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WHY PROGRESSIVES LOST THE WAR WHEN THEY LOST THE DRAFT

Diane H. Mazur*

INTRODUCTION

It was a fair question. At a Department of Defense ("DOD") press conference in January 2003, Secretary of Defense Donald Rumsfeld was asked to comment on a recent congressional proposal to establish a draft for national service, both military and civilian. Representative Charles Rangel of New York was the sponsor of the Universal National Service Act of 2003, a bill designed "to provide for the common defense by requiring that all young persons in the United States, including women, perform a period of military service or a period of civilian service in furtherance of the national defense and homeland security." Rangel had first publicized his proposal for compulsory national service in a New Year's Eve editorial in the New York Times. As the United States prepared for armed conflict in Iraq, his editorial theme was one of shared sacrifice. Speaking to politicians whose children were almost entirely insulated from military service, Rangel wrote: "Those who would lead us into war have the obligation to support an all-out mobilization of Americans for the war effort, including mandatory national service that asks something of us all."


4. Id.
Secretary Rumsfeld’s response to the reporter’s question about mandatory national service was bewildering in its irrationality. Rumsfeld invoked the unfairness of the Vietnam-era military draft, which permitted numerous exemptions and deferments from service, but he failed to mention that most of those exemptions and deferments—particularly the controversial college deferment—were no longer available under contemporary draft rules.  

Certainly Rumsfeld was aware that selective service law had changed significantly since the height of the Vietnam conflict. Rumsfeld also stretched the truth in characterizing all members of the military then on active duty as volunteers, knowing that he had issued “stop-loss” orders that same day to prevent servicemembers from leaving the military even though they had completed their agreed-upon term of service or had qualified for retirement, and also knowing that many reservists had already been.

5. Current draft law, if activated, would provide only a limited postponement of induction for men attending college, in most cases just until the end of a semester already in progress: Any person who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution is ordered to report for induction under this title (sections 451 to 471a of this Appendix), shall, upon the appropriate facts being presented to the local board, have his induction postponed (A) until the end of the semester or term, or academic year in the case of his last academic year, or (B) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier. 50 U.S.C. app. § 456(i)(2) (2000). See generally Military Selective Service Act, 50 U.S.C. app. §§ 451-471a (2000); Selective Service System, 32 C.F.R. §§ 1602-1699 (2003). An extended, multiple-year deferment for the entire length of an undergraduate education has not been available since 1971. See Amendments to the Military Selective Service Act of 1967, Pub. L. No. 92-129, §§ 101(a)(17)-(18), (20), 85 Stat. 348, 350-51 (1971) (repealing the Vietnam-era student deferment).

At the height of the Vietnam conflict, selective service law automatically deferred a college student from the draft throughout his undergraduate education, “until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs.” See Amendments to the Universal Military Training and Service Act, Pub. L. No. 90-40, § 6, 81 Stat. 100, 102 (1967). Before 1967, deferments were also generally available for continued graduate study. See Universal Military Training and Service Act, Pub. L. No. 82-51, § 1(n)(3), 65 Stat 75, 84 (1951) (permitting “deferment from [military] training and service of any category or categories of students for such periods of time as [the President] may deem appropriate”).

6. The President has the authority to “suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.” 10 U.S.C. § 12305(a) (2000). The President’s authority to “stop-loss” by keeping servicemembers on active duty who would otherwise be entitled to leave has been delegated to the Secretary of Defense. Exec. Order No. 12,728, 55 Fed. Reg. 35,029 (Aug. 22, 1990), as amended by Exec. Order No. 13,286(38), 68 Fed. Reg. 10,626 (Feb. 28, 2003).

7. See Sandra Jonitz & Lisa Burgess, Marines Enact Stop-Loss Plan For All; Some GIs Also Held in Place, EUR. & PAC. STARS & STRIPES, Jan. 9, 2003, available at http://www.estripes.com (affecting “roughly 14,000 Marines who thought they would be separating or retiring in the near future”). Shortly thereafter the Army and the Air Force also issued stop-loss orders that
involuntarily extended on active duty into a second year, the longest reserve call-ups since the Vietnam War. Most inexplicably, his visceral reaction to the possibility of a draft caused him to disparage the service of millions of veterans who had been drafted into service to the United States over the last half-century. It seemed that Rumsfeld had temporarily lost his mind:

We’re not going to reimplement a draft. There is no need for it at all. The disadvantages of using compulsion to bring into the armed forces the men and women needed are notable.

The disadvantages to the individuals so brought in are notable. If you think back to when we had the draft, people were brought in; they were paid some fraction of what they could make in the civilian manpower market because they were without choices. Big categories were exempted—people that were in college, people that were teaching, people that were married. It varied from time to time, but there were all kinds of exemptions. And what was left was sucked into the intake, trained for a period of months, and then went out, adding no value, no advantage, really, to the United States armed services over any sustained period of time, because the churning that took place, it took enormous amount of effort in terms of training, and then they were gone.

....

.... We have people serving today—God bless ‘em—because they volunteered. They want to be doing what it is they’re doing.

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Today... every single person there is there because they stuck their hand up and said, "I'd like to do that." So the argument, it seems to me, is not persuasive.9

Veteran’s organizations were devastated by Rumsfeld’s conclusion that the service of draftees added “no value, no advantage, really” to the military. Particularly with respect to young men who had been injured or killed in service to their country, Rumsfeld’s description of their service as being “sucked into the intake” and then simply “gone” was extraordinarily insensitive. For all draftees, Rumsfeld seemed to dismiss the possibility that they served their country in good faith and to the best of their ability despite having been conscripted.

The American Legion released a letter it sent to Rumsfeld reminding him that “every service member who sacrificed during the Vietnam War—volunteer and draftee alike—was a precious national asset” and that the Vietnam Veterans Memorial is engraved with the names of the conscripted as well as the volunteer. “Their sacrifice was, indeed, valuable.”10 The response of the Vietnam Veterans of America was even more pointed in its criticism. In a press release, the President of the VVA wrote:

Secretary Rumsfeld should know that the Vietnam War could not have continued for 10 years without a military draft of honorable Americans who accepted their military obligation as citizens of this great country....

... It is wrong for anyone to demean their memories and insult their families as the Secretary did last week. Similarly, it is wrong to demean the hundreds of thousands of us who were wounded and disabled as a result of our honorable service. Our service did have value. Most of us went on to make significant contributions to America in civilian life that are valued by our families, our friends, our communities, and by most Americans.11

Rumsfeld apologized two weeks after his statements on the draft, insisting he had only misspoken. He explained that he had never meant to say draftees added no value to the military while they were serving.

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but only that their value was lost when they left the military after serving shorter terms than volunteers.  

The apology, however, was not Rumsfeld's first priority. Following the press conference at which he made his controversial statements, Rumsfeld enlisted defense analysts in preparing materials to oppose Rangel's Universal National Service Act of 2003. Within a week, the DOD had released a report entitled, "Conscription Threatens Hard-Won Achievements and Military Readiness." The DOD seized on a short phrase in Rangel's New Year's Eve editorial—and on the fact that Rangel is African-American—to turn a bill about the responsibilities of citizenship into a bill that could be more easily discredited. Rangel had offered two principal arguments in favor of compulsory military service. First, he believed that those in government responsible for a decision to go to war would proceed more cautiously if their own children faced the risks imposed by their decision. Second, he questioned whether military personnel were already stretched too thinly among assignments in Iraq, Afghanistan, Bosnia, and Kosovo, and whether we have a force large enough to meet the needs of a broad-based response to terrorism. These arguments were not addressed in the DOD report, however, because they would have been the most difficult to rebut.

It was much easier to cast Rangel as a politician more interested in race than in national security, and so the defense department seized on Rangel's unexceptional observation that military service "is no longer a common experience" and a "disproportionate number of the poor and members of minority groups make up the enlisted ranks of the military, while the most privileged Americans are underrepresented or absent." The department's strategy was to answer a question Rangel didn't ask. It instead turned the debate to a common but discredited assumption that African-Americans were killed in disproportionate numbers during the Vietnam War and remain at disproportionate risk of death in today's military. Statistics demonstrate that the racial "cannon fodder"
argument is at best overstated and, with respect to the Vietnam era, inaccurate. 16 But Rangel was not even talking about the "cannon fodder" myth, let alone contending that it was accurate. The Pentagon’s strategy of non-responsiveness, however, effectively obscured his reasoning. 17 Within a week of its introduction, the Universal National Service Act of 2003 was no longer about citizenship and service, but about demands for racial and economic entitlement. 18

Former Secretary of Defense Caspar Weinberger was even more enraged at Rangel’s national service bill. He called the proposal “unconscionable demagoguery” and “utter and pernicious nonsense,” accusing Rangel of “[a]ttempting to play both the race and class warfare cards.” 19 Weinberger sarcastically mocked Rangel as a “statistical

‘too black’). See generally President’s Comm’n on an All-Volunteer Armed Force, Report of the President’s Commission on an All-Volunteer Armed Force (1970).


For many years, critics of heavy black representation in the Army have claimed that Afro-Americans have been used by their country as cannon fodder, an argument that had incredible emotional resonance during the Vietnam War. . . .

. . . No serious case can be made that blacks suffer undue casualties in America’s wars and military interventions.

