

CHALLENGES TO CIVILIAN CONTROL OF THE MILITARY:
A RATIONAL CHOICE APPROACH TO THE WAR ON TERROR

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Legal study of the institutions of national security decisionmaking has focused primarily on the allocation of authority between the president and the U.S. Congress to wage war. An overlooked gap within this framework is the strained relations between U.S. civilian leadership and the American military, which have been evident in every administration since World War II. The War on Terror further exacerbated these tensions—particularly with Judge Advocate General’s (JAG) Corps, which is the legal arm of the military. A rational choice framework is proposed to better address foreseeable challenges to the civilian-military relations.

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INTRODUCTION

Legal study of the institutions of national security decisionmaking has focused primarily on the allocation of authority between the president and the U.S. Congress to wage war. This work has rooted itself primarily in debates over the original understanding of the U.S. Constitution.¹ After the September 11 terrorist attacks, attention has also turned to the wartime

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1. See, e.g., LOUIS FISHER, PRESIDENTIAL WAR POWER (2d ed. 2004); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

balance between security and freedom, revolving around normative arguments about the scope of civil liberties.² This often stands in contrast to security studies in other disciplines, which apply rational actor approaches to the study of international crises, or examine the documentary record to understand the decisionmaking process of American leaders.³

An overlooked gap in the legal study of national security decisionmaking is civilian-military relations. Civilian control of the military remains one of the fundamental norms of our constitutional system, and it regularly governs the day-to-day functioning of our national security institutions. In terms of the decisions made in the fields of grand strategy, military tactics and operations, intelligence, and force structure, civilian control is perhaps the singular constitutional principle with which our civilian and military leaders continuously grapple. The legal academy's understandable fascination with the decision to wage war has caused it to ignore how these other decisions are implemented.⁴ It is rather like looking only at Congress's decision to delegate authority over the environment to the Environmental Protection Agency (EPA), without proceeding to ask how the EPA, Congress, the president, and the courts struggle over the policies to follow.

Scholars of American public law, not just those in national security affairs, should have an interest in civilian-military relations. Measured by appropriations, the American military is the second largest of the federal agencies. In fiscal year 2006, the U.S. Department of Defense received an annual budget of approximately \$411 billion, which rose to \$535 billion

2. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

3. See, e.g., ROBERT POWELL, *IN THE SHADOW OF POWER: STATES AND STRATEGIES IN INTERNATIONAL POLITICS* (1999); MARC TRACHTENBERG, *A CONSTRUCTED PEACE: THE MAKING OF THE EUROPEAN SETTLEMENT, 1945-1963* (1999).

4. For exceptions, see, for example, Deborah D. Avant, *Military Perspectives and Civilian Control in Post-Cold War Peace Operations*, 93 AM. SOC'Y INT'L L. PROC. 346 (1999); Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431 (2004); Richard H. Kohn, *Using the Military at Home: Yesterday, Today and Tomorrow*, 4 CHI. J. INT'L L. 165 (2003) (discussing the history and the potential implications of using the military in domestic applications in the War on Terror); Diane H. Mazur, *The Bullying of America: A Cautionary Tale About Military Voting and Civil-Military Relations*, 4 ELECTION L.J. 105 (2005) (examining the bad state of civilian-military relations through the lens of the 2000 presidential election); Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 704 (2002) (finding that judicial review of the military has decreased in the post-Vietnam era, thanks in large part to Chief Justice Rehnquist's jurisprudence).

with supplemental appropriations for the wars in Afghanistan and Iraq⁵—about 19 percent of all federal outlays.⁶ Only the Department of Health and Human Services, with about 23 percent, received more federal funding.⁷

The Department of Defense's funding is matched by its size. With 653,000 civilian employees, the Department of Defense has a workforce roughly three times larger than the next largest agency.⁸ Military personnel on active duty include 1.432 million men and women;⁹ all other nondefense employees in the executive branch total 1.227 million.¹⁰ The Department of Defense is responsible for perhaps the most important and basic function of government—providing security from external threats. And while this mission is already important enough, the Department of Defense's responsibilities have grown since the Cold War to include disaster relief, responding to civil disturbances, and assisting in drug interdiction.

Nonetheless, far more attention has focused on other agencies. They no doubt play significant regulatory roles, but their importance does not approach that of the U.S. Armed Forces. Perhaps one reason for the scholarly neglect of civilian-military relations is that it seems to be an area that remains relatively immune to judicial review. Unlike the thousands of cases involving review of agency action under the Administrative Procedures Act,¹¹ there do not appear to have been any significant cases in which a federal court has examined civilian-military control issues. If courts have been deferential to decisions of the executive branch in military matters, as one of us has observed elsewhere,¹² then it would be unusual to find them intervening in intraexecutive branch relations. Putting aside justiciability issues, it is also difficult to imagine how the merits of civilian control of the military might be challenged within the context of a lawsuit.

5. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2008, DEP'T OF DEFENSE 50 (2007), available at <http://www.gpoaccess.gov/usbudget/fy08/pdf/budget/defense.pdf>.

6. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2008, HISTORICAL TABLES, at tbl.4.2 (2007), available at <http://www.gpoaccess.gov/usbudget/fy08/sheets/hist04z2.xls>.

7. *Id.*

8. *Id.* at tbl.17.1, available at <http://www.gpoaccess.gov/usbudget/fy08/sheets/hist17z1.xls>.

9. *Id.* at tbl.17.5, available at <http://www.gpoaccess.gov/usbudget/fy08/sheets/hist17z5.xls>.

10. *Id.*

11. 5 U.S.C. § 551 (2000). For a recent example, see *Massachusetts v. EPA*, No. 05-1120 (U.S. Apr. 2, 2007) (addressing the Environmental Protection Agency's (EPA) refusal to regulate greenhouse gases).

12. John Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427 (2003–2004).

Some might also think that this issue has attracted little attention because the vitality of civilian control over the military is not in doubt. The United States has never suffered a military coup and no active duty officer has ever served as president or vice president. On this score, American civilian-military relations are in good health. Measuring civilian control of the military by whether a coup has occurred, however, would miss the full scope of the relationship, as would limiting our inquiry in administrative law only to whether agency officials have directly disobeyed directives from the executive branch or from Congress.

Just as the scholarly account of agency action is far richer, so too should be the study of civilian-military relations. Has the military undermined civilian control when, for example, officers criticize civilian policy or wage political campaigns to overturn the decisions of the commander-in-chief? Is civilian control threatened if military officers make certain policy decisions without civilian input, or if they manage circumstances such that civilian options are limited? Does our nation's growing reliance upon the military to address national problems, ranging from intelligence reform to disaster relief to the interdiction of illegal drugs, disturb the civilian-military relationship? Simply because civilian control of the military as a constitutional principle does not lend itself to adjudication does not mean that it should be left undefined. Civilian defense leaders, including the president and military officers, must give it meaning in order to perform their jobs.

This Article proposes a framework for understanding civilian-military relations. Part I explains that while the civilian-military tension has been high during the wars under the current Bush Administration, it has been high for some time, at least since the end of the Cold War. Part II constructs a principal-agent model for understanding civilian control of the military, and suggests ways in which civilian control can be increased. Part III discusses this model in the context of the role of military lawyers in the War on Terror, in particular by asking why civilian and military officers have such different policy preferences.

I. CIVILIAN-MILITARY RELATIONS SINCE THE COLD WAR

Recent events in the war in Iraq and in the War on Terror have raised the salience of civilian-military relations. The war in Iraq has brought forth a great deal of friction between civilian Department of Defense officials and military officers. For example, dozens of retired military officers, including some recently returned from Iraq, called for the resignation of Secretary of

Defense Donald Rumsfeld on the ground that he had mismanaged the war.¹³ The criticism from the retired officers echoed not-for-attribution comments by active duty officers, which had extended to criticism of Secretary Rumsfeld's heavy hand in planning before the invasion.¹⁴ Perhaps the most publicized flashpoint occurred when Army Chief of Staff, General Eric Shinseki, testified before Congress that an insufficient number of troops were being sent to occupy Iraq.¹⁵ Senior Department of Defense officials quickly repudiated Shinseki's comments.¹⁶ Our system perhaps has not witnessed a similar level of public conflict between civilians and military officers since President Truman's well-known and controversial firing of General Douglas MacArthur during the Korean War.

