

ADMINISTRATION OF WAR

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INTRODUCTION

“Of all the cares or concerns of government,” Alexander Hamilton wrote, “the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”¹ “The direction of war implies the direction of the common strength,” he continued in *Federalist 74*, “and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.”² To avoid the “mischiefs” and “dissensions” that would arise from multiple commanders, the Framers vested the power to conduct war, the Commander-in-Chief power, in a single president.³

This decision, over which there was little dissent in the Philadelphia or state ratifying conventions,⁴ might lead one to think that the president would exercise greater control over the military than over any other part of the executive branch. We do not commonly think of the armed forces of the United States as an agency, in part because it does not fall within the Administrative Procedure Act’s basic provisions. Nonetheless, the military is part of

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1. THE FEDERALIST NO. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
2. *Id.*
3. THE FEDERALIST NO. 70, at 473 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
4. See, e.g., JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 153–55 (2005); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 772–74; Saikrishna Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 285 (2001).

the permanent government, as are the other agencies, and indeed is the most important and the oldest—the army and navy were created to protect the nation’s security during the Revolutionary War, predating the Constitution itself.

Academic and judicial debates over the chief executive’s direction of the administrative state have centered over whether Article II’s grant of “the Executive Power” included the authority to remove all subordinate officers of the United States.⁵ Presidents have long argued that their executive power includes the power to remove inferior officers without the permission of Congress, thereby giving them the authority to direct the operations of the executive branch. Critics respond that Congress’s constitutional authority to create administrative agencies in the first place should give it the ability to condition the removal of their officers. Article II contains no discussion of removal; it only describes the Senate’s joint “advice and consent” role in the appointment of principal officers and Congress’s role in the creation of inferior offices.⁶ The Constitution could be read to require the same process for the removal of officers as for their appointment.

The judiciary has not fully accepted either argument. In *Morrison v. Olson*,⁷ the Supreme Court recognized that “there are some ‘purely executive’ officials who must be removable by the President at will if he is to be able to accomplish his constitutional role.”⁸ Nonetheless, it also allowed Congress to make officers removable only “for cause” if the need for independence from presidential control is great enough and does not interfere with the executive’s constitutional functions.⁹ Thus, the Court upheld the independent counsel’s protections from presidential removal because

5. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 685–93 (1988) (“good cause” removal provision for independent counsel does not impermissibly burden president’s power to control executive officials); *Bowsher v. Synar*, 478 U.S. 714, 722–23, 726–27 (1986) (“[W]e conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 596–97 (1994) (president must have removal power to maintain control over executive branch personnel); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 26–28 & n.119 (1994) (no consensus among Framers that president had complete authority to remove inferior officers).

6. U.S. CONST. art. II, § 2, cl. 2.

7. *Morrison*, 487 U.S. at 654.

8. *Id.* at 690 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627–29 (1935)).

9. *Id.* at 687, 689–91 (quoting *Humphrey’s Ex’r*, 295 U.S. at 631).

its independence was necessary to secure the impartial investigation of the president and his advisers, while, according to the Court, the president and the attorney general still retained some ability to direct its activities.¹⁰

At issue in these debates are more than simply personnel issues such as firing underperforming employees. Power over removal is a proxy for control over the administrative state. According to proponents of a broad reading of Article II, a president must have the unrestricted authority to fire an officer to ensure that all subordinates in the executive branch obey his commands.¹¹ Otherwise, the president cannot ensure a uniform interpretation and enforcement of the Constitution and other federal laws, as required by Article II's Take Care Clause. Defenders of congressional prerogatives claim that the power of administration goes unmentioned in Article II, and so the legislature can create and regulate it.¹² Expanded congressional control is also necessary, according to some accounts, to balance the vast growth of presidential power during and since the New Deal revolution.

Presidential control over the armed forces has been missing from these debates, perhaps because the Administrative Procedure Act contains significant exceptions for military activity.¹³ But presidential control over the Armed Forces presents a number of difficult questions that test the links between constitutional authority and control over the administrative state. In the military sphere, for example, the Commander-in-Chief Clause's placement in Article II seems to grant presidents a level of control over this most important

10. *Id.* at 691–93.

11. *See, e.g.*, Calabresi & Prakash, *supra* note 4, at 597 (“Inferior executive officers are, after all, the President’s men and women, assisting him in the exercise of his constitutional powers. If he decides that they are impeding his administrative program or are simply doing a poor job in providing what Hamilton might have called an ‘energetic’ administration, he must be able to replace them with others.”).

12. *See, e.g.*, Lessig & Sunstein, *supra* note 4, at 47, 54 (“[B]eyond these enumerated aspects of ‘the executive power’ is an undefined range of powers that we would now describe as ‘administrative power,’ marking a domain within which one has a duty to act according not to one’s own judgment, but according to the standards or objectives of a law. With respect to these latter powers, Congress has wide discretion to vest them in officers operating under or beyond the plenary power of the President.”).

13. The Administrative Procedure Act excludes from its definition of an “agency” both “courts martial and military commissions” and “military authority exercised in the field in time of war or in occupied territory.” 5 U.S.C. §§ 551(1)(F)–(G) (2006). It also excludes from its rulemaking and adjudication requirements “military or foreign affairs” functions. *Id.* 5 U.S.C. § 553(a)(1) (2006) (rulemaking); *id.* § 554(a)(4) (adjudication).

of agencies that goes beyond the removal power. The clause constitutionally guarantees the president's authority to issue binding orders to subordinate officers.¹⁴ Even if inferior officers refused to carry out presidential orders, the Commander-in-Chief Clause would seem to include the power to promote or demote officers and to make duty assignments. These powers would be central components of a president's ability to decide on strategy and tactics and ensure that the officers who are in place will carry them out. Ultimately, the clause might be read as an alternative source for a removal power, albeit one that applied only to military officers, even if Article II's Vesting Clause was thought not to provide one for the executive branch as a whole.

Functional reasons for a presidential removal power over the military supplement those arising from the formal constitutional text and structure. War demands a unity of purpose and command; the stakes are high, if not the highest. "Decision, activity, secrecy, and dispatch" are at a premium.¹⁵ Conflicting orders from different commanders, or even the creation of ambiguity, could spell military disaster.¹⁶ The executive, as Hamilton observed in the eighteenth century and Justice Sutherland in the twentieth, is structured for speed and decisiveness in the conduct of foreign affairs.¹⁷ "In the conduct of war, in which the energy of the executive is the bulwark of the national security," Hamilton wrote, "every thing would be to be apprehended from its plurality."¹⁸ Instead, "the arrangement of the army and navy, the direction of the operations of war," Publius continued in *Federalist* 72, "constitute what seems to be most properly understood by the administration of government," and hence "falls peculiarly within the province of the executive department."¹⁹ As Justice Sutherland wrote for the Court in *United States v. Curtiss-Wright*:²⁰ "In this vast external realm, with its

14. U.S. CONST. art. II, § 2, cl. 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 . . .").

15. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 3, at 472.

16. *See id.* ("Decision, activity, secrecy, and dispatch will generally characterise [*sic*] the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.")

17. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

18. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 3, at 476.

19. THE FEDERALIST NO. 72, at 487 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

20. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”²¹ Quoting from a Senate report, Justice Sutherland further explained that “[t]he nature of transactions with foreign nations . . . requires caution and unity of design, and their success frequently depends on secrecy and dispatch.”²² Regardless of one’s view of executive control over the civilian agencies, these considerations persuade that the president enjoys an elevated constitutional authority over the military.

This makes all the more puzzling one of the striking developments in administrative law under President George W. Bush: the reduction in the executive’s control over the armed forces. Administrative law scholarship has generally passed over the study of the military in favor of the domestic agencies. This is an oversight, because the armed forces are arguably the most important of all of the elements of the administrative state. Military interference in civilian affairs is of great concern in many other countries, as it was to the Framers in their worry about standing armies.²³ Modern and ancient history is replete with examples of generals overthrowing civilian governments. Civilian control of the military is perhaps the most important principle of the American constitutional system of government. Yet it is expressed nowhere in the document except in the Commander-in-Chief Clause, which scholars primarily discuss in terms of its role in the war powers debate.²⁴

Administrative law scholarship should pay attention to the armed forces not just because it performs the most important function of the executive branch, but because it is the largest part of the executive branch. Expenditures for the Defense Department reached \$530 billion in 2007, and are estimated to rise to \$583 billion in 2008 and \$651 billion in 2009 before supplemental bills for the Afghanistan and Iraq conflicts are included.²⁵ Military spending will consume 21 percent of the federal budget in 2009, down from 47 percent in 1962, but will still constitute the second largest source of government

21. *Id.* at 319.

