

Articles

The Soldier, the State, and the Separation of Powers

Deborah N. Pearlstein*

As U.S. counterterrorism activities continue to engage the armed forces in profound legal and policy debates over detention, interrogation, targeting, and the use of force, recent legal scholarship has painted a grim picture of the effective vitality of civilian control over the U.S. military. Prominent generals leverage their outsized political influence to manipulate the civilian political branches into pursuing their preferred course of action. Bureaucratically sophisticated officers secure the adoption of their policy judgments in the Executive Branch and Congress contrary to civilian preferences. And misplaced judicial deference to military expertise on what is necessary to regulate the special community of the armed forces exacerbates the growing social separation between the military and the society it serves. The question of how to distinguish expert advice from undemocratic influence that has long surrounded the work of administrative agencies is made especially complex by the unique constitutional role of the military. But before one can tell whether civilian control is threatened, one must first have some understanding of what it is. For all the intense focus in recent years on the legality of what the military does, where the modern military fits in our constitutional democracy has remained remarkably undertheorized in legal scholarship. Moreover, prevailing theories of civilian control in the more developed social- and political-theory literature of civil-military affairs view the Constitution's separation of powers—in particular, the allocation of authority over the military to more than one branch of government—as a fundamental impediment to the maintenance of civilian control as the theories take it to be defined. As a result, there remains a significant gap in the development of a constitutional understanding of the meaning of civilian control. This Article is an effort to begin filling that gap, by examining whether and how the constraining advice of military professionals may be consistent with our modern separation-of-powers scheme.

* Assistant Professor of Law, Cardozo Law School. An earlier version of this Article was selected for presentation at the Fourth Annual National Security Law Faculty Workshop, cosponsored by The University of Texas School of Law, the International Committee of the Red Cross, and the U.S. Army Judge Advocate General Legal Center and School. In addition to thanking participants in that workshop for their valuable insights, the author wishes to thank Phillip Carter, Bobby Chesney, Christopher F. Chyba, John Dehn, Eugene Fidell, Victor Hansen, Vicki Jackson, Martin S. Lederman, David Luban, Martha Minow, Mark Shulman, Ganesh Sitaraman, and participants in the Cardozo Law School Junior Faculty Workshop for very helpful discussions.

I. Introduction.....	798
II. Theorizing Challenges to Civilian Control.....	804
A. Huntingtonian Control.....	805
B. Agency Accountability.....	816
III. Constitutionalizing Theories of Civil–Military Relations.....	824
A. An Interpretive Approach.....	825
B. Formal Limits.....	829
1. <i>The Role of Congress</i>	829
2. <i>Formal Limits: The Role of the Courts</i>	838
IV. Toward a Revised Understanding of Civilian Control.....	840
A. The Accountability Interest.....	841
B. Effectiveness and Expertise.....	852
V. Conclusion.....	857

I. Introduction

As American counterterrorism activities continue to engage the armed forces in profound legal and policy debates over detention, interrogation, targeting, and the use of force, recent works by legal scholars from Bruce Ackerman and Diane Mazur to Glenn Sulmasy and John Yoo paint a remarkably grim picture of the vitality of civilian control over the U.S. military. Prominent, even “celebrity,” general officers leverage their outsized political influence to manipulate the civilian political branches into pursuing their preferred course of action.¹ Bureaucratically sophisticated mid-level officers inside the Pentagon are able to effect the adoption of their policy judgments in the Executive Branch and Congress “against the wishes of civilian leaders to the contrary.”² And misplaced judicial deference to military expertise has exacerbated the growing separation between the military and the society it serves.³ In these ways and more, such authors suggest, the modern military

1. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 43–64 (2010).

2. Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 *UCLA L. REV.* 1815, 1823 (2007); see also INDEP. REVIEW PANEL TO STUDY THE RELATIONSHIPS BETWEEN MILITARY DEP’T GEN. COUNSELS & JUDGE ADVOCATES GEN., *LEGAL SERVICES IN THE DEPARTMENT OF DEFENSE: ADVANCING PRODUCTIVE RELATIONSHIPS* 33–36 (2005) [hereinafter *PANEL REPORT ON PRODUCTIVE RELATIONSHIPS*] (describing efforts in the 1990s and 2000s to bring JAGs within the supervisory control of the civilian Defense Department General Counsel).

3. DIANE H. MAZUR, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* 53–91 (2010) (detailing a trilogy of Rehnquist Court opinions describing the military as a specialized community, to some extent separate from otherwise applicable constitutional rules, as well as describing the increasingly partisan political involvement by service members); see also Thomas E. Ricks, *The Widening Gap Between the Military and Society*, *ATLANTIC MONTHLY*, July 1997, at 66, 70 (“[T]oday’s officers are both more conservative and more politically active than their predecessors.”).

has come to threaten core notions of civilian control by exerting undue influence on democratic processes of governance.

Particularly given the scope of contemporary U.S. military activity in counterterrorism efforts worldwide, the notion that the military is in some important sense exerting undue influence over political decision making should seem troubling. Our constitutional democracy was, after all, founded on the complaint that the King had “affected to render the Military independent of and superior to the Civil power.”⁴ It should be troubling also for those familiar with a separation-of-powers scheme that allocates significant structural authority to more than one branch of the federal government for the purpose of ensuring that the military remains subordinate.⁵

Yet, high profile accounts of charismatic military leaders like Colin Powell effectively campaigning against a presidential initiative to lift the ban on gays in the military,⁶ or of a group of generals revolting against civilian Defense Secretary Donald Rumsfeld by criticizing his leadership during the Iraq War,⁷ tend to obscure more complex illustrations of military engagement in legal and policy-making decisions. Today, far from the pre-standing-army, pre-administrative-state world of the Constitution’s Framers, the modern military in many ways enjoys the functional advantages, now long embraced, of administrative agencies. Staffed by experts trained in multiple fields of professional knowledge, capable of accumulating and analyzing institutional experience and technical information, and ready to deploy those tools to assess potential responses to current problems,⁸ a host of decisions involving the military may be expected to draw on the kind of expertise that contemporary government has long sought to exploit.⁹ Consider, for

4. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

5. See, e.g., U.S. CONST. art. I, § 8 (affording Congress the power, *inter alia*, to raise and support armies and to provide and maintain a navy); *id.* art. II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”); *cf. id.* art. I, § 6 (precluding any “Person holding any Office under the United States” from simultaneous membership in Congress); *id.* art. III, § 3 (defining the crime of treason and providing that the offense “shall consist only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort”); *id.* art. IV, § 4 (requiring the federal government to guarantee every state a “Republican Form of Government”).

6. ACKERMAN, *supra* note 1, at 50–51.

7. *Id.* at 60. *Contra* Helene Cooper & David E. Sanger, *Obama Fires Afghan Commander, Citing Need for Unity in the War*, N.Y. TIMES, June 24, 2010, available at <http://www.nytimes.com/2010/06/24/us/politics/24mcchrystal.html> (reporting on President Obama’s decision to fire General Stanley A. McChrystal after McChrystal made public comments criticizing Administration officials over the war in Afghanistan).

8. See *infra* subpart IV(B).

9. See, e.g., *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (counseling deference to the military where the case involves “‘complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force,’ which are ‘essentially professional military judgments’” (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973))); *Skidmore v. Swift*, 323 U.S. 134, 139 (1944) (holding that the policies of the administrator under the Fair Labor Standards Act

example, the growing interest in the role of professional military lawyers—judge advocates general (JAGs)—and other members of the professional military, who challenged civilian policies authorizing the coercive treatment of detainees and a form of trial by military commission by working inside the Pentagon, as well as in testimony before Congress and in the public sphere.¹⁰ Relying on a combination of arguments from legal and professional expertise, the JAGs were among the few forces inside the government after the attacks of September 11 to promote compliance with domestic and international law in approaches to interrogation and trial.¹¹ Even as scholars have increasingly questioned the effectiveness of Congress and the courts in constraining executive power in the area of counterterrorism,¹² the professional

“are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case”).

10. The nature of the JAGs’ role has been the subject of a series of articles in recent years. *See, e.g.*, Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOUS. L. REV. 553, 590–95 (2007) (discussing the JAGs’ role in congressional inquiries into the treatment of suspected terrorists); Maj. Gen. Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, YALE J. INT’L AFF., Winter 2008, at 146, 149–52 (defending JAGs as an “indispensable part of a commander’s warfighting team” and explaining that the Constitution grants “civilian-control-of-the-military responsibilities” to all three government branches); Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 658–67 (2009) (arguing that JAG challenges to Bush Administration policies were rooted in an understanding of those policies’ legal and practical consequences rather than an attempt to increase the JAGs’ own autonomy); Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1420–23 (2008) (noting that JAG testimony before Congress on the Military Commissions Act included frank admissions of problems with administration policies and assertions of independence). For a more detailed factual account of the JAGs’ role on issues of interrogation in particular, see Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1276–79 (2006).

11. *See infra* Part II.

12. *See, e.g.*, Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SECURITY J. 145, 155 (2010) (noting that United States courts have never addressed the legality of executive targeted-killing procedures); Dawn E. Johnsen, *Foreword*, 81 IND. L.J. 1139, 1141 (2006) (introducing articles that identify factors such as political pressure on Congress not to interfere with the Executive on foreign policy matters); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2322–42 (2006) (proposing, in light of congressional inability to restrain executive power, a reform of executive agencies to introduce overlapping jurisdiction and produce a system of internal checks and balances on executive power); Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1196 (2006) (describing the Executive Branch’s ability to carry out a possibly unconstitutional warrantless-wiretapping program in secret and without congressional oversight); Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 221–29 (2010) (recounting the ways in which courts use deference and immunity principles to protect executive officials from suits related to their activities in the war on terror); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 437–39 (2009) (identifying factors—such as political realities, executive noncooperation, and jurisdictional barriers—that impede that ability of Congress and the Judiciary to provide an effective check on the Executive); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 410–11 (2009) (arguing that, as a practical matter, “the judicial role” as a limit on executive exercises of authority with regard to terror suspects is “vanishingly small”); William Michael

military has been among the few governmental structures to find any success in moderating the expansion of executive power in this realm. In ensuring that civilian decision makers are exposed to the judgment of subject-matter experts, as well as in preserving the possibility of accountability for Executive Branch activities through a system of military justice, the professional military has provided a structure through which rule-of-law forces may help to hold executive power in check.

Such contrasting examples highlight the uncertain line between excessive influence and expert advice. How can one meaningfully assess when the engagement of military professionals poses a threat to civilian control; whether the JAGs or other military advisory structures permissibly constrain the power of the civilian Executive; whether to support, for example, recurring attempts to require the JAGs to report directly to the civilian Department of Defense (DOD) general counsel, effectively eliminating the JAGs as independent sources of legal advice to civilian Pentagon leadership;¹³ or whether to be concerned when the courts appear to defer more to the expert judgment of the professional military than to the judgment of the civilian leadership to the contrary?¹⁴

Useful answers to such questions depend on there being some definition of the nature and function of constitutional civilian control. Before we can tell whether civilian control is threatened, we must first have some sense of what it is. Yet for all the appropriately intense focus in recent years on the legality of what the military does, where the modern military fits in our constitutional democracy has remained remarkably undertheorized in legal scholarship. Moreover, while the social- and political-theory literature of civil-military affairs is substantially more developed, the concept of civilian control holds rather different meanings in the differing theoretical models that prevail. Perhaps most concerning, both prevailing theories of civilian control in this literature view the Constitution's separation of powers—in particular, the allocation of authority over the military to more than one branch of government—as a fundamental *impediment* to the maintenance of civilian control as the theories take it to be defined. As a result, there remains a significant gap in the development of a constitutional understanding of the meaning of civilian control. This Article is an effort to begin filling that gap, in the service of evaluating whether and how the constraining advice of military professionals is consistent with our modern separation-of-powers scheme.

Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333, 1337–38 (2006) (questioning whether Congress must authorize “the biggest conflicts, the smallest conflicts, and everything in-between,” or whether Congress should give the Executive “a free hand” in most conflicts).

13. See PANEL REPORT ON PRODUCTIVE RELATIONSHIPS, *supra* note 2, at 33–36 (detailing unsuccessful efforts in the 1990s and 2000s to subordinate JAG lawyers to civilian DOD authority); see also CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 282–89 (2007) (same).

14. See *infra* section III(B)(2).

In contrast to contemporary legal scholarship, social and political theory has long focused on just such questions—how and to what extent civilian authority may be informed by military expertise within the confines of a system of civilian control.¹⁵ Part II thus begins by introducing the two predominant theoretical models of civilian control from this literature. To help illustrate the implications of these models, this part also introduces the JAG example as a test case for studying contemporary dilemmas in civil–military affairs. In one view, Samuel Huntington’s theory of “objective control,” the central goal of civilian control over the military is the promotion of military professionalization. Here, the key to maintaining civilian control is to ensure that officers’ primary loyalties are more to a set of professional norms and ethics than to a set of shifting civilian political commitments, enabling the military to remain politically neutral and therefore less threatening to the inevitably partisan demands of any particular civilian in control.¹⁶ For Huntington, then, the prospect that Congress may call on military officers to testify, for example, is problematic. It places officers who feel personal or professional loyalty to their Commander in Chief in a position that compromises their ability to offer their unvarnished expert views, necessarily involving them in subjective political debate, and undermining the possibility of securing objective control. While an officer may have critical expertise on questions of law and policy at the center of Congress’s interests, Huntington’s model suggests that testimony under these circumstances is to some extent at odds with the smooth functioning of civilian control.

The Article also considers the implications of a second model of civilian control, one that understands the civil–military relationship as one of principal (civilian) to agent (military).¹⁷ In the agency-theory view, the core purpose of civilian control is to ensure that politically accountable civilians make all policy decisions (and decide which decisions count as such), while military agents do no more than faithfully carry them out. Focused not on exploiting military expertise per se, but rather on guarding against any means by which the military could substitute its will for that of the voters’ elected representatives, the agency model’s essential teaching is that “civilians have the right to be wrong.”¹⁸ For agency theorists, the reality of a divided principal evident in shared presidential and congressional supervision of military

15. See generally AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA (Suzanne C. Nielsen & Don M. Snider eds., 2009) (collecting recent scholarship).

16. See SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 84 (1957) (explaining that a primary requirement of civilian control of the military is the minimization of military political power, which, under a theory of “objective” civilian control, is achieved “by professionalizing the military, by rendering them politically sterile and neutral”).

17. See, e.g., PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 57 (2003) (describing how under this theory the civilian authority, as principal, would delegate authority to military agents to carry out the mission of using force on behalf of the civilian society).

18. *Id.* at 65.

affairs is problematic in that, while it leaves civilians formally in control, it opens a channel for the military to play civilian principals against each other in service of advancing the military's own goals, thereby undermining effective civilian control overall. In this view, too, whether acting through Congress or through other levers of government power, the relative influence of expert officers may be understood to pose a challenge to civilian control.

How should such political models be evaluated in constitutional terms? Part III begins by suggesting that it is helpful to draw on the set of approaches that courts and scholars have used to inform the interpretation of separation-of-powers principles, using inquiries that ask both what the formal structural provisions of the Constitution demand and what the functional purposes were behind the constitutional decision to insist upon a particular allocation of authority in the first instance. Examining formal claims first, this part considers and rejects recent arguments that the JAGs' engagement on these issues inside the Executive Branch, with Congress, and with the courts, is somehow inconsistent with the power of the Commander in Chief. In Part IV, the Article takes up the more complicated functional interests that underlie the structural subordination of the military to civilian authority. Exploring evidence from constitutional text, history, and contemporary theory, this part focuses on two constitutional interests in particular: promoting political accountability and ensuring governmental effectiveness. It concludes that the role of the professional military, at least in some settings, may be better understood not as exerting undue influence but rather as promoting these still-salient goals. In this way, it becomes possible to reject the troubling position taken by both prevailing political models—namely, that the Constitution's allocation of authority over the military to more than one branch of government should be seen as an impediment to the achievement of effective civilian control.

Having begun with the question of whether it is consistent with constitutional notions of civilian control for the military ever to act as a constraint on the power of the civilian Executive, the tentative answer proposed here is twofold: that existing definitions of civilian control are contradictory in their implications and inconsistent with the constitutional scheme, and that a more appropriate understanding of civilian control tends to leave greater room for the possibility of military constraint in some circumstances. Rather than remaining tied to models of civilian control that are broadly hostile to the separation of powers, this Article suggests that the degree of threat to civilian control posed by a particular exercise of military advice may be better evaluated in light of whether or not it violates the formal constitutional structure and whether or not it serves an identifiable set of functional constitutional goals. The Article concludes by highlighting these principles of civilian control, suggesting a path forward for future work in civil–military relations and law.

Before proceeding, it may be useful to say a word about the specialized example of JAG engagement on questions of U.S. interrogation and trial

policies that this Article invokes as a way of testing the implications of the theoretical models considered here. In one sense, the JAGs' status as advisors not just on any topic of technical expertise but on the meaning of a specialized area of *law* would seem to give the JAGs a ready defense of their role: JAGs opposing civilian counterterrorism policies were merely following the Constitution's formal scheme, seeking to enforce legal strictures passed by one civilian branch (Congress) against the other (the Executive). Such a function might trouble those who favor less fettered notions of *presidential* power, but it is hardly a threat to control by civilians as such. This point is surely correct, and indeed, as shall be discussed below, part of the current debate about civilian control is wrapped up in long-standing questions about the formal scope of executive power compared to that of Congress. Yet this response only goes so far. Not all of the arguments advanced by the JAGs were legal in nature; some trafficked in issues of strategy or geopolitics. Moreover, not all of the legal interpretations the JAGs advanced were in line with interpretations by civilian government lawyers also charged with interpreting key parts of relevant law. Yet for reasons that seem worth exploring, there were limited occasions in which the JAG view effectively prevailed. One need not reject the possibility that law remains relatively autonomous from politics to recognize that the expertise and influence the JAGs offered were not limited to strictly technical advice. Particularly in light of what for many is the substantive attraction of the position the JAGs held, the JAG example seems an especially useful case study highlighting contemporary dilemmas faced in civil–military affairs.

II. Theorizing Challenges to Civilian Control

While the constitutional law literature is rich in discussion of the nature of the President's power as Commander in Chief—a role that literature treats as central to questions of civilian control¹⁹—legal scholarship has remained surprisingly sparse in engaging concepts of civilian control reaching across the branches of government.²⁰ In contrast, scholars of civil–military affairs

19. For examples of the most thorough recent works, see generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) [hereinafter Barron & Lederman, *Framing the Problem*] and David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman, *Constitutional History*]. See also David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 507–31 (2008) (explaining the American origins of civilian control over the military and focusing on the formal power granted, or not granted, to particular institutional actors); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEXAS L. REV. 299, 301 n.1 (2008) (providing a list of additional sources that discuss this topic).

20. Beyond the recent works by Ackerman, Mazur, and Sulmasy and Yoo, cited *supra* notes 1–3, several writers have engaged the particular criticism of the JAGs' roles. See *supra* note 10. These works have tended to emphasize the operational features of the JAG role, taking the dominant theoretical models of civil–military relations (to the extent they are mentioned at all) as given and avoiding broader questions of civilian control.

in social and political science have long sought to elucidate the purposes behind the democratic expectation of civilian control and have over time developed various theoretical understandings of the concept. Such understandings prove a useful place to start in structuring our thinking about the nature of civilian control. This part thus introduces the two most significant models to emerge from that literature: Samuel Huntington's theory of objective control and an agency-theory view most associated with Peter Feaver.

In many such discussions of civil–military relations, scholars often take as their examples high profile conflicts between presidents and generals over war strategy, instances in which a president has sought to avoid or override the advice of the professional military. Such clashes of opinion have arisen regularly in U.S. history, most famously between President Truman and General MacArthur over the course of the Korean War in the 1950s,²¹ and perhaps most significantly between President Lincoln and General McClellan over the treatment of slavery during the Civil War.²² But questions of civilian control do not always arise in such dramatic fashion. As the terrorism-related security challenges of the past decade usefully illustrate, there are a variety of ways in which military factions may seek to achieve preferred outcomes far short of publicly criticizing the President or disobeying a direct civilian command. This part uses the example of the role JAG lawyers played in challenging civilian interrogation and trial initiatives as a way of exploring the implications of the theories in contemporary civil–military engagement.

A. *Huntingtonian Control*

By far the most influential of modern political models of civilian control is the objective-control understanding proposed by Samuel Huntington in his Cold War work, *The Soldier and the State*.²³ Interested in advancing a

21. See MAJOR PROBLEMS IN AMERICAN MILITARY HISTORY 374–408 (John Whiteclay Chambers II & G. Kurt Piehler eds., 1998) (compiling historical documents and essays in a chapter titled “The Korean War and MacArthur’s Leadership”). See generally Roy K. Flint, *The Truman–MacArthur Conflict: Dilemmas of Civil–Military Relations in the Nuclear Age*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989, at 223 (Richard H. Kohn ed., 1991) (discussing the conflict between President Truman and General MacArthur regarding the Korean War, as well as the role this conflict played in civil–military relations).

