

# BOUNDARIES

## The Ethics of Military Influence on Politics

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### ABSTRACT

*Military rule is common across the world, but this form of government is incompatible with the rule of law for various reasons. To prevent this, Western democracies such as the United States impose a strong norm of civilian supremacy over military officials. The most important role of this norm of “civilian control” in America today is to police the interventions of senior military officers’ influence in politics. The standard position is that the military should be “apolitical.” However, this limitation does little work in helping senior officers understand permissible conduct, as nearly every issue confronting them will implicate matters of political judgment (due to matters of scale and resource tradeoffs, if nothing else). A more promising line to draw is between advocacy and advising, with the former seen as more violative of the civilian control norm. Such a distinction has been made by scholars before, but it is in need of a renewed defense and a deeper justification in political theory. I attempt to provide this argument, or at least demarcate its outlines, here.*

*In this Essay, I argue that military officers’ advocacy on political issues is presumptively illegitimate, but not always. On the one hand, the military is an intra-governmental institution organized according to illiberal and undemocratic principles with the potential to unduly influence civilians. On the other hand, the military does possess technical expertise regarding warfighting, and it is the military that is specially affected by decisions regarding military policy. Balancing these considerations should result neither in a complete ban on military influence nor in a totally permissive approach. As is appropriate when fleshing out a norm, the most we should do is identify relevant factors and considerations while not imposing bright-line rules. Whether the officer is advocating or merely advising on a matter requiring normative political judgment is one such factor. Additionally, one should consider the content of the advocacy. If military advocacy advances liberal democratic principles, it gives less offense to the norm of civilian supremacy.*

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BACKGROUND

A fairly standard position amongst senior military officers, as well as thought leaders in civil-military relations, is that these officers should be “apolitical.” The Supreme Court described “the American constitutional tradition of a politically neutral military establishment under civilian control.”<sup>1</sup> Similarly, the current Chairman of the Joint Chiefs promised at his confirmation hearing that his “engagements will remain apolitical.”<sup>2</sup> Early theorist Samuel Huntington argued that the military should be “politically sterile and neutral.”<sup>3</sup> Many contemporary scholars agree,<sup>4</sup> with Risa

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1. Greer v. Spock, 424 U.S. 828, 839 (1976).

2. Senate Armed Services Committee Advance Policy Questions for General Charles Q. Brown, Jr., USAF Nominee for Appointment to be Chairman of the Joint Chiefs of Staff, U.S. SENATE COMM. ON ARMED SERVS. (July 11, 2023), available at [https://www.armed-services.senate.gov/imo/media/doc/brown\\_apq\\_responses.pdf](https://www.armed-services.senate.gov/imo/media/doc/brown_apq_responses.pdf) [<https://perma.cc/ZB6Z-MMHC>]. Mark Milley, when apologizing for the Lafayette Square photo op incident in June 2020, stated: “[W]e must hold dear the principle of an apolitical military that is so deeply rooted in the very essence of our Republic.” A. Macias & D. Mangan, *Joint Chiefs of Staff Chairman Milley Apologizes for Appearing with Trump at Church Photo Op*, CNBC (Jun. 11, 2020), available at <https://www.cnbc.com/2020/06/11/george-floyd-joint-chiefs-chairman-milley-apologizes-for-appearing-with-trump.html> [<https://perma.cc/PC43-FTKP>].

3. SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 84 (1957).

4. See, e.g., ELLIOT COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME (2003) (apolitical professionalism constitutes “normal theory” of civil-military relations). For a rare dissent from the apolitical consensus, see Damon Coletta & Thomas Crosbie, *The Virtues of Military Politics*, 47 ARMED FORCES & SOC’Y 3 (2021). Coletta and Crosbie use concepts from the

Brooks calling this “conventional wisdom.”<sup>5</sup> Surveying the field, Mackubin Thomas Owens observes, “It is a pillar of American civil-military relations that military officers are expected to remain apolitical in the performance of their duties.”<sup>6</sup> Owens goes on to clarify that his view of an apolitical military is merely that it be *non-partisan*.<sup>7</sup> The desirability of a non-partisan military, though, is uncontroversial and theoretically uninteresting. But what about the military’s role in non-partisan politics? The aspiration of an apolitical military in the non-partisan context immediately raises several questions. If senior officers are to be more than mere automatons, they must have some interactions with civilian leaders that involve offering their opinions and advice. When doing so, is it possible to delineate between political and non-political interactions or influences? What role should senior military officers play in political decision making when they function as advisors to civilian leaders?