22. *Id.* (citation omitted).

23. *See* YOO, *supra* note 4, at 55–87 (describing Anti-Federalist fear of standing armies).

24. *See, e.g.*, LOUIS FISHER, PRESIDENTIAL WAR POWER 12–14 (2d ed. 2004); YOO, *supra* note 4, at 143–55.

25. U.S. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, at 49 (2008), *available at* <http://www.gpoaccess.gov/usbudget/fy09/browse.html>.

spending after welfare and entitlement programs (24 percent).²⁶ In 2007, 1.4 million men and women served in the armed forces²⁷ and 651,000 civilians worked in the Defense Department, while 1.2 million civilians served in the rest of the executive branch.²⁸ The military's large workforce and nationwide reach has led to a steady expansion of its responsibilities, including not just national defense but also drug interdiction, border control, and disaster relief.²⁹

To the extent that administrative law scholars have touched on the military, they have tended to focus on the question of delegated authority, with James Q. Wilson's study of army bureaucracy being an important exception.³⁰ In the war on terrorism, the debate has centered on whether the president can exercise independent constitutional authority to conduct hostilities in response to the 9/11 attacks, whether Congress must authorize the use of military force, and what the limits of Congress's authorization might be. Cass Sunstein and Eric Posner, for example, turn to administrative law principles, such as the familiar *Chevron* doctrine and clear statement rules, to understand what deference is due to the president in interpreting the Authorization to Use Military Force, passed on September 18, 2001, the Detainee Treatment Act, and other foreign relations statutes.³¹ This inquiry applies understandings of the

26. U.S. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, at 80 tbl.4.2 (2008), available at <http://www.gpoaccess.gov/usbudget/fy09/pdf/hist.pdf>. These figures do not include the effects of the stimulus bill passed by Congress in early 2009 to address an economic recession.

27. *Id.* at 335 tbl.17.5.

28. *Id.* at 329 tbl.17.1.

29. Military doctrine refers to these efforts as "military operations other than war," which includes the support of civilian authorities during crises and disaster relief. Discussion of military doctrine in these areas can be found in U.S. DEP'T OF THE ARMY, FIELD MANUAL 100-19: DOMESTIC SUPPORT OPERATIONS (1993). One of the more significant expansions of the military role in domestic affairs occurred with the passage of the 1981 Military Cooperation with Law Enforcement Act, 10 U.S.C. §§ 371-74 (2006), which permitted extensive military support for anti-drug operations. Nonetheless, the Posse Comitatus Act, 18 U.S.C. § 1385 (2006), forbids the military from enforcing the law within the United States, unless otherwise permitted by the Constitution or other federal laws.

30. See generally JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989).

31. See generally Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007) (applying *Chevron* to foreign relations law, both directly and by analogy); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005) (applying "the logic of *Chevron* . . . to the exercise of executive authority in the midst of war"); Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006

delegation of authority to the administrative state to delineate the boundaries of the president's authority to use force, and its subsidiary issues, in war.

This Essay seeks to expand the field of inquiry. Delegations of wartime authority to the executive branch are a subset of the broader issue of control of the military, just as studying a single statutory delegation of rulemaking falls within the larger story of the struggle between the president, Congress, and the courts for direction of the administrative state. Are the armed forces implementing the policies of the president and Congress, how much freedom does it have to pursue its own preferences, what mechanisms exist to control the military, and what influence should judicial review have on control? The absence of any military coups in American history might lead one to think that civilian control of the military in the United States is safe and sound. But this conclusion causes scholars to overlook the same interesting questions that characterize the study of the administrative state: whether the armed forces have pursued their own policy preferences by subtly dividing the political leadership, pushed forward in areas of statutory ambiguity or lax presidential monitoring, and limited the options presented to civilians. This Essay begins to address these questions. Part I describes the military's growing policy independence. Part II proposes a framework—the principal-agent model—to analyze that growing independence. Finally, Part III, explores how presidents can reduce military-civilian tensions through centralization and decentralization.

I. THE MILITARY'S GROWING INDEPENDENCE

Broadening the inquiry beyond well-known examples of conflict, such as President Harry Truman's firing of General Douglas MacArthur or President Abraham Lincoln's removal of General George McClellan,³² leads to important perspectives on relations between the civilian and military leadership during the Bush administration. Military historians and scholars observe that civilian-military relations have been in something of a crisis since the end of

SUP. CT. REV. 1 (tracing clear statement rules in national security versus individual liberties cases throughout American history to the present).

32. See generally ELIOT COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME (2002).

the Cold War.³³ What some scholars view as a serious problem can be understood as the success of the military in gaining significant policy independence from the political leadership. Descriptively, this is no different than the account of a federal agency managing to prevail in pursuing its own preferences at the expense of those of the president or Congress. This Part will describe the military's growing policy independence from civilian control; then Part II will propose a model for understanding it.

President Truman's firing of General MacArthur provides an example of the signs of the relevant phenomenon.³⁴ General MacArthur was not conspiring to overthrow civilian government.³⁵ Instead, he wanted a space for policy independence from civilian preferences.³⁶ At the time of his removal, General MacArthur was one of the United States' most distinguished military leaders. In defeating the Japanese in World War II, he had recovered more territory, with fewer forces at his disposal, and with less casualties, than American forces on the European front.³⁷ He had governed the reconstruction of Japan and reversed American defeat in Korea with the daring landing at Inchon.³⁸ After Communist China intervened in late 1950, MacArthur demanded that American forces expand the conflict into China proper to pursue victory on the peninsula.³⁹ President Truman, however, decided that the United States would limit the fighting to Korea and seek a settlement along pre-war borders.⁴⁰ When MacArthur continued to make public statements at odds with civilian policy, Truman fired him.⁴¹ MacArthur returned to the United States to a hero's welcome. When addressing a joint session of Congress, he questioned whether military officers owed "primary allegiance and loyalty to those who temporarily exercise the

33. See generally Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, NAVAL WAR C. REV., Summer 2002, at 9 (demonstrating that, although there may be no crisis, "civilian control has diminished to the point where it could alter the character of American government and undermine national defense").

34. For a popular history, see generally WILLIAM MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964* (1978).

35. *Id.* at 629-30.

36. *Id.*

37. *Id.* at 690-91.

38. *Id.* at 439-628.

39. *Id.* at 601-22.

40. *Id.* at 622.

41. *Id.* at 643-44.

authority of the executive branch of Government, rather than to the country and its Constitution which they are sworn to defend.”⁴²

After General MacArthur’s firing, civilian-military relations continued without many problems. This is not to say that there were no strains on the relationship during specific crises, such as the Cuban Missile Crisis, where the Kennedy administration worried that military leaders might spark a war without authorization, or during longer struggles, such as the Vietnam War. The lessons some prominent thinkers in the armed forces took away from the Vietnam War, however, was not that the strategy or tactics were mistaken, but that the military had allowed civilians to intrude too deeply into operational decisions.⁴³ Despite, or perhaps because of, the stresses of the Vietnam War and Soviet strategic parity in the 1970s, however, military leaders appeared generally to defer to civilian control during the Cold War period.⁴⁴ The most influential thinker on civil-military relations during the Cold War, Samuel Huntington, had predicted that the level of external threat from the Soviet Union would pressure American society to become more conservative—in the sense of limitations on individual rights and less suspicion of the military—and to make the armed forces more professional and independent from society.⁴⁵ Yet leading scholars have observed that civilian control over the military did not suffer significant disruptions under the pressures of the Cold War.⁴⁶ Rather, it was the end of the Cold War that ushered in a deterioration in the relationship.⁴⁷

Poor relations began with the election of Bill Clinton, the first president since World War II who had not served in the military. Observers speculate that the military already had its doubts about Clinton even before he assumed office, because of his apparent efforts to avoid the Vietnam War draft.⁴⁸ Clinton’s focus on domestic

42. 97 CONG. REC. app. at A4722 (1951) (statement of General Douglas MacArthur).

43. The most influential work along these lines is probably H.R. MCMASTER, DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM (1997).

