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See Also

Response

The Constitutional Bond in Military Professionalism: A Reply to Professor Deborah N. Pearlstein

Diane H. Mazur^{*}

In May 2007, Secretary of Defense Robert Gates was the commencement speaker for graduation ceremonies at the Naval Academy and the Air Force Academy. Midshipmen and cadets take an oath¹ upon graduation to support and defend the Constitution of the United States, and Secretary Gates gave the soon-to-be-commissioned officers a short lesson in constitutional structure. He said,

The Congress is a co-equal branch of government that under the Constitution raises armies and provides for navies. Members of both parties now serving in Congress have long been strong supporters of the Department of Defense, and of our men and women in uniform. As officers, you will have a responsibility to communicate to those below you that the American military must be non-political and recognize the obligation we owe the Congress to be honest and true in our reporting to them.²

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1. Commissioned military officers must swear or affirm they “will support and defend the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same.” 5 U.S.C. § 3331 (2006).

2. Robert M. Gates, U.S. Sec’y of Def., United States Naval Academy Commencement Remarks (May 25, 2007); Robert M. Gates, U.S. Sec’y of Def., United States Air Force Academy Commencement Remarks (May 30, 2007). The Secretary’s constitutional lesson was the same at each event, except that at the Air Force Academy he added an interpretive gloss to Article I, Section Eight, Clause Thirteen, stating that Congress provides for both “navies and air forces.” *Id.*

Does it surprise you that the Secretary of Defense felt the need to remind graduates of their professional obligation to Congress under Article I of the Constitution? Perhaps it should not, especially after reading Deborah N. Pearlstein's *The Soldier, the State, and the Separation of Powers*.³ Professor Pearlstein examines theoretical models for understanding civilian control of the military that are standards of political science but have only more recently spilled over into law.⁴ These models are notable for their curious and consistent assumption that our constitutional separation of powers within the federal government is inherently damaging to civilian control and military professionalism.⁵ Legal scholars have had relatively little interest in theorizing about constitutional control of military forces—as opposed to the popular emphasis on the power to declare war⁶—and so little has been said about this puzzling inconsistency between constitutional structure and the dominant teachings of political science.

The Soldier, the State, and the Separation of Powers is important and very persuasive. (In this Response, I will call it *Separation of Powers* to distinguish it clearly from *The Soldier and the State*,⁷ the classic work on civil–military relations referenced in the title.) Professor Pearlstein asks the right questions and reaches the right conclusions—no small task when law professors have typically deferred to expertise in other fields, if not avoided the subject entirely.⁸ What do we mean by civilian control of the military? Where is the line between a military that offers its professional expertise to civilian decision makers and a military that wields undue influence in those decisions? Is strong civilian control inconsistent with a constitutional structure that separates power over the military among the three branches of federal government? *Separation of Powers* convincingly dismantles the political orthodoxy that a professional military cannot thrive when its principals—legislative, executive, and judicial—share constitutional authority. It rightly concludes that any proper theory of civilian control must acknowledge and affirm our constitutional structure because, first, such an interpretation is faithful to constitutional text, and second, separation of powers actually strengthens civilian control and military professionalism.⁹

3. Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEXAS L. REV. 797 (2012).

4. *Id.* at 801.

5. *Id.*

6. *See generally, e.g.*, JOHN YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2010) (explaining the debate about the nature of presidential power with special emphasis on war powers).

7. SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL–MILITARY RELATIONS (1957).

8. A notable exception is the following insightful article: Geoffrey Corn and Eric Talbot Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, The President, and Congress*, 44 Hous. L. Rev. 553 (2007).

