

DOING AWAY WITH THE MILITARY DEFERENCE DOCTRINE: APPLYING LESSONS FROM CIVIL-MILITARY RELATIONS THEORY TO THE SUPREME COURT

LINDSAY LYON RODMAN*

ABSTRACT

This Article uses civil-military relations theory, an interdisciplinary academic theory, to inform a critique of the Supreme Court's military deference doctrine. National security leaders noted in late 2022 that we are in a moment where civil-military relations are backsliding. Civil-military relations theory requires robust civilian oversight of the military in a functioning democracy. The Article discusses the language and arguments that underpin the military deference doctrine and argues that using national security deference or congressional deference while focusing on civilian decision-making and the exercise of oversight of the military, rather than deference to military decision-making itself, would be a more responsible approach.

* Distinguished Professorial Lecturer in Law, George Washington University Law School. The author would like to thank Professors Laura Dickinson, Edward Swaine, Jonathan Turley, and Jonathan Cedarbaum for their incredible support and insights.

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I. INTRODUCTION

*“Civilian control of the military is part of the bedrock foundation of American democracy. The democratic project is not threatened by the existence of a powerful standing military so long as civilian and military leaders—and the rank-and-file they lead—embrace and implement effective civilian control.”*¹

In late 2022, eight former Secretaries of Defense and five former Chairmen of the Joint Chiefs of Staff co-signed an open letter stating: “We are in an exceptionally challenging civil-military environment. Many of the factors that shape civil-military relations have undergone extreme strain in recent years.”² Through this letter, these leaders sought to highlight the precarious moment we are all living through and impress upon all Americans their role in strengthening the democracy by embracing lessons learned from civil-military relations theory and practice. The letter proposed sixteen core principles and best practices that contribute to healthy military relations. The first of these was the principle quoted above.

The judiciary has a role to play in upholding democratic norms associated with civil-military relations. Although the roles of the executive and legislative branch with respect to civilian oversight of the military are more apparent in the Constitution itself, the sixth principle in the Secretaries’ and Chairmen’s open letter states: “In certain cases or controversies, civilian control is exercised within the judicial branch through judicial review of policies, orders, and actions involving the military.”³ Although the judiciary is often forgotten as the third constitutional component of the American civilian oversight mechanism, through this letter, the leading American experts in civil-military relations noted the important role the judiciary can play.

The open letter stands in some contrast to the Supreme Court’s approach to cases arising from the military in the modern era. Many scholars refer to the Supreme Court’s approach to military cases as “the military deference doctrine.”⁴ Although scholars have neither coalesced around a pithy

1. Ashton B. Carter et al., *To Support and Defend: Principles of Civilian Control and Best Practices of Civil-Military Relations*, WAR ON THE ROCKS (Sept. 6, 2022), <https://warontherocks.com/2022/09/to-support-and-defend-principles-of-civilian-control-and-best-practices-of-civil-military-relations/> [https://perma.cc/MEA7-RSLP].

2. *Id.*

3. *Id.*

4. See, e.g., John F. O’Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000). See also Diane H. Mazur, *Rehnquist’s Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 703 n.14

definition of the doctrine nor a specific starting point, legal scholarship presents a general consensus that the Supreme Court's approach to cases arising from the military is broadly deferential.

The arguments presented in relevant Supreme Court caselaw typically fall into two broad categories: (1) arguments that the legislative and executive branches have a constitutional prerogative with respect to military oversight; and (2) arguments that the Court is ill-suited to weigh into military matters due to lack of expertise or incompetence.

The first of these two categories of arguments, which is based on a plain reading of the Constitution, often also invokes (or can be read to invoke) similar arguments to other national security-related cases that do not focus on the military. Many of these cases are resolved using analysis invoking one of two separate doctrines: national security deference or congressional deference. In those cases, the Court will defer to the decisions of civilian political leadership in the other two branches associated with their constitutional national security powers, to include their oversight of the military.

The second category of arguments is problematic from a civil-military relations perspective. The study of civil-military relations—an academic field that combines political science and sociology, among other disciplines—has developed numerous theories that inform how political institutions should interact with the military within healthy democracies. All such theories advocate for the subordination of military decision-making to civilian oversight. In civil-military relations theory, a lack of expertise⁵ among civilians about military matters does not disqualify civilians from performing an oversight function; in fact, such an assertion is considered to

(2002); Stephanie A. Levin, *The Deference That Is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009 (1990) (criticizing deference).

5. The Supreme Court's acknowledgement of lack of expertise is somewhat unique to the military context; despite lack of expertise in many areas (recently notably including: the internet, gerrymandering, or science), the Supreme Court has not refrained from meaningfully engaging with expert decision-making in many other contexts. For example, Justice Kagan has said, "I mean, we're a court. We really don't know about these things. You know, these are not, like, the nine greatest experts on the internet." Transcript of Oral Argument at 45-46, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (No. 21-1333). Chief Justice Roberts has referred to gerrymandered maps created using data analytics as "sociological gobbledygook." Transcript of Oral Argument at 40, *Gill v. Whitford*, 585 U.S. 48 (2018) (No. 16-1161). See also Linda Greenhouse, *The Supreme Court & Science: A Case in Point*, 147 DAEDALUS 28 (2018).

be dangerous in civil-military relations theory,⁶ and deference by civilian overseers to the military erodes civilian control of the military.⁷

This Article addresses the Supreme Court's role in maintaining and sustaining healthy civil-military relations in our democracy. Through a combination of case analysis and theory, the Article argues that the Supreme Court's military deference doctrine is somewhat irresponsible and inconsistent with civil-military relations theory. Instead, the Supreme Court should heed the advice of the Secretaries and Chairmen quoted above by taking a more principled approach to military cases that recognizes the importance of civilian oversight of military decision-making. The Court can do so without upending precedent; most military deference caselaw explicitly or implicitly invokes national security deference or congressional deference, thereby providing another basis for upholding prior cases while moving away from language that harms the democracy.

The Article proceeds as follows. Part I describes the military deference doctrine. Starting with the *Korematsu* and *Hirabayashi* decisions as a cautionary tale. Part I then moves to describe the modern case law that forms the basis for the Supreme Court's current approach to military cases. Although scholars have repeatedly invoked the term "military deference" to describe the Court's relationship to the military, the doctrine itself is somewhat amorphous. In this Article, I will use the term "military deference" to refer to language in Supreme Court caselaw that suggests that the Court will defer to decisions arising from the military itself rather than a congressional determination (deference to Congress) or a decision by executive branch civilian political leadership (national security deference). Military deference language in caselaw is not always dispositive; it is often mixed with other analysis that invokes deference to Congress or national security deference. However, even in cases where military deference language is dicta, it perpetuates a problematic relationship and suggests that the Supreme Court is not inclined to exercise its constitutional obligation to provide civilian oversight of military decision-making. The final section of Part I briefly reviews two related doctrines associated with military cases: the

6. See Kori Schake, *The Line Held: Civil-Military Relations in the Trump Administration*, 15 STRATEGIC STUD. Q. 38, 38-39 (2021) (criticizing President Trump's "precedent of treating the military as a political actor as a normal part of civil-military relations"). See also *Civilian Control of the Military: Hearing Before the S. Comm. on Armed Services*, 117th Cong. 13-18 (2020) (statement of Lindsay Cohn, Assoc. Professor Nat'l Sec. Affs., U.S. Naval War College); Ronald R. Krebs et al., *Americans' Blind Faith in the Military Is Dangerous*, FOREIGN POL'Y (Dec. 3, 2018, 8:04 AM), <https://foreignpolicy.com/2018/12/03/americans-blind-faith-in-the-military-is-dangerous-civilian-oversight-deference-mcraven-trump/> [<https://perma.cc/LGB9-FH4C>].

7. Polina Beliakova, *Erosion by Deference: Civilian Control and the Military in Policymaking*, 4 TEX. NAT'L SEC. REV. 55 (2021).

state secrets privilege and the *Feres* doctrine. The state secrets privilege showcases an approach that requires a decision from civilian political leadership, while the *Feres* doctrine indicates that there may be an appetite within the Supreme Court for reconsideration of doctrines that exempt the military from judicial interference.

Part II is a survey of civil-military relations theories related to healthy civil-military relations in democracies, with a focus on civilian oversight. Beginning with Samuel Huntington, this Part discusses the dominant theories with application to the United States, their consistent emphasis on civilian oversight, and the idea that lack of expertise should not disqualify civilians from exercising their oversight responsibility. The second section of this Part is a brief survey of the limited relevant legal scholarship, showing how prior scholars have contended with some of this theory and where gaps remain in legal academia's treatment of civil-military relations.

Part III discusses recent caselaw in the federal circuit courts associated with the Religious Freedom Restoration Act ("RFRA") and the Administrative Procedures Act ("APA") to show that in the past five years, the lower courts have indicated a potential willingness to move away from military deference. The elevation of some of these cases to the Supreme Court may create an opening to adjust or even do away with the military deference doctrine. Part IV is the conclusion.

Using a civil-military relations theory-informed approach, this review of the relationship between the military and the Supreme Court will challenge the suggestion that there is anything natural, self-evident, or wise about military deference. Where deference is actually given to the decisions of civilian political leadership in the legislative or executive branches with respect to the military, it would be cleaner and less problematic to simply rely upon deference to Congress or national security deference, respectively. Where deference instead relies on arguments that the Court is not expert enough in military matters to adequately review such cases, the Court is essentially ducking its responsibility as part of a tripartite civilian democratic government to provide civilian oversight to the military. In those cases, the Court has a duty to perform a civilian oversight function.

II. THE MODERN SUPREME COURT MILITARY DEFERENCE DOCTRINE

There is some debate about when the military deference doctrine began. Some scholars argue that it began after the Civil War.⁸ Others describe a post-Civil War history of total military non-interference that evolved into a

8. See, e.g., Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 36-37 (2002).

slightly more substantive deference-based review during the 1960s Warren Court and ultimately turned into a constitutional deference analysis during the Burger Court in 1974-1976.⁹ And others argue that the deference doctrine is a creation of Chief Justice Rehnquist.¹⁰ For the purposes of this Article, reconciliation of these viewpoints is not required; there is a general consensus regarding the Supreme Court's embrace of a deferential posture in cases that arise from the military for at least fifty years.

The term "military deference" is often used in academia without definition, and in caselaw, it is rarely named as such. For the purposes of this Article, "military deference" does not necessarily refer to the outcomes of Supreme Court cases. The term is being used here to refer to the Supreme Court's deferential posture with respect to assertions made by the military, regardless of outcome. Military deference is most acute when the Court follows military decision-making without being willing to question it, but it also manifests in deferential language that facilitates future courts and American society developing a problematic relationship of deference with the military.¹¹ The potential negative consequences of inappropriate deference to the military from democratic civilian oversight bodies are both perpetuated and evidenced by the language used by the Court and the relationship built among these institutions over time. Even dicta suggesting that the Supreme Court should be deferring to the military can produce harm.¹²

In this Part, the Article reviews Supreme Court caselaw to expose the use of deferential language. Much of the language around deference focuses on the Supreme Court's incompetence in military cases, choosing instead to accept without questioning decisions made by the military. In earlier military

9. See, e.g., O'Connor, *supra* note 4, at 164-65.

10. See, e.g., Mazur, *supra* note 4, at 704; Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Traditional Deference to the Military, 1918-2004*, 65 MD. L. REV. 907, 945-46 (2006) (citing Mazur, *supra* note 4, at 704 and concurring in her analysis).

11. A recent study shows that American society's deference to the military has grown significantly in the past two decades. Ronald R. Krebs & Robert Ralston, *More Deferential but Also More Political: How Americans' Views of the Military Have Changed Over 20 Years*, WAR ON THE ROCKS (Nov. 21, 2021), <https://warontherocks.com/2021/11/more-deferential-but-also-more-political-how-americans-views-of-the-military-have-changed-over-20-years/> [<https://perma.cc/GA7E-UY7H>]. This growing deference has coincided with increased politicization of the military and decreasing emphasis on democratic civilian control of the military. *Id.*

12. This idea should be distinguished between appropriate and welcome support of the military. There is a careful balance for democratic societies to strike between well-earned appreciation for those who keep us safe and so-called "pedestalizing" of the military with the potential to result in eroding civilian oversight. See generally PETER D. FEAVER, THANKS FOR YOUR SERVICE: THE CAUSES AND CONSEQUENCES OF PUBLIC CONFIDENCE IN THE US MILITARY (2023).

deference caselaw from the 1970s and 1980s, the Supreme Court would use deferential with respect to the military but also decide cases based upon deference to one of the other two civilian political branches—usually Congress in the 1970s and 1980s cases. In later cases, however, the latter analysis can fall away, leaving behind any assessment of whether civilian control has been exercised in a given case. In many of these later cases, it would have been possible to omit the language related to military deference and replace it with congressional deference or national security deference to decisions made by the president, the secretary of defense, or a service secretary (i.e., the secretary of the Army, secretary of the Navy, or secretary of the Air Force). A more conscientious approach from the Supreme Court would thus have a relatively controlled effect on precedent while strengthening civil-military relations.

This survey of modern military deference caselaw begins with the Japanese internment cases to showcase the dangerous, undemocratic, and immoral outcomes that can arise in cases of deference to military expertise without meaningful civilian review. The Japanese internment cases predate the modern military deference doctrine, but they nevertheless set the scene for the later cases. The second Section of this Part will then look to more recent caselaw to pull out the arguments the Supreme Court uses to justify its ongoing deferential approach, using *Winter v. Natural Resources Defense Council, Inc.*¹³ (“*Winter v. NRDC*”) as a springboard. The analysis will show how the Court calls itself incompetent to review these cases while exalting the judgment of military professionals. In the third Section, this Part will address two related doctrines that are often discussed alongside or confused with military deference: the state secrets privilege and the *Feres* doctrine. Both of these doctrines illuminate potential paths forward.