44. See MICHAEL C. DESCH, CIVILIAN CONTROL OF THE MILITARY: THE CHANGING SECURITY ENVIRONMENT 22–29 (1999).

45. SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 456–57, 463–64 (1957).

46. DESCH, *supra* note 44, at 22–35.

47. *Id.*

48. DALE R. HERSPRING, THE PENTAGON AND THE PRESIDENCY: CIVIL-MILITARY RELATIONS FROM FDR TO GEORGE W. BUSH 335 (2005) (“The generals and admirals had reservations about Clinton when he came to office. First, there was the issue of the draft. Like

affairs reinforced the view that he was uninterested in foreign affairs⁴⁹ and intended to use the military to engage in experiments on the role of gays and women in society.⁵⁰ Officers were disturbed by Clinton's decisionmaking style, which was somewhat ad hoc, resistant to formal structures and processes, and always open to change.⁵¹ It did not help matters that the administration's budgets sought a "peace dividend" through reduced defense spending.⁵² Officers believed that Clinton's leadership in conflicts—Somalia, Haiti, Bosnia, and Kosovo—was lacking and that he was calling on the military to perform missions that distracted from the winning of wars.⁵³

President Clinton's decision to reverse the military's ban on openly gay soldiers, made four days after he assumed office, guaranteed conflict with the armed services.⁵⁴ General Colin Powell, the chairman of the Joint Chiefs of Staff, publicly opposed Clinton's position.⁵⁵ Military leaders conducted a lobbying effort in Congress to reverse the president's decision and leaked stories to the press that mass resignations would occur when his decision took effect.⁵⁶ They cooperated with retired officers, who publicly criticized the commander-in-chief's decision.⁵⁷ Ultimately, Clinton backed down and adopted the "don't ask, don't tell policy" favored by Powell and the Joint Chiefs and later adopted by statute.⁵⁸ Civilian and uniformed leaders struggled over other social issues, such as sexual harassment and the role of women in combat, for the rest of the Clinton administration.

Tension in civil-military relations rose sharply over the use of force abroad. Military officers attributed the debacle in Somalia to

many of his compatriots, Clinton did his best to manipulate the system to avoid being drafted during the Vietnam War.").

49. *Id.* at 333.

50. *Id.* at 338.

51. *Id.* at 332.

52. *Id.* at 297.

53. *See id.* at 331–35.

54. *See* Memorandum on Ending Discrimination in the Armed Forces, 1 PUB. PAPERS 23 (Jan. 29, 1993).

55. HERSPRING, *supra* note 48, at 341 (noting that Powell publicly stated that "homosexuality is not a benign behavior characteristic such as skin color").

56. *See, e.g.,* Melissa Healy, *Uproar over Gays in Military Muted at Ft. Knox*, L.A. TIMES, Nov. 29, 1992, at A1 ("In Washington, where the political battle over lifting the ban [on gays in the military] has already been joined, top commanders have warned pointedly of the potential for plunging morale, mass resignations, and a breakdown in discipline . . .").

57. *Id.* at 339.

58. *See id.* at 342.

mission creep—the Clinton administration had expanded a limited intervention to provide humanitarian aid into a nation-building exercise.⁵⁹ When eighteen American soldiers died during a strike against a Somali warlord, some military officers blamed the civilian political leadership for refusing to authorize the dispatch of armored units. The human rights crisis in the former Yugoslavia brought military resistance to the Clinton administration's approach to the use of force out into the open. General Powell, while serving as chairman of the Joint Chiefs, gave an on-the-record interview to the *New York Times* opposing military intervention in Bosnia⁶⁰ and wrote an opinion piece in the same newspaper a month before the 1992 presidential elections explaining why.⁶¹ Powell sought to influence policy before civilians in both the executive branch and Congress had decided how to stop Serbian attacks on Bosnian Muslims. When the Clinton administration attempted to develop a policy in the spring of 1993, Powell continued to oppose any use of ground troops and advised that air strikes would have limited effect.⁶²

Resistance to White House preferences extended to international law as well. In 1997, countries opened for signature an international convention to ban the use of anti-personnel land mines.⁶³ The United States participated in the negotiations and all of its NATO allies joined the treaty, although major powers such as Russia and China did not.⁶⁴ President Clinton apparently wanted the United States to join the convention, but the military successfully lobbied inside the executive branch to scuttle the idea.⁶⁵ The Clinton administration also sent a team to participate in the drafting of the Rome Statute, which established the International Criminal Court in 1998.⁶⁶ Even though President Clinton signed the treaty, it had little

59. *Id.* at 343–48 (describing disagreement between President Clinton and military leaders with regard to the scope of the military's mission in Somalia).

60. Michael R. Gordon, *Powell Delivers a Resounding No on Using Limited Force in Bosnia*, N.Y. TIMES, Sept. 27, 1992, at A1.

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

62. HERSPRING, *supra* note 52, at 355–56.

63. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211.

64. Christopher W. Jacobs, *Taking the Next Step: An Analysis of the Effects the Ottawa Convention May Have on the Interoperability of United States Forces with the Armed Forces of Australia, Great Britain, and Canada*, 180 MIL. L. REV. 49, 50 (2004).

65. Kohn, *supra* note 33, at 21.

66. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

chance of Senate approval and President Bush “un-signed” the treaty with the broad backing of the uniformed military.⁶⁷

Civil-military relations continued to worsen under President George W. Bush, brought on by the stresses of the Afghanistan conflict and the 2003 invasion of Iraq. This is not what would have been predicted at the outset of the Bush administration, which had campaigned on increases in military spending and an end to the lack of respect for the military that had roiled the Clinton years. Yet even before the September 11, 2001, attacks, Secretary of Defense Donald Rumsfeld and the uniformed military struggled over the administration’s “transformation” policy to make American forces lighter, faster, and better equipped for unconventional conflict by relying on high-technology and information advantages.⁶⁸ Rumsfeld also came to office believing that military leaders had grown too independent under the previous administration and intending to reassert stronger civilian control.⁶⁹ Afghanistan seemed to bear out the Secretary’s agenda. Rumsfeld ordered heavy bombing and the quick insertion of light special forces and CIA units over the Army’s recommendation of 50,000 to 60,000 troops. Quick success in toppling the Taliban, in a country where no foreign power had prevailed before, reinforced Rumsfeld’s belief in transformation and in overruling the advice of military commanders.⁷⁰

The war in Iraq brought the struggle between the civilian and military leadership out into the open. Pentagon leaders feuded openly with General Eric Shinseki, the army chief of staff. Secretary Rumsfeld announced Shinseki’s replacement fourteen months before his scheduled retirement, during fights over the cancellation of the Crusader artillery system. Shinseki then testified before Congress in the spring of 2003 that “several hundred thousand soldiers” would be needed to secure Iraq. Paul Wolfowitz, the deputy secretary of defense, criticized Shinseki’s estimate as “wildly off the mark” and said the more accurate figure was 100,000 troops.⁷¹ Wrestling privately with General Tommy Franks, the CENTCOM commander, Rumsfeld pressed for a small force to invade Iraq, on the order of 50,000 to 75,000 troops, whereas the United States had deployed about 500,000

67. Kohn, *supra* note 33, at 19 n.52.

68. *Id.* at 14.

69. HERSPRING, *supra* note 48, at 381.

70. *Id.* at 388.

71. *Id.* at 395.

troops in the 1991 Gulf War and military planners called for at least 250,000 in 2003.⁷² Although the eventual force was light, it defeated Iraq's military with surprising speed and low casualties, but was insufficient to secure and occupy the nation post-invasion.

As conditions worsened in Iraq after the fall of Saddam Hussein's regime, the military became more critical of Secretary Rumsfeld. Military officers anonymously criticized the Secretary for refusing to send enough troops to pacify the country, and generally attacked him for ignoring their advice and counsel. In an April 2006 act known in the military as the "revolt of the generals," dozens of senior retired military officers called for Rumsfeld's resignation for allegedly mismanaging the war.⁷³ In 2006, retired general Gregory Newbold, former director of operations of the Joint Chiefs, wrote an essay in *Time* declaring that it was his "sincere view . . . that the commitment of forces to this fight was done with a casualness and swagger that are the special province of those who have never had to execute these missions – or bury the results."⁷⁴ Part of the impetus for the revolt was the deeper lesson, taken by the officer corps from Vietnam, that the military had been too subservient to civilian leaders and that they should talk straight to the political leadership about their views. Ironically, the 2007–08 surge in forces in Iraq and the improvement in the country's rebuilding came against the advice of the senior military leadership, which had decided that the size of the American footprint in Iraq was part of the problem.⁷⁵

Dissension over Iraq was matched by contention over the continuing war on terrorism. Perhaps the most public example was Congress's consideration of the Military Commissions Act of 2006

72. *Id.* at 399.