9. Pearlstein, *supra* note 3, at 857.

I have argued in a recent book, *A More Perfect Military: How the Constitution Can Make Our Military Stronger*, that the military's traditional bond to constitutional ideals is an essential part of military professionalism and military effectiveness,¹⁰ a theme that aligns perfectly with Professor Pearlstein's conclusions about civilian control in *Separation of Powers*. I have no important disagreements with her analysis. As a result, my focus in this Response will be to expand perspective and add larger context. First, there is a reason conventional political theory on civilian control of the military fails to work well as a model for constitutional analysis. *Separation of Powers* takes the standard work in civil–military relations at face value—which is generous and neutral as a scholarly matter—but as a result, it understates the extremism of the work's Cold War foundations. Second, *Separation of Powers* focuses primarily on the classic problem posed by weak civilian control: the danger that the military will overreach or exercise undue influence in decisions that should be made by civilians. I argue this is the lesser of dangers we face from weak civilian control. More likely is the risk that civilians will take political advantage of a broken system to suppress information necessary for making informed democratic decisions. Today, civilian control is more about control of information related to the military than it is about control of the military itself. This is further complicated by an inability to distinguish between what is professional military expertise and what is not. Civilians tend to be the primary offenders in a system of weak civilian control, although their actions are inevitably corrosive to military ethics and professionalism.

I. Where It All Began

As *Separation of Powers* explains, the classic work of political theory in the field of civil–military relations is Samuel P. Huntington's *The Soldier and the State*, published in 1957.¹¹ His contribution to understanding civilian control of the military was to distinguish between what he called “subjective” civilian control and “objective” civilian control—the former deemed unworkable and the latter embraced as essential to a professional military.¹² Subjective civilian control of the military was dependent on shared bonds between the military and civilian society, ensuring that the military would reflect values of the larger community. In Huntington's words, subjective civilian control worked by “civilianizing the military, making them the

10. DIANE H. MAZUR, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* 12 (2010).

11. Pearlstein, *supra* note 3, at 805 (citing HUNTINGTON, *supra* note 7).

12. HUNTINGTON, *supra* note 7, at 80–85.

mirror of the state.”¹³ Objective civilian control, on the other hand, worked by “militarizing the military, making them the tool of the state.”¹⁴

Huntington made the choice between subjective and objective control seem so obvious. Objective civilian control would maximize military professionalism; subjective civilian control meant the military would be forever ensnared in politics.¹⁵ How could anyone disagree? Who would argue for a less professional military, or for a more political military? Huntington’s views on military professionalism and politics, however, came packaged in radical assumptions about the nature of the military and its place in American society. He believed a military could be professional only if it was distinctly different from the civilian world and operated in its own autonomous, constitutionally independent sphere. Unlike the World War II military of only a few years before, Huntington sought a military that was not representative of civilian society and its values.¹⁶ Huntington also used “politics” as a code word for our constitutional system in general.¹⁷ In his view, the only way to take politics out of the military was to take the military out of the Constitution.¹⁸

Taking the military out of the Constitution might not be such a problem, perhaps, if the military had never been in the Constitution. Huntington seemed to run off the constitutional rails when he concluded that “[t]he United States Constitution, despite the widespread belief to the contrary, does *not* provide for civilian control.”¹⁹ This seems difficult to digest, given the Constitution’s comprehensive framework for control of military forces: in Article I, Congress’s power to declare war, raise and support armies (with biennial control of appropriations), provide and maintain a navy, make rules for the government and regulation of the military, decide if and when to call forth the militia of the states into federal service and provide for organizing, arming, and disciplining them, together with the less frequently mentioned powers to define and punish offenses against the law of nations and make

13. *Id.* at 83.

14. *Id.*

15. *See id.* (“The antithesis of objective civilian control is military participation in politics: civilian control decreases as the military become progressively involved in institutional, class, and constitutional politics.”).

16. Huntington even condemned the Reserve Officer Training Corps (ROTC), the best opportunity we have to foster diversity of thought in military leadership and a productive engagement between civilian and military viewpoints. *See id.* at 282–88 (referring to ROTC and other post-World War I military training programs as an “abortive identification with society”).

17. *See, e.g., id.* at 177 (“The separation of powers is a perpetual invitation, if not an irresistible force, drawing military leaders into political conflicts.”).

18. *Id.* at 191.