The most directly relevant work on this issue in recent years is a book chapter by Risa Brooks.<sup>8</sup> Brooks lays out the positive aspects of military political influences, most importantly their expertise, but also their function as “fire alarms” (like whistleblowers) and also the possibility that they will encourage innovation.<sup>9</sup> She then contrasts these with the negative aspects, including the subjectivity of the values that military leaders may choose to advance; the “latent political influence” of the military, given its substantial social prestige and its alliance with one of the major parties; and the weakening of deference that officers will give to politically accountable civilians.<sup>10</sup> Balancing these, Brooks concludes that the

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history of political thought—Aristotelian “practical wisdom” and Machiavellian “virtu”—to carve out when political advocacy could be beneficial. *Id.* at 14. While one can appreciate this use of intellectual history, the claim of this Article is that contemporary political theory is more precise and relevant for the present question.

5. Risa Brooks, *Militaries and Political Activity in Democracies*, in AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA 213, 216 (Suzanne C. Nielsen & Don M. Snider eds., 2009) [hereinafter Brooks, *Political Activity*]. See also Risa Brooks, *The Perils of Politics: Why Staying Apolitical Is Good for Both the U.S. Military & the Country*, 57 ORBIS 369, 379 (2013) (“long-standing conventions that the American military is and should remain apolitical”). In later work Brooks would clarify that Huntington’s apolitical aspiration was too extreme. Risa Brooks, *Paradoxes of Professionalism: Rethinking Civil-Military Relations in the United States*, 44 INT. SEC. 7, 15 (2020). She argues that an extreme self-conception of the apolitical officer causes such an officer to have “blind spots” regarding their own politicization. *Id.* Brooks does not argue for the jettisoning of the apolitical conception, though, but rather a re-conceptualization that allows officers “to be politically aware, so that they can distinguish negative and partisan behaviors that are contrary to civilian control from those that are essential to achieving strategic success . . .” *Id.* at 44. The argument presented in this Article can be seen as a theoretically informed attempt to reconceptualize “apolitical” in the nature Brooks urges.

6. Mackubin T. Owens, *Military Officers: Political Without Partisanship*, STRATEGIC STUD. Q. 88, 88–89 (2015). Owens goes on to clarify that this should be limited to “partisan” politics.

7. *Id.*

8. Brooks, *Political Activity*, *supra* note 5, at 231.

9. *Id.* at 215–231.

10. *Id.* at 231–233 (“The playing field is not level: military leaders are not just another voice, but a particularly loud and clear voice. As a result, military opinion might be given substantial, even undue, weight.”).

loss of expertise is a price worth paying to maintain civilian control and that political influence should be prohibited.<sup>11</sup>

In this Essay, I will use a similar method—balancing the considerations for and against military political influence—but from a standpoint that is more grounded in political theory. I agree with Brooks that expertise belongs on the positive side of the ledger, but explain that this is because expert influence is justified as an exception to democracy’s “All Affected Interests Principle.” Moreover, I will bring to bear an additional consideration: the military’s claim to be specially affected by military policy. On the negative side of the ledger, I similarly agree that senior military officers’ substantial social prestige gives rise to a concern of undue influence. But along with this, I consider how this influence is dangerous because it comes from an institution whose illiberal and undemocratic organizing principles are opposed to those of the civilian polity.

### I. MILITARY RULE AND THE RULE OF LAW

This Symposium is concerned with the ethics of the rule of law, and military rule is incompatible with the rule of law. This is because an inherent conceptual feature of such a regime type is that it involves governance by command, and command-based rule violates the requirement that law be consistent and constant.