73. Michael Duffy, *The Revolt of the Generals*, TIME, Apr. 24, 2006, at 41, 41.

74. Greg Newbold, *Why Iraq Was a Mistake*, TIME, Apr. 17, 2006, at 43, 43.

75. See Michael C. Desch, *Bush and the Generals*, 86 FOREIGN AFF. 97, 104–05 (2007) ("[S]enior U.S. Commanders believed increasing the number of U.S. forces in Iraq would be counterproductive . . . [b]ut despite such protests, the military leadership was once again overruled by civilians in Washington—leading to the 'surge' taking place right now."); Richard B. Myers & Richard H. Kohn, Response, *The Military's Place*, 86 FOREIGN AFF. 147, 148 (2007) (noting that senior military officials opposed increasing the number of U.S. troops in Iraq until shortly after the 2006 bombing of the Golden Mosque in Samarra). *But see* Mackubin Thomas Owens, Response, *Failure's Many Fathers*, 86 FOREIGN AFF. 149, 150 (2007) (arguing that military leadership had a habit of exaggerating the need for troops overseas to protect the size of the defense budget or to discourage the executive from deploying a new mission).

(MCA),⁷⁶ which established rules for the detention and military trials of terrorists. In November 2001, President Bush issued an executive order establishing military commissions, in the form of a military tribunal, to try al Qaeda members and their allies for war crimes.⁷⁷ Some members of the military's Judge Advocate Generals (JAG) corps wanted to use courts-martial instead, but civilian leaders in the Pentagon favored commissions, which promised a flexible balance between the need for an open, fair proceeding and the need to keep national security secrets. In *Hamdan v. Rumsfeld*,⁷⁸ the Supreme Court held that the tribunals had to operate according to the lines set out in Common Article 3 of the Geneva Conventions,⁷⁹ setting off Congress's consideration of the 2006 Act. During congressional hearings, JAGs for the Marines and the Army testified that commission rules withholding classified evidence from the defendant, but not his lawyer, would still violate the Geneva Conventions, whereas the civilian representative of the Department of Justice testified to the opposite effect.⁸⁰

Military disagreement over civilian policy in the war on terrorism extended back to the beginning of the conflict. JAGs challenged President Bush's decision in February 2002, after extensive debate within the executive branch, that members of al Qaeda and the Taliban were not to receive the status of prisoners of war under the Geneva Conventions.⁸¹ After that decision, JAGs reportedly cooperated with private human rights groups to challenge the decision in federal court. Once uniformed lawyers were appointed to represent detainees in the military commission process, they

76. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

77. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002).

78. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

79. *Id.* at 626. For discussion of the decision, see Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1234 n.10 (2007) (providing a brief summary of the *Hamdan* case); Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 181-99 (2006) (discussing the facts in *Hamdan* and the arguments presented by each side); Posner & Sunstein, *supra* note 31, at 1223 (analyzing *Hamdan* under the *Chevron* doctrine established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984)).

80. *The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006).

81. See, e.g., Julian E. Barnes, *Military Fought to Abide by War Rules*, L.A. TIMES, June 30, 2006, at A1 (chronicling disagreement between JAGs and the White House over military commissions from 9/11 to the Supreme Court decision in *Hamdan v. Rumsfeld*).

dispensed with the secrecy and filed suit against the Bush administration directly.⁸² Members of the uniformed military also challenged the legality of holding suspected al Qaeda at the U.S. Navy Station at Guantanamo Bay, Cuba.⁸³ According to media reports, JAGs representing detainees in the military commission process met with members of Congress to seek their assistance in reversing Bush administration policies on detainees.⁸⁴ Congress's enactment of the MCA hewed closely to civilian preferences on the commissions and the designation of al Qaeda as illegal combatants. Although the Supreme Court, in *Boumediene v. Bush*,⁸⁵ reversed the MCA's effort to prohibit federal habeas corpus review over the detainees at Guantanamo Bay,⁸⁶ it has not yet addressed the substance of the MCA.

All of this has led historians and political scientists to warn of a crisis in civil-military relations. Russell Weigley, a prominent military historian, compared General Powell's resistance to intervention in Bosnia to General McClellan's reluctance to engage General Lee during the Civil War.⁸⁷ By 2002, Richard Kohn, a distinguished military historian, had already concluded that "civilian control of the military has weakened in the United States and is threatened today."⁸⁸ 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 decisions."⁸⁹ He detects "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."⁹⁰ He believes that civilian-military relations in that period are as poor as in any other period in American history.⁹¹ Michael Desch argues that the high tensions in civil-military relations are due

82. See, e.g., Jonathan Mahler, *The Bush Administration vs. Salim Hamdan*, N.Y. TIMES, Jan. 8, 2006, § 6 (Magazine), at 47 (detailing the lawsuit brought by Salim Hamdan and his appointed JAG counsel challenging Hamdan's detention at Guantanamo Bay).

83. See *id.*

84. See, e.g., Barnes, *supra* note 81 (noting that JAGs argued that it was "a mistake to ignore the long traditions of military justice when trying terrorism suspects").

85. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

86. *Id.* at 2262.

87. Russell Weigley, *The American Military and the Principle of Civilian Control from McClellan to Powell*, 57 J. MIL. HIST. 27, 31-32 (1993).

88. Kohn, *supra* note 33, at 9.

89. *Id.*

90. *Id.*

91. *Id.* at 10.

not to the military but to the civilians, which have violated Huntington's advice in favor of "objective control" by giving the military broad discretion over tactics and operations while keeping final say over politics and grand strategy.⁹² In a 1999 study, Desch found that civilians prevailed in almost all of the seventy-five civil-military disputes from 1938 to 1997, but that the military has won in seven or eight of the twelve post-Cold War conflicts.⁹³ Some attribute this discord to the regular give-and-take inherent in the civil-military relationship, whereas others believe that the military has grown bold in questioning the foreign policy decisions of the civilian leadership.⁹⁴

II. PRINCIPAL-AGENT THEORIES OF MILITARY CONTROL

The deterioration in civil-military relations shows the relative poverty of the focus on the removal power as the primary means of control of the administrative state. The president's constitutional authority to fire personnel is at its height with regard to the military. There is no system similar to the civil service protections that shield non-political appointees from removal. Other formal tools of control are also greater over the armed forces than over other civilian agencies. The president chooses which officers to nominate for promotions, though every promotion requires Senate advice and consent too.⁹⁵ Although the great majority of appointments do not require White House scrutiny, the appointment of general officers and combat commands determines which military careers continue and which ones end. The president can issue orders to the military that have the force of criminal law behind them. Failure to obey an order from a superior officer—and the president, as the commander-in-chief, is the top commander in the military—is a prosecutable offense under the Uniform Code of Military Justice.⁹⁶ No similar sanctions apply to civil servants in the civilian agencies who refuse to carry out a presidential directive.

Heightened tensions in the civil-military relationship during the Bush administration illustrate the need for a more subtle

92. Desch, *supra* note 75, at 105–06.

93. DESCH, *supra* note 44, app. at 135–38.

94. See Herspring, *supra* note 48, at 342–76; Myers & Kohn, *supra* note 75, at 147; Owens, *supra* note 75, at 149 (stating that the "military deserves a significant share of the blame" for the deterioration of the relationship between U.S. military leaders and civilians).

95. See 10 U.S.C. § 624 (2004); Weiss v. United States, 510 U.S. 163, 166 (1994).

96. Uniform Code of Military Justice art. 90, 10 U.S.C. § 890 (2006).

understanding of agency control. If elected leaders have trouble with the military, over which their constitutional powers are strongest, then their problems will be doubled with the civilian agencies. A principal-agent approach, developed first in the context of congressional delegation of rulemaking authority to civilian agencies, may suggest ways in which presidents can increase their control over the military.

Under a principal-agent model, initially applied to civil-military relations by Peter Feaver, the president is the principal and the military is the agent.⁹⁷ The principal does not have the time and resources to conduct military affairs; it delegates that authority to the armed forces to take advantage of specialization. The problem is that principals and agents have their own interests, and given enough leeway, the latter may benefit themselves rather than the principals. The classic example from corporate law occurs when management locates a corporation in a state with plentiful takeover defenses, which reduces the value of shareholders' equity. Agents may prevail by manipulating information or events or by taking advantage of deference to their expertise to convince the principals to approve policies that allow them to capture more of the benefits. Or agents may be able to conceal self-dealing behavior from the observation of principals, who delegated authority in the first place to reduce their management of the issue.⁹⁸ In the public administration context, the deviation between principal preferences and actual policies carried out by the agent is known as "agency slack"⁹⁹ or "bureaucratic drift."¹⁰⁰ The fundamental tradeoff becomes the principal's desire that the agent carry out his wishes, but without consuming resources in excessively tightening its control over the agent.¹⁰¹

97. PETER D. FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* (2003). For an effort to apply the model to the question of the JAGs' actions in the war on terrorism, see 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, 1831–45 (2007).