19. *Id.* at 163. The Supreme Court would likely disagree. *See Laird v. Tatum*, 408 U.S. 1, 15 (1972) (finding a tradition of resistance to military intrusion into civilian life “in the Third Amendment’s explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military”).

rules concerning captures;²⁰ in Article II, the president's power as commander in chief of our military forces;²¹ and in Article III, the power of federal courts to decide *all* cases arising under the Constitution and the laws of the United States—including cases involving the military.²² This is an extensive range of civilian involvement for a Constitution that supposedly does not provide for civilian control. What Huntington meant, however, was that the Constitution did not incorporate his very idiosyncratic version of civilian control, one that required civilians to recognize “autonomous military professionalism” and “an independent military sphere.”²³ How idiosyncratic was his vision? He thought Congress had stepped over the line when it passed the Uniform Code of Military Justice,²⁴ normally hailed as the standard example of what it means to govern and regulate the military under Article I.²⁵

Huntington's theory of objective civilian control was as much a complaint about the values of the United States and its governing document as anything else. He repeatedly pointed to liberalism as the enemy of military professionalism,²⁶ and by *liberalism* he did not mean the ideology that separates modern Democrats and Republicans. His grievance was against our democratic liberalism in the broadest sense and its respect for individual constitutional liberty.²⁷ He charged that liberalism was “inherently antimilitary,”²⁸ “united in its hostility to the military profession,”²⁹ and ultimately “the gravest domestic threat to American military security.”³⁰ *The Soldier and the State* is quite extreme in its distrust of civilian constitutional values. If unconvinced, consider that Huntington praised the antebellum South as one of only two genuinely conservative groups in American history, the Federalists of 1789–1812 being the other.³¹ “Unlike the Federalists,” Huntington added, “the Southerners had good grounds for their domestic fears. The slaveowners were the only significant

20. U.S. CONST. art. I, § 8, cls. 10–16.

21. *Id.* art. II, § 2, cl. 1.

22. *Id.* art. III, § 2, cl. 1.

23. HUNTINGTON, *supra* note 7, at 83.

24. *See id.* at 461 (criticizing the UCMJ as an “encroachment upon the integrity and status of the officer corps”).

25. *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (relying heavily on the UCMJ in evaluating detainee procedures).

26. *See* HUNTINGTON, *supra* note 7, at 154 (arguing that “American liberalism . . . identif[ies] its external and domestic enemies with military professionalism”).

27. *See id.* at 90 (characterizing liberalism as “emphasiz[ing] the reason and moral dignity of the individual and oppos[ing] political, economic, and social restraints upon individual liberty”).

28. *Id.* at 94.

29. *Id.* at 153.

30. *Id.* at 457.

31. *Id.* at 146–47.

social group in the history of the United States ever to be forcibly dispossessed of their property.”³²

Military professionalism, according to Huntington, depended on distancing the military from the professionally inappropriate values of civilians.³³ For this reason, it was necessary to minimize the role that constitutional text assigned to Congress and other institutions closely identified with the people. True military professionalism was possible only if the President, as Commander in Chief, served as the single source of authority over the military.³⁴ Our constitutional system of shared authority over the military was disruptive to this strict chain of command and therefore “an ever present threat to the symmetry and order of the military hierarchy,” placing military professionalism and civilian control at risk.³⁵ Huntington concluded that congressional authority (not to mention judicial authority, and he did not) had “made it impossible for American officers ever to be at ease in their professionalism.”³⁶

Professor Pearlstein notes the striking inconsistency within orthodox political theory of civilian control. She writes, “For a Constitution that seems so self-consciously to have allocated power over military affairs to several branches of civilian government, it seems odd that dominant understandings of civilian control chafe so much at the constitutional structure itself.”³⁷ “Odd” is surely an understatement. It is difficult to take Huntington’s work seriously as a basis for understanding constitutional control of the military by civilian authority, but it is indeed taken seriously,³⁸

32. *Id.* at 147.

33. *See id.* at 266–69, 309–12, 464–66 (reciting a litany of dissatisfaction with American civilian values).