Civilians and military officers have also struggled over legal policy in the War on Terror. In February 2002, after extensive debate between civilian and military leaders, President Bush decided that the Geneva Conventions did not apply to armed conflict with al Qaeda, and that the United States would not extend prisoner of war (POW) status to al Qaeda's Taliban allies.¹⁷ According to media reports, senior officers of the Judge Advocates General's (JAG) Corps opposed the decision and turned to human rights groups to challenge the decision in court.¹⁸ According to press reports, JAGs argued that the decision violated international law, and they implicitly believed that the president did not have the authority to interpret and apply international law on behalf of the nation's government and military.

A second event of friction occurred in the fall of 2006 during Congress's consideration of the Military Commissions Act of 2006.¹⁹ In November 2001, President Bush issued an order establishing special military

13. Paul D. Eaton, Op-Ed., *A Top-Down Review for the Pentagon*, N.Y. TIMES, Mar. 19, 2006, at D12 (op-ed by former general, the first major public call by retired military brass for Rumsfeld's resignation); Michael Janofsky, *More Calls for Rumsfeld to Leave*, N.Y. TIMES, Apr. 3, 2006, at A11; Thomas E. Ricks, *Rumsfeld Rebuked by Retired Generals: Ex-Iraq Commander Calls for Resignation*, WASH. POST, Apr. 13, 2006, at A1.

14. David S. Cloud & Eric Schmitt, *More Retired Generals Call for Rumsfeld's Resignation*, N.Y. TIMES, Apr. 14, 2006, at A1.

15. Diego Iburguen et al., *Mixed Signs From Iraq—Turks Delay Vote*, PHIL. INQUIRER, Feb. 26, 2003, at A3; Vernon Loeb, *Cost of War Remains Unanswered Question*, WASH. POST, Mar. 1, 2003, at A13.

16. Eric Schmitt, *Threats and Responses: Military Spending; Pentagon Contradicts General on Iraq Occupation Force's Size*, N.Y. TIMES, Feb. 28, 2003, at A1.

17. This decision is discussed in YOO, *supra* note 2, at 18–47.

18. Adam Liptak, *U.S. Barred Legal Review of Detentions, Lawyer Says*, N.Y. TIMES, May 19, 2004, at A14.

19. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

courts for the trial of terrorist suspects accused of committing war crimes.²⁰ Some JAG officers had opposed this option, arguing that the existing court-martial system under the Uniform Code of Military Justice (UCMJ) ought to be used instead.²¹ Civilian leaders in the Pentagon went ahead with the design of the military commissions, but proceedings never began due to habeas corpus litigation challenging their legality. In *Hamdan v. Rumsfeld*,²² the U.S. Supreme Court held that the commissions violated Common Article 3 of the Geneva Conventions,²³ which it concluded Congress had incorporated into the rules for military commissions when it enacted the UCMJ in 1950.²⁴

In response, the Bush Administration sought legislation from Congress to place the military commissions on firmer ground and to overrule aspects of *Hamdan*. During congressional hearings on the legislation, the head JAGs for the U.S. Marines and the U.S. Army claimed that military commission rules that withheld classified information from the defendant (but not defense counsel) violated “the judicial guarantees which are recognized as indispensable by civilized peoples,” as called for by Common Article 3.²⁵ Brigadier General James Walker, the Marines’ top uniformed lawyer, said “no civilized country should deny a defendant the right to see the evidence against him, and that the United States ‘should not be the first.’”²⁶ This directly conflicted with the position of the civilians in the Bush Administration, who concluded that the legislation was consistent

20. Notice on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). For a discussion of the constitutional issues involved with the Act, see Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues From Federal Courts*, 95 CAL. L. REV. (forthcoming 2007).

21. See *Testimony on Military Commissions: Hearing Before the S. Comm. on Armed Services*, 109th Cong. (July 19, 2006) (statement of Sen. Carl Levin) (“[T]he Committee heard from six Judge Advocates General, both active and retired . . . a majority . . . favor taking the existing rules of courts martial under the UCMJ as the starting point or framework for our consideration of military commissions . . .”); see also John D. Hutson, Editorial, *Your Turn, NH: Congress Must Right a Wrong on the Treatment of Detainees*, THE UNION LEADER, Sept. 11, 2006, at A9.

22. 126 S. Ct. 2749 (2006).

23. 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.

24. 126 S. Ct. at 2757. The decision has generated significant debate. See, e.g., Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007); Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007).

25. See Kate Zernike, *Lawyers and G.O.P. Chiefs Resist Proposal on Tribunal*, N.Y. TIMES, Sept. 8, 2006, at A1.

26. *Id.*

with the United States' international obligations.²⁷ In the same hearings, the representative of the U.S. Department of Justice argued that the proposal to allow the defense counsel but not the defendant to see classified information "properly administered by the military judge, would strike the appropriate balance between safeguarding our Nation's secrets and ensuring a fair trial of the accused."²⁸ In the same written statement, the representative declared: "In the midst of the current conflict, we simply cannot consider sharing with captured terrorists the highly sensitive intelligence that may be relevant to military-commission prosecutions."²⁹

Some criticize these actions for undermining the principle of civilian control of the military. Others defend them as an example of military experts preventing civilians from making serious strategic or tactical mistakes. Whatever their intention or effect, military criticism or even resistance to civilian policy decisions is not restricted only to the war in Iraq or the War on Terror. Rather, such criticism is the latest in a series of major conflicts between civilian and military leaders since the end of the Cold War.

Even before the September 11 attacks, observers had concluded that civilian-military relations had reached a "crisis."³⁰ During the early Clinton years, one prominent military historian argued that General Colin Powell had resisted civilian leaders—regarding the use of force in Bosnia—in a manner reminiscent of General George McClellan's hesitancy to commit to battle during the Civil War.³¹ Writing in 1994, Richard Kohn, one of the nation's leading military historians, characterized the Armed Forces during the late George H.W. Bush and early Clinton Administrations as "out of control."³² By 2002, Kohn had concluded that "civilian control of the military has weakened in the United States and is threatened today."³³ According to Kohn, "the American military has grown in influence to the point of being able to impose its own perspective on many policies and

27. *Concerning the Supreme Court's Decision in Hamdan v. Rumsfeld: Hearing Before the H. Comm. on Armed Services, 109th Cong.* (Sept. 7, 2006) (statement of Steven G. Bradbury, Acting Assistant Atty Gen. for the Office of Legal Counsel, U.S. Dep't of Justice), available at <http://armedservices.house.gov/comdocs/schedules/9-7-06BradburyStatement.pdf>.

28. *Id.* at 7.

29. *Id.* at 6.

30. See, e.g., Richard H. Kohn, *Out of Control: The Crisis in Civil-Military Relations*, NAT'L INTEREST, Spring 1994.

31. Russell F. Weigley, *The American Military and the Principle of Civilian Control From McClellan to Powell*, J. MIL. HIST., Oct. 2003.

32. Kohn, *supra* note 30, at 3.

33. Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, NAVAL WAR C. REV., Summer 2002, at 9.

decisions.”³⁴ Summing up the post–Cold War years, Kohn detected “no conspiracy but repeated efforts on the part of the armed forces to frustrate or evade civilian authority when that opposition seems likely to preclude outcomes the military dislikes.”³⁵ Kohn believed that civilian-military relations in that period were as poor as in any other period in American history.³⁶ In 1992, then-Colonel Charles Dunlap (now a brigadier general and deputy JAG of the U.S. Air Force), even wrote an essay in the form of a fictitious letter from the future describing a military coup by the year 2012 because civilian leaders were calling on the military to perform essentially civilian tasks, such as stopping drug trafficking or feeding the poor, which would lead to a politicized officer corps.³⁷

What events produced this crisis? The conventional explanation is that President Clinton entered office with a military already distrustful of him, because of questions raised during the 1992 campaign about whether he had dodged the Vietnam War draft. Matters only became worse when Clinton decided, as one of his first acts as president, to reverse the military’s ban on openly gay personnel. The Joint Chiefs of Staff immediately met with President Clinton to express their strong opposition to the decision, which was followed by an extensive congressional lobbying effort by the military in support of a statutory codification of the ban, coordination with retired officers who could publicly criticize President Clinton’s proposal, and leaks to the press of mass resignations should the ban be lifted.³⁸ Within a few months, President Clinton announced the existing “Don’t Ask, Don’t Tell” policy, which amounted to a significant change from the administration’s original policy.

While the controversy over gays in the military held high political salience, it was only one example of resistance by the military after the end of the Cold War. General Colin Powell, for example, gave an on-the-record interview in the *New York Times* opposing military intervention in Bosnia while serving as chairman of the Joint Chiefs of Staff; meanwhile, civilians in Congress, the first Bush Administration, and the 1992 presidential campaigns were still debating policy options.³⁹ General Powell even published an editorial in his own name opposing any Bosnian

34. *Id.*

35. *Id.*

36. *Id.* at 10.

37. Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, PARAMETERS: US ARMY WAR C.Q., Winter 1992–1993, at 2.

38. Kohn, *supra* note 30, at 3.

39. Weigley, *supra* note 31, at 28.

intervention.⁴⁰ Military historians suggest that the open opposition of General Powell and the military delayed U.S. intervention in the Balkans by four years.⁴¹ Military leaders sought to prevent the Clinton Administration from sending a large military force to intervene in Haiti, and blamed civilians for refusing to send adequate armor and resources for the mission in Somalia. Opposition from the military and the Pentagon prevailed over President Clinton's desire to support the treaty banning land mines and significantly impeded his signature of the treaty creating the International Criminal Court—a decision the Bush Administration soon reversed with the broad backing of the uniformed military.⁴²

During this period, the struggle between civilians and the military continued over less well-known issues as well. Military officers apparently undermined the administration of Secretary of Defense Les Aspin, leading to his resignation, and also forced his nominated successor, Admiral Bobby Ray Inman, to withdraw. Controversies accompanied the retirement of several four-star flag officers, and there seemed to be constant infighting over issues such as sexual harassment policies and women in combat.⁴³ No serious change in organizational force structure occurred, even though the primary enemy for which the American military had prepared for more than half a century, the Soviet Union, had disintegrated. As Kohn observed, "the uniformed leadership—each service chief, regional or functional commander, sometimes even division, task force, or wing commanders—possessed the political weight to veto any significant change in the nation's fundamental security structure."⁴⁴ Opposition to efforts to rethink policy in response to the end of the Cold War and developments in military technology continued into the Bush Administration, which experienced stiff resistance before the September 11 attacks to the "revolution in military affairs" promoted by Secretary Rumsfeld.⁴⁵

One could say, of course, that none of these examples demonstrates that civilian control of the military in the United States is under any real threat. If the sole purpose of civilian control of the military is to prevent a coup, then the principle has not been seriously challenged. But civilian control of the military encompasses more than just formal control over the

40. Colin L. Powell, Editorial, *Why Generals Get Nervous*, N.Y. TIMES, Oct. 8, 1992, at A35.

41. Kohn, *supra* note 33, at 17 & n.43.

42. *See id.* at 19 & n.52.

43. *Id.* at 11.

44. *Id.* at 13.

45. *Id.* at 14.

instruments of government. It 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.

This was the heart of General MacArthur's challenge to President Truman's leadership, widely considered the most serious civilian-military conflict, at least since the Civil War. MacArthur posed no threat of a military takeover of the formal mechanisms of government. Rather, MacArthur publicly questioned the civilian decision, after Communist China's intervention in the winter of 1950, to pursue a limited strategy in the Korean War instead of outright victory. MacArthur claimed that he was not required to take orders from the president as commander-in-chief, and that he owed a greater obligation to a higher constitutional authority. After he had been relieved by President Truman, General MacArthur returned to the United States to cheering crowds and addressed a joint session of Congress. In a speech to the Massachusetts legislature, MacArthur said: "I find in existence a new and heretofore unknown and dangerous concept that the members of our Armed Forces owe primary allegiance or loyalty to those who temporarily exercise the authority of the Executive Branch of Government rather than to the country and its Constitution which they are sworn to defend."⁴⁶ While certainly not as public or as brusque, some members of the uniformed military appear to share a similar attitude that civilian leaders are, at best, temporary office holders to be outmaneuvered or outlasted.

II. THEORIES OF CIVILIAN-MILITARY RELATIONS

Analysis of civilian-military relations is virtually nonexistent in the legal academic literature. A few articles have appeared in the law reviews of the Armed Forces or military academies, but for the most part they detail the recent history of civilian-military disputes, such as the controversy surrounding gays in the military.⁴⁷ Political science provides approaches that are helpful in understanding civilian control over the military. In particular, the rational choice approach to the analysis of government institutions sheds important insights into the circumstances that allow

46. Douglas MacArthur, General MacArthur's Address Before the Massachusetts Legislature (July 25, 1951), in Extension of Remarks of Hon. Clarence J. Brown of Ohio, In the House of Representatives, 82d Congress, 1st Sess., July 26, 1951, 97 CONG. REC. APP'X, Part 14 (July 12, 1951 to Sept. 17, 1951), at A4721, A4722.

47. See sources cited *supra* notes 4, 31–33.

opposition to civilian policies to occur and into methods that can increase civilian control.

A. The Classic Model of Civilian-military Relations

An institutionalist approach is not the one adopted by Samuel Huntington in *The Soldier and the State: The Theory and Politics of Civil-Military Relations*,⁴⁸ which remains the classic work on civilian-military relations. Huntington argued that two independent variables determine the nature of civilian-military relations: (1) the level of external threat; and (2) the ideological and constitutional nature of the society.⁴⁹ The United States has a liberal ideological and constitutional nature because of its emphasis on individual rights and concerns about military involvement in politics and society. Huntington also suggested two types of control: objective and subjective. Objective control seeks to advance the “professionalization” of the military, which would allow it autonomy in its sphere of action and render it politically neutral.⁵⁰ For Huntington, professionalization, by definition, includes the norm of obeying civilian orders.⁵¹ Subjective control, on the other hand, draws the military into politics and degrades its fighting abilities.⁵²

The serious challenge posed by the Soviet Union during the Cold War generated considerable tension, in Huntington’s view, for civilian-military relations. A liberal state, with its aversion to a large military and its culture, would normally have difficulty confronting a major external threat. In order to maintain the effective armed forces necessary to defeat such a dangerous foe, the United States would have needed to increase objective control. Objective control, however, requires society to move away from its individualistic roots. Huntington averred that “[t]he requisite for military security is a shift in basic American values from liberalism to conservatism. Only an environment which is sympathetically conservative will permit American military leaders to combine the political power which society thrusts upon them with the military professionalism without which society cannot endure.”⁵³ If the external threat is significant, but society continues

48. SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* (1957).

49. *Id.* at 2.

50. *Id.* at 83.

51. *Id.*

52. *Id.*

53. *Id.* at 464.

to follow its liberal state, Huntington predicted that stress in civilian-military relations would result. To resolve this tension, the United States would either have to reduce the external threat or weaken its liberalism.

Huntington's framework, proposed as it was during the first decade of the Cold War, has trouble explaining the current state of disruption in civilian-military relations described in Part I. It is unclear, in fact, whether the Huntington thesis fully accounts for developments in the remaining years of the Cold War. During the Cold War, Huntington predicted more difficulty in the civilian-military relationship, a movement toward objective control, and a change in constitutional and social norms in a more conservative direction. The end of the Cold War should have produced less civilian-military conflict as the external threat receded. The record of the last few decades, however, seems to reveal the opposite trend. One study, by Michael Desch, indicates that civilian control over the military did not experience significant problems in the Cold War after President Truman's firing of General MacArthur.⁵⁴ The same study also finds that civilian-military conflicts actually became more frequent after the Cold War. "The end of the Cold War," Desch observed, "coincided with a marked deterioration in the relations between civilian authority and the military leadership in the United States."⁵⁵

B. The Principal-agent Model of Civilian-military Relations

We propose instead to analyze civilian-military relations using principal-agent models developed to understand the administrative state.⁵⁶ The principal, usually Congress, delegates legislative authority to an agent, the federal agency. The relationship is strategic—each actor makes decisions to maximize its own interests, taking into account its understanding of the interests and likely responses of the other. The problem inherent in delegation is that the agent may pursue its own interests rather than take the action that the principal would prefer. But, if the principal attempts to control the agent too tightly, it will raise its costs and counteract the advantages of granting power to a specialized agent. In

54. MICHAEL C. DESCH, CIVILIAN CONTROL OF THE MILITARY: THE CHANGING SECURITY ENVIRONMENT 22–35 (1999).

55. *Id.* at 22.

56. See, e.g., Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433–34 (1989). For a recent application in a related context, see Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1702 (2006).

order to ensure that agents exercise their delegated authority as the principal would wish, the principal can establish monitoring mechanisms to detect any agency slack, or “bureaucratic drift,” as some describe it.⁵⁷ If these mechanisms detect a deviation between the wishes of the principal and the actions of the agent, corrective measures are taken, which can include reduction in position or even removal from office. Part of the goal in designing laws and institutional structures, from the perspective of the principal, is to achieve the right balance between the efficient delegation of authority and the costs of monitoring and sanctioning the agent.