98. See FEAVER, *supra* note 97, at 55 (“[T]he employee has an incentive to do as little work as he can get away with, all the while sending information back to the employer that suggests he is performing at an acceptable level . . .”).

99. See, e.g., Matthew Stephenson, *Optimal Political Control of the Bureaucracy*, 107 *MICH. L. REV.* 53, 58 (2008).

100. 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).

101. See Sulmasy & Yoo, *supra* note 97, at 1826–27 (“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.”).

A number of methods are available to tighten control over the agents. The most obvious is for the principal to be more specific in its delegations to the agent.¹⁰² Congress, for example, need not delegate authority to the Environmental Protection Agency to regulate air quality when it is in the public interest—it could instead specify ranges for different pollutants. The president can achieve a similar end by appointing and promoting personnel who share the same policy preferences, and thus will use the delegated power in the manner he desires. Congress can impose elaborate monitoring mechanisms, such as reporting requirements, oversight hearings, causes of action for third parties, and internal inspector generals, designed to alert the principal when the agent is straying from its wishes. Congress can even give the right to review agency decisions to an independent actor, such as the federal courts, as a way of monitoring agent activity.

Monitoring must be married to effective sanctions to counter agency slack. In this regard, constitutional law focuses only on the bluntest instrument—the removal of agents who fail to obey the principal. Although firing a subordinate official may be a very public sanction, it may not be calibrated properly to achieve the right change in policy. Firing General MacArthur may have been justified because of his desire to expand the war in Asia and his unwillingness to obey civilian commands, but firing General Powell because he does not provide a full range of options for intervention in Bosnia may be overkill. Other sanctions could include reducing the scope of delegation and hence the autonomy of the agent, cutting an agent's budget and size, transferring authority to another agency, or promoting more trustworthy personnel at the expense of existing leadership. A critical agency response to increased monitoring and sanctions is to fragment the principal—in other words, to encourage competing power centers within the principal.

A few observations are worth making before applying the model specifically to civil-military relations. First, *ex ante*, multiple principals may have different preferences about policy and therefore may be willing to tolerate different levels of agency autonomy based on their ability to control the agent in the future. In creating an

102. Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440 (1989) (“[T]he best solution is legislative specificity: writing into the law precisely what the agency is to achieve, and how it is to do so.”).

agency, for example, a majority in Congress may be concerned about a future president who may hold different policy preferences. This concern will be exacerbated if the majority is uncertain about its ability to stay in control of Congress in future elections or the ability of its party to win the White House. It will be willing to grant significant autonomy to the agency, or to beef up review by an independent actor like the courts, rather than allow the president to dictate the results.¹⁰³ Second, *ex post*, the divergence of principal wishes from agency actions will depend on a few variables. The most important factor will be whether the preferences of the principal and agents deviate significantly. The farther apart that they are, the more benefit to the agent of pursuing its own wishes. Another significant variable will be the expected cost to the agent of sanctions for failure to follow the principal's preferences—a function of the chances that monitoring will discover agency drift, the chances that the principal will impose sanctions, and the likely magnitude of those sanctions. The more principals spend on monitoring, the more likely they are to discover agency shirking; the more they are willing to impose tough sanctions, the less benefit the agent receives from shirking. Devoting more time and resources to monitoring and sanctioning, however, reduces the benefits to the principal of delegating authority to the agency in the first place.

Applied to the military context, it is worth identifying how the Bush and Clinton administration and civilian preferences may have diverged from those of the armed forces. Unlike the Clinton administration, both the civilian and military leadership were on the same page in the area of budget and personnel. Under the Bush administration, military spending rose sharply, both in absolute terms and as a share of the federal budget. As a percentage of the federal budget, Defense Department spending rose from 15.6 percent in 2001 (\$290 billion) to 21 percent in 2008 (\$651 billion).¹⁰⁴ Civilian and military leaders may very well have disagreed, however, over how that money should be spent. As noted earlier, President Bush and Secretary Rumsfeld favored a restructuring of the Army to emphasize smaller, lighter, and more lethal units that could deploy more quickly

103. See Stephenson, *supra* note 99, at 55 (“Forcing the politically responsive president to share power with a partially insulated, politically unresponsive bureaucracy tends to reduce the variance in policy outcomes, because bureaucratic insulation creates a kind of compensatory inertia that mutes the significance of variation in the president’s policy preferences.”).

104. U.S. OFFICE OF MGMT. & BUDGET, *supra* note 26, at 74–85 tbls.4.1–2.

to fight in smaller conflicts.¹⁰⁵ Army officers may well have favored keeping the focus on the large armored units designed for a broad conflict against a major power such as Russia or China¹⁰⁶—hence the conflict over the Crusader artillery system and the Comanche attack helicopter.¹⁰⁷ This tension signaled a larger difference over the nation's strategic goals in the wake of the Cold War's end. Civilians wanted a force shaped for the smaller conflicts, civil wars, nation building, and humanitarian missions that characterized the 1990s. Military leaders preferred the conflicts envisioned by the "Powell doctrine,"¹⁰⁸ which emphasized defeating an enemy quickly with overwhelming force, defined goals, and a clear exit strategy.¹⁰⁹

The pressure of external events may have exacerbated these differences. The actual combat phases of both the Afghanistan and Iraq wars were relatively short and involved few casualties for American forces. Whereas the latter was a regular international conflict between two conventionally armed forces, the former involved special forces, covert units, air power, and irregular allies fighting a mixture of loosely organized militia units and terrorist groups. Afghanistan required the United States to pivot quickly from defeating the Taliban and al Qaeda units to rebuilding a national government in cooperation with the Northern Alliance victors—a task still unfinished. Nation building is at odds with the Powell doctrine, because it requires military units to perform a police function over the civilian population, with goals that are hard to measure and difficult to achieve, and with no preset exit date. Iraq called for yet a different kind of strategy, that of counterinsurgency, which also deviated from the preferred focus on high-technology weapons systems, armored units and air superiority fighters, and

105. See, e.g., John Hendren, *Army Holds Its Ground in Battle with Rumsfeld*, L.A. TIMES, Nov. 29, 2002, at A1 ("Rumsfeld . . . has presented a clear, if controversial, vision of modern warfare, one that uses fewer infantrymen and relies more on precision airstrikes and on small groups of special operation soldiers.").

106. *Id.* ("Army leaders, who still insist that some military engagements will require large ground battles, have grown increasingly alarmed about what role their service plays in Rumsfeld's vision.").

107. See Renae Merle, *Army Scraps \$39 Billion Helicopter*, WASH. POST, Feb. 24, 2004, at A1 (describing the contentious cancellations of the Comanche helicopter and Crusader artillery system programs).

108. See Benjamin Schwarz, *The Post-Powell Doctrine*, N.Y. TIMES, July 21, 2002, § 7, at 11 (reviewing books challenging "contemporary military leaders' embrace of the Powell doctrine" (internal quotation marks omitted)).

109. See generally Colin L. Powell, *U.S. Forces: Challenges Ahead*, FOREIGN AFF., Winter 1992/93, at 32, 32–45.

large-scale conventional warfare. Instead, the armed forces eventually had to surge in large numbers of ground troops who patrolled in urban environments, cooperated with local leadership structures, and relied on intelligence to defeat al Qaeda operatives and Sunni resistance fighters. The Army had engaged in counterinsurgency operations in South Vietnam, sometimes to great effect, but had since lost its expertise in favor of the tactics and strategies needed for a conventional conflict.¹¹⁰

Tension between the civilian and military leadership over the tactics in the war on terrorism displayed a similar difference in preferences. Civilian leaders believed that the war begun by al Qaeda on September 11, 2001, called for a different kind of armed conflict. The enemy is not a nation-state, but an international terrorist organization that does not hold territory, has no population, and does not use regular armed forces.¹¹¹ Its primary tactic is to send covert operatives, using the easy transportation and financial networks of the global economy, to launch surprise suicide attacks on purely civilian targets.¹¹² It acts in direct violation of the laws of war, which call on combatants to clearly distinguish themselves and to refrain from targeting civilians.¹¹³ The war was not between nation-states, nor was it a civil war limited to the territory of a single country—the two categories of conflicts recognized by the Geneva Conventions of 1949.¹¹⁴

The method of fighting the war was also to be different. Unlike a conventional conflict, the United States would not prevail by fielding larger armed units, out-producing the enemy, or winning through maneuver or attrition. Rather, the gathering and analysis of information would allow the military, intelligence, and domestic security agencies to prevent terrorist attacks before they happen and to target or capture al Qaeda operatives. Close cooperation between international and domestic national security agencies was needed because of the ease with which al Qaeda could operate across

110. Scholars, of course, will need the distance of time before they can make firm conclusions about the reasons for the counter-insurgency successes in Iraq. For an early journalistic account, see generally THOMAS RICKS, *THE GAMBLE: GENERAL DAVID PETRAEUS AND THE AMERICAN MILITARY ADVENTURE IN IRAQ, 2006–2008* (2009).