22. See BRUCE CATTON, MR. LINCOLN’S ARMY 151–54 (1962) (describing the disagreement between President Lincoln and General McClellan regarding the feasibility and necessity of an emancipation program).

23. HUNTINGTON, *supra* note 16; see also Edward M. Coffman, *The Long Shadow of The Soldier and the State*, 55 J. MIL. HIST. 69, 69 (1991) (“Anyone seriously interested in American military history has to come to terms with Samuel P. Huntington’s *The Soldier and the State*.”). Huntington’s view that the military should avoid participating in civilian political debates came to dominate the views of the officer corps in the latter half of the twentieth century; while his theory has since been subject to manifold critiques, this essential view is still embraced by many scholars of civil–military relations. See, e.g., Risa A. Brooks, *Militaries and Political Activity in Democracies*, in AMERICAN CIVIL–MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW

normative recommendation for the conduct of civil–military affairs in the teeth of the Soviet threat, Huntington argued that the Framers’ initial reasons for insisting upon civilian control were no longer salient.²⁴ The danger that the military might usurp democratically elected leaders through outright coup had not materialized in U.S. history and by the 1950s seemed an increasingly fanciful fear.²⁵ Instead, Huntington posited, “the modern problem of civil–military relations” was one of how best to take advantage of and protect the military’s functional expertise.²⁶ As Huntington explained, “The modern officer corps is a professional body and the modern military officer a professional man. . . . Professionalism distinguishes the military officer of today from the warriors of previous ages.”²⁷ By professionalism, Huntington meant most broadly the institutional acquisition and maintenance of a set of technical skills, norms, and ethics—as may be found in medicine, science, or law—that define and distinguish those trained in the profession from others.²⁸ For the military officer, the skill set could be readily identified as “[t]he direction, operation, and control of a human organization whose primary function is the application of violence.”²⁹

Huntington’s conception of the military professional led him to imagine a distribution of power between civilian and military authorities that could exploit this advantage and protect the military institution as an autonomous, professional sphere of activity.³⁰ His model of “objective civilian control” was the embodiment of this idea, contemplating an allocation of power between military and civilian authorities that maximized “the emergence of professional attitudes and behavior among the members of the officer corps.”³¹ In contrast with historical models of “subjective civilian control,” in which members of the military were controlled by ensuring that they were inculcated with the values of the particular civilian leadership (or even the values of the more general political system), objective control aimed to substitute professional specialization for political values as a means of ensuring

ERA, *supra* note 15, at 213, 214–16 (observing that Huntington’s views have become “infused” into the officer corps’ approach to political participation and criticizing Huntington for ignoring the benefits to national security that can arise from greater public engagement by military leaders, but ultimately concluding that these benefits are outweighed by the risks to healthy long-term civil–military relations).

24. HUNTINGTON, *supra* note 16, at 164–65 (explaining that although the Framers spoke and wrote of subordination of the military to the civil power, they generally “did not . . . foresee the emergence of military professionalism and objective civilian control”).

25. *See id.* at 360–61 (describing criticism of the influx of military leaders to government in the late 1940s but concluding that appointed military leaders adapted to their civilian roles quickly, quieting fears that they would militarize the government).

26. *Id.* at 7; *see also id.* at 20 (“[T]he problem in the modern state is not armed revolt but the relation of the expert to the politician.”).

27. *Id.* at 7.

28. *Id.*

29. *Id.* at 11.

30. *Id.* at 83.

31. *Id.*

political control.³² It sought to avoid the danger posed by the potential rise of a corrupt, even totalitarian, political leadership in which civilian leaders would use fear, surveillance, and political indoctrination to eliminate the military as an independent threat.³³ Objective control aimed to ensure that the military remained “politically sterile and neutral.”³⁴ Accordingly, where officers were responsible for the organization and training of forces, the planning of force activities, and “the direction of [the force’s] operation in and out of combat,”³⁵ the civilian leadership would decide the “what” and “why” of state policy. The military professional existed not to engage policy questions but to provide the “instrumental means” of achieving an established policy goal.³⁶ It is the function of the military professional “to warn the statesman when his purposes are beyond his means.”³⁷

While maintaining that objective control was not about ensuring that the military embrace any particular set of civilian values, Huntington saw objective control as serving two goals central to the constitutional system. First, Huntington viewed the maximization of military professionalism as a way of guarding against the military’s accumulation of excessive political power.³⁸ An overt coup d’état might no longer be a serious threat in the United States, but the military’s ability to deploy its outsized political popularity in support of one or another policy initiative continued to be. The enhancement of military professionalism would help ensure that a commitment to neutral professional norms and ethics swamped whatever political or policy predispositions officers might hold.³⁹ Second, at least if the United States embraced military professionalism as Huntington defined it, objective control would “maximize[] the likelihood of achieving military security.”⁴⁰ The professional “military mind” was realist in its understanding of international power politics, believing that the “action of States is regulated by nothing but power and expediency.”⁴¹ And the military mind was conservative in the sense of tending to overestimate threats, favor preparedness, and disfavor

32. *Id.* at 83–84.

33. *Id.* at 82–83.

34. *Id.* at 84.

35. *Id.* at 11.

36. *Id.* at 68–69.

37. *Id.* at 69; *see also* Luban, *supra* note 19, at 555 (embracing this model and finding support for it in historically separationist models of bifurcating functions between civilians and the military, in which “politics is left to the politicians while military choices are *mostly* left to the military”).

38. *See* HUNTINGTON, *supra* note 16, at 84 (“[T]he objective definition of civilian control furnishes a single concrete standard of civilian control which is politically neutral and which all social groups can recognize. It elevates civilian control from a political slogan masking group interests to an analytical concept independent of group perspectives.”).

39. *Id.* at 258–59 (discussing how the growth of military professionalism led to a mindset within the military that “an impartial, nonpartisan, objective career service, loyally serving whatever administration or party was in power” was “the ideal”).

40. *Id.* at 85.

41. *Id.* at 65–66 (quoting MAJ. STEWART L. MURRAY, *THE PEACE OF THE ANGLO-SAXONS: TO THE WORKING MEN AND THEIR REPRESENTATIVES* 13 (1905)).

war.⁴² Given Huntington's position that these characteristics were essential in confronting modern threats, he believed that a "strong, integrated, highly professional officer corps, . . . immune to politics and respected for its military character, would be a steadying balance wheel in the conduct of policy."⁴³ Put differently, objective civilian control was likely to produce the best, most effective approach to national security.

As Huntington acknowledged, his objective understanding of civilian control would not have been possible for the Constitution's Framers, as there was no such thing as today's "professional" military in their time.⁴⁴ Indeed, in his assessment, the guidance the Framers did provide in the Constitution had tended historically to forestall the development of objective control.⁴⁵ The vagueness of the substantive powers included as part of the office of Commander in Chief had enabled presidents to launch turf wars over war powers at the expense of Congress, increasing conflict between the branches and with it the likelihood that the military would be caught in a political tug-of-war between them.⁴⁶ Like the later agency theorists, Huntington recognized that the Constitution gave Congress substantial power to regulate the armed forces.⁴⁷ Correspondingly, he saw that officers who failed (or were disinclined) to persuade their Commander in Chief that their professional judgment should be followed could take their cause to Congress in an effort to achieve the same result.⁴⁸ Huntington's concern was that this feature of the separation of powers would effectively engage the military in just the kind of political debate he thought it critical for the military to avoid.⁴⁹ As he explained, Congress's constitutional power to compel military testimony would render it "impossible for American officers ever to be at ease in their professionalism."⁵⁰ The Constitution's formal allocation of

42. *Id.* at 65–69. In Huntington's account, the "military mind" is particularly skeptical of international mechanisms he describes as "designed to prevent war." *Id.* at 65. Thus, "[t]reaties, international law, international arbitration, the Hague Court, the League of Nations, [and] the United Nations are of little help to peace." *Id.* at 65–66.

43. *Id.* at 464.

44. *Id.* at 164–65.

45. *Id.* at 178.

46. *Id.* at 179–80.

47. *Id.* at 178.

48. *Id.* at 182–83.

49. *Id.*; see also *id.* at 415–16 (describing statutory changes that exacerbated the possibility of interbranch conflict over the military). Huntington noted that

the National Security Act of 1949 permitt[ed] a member of the Joint Chiefs of Staff to present to Congress "on his own initiative, after first informing the Secretary of Defense, any recommendation relating to the Department of Defense that he may deem proper." This was the first statute in American history authorizing a professional military chief to take his views directly to Congress.

Id. at 416 (quoting National Security Act Amendments of 1949, Pub. L. No. 81-216, 63 Stat. 578, 580).

50. *Id.* at 184 (referring to the potential effect the separation of powers in general has on military professionalism); see also *id.* at 415–18 (describing the conflict faced by the Joint Chiefs of Staff in light of Congress's power to compel military testimony).

power over the military to both the President and Congress was thus the single greatest obstacle to the realization of objective control.⁵¹

What then would Huntington make of the role the JAG lawyers played in challenging civilian interrogation and trial policies? Consider separately the different structural mechanisms the JAGs deployed. In the first instance, JAGs worked through administrative channels within the Pentagon, advising civilian decision makers on the legality and wisdom of a variety of proposed initiatives in counterterrorism operations. For example, in December 2002, Defense Secretary Rumsfeld authorized for use with certain detainees a set of interrogation techniques, including threatening detainees with dogs and placing them in painful “stress positions.”⁵² In response to objections raised by the civilian Navy general counsel that such an approach would violate domestic and international law regulating detainee treatment, Rumsfeld established a working group to reconsider the use of these techniques.⁵³ When that working group issued preliminary recommendations urging similar or more aggressive interrogation techniques,⁵⁴ the head JAG for each branch of military service (known as The Judge Advocate General, or TJAG) responded with a stern memorandum in opposition. In particular, the TJAGs expressly challenged the civilian Justice Department Office of Legal Counsel (OLC) opinion indicating that the Executive had the power to authorize such techniques:

While the OLC analysis speaks to a number of defenses that could be raised on behalf of those who engage in interrogation techniques later perceived to be illegal, the “bottom line” defense proffered by

51. *See id.* at 163 (“The United States Constitution . . . does *not* provide for civilian control. . . . The military clauses of the Constitution . . . divide civilian responsibility for military affairs and foster the direct access of the military authorities to the highest levels of government”); *id.* at 177 (“The separation of powers . . . has been a major hindrance to the development of military professionalism and civilian control in the United States.”).

52. *See* Memorandum from William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def., to Donald Rumsfeld, Sec’y, U.S. Dep’t of Def. (Nov. 27, 2002) (on file with author) (recommending that Secretary Rumsfeld approve the use of certain “counter-resistance techniques”). Secretary Rumsfeld approved the recommendation on December 2, 2002, with the hand-written comment, “However, I stand for 8–10 hours [a] day. Why is standing limited to 4 hours?” *Id.*

53. VICE ADM. A.T. CHURCH, III, REVIEW OF DEPARTMENT OF DEFENSE OPERATIONS AND DETAINEE INTERROGATION TECHNIQUES 4–5 (2005) [hereinafter CHURCH REPORT], available at <http://www.defense.gov/news/mar2005/d20050310exe.pdf>; *see also* INDEP. PANEL TO REVIEW DOD DET. OPERATIONS, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 7 (2004) [hereinafter PANEL REPORT ON DETENTION OPERATIONS], available at <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf> (noting that Rumsfeld “rescinded the majority” of the December 2, 2002 techniques “[a]s a result of concerns raised by the Navy General Counsel”).

54. *See* CHURCH REPORT, *supra* note 53, at 5 (reporting that the working group issued a draft report in March 2003 that recommended thirty-six interrogation techniques, including “water boarding (pouring water on a detainee’s towed face to induce the misperception of suffocation)”). The working group considered as many as thirty-nine interrogation techniques; however, four of these techniques—including water boarding—were deemed unacceptable and were not included in the working group’s final report. *Id.*

OLC is an exceptionally broad concept of “necessity.” This defense is based upon the premise that any existing federal statutory provision or international obligation is unconstitutional *per se*, where it otherwise prohibits conduct viewed by the President, acting in his capacity as Commander-in-Chief, as essential to his capacity to wage war. I question whether this theory would ultimately prevail in either the U.S. courts or in any international forum. If such a defense is not available, soldiers ordered to use otherwise illegal techniques run a substantial risk of criminal prosecution or personal liability arising from a civil lawsuit.⁵⁵

The TJAGs emphasized not only legal, but also operational and political harms involved in implementing techniques contrary to established military training:

[T]he use of the more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral “high-road” in the conduct of our military operations regardless of how others may operate. Our forces are trained in this legal and moral mindset beginning the day they enter active duty. It should be noted that law of armed conflict and code of conduct training have been mandated by Congress and emphasized since the Viet Nam conflict when our POWs were subjected to torture by their captors. We need to consider the overall impact of approving extreme interrogation techniques as giving official approval and legal sanction to the application of interrogation techniques that U.S. forces have consistently been trained are unlawful.⁵⁶

While it may not be possible to measure precisely the effect of such efforts on civilian policy makers, at least some subsequent revision in policy is visible. Following TJAG complaints, Secretary Rumsfeld issued a new memorandum regarding approved interrogation techniques, this time authorizing only a subset of the techniques that the working group (which had relied on the civilian OLC’s analysis) had first recommended.⁵⁷ Elsewhere,

55. Memorandum from Maj. Gen. Thomas J. Romig, Judge Adv. Gen., U.S. Army, to Gen. Counsel, U.S. Air Force 1 (Mar. 3, 2003) (on file with author); *see also* 151 CONG. REC. S8793–97 (daily ed. July 25, 2005) (statement of Sen. Lindsey Graham) (introducing into the *Congressional Record* memoranda prepared by service JAG officers, including Memorandum from Rear Adm. Michael F. Lohr, Judge Adv. Gen., U.S. Navy, to Gen. Counsel, U.S. Air Force (Feb. 6, 2003) [hereinafter Lohr 2/6/03 Memorandum]; Memorandum from Rear Adm. Michael F. Lohr, Judge Adv. Gen., U.S. Navy, to Gen. Counsel, U.S. Air Force (Mar. 13, 2002) [hereinafter Lohr 3/13/02 Memorandum]; Memorandum from Maj. Gen. Jack L. Rives, Deputy Judge Adv. Gen., U.S. Air Force, to Gen. Counsel, U.S. Air Force (Feb. 6, 2003) [hereinafter Rives 2/6/03 Memorandum]; Memorandum from Maj. Gen. Jack L. Rives, Deputy Judge Adv. Gen., U.S. Air Force, to Gen. Counsel, U.S. Air Force (Feb. 5, 2003) [hereinafter Rives 2/5/03 Memorandum]; Romig, *supra*; and Memorandum from Brig. Gen. Kevin M. Sandkuhler, Staff Judge Adv. to Commandant, U.S. Marine Corps, to Gen. Counsel, U.S. Air Force (Feb. 27, 2003)).

56. Rives 2/5/03 Memorandum, *supra* note 55, at 2.

57. *See* CHURCH REPORT, *supra* note 53, at 5 (explaining that in an April 16, 2003 memorandum, Secretary Rumsfeld approved only twenty-four of the thirty-five techniques

staff judge advocates succeeded to a similar extent in moderating the most aggressive interrogation orders issued in the field during the war in Iraq. Lieutenant General Ricardo Sanchez, then U.S. Army Commander of the Coalition Joint Task Force in Iraq, had issued a September 14, 2003 order authorizing the use of a series of interrogation techniques, including techniques to exploit an “Arab fear of dogs,” prolonged isolation, stress positions, sensory and sleep deprivation, and environmental manipulation.⁵⁸ That authorization was rescinded less than a month later, following objections from military attorneys finding many of the techniques “overly aggressive.”⁵⁹

What would Huntington make of this kind of JAG engagement, first as internal military advisors? In the first instance, one might imagine him viewing such a role as unobjectionable, even helpful. As long as civilian leaders retain ultimate authority to decide on a course of action, presumably, JAG advice may be taken or left. Indeed, such efforts inside the Pentagon to shape interrogation and trial policy may be seen as evidence of Huntington’s professional military functioning precisely as it should. Highly trained

recommended by the working group). An initial list of techniques approved by Rumsfeld was issued in December 2002 and included (1) use of stress positions for a maximum of four hours; (2) use of falsified documents; (3) isolation for up to thirty days (with extensions upon approval of the commanding general); (4) interrogating in an environment other than the interrogation room; (5) deprivation of light stimuli, auditory stimuli, or both; (6) hooding; (7) twenty-hour interrogation; (8) removal of “comfort items” such as religious medallions; (9) switching detainee from hot rations to meals ready-to-eat (MREs); (10) removal of clothing; (11) forced grooming; (12) using phobias of detainees to induce stress (for example, fear of dogs); and (13) the “[u]se of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.” Haynes, *supra* note 52, at 1, 4–6. In January 2003, Rumsfeld rescinded his approval of all of these techniques. Memorandum from Donald H. Rumsfeld, Sec’y, U.S. Dep’t of Def., to Commander, U.S. S. Command (Jan. 15, 2003) (on file with author).

58. See MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 10, 24–25 (2004) [hereinafter FAY REPORT], available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> (describing the details of the Coalition Joint Task Force’s interrogation techniques in September 2003 and chronicling their genesis); see also CHURCH REPORT, *supra* note 53, at 8 (stating that Lieutenant General Sanchez published the policy on September 14, 2003); PANEL REPORT ON DETENTION OPERATIONS, *supra* note 53, at 37 (acknowledging that Lieutenant General Sanchez signed the policy on September 14, 2003). After the January 2003 rescission of the initial working-group techniques, a new Pentagon working group was “formed and published a revised memo in April 2003 under the signature of the SECDEF on Counter-Resistance Techniques.” LT. GEN. ANTHONY R. JONES, AR 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE 14 (2004), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>. This memo and the techniques outlined in Field Manual 34-52 were the basis of the guidance then provided to Lieutenant General Sanchez, from which he developed his instructions in the field. *Id.*

59. CHURCH REPORT, *supra* note 53, at 8 (explaining that because the staff judge advocate for U.S. Central Command (CENTCOM) found the policy to be too aggressive, it was changed); see also FAY REPORT, *supra* note 58, at 25–26 (noting that the September 2003 policy was made less aggressive in October 2003); PANEL REPORT ON DETENTION OPERATIONS, *supra* note 53, at 10, 14, 37–38 (observing that Lieutenant General Sanchez rescinded and replaced his policy after CENTCOM expressed its disapproval with the policy and concluded it was unacceptably aggressive).

officers with expertise in the rules governing the operation and control of the armed forces used those skills to warn civilians against the use of specific means to fulfill a set of policy goals aimed at addressing terrorism. To the extent their objections were raised through internal Pentagon channels, there was arguably little danger that public interest groups would have the opportunity to deploy the JAGs as weaponry in a political debate. That the JAGs' arguments were in part based on the constraints of international law raises some questions about the accuracy of Huntington's conception of the "military mind" as, for example, skeptical of international legal mechanisms.⁶⁰ But from Huntington's point of view, as long as the JAGs aimed to provide professional assessments of the application of operational law on which they had been specially trained, allowing civilians to make final calls on occasions in which law blurred into policy, their behavior should pose no necessary threat to a system of objective control.

On the other hand, the JAGs' advice was not strictly limited to technical questions of law. For example, a memo from Major General Jack Rives to the general counsel of the Air Force emphasized that the interrogation policies the civilians had endorsed seemed inconsistent with American moral commitments to humane treatment.⁶¹ Moreover, he argued, authorizing the use of techniques the troops had long been trained were wrong risked sowing confusion in the field, potentially compromising operational effectiveness.⁶² Such considerations are obviously relevant to policy determinations about the wisdom of individual interrogation techniques. But do these considerations flow from the JAGs' particularly legal expertise? Or are they questions of the "what and why" of state policy, better left to political judgment? Moreover, that the TJAGs initially offered their advice only internally does not preclude the possibility that the process was politicized in any number of ways. If a concern of civilian control is moderating the ability of uniformed military to deploy their outsized political influence, there is no clear reason to believe that influence might not also be effective, at least to some extent, when only the threat of (if not actual) public engagement is in play.

In this sense, the JAGs' more direct engagement of Congress and the public on issues related to military commissions would seem to present a

60. See HUNTINGTON, *supra* note 16, at 65–66 (concluding that the "military mind" is skeptical of devices—such as international legal mechanisms—designed to prevent war because the causes of war derive from human nature and are therefore impossible to abolish). The potential utility of military lawyers as a mechanism for promoting adherence to international legal obligations has implications for long-running debates on whether and why states comply with international law. A fuller discussion of these implications will be left to a separate article.

61. See *supra* note 56 and accompanying text; see also Lohr 2/6/03 Memorandum, *supra* note 55 (implying that Americans may find the interrogation policies, though technically legal, inconsistent with their fundamental values).