The rule of law protects procedural, not substantive, values,<sup>12</sup> and is generally thought to consist of eight desiderata.<sup>13</sup> The aspects of the rule of law that are most seriously offended by military rule are (1) the requirement that “the content of [law’s] norms, instead of being transformed sweepingly and very frequently, remain mostly unchanged for periods of time long enough to induce familiarity” (we can call this constancy), and (2) that “[law]’s norms are logically consistent

11. *Id.* at 237–38 (“To be clear, the costs and risks of this across-the-board rule are potentially substantial. Moreover, they must be acknowledged and accepted for the officer corps to embrace the rule. If military leaders refrain from political activity, the state may as a result sometimes pursue misguided or less informed military strategies and operational plans; it may miss opportunities in defense policy, procurement, or organizational restructuring. These are costs we must bear— and hope that other actors and institutions can help alleviate them— to maintain the long-term framework of civil-military relations upon which the republic is based.”).

12. See Brenner M. Fissell, *Jury Nullification and the Rule of Law*, LEGAL THEORY (2013).

13. MATTHEW KRAMER, OBJECTIVITY AND THE RULE OF LAW 104 (2007) (“1. [Law] operates through general norms; 2. its norms are promulgated to the people whose conduct is to be authoritatively assessed by reference to them; 3. its norms are prospective rather than retrospective; 4. the authoritative formulation of its norms are understandable (at least by people with juristic expertise) rather than opaquely unintelligible; 5. its norms are logically consistent with one another, and the obligations imposed by those norms can be jointly fulfilled; 6. its norms do not require things that are beyond the capabilities of the people who are subject to the norms; 7. the content of its norms, instead of being transformed sweepingly and very frequently, remain mostly unchanged for periods of time long enough to induce familiarity; and 8. its norms are generally effectuated in accordance with what they prescribe, so that the formulations of the norms (the laws on the books) are congruent with the ways in which they are implemented (the laws in practice).”); see also LON L. FULLER, THE MORALITY OF LAW 38–39 (1969) (listing: generality, publicity, clarity, consistency, feasibility, constancy, prospectivity, and congruence).

with one another, and the obligations imposed by those norms can be jointly fulfilled” (we can call this consistency).<sup>14</sup> Military rule involves governance by fiat—by command—and this ensures neither consistency nor constancy. This is because commands are “peremptory” in that they “preclude or cut off any independent deliberation by the hearer of the merits. . . of doing the act,” and they are “content-independent,” in that they “function as a reason independently of the nature or character of the actions to be done.”<sup>15</sup> Law could change daily based on the whims of the supreme commander. Moreover, this commander could impose logically inconsistent duties, since each new duty imposed conveys a peremptory, content-independent reason for obedience.

It is conceivable that a supreme military ruler would voluntarily deign to issue commands that are consistent and constant—thus temporarily satisfying the rule of law values just mentioned—but there is no legal or constitutional assurance that he or she would always do so. Thus, military rule would stand at least as a constant *threat* to the rule of law. Indeed, if the constancy requirement contains a sub-requirement that law should not even contain the *possibility* of frequent change—that the law be constitutionally compelled to have a minimum level of constancy—then even a commander who voluntarily maintains constant rules would violate the rule of law.

## II. POLITICAL INFLUENCE AS CONCEPTUALLY COHERENT CATEGORY

Having demonstrated the relevance of military rule to the rule of law, we can now dive more deeply into the issue of military influence over politics. One might wonder how we have jumped from the extreme issue of a command-based, military regime to the more mundane issue of military officials influencing a democracy. While common in many parts of the world (a number of military regimes took power in West Africa last summer),<sup>16</sup> military coups are not a realistic threat in contemporary Western democracies.<sup>17</sup> But the promotion of healthy civil-military relations in such democracies must concern itself with far more than direct attempts at a coup—it must work as a prophylactic against such an extreme eventuality, preventing a slippery slope from undue influence toward military government.<sup>18</sup> As Samuel Huntington concluded, “the problem in the modern

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14. KRAMER, *supra* note 13; FULLER, *supra* note 13.

15. H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243, 254 (1982).

16. This has been described as the “Coup Belt.” See *Confronting the “Coup Belt” in Africa*, UNIV. OF MICH. FORD SCH. (Dec. 12, 2023), <https://fordschool.umich.edu/news/2023/confronting-coup-belt-africa> [<https://perma.cc/ZHJ7-V4FA>].