111. *See, e.g.*, John Yoo, *Courts at War*, 91 *CORNELL L. REV.* 573, 575–76 (2006).

112. *Id.* at 576.

113. *Id.*

114. Geneva Convention Relative to the Treatment of Prisoners of War, arts. 2–3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

borders. At the same time, the use of force required the capabilities of individual units or unmanned airborne drones more notable for their small size and mobility rather than their firepower. Precision of targeting, rather than massive force, was the order of the day.

The military resisted the notion that the conflict with al Qaeda was an unprecedented form of warfare. Instead, the JAGs' resistance to the president's decision on the application of the Geneva Conventions can be understood as an effort to fit the war within traditional legal concepts. The Geneva Conventions, as originally understood, created one set of rules for wars between nations and another set for internal civil wars—the only two types of conflicts contemplated in 1949 when the treaties were drafted.¹¹⁵ When nations decided to extend the Geneva standards to wars of national liberation and other asymmetric, unconventional conflicts, they drafted and ratified two additional protocols to the conventions in 1977¹¹⁶—an effort that the United States did not join precisely because of the protections included for terrorists.¹¹⁷ Political leaders wanted to continue the policy of not granting terrorists prisoner-of-war status under Geneva, but also wanted to keep them in military hands rather than turning the matter over to domestic law enforcement. Military leaders, by contrast, believed that if the struggle with al Qaeda was to be considered a war for which the armed forces could be used, then Geneva standards ought to apply automatically.

The justification for this position shows the desire to keep the conflict within traditional military preferences about warfighting. Two basic claims were made to support the idea that the Geneva Conventions still governed the war with al Qaeda. The first was that even if the text of the Conventions did not apply to a terrorist group, the norms of Geneva had assumed the status of customary international law. The second was a policy argument that if the United States did not adhere to Geneva, its enemies would act in the

115. See Sulmasy & Yoo, *supra* note 97, at 1835 (“[T]he laws of war . . . were drafted primarily to deal with two types of armed conflict—wars between nation-states, and internal civil wars.”).

116. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, 1125 U.N.T.S. 609.

117. Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1 PUB. PAPERS 88, 88 (Jan. 29, 1987) (“[W]e must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.”).

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identical manner toward its own troops.¹¹⁸ The military's first argument was an appeal to a sort of standard template for war developed by the practice of states, one primarily developed by nations that conduct few significant military operations on their own. The United States, however, had objected to the norm by refusing to adopt the 1977 additional protocols. The second argument, concerning reciprocal treatment, would apply to a nation-nation conflict in which both sides were capturing members of the other's armed forces and were concerned about their treatment as prisoners. Al Qaeda, however, has no facilities for holding prisoners on any large scale because it controls no territory. Even if it did, the terrorist group shows no inclination to take prisoners, but instead has executed both civilians and soldiers alike. Whether American extension of Geneva to al Qaeda would make any difference in a future war would be speculative, but the mistreatment of American POWs by almost every enemy faced during the postwar period does not hold out great hope.

Other elements of the war on terrorism would have clashed with the sensibilities of an officer corps brought up under the Powell doctrine and the lessons of Vietnam. The emphasis on victory through overwhelming military force holds little application to war with an international terrorist group. The difficulty is not in the amount of force, an area in which western nation-states have an unchallenged advantage, but knowing where to use it. Focus on a clear goal and an exit strategy also finds little traction with the war on terrorism. The war on terrorism is more amorphous and less transparent than conventional armed conflicts between nation-states. Conflict with terrorist groups does not often involve regular armed forces units, but instead special forces, predator drones, and CIA and NSA assets. It is unclear what the eventual goal is, because ending terrorism itself is not possible; terrorism is only a tactic of fighting. The goal could be simply the elimination of the al Qaeda terrorist organization, though that would be difficult to achieve, and one that might not have any publicly identifiable endpoint due to the struggle's decentralized, nonterritorial character. The lack of endpoint of the conflict makes the exit strategy question a difficult one to answer.

The difference in preferences should lead to predictable struggles for control over policy. The military will seek to gain

118. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 34-35 (2006).

autonomy by shaping decision options in its favor, whereas civilian principals will increase monitoring and corrective sanctions to return agency performance closer to their preferences. To take an earlier example, the military drew the lesson from Vietnam that it had to go to war with widespread support and sufficient resources for victory from the American population, not just from its political leadership. Generals decided to reorganize the force structure to incorporate the reserves into the units that would be deployed if the nation were to engage in any significant conflict, making it difficult for the civilian principals to send the military into combat without popular support.¹¹⁹ Overestimating the forces needed to achieve certain military objectives similarly may alter the options actually available to the principals. The agent can increase its autonomy further by delaying its responsiveness to civilian orders or by providing a limited range of information to the principal necessary to make a decision on all policy options.

One visible tactic in the struggle over control was the agents' efforts to divide the principals' institutional unity. Increasing the number of competing power centers among the principal, for example, makes it more difficult for the principal to settle on a single policy, to monitor effectively, and to decide to increase monitoring or sanctions.¹²⁰ In the war on terrorism, for example, JAG opponents of President Bush's policies went to Congress and testified against the administration's positions on the military commission bill.¹²¹ JAG lawyers representing detainees at Guantanamo Bay also brought suit in federal court to enjoin military commission proceedings from taking place.¹²² Judicial review would provide another disruption in the principals' ability to coordinate policy. The JAGs' appeal to international law is understandable as an effort to create more autonomy by introducing foreign governments, international entities and NGOs into the principals' decisionmaking process.

A number of broader changes in both civilian and military personnel may exacerbate the gap in their preferences on particular policy questions. The change that has attracted much notice is the

119. FEAVER, *supra* note 97, at 67. See generally HARRY G. SUMMERS, ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR 33–44 (1982).

120. McCubbins et al., *supra* note 102, at 439.

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

122. See Mahler, *supra* note 82, at 88 (detailing JAGs' efforts to challenge the military commission proceedings at Guantanamo Bay).

growing difference between civilian and military values and perspectives, which has expressed itself in a number of ways. Scholars have observed that the officer corps, for example, has become increasingly Republican in the last few decades, the likely result of self-selection, Republican party outreach, and the decline in the Democratic party's hawkish wing after the Vietnam War.¹²³ As a result, the agency model would predict more friction during periods of Democratic control of the executive branch, but it would not have predicted the high levels of conflict under Bush. The introduction of the all-volunteer force after Vietnam has reduced the number of veterans in society at large and in the civilian political leadership in particular, a dynamic enhanced by the reduction of the military's size after the Cold War and a drop in the number of bases throughout the country.¹²⁴ Civilians and military officers have come to have a growing difference in both their opinions and their experience.

There is nothing normatively wrong with a difference in preferences between civilians and the military. It is inherent in the principal-agent relationship. Principals want to save time and resources by delegating authority to agents. The latter naturally desire autonomy in pursuing their missions. It is also not surprising that in an area as fraught with significance as the nation's security, there will be strong differences in preferences beyond questions solely of institutional independence. The phrase "shirking," when used in the literature on business organizations, implies that managers are attempting to benefit themselves financially at the expense of the shareholders—but it does not have that implication in the analysis of the public sector. Rather, as here, it refers to examples when agents seek to pursue their own interests rather than those of civilians. Shirking, in fact, may better advance overall American national security, should military policy preferences actually prove superior to civilian preferences on an individual question. But it would come at the cost of a reduction in civilian control of the military.