Recent political science work has applied this model in an effort to explain the post–Cold War disruption in civilian-military relations. As most fully developed by Peter Feaver, this approach views civilians as the principal and the military as their agent.⁵⁸ Civilians will want to delegate authority in war policy to take advantage of the specialization of the military and to reduce the costs of making decisions. But they will also want to put into place monitoring devices to determine whether the military is exercising its authority in line with civilian policies. An important challenge is to develop monitoring devices that minimize the ability of the military to act contrary to the civilians, but without incurring high costs on the civilians or the operations of the military.

In principal-agent models of business activity, the interest of the agent is usually taken to be shirking. In other words, the employees of a company wish to be paid for working, but wish to work as little as possible. In the public administration context, shirking does not make as much sense. Instead of wanting to do less work, agents have a different interest than principals. Agents in the bureaucracy want to maximize their autonomy and follow their preferred policies, not necessarily the policies preferred by the principal. Exactly what counts as the principal or the agent prevailing can be difficult, at times, to determine. If the agent has succeeded, for example, by manipulating information and events such that the principal has its way, but only in a very limited sphere, shirking has probably still occurred. If the agent, who presumably has specialized experience and better information, provides advice to the principal that influences the latter’s decision, shirking may not have occurred.⁵⁹

57. O’Connell, *supra* note 56, at 1702.

58. PETER D. FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* (2003).

59. *See id.* at 58–68.

In the civilian-military context, the actors may well have different ideal points for issues of when and how to use force, force structure, strategy, tactics, and the rules governing the military. If civilian and military preferences are identical, there should be little conflict in their strategic interaction. Perhaps the most important variable in their interaction will be a difference in preferences. As we have seen, in the post-Cold War period, significant problems in the relationship arose when civilians and military leaders held sharply different views about the merits of using force in Bosnia, for example, or the role of gays in the military. Separate, but related to a difference in preferences, is a desire for autonomy. Military leaders, like the leaders of other agencies, would prefer to have independence in setting and implementing policy.

This is not to say that civilians and the military disagree on the ultimate goal of providing adequate security for the United States from external threat. Yet they may hold different views on the best policies to achieve that outcome. Military leaders, for example, may wish to use force with a higher probability of victory, which may mean attacking with a larger advantage in forces than civilians might prefer, or with less political restraint on the tactics and strategies available, or with more information about the abilities and the plans of the enemy. Military leaders would favor higher defense expenditures under this theory, and perhaps also be reluctant to adopt radical changes in force structure and rules of engagement. Civilians may be more sensitive to cost, or more favorable toward limited uses of military force so as to achieve other diplomatic or political goals.

Putting differences over substantive policy to one side, military leaders could also present principal-agent problems if they are drawing more decisionmaking authority for themselves, even if the substantive decisions are the same ones that the civilians would ultimately reach. If military leaders are the ones who make the actual policy calls, or define which decisions are civilian and which are military, or manage circumstances so as to severely limit the choices available to civilians, then military preferences are prevailing rather than civilian ones. An example, according to Fever, is the military's change in its force structure after the Vietnam War to place greater reliance upon reserves.⁶⁰ This change made it difficult for civilian leaders to use force abroad without mobilizing the reserves, which, it was thought, would require presidents to build broad public support for a war before committing the military to hostilities.

60. *Id.* at 67.

Military resistance to civilian policies with which military leaders disagree could take several forms short of an outright refusal to obey orders. Military officers can leak information to derail civilian initiatives. They could “slow roll” civilian orders by delaying implementation. They could inflate the estimates of the resources needed, or the possible casualties and time needed to achieve a military objective. And perhaps a relatively unnoticed but effective measure is to divide the principal—if the number of institutions forming the principal increases, it will be more difficult to monitor the performance of the agent and to hold it accountable. Deborah Avant argues, for example, that civilians exercise greater control of the military in Great Britain than in the United States, because the parliamentary system merges the executive and legislative branches of the government.⁶¹ Greater agency slack may result from information asymmetries that may favor the military, such as information and expertise about warfare, adverse selection that may cause the promotion of officers resentful of civilian meddling, and moral hazard in which the inability of civilians to directly observe the performance of the military may allow the military to pursue its own preferences.

Several mechanisms can increase the ability of civilian principals in the executive branch and Congress to monitor their military agents.⁶² The most important and obvious is for civilians to limit the amount of delegation to the military. Delegation with few standards, such as providing only the goal and allowing the military complete freedom in planning and achieving the objective, increases the moral hazard problem. Instead, civilians could decide detailed strategies, battle plans, tactics, and logistics for a war. But handcuffing the military to such an extent raises the costs of delegation and could harm the mission, especially if civilians lack knowledge and expertise, as elected leaders sometimes do, of military matters. Civilians can recognize the military’s autonomy in certain areas such as operations in return for obedience on the broader, more important policy decisions. They can attempt to choose officers for promotion who agree with civilian preferences. They can rely on third parties, such as think tanks or the media, to provide “fire alarms” of agent deviations from policy.⁶³ “Police patrols,” such as investigations, oversight hearings, and

61. DEBORAH D. AVANT, *POLITICAL INSTITUTIONS AND MILITARY CHANGE: LESSONS FROM PERIPHERAL WARS* 21–48 (1994).

62. These tools are identified in FEAVER, *supra* note 58, at 75–87.

63. See generally Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

budget processes, are more intrusive monitoring options.⁶⁴ Civilians can also create institutional checks within the agents, such as fostering interservice rivalries.

Monitoring, however, would prove of little effectiveness without the ability of the principal to undertake corrective action. Principals would prefer that the agent act in line with their preferences, but monitoring and sanctioning are necessary to respond to an agency that seeks to impose its own preferences.⁶⁵ While monitoring and corrective action can be expensive for the principals, they will be more likely to establish more intrusive forms as the costs and frequency of policy drift increase. President Truman's decision to fire General MacArthur represented the sanction of a military agent who refused to obey the principal's wishes. Firing, however, is only one of several types of corrections available. As one alternative, civilians could reduce the scope of delegation or reduce the autonomy of the military. They can cut the budget of the armed services in response to military resistance. Civilians can also subject officers to a spectrum of disciplinary proceedings, retirements, and discharges from the military.⁶⁶

This model of civilian-military relations implies an equilibrium. We would expect the military to follow civilian policy when the payoff to do so is greater than the payoff from following its own preferences, minus the expected cost of the discovery of its shirking. The expected cost of the discovery of shirking is the product of the probability that the behavior will be discovered, the probability that shirking will be punished, and the magnitude of the cost of punishment to the military.⁶⁷

If the payoff for the military of shirking is not that much greater than following civilian preferences, then the military will follow the principal even if the probability for the detection of shirking and the expected cost of punishment are not high. If civilians believe that the military shares their basic preferences, they will not expend significant resources in monitoring. If the distance between military and civilian preferences is great, the military may still follow civilian policy if the chances of the detection of shirking and the cost of punishment are high. Civilians will monitor intrusively if they have a good chance of detecting shirking, unless the cost of the monitoring itself is high enough to outweigh the potential benefit. The simple prediction of this model is that the chances of military

64. *Id.*

65. McCubbins et al., *supra* note 56, at 444.

66. These sanctions are fully explored in FEAVER, *supra* note 58, at 87-95.

67. *Id.* at 102-17.

resistance to civilian preferences will increase as (1) the differences between civilian and military preferences increase; (2) the probability of detecting shirking decreases; or (3) the possibility or magnitude of punishment for shirking decreases.

One advantage that this model has over the Huntington approach is that it does not treat the magnitude of an external threat as the independent variable that determines the nature of civilian-military affairs. According to Huntington, the high level of threat would cause civilians to move their preferences closer to the military, which would also lead to less intrusive monitoring of the military, and “objective control.”⁶⁸ This theory would have predicted more civilian-military tension during the Cold War, unless that change in domestic society occurred, and less tension after the Cold War, once the Soviet threat had disappeared. The historical record, however, appears to support the conclusion that civilian-military problems were relatively muted during the Cold War, and have greatly increased since. External threat certainly influences the nature of the preferences that civilians and the military develop, but it does not dictate whether those differences in preferences will lead to problems in civilian control of the military.