17. James Burk, *Theories of Democratic Civil-Military Relations*, 29 *ARMED FORCES & SOC’Y* 7, 8 (2002) (“[T]his issue should not be at the center of a normative theory about civil-military relations in mature democracies. In these countries, there is no realistic expectation that the military will intervene to overthrow civilian rule or even that the military will influence a civilian government to pursue a more aggressive military policy than it otherwise would.”).

18. 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, 1817–18 (2007) (“Measuring civilian control

state is not armed revolt but the relation of the expert to the politician.”<sup>19</sup> *Influence*, then, matters; it can be illegitimate or legitimate, even if it is indirect in its effects.

Before describing the norm that should govern military influence below, it is necessary to address a prominent argument that would regard such line drawing as incoherent. One scholar has dismissed the possibility of an apolitical military by dismissing the possibility of delineating between political and non-political decisions. I argue that such a distinction can be made, but that it will not do much work in guiding the actions of senior military officers, since nearly every issue they confront will be political (according to my definition).

The objection has been made most forcefully by Deborah Pearlstein. Pearlstein identifies the distinction she believes to be fanciful as one between “means and ends, between political decisions and operational decisions,” and argues that “it seems deeply unlikely that the constitutional meaning of civilian control hinges on such a dubious distinction.”<sup>20</sup> Pearlstein attacks its logic by contextualizing the distinction as a relic of Huntington’s pre-realist intellectual climate—a time before the “dismantl[ing] [of] the notion that it is possible to pursue a purely objective study” of a given field.<sup>21</sup> Secondly, she argues that the distinction collapses because “the most quintessentially operational decisions . . . can have enormous political consequences.”<sup>22</sup>

On the first point, one can re-frame it as the claim that even technical advice is not neutral or apolitical because all influence on decision-making is inescapably political. She cites to Morton Horwitz’s *Transformation of American Law* to support this, writing that “realism’s most lasting contribution is probably skepticism of orthodox legal reasoning’s ability to ‘provide neutral and apolitical answers to legal questions.’”<sup>23</sup> But legal realism’s critique of classical legal orthodoxy centered on a claim about *legal* reasoning, not about the nature of all decision-making or all types of human knowledge.<sup>24</sup> One might think that an objective study of military capabilities is far more plausible, epistemologically, than an objective analysis of how to resolve a legal case.

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of the military by whether a coup has occurred, however, would miss the full scope of the relationship. . . .); Justin Walker, *F.B.I. Independence as a Threat to Civil Liberties: An Analogy to Civilian Control of the Military*, 86 GEO. WASH. L. REV. 1011, 1015 (2018) (“Civilian control, however, means more than the avoidance of a military coup. It is undermined when members of the military disobey orders, freelance without adequate monitoring by civilians, or exert excessive influence on the policymaking of elected officials. Such failures in turn flout our constitutional structure, frustrate democratic accountability, and often infringe on individuals’ civil liberties.”).

19. HUNTINGTON, *supra* note 3, at 20.

20. Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 855 (2011).

21. *Id.*

22. *Id.*

23. *Id.* at 855 n.273.

24. See Brenner M. Fissell, *Modern Critiques of Judicial Empathy: A Revised Intellectual History*, 2016 MICH. ST. L. REV. 817, 837 (2016).



Pearlstein's second point gets closer to the truth: senior officers make decisions that have enormous consequences. In my view, though, it is not the public reaction to a military decision that renders the influence "political"; rather it is that a recommendation given in this context is one that is necessarily made in the context of resource scarcity, and therefore one that assesses tradeoffs and weighs among them. As such, these recommendations are *normative*, and it is this normativity that renders them political. At the highest levels of military decision-making—those which are the focus of most civil-military scholarship—few decisions will not be of this character. This is a feature of these decisions' scale. If a decision has been escalated to the point that it is being considered by cabinet-level officials and very senior military leaders, it is almost certainly going to demand judgment beyond the expertise of military officials. Even a straightforwardly tactical decision, say, regarding how much fuel is needed to move troops from one location to the other, becomes a political decision when it involves a large enough number of troops. The sheer scale of the decision, in the context of scarcity, involves tradeoffs and resource allocation decisions which require political judgment. Decisions being made at the highest levels are decisions possessing a scale that will almost always render them political. Thus, while there is a conceivable category of decisions that do not implicate political judgment, this is likely to be quite a small category.