34. *See id.* at 35 (contending that “a single recognized source of legitimate authority over the military forces” is necessary to professionalism in the military).

35. *Id.* at 259. Huntington could not see a place for Congress in the chain of civilian control’s constitutional order because Congress had no place in the chain of military command: “The new American professional officer had an inbred respect for the integrity of the chain of command stretching from the President as Commander in Chief to the lowest enlisted man. No place existed in this picture for Congress.” *Id.* He returned to this theme again and again, never questioning his belief that constitutional structure had to mimic military structure. Separation of powers was “a major hindrance to the development of military professionalism and civilian control,” a “real constitutional stumbling block,” and “the only really significant institution complicating the achievement of civilian control and military professionalism.” *Id.* at 177, 191, 457. Huntington really did not think much of Congress and the courts, at least as participants in civilian control.

36. *Id.* at 184.

37. Pearlstein, *supra* note 3, at 827.

38. In recognition of the fiftieth anniversary of Huntington’s work, the United States Military Academy at West Point sponsored a research project “that would amplify for this twenty-first-century generation of students, both graduate and undergraduate, the remarkable contribution that Samuel P. Huntington’s *The Soldier and the State* (1957) has made, and continues to make, to the study of civil-military relations,” culminating in a book of essays on civilian control. AMERICAN CIVIL–MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA xvii (Suzanne C. Nielson & Don M. Snider eds., 2009).

and it forms the foundation for current arguments that the president has unfettered constitutional authority to control the military and its activities. The theory of objective civilian control is fundamentally grounded in resistance to the Constitution, not its support or defense, and as a result, the actors responsible for civilian control of the military—both civilian and military—invariably find themselves searching for ways to evade or excuse constitutional structure and text. More than fifty years after Huntington, we are still questioning whether faithfulness to the Constitution is the enemy of military effectiveness and professionalism.

II. Where We Are Today

Huntington could not have anticipated how closely the military would come to resemble his vision of an institution distant and distinct from civilian America. Despite more than a decade of war—the longest engagement in our history—only one-half of 1% of the American public serves in the post-September 11 military.³⁹ One of the most active fields of military study today is the civil–military gap: the divide of experience and culture between the military and civilian America.⁴⁰ The end of the draft has left the military far less representative of civilian society, from the top to the bottom of the ranks.⁴¹ The system has banished the last remnants of Huntington’s subjective civilian control, a model dependent on a citizenry that engages military issues in the public square.

The effect of this civil–military shift has been profound. The all-volunteer military has created a military fantasy that is difficult to control or correct.⁴² Civilian society is less informed and less invested in issues involving the military,⁴³ and this imbalance of responsibility has in turn made the military more resentful of civilian intrusion and less open to civilian

39. PEW RESEARCH CTR., *THE MILITARY–CIVILIAN GAP: WAR AND SACRIFICE IN THE POST-9/11 ERA* 8 (2011).

40. *See, e.g.*, MAZUR, *supra* note 10, at 42–52 (explaining origin of the gap from a legal perspective); *id.* at 8–9 (surveying veterans and civilians); THOMAS E. RICKS, *MAKING THE CORPS* 23 (1997) (noting the gap while providing an account of Marine Corps basic training); *see also generally* SOLDIERS AND CIVILIANS: *THE CIVIL–MILITARY GAP AND AMERICAN NATIONAL SECURITY* (Peter D. Feaver & Richard H. Kohn eds., 2001) (compiling research based on a major study of the gap).

41. The shift from a draft-assisted to an all-volunteer force surpassed Huntington’s expectations. He assumed the enlisted ranks would remain representative of society while the professional officer corps grew more distant. *See* HUNTINGTON, *supra* note 7, at 38–39 (explaining that enlisted men would be “a cross section of the national population” while officers would be “a separate professional group living in a world of their own with few ties to outside society”).

42. *See generally* ANDREW J. BACEVICH, *THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR* (2005) (revealing common misunderstandings about the military that have fueled militarism and undermined national security).