A. THE JAPANESE INTERNMENT CASES

In early 1942, soon after the Japanese attack on Pearl Harbor that brought the United States into World War II, President Franklin D. Roosevelt signed Executive Order (“EO”) 9066 delegating to “the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas.”¹⁴ On March 2, 1942, then-Lieutenant General John DeWitt (“LTG DeWitt”), who was assigned as the Commander of the Western Defense Command of the U.S. Army, used his delegated authority

13. 555 U.S. 7 (2008).

14. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

from the secretary of war to issue Public Proclamation No. 1¹⁵ and Public Proclamation No. 2,¹⁶ which established military areas encompassing the entire West Coast subject to his regulation, including exclusions, curfews and other restrictions on citizens within the military areas. On March 21, 1942, Congress passed a law creating “a penalty for violation of restrictions or orders” promulgated by military commanders pursuant to EO 9066 to restrict the movement of civilian American citizens within the military areas.¹⁷ After Congress’s law making these regulations punitive, LTG DeWitt continued making decisions as a military commander that had a profound impact on citizens’ constitutional rights and lacked ongoing civilian oversight in either the executive or legislative branches. Determinations of the legality or constitutionality of military decisions were at that point left to the judicial branch.

The Supreme Court heard two related cases during the war: *Hirabayashi v. United States*,¹⁸ challenging the curfew imposed in the military areas, and *Korematsu v. United States*,¹⁹ challenging the exclusion order. One question raised in *Hirabayashi* was whether Congress had unconstitutionally delegated its legislative power to a military commander.²⁰ Chief Justice Stone wrote in his opinion for the Court that the President and Congress together had permissibly delegated authority down to LTG DeWitt as “an emergency war measure,” but in doing so, he made two interesting notes.²¹ First, he distinguished this case from cases arising from courts-martial by stating “[t]he exercise of that power here involves no question of martial law or trial by military tribunal,” suggesting that would have changed the nature of the analysis, perhaps resulting in even more deference.²² Second, the Chief Justice relied heavily on the fact that “by the Act, Congress gave its approval to” LTG DeWitt’s Public Proclamations No. 1 and 2.²³ He described Public Proclamation No. 3, which Gordon Hirabayashi was accused of violating and which came after the Act from Congress, as “merely prescrib[ing] regulations of the type and in the manner which Public Proclamations No. 1 and 2 had announced would be prescribed at a future date.”²⁴ Therefore, *Hirabayashi*

15. Pub. Proclamation No. 1, 7 Fed. Reg. 2320 (Mar. 26, 1942).

16. Pub. Proclamation No. 2, 7 Fed. Reg. 2405 (Mar. 28, 1942).

17. H.R. Con. Res. 6758, 77th Cong. (1942) (enacted).

18. 320 U.S. 81 (1943).

19. 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 585 U.S. 667 (2018).

20. *Hirabayashi*, 320 U.S. at 89.

21. *Id.* at 92.

22. *Id.* at 92 (first citing *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866); and then citing *Ex parte Quirin*, 317 U.S. 1 (1942)).

23. *Id.* at 103.

24. *Id.*

is both a cautionary tale about accepting military judgment without meaningful civilian oversight and a case where the Court sought to find authority from political legislative and executive branch leadership, not merely defer to military decision-making.

In *Korematsu*, Justice Black leaned heavily on the previous holding in *Hirabayashi*, stating that the Court

cannot reject as unfounded the judgment of the military authorities and of Congress We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with²⁵

In *Korematsu*, the Court relied on a combination of deference to military decision-making and Congress's acquiescence to uphold LTG DeWitt's decision-making, finding that:

[*Korematsu*] was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.²⁶

With this language, *Korematsu* went further than *Hirabayashi* in two important ways. First, the time between Congress's endorsement and the military decision-making at issue here was greater; the relevant order for *Korematsu*'s exclusion was made on May 3, 1942. Second, the notion that Congress inevitably must repose confidence in the military in wartime suggests that Congress should not be engaging in active oversight. Once authority is delegated, civilian oversight of the military in war time still requires ongoing civilian engagement.

History has not been kind to the Supreme Court's reasoning in *Hirabayashi* and *Korematsu*. Those cases are regarded now as a stain on the Supreme Court's record, hiding racism-infused reasoning behind the veneer of military expertise and necessity.²⁷ In 1984, a California district court

25. *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (quoting *Hirabayashi*, 320 U.S. at 99), *abrogated by* *Trump v. Hawaii*, 585 U.S. 667 (2018).

26. *Id.* at 223.

27. See Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72 (1996); Joel B. Grossman, *The Japanese American*

overturned *Korematsu*'s conviction on a writ of *coram nobis*.²⁸ In that case, the judge stated, "Omitted from the reports presented to the courts was information possessed by the Federal Communications Commission, the [civilian leadership of the] Department of the Navy, and the Justice Department which directly contradicted General DeWitt's statements."²⁹ In other words, the Court relied on military leadership assertions and decision-making while inputs from civilian leadership from the executive branch were excluded from judicial branch consideration. The Supreme Court never inquired about the lack of civilian executive branch oversight or the determinations they made about General DeWitt's approach. As a result:

Korematsu remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.³⁰

Rather than learn this lesson, however, while eventually overturning *Korematsu*,³¹ the Supreme Court instead has moved further toward embracing deference to military attestation in the intervening decades.

B. THE MODERN MILITARY DEFERENCE DOCTRINE AS ARTICULATED IN *WINTER V. NATURAL RESOURCE DEFENSE COUNCIL, INC.*

The most recent fulsome articulation of the Court's modern approach to military deference is *Winter v. NRDC* from 2008.³² *Winter v. NRDC* did not

Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective, 19 U. HAW. L. REV. 649 (1997); Harvey Gee, *Journey Towards Justice: The Historical and Legal Legacy of Fred Korematsu and the Japanese American Internment in a Post-9/11 World*, 50 SUFFOLK U. L. REV. 237 (2017).

28. *Korematsu v. United States*, 584 F. Supp. 1406, 1420-21 (N.D. Cal. 1984), *aff'd*, 323 U.S. 214 (1944), *abrogated by* *Trump v. Hawaii*, 585 U.S. 667 (2018).

29. *Id.* at 1419.

30. *Id.* at 1420.

31. *Trump*, 585 U.S. at 710 ("The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))).

32. 555 U.S. 7 (2008).

arise out of military exigency or wartime. *Winter v. NRDC* was a challenge to Navy training using sonar, which came into conflict with marine mammal protections in the Coastal Zone Management Act of 1972 (“CZMA”).³³ The National Resources Defense Council sued the Navy and requested a preliminary injunction to stop Navy training. The preliminary injunction was granted by the district court and then upheld by the Ninth Circuit.³⁴ In *Winter v. NRDC*, Chief Justice Roberts stated in the Supreme Court’s ruling:

This case involves “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force,” which are “essentially professional military judgments.” *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973). We “give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986). As the Court emphasized just last Term, “neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.” *Boumediene v. Bush*, 553 U.S. 723, 797, 128 S. Ct. 2229, 171 L. Ed. 2d 41.

Here, the record contains declarations from some of the Navy’s most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat.³⁵

Chief Justice Roberts then went on to quote extensively from assertions made by these senior Navy officers about the importance of the training at issue in the case.³⁶ He took care to note that “military interests do not always trump other considerations, and we have not held that they do.”³⁷ Ultimately, however, the Court found that the district court abused its discretion in issuing an injunction against the Navy’s training using sonar.³⁸

The excerpt above is typical of modern military deference cases for three reasons. First, it cites to 1970s and early 1980s caselaw that consolidated the deferential approach to military cases. Specifically, Chief Justice Roberts cited *Goldman v. Weinberger*³⁹ to articulate and apply the military deference

33. *Id.* at 16-17.

34. *Id.* at 12.

35. *Id.* at 24.

36. *Id.* at 25.

37. *Id.* at 26.

38. *Id.* at 33.

39. 475 U.S. 503 (1986), *superseded by statute*, National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1019 (1987) (codified at 10 U.S.C. § 774).

doctrine.⁴⁰ *Goldman v. Weinberger* is a 1986 case involving a Jewish Air Force officer who sought permission to wear a yarmulke with his uniform.⁴¹ The officer was denied the religious accommodation by military leadership because the Air Force asserted it would detract from “the military’s perceived need for uniformity.”⁴² The opinion upholding the Air Force’s decision-making in *Goldman v. Weinberger* was written by then-Justice Rehnquist—who is considered by some to be the architect of modern military deference—though the specific language cited in *Winter v. NRDC* from *Goldman v. Weinberger* is derived from two earlier cases from 1983 and 1953.⁴³ This excerpt from *Winter v. NRDC* is just one example among many others using these citations to justify military deference.⁴⁴

The second way that Chief Justice Roberts’s approach exemplifies the military deference doctrine is that the Court implicitly questions its own role in providing meaningful civilian oversight by stating that the Court is not in a good position to question military professional judgment. As will be further explained below in Part II, civil-military relations theory indicates that abstention from decision-making by civilian oversight bodies due to a perceived lack of expertise is potentially quite dangerous.

In addition to the quote above, *Goldman v. Weinberger* also stands for the assertion that “courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”⁴⁵ In most cases, professional judgment should be given weight as to the importance of a particular interest. The Supreme Court’s deferential posture, however, combines exaltation of the professional

40. *Winter*, 555 U.S. at 24.

41. *Goldman*, 475 U.S. at 506.

42. *Id.* at 509-10.

43. *Id.* at 507-08. *See also* *Chappell v. Wallace*, 462 U.S. 296 (1983); *Orloff v. Willoughby*, 345 U.S. 83 (1953). *Chappell v. Wallace* is quoted in *Goldman* for the assertion that courts “are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.” *Goldman*, 475, U.S. at 507-08. *Orloff v. Willoughby* was cited alongside *Chappell v. Wallace* a few times in the same paragraph with the introductory signal “see also.” *Id.*

44. *See, e.g.*, *Solorio v. United States*, 483 U.S. 435, 448 (1987) (“[C]ivil courts are ‘ill equipped’ to establish policies regarding matters of military concern.” (quoting *Chappell*, 462 U.S. at 305)); *Bynum v. FMC Corp.*, 770 F.2d 556, 570 (5th Cir. 1985) (“Such a suit involves the second-guessing of military decisions by civilian courts”); *Stauber v. Cline*, 837 F.2d 395, 398 (9th Cir. 1988) (“[T]he *Feres* rule has been interpreted as necessary to avoid the courts’ second-guessing military decisions, or impairing military discipline.”); *Berry v. Bean*, 796 F.2d 713 (4th Cir. 1986). *Cf. Brown v. Glines*, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting) (“To be sure, generals and admirals, not federal judges, are expert about military needs. But it is equally true that judges, not military officers, possess the competence and authority to interpret and apply the First Amendment.”); *Singh v. Berger*, 56 F.4th 88, 91 (D.C. Cir. 2022) (citing the applicable language from *Chappell v. Wallace* but ultimately finding in favor of the plaintiffs, two Sikh men seeking religious accommodation from the Marine Corps).

45. *Goldman*, 475 U.S. at 507 (first citing *Chappell*, 462 U.S. at 305; and then citing *Orloff*, 345 U.S. at 93-94).

judgment of military authorities with a diminution of its own competence, resulting in a deep reluctance to question the decision-making of the military, even in the absence of other civilian oversight.

In *Winter v. NRDC*, Chief Justice Roberts cited *Gilligan v. Morgan*⁴⁶ and *Goldman v. Weinberger* to assert the importance of deferring to “essentially professional military judgments.”⁴⁷ *Gilligan v. Morgan* was a request by Kent State University students for an injunction against the Governor of Ohio “to restrain him in the future from prematurely ordering National Guard troops to duty in civil disorders and an injunction to restrain leaders of the National Guard from future violation of the students’ constitutional rights”⁴⁸ in the wake of the Kent State massacre in 1970, an incident where the Ohio National Guard fired upon students at Kent State University protesting the Vietnam War. Chief Justice Burger wrote the opinion in *Gilligan v. Morgan* and found the request for injunction to be non-justiciable.⁴⁹ In doing so, he stated that a review of military decision-making in this case would have been “inappropriate” even “in the unlikely event that [a judge] possessed requisite technical competence to do so.”⁵⁰ He stated further: “[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence.”⁵¹

Third, the excerpt above from *Winter v. NRDC* implicitly references national security deference (i.e., deference to executive branch political leadership that invokes the constitutional prerogative over national security decisions) through the cite to *Boumediene v. Bush*.⁵² *Boumediene* held that detainees at Guantanamo Bay retained a right of habeas corpus, overturning the portion of the Military Commissions Act of 2006 that purported to suspend the writ.⁵³ Despite the Court ultimately ruling against the President, the Court reiterated the importance of deference to the political branches in cases related to detention to prevent acts of terrorism.⁵⁴ *Boumediene* is one of a long line of national security deference cases reaching back at least as far as *United States v. Nixon*⁵⁵ from 1974.

46. 413 U.S. 1, 10 (1973).

47. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). *See also supra* note 35 and accompanying text.

48. 413 U.S. at 3.

49. *Id.* at 9-12.

50. *Id.* at 8.

51. *Id.* at 10; *see Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring) (mem.) (quoting *Gilligan*, 413 U.S. at 10).

52. 553 U.S. 723 (2008).

53. *Id.* at 732-33.

54. *Id.* at 796-98.

55. 418 U.S. 683 (1974).