In sum, it is not that legal realism makes the category of "political" influence intellectually vacuous. It is that the scale and impact of decisions made at very high levels of military authority are almost always political by virtue of those features—they will necessarily embed normative judgments, such as resource tradeoffs and risk toleration, that are only legitimately made by civilian leaders. These kinds of normative decisions are political in that they represent contestable choices regarding values or ends and, accordingly, are not amenable to expert analyses.<sup>25</sup>

### III. A BETTER NORM: AGAINST POLITICAL ADVOCACY

Since nearly all decisions and recommendations that senior officers make will be political, a more promising conceptual line is between that of advocacy and advising. Prior scholars have made such a distinction,<sup>26</sup> but it is in need of a renewed defense, as well as a deeper theoretical justification.

A norm against *advocacy* does not require that military leaders be completely silent. They have a legitimate role in *advising* civilian leaders, even when the issue is a political one. When making these decisions, military officials should be involved so that they can provide information and advice, but not so that they can take a position and argue for it. Peter Feaver, the most prominent scholar making this distinction, gives concrete examples:

the military may be best able to identify the threat and the appropriate responses to that threat for a given level of risk, but only the civilian can set

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25. See ALFRED MOORE, *CRITICAL ELITISM* 35 (2017); ZEYNEP PAMUK, *POLITICS AND EXPERTISE* 8–9 (2021).

26. Peter D. Feaver, *The Civil-Military Problematic: Huntington, Janowitz, and the Question of Civilian Control*, 23 *ARMED FORCES & SOC'Y* 149, 154 (1996).

the level of acceptable risk for society. The military can say we need such and such level of armaments to have a certain probability of being able to defend successfully against our enemies, but only the civilian can say what probability of success society is willing to pay for. The military can describe in some detail the nature of the threat posed by a particular enemy, but only the civilian can decide whether to feel threatened and so how or even whether to respond. The military quantifies the risk, the civilian judges it.<sup>27</sup>

The distinction between advocacy and advising, then, rests on an assessment of comparative competency: military officials have expertise over matters of tactics, strategy, organization, and the technical aspects of weaponry, but they cannot claim any special expertise regarding most judgments they will confront at the highest level. These are normative judgments that are also political judgments—they are contestable and can only legitimately be resolved by democratically chosen representatives. The decision to commit a political community to armed conflict, for example, involves complex considerations of national values and whether resource expenditures (including human lives) are worthwhile. Again, these are normative political judgments that likely have no right answer; a lifetime of experience in the military does not privilege someone as an expert in such matters.

In what follows, I will seek to justify this presumptive limitation but also mark out some exceptions to it.

#### A. *The Illegitimacy of Military Influence*

In a democracy, the requirement of deliberation makes it such that *influences* on the decision, and not just participation in the voting, can render a decision more or less legitimate.<sup>28</sup> It imposes a non-formalistic component to democratic legitimacy. For nearly all participants in democratic deliberation, their right to influence the deliberation and the vote stems from the principle of democratic inclusion. Merely being a member of a political community is itself enough to legitimate the influence of your voice on that community's lawmaking. This is the foundational norm of democracy: inclusion of all affected interests.<sup>29</sup>

The democracy-based right to inclusion in decision-making, though, does not extend to interests that are internal to the State itself and are non-representative.<sup>30</sup>

27. *Id.*; see also YEHUDA BEN MEIR, CIVIL-MILITARY RELATIONS IN ISRAEL 25 (1995).

28. By this, I intend to invoke deliberative democratic theory. Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 351–52 (1987) (“[T]he source of [democratic] legitimacy is not the predetermined will of individuals, but rather the process of its formation, that is, deliberation itself.”).

29. As political theorists Dario Castiglione and Mark E. Warren explain, “the basic norm of democracy is empowered inclusion of the community of those affected in collective decisions and actions.” Dario Castiglione & Mark E. Warren, *Rethinking Democratic Representation: Eight Theoretical Issues and a Postscript*, in THE CONSTRUCTIVIST TURN IN POLITICAL REPRESENTATION 21, 24 (Lisa Disch, Mathijs van de Sande & Nadia Urbinati eds., 2019).

