

LAWYERS ON HORSEBACK? THOUGHTS ON JUDGE
ADVOCATES AND CIVIL-MILITARY RELATIONS

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Uniformed lawyers—judge advocates—are uniquely situated at the heart of the American civil-military relationship. A recent article published in this law review argued that this placement has hindered military operations and disrupted civilian control over the military; left unaddressed, it will negatively affect the nation’s ability to fight and win future wars.

This Essay takes issue with such assertions. In fact, judge advocates foster appropriate civil-military relations. They participate in the development and application of policy in a manner that enhances civilian control over military affairs. Moreover, judge advocates are singularly well-placed to ensure that civilian leadership preferences are fully understood and followed by the military on the battlefield. The Essay concludes by forcefully rejecting any suggestion that judge advocates pose an obstacle to operational success, charging that those who make such claims reveal their lack of operational experience.

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INTRODUCTION

That the United States fields the most powerful military in the world is indisputable. With over one and a half million personnel under arms, it is nearly the size of the combined forces of the twenty-seven European Union members; only China has a larger military.¹ The nation dominates military investment to an even greater extent. In 2006, global military expenditures reached \$1.204 trillion. The United States accounted for 46 percent of the total, followed by France, Japan, China, and the U.K. at roughly 4 to 5 percent each.² Such investment translates directly into military wherewithal. The United States flies the two most powerful air forces in the world, the U.S. Air Force and U.S. Navy aviation. It fields Army and Marine equipment so technologically advanced that it is sometimes difficult for U.S. ground forces to operate with lesser-equipped coalition partners. And any one of the five U.S. fleets can place more combat power afloat than the entire navies of most countries.

Beyond tangible strengths, various intangible characteristics further enhance the potency of the U.S. armed forces. For instance, American armed forces are well educated and highly sophisticated, as symbolized by the fact that the U.S. commander in Iraq, General David H. Petraeus, earned a Ph.D. from Princeton under Army sponsorship. Thousands of officers attend graduate programs in the United States and abroad, while the various U.S. military academies, professional development programs, and war colleges offer renowned educational programs. Its reputation within American society further enhances its influence; indeed, respect for military officers exceeds that of most other professions engaged in public service.³

1. See INT'L INST. FOR STRATEGIC STUDIES, *THE MILITARY BALANCE 2007* (James Hackett ed., 2007).

2. STOCKHOLM INT'L PEACE RESEARCH INST., *RECENT TRENDS IN MILITARY EXPENDITURE (2007)*, http://www.sipri.org/contents/milap/milex/mex_trends.html.

3. A December 2007 Gallup poll on American public perceptions of various professions illustrates the degree of respect for the armed forces. Sixty-five percent of respondents rated military officers as "very high" or "high" when asked to assess honesty and ethical standards. Other professions ranked lower: clergy and policemen—53; judges—46; local office holders—20; State office holders—12; lawyers—15; and Congressmen—9. GALLUP, *HONESTY/ETHICS IN GOVERNMENT (2007)*, <http://www.gallup.com/poll/1654/Honesty-Ethics-Professions.aspx>.

But power tempts abuse. Therefore, democratic organizational theory has long held that civilian institutions and personnel must exercise ultimate authority over the military, lest a “man on horseback” wrest control of the State from the citizenry.⁴ Assuming the axiom’s validity in the American political-military context, the power, sophistication, and influence of the U.S. armed forces argue for robust civilian control safeguards. Some observers have expressed concern that, at least in certain regards, such control may be in jeopardy today.

Of particular note in this regard is Coast Guard Commander Glenn Sulmasy and Professor John Yoo’s provocative article, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, published in this law review.⁵ Sulmasy and Yoo adopt a rational choice model in lieu of Samuel Huntington’s classic approach to understanding civil-military relations.⁶ Given the sometimes troubled history of relations between the military and its civilian masters following the Second World War, and particularly since the demise of the Cold War, there is much to support their position. Rational choice theories do represent a powerful tool for deconstructing incidents in which the military, or more precisely individual military officers, appear to cross accepted and acceptable boundaries of involvement in the civilian policy process.

Their application of the model to the actions of judge advocates (colloquially known as JAGs), however, is problematic. True, judge advocates are uniquely placed in the American armed forces. Their mere presence ensures at least some level of influence over military activities. Perhaps more importantly, in a battlefield environment thick with media and nongovernmental organization scrutiny, every tactical event risks strategic consequences. Such transparency heightens the influence of legal advisers over choices made by commanders because the mere perception of an operation as unlawful (whether true or not) can hinder future operations, place troops at risk, and adversely affect the professional advancement of those involved. As never before, judge advocates are valued, and their advice heeded.

4. S.E. FINER, *THE MAN ON HORSEBACK* (2d ed., Westview Press 1988) (1962). This term refers to a military leader involved in politics, often a military dictator.

5. See generally Glenn Sulmasy & John C. Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 *UCLA L. REV.* 1815 (2007).

6. *Id.* at 1826. They suggest that Huntington “has trouble explaining the current state of disruption in civilian-military relations” However, Huntington pays significant regard to certain concerns raised by Sulmasy and Yoo, especially military interaction with Congress. In particular, he focuses on separation of powers. See SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 177, 191 (1959).

Sulmasy and Yoo, however, misunderstand the roles uniformed lawyers presently play in the U.S. system of government and in operational decisionmaking. It is unsurprising, therefore, that their thoughtful article has generated great attention across the judge advocate community. This Essay argues that far from distorting the appropriate balance between the military and its civilian masters, judge advocates foster it, especially vis-à-vis operational matters. In doing so, it makes no effort to unravel the complicated constitutional issues inherent within civilian control over the military. Rather, this Essay operationalizes the concept by explaining how judge advocates do, and should, participate in the development and application of policy and military operations in a manner that enhances the delicate equilibrium of civilian control over military affairs.

I. CIVILIAN CONTROL OVER THE MILITARY IN THE UNITED STATES

Civilian control over the military is an established tenet of modern American democracy.⁷ As Samuel Huntington has noted, “[t]he military ethic . . . holds that war is the instrument of politics, that the military are the servants of the statesman, and that civilian control is essential to military professionalism.”⁸ Two threads run through the premise that civilian supremacy strengthens democratic governance. The first assumes that only liberal democracies can realize majority values and desires while protecting fragile minority interests. Elected officials, as well as those they select to administer the government, best express such values, desires, and interests. The armed forces are ill-suited to do so, if only because they do not typify the citizenry they serve. Despite the respect enjoyed by the military, some commentators suggest that societal values and those of the military diverge markedly. In fact, a growing fissure may be developing between them.⁹

7. *Greer v. Spock*, 424 U.S. 828, 839 (1976) (noting the existence of “the American constitutional tradition of a politically neutral military establishment under civilian control”). As an example, U.S. DEP’T OF DEF., DIRECTIVE 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY (2004), limits the political activities of active-duty service members.

8. HUNTINGTON, *supra* note 6, at 79.

9. Frank Hoffman, *Bridging the Civil-Military Gap*, ARMED FORCES J., Dec. 2007, at 18. The Supreme Court has also recognized that “the military is, by necessity, a specialized society separate from civilian society.” *Parker v. Levy*, 417 U.S. 733, 743 (1974).

The second trend is more direct, and more determinative. The military enjoys a near monopoly over the instruments of hard power¹⁰ in the United States, and, as noted, said instruments are extraordinarily impressive. Mature democratic structures take account of both the likelihood and the severity of potential threats. Despite the improbability of direct military intervention by the U.S. armed forces in domestic affairs, the consequences of any forceful intercession would be catastrophic. Thus, military influence on policy processes must be carefully monitored and managed.¹¹

So central is civil control over military affairs in the American political architecture that the Constitution enshrines the notion. The constitutional fulcrum lies in a division of authority between the branches of government.¹² It is this distribution, not “intraexecutive branch relations,”¹³ that constitutes the sine qua non of U.S. civil-military relations.

The instruments of civilian control are varied. Constitutionally, “[t]he President shall be Commander-in-Chief of the Army and Navy of the United States”¹⁴ For instance, he enjoys the constitutional authority to appoint officers within the military, albeit subject to the advice and consent of the Senate.¹⁵ The congressional approval caveat illustrates the cooperation between branches that the American system of civilian control over the military often necessitates. For its part, Congress enjoys, inter alia,

10. JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 5 (2004) (asserting that hard power refers primarily to military or economic instruments of national power).