The seminal modern case establishing the executive branch prerogative in national security matters worthy of deference is *Department of the Navy v. Egan*⁵⁶ from 1988. Although *Egan* is a case about a civilian employee of the Navy related to his security clearance, the Court in that case cited both *United States v. Nixon*, a national security case with no nexus to the military, and a series of military deference cases⁵⁷ to find that courts should be “reluctant to intrude upon the authority of the Executive in military and national security affairs.”⁵⁸ This language has, in turn, been cited in recent Supreme Court national security cases that involve civilian executive branch decision-making, including *United States v. Zubaydah*⁵⁹ and *Ziglar v. Abbasi*.⁶⁰ Like deference to Congress in matters related to the military, deference to the executive branch’s civilian leadership does not invoke the same civil-military relations-related concerns as deference to military leadership under similar circumstances. The lack of clarity in these cases about whether the Court is deferring to a civilian leadership decision or military professional judgment, however, is problematic. A more disciplined approach from the Supreme Court could solely rely upon the deference to civilian leadership, thereby strengthening civil-military relations and democratic norms.

The procedural history of *Winter v. NRDC* is also worth noting. After a preliminary injunction against the Navy by the district court, civilian political leadership within the executive branch took action to review and support the Navy’s position. Specifically, the President granted the Navy an exemption from the CZMA pursuant to statutory authority when “the activity in question is in the paramount interest of the United States” and “[t]he President determined that continuation of the exercises as limited by the Navy was ‘essential to national security.’”⁶¹ Rather than rely upon the testimony of senior Navy officials to whom the Court gave explicit deference, the Court instead could have given national security deference to these presidential determinations. Had the Court desired to ground its analysis in determinations made by civilian political leadership exercising oversight, it had ample opportunity to do so.

56. 484 U.S. 518 (1988).

57. *Egan*, 484 U.S. at 530 (first citing *Nixon*, 418 U.S. at 710; then citing *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); then citing *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953); then citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); then citing *Schlesinger v. Councilman*, 420 U.S. 738, 757-58 (1975); and then citing *Chappell v. Wallace*, 462 U.S. 296 (1983)).

58. *Id.*

59. 595 U.S. 195, 205 (2022) (quoting *Egan*, 484 U.S. at 530).

60. 582 U.S. 120, 123 (2017) (quoting *Egan*, 484 U.S. at 530).

61. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 18 (2008). *See also* 16 U.S.C. § 1456(c)(1)(B) (1972).

Instead, the Court omitted that analysis nearly entirely, with the exclusion of the quick reference to *Boumediene v. Bush*. Although *Winter v. NRDC* quotes only part of a sentence (the words “essentially professional military judgments”) from the 1973 Kent State massacre case *Gilligan v. Morgan*, the full passage would have been a more apt reference. The passage reads as follows:

The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.⁶²

Thus, the Court omitted the reference in earlier caselaw to the importance of civilian oversight.

As with the Japanese internment cases, the military expertise receiving potential deference in *Gilligan v. Morgan* was also hardly the type of decision-making the Supreme Court should look fondly upon upholding. The Kent State Massacre resulted in the deaths of four students and the wounding of nine more and sparked nationwide protests.⁶³ Although *Gilligan v. Morgan* is now often cited to support deference to military decision-making, Chief Justice Burger’s reasoning in that case also invoked elements of national security deference and separation of powers analysis.⁶⁴ For example, he emphasized that “[t]he relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.”⁶⁵ The injunction requested by the plaintiffs was specifically to involve the judiciary in preventing the civilian Governor (the defendant) from mobilizing the National Guard. Therefore, the issue in this case was the constitutional separation of powers among the civilian political branches; as with other military deference cases, deference to uniformed military decision-making was not a necessary component of the analysis.

62. *Gilligan*, 413 U.S. at 10.

63. For more on what happened at Kent State, see Jerry M. Lewis & Thomas R. Hensley, *The May 4 Shootings at Kent State University: The Search for Historical Accuracy*, KENT ST. U., <https://www.kent.edu/may-4-historical-accuracy> [<https://perma.cc/B5G6-WMB3>] (last visited Feb. 17, 2024).

64. *Gilligan*, 413 U.S. at 8-9 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

65. *Id.* at 7.

Two other seminal cases consistently cited as sources of modern military deference are *Parker v. Levy*⁶⁶ and *Rostker v. Goldberg*.⁶⁷ Many scholars cite the 1974 Supreme Court decision in *Parker v. Levy* as the genesis of the modern military deference doctrine.⁶⁸ In both cases and most early modern military deference cases, the analysis invoked potential deference to Congress as well as military decision-making, not the executive branch.

Parker v. Levy was a court-martial conviction appeal by Howard Levy, who entered the Army under the “Berry Plan,” a program that allowed draftees who were doctors to defer entry to complete their medical training and eventually enter the military as medical officers with a two-year obligation.⁶⁹ While serving out his military obligation, Levy was convicted for making statements against the war and against military service.⁷⁰ The case presented the issue of whether the Uniform Code of Military Justice (“UCMJ”) punitive articles used to convict Levy were void for vagueness.⁷¹ The statutes at issue involved, for example, Article 133 of the UCMJ: “Conduct unbecoming an officer or a gentleman.”⁷²

Justice Rehnquist wrote the opinion in *Parker v. Levy*, holding that the applicable statutes were not void for vagueness.⁷³ Although the word “deference” never appears in *Parker v. Levy*, Justice Rehnquist spent significant time in his opinion extolling the importance of maintaining separation between military and civilian societies. In addition, he quoted an 1886 case to state the following: “Of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law.”⁷⁴ While this statement was made specifically about courts-martial, it now underpins modern deference to military judgment that has extended much farther in modern jurisprudence. Although *Parker v. Levy* is a foundational case for the military deference doctrine, the decision ultimately centered around Congress’ drafting and passing of the UCMJ; the finding of constitutionality of the punitive articles involved deference to Congress’s decision-making.

66. 417 U.S. 733 (1974).

67. 452 U.S. 57 (1981).

68. See, e.g., O’Connor, *supra* note 4, at 226; Mazur, *supra* note 4, at 740; Levin, *supra* note 4, at 1014.

69. *Parker*, 417 U.S. at 736.

70. *Id.* at 737.

71. *Id.* at 740-41.

72. 10 U.S.C. § 993 (2021).

73. *Parker*, 417 U.S. at 760-61.

74. *Id.* at 748 (quoting *Smith v. Whitney*, 116 U.S. 167, 178 (1886)).

Rostker v. Goldberg involved a 1981 constitutional due process challenge to the Selective Service System, which had recently been established by Congress after the end of the Vietnam draft. Justice Rehnquist, again writing for the court, centered his analysis around deference to Congress in military and national security matters, just as he did in *Parker v. Levy*, to hold that the all-male Selective Service requirements were not unconstitutional.⁷⁵ Justice Rehnquist also stated: “[n]ot only is the scope of Congress’ constitutional power in this area broad, but the lack of competence on the part of the courts is marked.”⁷⁶ Justice Rehnquist then proceeded to quote the same passage from *Gilligan v. Morgan* discussed above in its entirety, and he included not only the language used in *Winter v. NRDC* to justify deference to the military officials’ statements themselves but also the language “subject *always* to civilian control of the Legislative and Executive Branches.”⁷⁷ Therefore, though Justice Rehnquist is often cited as the architect of modern military deference through his opinions in *Parker v. Levy* and *Rostker v. Goldberg*, he did not depart from grounding his analysis in civilian political leadership decision-making. In these earlier modern cases, although problematic military deference language exists, it was also coupled with deference to Congress. It is only in more recent caselaw like *Winter v. NRDC* that language emphasizing the incompetence of courts to handle these matters has not been coupled with deference to civilian political leadership.

C. RELATED DOCTRINES: STATE SECRETS PRIVILEGE AND FERES

Two related Supreme Court doctrines worth noting are the state secrets privilege and the *Feres* doctrine. The state secrets privilege allows the executive branch to withhold evidence related to national security matters from litigation by asserting that it would not be in the public interest to disclose. Courts will not inquire further into these executive branch assertions. The *Feres* doctrine bars claims under the Federal Tort Claims Act (“FTCA”) against the military. Both doctrines protect military decision-making from further inquiry by the judiciary, and therefore, they are often confused with military deference. However, they are distinct doctrines. In the case of the state secrets privilege, the Supreme Court built in a test that resolves potential civil-military relations concerns by requiring the agency or department head to make the relevant assertions. In the case of *Feres*, deference is not to specific military determinations lacking oversight, but rather, the cases are deemed non-justiciable. Although the analysis is

75. *Rostker v. Goldberg*, 453 U.S. 57, 65-66, 83 (1981).

76. *Id.* at 65.

77. *Id.* at 65-66 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

different, *Feres* invokes some of the same concerns as the military deference doctrine, as it makes military decisions untouchable by judicial review. However, currently there appears to be momentum toward limiting the application of the doctrine in the near future.

i. State Secrets Privilege

The seminal state secrets privilege case is *United States v. Reynolds*.⁷⁸ In that case, a B-29 bomber carrying thirteen people, including nine military service members and four civilians, crashed while testing secret electronic equipment.⁷⁹ Nine of the thirteen people died, and the widows of the three deceased civilians sued under the FTCA.⁸⁰ The plaintiffs requested the accident report in discovery, and during the ensuing litigation, the secretary of the Air Force asserted “that it would not be in the public interest to furnish this report.”⁸¹ The government declined to produce the specific documents and any further evidence that would enable the district court to determine whether privilege should apply, resulting in a judgment in favor of the plaintiffs that was affirmed on appeal by the Third Circuit.⁸² Chief Justice Vinson wrote for the Court, creating a test for the state secrets privilege that endures today and reversing the decisions below.⁸³

Chief Justice Vinson drafted the test as follows: (1) “There must be [a] formal claim of privilege” by the government that is (2) “lodged by the head of the department which has control over the matter, after actual personal consideration by that officer,” then (3) “[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege . . . without forcing a disclosure of the very thing the privilege is designed to protect.”⁸⁴ The second part of this test directly addresses potential civil-military relations concerns. While the Court in *Reynolds* considered expert judgment in the form of an affidavit from the Judge Advocate General of the Air Force,⁸⁵ Chief Justice Vinson explicitly rested his decision upon the personally considered assertions made by the civilian department head, the secretary of the Air Force, exercising his oversight responsibility.⁸⁶ This test

78. 345 U.S. 1 (1953), *superseded by statute*, Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

79. *Id.* at 3.

80. *Id.*

81. *Id.* at 4.

82. *Id.* at 5.

83. *See, e.g.*, *United States v. Zubaydah*, 595 U.S. 195, 198-99 (2022); *FBI v. Fazaga*, 595 U.S. 344, 347 (2022).

84. *Reynolds*, 345 U.S. at 7-8.

85. *Id.* at 4-5.

86. *Id.* at 6-7.

remains the same today, with all subsequent state secrets privilege cases involving the military directed to senior civilian department heads or the President himself, thus avoiding military deference-related concerns.⁸⁷

ii. The Feres Doctrine

The *Feres* doctrine arises from somewhat similar circumstances as *United States v. Reynolds*. *Feres v. United States* was a consolidation of three FTCA cases against the military claiming negligence.⁸⁸ The most notorious of these is the Jefferson case, where “Plaintiff, while in the Army, was required to undergo an abdominal operation. About eight months later, in the course of another operation after plaintiff was discharged, a towel 30 inches long by 18 inches wide, marked ‘Medical Department U.S. Army,’ was discovered and removed from his stomach.”⁸⁹ Although Jefferson survived, the other two cases involved the deaths of active duty service members, one in a fire and the other due to medical malpractice.⁹⁰

Justice Jackson wrote for the court and “conclude[d] that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”⁹¹ Justice Jackson’s analysis rested on deference to Congress and legislative intent, though the evidence of such intent was thin. Thus, the military became immune from virtually any suit from military service members. *Feres* still applies today.

The *Feres* doctrine was extended by *Chappell v. Wallace* in 1983 to *Bivens* cases;⁹² and that conclusion was affirmed in *United States v. Stanley*.⁹³ In *Chappell v. Wallace*, five enlisted Navy sailors sued their superior officers for racism, seeking damages, declaratory judgment, and injunctive relief.⁹⁴ The Southern District of California “dismissed the complaint on the grounds that the actions . . . were nonreviewable military decisions.”⁹⁵ The Ninth

87. Cf. *Doe v. Mattis*, 928 F.3d 1, 25 (D.C. Cir. 2019) (using language related to military deference but not citing military deference cases and ultimately rejecting the secretary of defense’s (i.e., civilian political leadership) efforts to transfer a detainee suspected of supporting ISIS who was also an American citizen); *Karnoski v. Trump*, 926 F.3d 1180, 1193 (9th Cir. 2019) (using misplaced military deference analysis to evaluate a 2018 decision by the secretary of defense and the president to limit the military service opportunities of transgender people and referring to their decisions as “military judgments”).

88. 340 U.S. 135, 136-37 (1950).

89. *Id.* at 137.

90. *Id.* at 136-37.

91. *Id.* at 146.

92. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

93. 483 U.S. 669, 683-84 (1987).

94. *Chappell*, 462 U.S. at 297.

95. *Id.* at 298.

Circuit reversed, finding that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*⁹⁶ authorized damages for the constitutional violations alleged by the sailors “even though Congress had not expressly authorized such suits.”⁹⁷ “The Court, in *Bivens* . . . cautioned . . . that such a remedy will not be available when ‘special factors counselling hesitation’ are present.”⁹⁸ In his opinion in *Chappell v. Wallace*, Chief Justice Burger stated, “The ‘special factors’ that bear on the propriety of respondents’ *Bivens* action also formed the basis of this Court’s decision in [*Feres*].”⁹⁹

In dismissing the *Bivens*-type action in *Chappell v. Wallace* citing “special factors,” Chief Justice Burger stated:

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting. . . . Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.¹⁰⁰

In 1958, Master Sergeant James B. Stanley volunteered to participate in an Army program testing defenses against chemical warfare.¹⁰¹ Without his knowledge, Master Sergeant Stanley was administered four doses of lysergic acid diethylamide (“LSD”) in a month as a part of a secret Army study into the effects of LSD.¹⁰² As a result, he “suffered from hallucinations and periods of incoherence and memory loss, was impaired in his military performance, and would on occasion ‘awake from sleep at night and, without reason, violently beat his wife and children, later being unable to recall the entire incident.’”¹⁰³ In 1975, after being discharged from the Army and after a divorce, he attributed to the effects of the LSD, the Army reached out to obtain his cooperation in a study of the long-term effects of LSD; this was his first notification that he had been administered LSD.¹⁰⁴ Master Sergeant

96. 403 U.S. 388 (1971).