62. Rives 2/6/03 Memorandum, *supra* note 55, at 2 ("General use of exceptional techniques . . . , even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations, and may adversely affect the cultural self-image of the U.S. armed forces.").

greater challenge from Huntington's point of view. For example, JAGs assigned to defend the first detainees charged with offenses under the military-commission system attacked the system not only in judicial proceedings—as one might expect from their assignment—but also in media appearances characterizing the commissions as “contrary to international law and susceptible to political influence.”⁶³ In more than one instance, this tactic earned military counsel criticism from senior military leaders, including threats that the JAGs themselves could be prosecuted under the traditional military justice system.⁶⁴ Other JAGs went further still. Throughout the period of commission creation, challenge, and re-creation, a number of JAGs tasked to staff military-commission proceedings requested transfers over concerns with the commission process.⁶⁵ Among those requesting transfers were at least six JAGs tasked to serve not as defense counsel but as prosecutors in commission trials.⁶⁶ To greater or lesser

63. Jess Bravin, *Critics of Tribunals Gain Unlikely Allies: Lawyers in Uniform*, WALL ST. J., Mar. 18, 2004, at A1 (describing the challenges the JAG defense attorneys planned to bring against the military commissions); see also Raymond Bonner, *Terror Case Prosecutor Assails Defense Lawyer*, N.Y. TIMES, Mar. 5, 2007, at A10 (detailing criticism levied against one such defense attorney for making public statements condemning the military commissions and referring to the commissions as “kangaroo courts”).

64. See Bonner, *supra* note 63 (quoting then-commission prosecutor Colonel Morris Davis as stating that defense lawyer Major Michael Mori was “actively inserting himself into the political process” and could face prosecution for his public criticism of the commissions under Article 88 of the Uniform Code of Military Justice, which criminalizes the use of “contemptuous words” by a military officer about the President, Vice President, Secretary of Defense, or other high public officials); Bravin, *supra* note 63 (explaining that JAGs “have launched a surprisingly vigorous assault on the system that hired them” and quoting the commission’s top lawyer, Air Force Brigadier General Thomas Hemingway, as saying defense counsel “should only speak publicly to help their clients, not aim ‘to make a big splash’”).

65. See Ross Tuttle, *Rigged Trials at Gitmo*, NATION, Feb. 20, 2008, available at <http://www.thenation.com/article/rigged-trials-gitmo> (detailing the resignation of chief commission prosecutor Colonel Morris Davis in 2007 and highlighting three other prosecutors who requested transfers out of the Office of Military Commissions in 2004 because of their concerns regarding the fairness of the commissions).

66. Lieutenant Colonel Darrel J. Vandeveld, Major Robert Preston, Captain John Carr, and Captain Carrie Wolf requested reassignment from the commission prosecutor’s office after their superiors failed to respond to their allegations that the commission system was withholding material evidence from defendants that could prove their innocence. See Dan Ephron, *Gitmo Grievances*, NEWSWEEK, May 26, 2008, at 24 (reporting that Captain Wolf, along with Major Preston and Captain Carr, wrote emails to the chief prosecutor raising serious concerns with the commissions); Neil A. Lewis, *2 Prosecutors Faulted Trials for Detainees*, N.Y. TIMES, Aug. 1, 2005, at A1 (describing the allegations made by Major Preston and Captain Carr prior to leaving the prosecution team); Josh Meyer, *For Lawyer, Trial Was Tribulation*, L.A. TIMES (Oct. 12, 2008), <http://articles.latimes.com/2008/oct/12/nation/na-gitmo12> (detailing the circumstances leading to Lieutenant Colonel Vandeveld’s resignation from the commissions and, ultimately, active military duty). Lieutenant Colonel Stuart Couch declined to renew his assignment as prosecutor after being asked to use evidence that had been obtained through interrogations that he believed violated U.S. and international law. See Jess Bravin, *The Conscience of the Colonel*, WALL ST. J., Mar. 31, 2007, at A1 (chronicling the events culminating in Lieutenant Colonel Couch’s belief that certain evidence had been obtained through torture). Chief commission prosecutor Colonel Morris Davis resigned, expressing concerns that political interests in the Administration were improperly interfering with commission prosecutions. See Michael Melia, *Ex-Gitmo Prosecutor Charges*

degrees, all of these cases became public fodder for criticizing the commissions. Some of the JAGs' stories became the subject of variously sourced media exposés.⁶⁷ Other JAGs publicly expressed their concerns, for instance, that political interests in the Administration were improperly interfering with commission prosecutions.⁶⁸ After his departure, for example, Lieutenant Colonel Darrel J. Vandeveld testified at commission proceedings on behalf of defendants, stating that the U.S. government had been withholding material evidence that tended to exculpate defendants.⁶⁹

JAGs concerned about the shape of military commissions likewise urged their position directly with the Senate Armed Services and Senate Judiciary Committees, writing a public letter requesting that the Senate investigate whether the presidentially created commissions violated the U.S. Constitution, the Geneva Conventions, or other applicable laws.⁷⁰ Although advocating on behalf of their particular clients, the JAGs' language condemning the Guantanamo commissions was sweeping:

[T]he Department of Defense has sought and attempted to build a legal black hole wherein it can conduct both physically and psychologically abusive interrogations and impose penal and potentially capital sanctions subject only to the will of the Executive and the Department of Defense and not the rule of law.⁷¹

The JAGs' efforts to shape the commission process did not end after the Supreme Court invalidated the presidentially authorized commissions in *Hamdan v. Rumsfeld*⁷² in 2006.⁷³ JAGs repeatedly testified before Congress as it considered legislation to authorize a revised military-commission system

Pentagon Interference, TORONTO STAR (Apr. 29, 2008), <http://www.thestar.com/News/World/article/419384> (describing Colonel Davis's testimony that the Pentagon had interfered in the selection of detainees for trial); see also Josh White, *Ex-Prosecutor Alleges Pentagon Plays Politics*, WASH. POST, Oct. 20, 2007, at A3 (describing Colonel Davis's belief that the Pentagon sought to put certain detainees on trial for political reasons).

67. See, e.g., Lewis, *supra* note 66 (reporting on the content of various electronic messages containing the accusations of Captain John Carr and Major Robert Preston and chronicling the events leading to their resignations from the teams prosecuting Guantanamo detainees).

68. After learning that former DOD General Counsel William Haynes would be his superior, former chief commission prosecutor Colonel Morris Davis was quoted as explaining, "The guy who said waterboarding is A-okay I was not going to take orders from. I quit." Melia, *supra* note 66; see also White, *supra* note 66 (reporting that Davis said he felt pressure from the Pentagon to pursue "sexy" cases for their "strategic political value" relative to the 2008 elections).

69. Meyer, *supra* note 66.

70. Letter from Lt. Col. Sharon A. Shaffer et al., to John Warner, Chairman, United States Senate Committee on Armed Services, et al. (June 1, 2004), available at <http://www.law.georgetown.edu/faculty/nkk/documents/hill.letter.pdf> (requesting that the Senate Armed Services and Senate Judiciary Committees conduct probes into whether military commissions as constituted violated domestic and international legal standards).

71. *Id.*

72. 548 U.S. 557 (2006).

73. *Id.* at 635.

at Guantanamo following the Supreme Court's decision in *Hamdan*.⁷⁴ And JAG engagement was not limited to those JAGs who had been appointed counsel for the original commission defendants. Taking a position directly contrary to that taken by civilian officials in the Justice Department after *Hamdan*,⁷⁵ the TJAGs criticized new proposed commission rules as inconsistent with Common Article 3 of the Geneva Conventions; in their view, the proposed rules impermissibly restricted the confrontation rights of defendants and allowed the introduction of coerced testimony.⁷⁶ In the JAGs' estimation, such rules raised not only legal concerns but also political problems in achieving U.S. counterterrorism objectives. As Major General Charles Dunlap put it, "A process fully compliant with Common Article 3 will enhance our standing internationally and empower our allies to embrace the legal reasoning and architecture behind the prosecution of military commission cases. Doing so is plainly in our warfighting interests."⁷⁷ In Senate testimony, none of the TJAGs simply embraced the Executive's position that Congress should use the pre-*Hamdan* commission procedures as a baseline for legislation authorizing commissions going forward.⁷⁸

74. See, e.g., *Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld: Hearings Before the S. Comm. on Armed Servs.*, 109th Cong. 101-02 (2006) [hereinafter *Military Commissions in Light of Hamdan Hearings*] (statement of Sen. Carl Levin) ("[T]he committee heard from six JAGs, both Active and retired. . . . A majority . . . favor taking the existing rules of courts-martial under the UCMJ as the starting point for the framework for our consideration of military commissions . . .").

75. For a discussion of the Administration's beliefs regarding the applicability of Common Article 3 of the Geneva Conventions to the treatment of detainees in light of the Supreme Court's decision in *Hamdan v. Rumsfeld*, including the belief that the standard adopted by Congress in the McCain Amendment is consistent with Common Article 3, see *Standards of Military Commissions and Tribunals: Hearing before the H. Comm. on Armed Servs.*, 109th Cong. 68-70 (2006) [hereinafter *Standards of Military Commissions Hearing*] (statement of Steven G. Bradbury, Acting Assistant Att'y Gen. for the Office of Legal Counsel, United States Department of Justice).

76. See *id.* at 16-17 (statement of Maj. Gen. Charles J. Dunlap, Jr., Deputy Judge Advocate General, United States Air Force) ("[M]y personal opinion, sir, is that we cannot have a process whereby the finder of fact . . . gets evidence that the accused never sees and never has the opportunity to defend against . . ."). Compare *id.* at 17 (statement of Brig. Gen. James Walker, Staff Judge Advocate, United States Marine Corps) ("I am not aware of any situation in the world where there is a system of jurisprudence that is recognized by civilized people where an individual can be tried without—and convicted without seeing the evidence against him. And I don't think that the United States needs to become the first . . ."), with Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (requiring that trials be conducted in accord with "all the judicial guarantees which are recognized as indispensable by civilized peoples").

77. *Standards of Military Commissions Hearing*, *supra* note 76, at 8 (statement of Maj. Gen. Charles J. Dunlap, Jr., Deputy Judge Advocate General, United States Air Force).

78. *Military Commissions in Light of Hamdan Hearings*, *supra* note 74, at 7-36 (statements of Maj. Gen. Scott C. Black, Judge Advocate General, United States Army; Rear Adm. James E. McPherson, Judge Advocate General, United States Navy; Maj. Gen. Jack L. Rives, The Judge Advocate General, United States Air Force; Brig. Gen. Kevin M. Sandkulher, Staff Judge Advocate to the Commandant, United States Marine Corps; Maj. Gen. Thomas J. Romig, Former Judge Advocate General (Ret.), United States Army; Rear Adm. John D. Hutson, Former Judge Advocate General (Ret.), United States Navy).

What then would Huntington make of the JAGs' engagements of public and legislative audiences in these ways, or of Congress's behavior? It seems likely he would take a critical view. In designing rules for the military-commission system after the Court struck down the President's initial attempt, Congress called on the JAGs to testify publicly, effectively compelling them to take sides in what by then had become an explosive political debate over not only the legality but also the wisdom of pursuing military commissions. If the officers fully embraced and defended the position of the civilian Executive, they would be supporting their Commander in Chief but might feel compelled to subordinate their professional judgment. If the officers testified candidly according to their professional judgment—but contrary to the views of the civilian Administration—they might risk professional alienation of some kind given their service under the command of the President.⁷⁹ Either way, from Huntington's perspective, Congress's engagement was only making it harder "for American officers ever to be at ease in their professionalism."⁸⁰ In this account, then, the JAGs' public engagement could be said to undermine effective civilian control.

B. Agency Accountability

A second, more recent model of civilian control comes from theorists such as Peter Feaver, who argue that civil-military relations are best understood as a problem of principal and agent—an arrangement governed by a set of strategic interactions, played out in a hierarchical structure in which civilians are in charge.⁸¹ Civilians delegate authority to the military to carry out policy on civilians' behalf. In this model, the key criterion by which one determines whether civilian control is being served is not whether the chosen policy best meets some objective goal—for example, the protection of national security. Rather, what matters is only

whether the civilians are the ones who make key policy decisions (no *de facto* or *de jure* coup), whether the civilians are the ones who decide which choices civilians should make and which can be left to the military, and whether the military is behaving in a way that supports civilian supremacy in the long run.⁸²

Correspondingly, the primary challenge in ensuring the effective functioning of such a system is the calibration of monitoring tools and incentives that

79. See *infra* notes 183–88 and accompanying text.

80. HUNTINGTON, *supra* note 16, at 184.

81. FEAVER, *supra* note 17, at 57–58.

82. *Id.* at 66; see also Sulmasy & Yoo, *supra* note 2, at 1823 (“[Civilian control] must also be measured by the ability of the military to succeed in imposing its preferred policy outcomes against the wishes of civilian leaders to the contrary.”).

make it more likely that the military agent will faithfully and accurately carry out policies as civilian principals intend.⁸³

For agency theorists, the primary reason for conceiving of the civil–military relationship in these terms has less to do with constitutional allocations of authority and more to do with a functional claim about what works best to promote accountability of the (military) agent to the (civilian) principal. In democratic terms, the object is to ensure that the military’s preferences cannot be substituted for those of the voters’ elected representatives. Accordingly, while the military may certainly advise civilian leaders about what is best in their professional judgment, it is a “necessary and logical conclusion of the premises of democratic theory” that “civilians have the right to be wrong.”⁸⁴ If civilian leaders are inclined to make a poor decision (poor in the sense, for example, that it seems likely to weaken U.S. national security) contrary to expert advice, the appropriate remedy is not for officers to pursue their case in another forum, for Congress to strengthen the military’s advisory role *ex ante*, or for officers to resign in protest *ex post*, but rather to allow the informed electorate to exercise its authority as “ultimate civilian principal” to remove their civilian leaders from office.⁸⁵ Otherwise, to the extent the military can succeed in “imposing its preferred policy outcomes against the wishes of civilian leaders to the contrary,”⁸⁶ it is, in agency terms, “shirking” its responsibility.⁸⁷

For agency theorists, the uniformed military’s effective opposition to President Clinton’s attempt in the 1990s to lift the formal ban on gays in the military is among the concerning cases in point. After announcing his decision to lift the ban, President Clinton faced withering, and politically powerful, criticism from popularly acclaimed members of the military, with Colin Powell and members of the Joint Chiefs of Staff arguing that such integration would undermine cohesion within the force and compromise military effectiveness.⁸⁸ After failing through internal Executive Branch channels to persuade the President to reverse course, military leaders took

83. See FEAVER, *supra* note 17, at 54–58 (summarizing the theory and noting additional scholarly sources); see also Sulmasy & Yoo, *supra* note 2, at 1826 (adopting agency theory as the appropriate model of civilian control).

84. FEAVER, *supra* note 17, at 65.

85. See *id.* at 302 (“If civilian leaders are not responsibly managing the military, then the ultimate civilian principal, the electorate, has an obligation to punish its agents, the elected officials.”).

86. Sulmasy & Yoo, *supra* note 2, at 1823.

87. *Id.* at 1827 (suggesting that “shirking” in the public-administration context occurs where agents are able to “maximize their autonomy and follow their preferred policies”); see also FEAVER, *supra* note 17, at 68 (“The military agent is said to shirk when, whether through laziness, insolence, or preventable incompetence, it deviates from its agreement with the civilians in order to pursue different preferences . . .”).

88. P.W. Singer, *How The Real World Ended “Don’t Ask Don’t Tell,”* FOREIGN POL’Y BROOKINGS 8 (Aug. 2008), available at http://www.brookings.edu/~media/Files/rc/papers/2008/08_military_singer/08_military_singer.pdf (quoting General Colin Powell as arguing that nothing should be done that would “disrupt that feeling of cohesion with the force”).

their case to Congress, where they convinced congressional allies to support a bill that would enact the existing ban into law (and attach it to the President's much-touted family-leave legislation then pending).⁸⁹ The tactic eventually resulted in compromise legislation (allowing gays to serve, provided they kept their sexual orientation private) that reflected neither the White House's desire to lift the ban in its entirety nor the wishes of those in Congress who had introduced legislation imposing an outright ban.⁹⁰ Further, the military was perhaps even more effective in resisting the policy shift after the compromise legislation passed. As one author put it, "[t]he intent of the policy—to curb harassment—was sabotaged by the military so effectively that the practical effect became at least as persecutorial as anything before."⁹¹ In Feaver's terms, the military shirked.

Precisely because they recognize that constitutional authority over military supervision is shared between the President and Congress, agency theorists despair about the impact of the separation of powers on the maintenance of civilian control. That the principal is divided in this sense is seen as a central obstacle to the effective exercise of civilian control in agency-theory terms. So long as military officers may engage in "end runs around the chain of command to Congress," or leak information to the media if policy deliberations are not going their way, the military is able to play one principal against the other, take advantage of its own political salience, and thereby advance its own preferences over those of the Commander in Chief (or Congress, or both).⁹²

What then are the implications of the agency model for the JAG examples under consideration here? Should the JAGs be seen to pose a threat to the ability of the civilian principal to control the military agent? On one hand, to the extent the JAGs' advice and participation could be described as no more than an effort to abide by and enforce existing instructions of elected civilian principles—the obligation by treaty, ratified by the Senate and signed by the President, for example, to prohibit cruel treatment—then perhaps the agency theorist would be relatively untroubled. After all, there are circumstances in which the civilian principal, "like Odysseus, asks the military agent to tie [the civilian's] hands in some way so that the civilian can get what he knows he ultimately wants and not what he will say he wants

89. FEAVER, *supra* note 17, at 202.

90. *Id.* at 201–03; *see also id.* at 203 ("The military orchestrated much of the opposition by urging retired officers to speak up and by coordinating with congressional opponents of the president's plan; moreover, the military leaked word that there would be massive resignations in protest if the ban were lifted, further threatening the president's ability to set policy.").

91. Russell F. Weigley, *The American Civil-Military Cultural Gap: A Historical Perspective, Colonial Times to the Present*, in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* 215, 244 (Peter D. Feaver & Richard H. Kohn eds., 2001).

92. FEAVER, *supra* note 17, at 301.

under some limited circumstances.”⁹³ In this way, the system of military justice, in which adjudicatory courts-martial are broadly authorized by Congress but then carried out in the first instance by military personnel,⁹⁴ is entirely consistent with the agency-theory model.

But as noted above, legal interpretations on critical questions regarding interrogation and trial differed among military and civilian lawyers, and the JAGs’ statements were not limited to arguments based on law per se. In these respects, the agency theorist might worry that the JAGs’ modestly successful efforts to modify approved interrogation techniques inside the Pentagon was a sign of undue influence. The argument would go as follows: Because the military’s opinion matters to the public, and because the JAGs could go to Congress in the event they were unsatisfied by civilian executive decision making, civilian elected officials feared wholly ignoring JAG advice (or firing dissenting JAGs) for risk of public disapproval. They thus made the more politically palatable choice to capitulate in advance to military preferences—the opposite of what agency theorists would see as civilian control. Probably more concerning to the agency theorist, JAG efforts to advance their views on military commissions before other branches succeeded in taking advantage of a divided principal, as the JAGs turned to Congress to achieve the ends they had sought, but failed to achieve, through the civilian agents of the elected Commander in Chief. Where Huntington might see the danger of political influence here as mitigated by the fact that JAGs are military professionals, tied to their own canon of ethics rules and professional obligations, agency theorists find no necessary comfort in such affiliations. What matters instead are available incentives. The division of authority over the military between more than one branch gives the JAG agents an incentive to press their case with more than one supervisory authority. For those who believe that the results achieved reflected more the interests of a military faction than those either political branch would have pursued of its own accord, such end runs threaten the accountability interest at the center of civilian control.

A final example of JAG activity perhaps more dramatically illustrates the agency-theory concern: the deference seemingly paid by the courts to the judgment of the military (as opposed to that of either elected branch). In

93. *Id.* at 67–68 (discussing the congressional creation of the Base Realignment and Closure Commission as a means of closing bases without the need for difficult political decision making by Congress).

94. The Army’s earliest JAG lawyers served primarily to advise field commanders and administer courts-martial—the latter mostly aimed at ensuring the discipline of armed forces in the field. PANEL REPORT ON PRODUCTIVE RELATIONSHIPS, *supra* note 2, at 7–8. The Office of The Judge Advocate General of the Navy was established by statute in 1880; Congress created the analogous position for the Air Force in 1948. *Id.* at 8. The U.S. Army has had a permanent corps of military lawyers called Judge Advocates General since 1862, one of the many additions during the military’s dramatic expansion surrounding the Civil War. Col. Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 MIL. L. REV. 112, 114–15 (2004).

addition to their role inside the Executive Branch, JAGs became actively involved in federal court litigation—as assigned defense counsel and, seemingly beyond the necessary scope of their initial assignment, as *amici curiae*—surrounding civilian policies of detention and trial for terrorist suspects. In 2004, military-commission defendant Salim Ahmed Hamdan, represented both by civilian counsel and by appointed JAG Lieutenant Commander Charles Swift, filed suit challenging the Executive-created military-commission system on a variety of grounds.⁹⁵ Among his claims, Hamdan urged that the President lacked the power to establish such commissions without congressional authorization and that the commissions as established were not “regularly constituted court[s], affording all the judicial guarantees which are recognized as indispensable by civilized people,” as required by Common Article 3 of the Geneva Conventions.⁹⁶ As the case made its way through the courts, JAGs assigned to represent other commission defendants filed amicus briefs in support of Hamdan’s legal position, including one urging the Supreme Court to grant certiorari in the case before judgment in the appeals court.⁹⁷ While making clear that the views expressed “d[id] not represent the official views of the United States Government,”⁹⁸ the JAG brief was strongly worded: “[N]o one knows what the [commission] rules are, and the defendants languish waiting, perhaps for years, for ultimate resolution of these weighty matters. Such uncertainty is bad for accused and counsel, bad for the commissions themselves, and bad for the interest in prompt and speedy justice.”⁹⁹ At the same time, the Solicitor General, arguing on behalf of the civilian Secretary of Defense, urged the courts not to consider the case on the merits, invoking a host of abstention and political-question reasons why judicial engagement would be inappropriate.¹⁰⁰ Further, the briefs maintained, Hamdan was not entitled to

95. Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus, *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004) (No. CV04-0777L), 2004 WL 3753220.