30. Note that legislators and legislatures—the representative institutions that facilitate inclusion claims—need not legitimate their influence on legislation. The legitimization comes from their representative features.



These are the targets of the inclusion claim, not its recipients. I have argued elsewhere that this is implicit in democratic theory.<sup>31</sup> Consider the following from Robert Dahl: “The Principle of Affected Interests is very likely the best general principle of inclusion that you are likely to find,” and it states that “everyone who is affected *by the decisions of a government* should have the right to participate *in that government*.”<sup>32</sup> While all officials in a democracy are also citizens with a right to vote and petition their government, they have no such claim *qua* officials. This is true of the military. While this paper stressed earlier that individual servicemembers are simultaneously democratic citizens, officers *qua* officers cannot rely on democratic inclusion to justify their participation in decision-making. The military as an institution is one that is internal to the government—it is not a separate constituency within society that can command a claim to democratic inclusion. In the words of two commentators, “The principle of civilian control requires not only that the military not be policymakers but also that they not be seen (nor see themselves) as a separate constituency whose interests are to be considered in policy debates.”<sup>33</sup>

To all this, which is true of intra-governmental institutions more generally, there must be considerations about the nature of the military. The military, more so than any other organ of government, is organized and animated by principles that are at odds with liberal democracy. As I wrote recently:

The United States is a liberal democracy, while the military is an institution governed by principles that are opposed to both liberalism and democracy. Military law enforces command-based governance, hierarchy, and collectivism, with an end towards success in violent conflict. These values conflict with liberalism’s commitment to reason-giving, autonomy, individualism, and pacificism; they also conflict with democracy’s demand for deliberation and majoritarian preference aggregation.<sup>34</sup>

Senior military leaders will have spent their entire adult lives working within a system with the values just described, and they can be expected to have internalized these values as second nature. When the civilian leaders of a liberal democracy come together to decide issues of policy, such voices should therefore be viewed with suspicion during the deliberation. The military’s leadership, after all, speaks for the military in those circumstances, and not for individual citizens. The leadership represents militarism and its internal principles, many of which are inconsistent with the values civilian society holds dear. This counsels in favor of an even stronger exclusion of the military from political decision-making.

Second, there is a concern that the veneration of the military and its leaders in society will lead to the militaristic voice having excessive influence in any

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31. Brenner M. Fissell, *Police-Made Law*, 108 MINN. L. REV. 2561, 2611 n.275 (2024)

32. ROBERT DAHL, *AFTER THE REVOLUTION* 49 (emphasis added).

33. Kenneth W. Kemp & Charles Hudlin, *Civil Supremacy over the Military: Its Nature and Limits*, 19 ARMED FORCES & SOC’Y 7, 9 (1992).

34. Brenner M. Fissell, *The Military’s Constitutional Role*, 103 N.C. L. REV. 331, 331 (2025).

deliberative setting. There are good reasons to respect and venerate the military. But once one does so, one must admit that the subject of veneration will receive great deference, and this can skew deliberation in his or her favor. The reasons we venerate the military—courage, selflessness, etc.—do not give us reason to defer to them in a deliberative setting. Courage is not correlated with wisdom regarding policy, but there is a danger that it will be treated as such. Pearlstein recounts the concerns of the Framers that famous generals could use “popular enthusiasms . . . to ‘subvert independent judgment’ and make it easier for officers . . . to use their positions in public service to influence civil government to advance their own personal goals.”<sup>35</sup> The danger still exists today, as we will see below.

Intra-government institutions cannot ground their claim to influence policy on the basis of democratic inclusion, and the military’s illiberal and undemocratic internal features, combined with its potential for undue influence, suggest that its influence over policymaking should be extremely limited.

### *B. Legitimizing Considerations: Expertise & Special Effect*

There are certain aspects of the military, though, that legitimate a limited form of influence. First, like all agencies, the military will possess technical expertise that deserves to find a way into the deliberative space. Second, as an institution that can be committed to violent armed conflict that greatly risks the lives of its members, the military is uniquely affected by policies that govern it, such that its institutional voice ought not be completely shut out.