Id. at 8-9. Oddly, the authors of Conscription Threatens Hard-Won Achievements and Military Readiness appear either to be unaware of this data or willing to disregard it in a further effort to denigrate a draft-based military. The report notes, accurately, that black servicemembers in today’s military are overrepresented in support and administrative positions and underrepresented in positions involving direct combat. But it then describes this occupational data as being "in sharp contrast to the situation in a draft force," implying that blacks would be at greater risk than whites in a military that drew its personnel from a more inclusive range of the population, a conclusion without basis in fact or logic. See CONSCRIPTION THREATENS HARD WON ACHIEVEMENTS, supra note 13, at 6.

17. The DOD press conference called to announce and discuss the report CONSCRIPTION THREATENS HARD-WON ACHIEVEMENTS, supra note 13, was unusual in that the briefer would only speak off the record, for no apparent reason. A staff member introduced this person in the following way: "I have a renowned expert on the all-volunteer force with us, known to you and your readers as a 'senior defense official.' But I think all of you know the gentleman that's off to my left here, and to your right." U.S. Department of Defense, News Transcript, Background Briefing on the All Volunteer Force (Jan. 13, 2003), at http://www.defenselink.mil/news/Jan2003/01132003_t113bgd.html [hereinafter AVF Background Briefing].


19. Caspar W. Weinberger, Dodgy Drafters, WALL ST. J., Jan. 10, 2003, at A10. For Representative Rangel’s rebuttal to the remarks of both Secretary Rumsfeld and former Secretary Weinberger, see Charles B. Rangel, Letters to the Editor: You’re Not in the Army, Mr. J. Worthington III, WALL ST. J., Jan. 17, 2003, at A11. Rangel wrote: “For me, patriotic duty is not a
genius” for his observation that a disproportionately high number of minorities served in the military and a disproportionately high number of the economically privileged did not. Weinberger argued that any statistical disparity in enlistment rates could be explained on the basis that black youths were simply more patriotic than white youths. Rangel’s only problem, in Weinberger’s view, was a dissatisfaction with “too many patriotic blacks.” His closing shot, in the absence of anything rational to advance, was to call Rangel’s bill “mumbo-jumbo.” Men are not often referred to as being hysterical, but I believe in Weinberger’s case an exception could be made.

An exceptional series of events had cascaded from an uncomplicated proposal for compulsory military service. In an era of open and partisan association between the Republican Party and the military, a Secretary of Defense to a Republican President had to apologize for inadvertently expressing a lack of respect for military veterans and their service. Liberals were now calling for a military draft; conservatives were so hostile to the idea that they objected indiscriminately. The world had, apparently, turned upside down.20 The fleeting skirmish between Rumsfeld and military veterans, however, was just an incidental effect of a much more fundamental divide. There must be a reason that Rumsfeld was so viscerally opposed to Rangel’s proposal, and that reason likely had little to do with a belief that a draft would weaken the military’s effectiveness. If that had been the reason, I’m sure Rumsfeld could have calmly (and accurately) articulated his arguments. It’s not as if the subject of the draft had come out of the blue; questions had been raised about the need for conscription in controlling terrorism and protecting national security since shortly after September 11, 2001.21 When senior civilian defense officials, present and past, respond to a discussion of the draft with a reflexive display of diversion, misrepresentation, bluster, and personal insult, something else is going on. When senior military officers are “horrified” by the idea of shared sacrifice in military service,22 something else is going on.

Without doubt, the most important thing that civilians do not understand about the United States military today is how much it has
changed in the last generation. This point cannot be overstated. The military's character at the turn of this new century cannot be explained completely by its distinctive institutional responsibility to fight and win wars or by the paradigmatic reasoning that militaries are the way they are—and the way they always have been—simply because they are "military." Much of what explains the military today is of relatively recent origin. A fundamental shift in military culture and in constitutional civil-military relations began when a draft-based military was transformed into an all-volunteer force thirty years ago. Today we see the effect of a generation of the all-volunteer force—what some have instead called the "all-recruit" force—and the result is in many ways not a good one. People mistakenly assume the military is what it always has been, just by the inevitable nature of the institution. They fail to realize how much their understanding is shaped by what the military has become in the era of the all-volunteer force after Vietnam, the only military they have known.

In an earlier article, entitled Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law, I examined the opinions of Chief Justice Rehnquist in cases related to the military and traced his establishment of a doctrine of judicial deference to the military, one unprecedented in our constitutional and military history. The word "deference" is actually an understated way of describing Rehnquist's view of the constitutional relationship between the judiciary and the military. Through a series of opinions, principally Parker v. Levy, Rostker v. Goldberg, and Goldman v. Weinberger, Rehnquist crafted what would become, in effect, an exemption from judicial review for matters related to the military. His intention was to establish a military exception to the Constitution, shielding all executive and legislative decisions made within the Article I and II military powers from judicial review. Perhaps proving the adage that people "write what they know," many post-Vietnam constitutional experts accept judicial deference to the military as a given, assuming they have even considered the role of judicial review in maintaining civilian control of the military


27. 475 U.S. 503 (1986).
They accept without objection a doctrine of relatively recent origin that, without basis in text or precedent, presumes judges so ignorant of and disconnected from the military that they are incompetent to evaluate its actions under the Constitution. Perhaps constitutional scholars—particularly those of the post-draft era—accept it because they came of age in an America in which most of their compatriots would consider themselves equally incompetent to pass judgment on matters related to the military. Although the business of constitutional law is often the business of history, constitutional experts can be strangely incapable of reaching back before their own lifetimes when the question concerns the place of the military in our constitutional scheme. Rehnquist's *Vietnam* explains how the Rehnquist Court has been complicit in establishing and enforcing a constitutional separatism between those who serve in the military and those they protect.

It is no coincidence that the Court's encouragement of a constitutional distance between military and civilian spheres has overlapped perfectly, almost to the year, with the establishment of the all-volunteer force. A constitutional distance is more difficult to enforce in a draft-based military that continually rotates a representative cross-section of civilians through military service. In a volunteer or

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29. Even the rare constitutional scholar with post-Vietnam military experience can succumb to the false assumption that judicial deference to the military is a "longstanding" feature of constitutional interpretation. See Phillip Carter, *Judicial Deference to the Military: How It Will Affect Court Cases Involving Gay Rights, and War on Terrorism Policies*, FINDLAW'S WRIT (July 15, 2003), at http://wrtr.news.findlaw.com/commentary/20030715_carter.html (offering only the discredited decision in *Korematsu v. United States*, 323 U.S. 214 (1944), upholding the internment of citizens of Japanese ancestry, in support of his conclusion that courts have a tradition of judicial deference to the military). Phillip Carter is a former Captain in the United States Army, a law student at UCLA Law School, a journalist and frequent contributor to *Washington Monthly*, and a well-connected blogger on military and legal affairs. "Intel Dump," Mr. Carter's blog, is a valuable resource for insightful commentary on military subjects from a legal, political, and journalistic perspective. See http://philcarter.blogspot.com (last visited Apr. 22, 2004).

30. But see Andrew J. Bacevich, *Absent History: A Comment on Dauber, Desch, and Feaver*, 24 ARMED FORCES & SOC'Y 447, 449 (1998) (discussing Americans' "long-standing tendency to ignore most anything that contradicts our comfortable assumptions as to the benign character of U.S. civil-military relations").

31. The Vietnam-era authority to draft for military service expired on July 1, 1973. See *Conscription Threatens Hard-Won Achievements*, supra note 13, at 1. *Parker v. Levy*, 417 U.S. 733 (1974), the genesis of Rehnquist's doctrine of judicial deference to the military, was decided on June 19 of the following year.
recruited military, by contrast, forces of self-selection operate to shape
the composition and nature of the armed services. During the last five
years, a significant body of research in sociology and political science
has examined what has been termed the "civil-military gap," or the
distance of knowledge, experience, attitude, and culture between
military and civilian societies in the United States. The issue has become
one of central concern in the academic study of the military, but it has its
most important application in measuring the health of the constitutional
and legal relationship between the military institution and the society it
protects. Study of the civil-military gap was prompted by the intuitive,
anecdotal perception of academics that the military was changing in a
very fundamental way, and in a way that threatened traditional notions
of military professionalism and civilian control. This intuitive perception
was significant because it was shared by people with close connections
to the military as veterans, academic researchers, or specialized
reporters—people not normally predisposed to express criticism or
concern about the direction taken by the military. They were people, and
I include myself with them, who spoke from loyalty to the military
institutions and an uneasiness about the state of civil-military relations
under the Constitution.