97. *Chappell*, 462 U.S. at 298.

98. *Id.* (quoting *Bivens*, 403 U.S. at 396).

99. *Id.*

100. *Id.* at 300.

101. *United States v. Stanley*, 483 U.S. 669, 671 (1987).

102. *Id.*

103. *Id.*

104. *Id.* at 671-72.

Stanley tried to sue under the FTCA, but the district court and the Fifth Circuit agreed that *Feres* barred his suit.¹⁰⁵ Instead, the Fifth Circuit remanded in 1981—two years before the Supreme Court’s decision in *Chappell v. Wallace*—for consideration of a potential *Bivens* action.¹⁰⁶

The case came back up to the Supreme Court in 1987 “[b]ecause the Courts of Appeals ha[d] not been uniform in their interpretation of the holding in *Chappell v. Wallace*, and because the Court of Appeal’s reinstatement of Stanley’s FTCA claims seem[ed] at odds with sound judicial practice.”¹⁰⁷ Master Sergeant Stanley tried to argue that the reasoning in *Chappell v. Wallace* was based on chain-of-command relationships that were not at issue in his case.¹⁰⁸ In an opinion written by Justice Scalia, the Court stated: “Since *Feres* did not consider the officer-subordinate relationship crucial, but established instead an ‘incident to service’ test, it is plain that our reasoning in *Chappell v. Wallace* does not support the distinction Stanley would rely on.”¹⁰⁹ Thus, the Supreme Court solidified its position that the analysis in *Feres* extended to *Bivens* cases.¹¹⁰

In 2018, the Ninth Circuit held as follows in a *Feres* case, *Daniel v. United States*:

We must determine whether the oft-criticized jurisdictional bar recognized in *Feres v. United States* . . . (commonly known as the “*Feres* doctrine”)—providing governmental immunity from tort claims involving injuries to service members that are “incident to military service”—bars Walter Daniel’s tort action against the United States for the tragic death of his wife, Navy Lieutenant Rebekah Daniel, due to a complication following childbirth. As we have done many times before, we regretfully reach the conclusion that his claims are barred by the *Feres* doctrine and, therefore, affirm.¹¹¹

The reluctance to apply *Feres* in the Ninth Circuit is typical of much modern commentary around *Feres*. Justices Scalia and Thomas have consistently voiced their dissent to the doctrine, questioning the military necessity determinations that seem to underpin *Feres*. The first hint of this dissent occurred in 1987. It is noteworthy, and perhaps a bit confusing, that Justice Scalia also penned the opinion in *United States v. Stanley* extending

105. *Id.* at 672.

106. *Id.*

107. *Id.* at 676 (footnote omitted).

108. *Id.* at 679-80.

109. *Id.* at 680-81.

110. *Id.* at 683-84.

111. 889 F.3d 978, 980 (9th Cir. 2018) (footnote omitted).

Feres to *Bivens* cases in the same year. Nevertheless, Justice Scalia wrote in dissent in *United States v. Johnson* with Justices Brennan, Marshall and Stevens:

Perhaps without that scant (and subsequently rejected) textual support, which could be pointed to as the embodiment of the legislative intent that its other two rationales speculated upon, the *Feres* Court would not as an original matter have reached the conclusion that it did. Be that as it may, the speculation outlived the textual support, and the *Feres* rule is now sustained only by three disembodied estimations of what Congress *must* (despite what it enacted) have intended. They are bad estimations at that. . . . To the extent that the rationale rests upon the military’s need for uniformity, it is . . . unpersuasive. . . . [W]e have repeatedly cited the later-conceived-of “military discipline” rationale as the “best” explanation for [*Feres*].¹¹²

In this dissent, Justice Scalia showed his willingness to pierce both congressional deference and any hint of potential military deference underlying *Feres*. The signatures of three additional justices to his dissent indicate that his arguments were persuasive then, as they may remain now. Thus, in 1987, Justice Scalia extended *Feres* to *Bivens* cases while also laying the groundwork for future Supreme Court efforts to undermine it.

Most recently in *Clendening v. United States*, the Fourth Circuit applied *Feres* to a death case involving a Marine Corps officer who suffered from leukemia due to well-documented water contamination at Camp Lejeune.¹¹³ The Supreme Court denied certiorari in 2022, with Justice Thomas dissenting, stating, “As I have explained several times, *Feres* should be overruled.”¹¹⁴ Showing his willingness to inquire into military assertions and military decision-making, Justice Thomas stated further:

Feres’s professed concern with military discipline is anomalous, if not downright hypocritical, against the backdrop of military law more generally. We preclude run-of-the-mill tort claims that are “remotely related” to military status because of their potential to undermine military discipline. But we have “never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.” To the contrary, servicemen “routinely sue their government and bring

112. 481 U.S. 681, 695-96, 98 (1987) (Scalia, J., dissenting).

113. 19 F.4th 421, 425 (4th Cir. 2021).

114. *Clendening v. United States*, 143 S. Ct. 11, 12 (2022) (Thomas, J., dissenting) (mem.).

military decision-making and decision-makers into court” seeking injunctive relief.¹¹⁵

Justice Thomas’s characterization of the Court’s approach to military cases suggests that he is not predisposed to deference. Instead, he appeared to be inviting a more proactive inquiry into military decision-making, at least in *Feres* cases.

Recently, the executive branch has also recognized the inherent unfairness in *Feres* and taken some action to limit its application. In 2019, likely in response to the *Daniel* case discussed above where a Navy officer died post-partum due to medical negligence, the National Defense Authorization Act for Fiscal Year 2020 directed the creation of an administrative procedure to pay medical malpractice claims by military service members.¹¹⁶ The resulting regulations are codified in the Code of Federal Regulations at 32 C.F.R. Section 45.1.

Feres cases do not necessarily involve the same analysis as the military deference cases discussed above. At issue in *Feres* is the general immunity of the military to suit, not necessarily the value of a specific military judgment and whether it is worthy of deference or whether it has been sanctioned by civilian political leadership. *Feres*-related litigation and legislation have not invoked explicit mention of civil-military relations principles, as some earlier military deference cases have. Even so, these recent cases that expose reluctance to adhere to *Feres* also potentially showcase a willingness to move away from regarding military judgments as final and instead to probe further in the absence of a remedy or other resolution from Congress or the executive branch.

III. CIVIL-MILITARY RELATIONS THEORY

Although the academic field of civil-military relations focuses broadly on the relationship between civilians and the military, this Article is focused primarily on so-called “vertical” civil-military relations: the study of military subordination to civilian oversight.¹¹⁷ The analysis above shows how the Supreme Court has excused itself for the most part in having a role in such oversight, choosing to defer to civilian leadership in Congress and the executive branch in many cases but also explicitly to decisions coming directly from the military itself. “Vertical” civil-military relations are sometimes helpfully discussed in contrast with “horizontal” civil-military

115. *Id.* at 13 (footnote and citation omitted).

116. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (codified at 32 C.F.R. § 45.1).

117. RICHARD M. SWAIN & ALBERT C. PIERCE, *THE ARMED FORCES OFFICER* 97 (2017).

relations, which is the study of the military's relationship with broader civilian society.¹¹⁸

This Part introduces key ideas from civil-military relations theory to illuminate an important but underutilized lens for analyzing the Supreme Court's approach to cases arising out of the military. The first section provides an overview of relevant civil-military relations theory. The second section describes the relative gap in legal scholarship on matters of civil-military relations, highlighting a few noteworthy exceptions. The final section applies the theory to Supreme Court caselaw. The next Part will show how there may be a window of opportunity to apply civil-military theory to the military deference doctrine and clean up problematic analysis in Supreme Court jurisprudence.

A. THEORIES OF CIVILIAN OVERSIGHT AS APPLIED TO THE SUPREME COURT

Modern civil-military relations theory, especially comparative political science focused on post-colonial experiences in the global south, is often preoccupied with threats of coups d'état.¹¹⁹ The term "coup" was not popularized in English until the 1800s, around the time of the fall of Napoleon Bonaparte, but the theory regarding the balance between the need for national defense and liberty interests was well-reflected in the founding documents of the United States.

In modern usage, the term "coup" often refers specifically to a military overthrow of a civilian government, though it can also reference other forms of military overreach or overthrow of democratic governments.¹²⁰ American civil-military relations theoreticians recognize that a coup—while the most fearsome potential manifestation of a civil-military relations breakdown—is not the primary concern in the United States.¹²¹ Instead, from the founding of the United States, American civil-military relations scholarship has tended to focus on the appropriate relationship between military and civilian leadership, with an emphasis on ensuring that the military does not obtain so

118. *Id.* at 115.

119. Peter D. Feaver, *Civil-Military Relations*, 2 ANN. REV. POL. SCI. 211, 212-13 (1999).

120. The term "coup d'état" is broad and encompasses many categories of governmental overthrow by the military, though it is not typically used to describe overreaches by the military into governance or violation of civil liberties with the acquiescence of the civilian government. Modern comparative theory has developed a rich taxonomy of coups, including what are called "coups with adjectives," creating room within the scholarship for finding coups or coup-like behavior in situations of military overreach. *See, e.g.,* Leiv Marsteintredet & Andrés Malamud, *Coup with Adjectives: Conceptual Stretching or Innovation in Comparative Research?*, 68 POL. STUD. 1014 (2020).

121. Feaver, *supra* note 119, at 230 (pointing out how the issue of "robustness and efficacy of civilian control" is still debated in policy circles).

much power or become so unaccountable that civil liberties become jeopardized. For example, Alexander Hamilton did not see a threat to the Republic from a strong military; he focused instead on the threat to civil liberties and the threat posed from a centralized military organized under a monarch. In Federalist No. 29, he stated, “There is something so far-fetched and so extravagant in the idea of danger to liberty from the militia Where in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens?”¹²² In modern scholarship, by contrast, the experience of other countries has informed concern in the United States that unhealthy civil-military relations may lead to a possibility of democratic backsliding.

Significant punditry and other commentary outside of academia has also focused on the appropriate relationship between civilian oversight and military leadership in recent years.¹²³ President Trump’s appointment of Secretary of Defense James Mattis—a recently retired Marine Corps four-star general—and President Biden’s appointment of Secretary of Defense Lloyd Austin—a recently retired Army four-star general—both required the Senate to waive a seven-year statutory waiting requirement for retired generals to serve in high-level political office.¹²⁴ Concern erupted among commentators about the implications for civil-military relations of these two decisions, leading to an increase in attention to civil-military relations scholarship.¹²⁵

122. THE FEDERALIST NO. 29 (Alexander Hamilton). *But cf.* THE FEDERALIST NO. 46 (James Madison) (arguing that a small federal military would be outmatched by the militias of the various states, which “forms a barrier against the enterprises of ambition”).

123. *See, e.g.*, Schake, *supra* note 6; Mara Karlin, *Civilian Oversight Inside the Pentagon: Who Does It and How?*, in RECONSIDERING AMERICAN CIVIL-MILITARY RELATIONS 85 (Lionel Beehner et al. eds., 2021); Alice Hunt Friend, *What Makes a Civilian?*, WAR ROOM (Apr. 9, 2020), <https://warroom.armywarcollege.edu/articles/what-makes-a-civilian/> [<https://perma.cc/9HE5-N9GM>].

124. This requirement was originally ten years as codified in the National Security Act of 1947, ch. 343, § 202(a), 61 Stat. 495, 500. In 2008, the requirement decreased to seven years. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 113, 122 Stat. 3. *See also* Susan Hennessey & Rohini Kurup, *What’s at Stake in the Austin Waiver*, LAWFARE (Jan. 18, 2021, 10:08 AM), <https://www.lawfareblog.com/whats-stake-austin-waiver> [<https://perma.cc/5NVF-JDX4>].

125. *See, e.g.*, Rosa Brooks, *The Pentagon Needs More Civilian Control Over the Military Now, Not Less*, WASH. POST (Dec. 9, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/12/09/lloyd-austin-civil-military-control/> [<https://perma.cc/F84F-X7MW>]; Kirsten Gillibrand, *Civilian Control of the Military Is Fundamental to American Democracy*, N.Y. TIMES (Dec. 6, 2016, 3:22 AM), <https://www.nytimes.com/roomfordebate/2016/12/06/is-it-wrong-to-have-a-general-like-james-mattis-run-the-pentagon/civilian-control-of-the-military-is-fundamental-to-american-democracy> [<https://perma.cc/25E2-4FV7>]; Kori Schake, *All the President’s Generals*, FOREIGN POL’Y (Dec. 3, 2016, 11:15 AM), <https://foreignpolicy.com/2016/12/03/all-the-presidents-generals/> [<https://perma.cc/D7CV-CVJJ>].