11. For provocative articles on the subject, see Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, *PARAMETERS: U.S. ARMY WAR C. Q.*, Winter 1992–1993, at 2, and Thomas E. Ricks, *Colonel Dunlap’s Coup*, *ATLANTIC MONTHLY*, Jan. 1993, at 23.

12. *Ex Parte Milligan*, 71 U.S. 2, 88 (1866) (“The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.”), *quoted in Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773–74 (2006).

13. Sulmasy & Yoo, *supra* note 5, at 1817. For an article refuting the notion that civil-military relations are an intraexecutive branch matter, see Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 *HOUS. L. REV.* 553 (2007). Corn and Jensen argue that unlike executive agencies such as the State Department or the Department of Agriculture, the military is a national agency with responsibilities to both the executive branch and Congress. *Id.* at 557. Huntington also recognized that civilian control is not purely hierarchal: “Civilian control would be maximized if the military were limited in scope and relegated to a subordinate position in a pyramid of authority culminating in a single civilian head. The military clauses of the Constitution, however, provide for almost exactly the opposite.” HUNTINGTON, *supra* note 6, at 163.

14. U.S. CONST. art. II, § 2, cl. 1. The Framers did not enumerate the President’s powers under the Commander-in-Chief’s authority.

15. U.S. CONST. art. II, § 2, cl. 2.

specific powers “to declare War,” “raise and support Armies,” “maintain a Navy,” “make Rules for the Government and Regulation of the land and naval Forces,” and “make all Laws which shall be necessary and proper for carrying into Execution” these powers.¹⁶ Indispensable to the constitutional balance of civilian power over the military is the legislative branch’s authority to oversee government operations through investigation and information gathering.¹⁷ Of course, Congress’ most potent tool for influencing military affairs resides in the power of the purse, namely its control over federal appropriations.¹⁸ Finally, the judiciary ensures the system operates within the constitutional schema.¹⁹

Thus, the Constitution compels the three branches of government to delicately balance cooperation and conflict in order to ensure democratic civilian control of the military.²⁰ This being so, when considering issues of civil-military relations, the crux of the matter is often less one of civilian control of the military than it is separation of powers.²¹ This distribution of power has at times proven less than fully settled, particularly during periods of armed conflict.²² For instance, both Presidents Lincoln and

16. U.S. CONST. art. I, § 8, cls. 11, 12, 13, 14, 18.

17. The Supreme Court has opined that “the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.” *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). “A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.” *Id.* at 175; see also, Sam Nunn, *The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy*, 21 GA. L. REV. 17, 18 (1986).

18. U.S. CONST. art. I, § 8; see also John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 295 (1996).

19. The Court has traditionally been deferential to the political branches of government in the area of military affairs. See *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981) (“The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court.” (citing *Parker v. Levy*, 417 U.S. 733, 756, 758 (1974))); see also *Brown v. Glines*, 444 U.S. 348 (1980); *Middendorf v. Henry*, 425 U.S. 25 (1976); *Greer v. Spock*, 424 U.S. 828, 837–38 (1976); *Burns v. Wilson*, 346 U.S. 137 (1953); *United States v. MacIntosh*, 283 U.S. 605, 622 (1931). In *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), the Court noted that “[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.”

20. In *Bowsher v. Synar*, 478 U.S. 714 (1986), the Court acknowledged “[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others.” *Id.* at 725 (quoting *Humphrey’s Executor v. U.S.*, 295 U.S. 602, 629–30 (1935)).

21. See Corn & Jensen, *supra* note 13, at 556–57.

22. In part, this lack of certainty is because “presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Roosevelt capitalized on the ill-defined allocation of power over the military to “justify an extraordinary broad range of nonmilitary presidential actions largely legislative in nature.”²³ But most of the time, this system functions well in the development and implementation of military policy.²⁴

Civilian control over the military has also been institutionalized in the organization of the Department of Defense (DoD). The President and the Secretary of Defense occupy the pinnacle of the military chain of command and exercise operational authority and control over the armed forces.²⁵ Civilians serve as Secretaries of each of the military services and fill many other senior policy positions. The President nominates these officials, along with the Chairman of the Joint Chiefs of Staff, service chiefs, and combatant commanders, among others.²⁶ The Senate then confirms them. Further, once the President approves the results of a promotion board, almost all promotions of military officers still require the consent of the Senate.²⁷

Civilian control similarly extends to the legal community that advises the military. The President appoints the civilian DoD General Counsel and the General Counsels of the various services with the advice and consent of the Senate.²⁸ He also appoints the Judge Advocates General of

23. HUNTINGTON, *supra* note 6, at 179. Lincoln incarcerated antiwar advocates “without charge or trial,” while Roosevelt “used a military commission with few procedural niceties.” JACK GOLDSMITH, *THE TERROR PRESIDENCY* 116 (2007).

24. For example, the President and Congress often agree upon the organization, composition, and size of the armed forces, and equip them, determine where they will be based, and select military leaders without major controversy (although such matters occasionally prove highly contentious).

25. JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, at II-4 (2007) [hereinafter JOINT PUB. 1].

26. A “combatant commander” commands “one of the unified or specified combatant commands established by the President.” JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 97 (2007) [hereinafter JOINT PUB. 1-02]. A combatant command has a “broad continuing mission” and has been “established and so designated by the President, through the Secretary of Defense and with the advice and assistance of the Chairman of the Joint Chiefs of Staff.” *Id.* at 96. They have either geographic or functional responsibilities. Currently, the regional combatant commands are the Africa Command, Central Command (Middle East), European Command, Pacific Command, Northern Command (United States), and Southern Command (Central and South America). The functional commands are the Joint Forces Command, Special Operations Command, Strategic Command, and Transportation Command. *Id.* at B-3.

27. The exceptions to this general requirement include first lieutenants and captains in the Army, Air Force, and Marine Corps and their equivalents in the Navy, lieutenants (junior grade), and lieutenants. 10 U.S.C. § 624(c) (2000).

28. 10 U.S.C. §§ 140, 3019, 5019, 8019.

the Army, Navy, and Air Force, each of whom was originally recommended by their civilian service secretary.²⁹

Civilian control is well-entrenched in the prerogatives and processes regarding law and the military. The Justice Department serves as the lead agency in expressing U.S. legal policy, even in military matters.³⁰ The State Department negotiates the treaties that govern warfare. The Uniform Code of Military Justice (UCMJ) is federal legislation passed by Congress³¹ and the Manual for Courts-Martial (MCM) results, in great part, from legislation and Executive Orders.³² The highest military appellate court, the Court of Appeals for the Armed Forces, consists exclusively of civilian judges,³³ and appeal from that court lies to the Supreme Court.³⁴

The system and structure appear conceptually sound. Has the reality shifted in the aftermath of the 9/11 terrorist attacks, however? In particular, has the influence of judge advocates so grown in the face of two major wars and a transnational conflict with terrorists that the extant system of civilian control over the military is threatened?³⁵ This Essay argues that the sky is not falling. However, before turning to an analysis of the role of judge advocates in the system, it is necessary to dispense with two apparent red herrings offered by Commander Sulmasy and Professor Yoo.

29. 10 U.S.C. §§ 3037, 5148, 8037 (2000 & Supp. 2006). 10 U.S.C. § 5046 establishes the position of Staff Judge Advocate to the Commandant of the Marine Corps, to which a judge advocate is selected by the Secretary of the Navy for recommendation to the President for appointment.

30. 28 U.S.C. §§ 511–513. The Attorney General has, in turn, delegated responsibility for drafting formal Attorney General opinions and preparing opinions to the Office of Legal Counsel (OLC) under 28 U.S.C. § 510. In international affairs, OLC, *inter alia*, provides advice on “the legal aspects of treaties and other international agreements.” 28 C.F.R. § 0.25(e) (2006).

31. 10 U.S.C. §§ 801–946.

32. The 2008 edition of the Manual for Courts-Martial (MCM) incorporates the 2005 edition, amendments made by the President in Executive Orders, and also amendments to the Uniform Code of Military Justice (UCMJ) made by the National Defense Authorization Acts for Fiscal Years 2006 and 2007. JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES 1 (2008).

33. 10 U.S.C. § 942.

34. 10 U.S.C. § 867a.