First, consider expertise. This should be uncontroversial. The primary legitimator of the influence of unelected executive branch actors is their subject matter expertise; this has long been thought to be a necessary condition for the legitimacy of the administrative state, for example.<sup>36</sup> Justice Kagan summarized this rationale in a recent plurality opinion: “Agencies (unlike courts) have ‘unique expertise,’ often of a scientific or technical nature, relevant to applying a regulation ‘to complex or changing circumstances.’”<sup>37</sup> This is also true of the military. Matters of warfighting, including tactics and logistics, are thought of as realms of knowledge that lend themselves to expert knowledge development. What type of artillery is needed by the Ukrainian military to thwart a Russian ground advance, for example, seems to be a matter of knowledge that is outside the lay ken.

The military as an institution possesses another legitimator, though, beyond its expertise: its claim to be *specialy affected* by many decisions regarding military policy. Consider again the affected interests principle which is at the core of democratic inclusion: those who are affected by decisions deserve to have a say in them. While

35. Pearlstein, *supra* note 20, at 845–46.

36. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY 106 (2018) (“While agency decisional legitimacy depends on more than expertise, the expectation that agencies will act on the basis of knowledge is a core feature of acceptable administrative action.”).

37. Kisor v. Wilkie, 588 U.S. 558, 571 (2019) (plurality opinion) (addressing *Seminole Rock* deference).

we said that democracy does not demand recognition of a government official's claim to be affected *qua* officials, as this only covers citizens, the effects of military policy on military servicemembers are categorically different from the effects of government policy on civilian government workers. Military policy uniquely affects servicemembers since policy affects them in a way that has direct risk to their lives.<sup>38</sup> Such policies are implemented with an eye toward violent armed conflict. OSHA inspectors are affected by new laws on workplace safety because they have to change their enforcement practices. These types of effects do not give rise to a claim that OSHA employees should influence the content of workplace safety law. The military, however, can be asked to fight, and die, in a war. Policies that commit the military to a conflict or alter its internal organization in a way that might affect its warfighting efficiency are policies that directly impact the interest in life that servicemembers legitimately possess. I argue that this special effect of military policy on the military serves as an additional legitimator of military influence beyond military expertise on tactics and warfighting. This is channeled well by James Dubik in his critique of Feaver: "[c]itizens-who-become-soldiers are the people whose lives senior political and military leaders use in war," and "[r]espect for those whose lives will be used in war demands more" than treatment of them as a mere agent.<sup>39</sup> This is a powerful conclusion that deserves recognition. Decisions about military policy risk the lives of military servicemembers directly, and therefore, they deserve influence over military policy more than would civilian bureaucrats within an agency.

### C. *Balancing the Considerations: A Norm Against Political Advocacy*

On the one hand, the military is an intra-governmental institution organized according to illiberal and undemocratic principles with the potential to unduly influence civilians; on the other hand, the military does possess technical expertise regarding warfighting, and it is the military that is specially affected by decisions regarding military policy. I argue that these competing considerations should be balanced, resulting neither in a complete ban on military influence nor a totally permissive rule.<sup>40</sup> Rather, they suggest that an additional factor to consider when assessing the content of the civilian supremacy norm is whether the

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38. MICHAEL WALZER, *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP* 94–95 (1970); Saira Mohamed, *Cannon Fodder, or a Soldier's Right to Life*, 95 S. CAL. L. REV. 1037, 1082 (2022) ("[H]uman rights law can do more than simply impose constraints on the state's powers over its military forces; it also can affirm the basic human dignity of those who serve, limiting the nature of their sacrifice and legitimating their act of making claims upon the government they serve.").