III. RESTORING CIVILIAN CONTROL THROUGH DECENTRALIZATION

Turning from the descriptive to the normative, this Part asks what presidents can do to address the growing tensions in civilian-

123. FEAVER, *supra* note 97, at 205–06.

124. *Id.* at 206–07.

military relations. Under the principal-agent model described here, a decrease in civilian control over the military could result from two developments. One, deterioration in civil-military relations could arise from a growing gap in preferences between the principal and the agent over foreign and national security policy, as described in the Part II. Two, military preferences may ultimately prevail in policy disputes because civilian monitoring may fail to detect shirking or because the chances of sanctions in response are low.

The agency model suggests that civilians can take a number of steps to increase their control over the military. I should make clear that this is not a matter of whether the military should shape its advice based on what it thinks the civilians want to hear—a possible concern if agencies are competing for a limited pool of funding from the principal. Civilian leaders should want the military's unvarnished advice in order to reach the best decisions. Rather, the agency model addresses how civilians can improve the military's implementation of decisions and reduce any effort by the armed forces to narrow or unduly influence those decisions in its institutional favor.

Principals cannot do much immediately to change the preferences of their agents, but they can make institutional reforms that better detect and correct shirking. Civilians, for example, can narrow the delegation of authority to the military by making more decisions themselves or issuing more detailed, explicit orders that provide for less discretion in implementation. They can enhance the monitoring of military decisionmaking to detect efforts to deviate from civilian policy preferences. This can be done primarily by increasing the number of, and resources available to, civilians responsible for developing policy in the Pentagon and on the National Security Council staff. They can increase the sanctions for shirking by promoting officers who are faithful to civilian wishes, removing officers who defy civilian preferences, or reducing the budgets of resistant services.

Several of these changes depend on the president's constitutional authorities. Agents will continue to pursue their own policy preferences, even with a high likelihood of discovery, if the expected cost of sanctions—the chances that they will be imposed and their magnitude—remains low. The toughest sanction is removal from office, which falls within the president's sole constitutional power under Article II. But firing will have little effect in response to serious agency slack unless it is used with some regularity. A constant possibility of sanctions also will not adequately address agency slack if

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principal and agent preferences grow farther apart, because agents will claim more benefits even after the costs of monitoring and sanctions.

This appears to explain developments in civil-military relations since the end of the Cold War. It does not appear that civilian monitoring or sanctions have fallen; in fact, they may well have risen. The tension in civilian-military relations nevertheless has sharpened because the difference between civilian and military policy preferences has grown at an even faster rate. This should come as no surprise. The disappearance of the Soviet threat, which had been the overwhelming focus of American military planning for a half-century, left both sets of leaders searching for a redefinition of national security means and ends. Increasing reliance on the military for operations that do not involve combat, such as drug interdiction, nation building, and disaster relief, may draw the military more deeply into civilian debates, increase the scope for disagreements over the role of the military, and place strains on the military's resources and warfighting abilities. An all-volunteer force may have exacerbated tensions as the military becomes more separate and distinct from civilian society.

Removal from office may be both too blunt and too narrow a tool to improve civil-military relations. It is too blunt because it is overinclusive: presidential removal of an officer may arise because of a single disagreement over policy, but might be seen as a symbolic judgment on the officer's entire career. Dependence on the president's constitutional authority does not provide more fine-grained methods of responding to small-scale examples of agency slack. It is too narrow because it is an inadequate way to change the institutional culture of the agent. If resistance to civilian policy is wide and deep because of military culture—as it arguably was during the Clinton years—presidents will have to remove a large number of officers, perhaps to the point at which military effectiveness will be seriously endangered.

What is needed is a different way to improve control of the military that is not dependent solely on firing and promotion decisions. One such method is suggested by the comparative study of civilian-military relations and the debate over intelligence reform. Deborah Avant has observed that civilian control of the military has

suffered less in Great Britain than in the United States.¹²⁵ She finds the difference in the former's lack of a separation of powers between the executive and legislative branches, which provides less opportunity for the military to play its civilian masters against each other.¹²⁶ Indeed, one way that the U.S. armed forces may have won greater policy independence is by dividing the principal by playing Congress and the White House off one another. It must be acknowledged, however, that this phenomenon may not correlate with the end of the Cold War but instead may have been a persistent practice in past periods of American history.

If unifying the principal is one way to increase civilian control, dividing the agent may well be another. Dividing the military into different services, but with similar missions, for example, may reduce its ability to unify in its own struggle with the civilian principals. Individual services may be less likely to shirk on civilian priorities if they are competing with each other for budgetary and personnel resources. Civilian principals can reward agencies who implement their priorities most faithfully, or achieve the desired results most effectively. This insight is supported by work on the centralization of the intelligence community in the United States in the wake of the 9/11 attacks. The military first went through centralization in the Goldwater-Nichols Act of 1986,¹²⁷ which made the chairman of the Joint Chiefs of Staff the primary military adviser to the president.¹²⁸ According to Feaver, the chairman's increase in power came through the introduction of the idea of a unified military viewpoint, which came at the expense of the individual services.¹²⁹ A similar impetus has driven changes to the intelligence community in the wake of the 9/11 attacks. Before 9/11, several agencies operated intelligence collection or analysis units. The Central Intelligence Agency is only the most well known of them: the Defense Department, for example, contained the Defense Intelligence Agency and the National Security Agency; the Federal Bureau of Investigation was responsible for counterterrorism and counterintelligence; whereas the Departments of Justice, State, Energy, and Treasury each had their own

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

126. *Id.* at 22.

127. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in scattered sections of 10 U.S.C.).

128. 10 U.S.C. § 151(b) (2006).

129. FEAVER, *supra* note 97, at 82–83.

intelligence units. Failures in detecting the 9/11 attacks and in predicting the presence of weapons of mass destruction in Iraq both led to investigatory commissions that recommended centralization of the intelligence community.¹³⁰ In 2004, Congress enacted the Intelligence Reform Act,¹³¹ which created a new directorate of national intelligence to head the intelligence community and, like the chairman of the Joint Chiefs on military matters, would act as the principal adviser to the president on intelligence.¹³²

Whether to centralize agencies or create multiple entities organized by specialty and expertise is a question that has arisen in studies of both the corporate form and bureaucracy. As Oliver Williamson has written, a firm that needs a good or service is faced with several choices: should it purchase the item in the private market, should it merge with or acquire another firm that specializes in the function, or should it develop the ability to produce the item internally.¹³³ One of Williamson's answers is that as the uncertainty of acquiring the asset through contracting increases, because the good or services is rare or must be made to specifications or its supply must be dependable, firms will merge or grow larger to produce the product in house rather than in the market.¹³⁴ The reduction in transaction costs brought about by performing multiple functions under one roof should outweigh the costs in managerial complexity, loss of focus and benefits of competition, and inefficiencies in operating a large conglomerate.¹³⁵ This transaction cost approach to understanding institutions has important applications to administration—one question relevant here is whether it makes sense to aggregate different functions in one large agency, such as the Department of Defense, or to maintain multiple, specialized agencies with somewhat overlapping duties, such as a Department of the Navy and Army.

In the context of public administration, centralization holds the promise of reducing redundancies, promoting coordination and cooperation between agencies, and increasing agent accountability.

130. See, e.g., THE 9/11 COMMISSION REPORT 411–15 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> (recommending a national intelligence director to “manage the national intelligence program and oversee the agencies that contribute to it”).

131. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

132. 50 U.S.C. § 403(a)–(b).

133. OLIVER WILLIAMSON, MECHANISMS OF GOVERNANCE 66 (1996).

134. *Id.* at 70.

135. *Id.* at 67–70.

Centralization can save significant resources by eliminating duplicative redundancies, a particularly important effect for agency functions that require large up-front investments (such as the satellites needed for imagery intelligence). It can also improve efficiency by forcing cooperation at lower levels of bureaucracy and reducing turf wars. A common refrain heard in the post-9/11 commission reports was that different agencies were “stovepiped”—they did not share their information or analysis except at the highest levels of government, in failure to see the overall intelligence picture.¹³⁶ Centralization might also improve accountability by reducing the ability of agents to slack in their work and blame others for failures. The unified direction of a single agency head will produce quicker decisions and actions—which was Hamilton’s justification for the Constitution’s creation of a single president at the head of the executive branch.¹³⁷

But as Anne Joseph O’Connell and Richard Posner have separately observed, centralization can also bring costs: the reduction of competition between agencies, excessive focus on consensus, and less consideration of low-probability yet high-magnitude threats.¹³⁸ Multiple agencies, for example, can help prevent the “group think” that can occur when a lack of diversity of viewpoints occurs in government decisionmaking.¹³⁹ Principals will benefit if agencies have to race to the top to produce the best intelligence analysis or collect the most information, much as the private market forces firms to compete to offer the best goods at the best prices.¹⁴⁰ Competition also acts as a safeguard in the event of a failure—it is less likely that a crippling fault will affect multiple agencies, thereby improving the reliability of the system overall.¹⁴¹ Increased competition will produce costs that mirror the benefits of centralization—slower

136. See, e.g., THE 9/11 COMMISSION REPORT, *supra* note 130, at 401–09.

137. See generally THE FEDERALIST NO. 70 (Alexander Hamilton).

138. O’Connell, *supra* note 100, at 1685–86; RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, at 42–43 (2005).

139. O’Connell, *supra* note 100, at 1676; see also Cass R. Sunstein, Essay, *Deliberative Trouble?: Why Groups Go to Extremes*, 110 YALE L.J. 71, 118 (2000) (“Like-minded people engaged in discussion with one another may lead each other in the direction of error and falsehood, simply because of the limited argument pool and the operation of social influences.”).