35. Clearly, government lawyers have played an increasingly significant role in general. As Professor Jack Goldsmith, who experienced it firsthand as a lawyer in the Department of Defense’s (DoD) General Counsel’s Office and then later as the head of the Department of Justice’s Office of Legal Counsel, has noted “never in the history of the United States have lawyers had such extraordinary influence over war policy . . . [L]awyers weren’t necessarily expert on al Qaeda, or Islamic fundamentalism, or intelligence, or international diplomacy . . . [b]ut the lawyers—especially White House and Justice Department lawyers—seemed to ‘own’ issues that had profound national security and political and diplomatic consequences. They . . . dominated discussions on detention, military commissions, interrogation, GTMO, and many other controversial terrorism policies.” GOLDSMITH, *supra* note 23, at 129–30.

II. RED HERRINGS

A. Defense Attorneys and Their Ethical Obligations

Professor Yoo and Commander Sulmasy charge that “JAGs representing enemy combatants detained at Guantanamo Bay apparently met with members of the U.S. House of Representatives and the U.S. Senate to encourage them to block President Bush’s order establishing military commissions.”³⁶ In doing so, they demonstrated that “one way for JAGs or other military leaders to resist policies with which they disagree is to attempt to increase Congress’s role.”³⁷ Similarly, Yoo and Sulmasy cite the fact that “JAG attorneys representing enemy combatants subsequently challenged the legality of their clients’ detention in federal court” as evidence that “[m]ilitary officers with different policy preferences sought to introduce the judiciary as another actor to disrupt the unified decisionmaking of the principal.”³⁸

Simply put, the use of defense counsel activities to illustrate resistance to civilian control over military affairs flies in the face of the adversarial American criminal law system.³⁹ It is irrelevant whether the path a defense counsel takes in representing a client happens to coincide with his or her policy preferences. Much of the time it diverges widely. Rather, judge advocates, including defense counsel, are licensed attorneys obligated to abide by their state’s applicable canons of ethics governing professional conduct.⁴⁰ Virtually all such codes mandate the “zealous” representation of one’s client within the bounds of the law.⁴¹ Moreover, defendants in the United States are constitutionally entitled to effective assistance of counsel. As emphasized by the Supreme Court in *Penon v. Ohio*,⁴² “[t]he paramount importance of vigorous representation follows from the nature of our adversarial system of justice.”⁴³

36. Sulmasy & Yoo, *supra* note 5, at 1832.

37. *Id.*

38. *Id.* at 1833.

39. It might be argued that the trial of detainees in the war on terror lies outside the U.S. criminal justice system such that defense counsel should give greater deference to governmental policy preferences relative to the interests of their clients. Such an assertion, however, would be a direct affront to American notions of justice.

40. U.S. DEP’T OF THE ARMY, ARMY REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE 10 (1996).

41. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1 (1983).

42. 488 U.S. 75 (1988).

43. 488 U.S. at 84; *see also* United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). The right to effective assistance of counsel is found in U.S. CONST. amend. VI. The professional obligations of the attorney are distinct from the rights to which a detainee is entitled. A detainee may enforce only the latter in court, although the former may inform the substantive content of his or her rights.

Military regulations provide that a judge advocate assigned to represent an individual forms an attorney-client relationship, such that neither “the lawyer’s personal interests . . . nor the interests of third persons should affect loyalty to the individual client.”⁴⁴ No cogent basis exists to suggest the obligation diminishes when representing detainees. On the contrary, it would constitute professional misconduct for a judge advocate performing such duties to place interests other than his client’s at the forefront. It would similarly comprise professional misconduct for those in the defense attorney’s chain of command to attempt to limit his or her zealous representation.⁴⁵

No prohibition exists that would take the type of activities to which Sulmasy and Yoo object outside the scope of zealous representation.⁴⁶ Administration policy preferences simply have no effect on an attorney’s ethical obligations when acting as a defense counsel. Thus, the instances cited were hardly attempts to influence policy as understood in rational-choice theory; instead they were attempts to influence policy in the professional responsibility context of zealous representation of clients.

B. Conflict Between Government Lawyers

The second red herring presupposes a systemic conflict between uniformed and civilian lawyers.⁴⁷ For example, Sulmasy and Yoo note:

In February 2002, after extensive debate between civilian and military leaders, President Bush decided that the Geneva Conventions did not apply to armed conflict with al Qaeda, and that the United States would not extend prisoner of war (POW) status to al Qaeda’s Taliban allies. According to media reports, senior officers of the Judge Advocates General’s (JAG) Corps opposed the decision and turned to human rights groups to challenge the decision in court.⁴⁸

In fact, the disagreement among government lawyers (whether uniformed or not) over many of the Administration’s legal determinations regarding the global war on terror was more multifarious than a simplistic civilian-military dichotomy might suggest. Two examples illustrate the complexity.

44. U.S. DEPT OF THE ARMY, ARMY REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS 26 (1992) [hereinafter AR 27-26].

45. *Id.* at 30; *see also id.* at 26.

46. As is the case, for instance, with the release of exculpatory, yet classified information.

47. Commander Sulmasy and Professor Yoo simply assume disagreement exists. *See, e.g.,* Sulmasy & Yoo, *supra* note 5, at 1818 (“Part III discusses this model in the context of the role of military lawyers in the War on Terror, in particular by asking why civilian and military officers have such different policy preferences.”).

48. *Id.* at 1819 (citations omitted).

Consider the issue of Taliban and al Qaeda entitlement to prisoner of war status.⁴⁹ General consensus existed within the U.S. government's legal community that neither al Qaeda nor Taliban fighters qualified for prisoner of war status.⁵⁰ However, a heated debate apparently took place between civilian lawyers at the Departments of Justice, Defense, and State regarding the legal basis for the conclusion, with those at the Office of the Vice President and the White House Counsel's Office siding with the Office of Legal Counsel at Justice (DOJ-OLC).⁵¹

The Justice Department attorneys claimed "the President has authority to determine to suspend GPW [Geneva Conventions Relative to the Treatment of Prisoners of War] as between the U.S. and Afghanistan based on a conclusion that Afghanistan is a failed state."⁵² The Legal Advisor to the Secretary of State disagreed.⁵³ So contentious was the dispute that White House Counsel Alberto Gonzales informed the President that "OLC's interpretation of this legal issue is definitive. The Attorney General is charged by statute with interpreting the law for the Executive Branch He has, in turn, delegated this role to OLC."⁵⁴ Responding the following day, the Secretary of State argued that the "OLC interpretation does not preclude the President from reaching a different conclusion," "the OLC opinion is likely to be rejected by foreign governments" and "OLC views are not definitive on the factual questions which are central to its legal opinions."⁵⁵ There is no evidence that the President's eventual decision to accept the applicability of the Geneva Conventions to the conflict was

49. See Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

50. Memorandum From U.S. Dep't of State Legal Advisor William H. Taft IV to Counsel to the President Alberto Gonzales Regarding Comments on Your Paper on the Geneva Convention (Feb. 2, 2002) [hereinafter Taft Memo], in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 129, 133 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *TORTURE PAPERS*].

51. GOLDSMITH, *supra* note 23, at 113.

52. Taft Memo, *supra* note 50, at 131. This statement accurately summarizes the DOJ position as articulated in Memorandum From Assistant Attorney General Jay S. Bybee to Counsel to the President Alberto Gonzales and Gen. Counsel of the Dep't of Def. William J. Haynes II Regarding Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), in *TORTURE PAPERS*, *supra* note 50, at 81, 81 [hereinafter Bybee Status Memo].

53. Memorandum From Counsel to the President Alberto Gonzales to the President regarding Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict With al Qaeda and the Taliban (Jan. 25, 2002), in *TORTURE PAPERS*, *supra* note 50, at 118, 119 [hereinafter Gonzales Memo].

54. *Id.*

55. Memorandum from Sec'y of State Colin L. Powell to Counsel to the President Alberto Gonzales Regarding Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), in *TORTURE PAPERS*, *supra* note 50, at 122, 124 [hereinafter Powell Memo].

unduly influenced by uniformed lawyers. Rather, the dispute was primarily interagency and between civilian attorneys.

