

## The National Security Constitution: the Separation of Powers and the War on Terror

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## ARTICLES

### **THE NATIONAL SECURITY CONSTITUTION: THE SEPARATION OF POWERS AND THE WAR ON TERROR**

PROFESSOR GEOFFREY S. CORN\*

First, I would like to sincerely thank Chris Borgen and St. John's for inviting me here and letting me participate on this panel. I'd like to pick up where Professor Raven-Hansen left off and raise the question of whether—within this inter-agency process that's extensively designed, in part, to enhance the effectiveness of the advice that the President relies on to take care that the law be faithfully executed—the military stands in a unique position. By that I mean is the military better understood as what we might call a national agency than an executive agency? This is based on an article that was written by me and a colleague of mine, Lieutenant Colonel Eric Jensen, and published in the *Houston Law Review*.<sup>1</sup> We concluded that the answer to this question is yes: the military institution does stand in

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<sup>1</sup> 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).

a unique position in this inter-agency process because it is not properly understood as a purely executive agency. We defend this conclusion by pointing to certain attributes of military service, particularly for commissioned officers, that distinguishes them from other executive branch agents.

First and foremost, unlike other servants of the President who serve at the pleasure of the Executive, a military officer cannot be fired by the President. Certainly, the President as Commander-in-Chief can reassign an officer, but if we look at arguably the most significant historical example of this—President Truman's dispute with General MacArthur—we have to remember that General MacArthur was functionally fired by the President, but he was not removed from his service to the nation. He remained a commissioned officer, went on to West Point to be the Commandant, and ended up retiring. But the issue of why we come to this conclusion, I think, is less significant than what this means.

I will take as a given that civilian control of the military is an absolute, fundamental component of the relationship between the military and the civil government in this nation. Our military lawyers travel the world teaching other armed forces about this principle, and how important it is to have a credible and effective organization. But I think that begs the question. What does civilian control of the military mean? Our view, Lieutenant Colonel Jensen and I, is that civilian control of the military in the current culture of the military and the political branches of government has come to mean exclusive executive control of the military; this is potentially dangerous because it disables the ability of the Legislature to perform its legitimate function in the development of national security policy that implicates the role and function of the military itself.

Now, of course, this assumes that the Legislature has a legitimate constitutional function and role in the development of national security policy. Notably, if you disagree with that, then it kind of undermines the entire premise of this assertion. But our view is that the Legislature is that component of government that responds to the "push, push, push" until somebody stops us. This somebody has to be the co-equal branch of government, the Legislature. In order for the Legislature to effectively perform that function, it has to be armed with adequate information.

Another assumption related to this discussion relates to certain aspects of the Global War on Terror. In the Global War on Terror, the nature of how we are going to use the military component of national power is spread far beyond the traditional battlefield function that historically defined the role of the military. When I was a student at Commander General Staff

College, we learned that we could use a simple acronym to understand national security power, the DIME. National security power is essentially the process of leveraging national power related to Diplomacy, Information, Military, and Economic functions. I think it's fair to say that, since 9/11, the military has increasingly implicated all aspects of these four components of national security power (DIME); it has become more sophisticated in understanding its role in that process. Well, in my mind, that raises the stakes even more as to whether or not the military is in a position to provide relevant information to Congress related to the development of national security policy.

In our article, we believe that because a culture has developed both within the military and the broader executive branch—and, I believe, in Congress itself—that civilian control of the military means plenary executive control of the military, and the process of providing effective military information to Congress has been disabled. Thus, this has contributed to the inability of Congress to serve as the check on an Executive that is asserting more and more prerogative in the realm of national security affairs and, in particular, military affairs.

So what does civilian control of the military require the military to do? I think it raises a difficult challenge of balancing what, in many Latin American countries, is referred to as the concept of *La Patria*: that the military's first and foremost role is to protect the nation. Now, we know that if taken too far this concept would endanger civilian control over the military because this theory has led other militaries in the world to assume the responsibility of challenging civilian control when they believe civilian decisions are damaging the interest of the nation. We have to ensure that the assertion of this military role in the national security process doesn't rise to that level. At the same time, however, it also has to—the concept of civilian control of the military has to also ensure that the military understands that it does stand in a unique position in this national security process. Part of that unique position includes enabling both the Executive and the Legislature to perform their legitimate functions.