This principal-agent model provides a lens for understanding the civilian-military problems that have occurred during the Bush Administration, which can be seen as a continuation of the post-Cold War difficulties experienced by President Clinton. While the military has in no way seized formal power, it has attempted to expand its policy autonomy and has challenged civilian decisions. This has occurred in several of the ways predicted by this principal-agent model, such as rendering advice that inflates the difficulties or resources needed to achieve a military objective, as apparently occurred with the planning for actions in Somalia and Haiti, or even outright public efforts to limit the options available to civilian decisionmakers, as with General Powell’s public criticism of military intervention in the Balkans.

Throughout this period, however, the amount of civilian monitoring of military implementation of civilian policy remained relatively high. Due to technological advantages in communications, civilian officials at the Pentagon and the White House receive an unprecedented amount of real-time information regarding ongoing military operations. Civilians are now able to issue policy directives that provide little discretion. In the Kosovo campaign, for example, civilians dictated detailed operational orders such as

68. HUNTINGTON, *supra* note 48, at 464.

picking bombing targets. At the same time, because of President Clinton's public weakness with regard to the military, the threat of punishment for detected shirking was relatively minor for much of the post-Cold War period. President Clinton simply was unable to remove or otherwise punish well-known military leaders, such as General Powell.

III. THE PRINCIPAL-AGENT MODEL IN THE WAR ON TERROR

This rational choice model has important and understudied implications for institutional relationships within civilian and military institutions. This approach, we believe, provides interesting explanations for the recent conduct of some military lawyers, in particular, in resisting civilian decisions in the War on Terror. This Part will examine how the military has successfully opposed civilian policy choices in line with the insights generated by our model of civilian-military relations. It will conclude by suggesting reasons why the military and civilians hold such different policy preferences toward terrorism.

Most models of civilian-military relations consider the president, because of his constitutional authority as commander-in-chief, to be the civilian whose preferences are paramount. One of us has argued that this is normatively correct as a matter of constitutional interpretation,⁶⁹ but resolving that question is not necessary here. Regardless of whether the president indeed has primary constitutional authority over military policy, one way for JAGs or other military leaders to resist policies with which they disagree is to attempt to increase Congress's role. Rational choice theories of bureaucracy predict that agents who disagree with their principals will seek to introduce or take advantage of divisions within the principal. As Matthew McCubbins, Roger Noll, and Barry Weingast have found, a shirking agent will be able to play the different units of the principal against each other to expand its autonomy and to reduce the likelihood of punishment or sanction for pursuing its own preferences.⁷⁰ The requirement of agreement by different units of the principal will make the principal less responsive to shirking by the agent.⁷¹

Consistent with this model, some JAG attorneys went directly to Congress. JAGs representing enemy combatants detained at Guantanamo Bay apparently met with members of the U.S. House of Representatives and

69. See generally YOO, *supra* note 1.

70. McCubbins et al., *supra* note 56, at 439.

71. AVANT, *supra* note 61, at 21-48.

the U.S. Senate to encourage them to block President Bush's order establishing military commissions. As we have seen, the heads of the JAG services later testified before Congress in the summer and fall of 2006 on the draft of the Military Commissions Act of 2006.⁷² In these examples, several of these flag-rank officers at odds with their civilian principal attempted to engage Congress as a way to block executive branch policies. Indeed, efforts to oppose civilian legal policies bear significant similarities to the uniformed military's efforts to involve Congress in the 1993 controversy over gays in the military. Ultimately, the efforts during the War on Terror met with little success when Congress enacted the Military Commissions Act of 2006,⁷³ which codified President Bush's military tribunals and the administration's distinction between lawful and unlawful enemy combatants.⁷⁴

Indeed, it need not be only Congress that the military may seek to involve. Expanding the role of the courts would have the effect of further dividing the principal and rendering it less likely that it will set policy or punish a shirking military. We can see this dynamic at work in two actions undertaken by some JAGs who opposed President Bush's decisions on the applicability of the Geneva Conventions and the use and structure of military commissions. First, after failing to prevail in their view that the Geneva Conventions provided POW status to members of al Qaeda or Taliban captured during the 2001 fighting in Afghanistan, several JAGs apparently went in secret to private attorneys to urge them to bring suit on behalf of detainees held at Guantanamo Bay. JAG attorneys representing enemy combatants subsequently challenged the legality of their clients' detention in federal court. Military officers with different policy preferences sought to introduce the judiciary as another actor to disrupt the unified decisionmaking of the principal.

Additionally, a third way to disrupt unity within the civilian principal is to introduce competing power centers outside the national government itself. In domestic contexts that might include state governments, but in the War on Terror, military officers in disagreement with civilian policy might turn to allied governments or international organizations for persuasive support. Cooperation with allies is obviously beneficial for many reasons, but military officers could also urge that the United States adopt

72. See *supra* notes 25–29 and accompanying text.

73. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

74. See Choper & Yoo, *supra* note 20 (discussing the Military Commissions Act of 2006, and its effects).

foreign governments' views on matters such as the status of enemy combatants, because this would allow them more autonomy.

We suggest that JAG appeals to customary international law could play the same role in attempting to increase military autonomy. Some have argued that even if President Bush is correct that the Geneva Conventions do not apply to al Qaeda, rules of customary international law essentially require POW-level protections for all enemy combatants, whether legal or illegal. These rules of customary international law, it is claimed, bind the United States even though it refused to ratify the 1977 Additional Protocol I to the Geneva Conventions,⁷⁵ which sought to eliminate any distinction between legal and illegal combatants. By arguing that the president had to obey the unwritten, vague, and decentralized opinion of the international community, some 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.⁷⁶

Civilians who wished to increase their control over the military could have responded to these efforts in several ways. They could have limited the scope of the power delegated to the military in the area of legal policy. It seems that under the Clinton Administration, the JAG Corps had expanded the scope of its autonomy and its involvement in policy. The Bush Administration could have reacted to the JAGs' efforts to fragment the civilian principal by narrowing that autonomy. It could have expanded monitoring and narrowed JAG discretion by clarifying the authority of civilian Department of Defense lawyers to supervise the work of the JAGs. It even could have required JAGs representing suspected al Qaeda and Taliban detainees to work within the existing military commissions, rather than allowing them to take their cases to the other branches. It could have gone even further still by reducing the budget and personnel of the JAG Corps, which have grown dramatically in the last few decades.⁷⁷ The civilian leadership could have removed, demoted, or transferred JAGs who were seen as resisting civilian policy choices. Or it could have increased the level of civilian monitoring of the development and implementation of military legal policy.

Another response, at the level of institutional design, would be to fragment the military. Just as agents can take advantage of divisions within

75. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

76. See sources cited *supra* notes 25–29.

77. See *infra* notes 84–86 and accompanying text.

the principal, so too can the principal enhance its control by playing different agents against one another. More agents will improve the flow of information to the principal, and allow the principal to take advantage of rivalries for monitoring purposes. Civilian control, under this theory, was firmer when the independence of the different armed services was greater, though interservice rivalry also produces potentially great inefficiencies in military operations. The Goldwater-Nichols Department of Defense Reorganization Act of 1986⁷⁸ had the effect of reducing civilian control by strengthening the Joint Chiefs of Staff at the expense of the individual armed services.⁷⁹ It made the Joint Chiefs the creator of a unified military viewpoint and placed its chairman in the role of primary military advisor to the secretary of defense and the president. Civilians could introduce more control over the military in legal policy by reversing this trend insofar as it relates to the JAGs and the provision of military legal advice.⁸⁰

While these issues of monitoring and sanctions are significant in terms of civilian control of the military, they do not address the most important issue: the deviation of civilian and military policy preferences. If civilians and the military have similar preferences, as Huntington's theory predicts, then little monitoring or punishment is necessary and civilian-military relations should be relatively harmonious. It remains for us to ask why civilian and military leaders view legal policy issues, and the autonomy of military legal advisors, so differently in the War on Terror.

It now seems clear that civilians and many military figures hold different preferences over the legal framework to govern the War on Terror. In part, this may be the result of the increasing legalization of warfare. The involvement of lawyers in governmental and private decisionmaking has increased dramatically over the past decades. One area of this growth has been in the arena of national security and warfare. Historically, the American way of war did not provide for a significant role for lawyers in policymaking. National security generally deals with issues surrounding crisis and emergency—issues that require immediate reaction from policymakers. Lawyers and law, by nature, are more deliberative and focus on process. This distinction was particularly true during American combat operations, which had traditionally not recognized an integral role for lawyers.

78. 10 U.S.C. §§ 104–522 (2000).