Or consider the issue of interrogation techniques. In an August 2002 memorandum issued by the Department of Justice known colloquially as the “Bybee Memo,”⁵⁶ the Office of Legal Counsel opined, in part, that interrogation techniques must cause severe pain “of an intensity akin to that which accompanies serious physical injury such as death or organ failure” before rising to the level of torture.⁵⁷ Although many uniformed lawyers responded very negatively to the OLC’s legal position,⁵⁸ civilian government lawyers reacted just as vehemently. For instance, Navy General Counsel Alberto Mora, a Bush administration political appointee, warned DoD General Counsel, William Haynes, that the interrogation policy could “threaten Secretary Rumsfeld’s tenure and could even damage the Presidency.”⁵⁹ For Mora, some of the OLC legal assertions were “deeply flawed”⁶⁰ and “profoundly in error.”⁶¹ He was not alone. In a December 2004 memorandum replacing the Bybee Memo, OLC itself noted:

Questions have since been raised, both by this Office and by others, about the appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that “severe” pain under the statute was limited to pain “equivalent

56. Memorandum From Assistant Attorney General Jay S. Bybee to Counsel to the President Alberto Gonzales Regarding Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (2002), in *TORTURE PAPERS*, *supra* note 50, at 172, 172 [hereinafter Bybee Interrogation Memo]. Since the head of DOJ-OLC, Jay Bybee, “had little expertise in war-related issues,” he “largely delegated OLC’s war-on-terrorism responsibilities to [John] Yoo.” GOLDSMITH, *supra* note 23, at 23.

57. Bybee Interrogation Memo, *supra* note 56, at 214. The memorandum also dealt with the President’s Commander-in-Chief power and defenses to avoid the potential liability of those involved under 18 U.S.C. §§ 2340–2340A (2000). *See id.* at 173.

58. Memoranda From Air Force Deputy Judge Advocate General Major General Jack L. Rives, Navy Judge Advocate General Rear Admiral Michael F. Lohr, Army Judge Advocate General Major General Thomas J. Romig, and Staff Judge Advocate to the Commandant of the Marine Corps Brigadier General Kevin M. Sandkuhler to the General Counsel of the Air Force Mary Walker Regarding Recommendations of the Working Group to Assess the Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Feb. to Mar. 2003), in *THE TORTURE DEBATE IN AMERICA* 377–91 (Karen J. Greenberg ed., 2005).

59. Memorandum for Inspector General, Department of the Navy, The General Counsel of the Navy, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues 13 (Jul. 7, 2004), available at http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf.

60. *Id.* at 19.

61. *Id.* at 17.

in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”⁶²

In fairness, most of the legal controversies emerging from the global war on terrorism were (and remain) less about conflicts between uniformed and civilian government attorneys than between the civilians involved. While judge advocates may have participated in the sundry discussions, they certainly did not dominate them such that they supplanted their civilian counterparts. Sulmasy and Yoo have misidentified the true contenders in such disputes.

III. THE ROLE OF JUDGE ADVOCATES

Red herrings aside, Commander Sulmasy and Professor Yoo are concerned lest judge advocates skew policy and operational choices. Ultimately, the question is the appropriate role of uniformed attorneys. The notion of the need to exert greater control over the judge advocate community is hardly novel.⁶³ It is a fair question in a system of governance adhering strictly to precepts of civilian control over the military. In Sulmasy and Yoo’s view:

The growth of the role of JAGs has been remarkable in the past thirty years, even more so in the past decade. It has essentially gone unregulated Civilian leaders should remain aware that the growth in JAG influence can have a detrimental impact on the nation’s ability to win wars

JAGs, almost as surprised as others with their newfound prominence, must be mindful of the effects their advice can have on effective combat operations. Their enthusiasm in providing advice on operational matters will be viewed by some as challenges to civilian control of the Armed Forces. Policy concerns regarding operations or political decisions regarding the conduct of war cannot be officially challenged by JAGs.⁶⁴

62. Memorandum Opinion for the Deputy Attorney General, Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

63. See, e.g., Kurt A. Johnson, *Military Department General Counsel as “Chief Legal Officers”: Impact on Delivery of Impartial Legal Advice at Headquarters and in the Field*, 139 MIL. L. REV. 1 (1993) (discussing “an unprecedented effort by forces within the United States Department of Defense (DoD) to designate the civilian general counsel of the military departments as the ‘chief legal officers’ of the respective departments”). For a recent example of this tendency, see Charlie Savage, *Control Sought on Military Lawyers Bush Wants Power Over Promotions*, BOSTON GLOBE, Dec. 15, 2007, at 1A.

64. Sulmasy & Yoo, *supra* note 5, at 1844–45 (citations omitted).

In fact, the sky is not falling. Such concerns evidence a significant misunderstanding of the roles judge advocates play in theory and practice. Moreover, these concerns reflect a lack of appreciation of the functions of judge advocates on the modern battlefield. In order to remedy the confusion such comments might engender, particularly among those unfamiliar with the activities of uniformed lawyers, it is useful to briefly survey the relationships between judge advocates and both Congress and commanders.

A. Judge Advocates and Congress

Samuel Huntington has argued that “[t]he real constitutional stumbling block to objective civilian control [of the military] is the separation of powers. This is the essence of the American system of government, and its impact is felt throughout the armed forces.”⁶⁵ For him, “[t]he separation of powers is . . . an irresistible force, drawing military leaders into political conflicts.”⁶⁶

Analogously, Commander Sulmasy and Professor Yoo decry contacts between the judge advocate community and Congress.⁶⁷ Applying rational-choice theory, but sounding Huntingtonian in the process, they suggest that judge advocates have exploited the Constitutional separation of powers in military matters in the hope of “block[ing] executive branch policies” with which they disagreed.⁶⁸ In particular, Sulmasy and Yoo point to Congressional testimony by senior judge advocates in 2006 regarding the draft Military Commissions Act of 2006.⁶⁹

Unquestionably, military officers owe their fidelity to the President in his capacity as Commander-in-Chief. As a matter of law, it is a crime for a commissioned officer to speak contemptuously about the President.⁷⁰ That

65. HUNTINGTON, *supra* note 6, at 191.

66. *Id.* at 177.

67. Sulmasy & Yoo, *supra* note 5, at 1832.

68. *Id.*

69. Pub. L. 109-366, 120 Stat. 2600 (codified at 10 U.S.C.A. §§948a–950w (West Supp. 2007), 42 U.S.C.A. § 2000dd-0 (West Supp. 2007)); Sulmasy & Yoo, *supra* note 5; *id.* at 1820 & n.25 (citing Kate Zernike, *Lawyers and G.O.P. Chiefs Resist Proposal on Tribunal*, N.Y. TIMES, Sept. 8, 2006, at A1.). This article refers to the testimony that be found at *Standards of Military Commissions and Tribunals: Hearing Before the H. Comm. on Armed Servs.*, 109th Cong. (2006), available at <http://armedservices.house.gov/comdocs/schedules/2006.htm>.

70. 10 U.S.C. § 888 (2000 & Supp. 2006) (also prohibiting such speech against the “Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present”).

being so, what responsibilities do members of the armed forces have when called before Congress to testify on matters within its legislative competency?

If civilian control of the military comprised purely intraexecutive branch relations, then perhaps one could fashion an argument that military officers testifying before Congress should advocate their civilian masters' position, rather than offer independent analysis or viewpoints.⁷¹ Yet, as noted, constitutionally the branches of government share power over the military, an integral aspect of the checks and balances system that characterizes the American political scheme. If this system is to be effective, both Congress and the Executive Branch must enjoy access to relevant military information and advice provided by those best situated to offer it: typically uniformed officers.⁷² Obviously, such advice must be balanced, measured, and objective, lest the very dangers of which Sulmasy and Yoo caution be realized.⁷³

In reality, there is de minimus practical risk of inappropriate involvement by judge advocates in contentious political issues because very few of them ever have contact with, or influence on, the national policy process. Usually, only the Judge Advocates Generals of the Army, Navy, Air Force, and the Staff Judge Advocate to the Commandant of the Marine Corps, as well as a very few select members of their staffs, are involved in

71. Typically, military officers offer the Department of Defense position when questioned unless asked for their independent analysis. The classic example was the testimony in February 2003 of then Army Chief of Staff General Eric K. Shinseki before the Senate Armed Services Committee regarding troop requirements in the pending conflict with Iraq. It was only after Senator Warner, the Chairman of the Senate Armed Services Committee, invited the "honest and forthright observations of the service chiefs, professional as well as personal" that Shinseki offered an estimate greater than that suggested in the Department of Defense position (as determined by Secretary of Defense Rumsfeld). *Hearing on the DOD Budget Before the S. Armed Serv. Comm.*, 108th Cong. 2, 14 (2003) (emphasis added). His testimony created a controversy that eventually led to Shinseki and the Secretary of the Army leaving government service. See Michael R. Gordon, *Criticizing an Agent of Change as Failing to Adapt*, N.Y. TIMES, Apr. 21, 2006, at A18.