The genesis for this article was an experience that I had towards the end of my tenure as the Special Assistant for Law of War Matters. I was called to a briefing to prepare a Senior Military Officer for an appearance before a Senate committee on an issue related to the military commission. During his preparation session, the officer made a comment that I'll never forget. He said, "I wish I could say what I really believe when I am called to testify." I was just stunned by that because it seemed to me that his obligation to the nation and his role as an officer in the military when

called before the Senate *was to be candid*, even if that candor contradicted the views of the politically appointed “masters” of the executive branch. That experience got me thinking about this question: How can we ensure that the culture, both within the military institution itself and the political branches of government, breeds a healthy dialogue between not only the President and the military in the inter-agency process, but also between the military and the Legislature in areas where the Legislature has a legitimate role to perform?

One answer to this might be that the Legislature always has the ability to call hearings and demand information from the military, and that’s true. However, that’s only as effective as the ability of the Legislature to know what they know and know what they don’t know; one of the reactions that I had in watching many of the hearings before Congress is that they don’t know what to ask. They’re not asking the right questions, so it’s easy—if you will—for military leaders who don’t want to contradict the policies of the Executive to go through that process without having to contradict executive policies. Why? Because the probe—Congress itself—is ineffective.

Therefore, what we propose in this article is the possibility of enhancing the effectiveness of a Congress that is increasingly inexperienced in the area of military affairs by dealing or confronting military leaders who are more sophisticated in this area of political affairs. This entails enhancing the ability of Congress to perform its oversight function. In order for Congress to perform its function related to national security affairs involving the military, it needs to be armed with military expertise as part of its internal structure. In the article, we raised a couple of possible ways this could be done. The clear danger here is that whatever Congress does cannot intrude on the legitimate function of the Commander-in-Chief to run the military as the top General; so we reject the proposition that Congress, for example, could demand that the President assign senior military officers as advisors to Congress, or to Congressional committees, or to the Senate majority leader and the leader of the House.

What we suggest is Congress—particularly the key committees related to the military—should make an effort to create permanent positions of military advisors filled with retired officers who would facilitate the ability of these committees to know what they know and know what they don’t know. That process would contribute to their ability to solicit and demand a more candid and free flowing conduit of information from military experts. This would enable Congress to more effectively apply that check when they’re confronting an Executive who is going to “push, push, push”

or—as we were discussing last night at dinner—is going to naturally make an effort to fill an interstitial gap when an issue arises. In other words, where there is uncertainty as to what the law requires or what policy requires and Congress is not acting with due dispatch to fill that gap, then Congress needs to be aware of the military perspective on the legitimacy of these issues.

In this article, we emphasize a situation that shows why this is important and, more significantly, why creating a culture that encourages this kind of dialogue is important. This scenario involves the very public situation concerning General Shinseki—one of the few general officers who, before the war, was willing to be, in my opinion, truly candid about his view on the war when called before Congress. The consequence of that candor seemed to be fairly swift and decisive on the part of the Secretary of Defense because General Shinseki was immediately marginalized. What troubled me both personally and institutionally about this incident was that there were colleagues of that General in the Department of Defense who shared his concerns about the war, but who were not as equally forthcoming to support him in front of Congress.

Lastly, I suggest that we should figure out some mechanism to enhance the ability of Congress to obtain candid forthcoming insight from military leaders since those military leaders are not under the plenary authority of the Executive, but fill a unique role in this debate between the political branches of government. Perhaps this will enhance the probability that those efforts to challenge what is perceived as executive overreaching will be conducted within the political process itself instead of “taking it outside,” instead of trying to influence the process through leaks, through the media, or through surreptitious efforts to arm extra political operatives with information that will enable them to challenge the decisions of the Executive. This ensures that congressional acquiescence to presidential initiatives will be more fully informed and, therefore, the President will be more justified in pressing forward. Conversely, if Congress believes that this information justifies pushing back against this “push, push, push,” then they will feel more confident in doing so because they are armed with information that they otherwise would not have had. Thank you.