79. FEAVER, *supra* note 58, at 82–83.

80. Kohn, *supra* note 33, at 14.

Another cause of different preferences is the nature of the fight against al Qaeda. The United States continues to justify its policies with principles embodied in the laws of war.⁸¹ These rules, however, were drafted primarily to deal with two types of armed conflict—wars between nation-states, and internal civil wars. The September 11 attacks introduced a different type of armed conflict, one between a nation-state and an international terrorist organization with international reach and the ability to inflict levels of destruction previously only in the hands of states. Claims of deference to military expertise will not prove as compelling to civilians when the rules of warfare are being adapted to a new situation. Military expertise here involves more than mere technical questions, such as the performance of weapons systems or force and casualty estimates for certain goals. Deciding what rules to apply to a new type of armed conflict inherently calls for judgments that are based far more on policy preferences and balancing of costs and benefits.

Another reason for different civilian and military preferences might be rooted in the different role played by the law itself in the War on Terror. The post-World War II era has witnessed dramatic changes in media coverage of war, rapid growth in nongovernmental organizations, and vast technological advances in the means and methods of fighting wars. These issues, combined with our commitment to adhere to the law of armed conflict, have been a catalyst for opponents to use legal rules and processes as part of their operations, what military observers term “lawfare.”⁸² Our adherence to law and process within warfare has risen to a level that some now assert interferes with the efforts of military commanders to achieve victory on the battlefield.

One area in which we can see these developments at work is the military lawyer’s newfound involvement in combat operations. Once only used in a staff capacity on the “rear lines,” JAGs are now involved in every layer of the command structure during combat. This new legalization of warfare, mostly imbued from international obligations and the realities of twenty-four hour media coverage, can prevent field commanders from achieving legitimate objectives of warfare.

81. The laws of war are often referred to as the “law of armed conflict,” and by some as “international humanitarian law.” This Article will use the term recognized by the U.S. government for this body of law, the “law of armed conflict.” See generally DOCUMENTS ON THE LAW OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

82. See Charles J. Dunlap, Jr., Air Combat Command Staff Judge Advocate, Address at the Air & Space Conference and Technology Exposition 2005, The Law of Armed Conflict (Sept. 13, 2005) [hereinafter Dunlap Address].

Moreover, the twentieth century witnessed dramatic technological advances in both communications and war-making machinery. The ability to inflict massive damage to both civilian population centers and legitimate military targets dramatically increased.⁸³ The laws governing new conflicts and the desire to minimize civilian casualties became increasingly relevant areas of consideration for war planners.

Throughout the last century, JAGs had little role in the use of force, either in decisionmaking or legal analysis.⁸⁴ The number of JAGs was originally quite small.⁸⁵ For example, during the American Revolution, the Army had only 15 judge advocates and disbanded the JAG Corps altogether from 1802 to 1849. There currently are 1600 Army JAGs. The Air Force, as of 1949, had 250 JAGs; it now has 1300. The U.S. Navy formed its JAG Corps in 1967 and now has 735 military lawyers.⁸⁶

Since the founding of the republic, the military justice system was considered distinct and separate from the civilian system.⁸⁷ Warfare operations were clearly regarded as distinct from civilian enterprises and therefore demanded a separate judicial system with a reduced expectation of constitutional protections. The Supreme Court consistently deferred to this unique system designed to respect the unique demands of warfare and of the role of the military.⁸⁸

83. Charles J. Dunlap, Jr., *The Revolution in Military Legal Affairs: Air Force Legal Professionals in 21st Century Conflicts*, 51 A.F. L. REV. 293 (2001).

84. See generally FREDERIC L. BORCH, *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI* (2001).

85. Although specific numbers are not readily available, the U.S. Marine Corps (the first staff judge advocate was appointed to the commandant of the Marine Corps in 1966) and the U.S. Coast Guard (the legal program officially began in 1934) have also both undergone commensurate increases in their number of JAGs. For more information on the history of the Coast Guard JAGs, see *History of the Coast Guard Legal Program*, <http://www.uscg.mil/legal/historymain.html> (last visited Feb. 26, 2007).

86. For in-depth histories of the U.S. Army, the U.S. Air Force, and the U.S. Navy JAG programs, see The Judge Advocate General's Legal Center and School, *History of the Judge Advocate General's Corps*, <http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF> (last visited June 16, 2007); 26 THE REPORTER (SPECIAL HISTORY EDITION) (1999), <http://afsls14.jag.af.mil/TJAG/Reading%20Room/50th%20Anniversary%20Reporter.pdf>; U.S. Navy JAG History, <http://www.jag.navy.mil/about%20us/history3.htm> (last visited Feb. 26, 2007).

87. For a legislative history of the enactment of the Uniform Code of Military Justice (UCMJ), see *Index & Legislative History of the UCMJ: Military Legal Resources*, http://www.loc.gov/rr/frd/Military_Law/index_legHistory.html (last visited June 16, 2007). See also FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, *COURT-MARTIAL PROCEDURE* (3ed.2006); FREDERIC I. LEDERER, *MILITARY LAW: CASES AND MATERIALS* (2003).

88. See generally Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918–2004*, 65 MD. L. REV. 907

JAGs did not participate extensively in the day-to-day operations and decisionmaking of their commands.⁸⁹ Interestingly, the selective service programs of both World Wars led to dramatic increases in the level of process injected into the military system. Citizens drafted during those wars felt many of the measures were draconian and unfair to ordinary citizens fighting for their country by order, not choice.⁹⁰ Those drafted were not professional soldiers and were offended by the lack of process accorded to them in their new role as soldier.⁹¹ Upon the conclusion of both wars, former soldiers sought progressive updates in military justice. Congress reacted with changes to ensure many military members retained rights commensurate with those in the civilian federal system.

The code by which the military operates today, the UCMJ, was enacted by Congress in 1950.⁹² While long overdue and beneficial to service members to whom the UCMJ applies, this change still kept the military and civil justice systems separate.⁹³ Policymakers remained committed to preventing law and legal procedure from unnecessarily and negatively impacting warfare operations. Yet, the improved legal status of enlisted personnel and officers, and the newly enacted legal code, enhanced the role of military lawyers. They now have a dedicated internal policy, including laws and regulations from which to render advice and counsel on myriad issues of common law crimes and those unique to military life.⁹⁴

Still, JAGs continued to have little impact in combat operations through the Korean War.⁹⁵ During both World Wars I and II, JAGs adjudicated military personnel matters, defended against claims made by foreign governments, provided legal assistance, and supported

(2006) (providing a history of the Court's reluctance to interfere in military affairs, with the notable exception of the late 1960s to early 1970s during the Vietnam War era).

89. See generally BORCH, *supra* note 84.

90. See Walter T. Cox, III, *Echoes and Expectations: One Judge's View*, MIL. L. REV., Mar. 1999, at 183, 187.

91. *Id.* at 187.

92. Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950) (codified as amended at 10 U.S.C. §§ 801-946 (2000)).

93. Recognizing the unique needs of the U.S. Armed Forces, the UCMJ and the Manual for Courts Martial provide for a distinct federal criminal system for military members. See 10 U.S.C. § 802.

94. The newly enacted UCMJ covered both common law crimes such as larceny, robbery, and murder as well as uniquely military crimes such as sodomy, adultery, fraternization, failure to obey orders, and misbehavior before sentinels during time of war.

95. See BORCH, *supra* note 84; see also Christopher W. Behan, MIL. L. REV., Dec 2002, at 180 (reviewing BORCH, *supra* note 84).

administrative law matters.⁹⁶ Yet JAGs were not central to, and certainly not expected to be versed in, warfare operations. There was no expectation, or desire, for them to publicly comment on combat operations and policy decisions made by the civilian command authorities.⁹⁷ Combat officers would have found involvement by lawyers counterproductive in waging war.⁹⁸ Individual acts of heroism—or even limited involvement in warfare and policymaking—by JAGs did occur, but they were not the norm.⁹⁹ JAGs functioned as lawyers in uniform rather than warriors.

The American experience in Vietnam changed perceptions of the role of law in warfare. The Vietnam War raised novel tactical and legal issues.¹⁰⁰ A leading judge advocate (and later JAG of the Army), General George Prugh, Jr., presciently noted:

The battlefield was nowhere and everywhere, with no identifiable front lines, and no safe rear areas . . . it involved combatants and civilians from a dozen different nations. Politically, militarily, and in terms of international law, the Vietnam conflict posed problems of deep complexity. The inherent difficulty of attempting to apply traditional principles of international law to such a legally confusing conflict is well illustrated by the issue of prisoners of war.¹⁰¹

This experience, where lawlessness and legal complexities impacted combat operations, encouraged the increased involvement of JAGs in wartime decisions. The Vietnam environment blurred the line between civilian and

96. Michael F. Lohr & Steve Gallotta, *Legal Support in War: The Role of Military Lawyers*, 4 CHI. J. INT'L L. 465, 468–69 (2003).