Though the dialogue among civil-military relations scholars is robust and newly energized, the findings and wisdom gleaned from their scholarship tend only to be applied (in scholarship and in practice) to the executive branch,¹²⁶ and they contain little explicit discussion of the role of the judiciary. The reciprocal in the United States is also true; as discussed below, legal academia does not engage robustly with these issues, and the Supreme Court has never used the term “civil-military relations” in an opinion.¹²⁷

This Article argues that while references to civil-military relations theory at the Supreme Court are only implicit, and in-depth scholarship related to the role of the Supreme Court in civil-military relations is also sparse, there is an important role for civil-military relations theory in informing Supreme Court jurisprudence. Neither civil-military relations theory nor the Constitution suggests the modern Supreme Court should have a hands-off approach to military oversight; instead, a deeper look at the theory suggests that a civil-military relations-informed approach would encourage a reconfiguration of the military deference doctrine, introducing important concepts that could contribute to healthier and stronger democratic institutions moving forward.

i. Huntington’s Theory of Objective Control

The academic field of civil-military relations is relatively young. Early American civil-military relations theory in the twentieth century was dominated by sociological approaches. Beginning roughly in the 1960s, the field of political science turned to a more nuanced exploration of civil-military relations in the context of a republic without a colorable coup threat¹²⁸ but with concerns about military overreach. The seminal text in modern American civil-military relations is Samuel Huntington’s *The Soldier and the State*, first published in 1957.¹²⁹

Huntington’s theory of civil-military relations is often described as the “objective control model.” In this model, civilian leadership and military leadership need to operate separately and distinctly to obtain “objective control,” which is a construct distinguishable from the blurred roles that

126. Even as applied to the executive branch, scholarship from legal academia in this field is limited, focusing primarily on the unitary executive and the role of the Commander-in-Chief as the head of the military. *See supra* Part III.B.

127. As of February 2, 2023, the only relevant reference discovered in Supreme Court litigation was a 2017 brief in *Ortiz v. United States*. Petitioner’s Reply Brief at *7-8, 585 U.S. 427 (No. 16-1423).

128. *Cf.* Charles J. Dunlap Jr., *The Origins of the American Military Coup of 2012*, 22 *PARAMETERS* 2 (1992).

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

would exist in a “subjective control” model. An example of the subjective control model would be citizen-soldier leadership embraced in early American history before the Civil War.

Huntington believed that professionalization of the military would result in an apolitical class of officers who execute military missions and provide expert technical advice to civilian leadership. The professionalized military would (and should) thus inform civilian policy and strategy decisions while maintaining strict separation between the military sphere and the civilian sphere. Strict separation thus enables objective control. In objective control with strict separation, policy-making is bifurcated between military technical advice and civilian decision-making in what is sometimes discussed as a principal-agent relationship.¹³⁰ Huntington believed that the objective control model maximizes military professionalism, including adherence to professional ethics involving apoliticism, and thus leads to stronger democratic institutions.¹³¹ The role of the military in his view, therefore, was to be as technically expert as possible while remaining totally apolitical.¹³²

The U.S. military has embraced the Huntingtonian model,¹³³ as it clarifies roles and empowers military officers as professionals.¹³⁴ Those who embrace the objective control and the “strict separation” model can be tempted to use the emphasis on separation to advocate for civilian overseers butting out of military business. They might argue, for example, that military officers as technical experts need to be able to operate and make decisions without meddling from civilian leadership who might make them less efficient or effective.¹³⁵ This line of argumentation echoes the Supreme

130. Peter D. Feaver, *Crisis as Shirking: An Agency Theory Explanation of the Souring of American Civil Relations*, 24 ARMED FORCES & SOC'Y 407, 409 (1998).

131. HUNTINGTON, *supra* note 129, at 83.

132. *Id.* Huntington's theory is sometimes exposed for its tautological approach to officer professionalism; Huntington argued that professional officers should be apolitical, but then defined apoliticism as professionalism. There are a number of such paradoxes in American civil-military relations theory derived from Samuel Huntington. See Risa Brooks, *Paradoxes of Professionalism: Rethinking Civil-Military Relations in the United States*, 44 INT'L SEC. 7 (2020).

133. Risa Brooks, *Beyond Huntington: US Military Professionalism Today*, 51 PARAMETERS 65, 67 (2021); Thomas C. Bruneau, *Impediments to the Accurate Conceptualization of Civil-Military Relations*, in ROUTLEDGE HANDBOOK OF CIVIL-MILITARY RELATIONS 13, 19 (Florina Cristiana Matei et al. eds., 2d ed. 2015) (“[T]he U.S. armed forces welcomed Huntington's notion of ‘objective control’ as a rationalization for them to manage their own affairs . . .”).

134. Before Huntington, military officers were not widely recognized as professionals. He is credited with being an authority on professionalism in general and, in applying that analysis to the military, arguing that it too is a profession. See, e.g., ANTHONY E. HARTLE, MORAL ISSUES IN MILITARY DECISION MAKING 9 (2d ed. 2004). But see 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA bk. 3, ch. XXII (1838) (referencing the military as a profession).

135. See ELIOT A. COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME 4-5 (First Anchor Books ed. 2003) (2002) (explaining that Huntington's objective control theory is sometimes extended to suggest that for civilians “[t]o ask too many questions (let alone give orders) about tactics, particular pieces of hardware, the design of a campaign, measures

Court's approach to military deference, but it does not reflect Huntington's scholarship, and it is problematic in its potential implications for democracy. In the past couple of decades, civil-military relations scholars have begun pushing back on this coopting of Huntington's theory of objective control to clarify the importance of proactive civilian oversight in healthy civil-military relations.¹³⁶

Huntington acknowledged that his theory of objective control was not constitutionally required.¹³⁷ Huntington also acknowledged other theoretical models of civil-military relations that might help achieve the goal of civilian control.¹³⁸ He argued that his objective control model was preferable because it encourages military professionalism, which incentivizes the military to subordinate itself, as opposed to other models that seek to increase civilian power over the military.¹³⁹ Since the publication of Huntington's seminal book, scholars in the field have built upon his scholarship and developed their own complementary theories of civil-military relations.¹⁴⁰

Peter Feaver—a student of Samuel Huntington—is the most prominent scholar to have carried forward the tradition of the objective control model. In Feaver's view, objective control is best conceptualized through principal-agent theory.¹⁴¹ To explain his theory, Feaver famously stated pithily, “[C]ivilians have the right to be wrong.”¹⁴² In order for objective control to work, oversight must necessarily come from civilians who are likely less technically expert than their military advisors. In Feaver's view, the professional military must therefore be willing to endure the risk of inexpert (or wrong) decision-making for the longer-term health of the civil-military relationship. Feaver is arguably the leading scholar in civil-military relations today (among many other excellent noteworthy scholars, all of whom continue to take a Huntington-informed approach to their work).

of success, or to press too closely for the promotion or dismissal of anything other than the most senior officers is meddling and interference, which is inappropriate and downright dangerous”).

136. Healthy civil-military relations are not necessarily frictionless civil-military relations. Proactive civilian oversight that checks military power may create tensions, but as with all checks and balances, those tensions may be a result of a healthy system. See Peter D. Feaver & Richard H. Kohn, *Civil-Military Relations in the United States: What Senior Leaders Need to Know (and Usually Don't)*, 15 STRATEGIC STUD. Q. 12, 24-26 (2021).

137. HUNTINGTON, *supra* note 129, at 190 (“Objective civilian control has been extraconstitutional, a part of our political tradition, but not of our constitutional tradition.”).

138. *See id.* at 80.

139. *Id.* at 80-83.

140. Huntington was by no means the first American to think through these issues. He cites a line of important and worthy scholarship that came before him. *Id.* at 80 n.1.

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

142. Feaver, *supra* note 119, at 216.

ii. *Other Theories of Civil-Military Relations*

Morris Janowitz, a sociologist, authored the seminal work that is often contrasted with *The Soldier and the State*, titled *The Professional Soldier*, published in 1960. Although these two texts are often read in opposition to each other, they can also be read complementarily. Janowitz predicted that the military and civilian society living side-by-side would eventually culturally converge, creating more room for give-and-take between military and civilian spheres than Huntington's theory of strict separation. Many modern readers regard Huntington's work as being more relevant for the study of the subfield of civil-military relations that is sometimes called "vertical" civil-military relations (i.e., military subordination to civilian oversight) and Janowitz's work as being more relevant for the study of "horizontal" civil-military relations (i.e., the study of the military's relationship with civilian society).¹⁴³

Because Janowitz was a sociologist, he was not motivated by producing a theory about how to subordinate the military to civilian control. Instead, Janowitz's observations in *The Professional Soldier* are descriptive, seeking to show how military professionalism developed over the fifty preceding years and suggesting a trend into the future. Janowitz argued that the interplay between senior military professionalized officers and civilian decision-makers would lead to a convergence in styles of decision-making.¹⁴⁴ Janowitz observed that strategic decision-making does not happen in two stratified layers, as Huntington theorized would be ideal, but rather in a more homogeneous society of national security professionals.¹⁴⁵

Janowitz's convergence theory predicts the ultimate result of a society of "citizen-soldiers." In *The Professional Soldier*, the movement from military professional to citizen-soldier who actively participates in and engages with public life results in more of a constabulary or militia model of military service.¹⁴⁶ Janowitz's vision echoes early American history. With nearly universal service in the militia, military service was seen as a part of civic engagement, not a specialized profession in a separate society.¹⁴⁷

143. See *supra* notes 131-32 and accompanying text.

144. MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* 348, 364 (2017).

145. *Id.* at 348, 364.

146. *Id.* at 418-19. Janowitz further defines the use of a citizen soldier to require that military service "be *obligatory* (compulsory service fulfilling part of one's duties as a citizen), *universal* (reflective of the nation as a whole, not just one segment of the population) and have *legitimacy by democratic standards* (or strong popular support)." RAPHAEL S. COHEN, *DEMYSTIFYING THE CITIZEN SOLDIER* 6 (2015) (citing Morris Janowitz, *The Citizen Soldier and National Service*, 31 AIR U. REV. 2 (1979)).

147. COHEN, *supra* note 146, at 9.

Before the Civil War, the Army was also the centralized government's means of enforcing order; police forces came later.¹⁴⁸ Like Janowitz, the founders believed that accountability for military overreach could come from intertwining civilian society with the military, not exclusively through strict separation. While Janowitz and the American founders were both concerned with maintaining civilian oversight of the military, neither required objective control or strict separation to achieve that end. Despite Janowitz's predictions and the logic of his theory, the United States currently does not reflect the citizen-soldier model.¹⁴⁹ Instead, as stated above, the military has embraced more of a Huntingtonian model.¹⁵⁰

In his 2002 book, *Supreme Command*, Eliot Cohen provided a more modern critique of Huntington's theory of objective control and strict separation. Cohen referred to Huntington's work as "the 'normal' theory of civil-military relations" because it has been taken up so readily by scholars and the military.¹⁵¹ Using Carl von Clausewitz's work, including his famous assertion that "war is only a part of political intercourse, therefore by no means an independent thing in itself,"¹⁵² Cohen critiqued the Huntingtonian approach for not recognizing the ways in which war and the military are necessarily intertwined with political decision-making. In his book, Cohen stated: "[T]here can be in Clausewitz's view no arbitrary line dividing civilian and military responsibility, no neat way of carving off a distinct sphere of military action."¹⁵³

Cohen's concern with objective control is the potential for misapplication by civilian leadership who would then shy away from proactively engaging with military decision-making. Cohen stated: "Civil-military relations must thus be a dialogue of unequals and the degree of civilian intervention in military matters a question of prudence, not principle, . . . [as] Winston Churchill[] noted . . . 'it is always right to probe.'"¹⁵⁴ Where "strict separation" in Huntington's theory of objective control is meant to warn the military against interfering with civilian oversight, Cohen observed how it also shields the military from proactive engagement from civilian leaders. Instead, Cohen embraced the "unequal dialogue," where civilians feel empowered to recognize that principled probing of the military's

148. JANOWITZ, *supra* note 144, at 419-20.

149. See Eliot Cohen, *Twilight of the Citizen-Soldier*, 31 *PARAMETERS* 23 (2001).

150. See *supra* note 133.

151. COHEN, *supra* note 135, at 4.

152. CARL VON CLAUSEWITZ, *ON WAR* bk. VIII, ch. VI, § B (1874).

153. COHEN, *supra* note 135, at 8.

154. *Id.* at 12 (quoting WINSTON S. CHURCHILL, *THE GATHERING STORM* 462 (1948)).

decision-making is a requirement for sound leadership and oversight, especially in wartime.

Cohen's work justifies proactive civilian oversight both as a democratic priority but also as a boon to military effectiveness. This is perhaps counterintuitive, but it is an important finding. Many justifications for military deference—including deference by the judiciary—rely on an implicit assumption that engagement from civilian oversight will diminish military effectiveness. *Supreme Command* is a series of case-studies in proactive civilian leadership during wartime showcasing how leaders such as President Abraham Lincoln and Prime Minister Winston Churchill improved their militaries' performance and helped achieve victory through principled probing despite lacking the expertise of the generals they were overseeing.¹⁵⁵

American civil-military relations scholarship focuses primarily on the appropriate role of the military and how to imbue professional ethics in the military that will maintain their subordination to civilian oversight. Far less is written and theorized about the role of civilians in the “unequal dialogue” in the context of vertical civil-military relations.¹⁵⁶ Civil-military relations scholarship focused on civilians is primarily focused on survey instruments of the U.S. public, which convey the high regard that Americans have for the military (i.e., horizontal civil-military relations).¹⁵⁷ While this faith in the military is generally a good thing, it has the potential to rationalize inappropriate deference,¹⁵⁸ and it contributes to problematic politicization of the military when political candidates attempt to leverage that public faith.¹⁵⁹ While some of the American public's current faith in the military is reflective of a societal desire to show appreciation for military service and to right the wrongs of the post-Vietnam War era, placing the military on a pedestal runs the risks of exalting military decision-making beyond civilian reach and encourages inappropriate deference.

155. *Id.*

156. Alice Hunt Friend, *The Civilian and the State: Politics at the Heart of Civil-Military Relations*, WAR ON THE ROCKS (Oct. 17, 2022), <https://warontherocks.com/2022/10/the-civilian-and-the-state-politics-at-the-heart-of-civil-military-relations/> [<https://perma.cc/7UPC-SLTY>]. This is perhaps not surprising. Professional military education institutions produce much of the scholarship on civil-military relations and their role as educators for military leaders informs their focus on the military's role.

157. See WARRIORS & CITIZENS: AMERICAN VIEWS OF OUR MILITARY (Kori Schake & Jim Mattis eds. 2016); SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY (Peter D. Feaver & Richard H. Kohn eds. 2001).