39. JAMES M. DUBIK, *JUST WAR RECONSIDERED* 75–76 (2016).

40. Brooks rejects such a functionalist, context-dependent rule because it does not provide clear guidance *ex ante*. Brooks, *Political Activity*, *supra* note 5, at 231 ("Others might contend that one can judge the appropriateness of political activity only by the context and circumstances in which it is used, examining the issue, the specific actions taken, the stakes, the nature of domestic reaction, and so on. . . . Yet this option fails to give explicit guidance to help a military leader know when to speak out. Although looking at context may introduce more nuanced standards of appropriateness, it does not escape the problem of subjectivity.") But very few norms of civil-military relations, if any, take on rule-like form, providing clear notice of expected conduct. See Fissell, *supra* note 34, at 338. After all, we are interpreting a *norm*, and not a provision of Constitutional, statutory, or regulatory law.

military influence takes the form of advocacy for or against issues that require the exercise of normative political judgment.

There are three crucial caveats to this, each of which aims to account for the legitimacy considerations just mentioned. First, this limitation applies only to advocacy, and not to information-giving. Second, it applies only to matters requiring political judgment—it does not apply to matters of technical competence. These caveats leave open the possibility of military officials drawing on technical expertise to advise civilian decision-makers when they themselves make political decisions, but also to advocate for a preferred position when confining this advocacy to a realm of technical competence. Finally, this limitation can be suspended in certain circumstances. This allows for military officials to advocate for positions on even political matters in certain rare cases, thus drawing on their claim to be specially affected by military policy. This is a claim that entitles military officials to assert their influence from time to time, when certain conditions are met. These conditions, discussed below, exist when the content and manner of advancing the advocacy reduce the threat that the influence will overbear civilian deliberation in favor of militarism.

#### *D. Exception: Advocacy Advancing Liberal Democratic Values*

The norm against military advocacy for political positions flows from militarism's opposition to liberal democracy.<sup>41</sup> However, even in areas outside their technical competence, this essay observed that the military's claim to being specially affected by military policy creates a countervailing consideration which somewhat legitimizes its creation. Balancing this recognition alongside the weighty considerations of liberalism and democracy, I argue that military officials have a narrow window in which they may legitimately influence policy without triggering the threats of militarism and undue influence. This is when the advocacy is in favor of liberalism or democracy, both substantively and procedurally—in the content of the advocacy and the manner in which it is advanced. Such a limited right to influence political decision-making vindicates the basic claim that the military has to be specially affected by military policy, but without undermining the primary values of liberalism and democracy. Ironically, it vindicates the interest in the preservation of servicemembers' lives and limbs by permitting official influence that does *not* parrot militaristic claims regarding the need for a certain policy to preserve life and limb. In this sense, it can be seen as almost an "admission against interest," and thus treated with extra credibility, or at least viewed with less suspicion. Just as John Hart Ely solved the *counter-majoritarian difficulty* of an unelected Supreme Court conducting judicial review by imposing on it the condition of representation reinforcement,<sup>42</sup> so too can we

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41. Fissell, *supra* note 34, at 375.

42. See John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

permit a limited form of military influence over politics by imposing on it the condition of liberal democracy reinforcement.

First, let us address the most important condition: the liberal or democratic substance or content of the advocacy. Military officials who advocate for policies that tend to enhance liberalism or democracy, and therefore to counteract militarism, should be permitted to engage in such advocacy. If part of the reason there is a norm against advocacy is because the expected content of most military advocacy will be militaristic (due to enculturation and interest), in the rare cases when it is not, the civilian supremacy norm is not similarly offended. There is a sense in which any undue influence accorded to it will be benign due to the substantive position.

The second condition is that even if military advocacy is in service of liberal or democratic policies, the advocacy should itself be presented in a liberal and democratic manner—it must have characteristics of rationality and deliberation. Surely, such advocacy cannot take the form of an *ipse dixit* that is backed by a privileged claim of knowledge, or an earned right to offer unfounded positions based simply on one's status. Arguments must be based on evidence that is rationally accessible to all, and reason-giving must be reciprocal with civilian authorities, such that it is part of a deliberative process.

#### CONCLUSION

The role of military leaders in policymaking is an enduring issue in American civic life. A standard position is that these leaders should be “apolitical.” This Essay presents a modified defense of this position. It concedes that while nearly all issues confronted by senior military officers will be political, they can nevertheless advance the norm of civilian control by refraining from advocacy, instead confining themselves to the provision of information and advice. Democratic theory justifies such a limitation but also implies an exception from it: if the advocacy advances liberal democratic values in substance and form.