Cadet.

A "choice" backed by a threat of loss of university resources is no choice at all, putting editors in the tenuous position of compromising either their institutional independence or forgoing accommodations, such as meeting space and more. This demand of *Cadet* staff is not only illusory, but also unconstitutional under the First Amendment. Two additional legal principles restrain government actions of this type: the unconstitutional conditions doctrine and the waiver doctrine.

²⁹ *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973).

³⁰ *Id.* at 580.

³¹ *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 472–73 (Minn. Ct. App. 2005) (holding that where a state university did not exercise control over the content of a student newspaper, the university could not be held vicariously liable for defamation); *Milliner v. Turner*, 436 So.2d 1300 (La. App. 1983); *McEvaddy v. City Univ. of N.Y.*, 220 A.D.2d 319, 633 N.Y.S.2d 4 (App. Div. 1st Dept. 1995); *see also Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1074-75 (5th Cir. 1976) (holding that the actions of student newspapers over which state institutions do not exercise regulation do not act on behalf of the university).

³² *See, e.g., Pitt News v. Pappert*, 379 F.3d 96, 111 (3d Cir. 2004) (finding ban on alcohol advertisements "presumptively unconstitutional" because it targeted college publications).

³³ *Bazaar v. Fortune*, 476 F.2d 570, 575 (5th Cir. 1973) (quoting *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (Mass. 1970)); *see also Barnstone v. Univ. of Hous., KUHT-TV*, 514 F. Supp. 670, 689 (S.D. Tex. 1980).

The unconstitutional conditions doctrine prohibits a government entity from demanding a surrender of rights to receive a benefit to which an individual or group is already otherwise entitled.³⁴ Here, *The Cadet* already is entitled to the same support and accommodations as other groups, yet you have, in effect, asked them to surrender editorial independence as a condition for the continued receipt of that support.

Were it the case that the demands levied against *The Cadet* did not directly implicate a constitutional right with respect to the accommodations available to the paper, those demands would nonetheless violate the waiver doctrine. Under the waiver doctrine, the government cannot require the surrender of a right in exchange for the receipt of a benefit to which the individual is not otherwise entitled, such as a settlement, unless the waiver satisfies two conditions.³⁵ First, the waiver must be “made knowingly and voluntarily,” and second, in the specific facts of the case, “the interest in enforcing the waiver is not outweighed by a relevant public policy that would be harmed by enforcement.”³⁶ A waiver that violates either of these requirements is unenforceable.³⁷

Even if *Cadet* editors knowingly and voluntarily agreed to the administrative demands to adjust their content and disavow organizational traditions, the public has a strong policy interest in prohibiting negotiated government control of the media. Accordingly, the harm avoided by not enforcing such an agreement outweighs VMI’s apparent interest in chipping away at *The Cadet*’s editorial independence. VMI *may* make recommendations and offers to *Cadet* leadership. For example, it may offer that *The Cadet* work with the marketing and communications department or another university entity, and it may even offer additional benefits if the student leaders choose to accept this offer. But it *may not* threaten sanctions—such as loss of meeting space and leave from campus—if the editors decline this offer.

III. Conclusion

The Society of Professional Journalists Code of Ethics calls on reporters to “Act Independently,” explaining that journalists should “[d]eny favored treatment to . . . special interests, and resist internal and external pressure to influence coverage.”³⁸ As an independent

³⁴ See, e.g., *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 789 F.2d 1348, 1350–51 (9th Cir. 1986) (finding a state participant in a federal scheme to reimburse family planning services could not prohibit reimbursements to groups that offer counseling for abortion procedures), *aff’d*, 479 U.S. 925 (1986).

³⁵ See, e.g., *Overbey v. Mayor of Balt.*, 930 F.3d 215, 223-24 (4th Cir. 2019) (finding non-disparagement clause in police misconduct settlement unenforceable).

³⁶ *Id.* at 223; *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1991) (noting that the government bears the burden of showing its interest is not outweighed by public policy).

³⁷ *Overbey*, 930 F.3d at 223.

³⁸ *SPJ Code of Ethics*, SOC’Y OF PRO. JOURNALISTS <https://www.spj.org/ethicscode.asp> [<https://perma.cc/E2XK-F7QQ>].

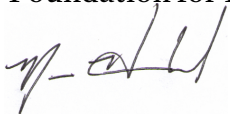
paper, *The Cadet* cannot bend to institutional pressure influencing its coverage; as a government entity, VMI must not exert such pressure.

We call on VMI to recommit to its legal obligations and refrain from unduly pressuring *The Cadet*. We request receipt of a response to this letter no later than the close of business on September 28, 2022.

Sincerely,



Anne Marie Tamburro
Program Officer, Student Press, Campus Rights Advocacy
Foundation for Individual Rights and Expression



Mike Hiestand
Senior Legal Counsel
Student Press Law Center

Cc: Lt. Col. Kevin Ryan, Secretary to the Board of Visitors
Maj. Gen. Cedric T. Wins, Superintendent