72. As Huntington has noted: "If Congress was to play its part in determining national military policy, it required the same independent professional advice which the President received." HUNTINGTON, *supra* note 6, at 415; see also *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

73. The dangers of excess are significant, a risk highlighted by Huntington:
How strong should be the doubts and disagreements of a chief with the President's policy before he takes the initiative in criticizing it before Congress? . . . If the military chief accepts and defends the President's policies, he is subordinating his own professional judgment, denying to Congress the advice to which it is constitutionally entitled, and becoming the political defender of an administration policy. If the military chief expresses his professional opinions to Congress, he is publicly criticizing his Commander in Chief and furnishing useful ammunition to his political enemies. There is no easy way out of this dilemma.

HUNTINGTON, *supra* note 6, at 416–17.

the formulation of national policies. A typical example is that cited by Sulmasy and Yoo, the hearings on the Military Commissions Act.

In November 2001, President Bush, acting pursuant to his authority as Commander-in-Chief, issued the order to establish military commissions.⁷⁴ One would have expected heavy judge advocate involvement, since detainees were held by the military, were to be charged with war crimes, and judge advocates would be responsible for the ensuing trials. Surprisingly, though, judge advocate input was quite limited. For instance, the Judge Advocate General of the Army, Major General Thomas Romig, only learned of the order five days before its promulgation; Army suggestions on how to revise it fell on deaf ears.⁷⁵

The failure to include uniformed lawyers in the process proved ill-advised. Following the Supreme Court's 2006 decision in *Hamdan v. Rumsfeld*, which concluded "that the military commission convened to try Hamdan lack[ed] power to proceed,"⁷⁶ the administration moved quickly to secure curative legislation. This time, it sought out the expertise of senior judge advocates. As Attorney General Alberto Gonzalez testified in August 2006, "Our deliberations have included detailed discussion with members of the JAG Corps, and I have personally met twice with the judge advocates general. They have provided multiple rounds of comments, and those comments will be reflected in the legislative package that we plan to offer for Congress' consideration."⁷⁷

The next month, the Judge Advocates Generals of the Army and Navy, the Air Force Deputy JAG, and the Staff Judge Advocate to the Commandant of the Marine Corps testified on the Military Commissions Act, together with the acting head of DOJ-OLC. The Chairman of the House Armed Services Committee clearly viewed the uniformed officers' testimony as distinct from that of "the administration."⁷⁸ For Congress, judge advocates offered a perspective unavailable from their civilian counterparts.

74. Military Order on Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

75. CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 137-38 (2007).

76. 126 S. Ct. 2749, 2759 (2006).

77. *Military Commissions in Light of the Court Decision in Hamdan v. Rumsfeld: Hearing Before the S. Comm. on Armed Servs.*, 109th Cong. 316 (2006).

78. Chairman Duncan Hunter said: "Today we hear from the administration on its recommendations. We also hear from our top military lawyers. We want to have the advantage of their thinking on the Administration's recommendations." *Standards of Military Commissions and Tribunals: Hearing Before the H. Comm. on Armed Servs.*, 109th Cong. (2006) (emphasis added), available at <http://armedservices.house.gov/comdocs/schedules/2006.htm>.

The officers testified frankly. For instance, Major General Scott C. Black, the Judge Advocate General of the Army, stated that while the proposed Commissions legislation “reflects many of our comments, . . . there are some issues, particularly the use of classified evidence . . .” with which he disagreed.⁷⁹ The other senior judge advocates concurred with General Black.⁸⁰ Their relative independence was also apparent in the tenor of the DOJ-OLC representative’s testimony, which emphatically emphasized consultations with judge advocates during the drafting process, and asserted that their concurrence had been received.⁸¹

In assessing whether the senior officers’ testimony fostered or frustrated civil-military relations, it is useful to consider their two options: (1) to offer an objective assessment based on their experience as lawyers specializing in military law and affairs; or (2) to echo the administration position.⁸² Starkly framed in this manner, it should be apparent that their testimony was less an issue of civil-military relations, than it was one of allocation of authority over military affairs as between the executive and legislative branches. Had the officers merely repeated the position advanced by the administration, their testimony would have been superfluous. Only objective testimony from the perspective of those with unique military experience would allow Congress to fulfill its constitutional responsibilities for oversight.

Thus, although one may believe that competency over military affairs should be allocated differently constitutionally, that is a different issue than engaged in this Essay. In the context of civil-military affairs, the testimony of the judge advocates fostered, rather than frustrated, the extant civilian control mechanisms.

B. Judge Advocates in Operations

In contemporary U.S. operations,⁸³ judge advocates are fully integrated members of military staffs. The senior judge advocate assigned to a unit

79. *Id.*

80. *Id.*

81. *Id.*

82. Note that by law “a member of the Joint Chiefs of Staff may make such recommendations to Congress relating to the Department of Defense as he considers appropriate.” 10 U.S.C. § 151(f) (2000).

83. U.S. military doctrine defines an “operation” as “1. A military action or the carrying out of a strategic, operational, tactical, service, training, or administrative military mission. 2. The process of carrying on combat, including movement, supply, attack, defense, and maneuvers needed to gain the objectives of any battle or campaign.” JOINT PUB. 1-02, *supra* note 26, at 392.

serves as a personal advisor to the commander, ensuring that the commander receives sufficient timely and accurate advice to conduct operations in accordance with law and policy. To perform these functions, judge advocates must have a thorough grasp of the applicable law, U.S. policy, the unit's mission, his commander's intent,⁸⁴ enemy objectives and tactics, the capabilities of weapons systems, and the staff planning processes. In other words, judge advocates require specialty expertise that civilian government attorneys seldom possess.⁸⁵

Commander Sulmasy and Professor Yoo suggest that “[o]ur adherence to law and process within warfare has risen to a level that some now assert interferes with the efforts of military commanders to achieve victory on the battlefield.”⁸⁶ In their view, “[t]his new legalization of warfare, mostly imbued from international obligations and the realities of twenty-four hour media coverage, can prevent field commanders from achieving objectives of warfare.”⁸⁷ As a result, “unregulated deference to the JAGs has limited some combat operations, and will continue to do so.”⁸⁸ Placed in a broad context, they conclude that

[t]he JAGs, more often than in previous conflicts, are now involved in the *jus in bello* of the War on Terror—not a place they are accustomed to being nor arguably one that is helpful to the ongoing conflict.

In this ambiguous arena, JAGs are immersed in more than just the straightforward application of widely accepted legal rules on the use of force. Rather, the United States is engaged in adapting the laws

84. “Commander’s intent” is defined as “[a] concise expression of the purpose of the operation and the desired end state. It may also include the commander’s assessment of the adversary commander’s intent and an assessment of where and how much risk is acceptable during the operation.” *Id.* at 103.

85. This is not to say that no civilian government attorneys possess such qualifications. In fact, some of the finest operational lawyers are former judge advocates working in the government as civilian attorneys.

86. Sulmasy & Yoo, *supra* note 5, at 1836.

87. *Id.*

88. *Id.* at 1844. No examples are provided by Commander Sulmasy and Professor Yoo, nor are the authors of this Essay aware of any. In 2001, there were media reports of the Central Command Staff Judge Advocate providing advice that resulted in the decision not to attack a convoy in which Taliban leader Mullah Omar may have been riding. See, e.g., Thomas E. Ricks, *Target Approval Delays Cost Air Force Key Hits*, WASH. POST, Nov. 18, 2001, at A12; *Face the Nation* (CBS television broadcast Oct. 21, 2001) (transcript), available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/cbstext_102101.html. These accounts were later refuted by the CENTCOM Commander, General Tommy Franks, who noted that his Staff Judge Advocate kept him “square with the Rules of Engagement and the Law of Land Warfare,” and that in the specific incident she repeatedly advised him that there were no issues with this proposed target. TOMMY FRANKS, *AMERICAN SOLDIER* 290–95 (2004). On the role of staff judge advocates in such situations, see Michael N. Schmitt, *Law, Policy, Ethics and the Warfighter’s Dilemma*, 1 J. MIL. ETHICS 113, 114–16, 121 (2002).

of war to this new type of enemy, with significant moral, policy, and political considerations. These questions involve the status of detainees, the applicability of the Geneva Conventions, the legality of targeting leaders of al Qaeda, and determining proportionality and distinction when terrorists conceal themselves within civilian populations. This new application of the laws of war has placed the JAG Corps in the middle of questions that had once been the domain of the elected civilian leadership or combat commanders.⁸⁹

Such assertions are unsupportable.