97. See *id.* at 470.

98. Richard K. Betts, *Compromised Command: Inside NATO's First War*, FOREIGN AFF., Aug. 2001, at 126, 129–30 (book review). Richard Betts analyzed General Wesley Clark's book on operations during the Kosovo campaign and criticized lawyers for having actually conducted the war. *Id.*

99. See THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 1775–1975, at 203–31 (1975).

100. The war also increased pressure for even more reform of the court-martial system. The U.S. Congress was increasingly willing to legislatively provide additional rights to military members. Policymakers, and those returning from draft service in Vietnam, increased pressure to bring equity to military justice and our federal criminal law. Although Congress still recognized the need for a separate system, policymakers began placing increased emphasis on the fairness of the military justice system.

101. George R. Smawley, *The Past as Prologue: Major General George S. Prugh, Jr. (Ret.) (1942–1975)—Witness to Insurgent War, the Law of War, and the Expanded Role of Judge Advocates in Military Operations*, MIL. L. REV., Spring 2006, at 96, 98 (quoting GEORGE S. PRUGH, VIETNAM STUDIES, LAW AT WAR: VIETNAM, 1964–1973 (1974), available at <http://www.army.mil/cmhp-g/book/vietnam/law-war/law-fm.html>). This same atmosphere, almost fifty years later in the war against al Qaeda, is found on an even greater scale as the Armed Forces fight against an enemy where there are no clear distinctions globally as to where the war front begins and where it ends.

enemy fighters, and the law of armed conflict became increasingly difficult to apply in combat situations.

In addition, the media was now reporting on the conduct of the war. War fighting would now, and into the foreseeable future, be viewed under a microscope.¹⁰² With this backdrop, the Military Justice Act of 1968¹⁰³ updated many UCMJ provisions, including the requirement that judges (with some requisite legal education and background) would now be appointed to oversee the court-martial system.¹⁰⁴ There had always been a desire among the Armed Forces, as well as both the executive branch and Congress, to prevent any legalization of national security to impact the ability to fight and win wars. Most civilian courts seemed to recognize and enforce this view.¹⁰⁵

Vietnam, in particular from 1966 to the end of hostilities, also increased JAG involvement in combat operations. The 1960s and 1970s witnessed an enhanced status for international human rights obligations. The post-World War II era saw an explosion in the area of human rights concerns and this consequently introduced human rights law into the legal analysis of warfare operations.¹⁰⁶ Many declarations of newly formed international organizations and nongovernmental organizations began to focus less on obligations of the state and more on the status of “inherent rights” of the individual, even in warfare.¹⁰⁷ Furthermore, the media coverage of the Vietnam War allowed reporters to witness and directly broadcast video of the unpopular war to the home front. The unpopular war and relative shock of witnessing the brutal nature of warfare itself created increased concern as to the Armed Forces’ conduct in warfare.

This concern with the lawfulness of combat operations by the U.S. military was highlighted by the singular case of Lieutenant William Calley and the atrocity that occurred at My Lai in March 1968.¹⁰⁸ This incident is

102. See MICHAEL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY* (2002).

103. Pub. L. 90-632, 82 Stat. 1335 (1968) (amending UCMJ provisions).

104. *Id.* Interestingly, until 1968, there were no judges whatsoever (as understood by civilians) within the military court-martial system. Courts martial had been conducted by warriors, commonly referred to as “line officers.” These officers were not required to have a law degree, nor the requisite temperament, background, or training in the law to serve as one might expect a judge to perform.

105. See LEDERER, *supra* note 87, at 1–25.

106. See Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

107. *Id.*

108. *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973), *aff’d*, 48 C.M.R. 19 (C.M.A. 1973).

pivotal on many levels—to the conduct of the war, support for the war, and scrutiny of the behavior of the Armed Forces. After My Lai, JAGs became formally immersed in the conduct of military operations, and their importance to the commanders in the field increased dramatically and permanently.

The story of My Lai is chilling. U.S. troops were involved in clearing villages at the time. After an emotional evening memorial service for a beloved member of their company, a commander briefed the next day's operation. Lieutenant Calley was in charge of the platoon headed into the combat zone to carry out the operation. Intelligence reports indicated that there were numerous Viet Cong in the village, and the troops were instructed to anticipate heavy resistance and high casualties. In fact, the intelligence was wrong, and there were no enemy combatants in the village. Unfortunately, Lieutenant Calley still carried out the attack on the village, which was mostly composed of children and the elderly, none of whom were armed.¹⁰⁹ Approximately five hundred noncombatants were killed, presumably at the orders of Lieutenant Calley. The conduct of Lieutenant Calley and those soldiers involved in the unlawful killing was, to say the least, reprehensible.¹¹⁰ This incident, coupled with the emerging emphasis on the law of armed conflict, led to a variety of investigations by both civilian and military leaders. One problem was evident to the investigators: The United States maintained a woefully inadequate training program for soldiers on the laws of war. As a result, the Department of Defense placed primary responsibility for this training on JAGs.¹¹¹ This new role provided military lawyers their first entrée into impacting war fighting and promoting adherence to the laws of armed conflict.

Subsequent conflicts in Grenada, Panama, and the Persian Gulf continued to transform the role of JAGs. By the 1990s, JAGs became an intimate part of operational advice to combatant commanders. In the Kosovo campaign, JAGs were an integral component of the decisionmaking process in military operations. JAGs were now teaching the laws of war to

109. See William George Eckhardt, *My Lai: An American Tragedy*, 68 UMKC L. REV. 671, 675 (2000). No Viet Cong were present and U.S. forces encountered little resistance. The next day, the troops swept through the village and burned houses, killed livestock, raped women, and groups of villagers were gathered together and shot. *Id.*

110. See Matthew Lippman, *War Crimes: The My Lai Massacre and the Vietnam War*, 1 SAN DIEGO JUST. J. 295 (1993).

111. See Department of Defense Directive 5100.77 (Nov 5, 1974); see also WILLIAM R. PEERS, DEP'T OF THE ARMY, REPORT TO THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT (1970), available at <http://www.loc.gov/rr/frd/military-law/pdf/RDAR-Vol-I.pdf>.

all members of the Armed Forces, performing mission and operational legal analysis, actively participating in war games, drafting (rather than merely advising on) rules of engagement, participating in the targeting process, and even reviewing battle plans and orders. As a direct result, JAGs are now found at every layer of the command structure.¹¹²

The Kosovo campaign further expanded and entrenched the JAGs' new role in combat operations. Combat commanders, confronted by the complexities of the air campaign, turned to JAGs to assist in fulfilling mission requirements. Many of the decisions made during the Kosovo campaign were essentially policy decisions.¹¹³ JAGs had transformed their role from back-line staff officers to wartime advisors and to, what JAG legal historian Fred Borch has called, "mission enhancers."¹¹⁴ JAGs now see their role as "problem solvers"¹¹⁵ for commanding officers in combat operations. Today, there are nearly five thousand military lawyers serving in the Armed Forces.

This newfound prominence, particularly within the last decade, has propelled JAGs into the arena of policy.¹¹⁶ The War on Terror, as well as Operations Enduring Freedom (Afghanistan) and Iraqi Freedom, challenge many of the existing frameworks of the law of armed conflict and war fighting in general. As General Prugh had eerily foreshadowed during the Vietnam War, the new conflict was even more difficult to fit into any existing legal foundation or analysis.¹¹⁷ The War on Terror has brought forward sharp divisions between civilian and military preferences in legal policy. JAG's assistance to commanders in targeting and other operations in both the Persian Gulf War and in Kosovo raised their status within the military and civilian leadership. Their status had risen even within popular culture during the latter part of the 1990s and early twenty-first century as

112. Lohr & Gallotta, *supra* note 96.

113. See generally James E. Baker, *LBJ's Ghost: A Contextual Approach to Targeting Decisions and the Commander in Chief*, 4 CHI. J. INT'L L. 407 (2003).