158. See Krebs et al., *supra* note 6.

159. Kori Schake, *Don't Drag the Military into Politics*, WAR ON THE ROCKS (Dec. 13, 2022), <https://warontherocks.com/2022/12/dont-drag-the-military-into-politics/> [<https://perma.cc/L58V-3XM2>].

There may be times when deference to military decision-making is warranted, but the idea of civilian overseers deferring to the military as a default doctrine runs afoul of civil-military relations theory as it has evolved. Starting from Huntingtonian first principles, the military should be apolitical and fully subordinated to civilian oversight. More recent theories suggest that in the “unequal dialogue” between civilian leadership and the military, proactive engagement by civilian leadership yields better outcomes than deference. Healthy civil-military relations may or may not require a strict separation between the civilian and military spheres, but the prioritization of the military’s subordination to civilian oversight is the key to the maintenance of healthy civil-military relations. Civilian oversight bodies should not defer to military decisions out of lack of expertise; civilians “have a right to be wrong.”

B. LEGAL SCHOLARSHIP ON CIVIL-MILITARY RELATIONS AND MILITARY DEFERENCE

Few legal scholars have taken on civil-military relations theory in the vertical dimension, though interest in these questions is rising. An even smaller number have addressed the potential role of the judiciary in relation to civil-military relations theory. Even so, the limited legal scholarship referencing civil-military relations has led to some observations worth noting.

Legal scholarship related to civil-military relations in the recent past has tended to coalesce around a few major historical points. First, in the late 1990s, a perceived crisis of civil-military relations resulting from the growing gap between military and civilian societies and a perception that “the military is beginning to view itself not just as a ‘separate’ society, as the Supreme Court characterized it in *Parker v. Levy*, but as an institution fundamentally superior to the society it serves.”¹⁶⁰ While some lawyers commented during this timeframe, the attention to civil-military relations at this point remained mostly outside of legal academia. Second, the role of civilian and military lawyers in the War on Terror and the so-called “JAGs’ Revolt” reignited this debate but fundamentally shifted its terms with a nearly-exclusive focus on the executive branch.¹⁶¹ Most recently, in the wake of the Trump presidency,

160. Charles J. Dunlap, Jr., *Maintaining the Balance in Civil-Military Relations*, 93 AM. SOC’Y INT’L L. PROC. 343, 344 (1999) (footnote omitted).

161. See, e.g., David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 480-82 (2008) (discussing the commander-in-chief power but only engaging with judicial deference to the president, i.e., national security deference, not deference to the military itself); 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 (2007); Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50

scholarship has emerged related to executive branch norms and the appropriate role of military officers vis-à-vis politics.¹⁶²

The most relevant treatment of the questions posed in this Article in legal academia likely comes from Diane Mazur in her 2010 book *A More Perfect Military*,¹⁶³ and Deborah Pearlstein in her 2012 article in the *Texas Law Review: The Soldier, The State, and the Separation of Powers*.¹⁶⁴ Both works are reactions to the wave of scholarship arising from the War on Terror. In 2004, as civilian lawyers in the national security community were advocating for “enhanced interrogation techniques” on detainees, the top military lawyers (“the JAGs”) dissented.¹⁶⁵ Pre-September 11, 2001 skepticism of military overreach from many academics turned into appreciation and exaltation of the military as being a potential professionalized check on unethical political civilian decision-making. At the same time, supporters of the Bush administration regarded pushback from uniformed lawyers against civilian political appointees’ decision-making as being antithetical to the civil-military relations priority of civilian oversight. For example, Glenn Sulmasy and John Yoo wrote together in 2007¹⁶⁶ to advocate for the principal-agent model in civil-military relations (embracing the scholarship of Peter Feaver discussed above)¹⁶⁷ as a means of criticizing the JAGs’ behavior. While the pushback from the JAGs was laudable to many from a moral standpoint, Sulmasy and Yoo argued that military officers publicly pushing back on civilian leadership decision-making is problematic from a civil-military relations perspective.

S. TEX. L. REV. 617 (2009); Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407 (2008); 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).

162. See, e.g., Hannah Martins Miller, Note, *Generals & General Elections: Legal Responses to Partisan Endorsements by Retired Generals*, 73 VAND. L. REV. 1209 (2020); Dan Maurer, *Paved with Good Intentions?: Civil-Military Norms, Breaches, and Why Mindset Matters*, 11 J. NAT’L SEC. L. & POL’Y 343 (2021); Dan Maurer, *Fiduciary Duty, Honor, Country: Legislating a Theory of Agency into Strategic Civil-Military Relations*, 10 HARV. NAT’L SEC. J. 259 (2019); Joshua E. Kastenbergh, *General Ludendorff’s Ghost: Insurrection, Accountability and the Retired Generals in Military Law, a National Security Imperative in the Aftermath of Donald Trump and January 6, 2021*, 48 AM. J. CRIM. L. 137 (2021); Anthony J. Ghitto, *The Presidential Coup*, 70 BUFF. L. REV. 369 (2022).

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

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

165. John Barry, *The Roots of Torture*, NEWSWEEK (Mar. 3, 2010, 7:39 PM), <https://www.newsweek.com/roots-torture-128007> [<https://perma.cc/Q2QS-ZQSD>].

166. Sulmasy & Yoo, *supra* note 161.

167. See *supra* notes 141-42 and accompanying text.

Pearlstein's 2012 article argued for a holistic constitutional approach to civilian oversight; civilian oversight, in her view, should be informed by constitutional law,¹⁶⁸ which recognizes a role for three co-equal branches. Pearlstein critiqued Huntington's theory of objective control for its preference for consolidated Executive power over the military—Huntington regarded the separation of powers between the executive and legislative branches as “a major hindrance to the development of military professionalism and civilian control in the United States” because it tends to draw military leaders into political conversations.¹⁶⁹ Instead, Pearlstein argued that a constitutional law-informed approach would recognize the important role of Congress as well as the judiciary in military oversight.¹⁷⁰

Pearlstein's views on the military deference doctrine, however, are muddled. While she called the doctrine of military deference “misplaced,”¹⁷¹ she also stated that “attention to military expertise by the civilian courts poses no problem to civilian control more broadly.”¹⁷² Her argument about the importance of a separation of powers-based approach to civilian oversight is underpinned by an argument that professional military judgment provides a meaningful check on executive power:

In ensuring that civilian decision makers are exposed to the judgment of subject-matter experts, as well as in preserving the possibility of accountability for Executive Branch activities through a system of military justice, the professional military has provided a structure through which rule-of-law forces may help to hold executive power in check.¹⁷³

Thus, Pearlstein departs from a prioritization of civilian oversight fairly meaningfully. While there is an important role for expert military advice in the context of executive branch decision-making, the invocation of military dissent as a check on civilian power is problematic, as noted by Sulmasy and Yoo. It is also not a necessary argument for an embrace of a separation of powers-based approach; had she framed the check on executive power in

168. See Pearlstein, *supra* note 164, at 858.

169. HUNTINGTON, *supra* note 129, at 177.

170. See Pearlstein, *supra* note 164, at 858. See also Michael L. Kramer & Michael N. Schmitt, *supra* note 161, at 1411 (“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. It is this distribution, not ‘intraexecutive branch relations,’ that constitutes the sine qua non of U.S. civil-military relations.” (footnotes omitted)). Kramer and Schmitt also note that “the judiciary ensures the system operates within the constitutional schema.” *Id.* at 1412.

171. Pearlstein, *supra* note 164, at 798.

172. *Id.* at 839.

173. *Id.* at 801.

terms of congressional power checking executive power, informed by military expertise, the argument would be less problematic. Therefore, this may be a semantic quibble with Pearlstein's analysis; nevertheless, according to civil-military relations theory, the check on political civilian leadership must be done by other civilians (through separation of powers or elections), not the military.

Mazur's analysis of the civil-military relations problems arising at the time is in synch with Pearlstein's. Mazur stated that Pearlstein "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."¹⁷⁴ In her book, Mazur identified the growing gap between military and civilian societies along the horizontal dimension, crediting the Supreme Court's military deference doctrine as solidified by Justice (then Chief Justice) Rehnquist for this result.¹⁷⁵ Taking examples from culture and society, Mazur argued that deference has bred military exceptionalism, which in turn has made the military resentful of civilian oversight.¹⁷⁶ While Mazur went further in criticizing the Supreme Court and the military than this Article does, ultimately she reached a similar conclusion: military deference runs counter to the goal of subordinating the military to civilian oversight. Mazur's scholarship also highlights how, before the military deference doctrine consolidated:

Military decisions were not worthy of deference simply because they were military. Military decisions were worthy of deference only when those decisions fell uniquely within the particular grants of power awarded to Congress and delegated to the military under the Constitution, and when substantive judicial review would be destructive of the effective exercise of that power.¹⁷⁷

Aside from Mazur's book, judicial deference to the military is noted in legal academia mostly without scrutiny, and analysis of national security deference is intertwined indistinguishably from military deference. A specific line of scholarly articles seeks to explain and interpret the military deference doctrine.¹⁷⁸ While most of these articles are descriptive, Shannon

174. Diane H. Mazur, *The Constitutional Bond in Military Professionalism: A Reply to Professor Deborah N. Pearlstein*, 90 TEX. L. REV. 145, 146 (2012).

175. MAZUR, *supra* note 163, at 180. *See also* Mazur, *supra* note 4.

176. MAZUR, *supra* note 163, at 180.

177. Mazur, *supra* note 4, at 717.

178. *See, e.g.*, O'Connor, *supra* note 4; Lichtman, *supra* note 10; Brian D. Lohnes & Nicholas D. Morjal, *A Separate Society: The Supreme Court's Jurisprudential Approach to the Review of*

Grammel in the *Military Law Review* recently published an interesting quantitative analysis of Supreme Court cases in 2022. Grammel found that justices with military experience were less likely to be deferential than those without military experience.¹⁷⁹ Although perhaps counterintuitive, the finding is potentially explainable in at least two ways: first, the justices with military service likely did not find the requirement for strict separation in the theory of objective control as compelling, as they had inhabited both the civilian and military societies themselves; second, as former members of the military, the justices may not have regarded themselves as incompetent to review professional military decisions and they likely would not have subordinated their own judgments to military experts so readily.¹⁸⁰

Perhaps the most thorough treatment of Huntington's theory of objective control and strict separation comes from Jonathan Turley's scholarship in the early 2000s. Turley characterized the military deference doctrine as follows: "Recognizing the military system as distinct and separate, the Court advanced various textualist and intentionalist rationales for insulating military decisionmaking from civilian review."¹⁸¹ In a trilogy of law review articles,¹⁸² Turley criticized the Court's approach as ahistorical and argued that it has produced a counter-Madisonian system within the military that is "inimical to both the concepts of a good society and a good soldier."¹⁸³

Turley used a historical methodology to describe how the founders of the United States, particularly Thomas Jefferson, warned about the dangers of separating military and civilian societies.¹⁸⁴ Turley argued that the later embrace of the objective control model with its implicit requirement for separation empowered the military justice system to such a point that it represented "constitutional de-evolution" in the case of using military tribunals to try civilian terrorists rather than favoring Article III courts.¹⁸⁵

Military Law and Policy, ARMY LAWYER 68 (2021); Shannon M. Grammel, *Old Soldiers Never Die: Prior Military Service and the Doctrine of Military Deference on the Supreme Court*, 223 MIL. L. REV. 988 (2015). Cf. Mark Patrick Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 953-54 (2019) (noting that "[w]hile the judiciary has historically been the least influential of the three branches in ensuring civilian control over the military, judicial review via the APA remains an important vehicle in ensuring accountability over all federal agencies, and the DoD is no exception").

179. Grammel, *supra* note 178, at 990.

180. Cf. *id.* at 1018-20 (noting that factoring in Justices' ideologies reduced the statistical significance of military service but that military service was correlated at a statistically significant level, suggesting that their military service informed their ideology, but that their ideology drove their voting pattern).

181. Turley, *supra* note 8, at 1.

182. Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 652 (2002).

183. Turley, *supra* note 8, at 1.

184. See *id.* at 18-22; see also Turley, *supra* note 182, at 657.

185. Turley, *supra* note 182, at 768.

Although Turley did not focus directly on military deference, his analysis shows through history what this Article seeks to show through theory: that the theory of objective control should not be an excuse for the Supreme Court to excuse themselves from their role in military oversight function.

C. APPLYING CIVIL-MILITARY RELATIONS THEORY TO THE MODERN MILITARY DEFERENCE DOCTRINE

Applying civil-military relations theory to modern military deference, it is difficult to defend the Supreme Court's deferential language. Beginning with Huntington, the Supreme Court's approach echoes language from his theory of objective control, which is underpinned by an embrace of separation. However, the Supreme Court analysis often lacks some important and essential characteristics of the theoretical analysis.

The 1976 case *Greer v. Spock* contains the most in-depth analysis of civil-military relations issues to appear in Supreme Court caselaw.¹⁸⁶ In *Greer v. Spock*, candidates for president and vice president from the People's Party and the Socialist Workers Party sought access to Fort Dix, a military base in New Jersey, to distribute their campaign literature.¹⁸⁷ Upon denial from the base commander consistent with base regulations, they sued for access to the base, arguing that the regulations violated their First and Fifth Amendment rights.¹⁸⁸ In upholding the regulations, the Court found them to be "wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control."¹⁸⁹ Although Justice Stewart, writing for the Court, never cited evidence establishing a political neutrality requirement in the Constitution, he did list a number of federal criminal statutes that prohibited attempts to politically influence the military and attempts by military officers to interfere with elections.¹⁹⁰

In a concurrence, Chief Justice Burger wrote, "Permitting political campaigning on military bases cuts against a 200-year tradition of keeping the military separate from political affairs, a tradition that in my view is a constitutional corollary to the express provision for civilian control of the military in Art. II, s 2, of the Constitution."¹⁹¹ Chief Justice Burger here accomplished two noteworthy things. First, this was a full-throated endorsement of separation theory and objective control, written in 1976, that echoes the trend in American political science literature initiated by

186. 424 U.S. 828 (1976).