Research on the civil-military gap suggests the real explanation for
Rumsfeld’s irrational reaction to a proposal to resurrect the draft. His
reaction had little to do with the arguments about racial and economic
disparity that quickly captured the debate. Those demographic concerns
simply served as diversions from other issues of representativeness and
diversity that are much more fundamental for civil-military relations
under the Constitution. The civil-military gap as it exists today, after a
generation of an all-volunteer force, is a gap based in ideological and
political partisanship, at odds with the constitutional assumption of a
politically neutral military. By definition, a draft that imposes shared
obligation for military service ensures a military that is more
representative of the society from which it draws its members, and the
kind of representativeness that contemporary opponents of the draft fear
most is an ideological representativeness. Today we have a military that
is built instead on a foundation of ideological self-selection, which is
conveniently consistent with, and is abetted by, the Court’s view of the
military as an institution necessarily separate from the society around it.
How does this recruited military sell itself? It sells itself as a place where
constitutional separatism is reinforced; it sells itself as a place where
constitutional resistance is a necessity for military effectiveness.
Unfortunately, an offer of constitutional immunity can be a dangerous
intoxicant, particularly in a time of popular and partisan disagreement over constitutional interpretation and evolution.\textsuperscript{32}

The civil-military gap has consequences for civilian control of the military in the operational sense of whether the military will follow the direction of its civilian leaders in using military force. Most political science research in civil-military relations has focused on relative decisionmaking authority between civilian and military leaders in specific contexts. However, this is not the only consequence of the civil-military gap. Thirty years after the advent of the all-volunteer force, a confluence of trends threatens civil-military relations more comprehensively. The gap of knowledge and experience between military and civilian societies is increasing as the military draws its members from an increasingly narrow and self-selected slice of America. The gap of constitutional values between military and civilian societies is increasing as the Court continues to reinforce the notion that constitutional values are inconsistent with military effectiveness. No one is questioning the Court's conclusions about constitutional values and military effectiveness because civilian society has lost its base of experience with which to do so. As a result, the military is increasingly selling itself, consciously or unconsciously, as a haven of constitutional immunity, drawing disproportionate numbers of recruits who enlist for ideological reasons. And the circle continues.

We live in a time in which the military is portrayed as an institution that not only protects the values of this country, but is often asked to define them. It was no coincidence, for example, that \textit{Grutter v. Bollinger}\textsuperscript{33} grounded its recent approval of affirmative action in higher education in large part on the existence of similar admission policies at West Point, Annapolis, and the Air Force Academy. Military judgment was applied, without objection by the dissenters, to corroborate a judicial finding of compelling purpose under the Equal Protection Clause, an absolutely extraordinary use of military policy in deciding a constitutional question.\textsuperscript{34} Justice O'Connor's unspoken assumption

\textsuperscript{32} A senior judge advocate in the United States Air Force once commented on the "remarkable resiliency of the military's popularity" despite the military's resistance to change on issues of constitutional equality such as sexual harassment, women in combat arms, and the service of gay people. \textit{See} Charles J. Dunlap, Jr., \textit{Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military}, 29 WAKE FOREST L. REV. 341, 354 (1994). I suspect that in some quarters the military's popularity is high \textit{because of} that resistance, not despite that resistance. A free pass to denigrate women and gay people can be a valuable commodity.

\textsuperscript{33} 539 U.S. 306 (2003).

\textsuperscript{34} Justice O'Connor relied on an amicus brief filed by former high-ranking military officers and civilian leaders of the armed services.
seemed to be that if the military believed it was appropriate and beneficial to admit students to its academies on a race-conscious basis, then by definition the practice could not be constitutionally invidious. Perhaps the step taken in Grutter was not surprising. Military perspectives on law, morality, order, and discipline are now frequently viewed, by all three branches of government, as models to which the rest of us should aspire, and the development raises no particular notice or concern. Research suggests, however, that the most constitutionally corrosive aspect of the civil-military gap may be the temptation it creates for government to use the military not for its professional expertise in the skills of war, but for politically partisan purposes within the domestic sphere. The most effective weapon against misuse of a large standing military for politically partisan purposes always has been, perhaps counter-intuitively, a requirement for universal military service, or at least universal eligibility for military service. This is why progressives lost the war when they lost the draft.

Throughout this Article, I will introduce sources of interdisciplinary research on civil-military relations that may be unfamiliar to most legal readers but are essential to understanding the direction of constitutional civil-military relations in this country. Study of the military from a legal and constitutional perspective has deteriorated because the current generation of legal academics has lost its connection to the military, to the point that when a law professor becomes a military reservist, it's news.\(^3\) I will also incorporate, wherever possible, reference to sources that can provide a sense of contemporary military experience and culture. One does not need to be a senior military officer, making decisions at the highest level of interaction with civilian leadership, before familiarity with the military experience is helpful in studying the constitutional relationship of the military to civilian society. The facets of military experience that are the most important for understanding the law of civil-military relations are also some of the most fundamental, such as the nature and necessity of military discipline and the responsibilities of leadership and command. These principles are

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To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting." We agree that "it requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."

*Id.* at 2340 (quoting Brief of Amicus Curiae Lt. Gen. Julius W. Becton, Jr. et al., at 29) (citations omitted).

familiar to anyone who has worked with, lived with, or studied the military, but without them, any interpretation of the Constitution’s intention with respect to the military would be incomplete and misleading.

Part I of this Article examines the substantial body of social science research on the contemporary civil-military gap produced over the last five years and evaluates its significance for the constitutional health of civil-military relations. An understanding of how the transition to an all-volunteer force contributed to the development of this divide is perhaps the most important factor in considering how we as a nation should choose who will serve—or who must serve—in the military. The answer holds great significance not only for constitutional values of equality, but also for the preservation of the political neutrality of military service, a constitutional assumption on which effective civilian control depends.

Part II identifies the warning signs of deteriorating civil-military relations and the consequences of an increasing civil-military gap. First, the ideological self-selection that underlies the all-volunteer force may be diminishing the propensity of African-Americans to serve in the military and creating sharp racial disparities in the reasons that young people enlist and in the military specialties they choose. Second, the political partisanship and social conservatism that defines the nature of the civil-military gap is substantially eroding the constitutional equality of women in military service, which imposes collateral effects on civilian women as well. Finally, and most fundamentally in a constitutional sense, the civil-military gap has contributed to a decline in the professional military ethic of subordination to civilian authority, the central ethic underlying civilian control of the military.

Part III begins by identifying and debunking some of the widely-held myths of military recruiting in the all-volunteer era, principally in the areas of recruit quality and military compensation. It then reviews several recent legislative proposals designed to increase the representativeness of the military in relation to civilian society and reduce the size of the civil-military gap, whether through compulsory military service, compulsory military training for brief periods, or volunteer-based incentives designed to broaden the attractiveness of military service to under-represented groups. Efforts to expand the recruiting base have not been effective, and Part III argues that the cause is a failure to consider the ideological divide inherent in the civil-military gap.
I. THE CIVIL-MILITARY GAP AND CONSTITUTIONAL DECAY

The impetus for formal study of the civil-military gap came from an unlikely source. In 1995, a Pentagon reporter for the Wall Street Journal, Thomas E. Ricks, followed a platoon of United States Marine Corps recruits through basic training at the Marine Corps Recruit Training Depot, Parris Island, South Carolina and through their first year of military service. He published several reports based on his experience, culminating in a book, *Making the Corps*, that was so influential it shifted the direction of academic study of the military. *Making the Corps* gave voice to a politically incorrect critique—politically incorrect from the perspective of the military’s politics, of course—that the military was changing in ways that threatened the stability of civil-military relations:

While American military officers always have tended toward conservatism, over the last twenty years they have become more politically involved, and effectively “Republicanized.” But far more than civilian Republicans, they seem to look down on American society in a way that the pre-World War II military didn’t. The U.S. military’s new contempt for American society is especially troubling because it comes at a time when the end of the Cold War has cut adrift the U.S. military from its traditional roles. With the demise of the Soviet threat, many in the Marines, from commandant to drill instructor, seem to define the enemy as “chaos.” That is worrisome because it can blur the line between foreign and domestic missions. Take this view to extremes—and some Marines do—and you wind up believing that the next war the U.S. military fights could be here at home.

Strong stuff, indeed. Some military officers and civilian military researchers listened, however, in part because Ricks carried the “conservative” credential of his distinguished military reporting and his affiliation with the Wall Street Journal, and in part because they had


38. RICKS, *MAKING THE CORPS*, supra note 37, at 23.

39. The “male” credential is probably important as well. In 1997, the same year Ricks’s *Making the Corps* was published, the Assistant Secretary of the Army for Manpower and Reserve Affairs, Sara E. Lister, used the word “extremist” in reference to the Marine Corps. The remark was made in the context of an academic discussion about the danger presented by a military service that
seen the same disturbing trend themselves. One retired admiral, for example, the senior commander of naval forces during the first Gulf War and later the Vice Chief of Naval Operations, has observed that "the armed forces are no longer representative of the people they serve. More and more, enlisted as well as officers are beginning to feel that they are special, better than the society they serve. This is not healthy in an armed force serving a democracy."  

The greatest value of Ricks's work is that it created a forum for speaking the unspoken, and researchers began to consider whether the military was, in fact, no longer representative of society—and unrepresentative in ways much more constitutionally significant than the simple demographics of race and sex—and whether the military had abandoned its professional and constitutional ethic of political neutrality. As Ricks concluded, although civilian society certainly has its problems, "it is another matter to propose that it is the role of the U.S. military—especially an all-volunteer, professional military oriented to a conservative Republicanism—to fix those problems."  

The provocative conclusions of *Making the Corps* were reinforced in a 1997 empirical study published by Duke political scientist Ole R. Holsti. His study, which received some minor attention in the popular press, found dramatic changes over the previous twenty years in the political partisanship of military officers on the fast-track for promotion.  

Holsti analyzed data from the Foreign Policy Leadership Project, a quadrennial survey of the civilian and military elite, and uncovered trends consistent with Ricks's more intuitive observations about the all-volunteer military. Between 1976 and 1996, essentially the first generation of the post-draft era, the percentage of military officers becomes contemptuous of and unrepresentative of the society it protects. See Philip Shenon, *Denounced for Remarks on Marines, Army Official Quits*, N.Y. TIMES, Nov. 15, 1997, at A12. Assistant Secretary Lister was forced to resign after raising the same point, in much the same language, for which Ricks was praised, but women have never had the same professional latitude to critique the military. See Diane H. Mazur, *A Call to Arms*, 22 HARV. WOMEN'S L.J. 39, 68 n. 148 (1999).