114. See BORCH, *supra* note 84, at 326.

115. Smawley, *supra* note 101, at 147 (quoting U.S. Army Military History Institute, Senior Officers Debriefing Program: Conversations Between Major General George S. Prugh and Major (MAJ) James A. Badami, Lieutenant Colonel (LTC) Patrick Tocher, and Lieutenant Colonel Thomas T. Andrews 4 (Apr. 4, 1977) (unpublished manuscript, on file with the U.S. Army Judge Advocate General's Legal Center and School Library, Charlottesville, Virginia)).

116. For recent examples of how JAGs are now deeply involved in national policy debates over the War on Terror, see Tom Brune, *Tribunal Bill Stalled: Bush Bill Allowing Military Trials Faces Objections From GOP Leaders, as Well as Dems and Pentagon*, NEWSDAY, Sept. 8, 2006, and Laurence Friedman & Victor Hansen, *Congress Should Champion the Advice of Military Lawyers*, JURIST, Sept. 5, 2006, <http://jurist.law.pitt.edu/forumy/2006/09/congress-should-champion-advice-of.php>.

117. Smawley, *supra* note 101.

well.¹¹⁸ Most Americans now have an idealized, if not exaggerated, version of what a military lawyer does on a day-to-day basis.¹¹⁹

But the JAGs' role in advising on the laws of war during the 1980s and 1990s was for more traditional military operations. The War on Terror has produced significant differences in military and civilian preferences because it does not cleanly fall within preexisting models of warfare. It presents an enemy that does not represent a nation-state, does not wear uniforms, does not operate with regular armed forces, and flouts the rules of warfare.¹²⁰ The al Qaeda jihadist, an asymmetric actor with no territory or established government, now threatens to use weapons of mass destruction.¹²¹

Traditionally, the *jus ad bellum*, or decision whether engaging in hostilities was justified, remained within the province of the executive civilian leadership. Discussions, advice, and decisions on whether or not to engage in combat operations, with few exceptions, were decided by the president and his immediate staff.¹²² Since these are ordinarily purely political preferences, the JAGs are normally not involved at all. The expertise of the military commanders, of course, is sought in formulating the requisite support for the use of force on issues such as the number of troops necessary, resources required, the likelihood of success, and special combat requirements. This input is critical for the civilian leadership to determine whether or not the nation will engage in combat operations to achieve a particular objective. The War on Terror, similar to past wars, remains within this framework of our model, and JAGs continue to refrain from openly expressing their preferences and relatively recent reliance on customary international law regarding the resort to force.

The *jus in bello* issues in the War on Terror, however, are more complex. Traditionally, these tactical combat decisions regarding acceptable practices are made by the combat military leadership with input and strategic guidance offered by the civilian leadership. Our model envisions the military offering input and advice on tactics and combat operations to the civilian leadership and deferring to their strategic guidance and decisionmaking. However, the *jus in bello* in the War on Terror is often entrenched in what are essentially policy decisions. This

118. See Charles J. Dunlap, Jr., *It Ain't No TV Show: JAGs and Modern Military Operations*, 4 CHI. J. INT'L L. 479, 479 (2003).

119. *Id.*

120. Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror*, *International Lawyers Fighting the Last War*, 19 NOTRE DAME J. L. ETHICS & PUB. POL'Y 309 (2005).

121. John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 575-79 (2006).

122. See, e.g., Powell, *supra* note 40.

unique war has often introduced law and policy decisions as critical components of the ongoing, hybrid conflict. Combat operations are now often intertwined with application of Geneva principles, interrogation techniques, intelligence collection, and other matters not normally associated with ongoing, tactical combat operations. Since this occurs as a matter of course in the new war, conflict inevitably is emerging. Many of the tactics for the war are essentially policy preferences. The civilian leadership, therefore, should refrain from their traditional deference to the military on these matters. The JAGs, more often than in previous conflicts, are now involved in the *jus in bello* of the War on Terror—not a place they are accustomed to being nor arguably one that is helpful to the ongoing conflict.

In this ambiguous arena, JAGs are immersed in more than just the straightforward application of widely accepted legal rules on the use of force. Rather, the United States is engaged in adapting the laws of war to this new type of enemy, with significant moral, policy, and political considerations. These questions involve the status of detainees, the applicability of the Geneva Conventions, the legality of targeting leaders of al Qaeda, and determining proportionality and distinction when terrorists conceal themselves within civilian populations.¹²³ This new application of the laws of war has placed the JAG Corps in the middle of questions that had once been the domain of the elected civilian leadership or combat commanders.

In some instances, some senior JAGs have preferences that are profoundly different than those held by the civilian leadership. There are a number of potential explanations. First, JAGs have been influenced in part by nongovernmental organizations in the human rights arena.¹²⁴ These organizations sharply criticize the U.S. government and military operations conducted in the War on Terror and characterize U.S. strategic and tactical decisions as violating moral as well as legal principles. Second, JAGs are responsive to the American legal academy, which also continues to criticize many operations in the War on Terror as violations of both U.S.

123. *Hearing on Military Commissions and Standards Utilized in Trying Detainees Before the H. Comm. on Armed Services*, 109th Cong. (2006) (statement of Rep. Hunter, Chairman, H. Comm. on Armed Services), available at <http://armedservices.house.gov/comdocs/schedules/9-7-06HunterOpeningStatement.pdf>.

124. See Kenneth Anderson, *The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations With Non-Governmental Organizations*, 2 *CHI. J. INT'L L.* 371, 383 (2001) (discussing concerns with unaccountable nongovernmental organizations and their impact on American foreign policy and objectives, stating that they have become virtually “anti-democratic” in nature).

constitutional law and international norms. Third, JAGs cannot help but see that the War on Terror has produced deep divisions among political parties and groups in civilian society.

The growth of the role of JAGs has been remarkable in the past thirty years, even more so in the past decade.¹²⁵ It has essentially gone unregulated. Legal ambiguities in the wars of the twenty-first century will undoubtedly require a continued and enhanced presence of JAGs in military operations. However, unregulated deference to the JAGs has limited some combat operations, and will continue to do so.¹²⁶ Civilian leaders should remain aware that the growth in JAG influence can have a detrimental impact on the nation's ability to win wars. Leaders have allowed a regime to arise in which the JAGs advise, within the confines of the law, the best means of achieving military objectives. American combat officers must now seek out JAGs for rulings on the incorporation of the law of armed conflict into their ongoing operations. It is no coincidence that this unprecedented role for JAGs developed at the same time that severe problems in civilian control over the military occurred in the wake of the Cold War.

JAGs, almost as surprised as others with their newfound prominence, must be mindful of the effects their advice can have on effective combat operations.¹²⁷ Their enthusiasm in providing advice on operational matters will be viewed by some as challenges to civilian control of the Armed Forces. Policy concerns regarding operations or political decisions regarding the conduct of war cannot be officially challenged by JAGs. If actions to resist civilian policy choices in the War on Terror continue, our rational model approach predicts a response by combat officers and civilian entities, ultimately resulting in a diminished role for JAGs.

125. See generally BORCH, *supra* note 84; Lohr & Gallotta, *supra* note 96.

126. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006) (discussing the dangers of becoming too engrossed in adherence to international law); see also Dunlap Address, *supra* note 82.

127. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, ch. 5.2 (1995) ("The law of armed conflict is not intended to impede the waging of hostilities. . . . [T]hese principles do not prohibit the application of overwhelming force against enemy combatants, units and material."). This manual, used by all U.S. Armed Forces and many armed forces around the world, makes clear in its definition of the law of armed conflict that such law is not to interfere with mission accomplishment.

CONCLUSION

Strained relations between civilian and military leaders continue. Opposition by certain JAG attorneys to the Bush Administration's legal policies in the War on Terror does not represent a singular event. Rather, it follows a steady pattern of military resistance to civilian decisions since the end of the Cold War and shows no signs of receding. We have developed a model that explains why civilians have recently encountered difficulty in controlling the military. Divergence in military and civilian policy preferences is a significant factor in producing tension and even a breakdown in the relationship. But an equally important cause is the reluctance of civilian leaders to sanction military officers who have undermined their decisions.

This Article suggests that legal scholars have overlooked for too long the civilian-military relationship. Civilian control of the military is a widely assumed, but underanalyzed feature of the American constitutional order. Civilian control can be eroded even in the absence of a military coup. Existing approaches, developed in the areas of constitutional, administrative, and statutory law, to analyze the delegation of authority to bureaucracies could be usefully applied to the civilian-military context. As the United States continues to wage war against al Qaeda and remains involved in conflicts in Iraq and Afghanistan, threats to national security do not appear to be receding. Understanding why civilian control over the military is weakening should be a central area of study within the legal academy.