96. *Id.* at 17–19.

97. Brief of Military Attorneys Detailed to Represent Ali Hamza Ahmad Sulayman al Bahlul Before a Military Commission as *Amicus Curiae* in Support of Petitioner at 4, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 04-702).

98. *Id.* at 2.

99. *Id.* at 4–5. A series of amicus briefs from the JAG defense team followed in subsequent proceedings. See, e.g., Brief of Amicus Curiae Office of Chief Defense Counsel, Office of Military Commissions in Support of Petitioner [Abstention Inappropriate], *Hamdan*, 548 U.S. 557 (No. 05-184), 2006 WL 42065; Brief of Military Attorneys Detailed to Represent Ali Hamza Ahmad Sulayman al Bahlul Before a Military Commission as Amicus Curiae in Support of Petitioner-Appellee and Affirmance, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393).

100. Brief for Respondents at 12–15, 19, 24, *Hamdan*, 548 U.S. 557 (No. 05-184), 2006 WL 460875.

the protections afforded by the Geneva Conventions; Common Article 3 in particular did not apply to Hamdan's case.¹⁰¹

The Supreme Court proved unpersuaded by the civilians' arguments.¹⁰² The President's treaty interpretation of Common Article 3 was simply "erroneous";¹⁰³ it was plain that the Geneva Conventions' protections did apply to the armed conflict the Court identified as at issue.¹⁰⁴ In addition, the Executive had argued that the statutory Uniform Code of Military Justice (UCMJ) delegated broad authority to the President to establish rules for commission proceedings—including rules different from those generally recognized in criminal cases—whenever the President "considers" application of those rules to be not "practicable."¹⁰⁵ The President had made just such a dispositive finding in his executive order, the government argued, asserting that "the danger to the safety of the United States and the nature of international terrorism" made certain elements of standard criminal trials, such as the application of the Federal Rules of Evidence, impracticable for detainees like Hamdan.¹⁰⁶ But the Court gave this finding negligible weight, explaining that "it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial."¹⁰⁷ Dissenting Justice Clarence Thomas cited statements made to the media by civilian Department of Defense officials to demonstrate that commissions

101. *See id.* at 48–49 (arguing that "Article 3 by its plain terms does not apply to the ongoing conflict with al Qaeda" because Article 3 concerns only conflicts that are not international in character).

102. *See Hamdan*, 548 U.S. at 630–32 (concluding that Common Article 3 applied to conflicts that were international in scope as long as they were not fought between nations, and that therefore individuals captured in the war against al Qaeda were entitled to the minimal protections guaranteed by Article 3).

103. *Id.* at 630 ("The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being 'international in scope,' does not qualify as a 'conflict not of an international character.' That reasoning is erroneous." (citation omitted)).

104. *Id.* at 631–32. While the Court recognized that the treaty was ambiguous in some respects, it did not hesitate in concluding that the Executive's commissions did not satisfy what requirements there were. *See id.* at 635 ("Common Article 3 obviously tolerates a great deal of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened . . . does not meet those requirements.").

105. *See* Brief for Respondents, *supra* note 100, at 18 (contending that Article 36 of the Uniform Code of Military Justice (UCMJ) granted the President broad discretion to adopt rules that depart from "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" if he determined that the application of those rules was not "practicable" (citing Uniform Code of Military Justice art. 36, 10 U.S.C. § 836)). The President also unsuccessfully advanced the Authorization for Use of Military Force (AUMF) as a fount of congressional authority to establish military commissions. *See id.* at 16–17 (asserting that since the detention of enemy combatants was a necessary incident of war, the AUMF's authorization of the use of force against al Qaeda must have also authorized the creation and use of military commissions to incarcerate such combatants).

106. *Id.* at 43–47 & n.22.

107. *Hamdan*, 548 U.S. at 623–24.

were necessary.¹⁰⁸ But the majority dismissed such statements as inadequate: “We have not heretofore, in evaluating the legality of executive action, deferred to comments made by such officials to the media.”¹⁰⁹

Of particular interest in the Court’s reasoning was its attention to the record, *vel non*, of the commissions’ development inside the Pentagon.¹¹⁰ In rejecting the President’s bare determination that pursuing traditional courts-martial would be impracticable, the Court emphasized that “[n]othing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case.”¹¹¹ While it is unclear to what extent the Court relied on amicus briefs, the Court did have before it the briefs of current JAG officers taking a position contrary to that of the Administration. It also had internal e-mail messages from JAGs who had requested transfers away from their positions as commission prosecutors after expressing concerns that the commissions were not only legally flawed but also corrupt.¹¹² The Court had amicus briefs from former JAG officers as well as recently retired admirals and generals arguing that the President had not made a sufficient finding of impracticability, that the President was wrong in determining that the Geneva Conventions did not apply in the instant conflict, and that civilian conclusions to the contrary were endangering American lives.¹¹³ Perhaps most important, prominent press accounts had reported that the Administration had bypassed standard internal decision-making processes when it designed the commissions, ensuring that “[m]ilitary lawyers were largely excluded” from the process of developing a commission trial system in the days following the September 11 attacks.¹¹⁴ In a multipart series of articles, the *New York*

108. *See id.* at 712–13 (Thomas, J., dissenting) (quoting statements by then-Secretary of Defense Donald Rumsfeld expressing a preference for trying enemy combatants in a judicial system different from the existing federal and military court systems).

109. *Id.* at 623 n.52 (majority opinion).

110. *See* Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 90, 109–10 (2006) (detailing how the informality of the military commissions and the constantly changing nature of their governing rules concerned the majority in *Hamdan*).

111. *Hamdan*, 548 U.S. at 623.

112. The petition for writ of certiorari in the case quoted an article that revealed details of messages from commission prosecutors Captain John Carr and Major Robert Preston complaining about the lack of fairness in the trial system. *See* Petition for Writ of Certiorari at 28, *Hamdan*, 548 U.S. 557 (No. 05-184), 2005 WL 1874691 (“The commission’s own prosecutors stated that ‘the chief prosecutor had told his subordinates that the members of the military commission that would try the first four defendants [which include Hamdan] would be “handpicked” to ensure that all would be convicted.’” (quoting Lewis, *supra* note 66)).

113. *See, e.g.*, Brief for Military Law Historians, Scholars, and Practitioners (Military Commissions and the Articles of War) at 3, *Hamdan*, 548 U.S. 557 (No. 05-184), 2006 WL 53989 (calling the President’s finding of impracticability “arbitrary and capricious”); Amicus Curiae Brief of Retired Generals and Admirals and Milt Bearden in Support of Petitioner at 2, *Hamdan*, 548 U.S. 557 (No. 05-184), 2006 WL 42063 (maintaining that a ruling that the Geneva Conventions did not apply in the war against al Qaeda would “directly and immediately endanger[] American troops and undermine[] the laws of war”).

114. Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at N1.

Times detailed how civilian officials in the Administration had put forward commission rules over the objections of senior military leaders, including the Army TJAG, and that the rules fell short of domestic and international law standards.¹¹⁵ In short, to the extent it was possible for the Court to discern the views of the military's experts on military justice and international law, or indeed whether such experts had been consulted, the information it had tended to weigh against upholding the commission process.¹¹⁶ In this sense, one might argue that the *Hamdan* Court afforded more weight to the views of the military experts than to the civilian policy makers themselves.

Return then to the agency-theory perspective—one that views political accountability above all as the interest at the core of civilian control. The courts famously are said to have less of a claim to political accountability than either Congress or the Executive.¹¹⁷ But the JAGs were effectively able to engage the courts in rejecting the civilian determination that traditional courts-martial were impracticable. While the courts by now have an established tradition of attending to the expertise and interpretations of other administrative agencies,¹¹⁸ in the interest of agency expertise and out of a view that executive agencies are more politically accountable than the federal courts, agency theorists might contend that the relevance of that practice is questionable here. For the most part, the JAGs were not proffering an interpretation based on power delegated by Congress to issue rules with the force

115. Detailing how the opinions of uniformed military officers were largely marginalized during the creation of the commissions, Golden wrote,

Many of the Pentagon's experts on military justice, uniformed lawyers who had spent their careers working on such issues, were mostly kept in the dark. . . .

. . . .

. . . [T]he Army's judge advocate general, Maj. Gen. Thomas J. Romig, hurriedly convened a meeting of senior military lawyers to discuss a response [to a draft presidential order creating the commissions]. The group worked through the Veterans Day weekend to prepare suggestions that would have moved the tribunals closer to existing military justice. But when the final document was issued that Tuesday, it reflected none of the officers' ideas, several military officials said. "They hadn't changed a thing," one official said.

In fact, while the military lawyers were pulling together their response, they were unaware that senior administration officials were already at the White House putting finishing touches on the plan.

Id.

116. *Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring courts to strike down agency action as arbitrary if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

117. *See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962) ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people . . .").

118. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984) (acknowledging that "considerable weight" and "deference" are traditionally accorded to the determinations of administrative agencies).

of law—the modern standard for affording an agency’s interpretation deference.¹¹⁹ In any case, particularly because the JAGs’ advice on the ambiguous law at issue arguably treads into policy-making territory, their claim to technical expertise must be limited. Where the law is unclear, policy fills in. And where policy is made, the agency-theory critic would say it is the civilian politicians, not the military advisors, whose expertise matters most. If the agency account is right to place accountability concerns at the center of our understanding of civilian control, and right about how accountability would be best served in this case, then the JAGs’ role here too may be said to pose a challenge to the agency view of civilian control.

III. Constitutionalizing Theories of Civil–Military Relations

To judge by the prevailing models, there may be some cause to embrace recent concerns about the weakening of civilian control—or perhaps more specifically, the strengthening of military influence beyond what might be viewed as a desirable level.¹²⁰ Yet the different approaches above appear to support somewhat different conclusions about the relative threat to civilian control posed by different aspects of JAG engagement. For the Huntingtonian, the JAGs’ advisory function (at least to the extent it operates internally) might be understood largely to reinforce a commitment to objective control, enabling the integration of expert military guidance in putatively less political Executive Branch settings. For at least some agency theorists, in contrast, the JAGs’ ability to influence civilian decision making through multiple channels enables them to leverage their power in each setting, allowing unaccountable military actors to impose undue pressure (even within the Executive Branch) on more politically accountable civilians. Which among these accounts is right?

Perhaps more striking, both political models of civilian control exist in surprising tension with the formal constitutional structure. For Huntington, the separation-of-powers reality that Congress may call on military officers to testify, for example, places officers who feel personal or professional loyalty to their Commander in Chief in a position that compromises their ability to offer unvarnished expert views. Likewise, for agency theorists, the prospect of congressional supervision of military affairs is problematic in that, while it leaves civilians formally in control, it opens a channel for the military to play civilian principals against each other in service of advancing the military’s own goals—thereby undermining prospects for accountability through civilian control. For a Constitution that seems to have so self-consciously allocated power over military affairs to several branches of

119. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding that *Chevron* deference only applies to statutory interpretation where Congress delegates the agency authority “to make rules carrying the force of law”).

120. See *supra* notes 1–5 and accompanying text.

civilian government,¹²¹ it seems odd that contemporary understandings of civilian control chafe so much at the constitutional structure itself.

To be fair to authors like Huntington and Feaver, neither theory of civilian control set forth above was developed with much concern for how formal constitutional terms¹²² may limit or shape the possible meanings of civilian control. Huntington especially was skeptical of the idea of civilian control as a constitutional concept at all. He viewed the importance of civilian control as “extraconstitutional, a part of our political tradition but not of our constitutional tradition.”¹²³ Neither were these theories developed with particular attention to whether and why the purposive interests they identify—political accountability or effectiveness—matter in constitutional law. Surely such interests should be relevant at some level in a democracy, but how do they inform our understanding of constitutional concepts that are manifested in multiple ways in the Constitution’s formal structure?

To give some analytical framework for the analysis of civilian control that follows, this part begins by adopting an approach to interpretation familiar in separation-of-powers literature—an approach that requires the consideration of both formal and functional factors to elucidate constitutional meaning. Returning to the JAG example discussed above, it considers briefly and rejects the formal arguments that may be levied against Congress’s creation of the JAG advisory structure inside the Executive Branch, as well as against the Court’s particular attention to the views of military experts notwithstanding those of the civilian Commander in Chief. The functional arguments that the JAGs’ role poses a challenge to civilian control are then addressed in Part IV.

A. *An Interpretive Approach*

To answer the question “what does the Constitution mean by civilian control,” one needs in the first instance some sense of where to look. After all, “civilian control” appears by its terms nowhere in the text of the Constitution. Nonetheless, there are a number of textual provisions that seem plainly occupied with subordinating the military to the civilian political authority.¹²⁴ What, if anything, do such provisions tell us about the constitutional validity of, for example, military advisors, acting in roles created by statute, taking a public position at odds with the views of their Commander in Chief?

121. For example, the President is given the role of “Commander in Chief of the Army and Navy of the United States,” U.S. CONST. art. II, § 2, cl. 1, while Congress retains the power to “make Rules for the Government and Regulation of the land and naval Forces,” *id.* art. I, § 8, cl. 14. These powers and related others are discussed in greater detail below.

122. *See supra* note 121.

123. HUNTINGTON, *supra* note 16, at 190. He saw civilian control much like the party system: “Neither is contemplated in the Constitution, yet both have been called into existence by nonconstitutional forces.” *Id.*

124. *See supra* note 121.

A formal approach to evaluating such a separation-of-powers dilemma would begin by asking about the particular tasks assigned by the text to each branch of government. While the formalist label has been used in less-than-consistent ways in scholarly and judicial writings,¹²⁵ the formalist methodology at its core asks whether a disputed action is, for example, essentially legislative or executive by its nature.¹²⁶ Only the Executive Branch may exercise “executive” functions; only Congress may exercise “legislative” functions.¹²⁷ While civil–military-relations scholarship tends to pay relatively little attention to such formal claims, analyses that attempt to evaluate the separation-of-powers validity of a particular branch action in definitional terms alone are common in constitutional law,¹²⁸ and the Supreme Court’s jurisprudence regularly integrates such considerations.¹²⁹ Here, then, we might ask whether Congress’s creation of an office of military legal advisors of this nature impermissibly interferes with the President’s essential function as chief of the armed forces.¹³⁰

At the same time, as both courts and scholars have also recognized, such formal analysis often fails to yield satisfying or complete answers to separation-of-powers questions.¹³¹ The most prominent example of such a dilemma in constitutional law is why administrative executive agencies may be allowed to exercise a range of powers for making rules and resolving

125. See Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1555–56 (2009) (noting that while the formalist approach looks to the “functions” of the branches of government to determine the constitutional validity of an action by a particular branch, formalist courts make it clear that efficiency and convenience are not the principal objectives of democratic government).

126. See Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 454 (1991) (describing the formalist approach as a definitional analysis, whereby the Court would determine whether a branch action falls within that branch’s constitutionally derived powers—executive, legislative, or judicial—in order to decide whether the action is constitutional).

127. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 997 (2006) (“Under [the formalist] rationale, legislative power must rest with the legislative branch, executive power with the executive branch, and judicial power with the judicial branch.”); see also Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523–24 (1991) (noting formalists’ commitment to “strong substantive separations between the branches of government”).

128. See, e.g., M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1138–39 (2000) (describing how under the formalist approach, “the structural provisions of the Constitution specify the type (legislative, executive, judicial) and place (Congress, President, Supreme Court) of all government power”); Redish & Cisar, *supra* note 126, at 454 (advocating a formalistic approach to separation-of-powers analysis that determines the validity of a branch action solely through definitional analysis rather than through functional balancing).

129. See William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 22–25 (1998) (contrasting formal and functional judicial approaches to separation-of-powers interpretation).

130. Cf. *Bowsher v. Synar*, 478 U.S. 714, 732–33 (1986) (finding the position of Comptroller General to involve “execution” in constitutional terms because it involved interpreting the law to implement the legislative mandate).

131. See Pearlstein, *supra* note 125, at 1558–59 (citing cases and scholars who have recognized problems associated with applying formalism to separation-of-powers questions).

disputes. If adjudicatory powers are judicial in nature, for instance, why is it ever constitutionally permissible for such powers to be exercised by an agency of the Executive Branch? Formal separation-of-powers logic provides no answer. In matters of national security, the compulsion to turn to nonformal inquiries has been especially acute. In principle, there is much to support the idea that national security authority is shared amongst the branches according to established, formal commitments based on the nature of particular powers. Yet in practice, it has rarely been that simple. For instance, the Constitution's text does not expressly allocate to the Executive any power to detain prisoners seized on the field of combat. Yet it is broadly agreed that the President must have such power, at least to some extent, as part of any inherent or delegated authority to wage war.¹³² As the Court put it in recognizing presidential authority to detain individuals captured in a military-combat zone after September 11, "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."¹³³ Why is detention a "fundamental incident"? Formal analysis provides no obvious answer.

Given the complexity of such questions, the Court has also relied on so-called functional interpretation to understand what the separation of powers demands. Functional approaches may include both considerations of actual effectiveness (what works in a given policy context),¹³⁴ as well as

132. The Court in *Hamdi* chose not to decide whether the President had an inherent power to detain, because it found that the AUMF gave the President delegated authority to use all necessary force including power to detain. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–18 (2004) (plurality opinion). Other courts have found that inherent or delegated authority to wage war presupposes the power to detain. *See, e.g.*, *Gherebi v. Obama*, 609 F. Supp. 2d 43, 59–62 (D.D.C. 2009) ("And whenever the President can lawfully exercise military force, so, too, can he incapacitate the enemy force through detention rather than death."); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 72–74 (D.D.C. 2009) (observing that by authorizing force against organizations, the AUMF gave the President the power to use force, including detention, against their members); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2092 n.198 (2005) (presuming that the "law-of-war rule" relied upon in *Hamdi* to determine what the AUMF authorized was likely customary international law—specifically, Article 118 of the Third Geneva Convention, which requires that prisoners of war be repatriated at the end of hostilities).

133. *Hamdi*, 542 U.S. at 519.

134. For example, in interpreting counterclaim jurisdiction in such a way as to make the reparations procedure most effective, the Court observed that

[t]he CFTC adjudication of common law counterclaims is incidental to, and completely dependent upon, adjudication of reparations claims created by federal law, and in actual fact is limited to claims arising out of the same transaction or occurrence as the reparations claim.

In such circumstances, the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*. Conversely, were we to hold that the Legislative Branch may not permit such limited cognizance of common law counterclaims at the election of the parties, it is clear that we would defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. We do not think Article III compels this degree of prophylaxis.

considerations of constitutional purpose (such as why the Framers wanted to separate powers).¹³⁵ Answers to purposive inquiries in particular have tended to point to a core set of interests that the separation-of-powers scheme is designed to serve: protecting individual rights, ensuring that government officials remain responsive to the will of the electorate, and allocating responsibility among the branches in a way that helps promote government effectiveness.¹³⁶ In the present context, the functionalist might then ask whether the provision of military advice in different settings promotes or undermines these constitutional purposes. The political models of civilian control described above focus to varying degrees on one or two of these interests. Agency theorists, for instance, are principally concerned with the maintenance of democratic accountability and for this reason view unelected but influential military advisors with some concern. Huntingtonians focus more on the importance of exploiting the military's professional expertise in the interest of effective national security and for this reason would seem to take a more (but perhaps not entirely) favorable view of the utility of military advice provided in the right kind of setting.

The most powerful argument in favor of functionalist approaches in separation-of-powers jurisprudence has been what one might describe as the necessity of accommodating facts on the ground. In the modern administrative state, strict adherence to formalist divisions would likely result in the dismantling of much of the executive agency apparatus, which today is daily engaged in, for example, both rulemaking (i.e., legislative) and adjudicative (i.e., judicial) functions.¹³⁷ To the extent such rigid divisions were ever the Framers' intent, modern government has found it impossible to adhere to a structure in which strictly formal lines limit the kinds of roles each governmental actor may play.¹³⁸ The transformation of the military since the time of the Framers is at least as dramatic as that of the broader administrative state. As shall be described in greater detail in Part IV, the Framers

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986) (citations omitted) (internal quotation marks omitted).

135. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (noting that the Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty" (citing *Morrison v. Olson*, 487 U.S. 654, 685–96 (1988); *Bowsher*, 478 U.S. at 725)).

136. Pearlstein, *supra* note 125, at 1573; see also Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 640 (2000) (identifying separation-of-powers goals of "democracy," "professional competence," and "protection and enhancement of fundamental rights"); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1767 (1996) (identifying separation-of-powers goals of "balance," "accountability," and constraining "governmental power").

137. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492–93 (1987) (arguing that administrative agencies do not lend themselves to strictly formalist divisions because they exercise legislative and judicial functions in addition to executive functions).

138. *Id.* at 493.

developed a concept of civilian control and created the basic constitutional mechanisms putting it into effect at a time when the idea of a standing army was anathema and the notion of a highly professionalized military was beyond conception. In this sense, the concept of civilian control, however formally accomplished by the Framers, seems ideally susceptible to functional evaluation to the extent formal analysis proves inconclusive. To be clear, the effective abandonment of certain realities of the Framers' world need not mean that the Framers' purposes in insisting upon civilian control are no longer relevant. (Quite the contrary, interests like the preservation of democratic accountability and the exploitation of expertise seem highly salient today.) Rather, functionalist analysis permits evaluation of current structures in light of whether those purposes, played out across a very different field, are still being served.

B. Formal Limits

There are at least two sets of formal arguments that the JAGs' resistance to the policy choices of the civilian Executive effectively undermines civilian control. One such claim is that by creating a corps of quasi-independent legal advisers inside the military or by requiring JAGs to testify (even when their candid views run against the interests of their civilian Executive Branch superiors), Congress is infringing on formal power reserved to the President as Commander in Chief.¹³⁹ If the JAG structure created by Congress unduly burdens the President's ability to remove such officers, for example, then Congress might be intruding on the operation of a part of the military structure the Constitution meant to leave to the President alone. A second claim goes to the role of the courts, namely, that the courts' reliance on military professionals' insights—particularly as they are at odds with the views of the civilian Commander in Chief—infringes on the formal authority of the Executive to interpret and apply the law in this specialized realm. This subpart briefly develops these arguments and ultimately rejects them as an unnecessary consequence of formal constitutional provisions of civilian control.

1. *The Role of Congress.*—Perhaps the most dramatic claim made against the JAGs in recent scholarship has been that the JAGs undermine civilian control because they challenge the formal role of the President as Commander in Chief.¹⁴⁰ For its proponents, this contention is based on a view that the President is the “civilian whose preferences are paramount,” and therefore that effective *civilian* control is essentially a function of

139. Sulmasy & Yoo, *supra* note 2, at 1832.

140. *See id.* (noting that the prevailing models consider the President, as Commander in Chief, to be “the civilian whose preferences are paramount,” and therefore that JAGs who take their disagreements to Congress may be undermining constitutionally granted executive authority).

effective *executive* control.¹⁴¹ In this account, which draws loosely on the principal–agent model of civil–military affairs from political theory, the President is the principal and the military is his agent, tasked with no more than operationalizing the President’s expressed policy goals.¹⁴² For these authors, the JAGs’ 2006 testimony on the structure of military commissions, which was in ways “at odds with their civilian principal,” and their aggressive advocacy outside the courts against the commissions, were inappropriate efforts to expand their own role in matters of defense policy.¹⁴³ Worse, by invoking international law as well as the views of international courts and allies when opposing civilian policy initiatives, the JAGs “sought to introduce more players into the position of the principal to expand military autonomy and reduce the probability of sanction for opposing the president’s policy choices.”¹⁴⁴ Whatever mechanism is involved, to the extent the military can “succeed in imposing its preferred policy outcomes against the wishes of civilian leaders to the contrary,” it threatens civilian control by substituting its will for that of the voters’ representatives.¹⁴⁵

At the broadest level of abstraction, the formal claim is easily addressed. The notion that civilian control is effectively synonymous with executive control is simply belied by the Constitution’s text, which divides responsibility for control over the military among all three branches of civilian government.¹⁴⁶ Article II establishes the President as “Commander in Chief of the Army and Navy of the United States” and further notes that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”¹⁴⁷ The Legislature’s powers over the military are set forth at far greater length and detail. Under Article I, Congress has the

141. *Id.* (describing this model of civil–military relations).

142. *See* FEAVER, *supra* note 17, at 66 (“Civilians still have to be calling the shots, and military behavior has to be consistent with civilian supremacy.”); *see also* Sulmasy & Yoo, *supra* note 2, at 1823 (arguing that civilian control “must also be measured by the ability of the military to succeed in imposing its preferred policy outcomes against the wishes of civilian leaders to the contrary”).

143. Sulmasy & Yoo, *supra* note 2, at 1832 (describing JAG efforts to “block executive branch policies,” including testifying and attempting to enlist Congress).

144. *Id.* at 1833–34.

145. *Id.* at 1823. The idea from agency theory that civilian control is centrally concerned with keeping the military accountable to politically elected civilians is an important one, and the Article shall consider it in detail below.

146. The Court has, on rare occasion, implied that the military is an agent of the Executive alone. *See, e.g.,* Parker v. Levy, 417 U.S. 733, 751 (1974) (“[T]he military is the executive arm whose law is that of obedience. . . . The military establishment is subject to the control of the civilian Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.” (citation omitted) (internal quotation marks omitted)). However, its opinions before and since then recognizing Congress’s power to regulate military affairs have in key respects belied the authority of such passing dicta. *See, e.g.,* Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981) (“The case arises in the context of Congress’[s] authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.”).

147. U.S. CONST. art. II, § 2, cl. 1.

power to “provide for the common Defence”; “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”; “raise and support Armies”; “provide and maintain a Navy”; and “make Rules for the Government and Regulation of the land and naval Forces.”¹⁴⁸ Further, at a time when the militia was intended to be central to the United States’ national-defense capability, the Framers also allocated to the Legislature the power to call forth the militia to “suppress Insurrections and repel Invasions” and to provide for its organization, armament, and discipline, so long as it was employed in federal service.¹⁴⁹ (One might also note the courts are given jurisdiction to adjudicate a wide variety of cases, including the offense of treason, which is defined as levying war against the United States.)¹⁵⁰ As several scholars have now explained, there is no support for the notion that fulfilling *presidential* policy preferences is synonymous with the constitutional demands of civilian control.¹⁵¹

There remains, however, a more limited formal argument underlying this, one that fully recognizes that Congress has a significant role in the regulation and control of the military but that insists upon the possibility that the

148. *Id.* art. I, § 8; *see also id.* § 6 (precluding any “Person holding any Office under the authority of the United States” from simultaneous membership in Congress); *id.* art. IV, § 4 (providing that the United States “shall guarantee to every State . . . a Republican Form of Government”). Note that the courts were not left without power to engage in war-related determinations. *See id.* art. III (setting forth the powers of the Judiciary and defining the crime of treason as “consist[ing] only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort”).

149. *Id.* art. I, § 8. With respect to the delegation of control over the militia to Congress, Justice Jackson noted,

Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution’s policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring). Justice Jackson also observed that the Third Amendment limits the President’s power to seize housing for troops:

Time out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says, “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” Thus, even in war time, his seizure of needed military housing must be authorized by Congress.

Id. (quoting U.S. CONST. amend. III).

150. U.S. CONST. art. III.

151. *See, e.g.*, Corn & Jensen, *supra* note 10, at 558 (arguing that the primacy of the Executive over all political and policy issues related to the military is inconsistent with the constitutional paradigm of shared authority over the military between the Executive and Legislative Branches); Hansen, *supra* note 10, at 627 (noting that because of the risk that the President “could use the military in ways that would threaten our democratic system . . . , the Constitution creates a very significant role for Congress and makes the military answerable not just to one executive department or branch of government, but to Congress as well as the President”).

Commander in Chief enjoys some formal powers over the military that not even Congress can override.¹⁵²

To the extent the JAGs' current role is a statutory creation, the complaint is thus less about the nature of civilian control than about Congress's power to create what might be seen as a quasi-independent legal advisory structure inside the Executive Branch. To evaluate the strength of this criticism, it is useful first to put the modern role of military lawyers in some legal and historical context. Created by statute and under the command of General George Washington, the position of Judge Advocate General of the Army dates to the Second Continental Congress in 1775.¹⁵³ Today, head JAG officers for the armed services (TJAGs) are tasked by statute not only with directing corps of staff judge advocates but also with serving as principal legal advisor to their service secretary and chief of staff on matters of military justice and as legal advisors to the civilian service secretaries on topics ranging from labor and environmental law to operational deployment matters (including the interpretation and application of international law restrictions in armed-conflict settings).¹⁵⁴ With the rapid growth of

152. See Barron & Lederman, *Constitutional History*, *supra* note 19, at 1102 (“[I]t is difficult to construe the words of the Commander in Chief Clause *not* to establish some infeasible core of presidential superintendence of the army and the navy (and the militia when they are called into federal service).”); see also Barron & Lederman, *Framing the Problem*, *supra* note 19, at 769 (“Congress may not (by statute or otherwise) delegate the ultimate command of the army and navy (or of the militia when in the service of the national government) to anyone other than the President.”).

153. 2 JOURNALS OF THE SECOND CONTINENTAL CONGRESS, 1774–1789, at 220–21 (1905); see also THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975, at 7–11 (1975), available at http://www.loc.gov/rr/frd/Military_Law/pdf/lawyer.pdf (discussing the responsibilities of the judge advocate as they appear in rules adopted by the Second Continental Congress in 1775 and noting Washington’s role in the appointment of the first judge advocate).

154. See 10 U.S.C. §§ 806, 3037(c), 5148(d), 8037(c) (2006) (outlining the duties of TJAGs, judge advocates, and legal officers, which include requiring judge advocates assigned to civilian offices of the government to perform the duties requested by the agency concerned); PANEL REPORT ON PRODUCTIVE RELATIONSHIPS, *supra* note 2, at 28 (listing the responsibilities and duties of the Navy and Air Force TJAGs); U.S. DEP’T OF THE ARMY, GEN. ORDERS NO. 3: ASSIGNMENT OF FUNCTIONS AND RESPONSIBILITIES WITHIN HEADQUARTERS, DEPARTMENT OF THE ARMY 29–30 (2002) (summarizing the roles and responsibilities of The Judge Advocate General of the Army); see also U.S. DEP’T OF THE ARMY, FM 27-100: LEGAL SUPPORT TO OPERATIONS, at vii (2000), available at http://www.loc.gov/rr/frd/Military_Law/pdf/legal_support_operations.pdf (describing “how the Judge Advocate General’s Corps (JAGC) will provide legal support to operations and how commanders should integrate legal support in operational planning and training”). Defining operational law, the Army field manual states,

Operational Law is that body of domestic, foreign, and international law that directly affects the conduct of operations. The *practice* of *Operational Law* consists of legal services that *directly* affect the *command and control* and *sustainment* of an operation. Thus, *Operational Law* consists of the command and control and sustainment functions of legal support to operations. Support functions are an integral part of legal support to operations; however, they are treated separately from this discussion of *Operational Law*.

Id.

international human rights and humanitarian law (IHL) after World War II (including the ratification of, among other treaties, the modern Geneva Conventions), compliance with increasingly formalized operational rules began to emerge as a key feature of JAG training.¹⁵⁵ Responsibility for ensuring appropriate training in these and other IHL protections was given to the JAGs.¹⁵⁶ Well before the attacks of September 11, judge advocates had thus become central in helping to interpret and apply domestic and international law in times of armed conflict.¹⁵⁷

At the same time, the TJAGs and their subordinates have not been the sole source of legal advice to civilian Department of Defense policy makers. Since World War II, separate offices of politically appointed civilian general counsels have advised each of the civilian service secretaries and the DOD as a whole. The civilian general counsel's office in each service was established to advise the service secretaries "in the political-legislative-legal field."¹⁵⁸ The DOD Office of the General Counsel was created to resolve "disagreements within the Department of Defense" on legal and policy matters.¹⁵⁹ Of significance here, the civilian general counsels do not have executive or supervisory authority over the TJAGs and JAG Corps.¹⁶⁰ Rather, both military and civilian legal officials engage general, often overlapping areas of jurisdiction that have changed repeatedly over time (through statutory enactment and departmental guidance).¹⁶¹ In part because the relationship between the civilian general counsels and military JAG lawyers has been somewhat unclear, it has been marked by some conflict.

155. Among many changes, the UCMJ, adopted after the war, required JAGs to be trained lawyers and members of a state bar. 10 U.S.C. § 3065(e) (2006); *see also id.* § 827(b)(1) (requiring that trial and defense counsel "be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of the State").

156. *See, e.g.*, U.S. DEP'T OF THE ARMY, FIELD MANUAL (FM) 1-04: LEGAL SUPPORT TO THE OPERATIONAL ARMY ¶ 4-25 (2009), *available at* <http://www.fas.org/irp/doddir/army/fm1-04.pdf> (assigning to the Staff Judge Advocate the duty to "[p]rovide international and operational law advice, including training and support to the Department of Defense Law of War Program"); *see also* U.S. DEP'T OF DEF., DIRECTIVE 5100.77, at 4 (1974) (assigning responsibility for training to the secretaries of the military departments); LT. GEN. W.R. PEERS (RET.), THE MY LAI INQUIRY 239 (1979) (stating that soldiers must go through two hours of mandatory annual training by JAGs regarding the Geneva and Hague Conventions and that a separate course is given to senior officers on "the Law of War").

157. PANEL REPORT ON PRODUCTIVE RELATIONSHIPS, *supra* note 2, at 46-47.

158. *Id.* at 9 (quoting U.S. DEP'T OF THE ARMY, SUBMISSION TO THE INDEPENDENT REVIEW PANEL TO STUDY THE RELATIONSHIPS BETWEEN MILITARY DEPARTMENT GENERAL COUNSELS AND JUDGE ADVOCATES GENERAL 1 (2005)).

159. *Id.* at 10 (quoting U.S. DEP'T OF DEF., DIRECTIVE 5145.1 (2001)).

160. *Id.* at 30.

161. Some functions are clearly committed to the TJAG and not to the General Counsel by statute. *See, e.g.*, 10 U.S.C. §§ 806, 827, 869, 873 (2006) (assigning duties for judge advocates including making field inspections to ensure military justice, acting as trial or defense counsel, reviewing a finding of guilt, and acting upon a petition for new trial). Other functions are not so clearly allocated to one office or the other. *See* PANEL REPORT ON PRODUCTIVE RELATIONSHIPS, *supra* note 2, at 31 (referencing a need for "greater clarity as to the existing roles of these two legal officers").

Indeed, beginning in the 1990s, a series of efforts by civilian secretaries of defense sought to require JAGs to report directly to the civilian general counsels, effectively eliminating the JAGs as an independent source of legal advice to civilian Pentagon leadership.¹⁶² To date, however, such attempts have been rejected by Congress, which has instead legislated in various ways to reinforce the independence of the TJAGs as legal advisors to the military department secretaries and chiefs of staff, and likewise to reinforce the independence of the JAGs in the field to provide legal advice to their commanders.¹⁶³

Return then to the claim that the JAGs' advisory role—internally and before Congress—infringes on the authority of the Commander in Chief. Although largely not occupied with the particular problem of civilian control, the extensive study of the Commander in Chief power by Professors Barron and Lederman acknowledges Congress's significant role in the regulation and control of the military but at the same time posits a “preclusive prerogative of superintendence” by the President over the military upon which Congress cannot infringe.¹⁶⁴ In this view, the Framers intended to establish a

162. See, e.g., Letter from Richard Cheney, Sec'y, U.S. Dep't of Def., to Sam Nunn, Chairman, S. Comm. on Armed Servs. (June 13, 1991) (urging the Armed Services Committee to provide “for the General Counsel of each Military Department to serve as the single chief legal officer of his respective department accountable for legal advice and services in that department”); see also PANEL REPORT ON PRODUCTIVE RELATIONSHIPS, *supra* note 2, at 33–36 (discussing efforts to make civilian general counsels the chief legal officers of their departments); SAVAGE, *supra* note 13, at 282–89 (detailing unsuccessful efforts in the 1990s and 2000s to subordinate JAG lawyers to civilian DOD authority).

163. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 574, 118 Stat. 1811, 1921–23 (2004) (codified at 10 U.S.C. §§ 3037(e), 5148(e), 5046(c), 8037(c), (f) (2006)) (protecting the ability of JAGs to provide independent legal advice in the Army, Navy, Air Force, and Marine Corps). Further, and over the stated objections of the previous Administration, Congress moved to increase the rank of the most senior JAG officials. See S. REP. NO. 109-69, at 312 (2005) (explaining that rank increase was necessary because “[t]he greatly increased operations tempo of the Armed Forces has resulted in an increase in the need for legal advice from uniformed judge advocates in such areas as operational law, international law, the law governing occupied territory, the Geneva Conventions, and related matters”); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 1042—NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006, at 7 (2005), available at <http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/109-1/s1042sap-s.pdf> (objecting to the proposed increase in rank). The increase in rank eventually passed as part of the Fiscal Year 2008 National Defense Authorization Act, “primarily on the grounds that it would provide TJAGs with better access and visibility to senior civilian decision makers in the Department of Defense and their respective Military Departments.” PANEL REPORT ON PRODUCTIVE RELATIONSHIPS, *supra* note 2, at 63. The Act also increased the rank for each of the service JAGs from two to three stars and gave the rank of one-star general or admiral to the legal counsel to the chairman of the Joint Chiefs of Staff. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 543, 122 Stat. 3, 114–15 (codified at 10 U.S.C. §§ 3037(a), 5148(b), 8037(a) (Supp. IV 2011)).

164. Barron & Lederman, *Framing the Problem*, *supra* note 19, at 769 (arguing that with respect to the military, “no statute may prescribe that certain ‘command’ decisions are to be the province of anyone who is not subordinate to the Chief Executive”); see also Barron & Lederman, *Constitutional History*, *supra* note 19, at 1102 (asserting that “it is difficult to construe the words of

particular hierarchical relationship between the military and its civilian Commander to ensure that even the most famous generals would remain subordinate to the civil power.¹⁶⁵ Accordingly, powers over the appointment and removal of military officers (powers that had been vested in the Legislature under the Articles of Confederation regime¹⁶⁶) would now reside with the Commander in Chief.¹⁶⁷ From this, Barron and Lederman suggest that any attempt by Congress to assign a certain set of functions to members of the military who are in any sense “independent” of the President (akin to other “independent” executive agencies like the National Labor Relations Board or Federal Trade Commission) “might be constitutionally dubious with respect to similarly consequential positions of authority in the military establishment.”¹⁶⁸

If Barron and Lederman are correct that the President retains some supervisory authority over the military that Congress cannot by statute overcome, then one must at least ask whether the statutorily created role the JAGs now enjoy represents an imposition on any of the President’s “preclusive prerogatives” of control. After all, Congress has extensively regulated the appointment, promotion, and removal of military officers—including those in the JAG corps.¹⁶⁹ Moreover, in 2004, Congress passed a law providing that no officer or employee in the Defense Department may interfere with “the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Army or the Chief of Staff of the Army,” or the ability of JAGs in the field to give “independent legal advice to commanders.”¹⁷⁰ By its terms, this provision excludes the President from the actors prohibited from interfering. But if in practice the President relies on his Defense Department agents to police JAGs who fail to toe the party line, as it were, one might imagine such a substantive noninterference restriction

the Commander in Chief Clause *not* to establish some indefeasible core of presidential superintendence” of the military).

165. See Barron & Lederman, *Framing the Problem*, *supra* note 19, at 767–69 & n.246 (contending that the reason for designating the President as Commander in Chief was to ensure the subordination of the military and even the most renowned generals to civilian control in all circumstances); see also Barron & Lederman, *Constitutional History*, *supra* note 19, at 1102–03 (pointing out that Congress cannot actually, or even effectively, take this command power away from the President by appointing a new federal officer to be the head of the armed forces, as the Continental Congress did with George Washington during the Revolutionary War).

166. Barron & Lederman, *Framing the Problem*, *supra* note 19, at 780.

167. See *id.* at 769 (“[T]he text of the Commander in Chief Clause is fairly read to instruct that no statute could place a general or other officer in charge [of an authorized armed conflict] and insulate that officer from presidential direction or removal.”); see also *id.* (“[W]e think the text, as reinforced by historical practice, makes a strong case for at least some variant of a ‘unitary executive’ within the armed forces, particularly as to traditional functions in armed conflicts.”).

168. Barron & Lederman, *Constitutional History*, *supra* note 19, at 1103–05 (suggesting that “the President must be able to direct *all* discretionary decisions to be made within the armed forces and the (federalized) militia . . . where distinctly *military judgments* are at issue”).

169. See *infra* notes 175–84 and accompanying text.

170. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 574(a), 118 Stat. 1811, 1921–22 (codified at 10 U.S.C. § 3037(e) (2006)).

affecting their ability to take action against JAGs for independent advice they offer. In the examples above, some JAGs resigned or requested transfers when they disagreed with the course of civilian policies.¹⁷¹ A few military-commission defense lawyers later left the military for other reasons.¹⁷² But one did not see the President (or the Secretary of Defense) simply firing the Pentagon TJAGs. Why? The constitutional formalist poses one potential explanation: that congressional restrictions on removal or other presidential prerogatives have made it possible for JAGs to act with independence beyond that consistent with the preclusive powers of the Commander in Chief.