41. RICKS, *MAKING THE CORPS*, supra note 37, at 286.

identifying as members of the Republican Party doubled, from thirty-three percent to sixty-seven percent. Although civilian leaders followed the same Republican trend, the increase was comparatively small, from twenty-five percent to thirty-four percent. The increase in military identification with the Republican Party, moreover, came not at the expense of Democratic Party affiliation, but at the expense of the traditional military ethic of nonpartisanship. Within twenty years, the number of military officers with a party identification of "independent" or "other or none" had declined by half. Self-identification of political ideology followed the same trend. The number of military officers identifying as anything to the left of moderate (either "somewhat liberal" or "very liberal") plummeted by eighty percent, from sixteen percent to three percent. The number of civilian leaders identifying with some degree of liberal ideology was more constant between 1976 and 1996, decreasing from forty-two percent to thirty-five percent. The differences are stark, and they demonstrate a significant cultural and political shift within the all-volunteer military that was not simply reflective of civilian trends.

In a post-draft civilian society that has lost much of its common base of experience with military service, this increasing distance in the civil-military gap went largely unnoticed outside the small community of political and social scientists who study the military. With rare exception, principally in the very recent work of Jonathan Turley and Charles Dunlap, law reviews have neglected the study of constitutional civil-military relations during the all-volunteer era. The indifference of constitutional experts, however, also reflects a broader indifference about the place of the military in America. Over the last generation, civilian society has gradually developed an unusual—almost virtual or hypothetical—relationship with the military. As a rule, we don't know very much about the military and have relatively little personal exposure to it, whether through our own military service or the service of family


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members and friends, yet we have more confidence and trust in the military than we do in other public institutions. We romanticize and idealize the military with little knowledge of its reality, the same military that, even after September 11, 2001, there is still no great rush to join. We reserve a special pedestal for those who serve in uniform, but from a distance we seem to assume that the demands of military service are beyond the capability of the typical American who might, in another day, have served as the unexceptional "citizen-soldier." Simply, we are in uncritical awe, as are too many members of the Court when asked to evaluate the military under the same rule of law that applies domestically to us all.

It is very difficult to critique constructively the military and the health of civil-military relations in the present time. At best, any critique carries with it a concern for the safety and well-being of servicemembers deployed overseas. At worst, any critique is dismissed as unpatriotic or anti-military. Even Laurence Tribe expressed some trepidation in writing about Bush v. Gore in a post-September 11 world because he was concerned that criticism of the Court's ruling might be taken to diminish the authority of the Commander in Chief in an era of heightened national defense. Just as Tribe believed that circumstances provided more reason, not less reason, to publish his dissent, I believe that we as a society, now even more than before September 11, need to understand why civil-military relations under the Constitution have deteriorated. The reader should remember that a critique of the all-volunteer military is not intended as condemnation of individual servicemembers, the identification of cultural trends within the military does not mean that every servicemember has contributed to that trend, and the recognition that certain characteristics of the military community are unrepresentative or disproportionately high or low in comparison to the

46. See id.
48. See Persons v. United States, 925 F.2d 292, 295 (9th Cir. 1991) (noting that the Court "has been guided by an increasing sense of awe for things military"), quoted in Turley, Trials and Tribulations, supra note 43, at 706 n.324.
50. See Laurence H. Tribe, FrouG v. hisU and Its Disguises: Freeing Bush v. Gore From Its Hall of Mirrors, 115 Harv. L. Rev. 170, 172 n.† (2001) (acknowledging that he "might have had second thoughts about the wisdom of publishing it now if its point were to question the legitimacy of the Bush presidency").
civilian community does not mean that every servicemember shares that characteristic. One can criticize the military out of loyalty to its constitutional ideal without being disloyal to the military or to the citizens (and non-citizens) who serve in uniform. With that understanding in mind, Part I will review and evaluate the extensive empirical research undertaken in response to the concerns raised by Ricks and Holsti.

A. The Non-Legal Academics of Constitutional Civil-Military Relations.

The Triangle Institute for Security Studies ("TISS") is a consortium of faculty members at Duke University, the University of North Carolina at Chapel Hill, and North Carolina State University interested in the study of national and international security.51 Two of these faculty members, Peter Feaver of Duke52 and Richard Kohn of the University of North Carolina,53 were the principal organizers of a TISS research study designed to test empirically the anecdotal arguments concerning the existence of the civil-military gap, its nature, and its potential consequences. Their study, the Project on the Gap Between the Military and Civilian Society ("Gap Project"), centered on a large survey of military officers with top promotion potential, influential civilian leaders of the "Who's Who" variety, and members of the general public, and its

data base was utilized by a number of researchers in a wide variety of published studies. The purpose of the Gap Project was to gather data pertinent to four basic questions underlying contemporary civil-military relations: "What is the nature or character of the civil-military gap today? What factors shape it? Does the gap matter for military effectiveness and civil-military cooperation? What, if anything, can and should policymakers do about the gap?" Survey respondents were asked for their opinions on a variety of topics that might reveal a political, ideological, or cultural gap between civilian and military societies, such as national defense, foreign policy, civil-military relations, political partisanship, constitutional values, social and economic policy, morality, and religion.

The significance of any civil-military gap is dependent upon more fundamental assumptions about the meaning of civilian control of the military under the Constitution. The constitutional requirement of a military agent controlled by civilian principals is found in complementary (but potentially overlapping) clauses of Articles I and II. The President is the Commander in Chief of the armed forces, while Congress has the power to declare war, raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the armed forces. The central measure of good civil-military

54. Twelve studies based on the Gap Project data were published in SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY (Peter D. Feaver & Richard H. Kohn eds., 2001) [hereinafter SOLDIERS AND CIVILIANS]. The volume also includes a Technical Appendix containing the full version of the Gap Project's survey of approximately two hundred and fifty questions. Other studies conducted as part of the Gap Project were published in a special issue of Armed Forces & Society, the journal of the Inter-University Seminar (IUS) on Armed Forces and Society, the pre-eminent professional organization for the academic study of the military. See Symposium, Media and Education in the U.S. Civil-Military Gap, 27 ARMED FORCES & SOC'Y 177 (2001); see also Lance Betros, Political Partisanship and the Military Ethic in America, 27 ARMED FORCES & SOC'Y 501 (2001) (also analyzing Gap Project data).

55. Peter D. Feaver et al., The Gap Between Military and Civilian in the United States in Perspective, in SOLDIERS AND CIVILIANS, supra note 54, at 1, 5-6.

56. See U.S. CONST. art. II, § 2, cl. 1. In October 2002, Secretary of Defense Rumsfeld banned the practice of referring to each of the four-star generals who headed nine unified combatant commands as "Commander in Chief" or, in short, "CINC" (pronounced "sink"). Previously, for example, the senior general in command of the American military in Europe had held the title "Commander in Chief of U.S. Forces in Europe," or in its acronym form, "CINCEUR." Rumsfeld believed the title of Commander in Chief was a constitutional term reserved to the President. See Vernon Loeb, One 'Chief Commands; Others Are Out of CINC, President Alone Has Title, Rumsfeld Says, WASH. POST, Oct. 29, 2002, at A19.

57. See U.S. CONST. art. I, § 8, cls. 11-14. The boundary of military authority between the President and Congress is not always clear. For example, if submarines were not mission-ready because they lacked sufficient personnel for full crews, could President Bush order the Navy to disregard congressional limits and assign female servicemembers to submarine training to fill the shortfall? See 10 U.S.C. § 6035(a) (2000) (barring the Navy from assigning women to submarine
relations is the robustness of civilian control of the military exercised by the President and by Congress, but the question of whether civil-military relations are in "crisis" as a result of any gap of knowledge, experience, or culture can be answered only by first identifying a standard or measure of acceptable civilian control. In other words, how do we know when we have good civil-military relations under the Constitution, and how do we know when we do not?

There are two principal models for analyzing the state of civil-military relations. The more traditional model attempts to measure "the influence, both formal and informal, of the military relative to other groups within the society." It focuses on civil-military interaction at the highest levels of leadership in a very simple, direct, and sometimes zero-sum way, asking who controls, who decides, and who prevails when

service until thirty days of continuous session of Congress has expired after notice of the Navy's intent to change policy, presumably sufficient time for Congress to bar women legislatively). Would that order be an exercise of the President's prerogative to direct the activities of servicemembers already under his command, or would it be a usurpation of congressional authority to govern and regulate the military, as reflected in legislation prohibiting women from serving aboard submarines? It's a good question, so good that I offered this hypothetical situation as an exam question in a first-year course in Constitutional Law. Student answers, unfortunately, tended to rely on estimates of political power to the exclusion of textual interpretation, the latter being the skill I was attempting to measure. Those who framed the question in the context of the current President's broad use of war powers against the threat of terrorism, subject to little congressional oversight, tended to find executive power to order female servicemembers into submarine training over congressional objection. Those who framed the question in the context of President Clinton's unsuccessful attempt to end the military's ban on gay servicemembers tended to conclude the President had no constitutional power to give the order, especially over congressional objection. The "Don't Ask, Don't Tell" fiasco in 1993 "announced to Washington and the world [and, apparently, to future law students] that the President could be rolled." Richard H. Kohn, Out of Control: The Crisis in Civil-Military Relations, NAT'L INT., Spring 1993/1994, available at LEXIS, News Library, NTLINT File [hereinafter Kohn, Out of Control]. Justice Robert Jackson's concurring opinion in the "Steel Seizure Case," which established a three-part structure for evaluating competing claims of inherent executive authority and express legislative authority, may not be helpful in resolving this hypothetical question. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). If the President issues an order directing the deployment of military personnel and equipment under his command, the President arguably acts under the express constitutional authority of the Commander in Chief. Cf. id. at 643-44 ("There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants.").