43. *See* PEW RESEARCH CTR., *supra* note 39, at 64 (conducting a survey in which both civilians and veterans agreed that civilians do not understand the problems facing the military).

engagement.⁴⁴ We paper over this uneasy atmosphere with ostentatious displays of respect and admiration for the military, perhaps with the unspoken agreement that those who do not serve have not earned the right to speak with any substance. We fail to enforce boundaries between military and civilian influence and prerogative, partly because we no longer understand the military well enough to know where the line is and partly because we have been encouraged to believe that military competence exceeds civilian competence.⁴⁵ These developments have created the perfect storm of distorted civilian control.

The key question in *Separation of Powers* is whether military advice constrains the choices of civilian leaders in ways that undermine civilian control of the military. One assumption behind the question, of course, is that the very expression of military advice can constrain civilian choice because civilians find it uncomfortable or politically disadvantageous to make decisions that are inconsistent with that advice. The problem is magnified when the advice is open to public view in testimony before Congress or in defense of clients before military courts. This was the core of Huntington's complaint about separation of powers. If the Executive Branch had a monopoly on civilian control, we would not have these embarrassing revelations of disagreement between the Commander in Chief and his military subordinates.

Separation of Powers examines civilian control and separation of powers in the functional context of military lawyers who did not agree when Executive Branch civilians said the military could disregard statutory prohibitions on torture and abuse of prisoners.⁴⁶ The author of the infamous "torture memos," John Yoo of the Department of Justice's Office of Legal Counsel, fortified his legal analysis with the accusation that military lawyers undermined civilian control by revealing disagreement with their Commander in Chief in legislative or judicial settings.⁴⁷ According to Yoo,

44. See, e.g., *id.* at 3 (quoting the former chairman of the Joint Chiefs of Staff stating that the nation's civilians "do not know" the military and "do not comprehend the full weight of the burden we carry or the price we pay when we return home from battle").

45. See Maj. Gen. Charles J. Dunlap, Jr., Deputy Judge Advocate General, U.S. Air Force, *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 342 (1994) ("Rather than resisting military intrusion into civilian affairs, Americans turn to the armed forces ever more frequently to provide answers when conventional political methodologies fail."). Dunlap, recently retired, also wrote a satirical but deadly serious treatment of an American society that loves the military so much it abandons civilian control entirely. Maj. Gen. Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, PARAMETERS, Winter 1992–1993, at 2. Like George Orwell's *Nineteen Eighty-Four* probably was in 1984, Dunlap's article seems especially ominous today.

46. Pearlstein, *supra* note 3, at 803–04.

47. 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, 1832 (2007). But see Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil–Military Relations*, 50 S. TEX. L. REV. 617, 621 (2009) ("[W]hen Sulmasy

military lawyers tried to gain improper advantage by stepping outside the chain of command and encouraging division among constitutional principals.⁴⁸ His criticism evoked the common complaint that children gain an improper advantage by playing one parent against the other, but the parent-child ploy works only because each parent is reluctant to undercut the other's authority. In the case of the torture memos, the problem was not that the Executive Branch was reluctant to disagree publicly with Congress but that it was reluctant to disagree publicly with the military.⁴⁹ Its solution was to package and present "military" information in a way that seemed to support presidential preference.⁵⁰ Military lawyers were not the bad actors in this story of civilian control, nor did they execute "end runs" around the President. The bad actors were civilians who attempted to suppress information related to the military to create a veneer of military support for their policies.⁵¹

Commander in chief of the military does not mean *civilian* in chief of the various constitutional actors tasked with civilian control.⁵² This misguided reliance on the sanctity of the military chain of command despite constitutional structure to the contrary is the greatest flaw in the traditional political theory of civilian control. It has also become a central feature of

and Yoo refer to civilian control of the military, what they are really arguing for is politicization of the military by one branch of government.”)

48. Sulmasy & Yoo, *supra* note 47, at 1832.

49. See Pearlstein, *supra* note 3, at 819 (explaining that civilian elected officials capitulated to military preferences in an effort to avoid public disapproval).