To assess the role of judge advocates relative to the international law governing conflict, it is necessary to distinguish the *jus ad bellum* and *jus in bello*. The *jus ad bellum* addresses when it is that a State may resort to force as an instrument of its national policy.⁹⁰ In other words, it involves questions of when a State may “go to war.” Although judge advocates must understand the rationale for a national policy decision to employ military force, it is generally left to their civilian counterparts to provide advice on such matters to senior civilian leaders.⁹¹

By contrast, the *jus in bello* (also known as the “law of war,” “law of armed conflict,” and “international humanitarian law”) sets forth norms that determine how hostilities may be conducted and establishes certain protections for various individuals or objects, such as prisoners of war, the wounded, civilians, and civilian property.⁹² For the commander in the field

89. Sulmasy & Yoo, *supra* note 5, at 1843–44.

90. The *jus ad bellum* is set forth in the United Nations Charter and in customary international law. The best contemporary exposition of this law is YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* (4th ed. 2005).

91. For a discussion of this point, see John T. Rawcliffe, *Changes to the Department of Defense Law of War Program*, *ARMY LAW.*, Aug. 2006, at 23. However, judge advocates must fully understand the legal and policy basis for the decision to employ the armed forces because, as will be discussed below, they play a key role in the development of, inter alia, rules of engagement, which integrate law, policy, and operational concerns and objectives and which are an integral part of the commander’s ability to command and control his forces in the chaos and violence of combat.

92. The *jus in bello* is set forth in customary international law and in, for States Party thereto, such treaties as the 1949 Geneva Conventions and the 1977 Protocol Additional I. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention IV, *supra* note 49; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. The United States is a Party to the 1949 Geneva Conventions, but not Additional Protocol I. However, it considers much of the Protocol as reflective of customary international law. For a discussion of its customary law status, see THE SIXTH ANNUAL

or at headquarters, it is usually this body of law that most impacts his or her operations. In particular, the *jus in bello* may take certain tactics and practices off the table.

Judge advocates play a unique role in implementing the *jus in bello*. For instance, the 1949 Geneva Conventions require State Parties to disseminate the law of armed conflict to members of the armed forces and obligates them, through their Commanders in Chief, to “ensure the detailed execution” of the laws of war.⁹³ Moreover, the 1977 Additional Protocol I to the Geneva Conventions obligates Parties thereto to “ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.”⁹⁴

Compliance with such requirements is best achieved through the assignment of uniformed attorneys to military units. Civilian attorneys, even those working in government, seldom understand military operations and equipment to the extent necessary to make the law of war training sufficiently contextual for combat forces; they certainly lack the depth to provide meaningful advice on the battlefield. To cite an oft-used example, during Operation Allied Force, there was an outcry over NATO’s launching of air attacks from medium and high altitude. What those unfamiliar with modern weaponry missed was that guided weapons, within certain parameters, become more accurate over greater distances because they have more time to fix accurately onto the target. Not realizing this dynamic, an adviser without military training and experience might well have urged attacking from a lower altitude in order to comply with the *jus in bello* precautions in attack requirements, without realizing that his or her advice actually risked violation of that very norm.⁹⁵

AMERICAN RED CROSS-WASHINGTON COLLEGE OF LAW CONFERENCE ON INTERNATIONAL HUMANITARIAN LAW, 2 AM. U. J. INT’L. L. & POL’Y 415, 428 (1987) (remarks of Michael J. Matheson). An excellent discussion of *jus in bello* is YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2004).

93. Geneva Convention I, *supra* note 92, art. 45; Geneva Convention II, *supra* note 92, art. 46.

94. Additional Protocol I, *supra* note 92, art. 82. The Protocol also requires them to “give orders and instructions to ensure observance of the Conventions and this Protocol, and . . . supervise their execution.” *Id.* art. 80.2.

95. The principle of distinction, which the United States recognizes as customary international law, provides that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” *Id.* at art. 48. Regarding choice of tactics, the “precautions in attack” rule provides that “[t]hose who plan or decide upon an attack shall . . . [t]ake all feasible precautions in the choice of means [weapons] and methods [tactics]

But are military operations in the war on terror, as Commander Sulmasy and Professor Yoo suggest, somehow so qualitatively different that they diminish the value of the specialty expertise judge advocates develop over a career of military service? Certainly, they are not. While it is fair to imply that their training and experience in the past rendered them better qualified to provide legal advice on a conventional, rather than an unconventional, battlefield, that is no longer the case. Current training programs emphasize the changed nature of combat in the contemporary battlespace, with much attention paid to counterterrorist operations, particularly those conducted by Special Forces. Moreover, the judge advocate community today has extensive operational experience, including conventional combat, special operations, detention, and stability operations.⁹⁶ It is not unusual to find judge advocates with two or more combat tours since 2001.

In fact, the real issue in the civil-military context is not the evolving qualitative and quantitative qualifications of the judge advocate community. Rather, the question is which group is better qualified to provide the requisite advice—civilian or uniformed attorneys. For anyone with experience in twenty-first century warfare, the self-evident answer is judge advocates. On the whole, they receive more and deeper training in the *jus in bello* than their civilian government counterparts, and they have applied it on the battlefield.⁹⁷ As a result, they understand warfare better, from how soldiers are likely to act on the battlefield to the weapons they carry. Many of them have provided advice in the highly stressful, fast-paced combat environment; few civilian attorneys have ever had comparable experiences. Finally, they best understand the operational impact should precedent-setting legal decisions regarding the enemy be applied in the future to U.S. forces.

of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.” *Id.* at art. 57.2(a)(ii).

96. The term “stability operations” encompasses “various military missions . . . conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.” JOINT PUB. 1-02, *supra* note 26, at 508. Special operations are operations “conducted in hostile, denied, or politically sensitive environments to achieve military, diplomatic, informational, and/or economic objectives employing military capabilities for which there is no broad conventional force requirement. These operations often require covert, clandestine, or low visibility capabilities.” *Id.* at 502–03.

97. Comprehensive training is primarily provided at the Army Judge Advocate General’s Legal Center and School, the Air Force Judge Advocate General’s School, and the Naval Justice School. Judge advocates attending the nation’s war colleges, such as the Naval War College, also often take advanced courses in the subject.

Consider the issues singled out by Sulmasy and Yoo to support their position. The record of some key civilian government attorneys in sifting through the intricacies of the Geneva Conventions' applicability or the status of detainees can hardly be held up as evidence of their mastery of the *jus in bello*. Their determinations unleashed a firestorm of international controversy and caused the United States significant embarrassment domestically and internationally. Recall, for instance, the early confusion on the applicability of the Conventions to the conflict in Afghanistan, a point of law that most law of war experts would find very basic.⁹⁸ As to the status and treatment of detainees, determinations made by certain civilian attorneys led to a series of Supreme Court rulings adverse to the government; contentious litigation in the high court continues.⁹⁹ And with regard to targeting issues, judge advocates have been providing advice on such matters for decades, contrary to Sulmasy and Yoo's assertion of "the military lawyer's newfound involvement in combat operations." Warfare has long involved strikes on civilians who have become targetable by virtue of their direct participation in hostilities and attacks conducted with the knowledge that civilian incidental injury is likely to occur. Judge advocates have traditionally been involved in mission planning for such operations.¹⁰⁰ Indeed, the involvement of judge advocates in targeting decisions has made possible the operationalization of the *jus in bello* in U.S. practice, thereby enhancing the perception of the United States as a nation that balances both military necessity and humanitarian concerns.

98. See, e.g., Bybee Status Memo, *supra* note 52, at 81. The President reversed course and acknowledged the applicability of the Geneva Convention III to the conflict in Afghanistan on February 7, 2002. Presidential Memorandum on Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002), in TORTURE PAPERS, *supra* note 50, at 134, 134–35 [hereinafter President's Memo]. On the shift in administration policy, see Katherine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1; John Mintz & Mike Allen, *Bush Shifts Position on Detainees*, WASH. POST, Feb. 8, 2002, at A1.

99. See *Boumediene v. Bush*, 127 S. Ct. 3078 (2007); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004). For a discussion of these cases, see Michael N. Schmitt, *The United States Supreme Court and Detainees in the War on Terror*, 37 ISRAEL YEARBOOK ON HUMAN RIGHTS 33 (Yoram Dinstein & Fania Domb eds., 2007).