While the formal inquiry sheds some light on the scope of the power granted to Congress and the Commander in Chief, the argument ultimately fails on several grounds. First, it remains unclear whether and to what extent a preclusive prerogative of superintendence in the Commander in Chief exists.¹⁷³ Acknowledging some degree of uncertainty, Barron and Lederman's claim—that it would be constitutionally dubious to give officers the independence that comes from insulation from presidential removal¹⁷⁴—seems ultimately quite narrow. Yet the laudably detailed historical evidence from practice advanced in support of this view is far from dispositive. As Barron and Lederman note, the Civil War-era Congress passed a law giving a court-martial the authority to reverse the President's dismissal of an officer if it determines such dismissal was “wrongful[.]”¹⁷⁵—a bill neither the President nor his Attorney General (when asked for his legal analysis) found objectionable.¹⁷⁶ Sixteen years later, another President's Attorney General found, conversely, that the President could not reverse a court-martial ruling that an officer must be disqualified from holding office if such reversal were inconsistent with statutory rules to the contrary.¹⁷⁷ From this history, it seems clear that the President certainly had removal power in the absence of applicable statutory provisions, but once Congress had acted, Congress's authority could be superseding.¹⁷⁸ While the Supreme Court later concluded

171. *See supra* notes 65–69 and accompanying text.

172. *See infra* note 185 and accompanying text.

173. *See, e.g.*, G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS AND EXECUTIVE REGULATIONS IN GENERAL 15–16 (1898) (“[I]f it were practicable for Congress completely to regulate the methods of military administration it might, under the Constitution, do so. But it is entirely impracticable, and therefore it is in a great measure left to the president to do it.”).

174. Barron & Lederman, *Framing the Problem*, *supra* note 19, at 769–70, 800.

175. Barron & Lederman, *Constitutional History*, *supra* note 19, at 1017 (citing Act of Mar. 3, 1865, ch. 79, § 12, 13 Stat. 487, 489).

176. *See id.* (citing Restoration of Dismissed Military and Naval Officers, 12 Op. Att’y Gen. 4, 4 (1866)) (remarking that President Lincoln did not object to the bill and that his Attorney General found the measure to be within Congress’s power).

177. *Id.* at 1031 (citing Case of Fitz John Porter, 17 Op. Att’y Gen. 297 (1882)).

178. *See id.* (asserting that during this time, administrations understood that the President’s “preclusive power of superintendence” still left Congress “substantial room to regulate the processes of hiring, promotion, and discharge”).

that the President could effectively remove an officer anyway by appointing his replacement, the replacement could be approved only upon the advice and consent of the Senate.¹⁷⁹ It has remained an open question whether the President could remove by appointment contrary to statute if no Senate consent were forthcoming.¹⁸⁰

Whether or not such a preclusive prerogative exists, there can be little question that Congress today allows the Commander in Chief to exercise substantial formal authority to dismiss or otherwise remove military officers, including JAGs. Article 4 of the UCMJ, for example, gives commissioned officers the right to request a trial by court-martial following a presidential order of dismissal.¹⁸¹ The statute both assumes the existence of an underlying presidential power of dismissal and provides that if the President fails to convene a court-martial within six months of the request, or indeed if the officer is ultimately acquitted by court-martial, the officer's remedy is not reinstatement but rather a form of administrative discharge (carrying less onerous consequences for matters such as reputation and pension but still ending a military career).¹⁸² In addition, and of greater practical significance in many respects, is the President's statutory authority over officer promotion. While promotion decisions are handled in the first instance by selection boards comprised of groups of military officers,¹⁸³ the President may remove any officer from the list of officers recommended for promotion through this process.¹⁸⁴ As a general matter, officers who fail selection for promotion more than once are typically subject to discharge.¹⁸⁵ And indeed, at least some of the JAGs who undertook defense-counsel duties before the military commission were later denied promotion—an outcome of unclear causal relationship to their defense role.¹⁸⁶

179. See *Wallace v. United States*, 257 U.S. 541, 545 (1922) (“[T]he President with the consent of the Senate may effect the removal of an officer of the Army or Navy by the appointment of another . . . , and . . . none of the limitations in the statutes affects his power of removal when exercised by and with the consent of the Senate.”).

180. See *id.* at 545–47 (holding that because the Senate had confirmed the President's appointment in this particular case, the inference follows that it consented to the dismissal of the appointee's predecessor).

181. 10 U.S.C. § 804(a) (2006).

182. *Id.* § 804(a)–(b).

183. See 10 U.S.C. §§ 611–612 (2006) (detailing the process of and circumstances for convening selection boards as well as the composition of such boards).

184. 10 U.S.C. § 629(a) (2006).

185. See, e.g., *id.* § 632 (outlining the circumstances in which failure to be selected for promotion will lead to discharge and detailing certain exceptions to the general rule).

186. See Neil A. Lewis, *U.S. Terrorism Tribunals Set to Begin Work*, N.Y. TIMES, Aug. 22, 2004, at N22 (quoting Lieutenant Commander Philip Sundel, when asked whether he believed his promotion denial was related to his defense representation and criticism of the tribunal system, as saying, “I have no way of knowing if it adversely impacted my situation. It didn't positively impact, it seems.”); see also Gina Cavallaro, *Lawyer: Defending Detainee Slowed Promotion*, MARINE CORPS TIMES (Sept. 18, 2010), <http://www.marinecorpstimes.com/news/2010/09/marine-promotion-denied-for-defending-terrorism-suspect-091810w/> (reporting on a suit by Lieutenant Colonel Michael Mori that alleged that his representation of a military-commission defendant

Under the circumstances, the argument that the President's formal authority under the Constitution is threatened by the evolving role of the JAGs seems unlikely. Yet particularly for this reason, the apparent lack of sanctions against many of the most senior JAGs who objected to the interrogation and commission policies remains something of a puzzle. Whatever the cause of some of the JAGs' failures to secure promotion, there is no sense in which all who objected to Administration policies suffered adverse consequences of some sort. Then-Major General Jack L. Rives, for instance, who expressed objections to various aspects of these policies internally and before Congress,¹⁸⁷ was later promoted from Deputy Judge Advocate General (DJAG) to TJAG and indeed was the first TJAG from any service to serve in the grade of Lieutenant General.¹⁸⁸

Here, the concerned agency theorist might suggest an alternative explanation of arguably equal significance to the principle of civilian control: the President and his civilian agents were constrained from taking action against the dissenting JAGs not by formal mechanisms but by political consequences. That is, this account would have it, the President and the Secretary of Defense may well have wished to silence the JAGs but feared the domestic political consequences of being seen to quash professional military advice. The civilians were thus chilled from acting on their own assessment of the nation's interests, later to be judged by the electorate, but instead made decisions in the first instance unduly driven by military views. Part IV below turns to consider this alternative possibility.

2. *Formal Limits: The Role of the Courts.*—Before more directly engaging functional concerns of political accountability and expertise, it is worth noting the existence of a second set of formal arguments that may be raised in objecting to the JAGs' relative influence—this one not with respect to their bureaucratic or legislative engagement but with respect to their persuasiveness before the courts.¹⁸⁹ Recall, for example, the JAGs' seeming effectiveness before the Supreme Court on the meaning of the statutes and treaties at issue in *Hamdan*. What if the Court's apparent attention to JAG views, notwithstanding the position of the Commander in Chief in that case, impermissibly treads on interpretive powers reserved to the President alone? Indeed, a number of scholars have contended over the years that the President has formal power under the Constitution to interpret statutes and

delayed his promotion); Carol Rosenberg, *Guantánamo Defense Lawyer Forced Out of Navy*, SEATTLE TIMES (Oct. 8, 2006), http://seattletimes.nwsourc.com/html/nationworld/2003294468_lawyer08.html (reporting on *Hamdan* defense counsel Lieutenant Commander Charles Swift's denial for promotion to commander).

187. See *supra* notes 56, 61–62, 78 and accompanying text.

188. Biography of Lieutenant General Jack L. Rives, U.S. AIR FORCE, <http://www.af.mil/information/bios/bio.asp?bioID=6920> (last updated Feb. 2010).

189. See Sulmasy & Yoo, *supra* note 2, at 1820–21 (recounting the Supreme Court's ruling in *Hamdan* that invalidated the military commissions that some JAG officers opposed).

treaties bearing on foreign and military affairs.¹⁹⁰ Article II offers the Executive several founts of authority, including not only the Commander in Chief Clause¹⁹¹ but also the Treaty Clause,¹⁹² either or both of which may afford the President interpretive power in foreign-relations matters. If this is the case, then the President per se may be formally entitled to deference by the courts.¹⁹³ This deferential reading of the Constitution would have run to the President per se, not to his military subordinates. In this regard, the Court's inclination to attend to the views of military experts (even experts serving as counsel)—particularly views independent of those of the civilian President—might be said to raise concerns about undue influence by the military.

There are at least two problems with such an argument. First, it is true that there is a good case to be made that the Executive must have some inherent power to interpret statutes and treaties, if only enough to “take care” that the law is implemented in the (frequent) absence of controlling judicial opinions.¹⁹⁴ But it requires a further step to demonstrate that any such formal interpretive power on the part of the Executive requires the courts to *defer* to the President's interpretation, whether or not he is Commander in Chief. Whatever formal interpretive authority the Executive may have to interpret the law, it is unlikely that it exceeds the Court's Article III power to “say what the law is”¹⁹⁵ in the event the executive and judicial views conflict.¹⁹⁶ Of perhaps greater significance, judges are civilians too. Again, while judicial attention to military views that contrast with the views of the civilian Executive may trouble those who favor a more robust understanding of presidential power over the military, attention to military expertise by the civilian courts poses no problem to civilian control more broadly.

190. See, e.g., Bradley & Goldsmith, *supra* note 132, at 2100–02 (stating that, as the Supreme Court has noted, the President has more interpretive leeway when acting “pursuant to a foreign relations statute in an area in which he possesses independent constitutional authority”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 223 (1994) (arguing that the Executive Branch is the branch with the greatest effective power to interpret the law, noting in particular “the constitutional powers of the executive that may be used to implement and enforce adherence to its interpretation of the laws,” such as the powers related to foreign policy and execution of the laws as well as the President's authority as Commander in Chief).

191. U.S. CONST. art. II, § 2, cl. 1.

192. *Id.* art. II, § 2, cl. 2.

193. See Bradley & Goldsmith, *supra* note 132, at 2084 n.150 (suggesting, *inter alia*, that the Executive might be entitled to *Chevron* deference).

194. See U.S. CONST. art. II, § 3 (stating that the President “shall take Care that the Laws be faithfully executed”); see also, e.g., W. Michael Reisman, Comment, *Necessary and Proper: Executive Competence to Interpret Treaties*, 15 YALE J. INT'L L. 316, 325–28 (1990) (arguing that the Executive must inevitably make judgments about what the law requires).

195. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

196. See Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PENN. L. REV. 783, 851 (2011) (contending that categorical deference to executive interpretations in foreign-relations matters “is not formally required (as a matter of executive power) and may be formally prohibited (as a matter of judicial power)”).

IV. Toward a Revised Understanding of Civilian Control

To the extent one agrees with the substantive positions the JAGs pursued in the examples given above—in which uniformed military officers served in some sense to constrain the initiative of the civilian Executive and his agents—one might be inclined to conclude that it would be wise to embrace, even strengthen, the military's capacity to act as a check on executive power. Certainly in advancing the separation-of-powers interest in protecting individual rights,¹⁹⁷ the JAGs might readily be said to have played a useful role.¹⁹⁸ On the other hand, prevailing political models of civilian control suggest that it is possible to see the JAGs as undermining other interests equally at the heart of the Constitution's functional interests in separating powers. To agency theorists, the JAGs' engagement of Congress and the courts might appear like the agent playing for advantage against a divided principal, allowing a military constituency to prevail over more politically accountable civilians. For adherents to Huntington's model of objective control, the JAGs' public engagement ensnared them in precisely the kind of political debate that tends to erode neutral military professionalism—and therefore effectiveness—over time.

As this part shows, there are strong arguments from constitutional history that concerns of both political accountability and functional effectiveness were indeed central among the reasons why the Constitution insisted upon civilian control over the military. At the same time, a more detailed understanding of the nature of these still-salient interests suggests

197. See *supra* subpart III(A).

198. Although not the focus of this Article, such rights-related concerns are important to note. For every example one might find of military officers promoting the cause of individual rights—as in the interrogation example—one might readily cite another example in which the officer corps has worked to oppose rights-enhancing measures—as in the military's vigorous opposition in 1993 to the integration of openly gay and lesbian soldiers into the armed forces. See *supra* notes 52–62, 88–90 and accompanying text. Indeed, for every *Hamdan*—in which an important faction in the professional military opposed a rights-infringing policy of the civilian Executive—one might cite a *Korematsu*—a case in which the judgment of the professional military was invoked (however problematically) to justify the race-based seizure and eventual internment of American citizens during World War II. *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944); see also *Winter v. NRDC*, 555 U.S. 7, 24–26 (2008) (relying on military expertise to reject environmental-protection claims against the use of a potentially damaging sonar system); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (upholding against a First Amendment challenge the Air Force's prohibition on wearing a yarmulke while in uniform, because “when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest”). Whether members of the military are more or less inclined than civilian policy makers to discount rights concerns has long been the subject of debate and will remain so for the foreseeable future. See, e.g., HUNTINGTON, *supra* note 16, at 65–66 (describing “the military mind” and characterizing it as “skeptical of institutional devices designed to prevent war,” particularly including those of international law); MAZUR, *supra* note 3, at 76–77 (discussing how the military has become more politically partisan); THOMAS E. RICKS, MAKING THE CORPS 23 (1997) (“[O]ver the last twenty years [military officers] have become more politically involved, and effectively ‘Republicanized.’”).

that it is not at all clear that they are compromised by the JAG example at issue here. More broadly, multibranch participation in the maintenance of civilian control was thought to be—and at least in this example, remains—consistent with the protection of those interests. This part thus argues against the assumption shared by both prevailing political models that the Constitution’s allocation of powers over the military to more than one branch should be seen as a necessary impediment to the achievement of effective civilian control.

A. *The Accountability Interest*

As agency theory would have it, the preservation of political accountability is the primary, and perhaps singular, purpose behind civilian control. And while agency-theory accounts vary in this regard, it seems clear that at least two kinds of interests are encompassed in this concept of accountability. The first is direct electoral accountability—the idea, at its broadest, that elected officials should make decisions in a democracy and unelected officials should not.¹⁹⁹ A second kind of accountability concern may be distinguished from the first and is reflected equally in Huntington’s view and that of the agency theorists. That is the concern that the military will exert excessive influence in democratic debate, acting as a public constituency able to deploy the outsized political popularity enjoyed by the most admired generals to skew democratic decision making for or against a particular policy initiative.²⁰⁰ In some aspects of the JAG example, those notions of accountability appear to merge. Because the military enjoys enormous public popularity and respect,²⁰¹ the argument goes, civilian elected officials feared veering too far from JAG advice, therefore capitulating in advance to military preferences and in this way allowing the military cart to drive the civilian horse.

There can be little doubt that accountability in both of these forms was among the interests that led the Constitution’s Framers to favor an elaborate structure of civilian control. As the next subpart explains, accountability concerns were not the Framers’ only functional interests in insisting upon civilian control of the uniformed military. In this respect alone, agency theory—and particularly its unmodified position that civilians have the right

199. See FEATHER, *supra* note 17, at 65 (“In a democracy, civilians have the right to be wrong.”); *id.* at 302 (“[E]ven when the military is right, democratic theory intervenes and insists that it submit to the civilian leadership that the polity has chosen.”).

200. See *infra* notes 223–29 and accompanying text.

201. See, e.g., Lydia Saad, *Congress Ranks Last in Confidence in Institutions*, GALLUP (July 22, 2010), <http://www.gallup.com/poll/141512/Congress-Ranks-Last-Confidence-Institutions.aspx> (reporting that when compared with a broad list of American institutions, Americans have the highest level of confidence in the military and that “[t]he military has been No. 1 in Gallup’s annual Confidence in Institutions list continuously since 1998, and has ranked No. 1 or No. 2 almost every year since its initial 1975 measure”).

to be wrong²⁰²—seems incomplete. Nonetheless, in evaluating the persuasiveness of the agency objection on its own terms, it is necessary to understand the nature of these accountability interests. While American society, its government, and military have changed dramatically since the days of the Constitution’s framing, historical understandings of the need for accountability remain a useful place to start.

The Framers’ thinking about the role of the military in society, and of the prospect of a standing army under the Constitution, had been deeply informed by then-recent history.²⁰³ For Adams and Jefferson, for example, the lesson that loomed large was from the British “New Model Army” of Oliver Cromwell.²⁰⁴ “Composed of officers from the aristocracy and soldiers from the bottom of society brutalized by harsh discipline, isolated from the rest of society, loyal not to an ideal or to a government but to a commander and to its own traditions,” “professional” soldiers like Cromwell’s were seen by the Framers as stripped of individuality and susceptible to identifying more with their leaders than with the general population.²⁰⁵ These were not citizens likely to share democratic values of participation and deliberation. For Madison as well, soldiers this acculturated to military existence and this divorced from the interests of the regular population were cause for concern; this was a group more readily turned by corrupt commanders against the interests of the people.²⁰⁶ Whether or not by outright coup, the Framers thought such a force could too easily become an instrument of tyranny.²⁰⁷

202. See *supra* note 18 and accompanying text.

203. See RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, at 73 (1975) [hereinafter KOHN, *EAGLE AND SWORD*] (explaining that the Framers made decisions concerning the government’s power over the military, including the right to raise a standing army in peacetime, “[w]ith the Revolution and the bitter divisions in Congress in the early 1780s in mind”); CHARLES ROYSTER, *A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775–1783*, at 359 (1979) (“The war years had created in America a group of men who advocated a permanent military establishment.”); Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989*, *supra* note 21, at 61, 68–71 [hereinafter Kohn, *Intent of the Framers*] (describing the Framers’ concerns about military strength and effective defense in the wake of the Revolutionary War and noting that early in the Constitutional Convention, the Framers empowered the government to maintain a standing army).

204. See KOHN, *EAGLE AND SWORD*, *supra* note 203, at 4 (calling the term “standing armies,” which would include Cromwell’s New Model Army, “a powerful, emotional phrase so easily understood and so universally accepted that it needed no further definition”).

205. *Id.* at 2; see also Jonathan Turley, *The Military Pocket Republic*, 97 *NW. U. L. REV.* 1, 15 (2002) (noting that Jefferson wanted to avoid aspects of the British military tradition that dehumanized the individual soldiers).

206. Professor Turley notes,

[T]he military system trains and relies on officers to protect individuals from abuse and to maintain the values of the system. . . . However, . . . Madison sought a more stable and consistent system that did not rely on the virtue of leaders in the governance of free men and women. Not only does the military system lack some of the most critical structural and auxiliary protections, but it has a strong cultural resistance to using structural guarantees to supplant command control.

The British royal governors' repression of civilians in the Colonial Era had only served to reinforce this fear. After the mid-seventeenth century, more than half of British colonial governors sent to America were army officers, authoritarian in nature and willing to use force.²⁰⁸ During the French and Indian War of the mid-eighteenth century, British forces appropriated private homes for quartering soldiers and deployed corrupt recruiters to lure young boys into service.²⁰⁹ And by the Revolutionary Era, thousands of British soldiers had taken up posts in the colonies, clashing repeatedly with colonists, looting and destroying property, and ultimately killing five civilians in the Boston Massacre.²¹⁰ As reflected in the priority that civilian control eventually took in the Declaration of Independence, the British Army had come to be seen as the most immediate manifestation of the oppression of the colonial population.²¹¹ The idea of a "standing army" had become synonymous with the denial of individual rights.²¹² As Hamilton later put it, "the people of America may be said to have derived [a] hereditary impression of danger to liberty from standing armies in time of peace."²¹³ The Articles of Confederation government proved rather strictly limited by this impression, restricting the kinds of standing forces that could be maintained in times of peace and counting instead on the existence of a well-regulated militia of citizens as the principal instrument of national defense.²¹⁴

Turley, *supra* note 205, at 58.

207. In a letter to Joseph Warren, for example, Samuel Adams observed that [a] Standing Army, however necessary it may be at some times, is always dangerous to the Liberties of the People. Soldiers are apt to consider themselves as a Body distinct from the rest of the Citizens. They have their Arms always in their hands. Their Rules and their Discipline [are] severe. They soon become attached to their officers and disposed to yield implicit obedience to their Commands. Such a Power should be watch[e]d with a jealous Eye.

Letter from Samuel Adams to James Warren (Jan. 7, 1776), in 1 WARREN-ADAMS LETTERS 197, 197-98 (1917).

208. KOHN, EAGLE AND SWORD, *supra* note 203, at 4.

209. *Id.* at 4-5.