58. Recent commentary has argued for and against the proposition that civil-military relations are now "in crisis." See Deborah Avant, Conflicting Indicators of "Crisis" in American Civil-Military Relations, 24 ARMED FORCES & SOC'Y 375 (1998); Peter D. Feaver, Crisis as Shirking: An Agency Theory Explanation of the Souring of American Civil-Military Relations, 24 ARMED FORCES & SOC'Y 407 (1998); Kohn, Out of Control, supra note 57.

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civilian and military actors are at odds.\textsuperscript{60} The traditional model analyzes the making of defense and foreign policy to determine whether the military has exceeded its constitutional bounds of agency and influence.\textsuperscript{61} Civilian control is a question of operational control and, as Professor Feaver wrote, "[t]he civil-military challenge is to reconcile a military strong enough to do anything the civilians ask them to with a military subordinate enough to do only what civilians authorize them to do."\textsuperscript{62} The key, most simply, is whether militaries follow the orders of civilians and do what they are told to do, and only what they are told to do. The most extreme failure of civil-military relations is the military coup, of course, but most recognize that damage to civil-military relations occurs far short of a potential for coup.\textsuperscript{63} A typically nuanced view of civil-military relations asks whether the military exercises inappropriate influence in decisions concerning foreign policy, use of

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  \item \textsuperscript{60} See Michael C. Desch, Soldiers, States, and Structures: The End of the Cold War and Weakening U.S. Civilian Control, 24 ARMED FORCES & SOC’Y 389, 391 (1998) ("The best indicator of the strength of civilian control is who prevails when civilian and military preferences diverge."). Peter Feaver describes civil-military relations as "a game of strategic interaction" in which civilians choose how closely to monitor the military’s compliance with civilian direction, and the military chooses whether to "work" (comply) or "shirk" (not comply) based on the probability of detection and punishment. See Feaver, supra note 58, at 409-10.
  \item \textsuperscript{61} The resistance of Colin Powell, former Chairman of the Joint Chiefs of Staff, to military intervention in the Balkans is often offered as a particularly egregious example of military influence in the making of foreign policy. "General Powell took it upon himself to be the arbiter of American military intervention overseas, an unprecedented policy role for a senior military officer, and the most explicit intrusion into policy since MacArthur’s conflict with Truman." Kohn, Out of Control, supra note 57. Powell’s resistance to civilian authority serves as a paradigmatic example of the failure of civil-military relations under the “influence” or “power” model: If civilian control is defined first by the relative influence of the military as opposed to civilians in military affairs, and second by the appropriateness of the areas in which the military exercises its influence, then it was under Colin Powell’s tenure that civilian control eroded most since the rise of the military establishment in the 1940s and 1950s. \textit{Id.}
  \item \textsuperscript{62} Peter D. Feaver, The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control, 23 ARMED FORCES & SOC’Y 149, 149 (1996).
  \item \textsuperscript{63} See Kohn, Out of Control, supra note 57 (recognizing that modern concerns of civilian control extend beyond “a coup d’etat, the man on horseback” that was foremost in Framers’ minds). \textit{See generally S. E. FINER, THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS} (rev. ed. 2002). Some still make the mistake of awarding credit for constitutionally strong civil-military relations based only on the absence of a military coup or any reasonable risk of one. Michael Desch concluded that talk of a crisis in civil-military relations is “overdrawn” even though he expects “it will be harder for civilians to get the military to do things they do not want to do than it was during the Cold War.” He seemed to dismiss the potential for crisis on the basis that “there is little danger of the U.S. military launching a coup and seizing power” or “becom[ing] openly insubordinate and disobey[ing] direct orders.” Desch, supra note 60, at 399. Open and transparent instances of insubordination, however, can be less dangerous to civil-military relations than either passive resistance or the slow drip of progressive alienation.
\end{itemize}
military force, or defense appropriations, or whether civil-military interaction is hampered by excessive friction or tension.\textsuperscript{64}

The Gap Project examined some issues related to inappropriate military influence on civilian policymaking, but its principal focus was on a second, less traditional model of civil-military relations that receives relatively little attention. In today's climate, however, the second model may highlight a weakness in civil-military relations that presents a greater constitutional danger. This focus is not directly operational or policy-oriented in the sense of evaluating whether the military will engage in rogue activities (or rogue refusals to comply with civilian direction) in its own interest. It addresses a much more subtle, creeping concern that is potentially more constitutionally corrosive than open forms of military insubordination or resistance. The Gap Project was primarily about representativeness—whether the change from a conscription to an all-volunteer force had created a military that was no longer ideologically and politically representative of civilian society.

The representativeness model, grounded more in sociology than in political science, asks whether institutions as a whole, civilian and military, have become ideologically alienated from one another to a degree that potentially undermines civilian control under the Constitution.\textsuperscript{65} This more indirect approach to assessment of civil-military relations has received much less attention than influence- or power-oriented models, but may be more suited to identifying trends that develop gradually through self-selection and attrition. Even before analysis of the Gap Project data was complete, Professor Kohn recognized that the military had become less and less reflective of the society from which it was drawn:

At the same time, the professional military became politicized, abandoning its century-and-a-half tradition of non-partisanship. It began thinking, voting, and even espousing Republicanism with a capital R.... In the wake of Vietnam, the officer corps began to attract a larger percentage of its people from the most traditional or conservative parts of the country. The switch from the draft to all-volunteer forces further diminished whatever ideological diversity had existed in the officer corps. The military became even more traditional in its values: Republican, conservative, and increasingly conscious of

\textsuperscript{64} See Avant, supra note 58, at 380 (including degree of tension between civilian and military leaders, in addition to military influence on policy, as factors in evaluating civil-military relations).

\textsuperscript{65} See id. at 378-79 (discussing the representativeness model); Gibson & Snider, supra note 59, at 194 (referring to the representativeness model as "ideology").
itself as a separate entity in American society. A politicized military and a much more partisan division over national security would prove to be a dangerous combination.66

Most civilians today do not understand how radically different the military has become in the all-volunteer era and how far it has departed from its constitutional ideal. The military takes a great deal of credit for creating and maintaining diversity on the basis of sex and race,67 but over the last twenty years it has lost much of the most important kind of diversity for purposes of civil-military relations: the ideological and political diversity that acts to protect civilian control.68 Samuel Huntington, the author of The Soldier and the State, one of the two classic post-World War II works on civilian-military relations,69 observed more than fifty years ago that a politically neutral military was a necessary predicate to an objective model of civilian control.70 Huntington’s observation was not new, as political neutrality had been an uncontroversial, unremarkable component of the professional military ethic from the beginning of the 1800s.71 The military’s political neutrality, moreover, was not only an ethical obligation, but a constitutional obligation as well. In 1976, shortly after the dawn of the all-volunteer force, the United States Supreme Court held that the military had a constitutional responsibility to avoid “both the reality and the appearance of acting as a handmaiden for partisan political causes,” a responsibility that was “wholly consistent with the American

66. Kohn, Out of Control, supra note 57; see also Feaver, supra note 62, at 417 (“The military is itself becoming more ideologically homogenous and markedly more politically and socially conservative than the general public.”).

67. See DEP’T OF DEF., POPULATION REPRESENTATION IN THE MILITARY SERVICES, FISCAL YEAR 2001 viii (2003) (concluding that the report “shows both the diversity and the quality of the Total Force,” comprised of “[m]en and women of various racial and ethnic groups of divergent backgrounds, from every state in our country”).

68. See Kohn, Out of Control, supra note 57 (recommending that the military “rebuild the diversity of the officer corps, particularly with respect to prevailing attitudes and perspectives” to strengthen civil-military relations and mechanisms of civilian control).


70. See HUNTINGTON, supra note 69, at 83-85 (noting that a “politically sterile and neutral” military is a key factor in objective civilian control).

71. See Turley, Military Pocket Republic, supra note 43, at 30 (contending the military “embraced its apolitical interests as a core constitutional value” with the establishment of the United States Military Academy at West Point). “According to the definitions of military honor, the professional soldier is ‘above politics’ in domestic affairs.... [G]enerals and admirals do not attach themselves to political parties or overtly display partisanship.” JANOWITZ, supra note 69, at 233.
constitutional tradition of a politically neutral military establishment under civilian control.”