100. Sulmasy & Yoo, *supra* note 5, at 1839. The law of war issues are "direct participation" and "proportionality," respectively. The former provides that civilians may not be attacked "unless and for such time as they take a direct part in hostilities." Additional Protocol I, *supra* note 92, at art. 51.3. The latter prohibits an attack which "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.* at arts. 51.5(b), 57.2(a)(iii), 57.2(b). Both rules reflect customary international law.

Sulmasy and Yoo further suggest that since “[m]any of the tactics for the war are essentially policy preferences,” the “civilian leadership, therefore, should refrain from their traditional deference to the military on these matters.”¹⁰¹ One would hope that they have confused the strategic, operational, and tactical levels of war, for civilians are poorly equipped by experience and training to handle the tactical matters.¹⁰² The prospect of civilians making tactical decisions would cause measurable, and well-founded, angst throughout the military. It would place U.S. soldiers at risk, endanger civilians, and impede achievement of operational and strategic level objectives. It is a clear non sequitur to assert that because tactical events sometimes have strategic consequences in today’s transparent, media-intense combat environment, civilians should advise on tactical decisions. Moreover, Sulmasy and Yoo dangerously fog the distinction between law and policy. While it is true that policy should play a role in interpreting gray areas of law, one must be careful not to confuse interpretation with misapplication of the law. Policy preference is not acceptable as an excuse for ignoring normative strictures of the *jus in bello*.

Perhaps the most telling indicator of the present value of judge advocates in operational matters is the fact that they are viewed by military

101. Sulmasy & Yoo, *supra* note 5, at 1843.

102. There are three levels of war:

[S]trategic level of war—The level of war at which a nation, often as a member of a group of nations, determines national or multinational (alliance or coalition) strategic security objectives and guidance, and develops and uses national resources to achieve these objectives. Activities at this level establish national and multinational military objectives; sequence initiatives; define limits and assess risks for the use of military and other instruments of national power; develop global plans or theater war plans to achieve these objectives; and provide military forces and other capabilities in accordance with strategic plans.

JOINT PUB. 1-02, *supra* note 26, at 516.

[O]perational level of war—The level of war at which campaigns and major operations are planned, conducted, and sustained to accomplish strategic objectives within theaters or other operational areas. Activities at this level link tactics and strategy by establishing operational objectives needed to accomplish the strategic objectives, sequencing events to achieve the operational objectives, initiating actions, and applying resources to bring about and sustain these events.

Id. at 394.

[T]actical level of war—The level of war at which battles and engagements are planned and executed to accomplish military objectives assigned to tactical units or task forces. Activities at this level focus on the ordered arrangement and maneuver of combat elements in relation to each other and to the enemy to achieve combat objectives.

Id. at 532.

leaders as “force-multipliers.”¹⁰³ Department of Defense directives recognize this reality by placing law and uniformed lawyers at the heart of operations. Members of the armed forces must “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”¹⁰⁴ To effectuate the requirement, “all plans, policies, directives and rules of engagement issued by [a Combatant Command] and its subordinate commands and components” have to be “reviewed by legal advisors to ensure their consistency with [the DoD Law of War Program] and the law of war [itself].”¹⁰⁵ The vast majority of Combatant Command and subordinate unit lawyers are uniformed.

Official instructions issued by the Chairman of the Joint Chiefs of Staff take the same approach. The Chairman’s legal counsel, a senior judge advocate, must “[r]eview all plans, policies, directives, deployment orders, execute orders, and rules of engagement issued by the Joint Staff and/or submitted by combatant commanders to ensure their conformance with domestic and international law . . . and the law of war.”¹⁰⁶ The instructions also charge Combatant Command legal advisors with attending “planning and operations-related conferences for military operations and exercises . . . to enable them to provide advice concerning law of war compliance during joint and combined operations.” Additionally, “[a]ll operation plans (including preplanned and adaptively planned strategic targets), concept plans, rules of engagement, execute orders, deployment orders, policies, and directives [must be] reviewed by the command legal advisor to ensure compliance with domestic and international law.”¹⁰⁷ Again, it is difficult to imagine most civilian attorneys performing these functions as capably as uniformed legal officers.¹⁰⁸

103. A “force multiplier” is “[a] capability that, when added to and employed by a combat force, significantly increases the combat potential of that force and thus enhances the probability of successful mission accomplishment.” *Id.* at 211.

104. U.S. DEP’T OF DEF., DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM, para. 4.1 (May 9, 2006).

105. *Id.* at para 5.11.8.

106. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, at enclosure. A, para. 1.b(6) (Jan. 31, 2007).

107. *Id.* at paras. 3(d), 3(e).

108. In practice, legal support to operations encompasses a much broader range of legal practice. Judge advocates deliver legal services in numerous areas, including military justice, international and operational law, administrative law, contract and fiscal law, claims against the government, and legal assistance. Operational law has been defined as “that body of domestic, foreign, and international law that directly affects the conduct of operations.” U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS, at vii (2000).

Of particular note are rules of engagement (ROE), which comprise those “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”¹⁰⁹ They “ensure actions, especially force employment, are consistent with military objectives, domestic and international law, and national policy.”¹¹⁰ While many civilian attorneys might have an excellent grasp of national policy and applicable law, their lack of understanding of military operations leaves them ill-suited to assist in drafting the ROE that will be applied by soldiers, airmen, marines, and sailors in the heat of battle.

Finally, judge advocates ensure incidents that may have been unlawful are properly investigated and reported. Indeed, in connection with the killing of 24 Iraqis in 2005 at Haditha, Iraq, a Marine Corps judge advocate was criminally charged with failing “to ensure accurate reporting and a thorough investigation into a possible . . . violation of the law of war by Marines from his Battalion . . . fail[ing] to ensure that this possible . . . violation of the law of war was accurately reported to higher headquarters,” and “fail[ing] to ensure that a thorough investigation was initiated into this possible . . . violation of the law of war.”¹¹¹ Civilian attorneys cannot perform such investigatory functions adequately because they are not present on the battlefield.

Doctrinal mandates to factor judge advocates into operations planning carry over onto the field of battle. In reality, concern that “American combat officers must now seek out JAGs for rulings on the incorporation of the law of armed conflict into their ongoing operations”¹¹² would seem strange to those very officers. First, they need not “seek out judge advocates” since judge advocates no longer operate only in the rear echelons of combat zones on issues unrelated to combat activities.¹¹³ On the contrary, today’s judge advocates operate as far forward as possible. In a tragic testament of their proximity to the fight, six Army judge advocates and enlisted paralegals

109. JOINT PUB. 1-02, *supra* note 26, at 472.

110. JOINT PUB. 1, *supra* note 25, at 1-21.

111. Haditha, Iraq Investigation, Charges and Specifications, <http://www.usmc.mil/lapa/Iraq/Haditha/Haditha-Preferred-Charges-061221.htm> (last visited Feb. 12, 2008). Charges were eventually dropped. *Id.*

112. Sulmasy & Yoo, *supra* note 5, at 1844.

113. “[T]he JTF [Joint Task Force] SJA no longer functions primarily within the combat support and combat service support arenas. A member of the JFC’s personal staff, the JTF SJA is an essential advisor on the myriad of legal issues associated with combat and noncombat operations.” JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS III-16 (2007) [hereinafter JOINT PUB. 1-04].

have been killed in Iraq and Afghanistan since 2001; over thirty Army and Marine Corps judge advocates and paralegals have been wounded.¹¹⁴

The insistence of senior military officers on having judge advocates immediately available to provide legal advice belies any suggestion that they obfuscate combat operations. As a former Deputy Chief of Naval Operations for Surface Warfare noted:

[T]here are trained and experienced operational lawyers working in the Office of the Secretary of Defense, the Joint Chiefs of Staff, the Offices of the Chief of Naval Operations, Commandant of the Marine Corps, Judge Advocate General, the Naval War College, and most importantly, on the staffs of joint, theater, fleet, battle groups, expeditionary units, and other major operational commands. With satellite communications and secure radios, these experts can rapidly communicate, share opinions, receive guidance, make recommendations, get additional material, and do all that is necessary to develop the best legal advice for the commander The best operational lawyers are activists—speaking out, offering advice in the planning process, and seeking ways to support the commander in carrying out the mission under the law, but mindful that the commander is ultimately accountable and must weigh political and policy considerations, along with legal, in reaching a decision. In addition, a thorough understanding of what the individual ship, aircraft, expeditionary unit, soldier, sailor, marine and airman are trained to do is essential in this era of joint and combined operations.¹¹⁵

Might the purported problem in the civil-military context be less the presence or number of uniformed attorneys in the process, than, in the words of Sulmasy and Yoo, that they are “unregulated”?¹¹⁶ Do they unduly intrude too far on matters that are not strictly related to the positivist application of black letter *jus in bello* on the battlefield?