210. *See id.* at 5-6 (describing the increasing discontent that colonists experienced with the standing British army that occupied the colonies starting in 1763); Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1681 (2000) (noting that five colonists were killed in the Boston Massacre); *see also* Letter from John Adams to J. Morse (Jan. 5, 1816), in 10 THE WORKS OF JOHN ADAMS 201, 203 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1856) (stressing the trauma the Boston Massacre caused for the colonists).

211. *See* THE DECLARATION OF INDEPENDENCE paras. 13-16 (U.S. 1776) ("He has kept among us . . . Standing armies . . . [and has assented to] quartering large bodies of armed troops among us . . .").

212. *See* KOHN, EAGLE AND SWORD, *supra* note 203, at 6 ("Hatred of the standing army . . . became central to the Revolutionary tradition, deeply interwoven with the language of independence . . .").

213. THE FEDERALIST NO. 26, at 170 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

214. *See* ARTICLES OF CONFEDERATION of 1781, art. VI, para. 4 (forbidding states from maintaining a standing army or war vessels in times of peace, but requiring them to maintain a "well regulated and disciplined militia").

Yet even as the Articles were being prepared, a faction led by General George Washington lamented the practical failings of the militia approach—failings he had seen firsthand in his struggles to train and deploy the Continental Army.²¹⁵ By the time of the Constitutional Convention, the limitations of militias had become more vivid.²¹⁶ While a strong recognition of the danger of standing armies remained,²¹⁷ it had become clear that some form of national military establishment would be a part of the new Constitution.²¹⁸ As Madison put it, “if [armies] be necessary, the calamity must be submitted to.”²¹⁹ On the critical issue of accountability, however, the Framers would learn the lessons of the British example. Among other things, control over the Army would not be vested in an executive alone. And Congress would be required to authorize military expenditures “in the face of their constituents” every two years.²²⁰ In this way, whatever military there was would be controlled entirely by “the representatives of the

215. See KOHN, *EAGLE AND SWORD*, *supra* note 203, at 9–11 (giving examples of the difficulties Washington and other senior officers of the Continental Army experienced with using militiamen effectively in the Revolutionary War).

216. See *id.* at 74–76 (citing Shay’s Rebellion—which illustrated the inability of the federal government under the Articles of Confederation to use military power to protect federal property or maintain order in the states—as a catalyst for calls for stronger military powers in the new Constitution).

217. THE FEDERALIST NO. 41 (James Madison), *supra* note 213, at 257–58 (insisting that the federal military remain minimal in size); see also KOHN, *EAGLE AND SWORD*, *supra* note 203, at 77 (describing Elbridge Gerry’s unsuccessful move for a 2,000- or 3,000-man limit to federal forces in peacetime). George Mason, Elbridge Gerry, and Edmund Randolph ultimately refused to sign the Constitution in part over objections to the creation of a standing army. Turley, *supra* note 205, at 22.

218. See KOHN, *EAGLE AND SWORD*, *supra* note 203, at 77–78 (explaining that most delegates to the Constitutional Convention were firmly set on giving Congress the power to raise a standing army and that opposition to these powers consisted mainly of rhetorical gestures or unpopular proposals); see also Turley, *supra* note 205, at 19–21 (providing examples of the types of protests and proposed limitations to a standing army that were raised at the Constitutional Convention but noting that ultimately it was decided that a standing army and navy would be a feature of the new nation).

219. James Madison, Speech in the Virginia Convention: Power to Lay Taxes (June 12, 1788), in 5 THE WRITINGS OF JAMES MADISON 164, 169 (Gaillard Hunt ed., 1904).

220. THE FEDERALIST NO. 26 (Alexander Hamilton), *supra* note 213, at 171. Hamilton also drew on the English experience in reconciling the dangers standing armies posed to liberty with the need for security, explaining that

[i]n that kingdom, when the pulse of liberty was at its highest pitch, no security against the danger of standing armies was thought requisite, beyond a prohibition of their being raised or kept up by the mere authority of the executive magistrate. . . . They were aware that a certain number of troops for guards and garrisons were indispensable; that no precise bounds could be set to the national exigencies; that a power equal to every possible contingency must exist somewhere in the government[;] and that when they referred the exercise of that power to the judgment of the legislature, they had arrived at the ultimate point of precaution which was reconcilable with the safety of the community.

Id. at 169–70.

people.”²²¹ As one former Continental Army officer put it, contrasting the incipient American system to that of the British monarch,

[There] the armies are *his armies*, and their direction is solely by him without any control. . . . Here the army . . . is the army of the people. It is they who raise and pay them; it is they who judge of the necessity of the measure

. . . It is therefore *our army* . . . and not the sword . . . of a king.²²²

As powerful as this interest in popular accountability was, it was not the only kind of democracy concern that occupied the Framers. The years following the Revolution had brought lessons not only in military effectiveness but also in the military’s role in society. In stark contrast to the contempt in which the British Army had been held, General George Washington returned from the front to extraordinary popularity at home.²²³ While formal structures could mitigate to some extent the danger of military rule, the growing fear was that loyalty to military heroes like Washington would “confer an authority outside the law that would enable Washington to rule others by his will alone.”²²⁴ The image of the “man on horseback” came to symbolize the concern that a particularly successful and charismatic commander could effectively lead the public down a path contrary to its own democratic interests.²²⁵ Overwhelming popular enthusiasms of this nature could not only effectively empower a (theretofore unrecognized) tyrant; they tended to “subvert[] independent judgment”²²⁶ and make it easier for officers (less pure in motive than Washington himself) to use their positions in public service to influence civil government to advance their own personal goals.²²⁷ Moreover, as John Adams emphasized, the instinct among men of “spirit and

221. THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 213, at 179–80 (“Independent of all other reasonings upon the subject, it is a full answer to those who require a more peremptory provision against military establishments in time of peace to say that the whole power of the proposed government is to be in the hands of the representatives of the people.”); *see also* THE FEDERALIST NO. 41 (James Madison), *supra* note 213, at 259 (arguing that giving control over military appropriations to representatives facing elections every two years provides a check on the dangers of a military).

222. Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 569, 570 (Merrill Jensen ed., 1978). Accountability in the pure sense was also favored by the military itself, which feared being made the political scapegoat of civilian policy decisions. ROYSTER, *supra* note 203, at 312.

223. KOHN, EAGLE AND SWORD, *supra* note 203, at 51–52; ROYSTER, *supra* note 203, at 255–57.

224. ROYSTER, *supra* note 203, at 257; *see also id.* at 261 (“A free and wise people will never suffer any citizen to become too popular—much less too powerful. A man may be formidable to the constitution even by his virtues.” (quoting William Tudor, Former Judge Advocate, Cont’l Army, Oration at the Annual Commemoration of the Boston Massacre (Mar. 5, 1779))).

225. *E.g.*, GORDON NATHANIEL LEDERMAN, REORGANIZING THE JOINT CHIEFS OF STAFF: THE GOLDWATER-NICHOLS ACT OF 1986, at 59 (1999) (describing these historical concerns). *See generally* S.E. FINER, THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS (1962) (exploring military intervention in government around the world and throughout history).

226. ROYSTER, *supra* note 203, at 263.

227. *Id.* at 265–66.

ambition” to seek glory already led them to adventurism in pursuits like foreign wars.²²⁸ With the popular attraction to such heroes, “the world, instead of restraining, encourages them.”²²⁹

To this separate concern of excessive popular influence by the military, the Federalists could offer the comfort that the militias would continue to play a vigorous role in the national defense. Thanks in large measure to the Anti-Federalist interest in protecting state prerogatives, the American military model in the Constitution would, at some level, remain the “citizen-soldier,” who, after service, would return to his civilian life.²³⁰ However heroic the citizen-soldier might become, his identity of interest with the general population made his potential popular influence nothing to fear: “What shadow of danger can there be from men who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits, and interests?”²³¹ In this respect, the military’s anticipated political popularity was not per se a threat to democracy; excessive influence was to be feared only to the extent it carried with it an anticipated set of viewpoints—inclinations toward tyranny, adventurism, or personal aggrandizement. So long as the interests of the soldier remained substantially coincident with the interests of the people, such inclinations were unlikely to emerge.

While the scope and nature of the military has of course changed dramatically since the Constitution was drafted, the dual concerns of accountability and influence have regularly reemerged as perceived challenges have arisen to the vitality of civilian control in the decades since. The concern that the military would unduly influence partisan politics, for example, led to a series of laws and regulations beginning in the early twentieth century starkly restricting the ability of active-duty military

228. JOHN ADAMS, *Discourses on Davila; A Series of Papers on Political History*, reprinted in 6 THE WORKS OF JOHN ADAMS 223, 260 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851).

229. *Id.* at 262–63; see also Luban, *supra* note 19, at 491–99 (describing the struggle to both encourage military heroes and restrain their power with regard to the society they protect).

230. See Allan R. Millett, *The Constitution and the Citizen-Soldier*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989, *supra* note 21, at 97, 101 (“Even the most ardent believers in regular troops . . . accepted the political reality that the militia had survived the [Revolutionary War].”). In a letter to the New York legislature upon assuming command, Washington wrote,

When we assumed the Soldier, we did not lay aside the Citizen; and we shall most sincerely rejoice with you in that happy hour when the establishment of American Liberty, upon the most firm and solid foundations, shall enable us to return to our Private Stations in the bosom of a free, peaceful and happy Country.

GARRY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 21–22 (1984).

231. THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 213, at 186; see also John Hancock, Oration at the Annual Commemoration of the Boston Massacre (Mar. 5, 1774), in 1 ORATIONS OF AMERICAN ORATORS 127, 133–34 (rev. ed. 1900) (“From a well-regulated militia, we have nothing to fear; their interest is the same with that of the State. . . . [T]hey do not jeopard[ize] their lives for a master who considers them only as the instruments of his ambition . . .”).

personnel to engage in political activities.²³² Over time, statutes came to prohibit officers from holding any civil elective office²³³ and to impose criminal penalties under the UCMJ for using “contemptuous words” against the President, members of Congress, or other elected officials.²³⁴ Today, active-duty military personnel are prohibited from participating in partisan political fundraising, rallies, or conventions; using official authority or influence to interfere with an election; or soliciting votes “for or against a partisan political party, candidate, or cause.”²³⁵ What has emerged, at least on paper, is a professional military ethic requiring officers to remain politically neutral. In this context, evidence of growing partisan politicization within the military has been greeted as a sign of weakening civilian control.²³⁶ Weakening or no, officers who have run afoul of political-neutrality restrictions have regularly been subject to disciplinary action.²³⁷

Likewise, concerns of political accountability have shadowed twentieth-century debates over the structure of the vast national-defense establishment. They were at the fore, for example, in vigorous debates in the 1980s over the role of the Joint Chiefs of Staff (JCS). An ad hoc creation that had grown out of the need to coordinate interservice military advice and operations during

232. STAFF OF S. COMM. ON ARMED SERVS., 99TH CONG., DEFENSE ORGANIZATION: THE NEED FOR CHANGE 41 (Comm. Print 1985). As the Supreme Court explained in upholding a restriction against civilian political candidates campaigning on military bases, “[s]uch a policy is wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control. It is a policy that has been reflected in numerous laws and military regulations throughout our history.” *Greer v. Spock*, 424 U.S. 828, 839 (1976); *see also id.* at 839 n.12 (citing statutes prohibiting service members from being polled on their preferences of political candidates, prohibiting candidates for federal office from soliciting contributions from military personnel, prohibiting officers from attempting to influence other service members to vote for any particular candidate, and prohibiting officers from “in any manner interfer[ing] with the freedom of any election in any State”).

233. 10 U.S.C. § 973 (2006).

234. *Id.* § 888.

235. U.S. DEP’T OF DEF., DIRECTIVE 1344.10, at 3–4 (2008).

236. *See, e.g.*, MAZUR, *supra* note 3, at 74–91 (“Political neutrality has long been an entirely uncontroversial, unremarkable component of the professional military ethic. . . . The last thing we want as a democracy is to create the impression that the people who carry the guns also control the elections.”); RICKS, *supra* note 198, at 23 (describing a military that has become “Republicanized” and features officers who “seem to look down on American society in a way that the pre-World War II military didn’t”).

237. A Senate report documented two examples:

General Edwin Walker, USA, commander of the 24th Infantry Division in West Germany, was admonished by the Kennedy Administration for distributing right-wing propaganda to his troops and for publicly criticizing Administration policies. He subsequently resigned his commission. In 1978, General John Singlaub, USA, Chief of Staff of the U.S.–South Korean Combined Forces Command, was removed from his position after publicly condemning Carter Administration policies. He subsequently retired from the Army following a second similar incident.

STAFF OF S. COMM. ON ARMED SERVS., 99TH CONG., DEFENSE ORGANIZATION: THE NEED FOR CHANGE 41 (Comm. Print 1985); *see also* Cooper & Sanger, *supra* note 7 (reporting on President Obama’s decision to fire General Stanley A. McChrystal after McChrystal made public comments criticizing Administration officials over the war in Afghanistan).

World War II,²³⁸ the JCS in the decades since had become a mechanism through which the military service chiefs, acting in the interests of their own services, would negotiate a course of action among themselves, then present a unified—and all-but-impenetrable—front in advancing a recommendation to the civilian Secretary of Defense. As an influential congressional report urging reforms explained, the Chiefs’ collusion compromised the quality of military advice and effectively undermined civilian control: “[T]he Secretary is confronted by all four Chiefs of the uniformed Services who have taken a unified stand on a position. As such, it is very difficult for him to overrule the Chiefs even if he believes their advice is poor. This dilutes his ability to control the Chiefs.”²³⁹ As part of sweeping revisions to the JCS structure passed in 1986, Congress made the chairman of the JCS alone the “principal military adviser” to the President.²⁴⁰ As advocates for the change explained it, “‘When military responsibility is unclear, civilian control is uncertain.’ This is so because: control requires accountability; accountability requires clearly fixed responsibility; and responsibility requires commensurate authority. Today no one individual is accountable to the President and the Secretary of Defense for the quality of military advice.”²⁴¹ Going forward, the notion was, the President would be able to hold a single officer accountable for the quality of military advice, reinforcing the President’s ability to effectively assert electoral preferences over the military itself.²⁴²

The apparently ongoing salience of these interests might be seen to bolster the agency theorist’s critique of the JAGs’ recent performance. But consider again the criticism, for example, that the JAGs’ engagement on military commissions weakened political accountability by taking advantage of the divided civilian principal—achieving ends sought by their own military constituency through Congress and the courts that had been rejected by the civilian agents of the elected Commander in Chief. As we have seen, the Framers’ interests in accountability were not bound by the agency

238. See LEDERMAN, *supra* note 225, at 11–12 (explaining that increasingly complex interservice operations—for example, the use of Army troops (as opposed to Marines) in the amphibious assaults in North Africa and Normandy—created the need for greater organization between the branches and resulted in the creation of the Joint Chiefs of Staff).

239. STAFF OF S. COMM. ON ARMED SERVS., 99TH CONG., DEFENSE ORGANIZATION: THE NEED FOR CHANGE 44 (Comm. Print 1985); see also H.R. MCMASTER, DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM 328 (1997) (“The Chiefs’ failure to [render their best advice], and their willingness to present single-service remedies to a complex military problem, prevented them from developing a comprehensive estimate of the situation [in Vietnam] or from thinking effectively about strategy.”).

240. LEDERMAN, *supra* note 225, at 86.

241. *Reorganization Proposals for the Joint Chiefs of Staff: Hearings Before the Investigations Subcomm. of the H. Comm. on Armed Servs.*, 97th Cong. 97 (1982) (statement of General David C. Jones, United States Air Force, Chairman, Joint Chiefs of Staff) (quoting President Eisenhower’s 1958 Message to Congress).

242. Cf. LEDERMAN, *supra* note 225, at 59 (“[H]aving a committee rather than one officer render advice diminished civilian control over the military because the president could not hold one officer responsible and thus accountable for the poor quality of military advice.”).

formulation. Indeed, the bifurcation of responsibility over the military between the President and Congress was meant to enhance military accountability to the public.²⁴³ In this light, the role the JAGs played in recent debates might better be seen to advance the accountability interests served by civilian control—an interest that does not demand that a singular principal remain in charge, but that seeks to promote the interest of representative decision making more broadly. Before JAG engagement in the courts and in testimony on Capitol Hill, debates about the authority and scope of military-commission trials had been largely hidden within the confines of the Executive Branch.²⁴⁴ The concern that the military might exercise excessive influence in political debate had been addressed by the reality that there would be essentially no debate as Congress stood by silently in the face of the Executive’s initiative. After the *Hamdan* litigation, culminating in the Supreme Court’s 2006 decision concluding that the President lacked authority to convene such commissions without more express statutory authorization,²⁴⁵ the President was compelled to seek active congressional engagement, resulting in the debate and passage of two separate military-commissions acts, both substantially more elaborate than the Executive-only system that had existed before.²⁴⁶ The JAGs’ engagement in this way helped prompt a broader democratic debate on the trials than would otherwise have occurred.

The availability of public interbranch engagement through mechanisms such as congressional testimony seems particularly important in an era when the mechanisms for promoting accountability that the Framers imagined would maintain the military as an army of the people have long ceased to function. The model of the citizen-soldier the Framers thought would help ensure a continuing alignment of the interests of the military with the interests of the civilian population began to give way to the growing professionalization of the military as early as the founding of the United States Military Academy at West Point in 1802.²⁴⁷ By the Civil War, “an American profession of military officership [had] evolve[d] to articulate military interests and values distinct from those of American civilians.”²⁴⁸ The engagement of state militias likewise gave way to national conscription as a

243. See *supra* notes 220–22 and accompanying text.

244. See Kramer & Schmitt, *supra* note 10, at 1422–23 (describing the importance of independent JAG testimony to effective congressional oversight of military commissions during the Bush Administration).

245. *Hamdan v. Rumsfeld*, 548 U.S. 557, 612–13 (2006).

246. See generally Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801–1807, 123 Stat. 2574, 2574–2614 (codified at 10 U.S.C. §§ 948a–950t (Supp. III 2010)); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

247. See Weigley, *supra* note 91, at 223–24 (noting the gradual evolution of a professional military officership during the period between the American Revolution and the Civil War).

248. *Id.* at 224.

means of securing adequate forces in wartime,²⁴⁹ but by 1973 even this practice was abandoned as drafted armies were replaced by an all-volunteer force.²⁵⁰ A host of factors—from the particular characteristics of those who self-select for military service to increasingly complex military technology favoring long-service professionals—have since combined to reinforce what most scholars see as a growing gap in civil–military relations that has led, among other things, to systematic differences between civilians and the military in “attitudes concerning whether and how to use force” and in their relative “willingness to bear the human costs of war.”²⁵¹

At the same time, while Congress was entrusted with key powers over military affairs, including the task of publicly authorizing funding to ensure that military decisions would be made by politically accountable representatives, the explosive growth in the use of private contractors to handle functions long performed by the military has made it easier to shield huge swaths of military-related spending from public view.²⁵² As Jon Michaels has explained,

249. See An Act for Enrolling and Calling Out the National Forces, and for Other Purposes, ch. 75, 12 Stat. 731 (1863) (creating the first national draft in the United States); Timothy J. Perri, *The Economics of US Civil War Conscription*, 10 AM. L. & ECON. REV. 424, 428 (2008) (explaining that the “Enrollment Act of 1863” accomplished the transition to national conscription from the militia system, which “may have been of value in local defense for limited conflicts [but] was probably not well suited for a conflict of larger scope and longer duration”).

250. See Amendments to the Military Selective Service Act of 1967, Pub. L. No. 92-129, § 101(a)(35), 85 Stat. 348, 353 (1971) (codified at 50 U.S.C. app. § 467(c) (2006)) (amending the Military Selective Service Act of 1967 to state that “no person shall be inducted for training and service in the Armed Forces after July 1, 1973” pursuant to the draft, subject to limited exceptions); see also Michael C. Desch, *Explaining the Gap: Vietnam, the Republicanization of the South, and the End of the Mass Army*, in SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY, *supra* note 91, at 289, 292–95 (discussing how the transition from the draft to an all-volunteer military force contributed to the growing political gap between the military and civilian society).

251. PETER D. FEAVER & CHRISTOPHER GELPI, CHOOSING YOUR BATTLES: AMERICAN CIVIL-MILITARY RELATIONS AND THE USE OF FORCE 5 (2004); see also MAZUR, *supra* note 3, at 76 (detailing the growing awareness of scholars that by the mid-1990s, the military had become more homogenous than when the draft had circulated more diverse soldiers through the service); Desch, *supra* note 250, at 301 (“[I]ncreasingly complex conventional military technology [has] made it necessary for soldiers to develop skills that could only be taught to a long-service, professional military.”); Adm. Mike Mullen, Chairman, Joint Chiefs of Staff, Address at West Point Graduation Ceremony (May 21, 2011), transcript available at <http://www.jcs.mil/speech.aspx?ID=1598> (“I fear [civilians] do not know us. I fear they do not comprehend the full weight of the burden we carry or the price we pay when we return from battle. This is important, because a people uninformed about what they are asking the military to endure is a people inevitably unable to fully grasp the scope of the responsibilities our Constitution levies upon them.”).