50. *Id.*

51. Decisions about escalating the Vietnam War were similarly made on the basis of “contrived consensus” between civilians and their military advisors, and the military’s failure to object is now remembered as a devastating breach of professional obligation. See H.R. MCMASTER, DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM 154 (1997) (“[C]ontrived consensus between the president and his civilian and military advisers would permit planning for the Americanization of the war without full consideration of the potential costs and consequences.”); see also *id.* at 329 (“Rather than advice[,] [Secretary of Defense Robert] McNamara and [President Lyndon] Johnson extracted from the [Joint Chiefs] acquiescence and silent support for decisions already made.”).

52. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring) (“[T]he Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants.”). The word *commander* is best understood for its plain military meaning. See THE FEDERALIST NO. 69, at 417–18 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that the Commander in Chief acts only “as first General and admiral”). No one would contend that senior generals and admirals have discretion to disregard federal law as a function of their command authority, and so why should the “first” among them have any greater discretion? Constitutional scholars have typically not considered plain military meaning when construing the Commander in Chief Clause. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 770 (2008) (arguing that the Commander in Chief Clause “does not preclude” a recognition of substantive war powers vested in the President); David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 483 (2008) (concluding that the Commander in Chief Clause “tells us nothing about what the commander in chief power encompasses”).

civilian control in operation, because it offers a convenient justification for controlling information about the military. If the President can use commander-in-chief authority to bottle up conflicting advice within the chain of command, it will never become part of the public debate. A divided principal is therefore a safeguard against manufacture of an apparent military endorsement that hides actual military dissent, not a threat to civilian control. With separated powers, it is much more difficult to play “the military card” and succeed. Is it really a problem for civilian control—an undue military constraint—if the President is forced into a different policy choice because he cannot conceal the fact that his decision went against military advice? Is it bad for civilian control if civilian actors have the obligation to explain to the electorate or to other branches of government why they chose to act against military advice?

Public opinion about the value of torture in interrogation, for example, could be decidedly less positive⁵³ if civilians understood how strongly military professionals opposed it. Top military lawyers understood that torture and abuse of prisoners would undermine military effectiveness and be a colossal mistake. Decades of hard-won experience had taught the military that abusive conduct in interrogation hurts the war effort, puts our own service members at risk of retaliation, and most simply, does not work because it produces unreliable information.⁵⁴ When these senior officers objected to civilian intentions, they were excluded from a Department of Defense working group that later produced a report making no reference to military concerns.⁵⁵ It was the best of both worlds for the Executive Branch. It now had a defense-working-group report confirming its interrogation policy and dressed with the veneer of military input and consensus, even though the report reflected no actual military expertise and reached a conclusion contrary to what the military would have recommended. The same motivation has animated periodic attempts to require military lawyers to conform their legal advice to the opinions of civilian lawyers in the Department of Defense.⁵⁶ What gets lost is the fact that advice is no longer “advice” when someone can order what the advice should be, especially

53. See Pearlstein, *supra* note 3, at 856.

54. MAZUR, *supra* note 10, at 120–24; U.S. DEP’T OF THE ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS 5-21, 5-26 (2006).

55. S. COMM. ON ARMED SERVS., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xxi–xxii (Comm. Print 2008); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 179–81 (2007); Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). The legal opinions forming the basis for the Working Group Report were later withdrawn. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 142–43, 146 (2007).

56. SAVAGE, *supra* note 55, at 282–89; Pearlstein, *supra* note 3, at 801.

when the President is likely to then assure the American people that his decision was fully supported, as always, by the advice of commanders on the ground.⁵⁷