The reality of the twenty-first century battlefield is that judge advocates must often provide advice that goes beyond that which is strictly legal. U.S. enemies often engage in “lawfare,” which involves allegations of unlawful actions to weaken domestic and/or international support for U.S.

114. E-mail from Command Sergeant Major Michael Glaze, Army JAG Corps Regimental Sergeant Major, to Michael L. Kramer (Jan. 10, 2008) (on file with the authors); E-mail from Gunnery Sergeant Maxwell J. Williams, Legal Chief Wounded Warrior Regiment, to Michael L. Kramer (Jan. 22, 2008) (on file with the authors).

115. James H. Doyle, Jr., *International Law and Naval Operations*, in *THE LAW OF MILITARY OPERATIONS: LIBER AMICORUM PROFESSOR JACK GRUNAWALT* 17, 33 (U.S. Naval War Coll., Int'l Law Studies Vol. 72, 1998).

116. Sulmasy & Yoo, *supra* note 5, at 1844.

operations.¹¹⁷ In many cases, they intentionally seek to create an incident in which such allegations might be leveled. For instance, it is increasingly common for opponents to use civilians to shield military objectives, thereby forcing U.S. commanders to choose between not striking a shielded target or attacking it and causing civilian casualties which will be used by the enemy to condemn U.S. operations.¹¹⁸ The stakes are high, a point made succinctly in the recently issued Army and Marine Corps counterinsurgency field manual—"Lose Moral Legitimacy, Lose the War."¹¹⁹

In this environment, commanders expect judge advocates not only to opine on the strict legality of proposed operations, but also to advise on how the operations will be perceived legally and morally—in other words, on their apparent legitimacy.¹²⁰ It has long been deemed appropriate for judge advocates to consider "moral, economic, social, and political factors[] that may be relevant to the client's situation, but not in conflict with the law."¹²¹ As the then Commander of the Multinational Corps Iraq noted in 2005, "Develop a close relationship to your SJA [Staff Judge Advocate]. If you can't, get someone new. You cannot have the SJA outside your decision loop."¹²² Similarly, another high level commanding general recently told an audience of judge advocates that "[y]ou are a key staff officer who must analyze problems, anticipate 2nd and 3rd order effects and make recommendations not necessarily related to law."¹²³ The current senior commander in Iraq, General

117. On lawfare, see Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, *passim* (Nov. 29, 2001) (unpublished paper presented at Harvard University, Carr Center, Humanitarian Challenges in Military Intervention Workshop), available at <http://www.ksg.harvard.edu/cchrp/UseofForcePapers.shtml>. On lawfare and similar tactics employed by opponents of the United States and other technologically advanced nations, see Michael N. Schmitt, *21st Century Conflict: Can the Law Survive?*, 8 MELBOURNE J. INT'L L. 443, 469–71 (2007).

118. By operation of the rule of proportionality, the presence of a sufficient number of involuntary shields can make striking the target unlawful. For a discussion of the use of human shields, see Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 48 COLUM. J. TRANSNAT'L L. (forthcoming 2008).

119. U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 7–9 (2006).

120. Military doctrine encapsulates the notion, defining it as "based on the legality, morality, and rightness of the actions undertaken." JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS A-4 (2006); see also JOINT CHIEFS OF STAFF, JOINT VISION AND TRANSFORMATION DIVISION, AN EVOLVING JOINT PERSPECTIVE: U.S. JOINT WARFARE AND CRISIS RESOLUTION IN THE 21ST CENTURY 55 (2003).

121. AR 27-26, *supra* note 44, at 17.

122. John R. Vines, Lieutenant General, U.S. Army, Commander, Multinational Corps-Iraq, Remarks to an Audience Composed Predominantly of Combat Arms Officers (Dec. 12, 2005) (author's notes of presentation).

123. Peter Chiarelli, Lieutenant General, U.S. Army, Commander, Multinational Corps-Iraq, Remarks at the Army Legal Center and School (Aug. 11, 2006) (briefing on file with authors). He

David H. Petraeus, unambiguously adopted this approach as Commander of the 101st Airborne Division in Iraq between 2003 and 2004. According to General Petraeus:

Military lawyers were true combat multipliers in Iraq. They were not only invaluable in dealing with a host of operational law issues, they also made enormous contributions in helping resolve a host of issues that were more than a bit out of normal legal lanes. In essence, we “threw” lawyers at very difficult problems and they produced solutions in virtually every case—often under very challenging circumstances and in an uncertain security environment. . . . I tried to get all the lawyers we could get our hands on—and then sought more.¹²⁴

What those concerned about “unregulated” judge advocates have missed is that their advice actually enhances civilian control over the military by increasing the likelihood that commanders and their staffs will be sensitized to civilian policy concerns. But even if the critics were right (and they are not), from a practical perspective and in a civil-military context, civilian lawyers are simply unavailable to render this type of advice. In many cases, the alternative to judge advocates is no advice at all.

Ultimately, those concerned with the supposed omnipresence of the uniformed lawyer in operational matters would benefit from a better grasp of the perspective most judge advocates have on the identity of their client. As a matter of tradition, training, and professional ethics, the operational law judge advocate’s client is his or her respective service. The Army’s Rules of Professional Conduct specifically provide that the “Army lawyer represents the Department of the Army acting through its authorized officials,” with the “authorized official” being the unit commander in most cases.¹²⁵ Therefore, the institutional interest of judge advocates is ensuring commanders act within the limits of the law. Given that civilians produce law in accordance with the constitutional process, it is an interest that fits neatly into the American system of civilian control over the military.

further stated that he expected judge advocates to be “full-spectrum staff officers,” for counterinsurgency operations are “legally intensive; laws, directives, policies, congressional interest can create a confusing environment.” *Id.*

124. JOINT PUB. 1-04, *supra* note 113, at II-9.

125. AR 27-26, *supra* note 44, at 14. Other services adopt a similar scheme. See, e.g., U.S. DEP’T OF THE NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTRUCTION 5803.1C, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL (2004).

CONCLUSION

Analysis of the role of judge advocates in civil-military relations inevitably leads back to Commander Sulmasy and Professor Yoo's presumption that civilian and military lawyers harbor different policy preferences. In fact, the claim is conclusory, for little evidence exists of these alleged contradictory policy perspectives. On the contrary, recent policy disputes have tended to be interagency in nature.

Rather than asserting policy preferences, judge advocates are typically motivated by two normative interests: (1) ensuring the commander does not misapply law in a manner that interferes with successful execution of military operations; and (2) ensuring the commander does nothing that would violate international law, domestic law, or policy. In other words, the mission of a judge advocate is to safeguard civilian leadership preferences, as expressed in law and policy.

So long as both groups are committed to compliance with the law, there are but two situations in which disputes might surface between uniformed and civilian attorneys. The first is a professional difference of opinion as to what the law requires, but this is a legal, rather than policy, dispute. The other is when a judge advocate believes that proposed legislation or a civilian policy (proposed or in effect) implementing the law impedes the effective conduct of military operations. In such cases, it is the professional ethical obligation of the judge advocate to advise his client, usually the commander, accordingly. Should the matter come to the attention of the Congress, it is equally his obligation to provide objective testimony so as to preserve the constitutional prerogatives of the legislative branch relative to civilian control over the military.

Moreover, those who criticize the extent of judge advocate involvement during military operations thereby reveal their lack of operational experience. The law of war is complicated. Applying it in a progressively complex combat environment requires specialized training, practical experience, and in-depth knowledge of the operational art. Most civilians typically fall short in these regards. The reality is that far from hindering effective conduct of operations, judge advocates enhance them. The value combat commanders place in having their legal advisers close at hand proves the point.

Ultimately, Commander Sulmasy and Professors Yoo's arguments must be turned on their heads. Judge advocates do not corrupt civilian control over the military, they inform it. Uniformed lawyers act as honest interlocutors in the process. They are well-positioned to transmit civilian-generated

prescriptive norms, and in most cases only they have the military knowledge necessary to effectively contextualize and operationalize such norms. Judge advocates are not “lawyers on horseback,” but rather function as an effective tool in ensuring civilian control over the military without detracting from the military’s ability to fight and win the nation’s wars.