Political partisanship in a military environment raises special concerns of inappropriate influence that would not be present in a civilian context. There are few truly idle suggestions from a military leader to subordinates, and it is often difficult to draw a line between the mere expression of personal political opinion by ranking servicemembers and their use of official military authority or influence for partisan purposes. When the partisan identification of individuals can no longer be separated from the uniform and the institution,


73. Several federal statutes are designed to enforce the constitutional assumption of a politically neutral military. Any servicemember who “prevents or attempts to prevent by force, threat, intimidation, advice or otherwise any qualified voter of any State from fully exercising the right of suffrage” or “orders or compels or attempts to compel any election officer in any State to receive a vote from a person not legally qualified to vote” is subject to a fine of up to five thousand dollars and imprisonment for up to five years. 18 U.S.C. § 593 (2000); see also 18 U.S.C. § 609 (2000) (prohibiting the use of “military authority to influence the vote of a member of the Armed Forces or to require a member of the Armed Forces to march to a polling place”). The punishment for improper influence in the voting process is less severe if committed by a civilian. See 18 U.S.C. § 594 (2000) (imposing a fine of up to one thousand dollars and imprisonment for up to one year on any person who “intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose”).

There has long been an awareness of the potential for inappropriate influence by the military over the voting process. See 18 U.S.C. § 592 (2000) (prohibiting the presence of troops at any place where an election is held, which precludes the use of military installations as voting locations). Federal law even prohibits the pre- or post-election polling of a servicemember “with reference to his choice of or his vote for any candidate, . . . either for the personal use of the person making the request, or for the purpose of reporting the same . . . or for the purpose of publishing the same orally, by radio, or in written or printed form.” 18 U.S.C. § 596 (2000). See Laird v. Tatum, 408 U.S. 1, 30-31 (1972) (Appendix I to Douglas, J., dissenting) (noting that statutes prohibiting military interference in elections have their roots in Reconstruction-era military abuses).

The DOD has issued a directive permitting servicemembers on active duty to “[r]egister, vote, and express his or her personal opinion on political candidates and issues, but not as a representative of the Armed Forces.” A servicemember shall not “[u]se his or her official authority or influence for . . . soliciting votes for a particular candidate or issue.” See Department of Defense Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty §§ 4.1.1.1, 4.1.2.1 (1990). Servicemembers are also prohibited from wearing the uniform under circumstances that imply service sanction for political activities or statements. See generally Department of Defense Directive 1334.1, Wearing of the Uniform (1969). DOD directives, instructions, and other publications are available at http://www.dtic.mil/whs/directives/current.htm (last visited Apr. 22, 2004).
however, the military has a problem of ethical and constitutional dimension. Since the "Don't Ask, Don't Tell" controversy of a decade ago, we have seen a half-generation of servicemembers trained by example that it is appropriate to display partisan political allegiances even under circumstances in which the identification is clearly institutional and not individual, such as when in uniform or when engaging in military duty. Given the centrality of political neutrality to both ethical and constitutional conceptions of professional military service, it is surprising that no one has directly connected either Huntington’s or the Court’s admonitions against political partisanship in civil-military relations with the political and ideological reality of the all-volunteer force as it exists today. If, as Huntington believed, objective civilian control of the military requires political neutrality, then our grip on objective civilian control is tenuous. If, as the Court held, the military’s obligation of political neutrality constitutes the military’s half of the constitutional bargain underlying civilian control, then the all-volunteer force may be failing to meet its constitutional expectation.

B. Political Partisanship, Social Conservatism, and the Nature of the Civil-Military Divide

Fittingly, the lead study in the compilation of research based on data gleaned from the Gap Project was conducted by Duke University’s Ole Holsti, who raised, along with defense reporter Thomas Ricks, some of the first concerns about institutional changes in the nature of the military. Holsti had previously found, based on an earlier data set from another survey of military and civilian elites, a dramatic and disproportionate increase both in political partisanship and in Republican Party identification among military officers over the twenty-year period.

74. See Kohn, Out of Control, supra note 57 (noting extreme lapses of professional military ethic of political neutrality, including a public event at which servicemembers attending as representatives of the United States Army “burst into applause” at the mention of the late Senator Strom Thurmond’s 1964 move from the Democratic to the Republican Party; only a charitable assumption of ignorance regarding the circumstances surrounding his change of party removes racist intent); Lt. Col. Michael J. Davidson, Contemptuous Speech Against the President, ARMY LAW, July 1999, at 1 (detailing incidents of open ridicule of President Clinton by servicemembers). The single publicized instance of a military officer’s contemptuous speech against President George W. Bush was a notable oddity. See Bob Egelko, War on Terrorism: Military Law Prohibits Officer’s ‘Contemptuous Words’ for Bush, S.F. CHRON., June 9, 2002, at A6.

75. See Ole R. Holsti, Of Chasms and Convergences: Attitudes and Beliefs of Civilians and Military Elites at the Start of a New Millennium, in SOLDIERS AND CIVILIANS, supra note 54, at 15 [hereinafter Holsti, Chasms and Convergences].

76. See RICKS, MAKING THE CORPS, supra note 37.
that paralleled the transition to an all-volunteer force. Holsti's analysis of the Gap Project data was fully consistent with these earlier findings. Among "up-and-coming" military officers, self-identified Republicans out-numbered Democrats by a factor of eight to one (sixty-four percent to eight percent), with only twenty-eight percent declaring an affiliation of "independent" or "other or none." Twenty years earlier, at the beginning of the all-volunteer force, fifty-five percent-twice as many—of a similar sample of military elites had identified themselves as non-partisan.

Holsti then analyzed survey data from both the general public and civilian leaders, each subdivided into military veterans and non-veterans. His most startling finding was that active-duty military officers indicated a partisan political affiliation more frequently than did any other group in the survey except for civilian leaders who were also military veterans. Members of the general public (both veteran and non-veteran) and non-veteran civilian leaders all indicated higher levels of political non-partisanship than military officers who have an ethical and constitutional obligation of non-partisanship.

The politically partisan shift of the all-volunteer military has been magnified by other political and demographic trends. First, the military has experienced a dramatic reduction in force of one-third of its personnel since the late 1980s, which serves to concentrate and heighten any concurrent effect of self-selection. Second, the homogeneity of the all-volunteer force has been enhanced by a significant legacy factor. Children of servicemembers are much more likely to serve in the military, to such a degree that a former Secretary of the Navy has expressed concern about the development of a "military

77. See HOLSTI, supra note 42; Holsti, supra note 42.
78. See Holsti, Chasms and Convergences, supra note 75, at 28 tbl.1.3.
79. See id. at 97.
80. Holsti believed that the Gap Project survey data may have actually understated the divide between civilian and military worlds. "Although public comments on [Holsti's earlier] study by active and retired military personnel have tended to be dismissive, virtually all of the many e-mails about the study from members of the military have indicated that, if anything, the findings have understated rather than overstated the magnitude and consequences of the civilian-military gap." Id. at 57 n.26 (citation omitted). One officer wrote to Holsti, in part: "I am sorry to say that you would not believe the fierce Republican partisanship of what seems to me to be the preponderance of my fellow officers, especially when confronted with President Clinton's ongoing crisis. What troubles me most about my fellow officers is the general contempt that they hold for civilian society." Id.
caste." Third, a particularly powerful trend affecting the military's political identification has been the rise of the Republican Party in the South since the civil rights era. A disproportionately high number of military recruits come from the South (and a disproportionately low number from the Midwest and the Northeast), and so the shift in the South's political identification inevitably spills over into an all-volunteer military that draws heavily from that region. Fourth, the military's presence has also been skewed "Southern" by congressional choices of which military facilities to close for cost-saving purposes. A disproportionate number of bases have been closed in the Northeast and the West, regions which, as noted by Thomas Ricks, are both more expensive in cost of living and more liberal in political outlook. He added: "An odd side effect of this retreat south of the 40th parallel is that the majority of big Army bases in the continental U.S. now are named after Confederate officers."

Holsti also found that servicemembers' self-identifications of political ideology were consistent with their self-identifications of party affiliation. A disproportionate number of military respondents identified themselves generally as conservatives, although their answers to specific questions suggested a more narrow orientation of social conservatism rather than economic conservatism. The civil-military gap in ideology tended to be most pervasive, interestingly, when "conservatism" was measured using more general terms, such as traditional values, moral redemption, or "God's will," as opposed to more specific policy questions. The finding of a distinction between economic conservatism and social conservatism is an important one. The emotional core of public resistance to constitutional values today, particularly values of

83. See Halbfinger & Holmes, supra note 14 (noting that forty-two percent of military recruits in the year ending Sept. 30, 2000 came from the South). "Since the end of the draft...[t]he percentages of people from the Northeast and Midwest have dropped, while the proportion from the West has climbed and from the South has skyrocketed—even after accounting for southward and westward population shifts in society at large." Id.
84. See Michael C. Desch, Explaining the Gap: Vietnam, the Republicanization of the South, and the End of the Mass Army, in SOLDIERS AND CIVILIANS, supra note 54, at 289, 308-12 (concluding that a large majority of the civil-military gap can be accounted for statistically by the decrease in percentage of youth who serve in the military and the Republicanization of the South).
85. RICKS, MAKING THE CORPS, supra note 37, at 278-79.
86. See Holsti, Chasms and Convergences, supra note 75, at 33 tbl.1.4, 52 tbl.1.12. Holsti hypothesized that military officers may be economic populists because the business of national defense and its accompanying infrastructure of social welfare for servicemembers requires an enormous commitment of public funds. Id. at 52.
87. See id. at 93-94.
equality, is one of social conservatism, not economic conservatism. If a politically partisan military is going to be used by civilian authorities as a conservative platform for making a statement about domestic policy issues, those issues are going to be social in nature, not economic. The military institution is inherently tied to more public spending, not less.