Is it the military that constrains presidential initiative, or it is information about the military that constrains presidential initiative? It is almost always the latter in our fractured system of civilian control. If civilians were not so squeamish about disagreeing publicly with military advice—they are, after all, in charge in a system based on civilian control—it would quickly lose its disproportionate influence. We would not be so concerned if dissenting military opinion entered public debate. If civilians were better at distinguishing between what is military expertise and what is not, we could more easily disregard military opinion that is little more than “I’m in the military, and I have an opinion.” We should not have relied so unthinkingly, for example, on ostensible military expertise regarding the need for “Don’t Ask, Don’t Tell” when a less obsequious approach would have revealed that the military had no expertise on the issue and disregarded the data it did have.⁵⁸ Conversely, if civilians were better at recognizing the proper sphere of military expertise, we would not shrink from fully airing that expertise even if some civilians found the information politically inconvenient. The opposition of military lawyers to the torture and abuse of prisoners was not a mere “policy” disagreement outside the military realm.⁵⁹ Military lawyers are military officers as well, and they understood how this misconduct would undermine military effectiveness. They also had an obligation to ensure that members of the military complied with law. If

57. An article published in a premier journal of military study, written by a professor at the Air Force Academy, argued that military officers have an obligation to shape their testimony to Congress in order to conceal any disagreement between military advice and presidential preference. Damon Coletta, *Courage in the Service of Virtue: The Case of General Shinseki’s Testimony Before the Iraq War*, 34 ARMED FORCES & SOC’Y 109 (2007). In loyalty to their Commander in Chief, Professor Coletta argued, the officers should help maintain an appearance that the president was following military advice even when he was not. *Id.* at 118–19. Coletta criticized testimony by Army Chief of Staff Eric Shinseki concerning the size of the force necessary to stabilize Iraq. “Shinseki’s testimony made it appear as if civilian leaders either dismissed what the military ‘knew’ or intentionally misled allies, not to mention Congress, about U.S. strategic objectives.” *Id.* at 116. As a matter of military professionalism and constitutional faithfulness, however, Coletta could not be more wrong. See Corn & Jensen, *supra* note 8, at 594 (recognizing that the military’s professional obligation extends to the government as a whole, not only to the Commander in Chief, and that “this duty cannot be compromised in the interest of placating one branch in favor of the other”).

58. Rear Admiral John Hutson, a member of the 1993 military working group that recommended a ban on gay service members, later said this about the process: “And the decisions were based on nothing. It wasn’t empirical, it wasn’t studied, it was completely visceral, intuitive. . . . It was ridiculous, it was all by the seat of our pants.” In the end, “we were all opposed to it because we’re all opposed to it.” NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 122–23 (2009).

59. *Contra* Sulmasy and Yoo, *supra* note 47, at 1831–33 (referring to military concerns about the legality of interrogation methods as mere “policy preferences”).

civilians saw the military as part of our constitutional ideal, not apart from it, we would worry much less that we were undermining civilian control by allowing dissenting military opinion to be heard in all three branches of government.

III. Conclusion

What does it mean to have strong civilian control? The answer can be found in a strict principle of accountability. Professor Pearlstein is exactly right when she concludes that our constitutional separation of powers was intended to enhance accountability in how we manage the military by expanding the circumstances in which information necessary for representative decision making could emerge.⁶⁰ There is no constitutional accountability for civilian control without candid military advice that is transparent and properly limited to matters of professional military expertise. Huntington was wrong in thinking that separation of powers thrusts the military into politics. A system of separated powers does not make the military more political, but it does ensure that political decisions about the military will be more public.

Civilian control does not depend on building an appealing veneer of consensus between military advice and civilian preference. In fact, when civilians package military misinformation for political advantage, or when military leaders look the other way when civilians misrepresent military advice, they weaken civilian control and undermine military professionalism. Civilian control does depend on a politically neutral military, but the Constitution itself provides the necessary framework for neutrality. Civilian control is strong when there is robust, even messy, sharing of civilian constitutional authority among the Executive, Legislative, and Judicial Branches of government. Civilian control is strong when it generates, not suppresses, candid advice on military subjects. Most importantly, civilian control is strong when civilians can directly engage and openly disagree with military advice, if necessary, without the exchange being seen as embarrassing, rude, or unpatriotic. This is the vision of civilian control that keeps the military an integral part of our constitutional design.

60. Pearlstein, *supra* note 3, at 848–49.