252. Describing how the use of private military contractors can reduce public scrutiny for waging war, Jon Michaels notes,

If . . . there were some external, elastic source of troops, who could complement and supplement the U.S. Armed Forces, provide needed reinforcements, and help the president avoid having to activate reservists and/or reinstating a military draft, the costs of *not* acting conservatively and judiciously [would be] lowered. Privatization, at least at the margins, therefore presents a great alternative to lobbying Capitol Hill and the American people for permission to increase the size of the military quickly. While

The sources of funds for private guards in Afghanistan, for coca-crop dusters in Colombia, and for security forces in Iraq may be outside the formal scope of Defense Department appropriations budgets, and hence may be buried within longer-term funding sources that are not as readily apparent to Congress. . . . [W]hen contracts with privateers are scattered throughout or among executive agencies, it becomes very difficult for Congress to detect, target, and—if need be—attack particular streams of funding in order to influence policy via the purse.²⁵³

In this context, the occasional congressional hearing seems a remarkably modest means of compensating for the loss of accountability mechanisms the Framers once contemplated.

What of the concern that the JAGs—like “lawyers on horseback” preemptively foiling civilian ends—were able to find bureaucratic success in moderating interrogation policy in part by harnessing the military’s outsized political popularity to pressure civilian decision makers internally?²⁵⁴ That is, the concern not of accountability in a direct sense but of excessive military influence more generally. Particularly since the professionalization of the armed forces beginning after the end of the draft in the twentieth century, the coincidence of political, social, and cultural interests between the civilian and military populations has declined dramatically.²⁵⁵ It should thus be of little surprise—but of arguable concern—that the JAGs’ position was in some respects inconsistent with the views of many Americans, who had signaled some tolerance for coercive interrogation and generalized support for

contractors could not “discreetly” command an entire theater in a major conflict, smaller outfits can be selectively positioned to provide the president with much greater flexibility—to continue, for instance, an unpopular or unexpectedly demanding war (that neither the president nor Congress would want to bolster with fresh newly conscripted soldiers). Hence with lower political opportunity costs for waging war, the president may be more apt to overcommit American capital—human, monetary, and diplomatic—in ways that would be less likely to occur were Congress and the American people (through their legislators) given a more direct say.

Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1063–64 (2004) (footnote omitted).

253. *Id.* at 1074.

254. See generally Kramer & Schmitt, *supra* note 10 (confronting the lawyers-on-horseback argument).

255. See, e.g., MAZUR, *supra* note 3, at 76–77 (detailing the shift in civil–military relations after the end of the draft, noting in particular the increased politicization of the military and accusations that service members began to develop a feeling of superiority over the citizenry); RICKS, *supra* note 198, at 21–24 (describing the alienation of the Marine Corps from the rest of American society, caused partly by the Corps’s tightly knit brotherhood and partly by the “public’s . . . ignorance of military affairs”); Desch, *supra* note 250, at 301 (“[I]ncreasingly complex conventional military technology made it necessary for soldiers to develop skills that could only be taught to a long-service, professional military.”); see also Weigley, *supra* note 91, at 244 (discussing the increasing distance between civilian and military leaders, especially as recent presidents and legislators have had no military-service background).

trial by military commission.²⁵⁶ Yet even here, the concern of excessive influence seems misplaced. Of critical importance is the understanding that the Framers were not concerned about the danger of military influence as a categorical harm. Rather, they feared military leaders because they imagined a particular kind of military “mind” that would tend to influence the public to support certain normatively undesirable ends: a government that would infringe on individual rights, enable personal corruption, and encourage foreign or militaristic adventurism. Here, the JAGs did not pursue corrupt personal gains. On the contrary, to the extent their advice carried substantive import, it was geared toward promoting certain individual rights (i.e., for military-commission defendants and custodial detainees). It may well be the case that there is a gap between civilian and JAG views on this and other issues. But if it is a gap that sufficiently troubles the American people, Congress’s engagement would provide a direct avenue for democratic dissent. In the meantime, it is difficult to see the JAGs’ influence in this example as fulfilling the man-on-horseback image the Framers feared.

B. Effectiveness and Expertise

For the Huntingtonian, what concern might exist over the JAGs’ role in recent years centers not on their engagement inside the Executive Branch or in the courts *per se* but rather their engagement with Congress and in the public sphere. On one level, JAGs appear to have essential expertise on issues of detainee treatment and trial, housing the U.S. government’s core competence in questions of applied international humanitarian and operational law. Yet in the critical view, when the JAGs spoke to the media and testified publicly before Congress on these issues, they could do nothing but effectively take sides in a vigorous political debate over not only the legality but also the wisdom of core Administration policies.²⁵⁷ If civilian control requires that military officers ideally remain insulated from political debate, such active engagement was arguably the opposite of what was needed to harness military effectiveness in Huntington’s conception.

While the agency-theory conception of civilian control tends to discount the notion that military effectiveness and the exploitation of expertise play some role in defining the nature of civilian control, there can be little doubt that such concerns were on the Framers’ minds in designing the constitutional scheme. And while Huntington was correct in critical respects that “[p]rofessionalism distinguishes the military officer of today from the warriors of previous ages,”²⁵⁸ it was quite clear by the time of the Framing that at

256. See, e.g., News Release, Pew Research Center, Bush and Public Opinion: Reviewing the Bush Years and the Public’s Final Verdict (Dec. 18, 2008), available at <http://www.people-press.org/files/legacy-pdf/478.pdf> (reporting that “nearly half of Americans consistently said that the torture of terrorists to gain key information was at least sometimes justified”).

257. See *supra* Part II.

258. HUNTINGTON, *supra* note 16, at 7.

some level, “[w]ar, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.”²⁵⁹ The Framers’ knowledge came from direct experience, having narrowly prevailed in the Revolutionary War.²⁶⁰ As George Washington memorably put his experience of the militia, “[They] come in, you cannot tell how, go, you cannot tell when, and act, you cannot tell where, consume your provisions, exhaust your stores, and leave you at last at a critical moment[.]”²⁶¹ Where the revolutionaries had thought the citizen-soldier most likely to produce an effective force—one who fought for his standing as a citizen would always defeat one who fought for no more than money²⁶²—the leaders of the Continental Army came to conclude that experience and training were essential.²⁶³

By this measure, the Framers saw, the Articles of Confederation government had fared miserably. Near the outset of the Constitutional Convention, Virginia Governor Edmund Randolph suggested that the system had been inadequate to secure the peace and security of the Confederation.²⁶⁴ Washington and the other leaders of the Continental Army were thus insistent on reforms to improve organization and training, among other things, to avoid the ineffectiveness they had struggled with in the field.²⁶⁵ The Framers may have had varied views on how best to ensure civilian control—both in the allocation of powers as between the President and Congress and as between the federal government and the states. But that they were indifferent to the notion that any model of civilian control must serve interests of expertise and effectiveness cannot be supported.

It is a truism that the problems of expertise and effectiveness confronting the U.S. military have grown in magnitude and scope from the

259. THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 213, at 166.

260. Kohn, *Intent of the Framers*, *supra* note 203, at 68.

261. 1 JARED SPARKS, THE WRITINGS OF GEORGE WASHINGTON 222–23 (Boston, Am. Stationers’ Co. 1837) (writing to the President of the Continental Congress).

262. See ROYSTER, *supra* note 203, at 38–39 (explaining that most revolutionaries believed that “[s]ince [the citizen-soldier] fought to preserve his standing as a citizen against those who would make him a slave, his pride in civil society would help to make him stronger than his opponents in combat”).

263. See *id.* at 48 (recounting the shortcomings of short enlistment periods); *id.* at 66 (“All agreed that a regular army had to exist and that longer terms were needed to make the army both effective and economical.”); *id.* at 359 (noting that for some, “the war experience had discredited the idea that all citizens could take the field as effective soldiers,” and that for these men, “American independence and security could more safely rest on the expertise of trained men than on the virtue of the citizenry”).

264. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 23–24 (Max Farrand ed., rev. ed. 1966) (discussing Governor Randolph’s speech at the Convention on May 29, 1787).

265. See KOHN, EAGLE AND SWORD, *supra* note 203, at 9–11 (“Washington and the other leaders of the Continental Army unanimously recommended a national military establishment and a complete overhaul of the militia.”); Kohn, *Intent of the Framers*, *supra* note 203, at 75 (discussing reforms to the military—including uniformity, training, and reorganization—that Washington and other military leaders thought necessary after their frustration with the militia during the Revolutionary War).

force of negligible size and experience in the early nineteenth century. Today, the modern military in many ways enjoys the functional advantages of the administrative agencies. As it is, some military judgments are subject to review under the same Administrative Procedure Act (APA) used to regulate the exercise of authority by expert agencies in general.²⁶⁶ The post-World War II explosion of both military spending and administrative decision making more broadly substantially heightened the dilemma of how to exploit growing military professionalism and expertise while still maintaining civilian control. Huntington's key insight thus remains especially salient today: "the modern problem of civil-military relations" is the management of military expertise.²⁶⁷ How can we ensure that the President gets the best unvarnished advice from the JCS, following what were broadly seen as failings of this structure in Vietnam and thereafter?²⁶⁸ What should be done with the opinions of generals like Eric Shinseki, who, as Army Chief of Staff, testified to Congress—quite contrary to the views of the Secretary of Defense—that managing Iraq following the U.S. invasion in 2003 would require "something on the order of several hundred thousand soldiers"?²⁶⁹ For that matter, what should be done with the opinions of generals like Charles Dunlap, who, as Deputy Judge Advocate General, testified to Congress that compliance with Common Article 3 as the JAGs read it was "in [America's] warfighting interests"?²⁷⁰

266. However, some military decision making is expressly exempted from APA regulation. *See, e.g.*, 5 U.S.C. § 553(a)(1) (2006) (exempting the conduct of "military or foreign affairs function[s]" from APA notice-and-comment requirements); *id.* § 554(a)(4) (exempting the military from formal adjudication and hearing requirements). Such exceptions, however, leave room for a wide range of decisions subject to APA regulation. For example, the APA subjects military decisions to "arbitrary [or] capricious" review, exempting only those decisions involving military commissions, courts-martial, and "military authority exercised in the field in time of war or in occupied territory." *Id.* §§ 701(b)(1)(F)–(G), 706(2)(A); *see also, e.g.*, *Indep. Guard Ass'n of Nev., Local No. 1 v. O'Leary ex rel. U.S. Dep't of Energy*, 57 F.3d 766, 767–68, 770 (9th Cir. 1995) (finding the "'military function' exception" to APA notice-and-comment procedures not applicable to an Energy Department personnel regulation establishing a "Personal Assurance Program" for contractor-employees with nuclear-explosive duties); *Doe v. Rumsfeld*, 297 F. Supp. 2d 119, 129 (D.D.C. 2003) (finding that the APA's arbitrary-or-capricious-review exception for military authority exercised in the field in time of war did not bar service members' claims against the Secretary of Defense for injunctive relief in an action challenging mandatory anthrax vaccinations).

267. HUNTINGTON, *supra* note 16, at 19; *see also id.* at 20 ("[T]he problem in the modern state is not armed revolt but the relation of the expert to the politician.").

268. *See, e.g.*, LEDERMAN, *supra* note 225, at 27 ("The chiefs' marginalization, combined with their hesitation to voice their dissent publicly, resulted in a U.S. military commitment without the full-fledged input of the president's statutorily-appointed 'military advisers.'"); MCMASTER, *supra* note 239, at 328 ("When it became clear to the Chiefs that they were to have little influence on the policy-making process, they failed to confront the president with their objections to McNamara's approach to the war.").

269. Eric Schmitt, *Pentagon Contradicts General on Iraq Occupation Force's Size*, N.Y. TIMES, Feb. 28, 2003, at A1.

270. *Standards of Military Commissions Hearing*, *supra* note 75, at 8 (statement of Maj. Gen. Charles J. Dunlap, Jr., Deputy Judge Advocate General, United States Air Force).

For scholars like Huntington, the answer is to limit the kinds of matters on which an officer may be seen to have an expert opinion. To do this, he relies heavily on the conceptual distinction between means and ends, between political decisions and operational decisions, between military policy and military science.²⁷¹ Soldiers have something to contribute in considering means; their opinion is not expert to the extent it relates to ends. Whether or not it is possible to unearth support for such a distinction in the Constitution's text or history, it seems deeply unlikely that the constitutional meaning of civilian control hinges on such a dubious distinction.²⁷² This is so for a variety of reasons. At the broadest level, Huntington's concept of military professionalism is deeply bound by the age in which it was written—an age in which it was still arguably possible to speak of the study of military strategy (or even law) as a science. For Huntington, the import of this distinction was to protect the ability of the professional military to operate within its own, apolitical sphere. Yet as progressives and realist scholars of all types dismantled the notion that it is possible to pursue a purely objective study of such topics, the idea that decision making in these realms could partake of wholly objective assessments has seemed increasingly quaint.²⁷³

More to the point, as military historians have long known, the most quintessentially operational decisions—like whether and to what extent it is permissible to use particular coercive interrogation techniques on a particular detainee—can have enormous political consequences. It would be a mistake to suggest that this insight is new to twentieth-century warfare. Huntington himself recognized the sometimes inconclusive nature of the distinction he drew and argued that in cases of uncertainty, “considerations of strategy must . . . give way to considerations of policy.”²⁷⁴ But the problem is a greater one than Huntington credits. While counterinsurgency is hardly the only kind of war the modern military fights, contemporary military counterinsurgency doctrine makes the point with characteristic clarity:

The political and military aspects of insurgencies are so bound together as to be inseparable. Most insurgent approaches recognize that fact. Military actions executed without properly assessing their political effects at best result in reduced effectiveness and at worst are

271. See *supra* subpart II(A).

272. See, e.g., ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* 242 (2002) (“[A] seemingly sharp separation [between military science and political purpose] crumbles when it encounters the real problems of war.”).

273. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 170 (1992) (positing that realism's most lasting contribution is probably skepticism of orthodox legal reasoning's ability to “provide neutral and apolitical answers to legal questions”).

274. HUNTINGTON, *supra* note 16, at 73; see also *id.* at 72–73 (“Obviously a considerable area exists where strategy and policy overlap. In this realm the supreme military commander may make a decision on purely military grounds only to discover that it has political implications unknown to him.”).

counterproductive. Resolving most insurgencies requires a political solution; it is thus imperative that counterinsurgent actions do not hinder achieving that political solution.²⁷⁵

In this respect, Huntington's distinction between strategy and policy easily justifies the exception (civilian operational decision making) that swallows the (military operational decision making) rule.

But if Huntington's model of objective control is both impossible to achieve and correspondingly unlikely to capture a plausible constitutional understanding of civilian control, how then might a contemporary government manifest the Framers' interest in exploiting professional expertise in the interest of greater effectiveness? Return to the dilemma of JAGs being called for congressional testimony. For Huntington, such moments of inter-branch engagement undermine civilian control, for they make it harder for officers to be at ease in their professionalism. But given the constitutional history, Huntington's disfavor seems misplaced. His view not only denies the potential wisdom of the constitutional decision to give both Congress and the Executive some measure of authority over the military, it would imply that it is better to deprive Congress of information (by limiting officers' ability to testify or otherwise narrowing the range of issues considered operational) it presumably needs if it is to fulfill its formal role to regulate the military effectively. This seems exactly backwards. Precisely because bureaucratic and career-based incentives are likely at work in a professional military (i.e., an incentive to make decisions likely to aid, rather than hinder, one's career advancement),²⁷⁶ and because there may be an important loyalty attachment between an officer and her Commander in Chief,²⁷⁷ officers who testify contrary to the stated positions of their Executive seem especially likely to be speaking from knowledge and conviction. Such a system may leave officers ill at ease in their profession—and indeed, may prove to pose too strong a *disincentive* against candid public statement—but it is entirely consistent with an understanding of civilian control that expects effectiveness to matter to the civilians in charge.

275. U.S. DEP'T OF THE ARMY, FM 3-24: COUNTERINSURGENCY 1-22 (2006), available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf>.

276. See Leonard Wong & Don M. Snider, *Strategic Leadership of the Army Profession*, in THE FUTURE OF THE ARMY PROFESSION 601, 618–19 (Lloyd J. Matthews ed., 2d ed. 2005) (emphasizing the importance of developing a military organizational culture that encourages the “moral courage for self-abnegation” ahead of “personal success and egos”).

277. See MCMASTER, *supra* note 239, at 330 (attributing the Joint Chiefs' failure to adequately challenge U.S. policy in Vietnam in part to the fact that they “felt loyalty to their commander in chief”); *id.* at 309–12 (recounting examples of the Joint Chiefs dodging questions from legislators about their assessment of the state of affairs in Vietnam, and concluding that “the Chiefs had decided to support their commander in chief by misrepresenting their own estimates of the situation”).

V. Conclusion

This Article began with the question of whether it was consistent with constitutional notions of civilian control for the military ever to act as a constraint on the power of the civilian Executive. The tentative answer proposed here is twofold: that existing definitions of civilian control are contradictory in their implications and inconsistent with the constitutional scheme, and that a more appropriate understanding of civilian control tends to leave greater room for the possibility of military constraint.

But how much constraint is tolerable, and what kinds of constraint are appropriate? A thorough answer to those questions requires a revised theory of civilian control, one that avoids the failings of the prevailing accounts while offering enough guidance to shed light on the extent to which military expertise may act to constrain civilian decision making. While a fully developed model will require future work, several principles emerge from the foregoing analysis that may be usefully summarized here. First and foremost, an understanding of civilian control should begin by assuming that the formal allocation of power over the military to more than one branch of government is meant to serve, rather than undermine, the principle of civilian control. Whatever the aims of civilian control may be, they need not be defined as aims that are fundamentally incompatible with the Constitution's central scheme in this respect.

Second, it is likely a mistake to imagine that a structural theory of civilian control can be wholly divorced from its normative constitutional values. Huntington's attraction to his model of objective control was driven in large part by his fear of what he thought was his model's inevitable opposite: subjective control in which civilians keep members of the military in line by insisting that they internalize the values of the particular civilian leadership. In Huntington's history, such a mechanism could tie the military closely to a particular party but could also make the military an enemy of democratic governance once that civilian party left power. Indeed, the kind of military partisanship Huntington feared can pose a threat to civilian control over the long term. Yet it is possible to distinguish among varied forms of subjective commitment, some of which are more dangerous to civilian control than others. It may be possible to insist the military be committed to a set of systemic, constitutional values that are normative in nature but that transcend political party. As we have seen, it is difficult to avoid the conclusion that the Framers had such specific values in mind when they developed mechanisms for ensuring civilian control. That is, the Framers thought civilian control was important not because the military was categorically bad (or military judgment categorically wrong)—indeed, they hoped a national-defense establishment would contribute to governmental effectiveness—but because they feared the military would undermine particular constitutional values, including the protection of individual rights and the maintenance of a noncorrupt, politically accountable system of government. Mechanisms of

military constraint that advance these goals may be favored. Mechanisms that work against them may not.

Finally, these findings must be made with some caveats. The first has to do with the potential limits of theoretical models. Writing on the eve of the dramatic reorganization of the JCS in the 1980s, an influential congressional report acknowledged that common definitions of the meaning of *civilian control* were hard to find.²⁷⁸ Despite this, the report argued,

[T]he experience of nearly two centuries of American history suggests that this absence of a definition has served us well. As with other constitutional doctrines which are broad and do not have specific definition, civilian control of the military has given the system the political flexibility that is needed to maintain the essence of the principle . . . [without] crippl[ing] the valuable professional advice or the role played by the professional military officer.²⁷⁹

That conflicts and dilemmas of the nature discussed here continue to arise is not necessarily a sign that greater clarity is needed but rather an indication that the iterative process of democratic governance is working as it should. The Constitution sets down outlines, not detailed blueprints of government, and not every answer left blank poses a problem for its day-to-day functioning.

At the same time, the active battles of late—in Congress, in the courts, and in legal scholarship—over who should be involved in making critical decisions in U.S. counterterrorism operations suggests more clarity may be useful. Prevailing models of civil–military relations were not developed with constitutional law squarely in mind, but they unavoidably carry implications for the field. Both models may be invoked, for instance, to favor unitary structures of civilian control over the military and in particular an understanding of civilian control as exercised largely by a single branch—most typically in recent years, the office of Commander in Chief.²⁸⁰ At a minimum for the purpose of informing such longstanding debates in the separation of powers, finding a place for the modern military in contemporary constitutional theory seems a necessary project for law.

278. See STAFF OF S. COMM. ON ARMED SERVS., 99TH CONG., DEFENSE ORGANIZATION: THE NEED FOR CHANGE 44 (Comm. Print 1985) (“[T]here is no readily available definition of the meaning of civilian control.”).

279. *Id.*

280. See, e.g., Sulmasy & Yoo, *supra* note 2, at 1832 (“Most models of civilian-military relations consider the president, . . . as commander-in-chief, to be the civilian whose preferences are paramount.”).