Some researchers discount the significance of the military’s increasing political partisanship and cultural distance, but they do so by focusing on trivial differences and ignoring what is most constitutionally invidious about the contemporary civil-military gap. As I have argued in a previous article, the political and ideological nature of the all-volunteer force has evolved in perfect alignment with the Court’s development of a doctrine of sweeping judicial deference in matters pertaining to the military. The core of the Court’s new doctrine has been to recast the military as a separate society, set apart from the civilian society it protects. In the words of Parker v. Levy, the Court’s first military case of the all-volunteer era, “the military is, by necessity, a specialized society separate from civilian society” and “a society apart from civilian society.” The Court invited the military to see itself not only as separate, but as superior, and suggested that the military should not be subject to constitutional expectations because those expectations would inevitably be beneath the military’s higher standards. The line was drawn on the basis of moral worth, with moral superiority justifying exemption from evolving constitutional norms. Justices sneered at so-called civilian values—“[r]elativistic notions of right and wrong, or situation ethics, as some call it”—as unworthy of the military. Later cases reinforced the Court’s construction of a constitutional separatism between civilian and military worlds, exempting the military (and

88. The first clue that a researcher does not assign much significance to the military’s abandonment of an ethic of political neutrality is his or her use of quotation marks in reference to the civil-military gap. See, e.g., Benjamin O. Fordham, Military Interests and Civilian Politics: The Influence of the Civil-Military “Gap” on Peacetime Military Policy, in SOLDIERS AND CIVILIANS, supra note 54, at 327. Fordham acknowledges the military’s “increasingly close and exclusive identification with the Republican and conservative portion of [civilian society],” id. at 344-45, but attributes much of its partisanship to harmesless economic self-seeking. See id. at 346-52. He concludes: “Military partisanship may be unseemly, but as long as it does not involve the use of the institution’s coercive capabilities in domestic politics, it is probably best to manage its consequences rather than to attempt to eliminate it.” Id. at 360.
89. See Mazur, supra note 24.
92. Id. at 765 (Blackmun, J. and Burger, C.J., concurring). Sarcasm abounded (and at the expense of the state of Tennessee): “The truth is that the moral horizons of the American people are not footloose, or limited solely by ‘the civil code of Tennessee.’” Id.
WHY PROGRESSIVES LOST THE WAR

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WHY PROGRESSIVES LOST THE WAR

Why Progressives Lost the War When They Lost the Draft

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93. See Rostker v. Goldberg, 453 U.S. 57 (1981). Rostker v. Goldberg upheld congressional exclusion of women from draft registration in large part on the basis of congressional belief that compulsory military service was inconsistent with "current thinking as to the place of women in the Armed Services." Id. at 71. "The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people." Id. at 77 (quoting S. REP. NO. 96-826, at 157 (1980), reprinted in 1980 U.S.C.C.A.N. 2612, 2647). The principle may enjoy wide support, but in practice it may expose all servicemembers in combat support positions, male and female, to unnecessary danger. Combat support personnel who do not "intentionally and routinely" engage in combat may still do so on an unpredictable basis, and without the benefit of preparation or training. This is part of the cost paid when military policy is used to maintain comfortable notions of traditional gender roles for women. See, e.g., Vernon Loeb, Father of Slain Soldier Says Army Was Unprepared, WASH. POST, July 12, 2003, at A13 (describing ambush, in Nasiriyah, Iraq, of the 507th Maintenance Company, a combat support unit comprised of both men and women, including Private Jessica Lynch); Dana Priest, M-16s Jammed During Ambush in Iraq; Unreleased Army Report Cites Weapons Malfunctions, Desert Conditions, WASH. POST, July 10, 2003, at A14 (same).

94. See Goldman v. Weinberger, 475 U.S. 503 (1986). Air Force Captain Goldman, a military clinical psychologist and an Orthodox Jew, was punished for wearing a yarmulke while in uniform and working indoors at the base health clinic. Justice Rehnquist, writing for the majority, suggested that Goldman's religious beliefs reflected a selfishness that was inconsistent with the demands of military service. Rehnquist wrote: "The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" Id. at 507 (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)). Congress passed legislation in response to Goldman v. Weinberger that permitted servicemembers to wear an item of religious apparel while in uniform provided the item was "neat and conservative" and would not "interfere with the performance of the member's military duties." See 10 U.S.C. § 774 (2000). DOD regulation now provides that "a Jewish yarmulke may be worn with the uniform whenever a military cap, hat, or other headgear is not prescribed. A yarmulke may also be worn underneath military headgear as long as it does not interfere with the proper wearing, functioning, or appearance of the prescribed headgear." Department of Defense Directive 1300.17, Accommodation of Religious Practices Within the Military Services § 3.2.7.3 (1988).

95. SOLDIERS AND CIVILIANS, supra note 54, at 478.
step. Ricks warned of the corrosive effect of a military institution that is granted license by its civilian authority to influence civilian policy: "When the military is politically active, when it believes it is uniquely aware of certain dangers, when it discusses responding to domestic threats to cherished values, then it edges toward becoming an independent actor in domestic politics." One might ask where in the world the military got the idea that it had a role to play in defining moral behavior in America. The answer, I believe, can be found in the opinions of the United States Supreme Court.

It is this sense of separatism, moral superiority, and constitutional exemption that drives the contemporary civil-military gap. Government endorsement of the military as a morally superior institution is generally not subtle. For example, a former Secretary of Defense in President Clinton's administration, William S. Cohen, once lectured the Yale Law School community on the appropriateness, even the necessity, of a civil-military gap drawn upon lines of morality. He ridiculed the concerns of those who study the civil-military gap, rhetorically asking the audience whether it was a problem that "this group of highly educated, highly motivated, highly disciplined [military] individuals might be looking down their noses with contempt upon contemporary society whose

96. See Holsti, Chasms and Convergences, supra note 75, at 53-56 & tbl.1.14. There was a stark gap in civilian and military responses to the questions. In response to the statement that the military could help American society become more moral, 70.3 % of military leaders agreed, in comparison to 37.4 % of non-veteran civilian leaders. In response to the statement that civilian society would be better off with military values, 77 % of military leaders agreed, in comparison to 25 % of non-veteran civilian leaders. Military leaders were much more likely to agree with these statements than any other sub-group in the Gap Project study, including both veteran and non-veteran members of the general public, which rebuts the argument that civilian leaders are out of step with the general public on this issue. See id.

Another Gap Project study constructed what the authors termed the "moral crisis scale," a combined measure of the results of the two above-referenced questions together with two additional questions tapping opinions on the general moral health of civilian America. The additional statements were: "The decline of traditional values is contributing to the breakdown of our society," and "The world is changing and we should adjust our view of what is moral and immoral behavior to fit these changes." See Paul Gronke and Peter D. Feaver, Uncertain Confidence: Civilian and Military Attitudes About Civil-Military Relations, in SOLDIERS AND CIVILIANS, supra note 54, at 129, 148. Gronke and Feaver also found evidence of a distinct civil-military gap with respect to perceptions of moral superiority. "Consistent with the culture gap hypothesis, indications of alienation emerge. . . . The greater the degree of military contact, the more likely the respondent is to hold views that civilian society is in moral crisis and that the military can help in this regard." Id. at 149.

97. RICKS, MAKING THE CORPS, supra note 37, at 295.
standards were not quite as high or rigid or moral." It could not be a
problem, Cohen explained, because members of the military actually did
have higher moral standards than the civilians they served.99 We as a
society have been slow to realize how intoxicating a license of moral
superiority and a grant of constitutional exemption can be in today's
political climate, and there is no question that ideologically self-selected
military recruitment is a fundamental factor in the development of the
civil-military gap over the last generation. It is not the only factor, but
ideology forms a unifying base for understanding a confluence of trends
that, together, have shaped a change in the nature of our military
institution.

C. Identifying a Constitutionally Predatory or Alienated Military

One of the studies published from the Gap Project data offers a
perceptive theoretical model for explaining the civil-military gap. Professor
James Burk’s analysis makes no citation to opinions of the
United States Supreme Court—he is a distinguished expert in the
sociological study of the military, not a lawyer—but his theoretical
model of the civil-military gap is able to explain the inevitable effect of
a Court that is complicit in creating an expressly separatist military
entity that operates outside the Constitution.100 In constructing a model
of civil-military relations, Burk advances a concept of “institutional
presence,” which he defines as “the material and moral integration of an
institution with the larger society.” 101 His model identifies four
analytically distinct forms of institutional presence that the military
could maintain in its relationship with civilian society, dependent upon
two major dimensions of presence, material and moral.102 Material
presence is essentially a measure of the magnitude of the military’s
impact or influence, for good or for bad, on civilian society. A military
whose contact with civilian society is frequent, direct, and salient has
high material presence. Moral presence, on the other hand, is a
normative measure:

Moral presence refers to the degree to which an institution has to be
considered an important actor in the normative order, that is, in our

99. See id. Cohen’s remarks offer additional evidence in support of the Gap Project thesis that
the civil-military gap is grounded in perceptions of the military’s moral superiority.
AND CIVILIANS supra note 54, at 247-58.
101. Id. at 248.
102. See id. at 249-53 (explaining the concept of institutional presence, both as a general
theoretical model and as applied to the military).
understanding of what constitutes a good society. It is the moral presence of an institution that gives us some ability (always imperfect) to reach a substantive judgment about whether and how a particular institution contributes to the construction of a good society.\textsuperscript{103}