140. Cf. OLIVER WILLIAMSON, CORPORATE CONTROL AND BUSINESS BEHAVIOR 110–53 (1970).

141. O’Connell, *supra* note 100, at 1678.

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decisionmaking, reduced accountability, more expense in monitoring, and greater agency slack.¹⁴²

Neither centralization nor decentralization should be applied across the board. They represent polar opposites on a sliding scale of agency design, with the appropriate point depending on circumstances and agency mission. The military, for example, has elements of both unification and redundancy. The chairman of the Joint Chiefs, as has been noted, is an effort at centralization, as was the creation of the Defense Department after the end of World War II. Each service's maintenance of its own air capabilities, command staffs, and educational institutions is an example of redundancy. Redundancy can also occur between the military and intelligence community. The CIA has paramilitary units that bear strong similarities to the military's special forces units, whereas the Pentagon consumes a large proportion of the intelligence budget through its collection and analysis agencies.

Improving civilian control of the military would point toward reversing the trend toward centralization that has taken hold in both the military and intelligence worlds. At the point of policy development, multiple agencies may lead to more varied and higher quality advice. Competition would allow the principals to choose the proposals and programs of the individual services that best match their policy preferences on any given issue. Eliminating the monopoly on military advice of the chairman of the Joint Chiefs, for example, would allow more competition between the services in military analysis and planning. The services would compete to solve military problems posed by civilians principals—such as the most effective way to stabilize Iraq or pacify the Afghanistan countryside—just as different intelligence units might strive to present the best analysis of collected data. The prevailing service would take the lead in commanding the missions, which would result in greater resources and broader responsibilities. That dynamic would present the principals with more military options to achieve national goals, and would act as an important check on agency shirking.

Competition may not just improve civilian control, but also may lead to better decisionmaking. This would be particularly important in areas where significant tradeoffs are present. To take Iraq as an example, it may be the case that defeat of the insurgency could take a

142. *Id.* at 1679–83.

longer time but with less investment of resources and personnel, or that a faster strategy could be achieved but at the cost of a surge of new assets. There may be no correct answer as to how to strike this tradeoff as a matter of expert military advice. Rather, it should be a decision for the civilian principals about whether to incur higher costs for faster progress toward national goals, and competition among the services will allow them to understand the tradeoffs at stake. Such diversity of viewpoint might be particularly important as threats to national security themselves come in different guises. A broader array of approaches and insights will be necessary when the challenges are unprecedented.

Decentralization might also be extended to competition in policy implementation, which would encompass issues of force structure. The redundancies in air support and special forces units has already been noted, though it should be acknowledged that specialization occurs in these units depending on the service involved (Navy Seals, for example, would focus on waterborne or amphibious operations). It might make sense for duplication to occur in specific areas in which competition in function is particularly desirable. In responding to the challenge presented by the al Qaeda terrorist network, for example, it is not immediately apparent that any one service has a natural advantage over the others. Allowing each service to develop special units designed to conduct operations against cells of al Qaeda agents may create a healthy competition. Civilian principals could choose to assign missions to those services whose approaches best fit their policy preferences, rather than those of the agents.

To take one example, Marine and Army units could take responsibility for pacifying different provinces during the Iraq war. Each service could attempt different strategies for conducting counterinsurgency operations. One might try to reduce its footprint by retreating to large bases and conducting brief, intense missions because it believed that opposition grew in proportion to the visibility of American forces. The other might opt for a more consistent, visible presence in the hopes of winning the cooperation of moderate elements of Iraqi society. Civilians could judge which service encountered more success and direct additional resources and responsibilities to that service. The more options available to civilians, the more freedom they will have to choose policies that more closely follow their preferences.

Or to take another example, the services may present different options for attacking selected terrorist leadership targets hiding in

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areas with a high density of civilians. The Navy might propose cruise missiles, the Air Force could use air strikes by manned aircraft or unmanned aerial vehicles, and the Army could send in helicopters or special forces units. Competition among the services will present civilian decisionmakers with options along several different values, such as speed, accuracy, flexibility, and destructiveness. The principals will be able to choose the service that best presents a plan maximizing the values sought by the civilians, which itself will depend on the circumstances, rather than being limited to one course of action.

As noted earlier, the introduction of more competition will not come without costs. Redundancy of capabilities between the services will increase costs and could lead to a waste of resources. The costs of the Air Force, Navy, and Marines operating different types of attack jets may well outweigh the benefits of specializing individual weapons systems for a service's unique mission. Specialization yields important benefits, but redundancy might make less sense if large investments are required. It would make little sense, for example, for the Air Force to operate significant ground units. Decentralization might spur free-riding rather than competition. Or it might create a destructive competition and a race to the bottom if the services refuse to cooperate. Decentralization might also make civilian control of the military more difficult by making it more difficult to hold the military directly accountable for errors.

Perhaps one way to address these concerns is to limit initial efforts at decentralization to the staff level. The costs of redundancy do not seem to be as pronounced at the planning stage or in the Pentagon, when heavy investments in duplicate military personnel or weapons systems are not required. This is similar to the conclusions that some scholars have reached with intelligence reform. It would not be cost effective for each intelligence agency to operate its own satellite reconnaissance system, but it would be relatively low cost to allow different agencies to view the same raw intelligence and develop their own conclusions. Similarly, the individual military services should continue to specialize in function, and even if they must cooperate in carrying out missions, military planning on strategy and policy could be opened to competition. Civilians would choose among individual proposals offered by the different services to carry out certain missions and functions.

Special forces is another area in which gains in civilian control and effective decisionmaking might outweigh the costs of

redundancy. Such units are small and do not consume a large percentage of the services' budgets. They could compete in addressing post-9/11 missions such as tracking and attacking terrorist leaders or blocking the proliferation of weapons of mass destruction. Those units that proved superior in performing the mission could receive more funding and resources, and their strategies and tactics would serve as a model for others. Special forces may present a low-cost way to experiment with more competition among the services without incurring large costs in redundancy.

These types of solutions might increase interservice rivalry, which entails its own costs. Decentralization might also increase civilian control problems by creating more opportunities for individual services to ally with more congressional committees. But the American system of civil-military relations already assumes certain benefits from interservice rivalry. It already produces benefits from both competition and specialization which appear to outweigh the costs, at least to political and military leaders over time. Even though civilian leaders created the Department of Defense after World War II to increase centralized civilian control of military matters, they did not attempt to meld the individual services into a single force, and they still have not done so. The right mix of centralization and decentralization in the design of the military agencies will depend on the circumstances created by political history, the nature of the external threat, and the costs and benefits of more direct civilian control. I suggest here that when there is less agreement on the most effective policies because of an unprecedented form of external threat brought about by the end of the Cold War and an expanded understanding of the American position in the world, decentralization may create a healthy competition that provides civilian principals with more policy options and hence more control over their agents.

CONCLUSION

This Essay has sought to identify one of the most significant, but also understudied, aspects of administrative law that arose during the Bush administration: control over the military. It has explored a principal-agent model, built on rational choice approaches to the study of bureaucracy, to explain the apparent deterioration in civil-military relations. That model also suggests ways, such as

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decentralizing military command, in which civilian principals can increase their control over their agents, if that is their wish.

As the Obama administration takes office, this approach suggests that problems in civilian-military relations will not disappear, but in fact might grow worse. As I have noted, the growing gap between military and civilian outlooks and values sets the environment for differences on individual policy preferences. In light of this gap, the Obama administration might have problems similar to those experienced by the Clinton and Bush administration. If that is the case, then the new administration will need to devote even more attention to the question of civilian control of the military than did the last.