187. *Id.* at 832-33.

188. *Id.* at 833-34.

189. *Id.* at 839.

190. *Id.* at 839 n.12.

191. *Id.* at 841 (Burger, C.J., concurring).

Huntington. Second, it endorsed an embrace of history to inform the question of the appropriate relationship between the military and civilian control. In fact, Chief Justice Burger noted:

History demonstrates, I think, that the real threat to the independence and neutrality of the military and the need to maintain as nearly as possible a true “wall” of separation comes not from [campaign] literature . . . but from the risk that a military commander might attempt to “deliver” his men’s votes for a major-party candidate. . . . It is only a little more than a century ago that some officers of the Armed Forces, then in combat, sought to exercise undue influence either for President Lincoln or for his opponent, General McClellan, in the election of 1864.¹⁹²

Justice Powell noted further in his concurrence in *Greer v. Spock*:

The overriding reason for preserving this neutrality is noted in Mr. Justice Brennan’s dissenting opinion: “It is the lesson of ancient and modern history that the major socially destabilizing influence in many European and South American countries has been a highly politicized military.” This lesson may have prompted the constitutional requirement that the President be the Commander in Chief of the Armed Forces. Command of the Armed Forces placed in the political head of state, elected by the people, assures civilian control of the military. Few concepts in our history have remained as free from challenge as this one. But complete and effective civilian control could [be] compromised by participation of the military in the political process. There is also a legitimate public concern with the preservation of the appearance of political neutrality and nonpartisanship. There must be public confidence that civilian control remains unimpaired, and that undue military influence on the political process is not even a remote risk.¹⁹³

Although the Court’s opinion and various concurrences and dissents in *Greer v. Spock* do not cite specifically to Huntington or other theories, the concerns raised about maintaining the military’s apolitical nature are consistent with parallel conversations related to civil-military relations theory in academia at the time. To Huntington, military apoliticism was important for two reasons: first and primarily, it is a manifestation of professionalism, and second, through the vehicle of professionalism, it

192. *Id.* at 841-42.

193. *Id.* at 845-46 (Powell, J., concurring) (citations omitted) (quoting *id.* at 867 (Brennan, J., dissenting)).

prevents the military from improperly interfering with political decision-making. These concurrences and Justice Brennan's dissent noted the importance of subordinating the military to civilian oversight and the ways in which apoliticism in the military prevents military interference with political decision-making. Even so, the case resulted in deference to the base commander's decision-making, using the rationale that this decision furthered the goal of maintaining apoliticism among military service members. As noted above, military deference has since been used by the Supreme Court with analysis that runs afoul of civil-military relations theory and does not rest on this notion of apoliticism.

Thus, Huntington's legacy seems to have made its mark in early modern Supreme Court jurisprudence related to military deference. While *Greer v. Spock* is noteworthy for its explicit wrestling with civil-military relations norms, it is the only case of its kind—as noted above, more recent cases have dropped references to these principles.

Other civil-military relations theories—including those that build off of Huntington—illuminate alternative paths for the Court today. Feaver resoundingly rejects the notion that civilians should defer to the military, especially when the justification is for a lack of expertise. That rationale for deference is regarded by many civil-military relations scholars as being outright dangerous,¹⁹⁴ as it empowers the military to perceive itself to be beyond scrutiny and places implied limitations on civilian oversight. Cohen's notion of the "unequal dialogue" creates a framework within which military and civilian leadership are in conversation, but the prerogative of civilian oversight gives civilians the upper hand. For the "unequal dialogue" to produce successful outcomes, especially in wartime, Cohen argues that civilian leadership must be willing to probe into the military sphere as appropriate.¹⁹⁵ In other words, Cohen would resoundingly reject the wisdom of deference in favor of a more probing doctrine. Putting these observations from Feaver and Cohen together, where the executive branch or legislative branch have exercised civilian oversight, the Court would do better to explicitly contend with those decisions rather than the military's attestations. Where such oversight is lacking, the duty of the judicial branch is to ensure there is no vacuum of military oversight. The Court should feel empowered to engage with assertions made by the military more readily in those cases and certainly not defer.

194. See *supra* note 6 and accompanying text.

195. See *supra* notes 151-55 and accompanying text.

A case in point is *Orloff v. Willoughby*,¹⁹⁶ a 1953 case that underpinned then-Justice Rehnquist's analysis in the religious freedom case *Goldman v. Weinberger*.¹⁹⁷ *Orloff v. Willoughby* was a habeas challenge from a doctor who obtained medical training at government expense and, by statute, was therefore obligated to serve if called up.¹⁹⁸ When he was called upon to serve as a medical officer, he was asked to take an oath swearing he was not a member of the Communist Party, which he refused by claiming "constitutional privilege."¹⁹⁹ Because he refused this oath, he was instead inducted as an enlisted member in the Army, where he served as a medical laboratory technician.²⁰⁰ Orloff requested habeas relief in the form of discharge from the Army because he was not serving as an officer and a doctor, as he believed would have been required pursuant to the agreement that paid for his medical training and the statute that authorized the training program.²⁰¹

Orloff v. Willoughby is similar to other cases discussed above in that the Court did not distinguish clearly in its analysis between determinations made by the military and the constitutional powers vested in the president and Congress. The case was also a product of its time; in the 1950s, political affiliation (potential association with the Communist Party) was regarded as an obvious national security threat with potential criminal liability. Justice Jackson stated: "[T]he question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question 'No.'"²⁰² However, in this case, the only affidavit in evidence came from the base commander, Colonel Willoughby. The Court never inquired, but only assumed, that the president and any other civilian responsible for overseeing the Army (e.g., the secretary of defense or the secretary of the Army) made a determination that communists should not be officers. Though this was likely a safe assumption at the time, the lack of clarity in the analysis is problematic because of what followed.

Justice Jackson stated toward the end of the opinion: "The military constitutes a specialized community governed by a separate discipline from

196. 345 U.S. 83 (1953).

197. 475 U.S. 503 (1986), *superseded by statute*, National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1019 (codified at 10 U.S.C. § 774).

198. 345 U.S. at 84-85.

199. *Id.* at 89-90.

200. *Id.* at 85.

201. *Id.* at 84.

202. *Id.* at 91.

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.”²⁰³ While the dangers of the military intervening in judicial matters seems apparent in a democracy, logic fails to establish that the reciprocal must also be true. There are many good reasons that the Supreme Court should not allow habeas petitions from service members who do not like their military assigned duties. However, an analysis of whether that assignment is consistent with the law and the Constitution should involve deference (if there is deference) to decisions made by civilian political leadership in the executive and legislative branches, not a base commander. Although *Orloff v. Willoughby* is an older case, it is frequently cited in the core military deference cases discussed above and remains good law.

A more principled approach to cases that involve analysis of military decisions would instead take into account the importance of civilian oversight of military decision-making. Civil-military relations theory presumes that most civilian oversight is conducted by the executive branch. In many cases that leverage military deference language and precedents, there is ample evidence or the opportunity to obtain evidence that executive branch oversight has actually occurred. In those cases, leveraging such evidence and then applying national security deference would be a more appropriate approach. In other cases—particularly earlier modern military deference cases—statutory interpretation is the actual issue at hand, and therefore, the analysis would be cleaner if it referenced congressional deference rather than military deference. However, in cases such as *Korematsu*, where the executive branch record might instead illuminate dissenting views from civilians and where no other oversight was exercised, the Court should view itself as empowered to question military assertions in the name of upholding democratic principles associated with civil-military relations.

IV. OPPORTUNITIES FOR THE SUPREME COURT TO ADDRESS THE MILITARY DEFERENCE DOCTRINE

Although there is no indication that lower federal courts are being directly informed by civil-military relations theory, federal courts have shown more of an appetite recently for questioning military assertions. Three very recent examples from the circuit courts help illustrate a possible trend: (1) *Singh v. Berger*,²⁰⁴ a 2022 challenge under RFRA by Sikhs seeking to enlist in the Marine Corps; (2) ongoing litigation in *Roe v. Department of*

203. *Id.* at 94.

204. 56 F.4th 88 (D.C. Cir. 2022).

Defense,²⁰⁵ a challenge under the APA from two service members who were facing separation due to their HIV; and (3) challenges under RFRA to military orders requiring coronavirus vaccination during the pandemic. In all of these cases, assertions made by the military at the preliminary injunction stage received remarkably little deference. Cases related to all three of these examples also have the potential to reach the Supreme Court in the next few years.

A. SINGH V. BERGER

In *Singh v. Berger*, two Sikh men sought to enlist in the Marine Corps. Requirements at boot camp that male enlistees shave their heads and beards and that all enlistees were not authorized to wear additional articles of faith came into conflict with their religious beliefs as Sikhs.²⁰⁶ Although the Marine Corps conceded that the men would be allowed to wear articles of faith, keep their hair long, and wear beards later in their military service, the Marine Corps asserted that boot camp required the forging of unit cohesion and a uniform mindset and that these rules were required in the furtherance of those goals.²⁰⁷

The plaintiffs requested injunctive relief under RFRA against the Marine Corps so they could enlist without being forced to shave their heads or beards and adhere to other uniform regulations that precluded abiding by their religious requirements to wear a turban, a ceremonial dagger, and a metal bracelet. Under RFRA, the Marine Corps had to show “a compelling interest accomplished by the least restrictive means in refusing to accommodate their faith for the thirteen weeks of boot camp.”²⁰⁸ The D.C. Circuit resoundingly rejected the Marine Corps’ assertions about both their compelling interest and the least restrictive means.

Quoting *Winter v. NRDC*, the D.C. Circuit stated, “When the injunction addresses military affairs, courts ‘give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.’”²⁰⁹ Applying this doctrine, the D.C. Circuit reviewed a declaration from a colonel who managed military accession

205. 947 F.3d 207 (4th Cir. 2020). See also Sanjali De Silva, *Federal Court Strikes Down Pentagon’s Discriminatory Restrictions on Military Service of People Living with HIV as Arbitrary and Unconstitutional; Hailed by Lambda Legal as “Landmark Victory,”* LAMBDA LEGAL (Apr. 7, 2022), https://lambdalegal.org/newsroom/us_20220407_federal-court-strikes-down-pentagons-discriminatory-restrictions-on-military-service-of-people-living-with-hiv/ [<https://perma.cc/T2RE-44UG>].

206. *Singh*, 56 F.4th at 91.

207. *Id.* at 98.

208. *Id.*

209. *Id.* at 95 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)).

policies for the Marine Corps, which explained “that uniformity is crucial to the ‘psychological transformation’ by which civilians acquire the ‘team mentality,’ ‘willingness to sacrifice,’ and ‘*esprit de corps*’ that are ‘the hallmark of the Marine Corps.’”²¹⁰ Despite these professional military judgments, the appellate court performed a rigorous analysis of other Services’ policies that accommodate Sikhs and Marine Corps’ own policies related to medical exemption and female service members.²¹¹ Despite engaging with *Winter v. NRDC*, the D.C. Circuit showed its unwillingness to defer to the attestations of the Marine Corps in this case, resulting in a resounding victory for the two plaintiffs.

In April 2023, Judge Richard Leon of the District Court for the District of Columbia issued an additional preliminary injunction laying out standards the Marine Corps must meet to accommodate Sikh recruits in boot camp.²¹² As of the writing of this Article, it appears that one of the recruits is preparing to enter boot camp.

B. ROE V. DEPARTMENT OF DEFENSE & THE MINDES TEST

In the Air Force, two enlisted airmen recently challenged pending separations from the military after testing positive for HIV.²¹³ By Department of Defense regulation, individuals who are HIV positive may not enlist in the military, but if a service member contracts HIV during service, they may continue to serve if they are deemed fit for service.²¹⁴ Department of Defense and Air Force regulations set out standards and evidentiary requirements for Board determinations in individualized cases about fitness for service, which include considerations regarding the service members’ deployability.²¹⁵ Deployment to the Central Command (“CENTCOM”) area of operations—the area with the highest need for deployment—required a waiver for HIV-positive service members.²¹⁶

Both service members had minimal detectable viral loads and were controlling their HIV effectively. In addition, their direct leadership recommended retention, stating that they were each contributing valuably to their units. Despite numerous attestations of their ability to serve, an informal

210. *Id.* at 98.

211. *See id.* at 99-102.

212. Irene Loewenson, *Here’s How the Corps Will Accommodate a Sikh Recruit in Boot Camp*, MARINE CORPS TIMES (Apr. 23, 2023), <https://www.marinecorpstimes.com/news/your-marine-corps/2023/04/24/heres-how-the-marine-corps-will-accommodate-sikh-recruits-in-boot-camp/> [<https://perma.cc/YPT2-BZKZ>].

213. *Roe v. Dep’t of Def.*, 947 F.3d 207 (4th Cir. 2020).

214. *Id.* at 214.

215. *See id.*

216. *Id.* at 215.

physical evaluation board, a formal physical evaluation board, and a final appeal to the secretary of the Air Force's personnel council all denied them retention, citing the need for a waiver for deployment as a justification.²¹⁷ Plaintiffs brought suit requesting injunctive and declaratory relief under the APA, as well as a preliminary injunction to prevent their discharge during litigation.²¹⁸ Judge Leonie Brinkema of the Eastern District of Virginia granted the preliminary injunction and the Air Force appealed to the Fourth Circuit.²¹⁹

Roe v. Department of Defense applied a test related to the Supreme Court's military deference analysis called the *Mindes* test, derived from a 1971 case in the Fifth Circuit, *Mindes v. Seaman*.²²⁰ The *Mindes* test has been adopted in a few federal circuit courts to determine when a case presents a nonjusticiable military controversy, though it has never been applied at the Supreme Court.

The *Mindes* test is as follows. First, a challenge to a military action must allege a deprivation of a constitutional right or a violation of applicable statutes or regulations.²²¹ Second, the service member must exhaust administrative corrective measures within the Service.²²² If those two conditions are met, the circuit court will apply a four-factor analysis:

1. The nature and strength of the plaintiff's challenge to the military determination. . . .
2. The potential injury to the plaintiff if review is refused.
3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.
4. The extent to which the exercise of military expertise or discretion is involved.²²³

Much like the Supreme Court's deference in most military cases, this test could be applied without running afoul of civil-military relations theory if the courts remained mindful of focusing their analysis on decisions made by civilian leadership. The second prong of the preliminary analysis requires exhaustion of Service remedies. In *Roe v. Department of Defense*, the

217. *Id.* at 216-17.

218. *Id.* at 217.

219. *Id.*

220. *Id.* at 217-18; *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), *abrogation recognized* by *Meister v. Tex. Adjutant Gen. Dep't*, 233 F.3d 332, 341 (5th Cir. 2000).

221. *Guerra v. Scruggs*, 942 F.2d 270, 276 (4th Cir. 1991) (quoting *Mindes*, 453 F.2d at 201).

222. *Id.*

223. *Id.* (quoting *Mindes*, 453 F.2d at 201-02) (omission in original)).

ultimate decision-making body was the secretary of the Air Force Personnel Council, which “[a]cts for, recommends to, and announces decisions on behalf of [the secretary of the Air Force] for a variety of military personnel issues.”²²⁴ Therefore, the Board represented civilian political leadership’s decision-making authority. In many cases, exhaustion of administrative remedies within the Service will culminate with secretary-level review.

However, under the *Mindes* test, there is no requirement that the final decision in the case rests with civilian oversight of the military. In some cases, however (including, for example, the processing of religious exemption requests in *Singh v. Berger*),²²⁵ final determinations would be made by uniformed personnel. In those cases, the fourth question in the *Mindes* analysis, which focuses on military expertise or discretion, is therefore given some deference, invoking similar concerns to the Supreme Court’s deference to professional military judgment. In *Roe v. Department of Defense*, however, the analysis of this fourth question did not invoke these concerns because the circuit court did not find that the military had met its obligation to make a determination.²²⁶

While applying the *Mindes* test in *Roe v. Department of Defense*, the Fourth Circuit found that both threshold questions and all four of the factors counseled in favor of justiciability. On the third factor, the court stated that “review creates minimal interference with the military’s function because, as discussed below, at the core of Plaintiffs’ claims is an allegation that the Air Force failed to follow its own stated policies and make nonarbitrary, individualized determinations,” and on the last factor, the court found that “by declining to make individualized determinations regarding servicemembers’ fitness for service, the military failed to apply its expertise to the evidence before it.”²²⁷

The Fourth Circuit then turned to the analysis of the preliminary injunction, citing *Winter v. NRDC* in its analysis of the importance of deployability to CENTCOM.²²⁸ The circuit court specifically cited the language in *Winter v. NRDC* from *Gilligan v. Morgan* and from *Goldman v. Weinberger* that references deference to military professional judgments.²²⁹ Even so, the court determined:

224. *Air Force Review Boards Agency*, U.S. AIR FORCE, <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104511/air-force-review-boards-agency/> [https://perma.cc/7FNZ-5Y7Z] (last visited July 25, 2023).

225. *Singh v. Berger*, 56 F.4th 88 (D.C. Cir. 2022). The D.C. Circuit does not follow the *Mindes* test and therefore did not apply this analysis. *See id.*

226. 947 F.3d 207, 218-19 (4th Cir. 2020).

227. *Id.*

228. *Id.* at 219.

229. *Id.*

First, if the deployment policies permit servicemembers to seek a waiver to deploy to CENTCOM's area of responsibility, the Air Force violated the APA because it discharged the servicemembers without an individualized assessment of each servicemember's fitness, instead predicting they could not deploy as a result of their HIV status. Second, even if the Air Force was correct that CENTCOM's policies render the servicemembers categorically ineligible to deploy to its area of responsibility, Plaintiffs have shown they are likely to succeed on their claim that the deployment policies at issue violate the APA because the Government has not—and cannot—reconcile these policies with current medical evidence.²³⁰

Therefore, despite a secretary-level determination that these service members should not remain in the Service, the court determined that the case was justiciable and the preliminary injunction should stand.²³¹ In doing so, the circuit court questioned the professional judgment of three levels of personnel boards. While the court could have concluded its analysis after criticizing the lack of an individualized determination, the court went further in this final excerpt by stating that the Air Force could not conclude the service members were not deployable due to their HIV status.²³² In doing so, the court negated the possibility of deferring to the professional judgment of the members of each of the three boards that made decisions in both service members' cases.

At the district court, Judge Leonie Brinkema ultimately ruled in favor of the service members—a decision that resulted in a policy change within the Department of Defense regarding the retention of service members who test positive for HIV.²³³ Upon the writing of this Article, litigation continues to allow HIV-positive individuals to enter into the military.²³⁴

C. CORONAVIRUS VACCINATION CASES

In 2022, the Supreme Court granted an application for a partial stay in *Austin v. U.S. Navy Seals 1-26*, reversing a district court decision

230. *Id.* at 219-20.

231. *Id.* at 234.

232. *Id.*

233. Press Release, U.S. Dep't of Def., Department of Defense Updates Policy on HIV-Positive Service Members (June 7, 2022), <https://www.defense.gov/News/Releases/Release/Article/3055795/department-of-defense-updates-policy-on-hiv-positive-service-members> [<https://perma.cc/LYP3-ZVUB>].

234. Jordan Gonsalves, *A Positive HIV Test Shattered His Dreams of Serving in the U.S. Army. Now He's Suing*, TIME (Dec. 1, 2022, 12:06 PM), <https://time.com/6238034/us-military-hiv-ban-lawsuit/> [<https://perma.cc/9CJ5-FTRN>].

“preclud[ing] the Navy from considering respondents’ vaccination status in making deployment, assignment, and other operational decisions.”²³⁵ Justice Kavanaugh concurred, and Justices Thomas, Alito, and Gorsuch dissented.

In his concurrence, Justice Kavanaugh cited national security deference language from *Department of Navy v. Egan* and the language often cited from *Gilligan v. Morgan* about professional military judgment and courts’ incompetence in this area.²³⁶ Justice Kavanaugh then found: “In this case, the District Court, while no doubt well-intentioned, in effect inserted itself into the Navy’s chain of command, overriding military commanders’ professional military judgments.”²³⁷ Justice Kavanaugh cited Justice Jackson’s famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* regarding presidential power and applied it to an assertion from a Navy admiral that sending unvaccinated SEALs into a deployed environment would constitute dereliction of duty.²³⁸ In doing so, Justice Kavanaugh muddled three doctrines while stretching to assert the importance of deferring to the Admiral’s professional military judgment.

In dissent, Justice Alito, joined by Justice Gorsuch, performed an analysis under RFRA, stating:

Here, it is not disputed that compliance with the vaccination requirement would impose a substantial burden on respondents’ free exercise of religion. Therefore, the two remaining questions are (1) whether the Navy’s mandatory vaccination program furthers compelling interests and (2) whether the denial of respondents’ exemptions represents the least restrictive means of furthering such interests.²³⁹

Justice Alito found merit in the Navy’s compelling interest in preventing the spread of coronavirus, but he found “the Navy’s summary rejection of respondents’ requests for religious exemptions was by no means the least restrictive means of furthering those interests.”²⁴⁰ In performing his least restrictive means analysis, Justice Alito questioned the Navy’s assertion of broad authority to direct the SEALs “to perform whatever duties or functions the Navy wants.”²⁴¹ In doing so, his analysis runs counter to the spirit of many

235. 142 S. Ct. 1301 (2022) (mem.).

236. *Id.* at 1302 (Kavanaugh, J., concurring) (first citing *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988); and then citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

237. *Id.*

238. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring)).

239. *Id.* at 1304 (Alito, J., dissenting).

240. *Id.* at 1305.

241. *Id.* at 1306.

of the core cases underlying military deference, such as *Chappell v. Wallace* (the case extending *Feres* to *Bivens* actions that refused to interfere with the chain of command) and *Orloff v. Willoughby* (the challenge by a trained doctor who would not swear he was not a Communist to his assignment as a medical technician).

Later in 2022, the Sixth Circuit affirmed individual and class injunctions against the Air Force, preventing discipline of service members who refused the coronavirus vaccine.²⁴² In performing its review of the preliminary injunction, the Sixth Circuit addressed justiciability under the *Mindes* test and applied *Winter v. NRDC*.²⁴³ While considering the *Mindes* question of justiciability, the court engaged in an analysis of whether congressional deference should apply, stating:

When resolving statutory questions, the [Supreme] Court presumes that laws do not intrude into military affairs when they are ambiguous on the point. . . . But courts should not overread this canon of construction. . . . [It] does not mean that courts may “decline” an invitation that Congress has sent.²⁴⁴

The Sixth Circuit also noted that it had only applied the Fifth Circuit *Mindes* test once, under relatively unique circumstances.²⁴⁵ Finding sufficient statutory intent in RFRA to reach military cases, the court settled the justiciability question and moved to the substantive questions underlying the preliminary injunction: a review of the merits under RFRA.²⁴⁶

Military discipline is among the issues most readily receiving deference by the Supreme Court. The Sixth Circuit never addressed that point. Instead, the court reviewed the various options available to the Air Force and the Air Force’s lack of individualized consideration of the plaintiffs’ requests for religious accommodation under a “more focused” inquiry under RFRA.²⁴⁷ The court found none of the Air Force’s assertions persuasive. Notably, near the end of the opinion, the Sixth Circuit explicitly addressed the Air Force’s

242. *Doster v. Kendall*, 54 F.4th 398 (6th Cir. 2022), *vacated sub nom.* *Kendall v. Doster*, 144 S. Ct. 481 (2023) (mem.). The case was vacated as moot after the passage of Section 525 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 505, 136 Stat. 2395, 2571-72, which directed the secretary of defense to rescind the vaccine mandate. The secretary of defense rescinded the mandate on January 10, 2023. Memorandum from the Sec. of Def. on COVID-19 Vaccination Requirements for Members of the Armed Forces (Jan. 10, 2023), <https://media.defense.gov/2023/Jan/10/2003143118/-1/-1/1/secretary-of-defense-memo-on-rescission-of-coronavirus-disease-2019-vaccination-requirements-for-members-of-the-armed-forces.pdf> [<https://perma.cc/43CB-EYJK>].

243. *Doster*, 54 F.4th at 412-13.

244. *Id.* at 412.

245. *Id.* at 413.

246. *Id.* at 415.

247. *Id.* at 422 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014)).

request for “the ‘great deference’ that the Supreme Court had previously given to the military.”²⁴⁸ The Air Force also quoted a senate report drafted during consideration of RFRA stating that courts have “always extended to military authorities significant deference” and that the Senate committee “intends and expects that such deference will continue.”²⁴⁹ Even so, the Sixth Circuit found this line of argumentation unconvincing, preferring to rely on the text of RFRA, which contains no evidence of an endorsement of military deference, and upheld the preliminary injunctions for the entire class.²⁵⁰

Although *Austin v. Navy Seals 1-26* and *Doster v. Kendall* are essentially moot now that the pandemic is declared over, these cases again showcase a lack of interest of the Supreme Court and the Sixth Circuit in military deference. Taken together with *Singh v. Berger* in the D.C. Circuit and *Roe v. Department of Defense* in the Fourth Circuit, there may be momentum building toward a reconsideration of military deference in the coming years.

V. CONCLUSION

Civil-military relations theory exposes the problematic nature of the Supreme Court’s military deference doctrine. Healthy civil-military relations in a democracy requires subordination of the military to civilian oversight. The United States Constitution divides civilian governance into three co-equal branches, with responsibility for military oversight heavily weighted in the executive and legislative branches. When cases come before the Supreme Court related to the military, the Court’s deferential posture is a risky democratic proposition.

As discussed above, the Court’s deference is often articulated as deference to civilian leadership in the executive branch (i.e., national security deference) or Congress (i.e., congressional deference). However, that analysis is often intertwined with deference to military judgments justified by a perceived lack of competence to exercise oversight of military decision-making. The Court’s analysis in military deference cases does not distinguish clearly between relying upon civilian leadership’s decision-making and relying on military decisions that have received no oversight. Therefore, the Court’s deference represents a small abdication of the United States government’s obligation—first noted in the Declaration of Independence²⁵¹—to ensure civilian oversight of the military.

248. *Id.* at 426 (quoting Brief of the Appellants at 32, *Doster*, 54 F.4th at 398 (No. 22-3497)).

249. *Id.* (quoting S. REP. NO. 103-111, at 12 (1993)).

250. *Id.* at 442.

251. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Nothing in civil-military relations theory or the Constitution suggests that the judiciary should be the primary source of civilian oversight in military-related cases. Executive or legislative branch oversight would likely be preferable in most cases. But, where there has been no civilian review of military decisions in the other two branches, the judiciary is then positioned as the last chance to ensure that the military's decision-making is subordinated to civilian oversight. Without a finding that civilian oversight has been exercised, the Supreme Court's explicit embrace of military deference runs afoul of civil-military relations theory and risks contributing to the erosion of civil-military relations norms that the Secretaries of Defense and Chairmen of the Joint Chiefs of Staff wrote about in 2022.

The letter quoted at the top of this Article urged all Americans to do their part in upholding civil-military relations norms. These experts and leaders felt an urgency and saw civil-military relations norms eroding, noting that we are currently in a pivotal moment. Building upon the momentum identified in recent cases to question military attestations, now would be an opportune time to clean up Supreme Court jurisprudence and do away with the military deference doctrine in favor of analysis that prioritizes civilian oversight of military decision-making.