The military's overall institutional presence is defined by the combined effect of material and moral presence. A military is central to society if its material presence and moral presence are both high; it interacts with civilian society in a meaningful way and its values are consistent with civilian expectations for the institution. The military becomes peripheral, however, if it loses meaningful contact with civilian society, even if it remains well integrated with civilian society on a moral level. The last two typologies of civil-military relations come into play when the military's moral integration with civilian society is low, which is precisely the concern raised by research on the civil-military gap. The military can become alienated from civilian society if its values are distant from those of civilian society and it has infrequent and indirect contact with people outside the military institution. Last, a predatory military is high in material presence but low in moral presence; in other words, it has a high impact on civilian society, but in a manner that fails to reinforce civilian moral expectations. Burk concludes that today's military is central in its institutional nature because it is both morally integrated with civilian society and has a significant material presence.\textsuperscript{104}

Burk's model of institutional presence is a valuable framework for evaluating civil-military relations, but he underplays the significance of the civil-military gap when he evaluates the degree of moral integration between civilian and military societies. Burk assesses the military's moral integration over the last fifty years by focusing primarily on the military's commitment to values of equality, the principal theme of constitutional evolution over that time. Institutional decency or legitimacy can be measured, in Burk's view, in comparison to prevailing civilian norms of "citizens' rights and the closely-related interest in building decent or non-humiliating relations between institutions and the people they serve, which we might call the movement toward greater inclusiveness."\textsuperscript{105} He concludes that the military has met the test of

\textsuperscript{103} Id. at 250.

\textsuperscript{104} See id. at 254-61 (finding high material presence on the basis of the military's economic impact on civilian society), 264-70 (finding high moral presence on the basis of military legal reform, progress in race and gender relations, and support of strategic peacekeeping and humanitarian missions).

\textsuperscript{105} Id. at 263.
moral integration, but he does so by relying on developments in military culture that either took place before the advent of the all-volunteer force or, if after, were accomplished under duress.

Burk cites the 1950 enactment of the Uniform Code of Military Justice ("UCMJ"),\(^\text{106}\) which brought a civilianized perspective of substantive and procedural law to the military's criminal justice system, as a representative example of institutional change that better integrated military and civilian values on a moral plane.\(^\text{107}\) I believe it is significant, however, that the UCMJ followed the largest mobilization of military personnel in this country's history. Without the near universal service of men in World War II, the need for reformation of the military's criminal justice system would never have been recognized as a priority.\(^\text{108}\) Recent efforts to modernize the UCMJ at the time of its fiftieth anniversary were met with a complete lack of interest on the part of the military and of Congress,\(^\text{109}\) and it is certainly no coincidence that it is now an all-

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107. See Burk, supra note 100, at 264-65.
volunteer military, encouraged by the intervening guidance of the Rehnquist Court, that resists legal reform.

Burk also cites the military’s efforts at inclusiveness with respect to the service of racial minorities and women in finding a high level of moral integration in contemporary civil-military relations. The military’s success, relative to the civilian world, in fostering healthy race relations deserves credit. However, it should also be noted that the military failed to make a moral commitment to better race relations until the need for minority volunteers after the end of the draft made racial inclusiveness a functional imperative, not just a moral imperative. The same functional imperative has brought more women into the all-volunteer force, but the moral imperative with respect to women is still lagging. Women have been functionally integrated across a broad range of military duties in the all-volunteer era, particularly after the first Gulf War, but I believe that the military’s moral integration with civilian expectations of equality for women has stalled, or even reversed itself, in the last generation. Burk’s description of “decent or non-humiliating relations” between institutions and individuals as a prerequisite to moral integration is an apt one with respect to gender relations in the military. The progress of women in the all-volunteer military is difficult to chart because it moves in two directions at the same time. Women perform more core military duties today than ever before, but they are asked to do so under an implicit humiliation that, in my experience, did not exist twenty-five years ago. Researchers who simply point to the military duties that women perform as evidence of progress fail to note the context of a military that increasingly sees itself as socially conservative, morally superior, and exempt from constitutional expectations of equality with respect to women.

Returning to Burk’s model of institutional presence, if we assume that the civil-military gap, as reflected empirically and as endorsed by

110. See Burk, supra note 100, at 266-68.
111. See MOSKOS & BUTLER, supra note 16, at 34 (concluding that racial integration of Army leadership in the earlier part of the all-volunteer era allowed the Army to emerge from its “time of troubles” at the end of the Vietnam War).
112. See MARGARET C. HARRELL & LAURA L. MILLER, RAND NAT’L DEF. RESEARCH INST., NEW OPPORTUNITIES FOR MILITARY WOMEN: EFFECTS UPON READINESS, COHESION, AND MORALE 12 tbl.2.1 (1997), available at http://www.rand.org/publications/MR/MR8961 (stating that 62 % of Marine Corps positions are open to women, 67.2 % of Army positions are open to women, 91.2 % of Navy positions are open to women, and essentially all (99.4 %) Air Force positions are open to women).
113. Burk, supra note 100, at 263.
114. See Part IIB for a discussion of how the civil-military gap has weakened constitutional equality for military women.
the Court, demonstrates a lack of moral integration between military and civilian societies, we are left with two potential descriptions of contemporary civil-military relations. If the military also has high material presence or influence, then it would be considered predatory. It is important to remember that a predatory military does not mean one that uses or threatens military force against its civilian principals or against civilian society. It does not mean a military whose individual members prey on civilians. Burk defines a predatory institution primarily in an economic sense, as one that “consume[s] many social resources, for purposes that endanger[] the values and way of life characteristic of a liberal democracy.” I would additionally, even principally, define a predatory military in a political or constitutional sense, as one that uses its influence within civilian society (or allows itself to be used by civilian actors) to affect concerns outside the military’s constitutional role. If we have a predatory military today, it is because it is used by Congress or by the President as a means of influencing the direction of domestic policy outside the normal bounds of civilian-military relations under the Constitution.

On the other hand, if a military with low moral integration has little direct contact with or impact on civilian society, then it is considered alienated. It would be easy to dismiss any possibility of an alienated military, given how much attention is paid today to a military that is now deployed on several fronts around the world. I would not, however, describe the military today as having high material salience in a traditional way. The distance between civilian and military societies that has developed as a result of the end of compelled national service has made our relationship with the military very theoretical or virtual. It is not a matter of lack of civilian support for the military. If anything, it is the degree of unthinking, uncritical, unknowledgeable, and slavish support for the military that creates a problem for civil-military relations. Many people who should know better mistake admiration for the military with healthy civil-military relations. They ask, in essence, “how can civil-military relations be bad, or how can the all-volunteer force be a problem, if civilians think so highly of the military and its members?” They miss, however, the point of civilian control under

115. Burk, supra note 100, at 251.
116. Judge Richard Posner has made this mistake. He argued that our “unstinted admiration” of the armed forces rebuts the contention that the all-volunteer force fails to fulfill communitarian principles of common responsibility for a common defense. See Richard A. Posner, An Army of the Willing, NEW REPUBLIC, May 19, 2003, at 27. More disturbingly, he presumed, as Secretary Rumsfeld would later, that most draftees would not serve their country in good faith if called,
the Constitution. Some legal writers with military experience have recognized that civil-military relations can be at their weakest when our ignorant adoration of the military is at its highest. It is under those circumstances that civilians are most tempted to use the military to solve all problems of any nature, both foreign and domestic.¹¹⁷

Categorizing today's all-volunteer force as having either high material salience (and therefore predatory) or low material salience (and therefore alienated) is more difficult because of the effect of the civil-military gap, which has "virtualized" civilian society's relationship with the military. In the end, however, I have to conclude that the all-volunteer force has had a predatory effect in political, constitutional, and
deeding them "a mass of (inevitably sullen) cannon fodder." This is a deep (and uninformed) insult to the many, many men who, once called, served to the best of their ability. I do not understand the economic reasoning (and Posner does not offer any) behind the presumption that people will not perform an obligation in good faith unless they have already volunteered to perform the obligation. It seems to turn the concept of an obligation on its head, and it seems to be a bleak assessment of human nature as well.

Posner has demonstrated elsewhere that he is factually out-of-touch with the nature of the modern military. He can only imagine that "a minute percentage of women" would ever be qualified for, or have any interest in, the military-style training offered at the Virginia Military Institute, apparently unaware of the number of women who already undergo that training as members of the armed forces. See Richard A. Posner, Against Constitutional Theory, 73 N.Y.U. L. REV. 1, 15 (1998). For a more accurate description of the contributions of military women in a time of war, see Vernon Loeb, Combat Heroine: Teresa Broadwell Found Herself in the Army—Under Fire, In Iraq, WASH. POST, Nov. 23, 2003, at D1 (chronicling the experiences of women who serve in combat in practice, if not on paper).

¹¹⁷. See Dunlap, supra note 44, at 387.

Paradoxically, another of [postmodern militarism's] cardinal features is the populace's corporate unfamiliarity with the true nature of the military. The nation's people celebrate military power without truly understanding the institution that produces it. Likewise, postmodern militarism looks to the armed forces for answers to perplexing societal problems without apprehending the long-term implications of military-derived solutions. Id. General Dunlap understands that civilian control under the Constitution is about more than just control itself. The purposes for which civilians control the military is critical as well. "[T]he principle of civilian control may be offended when the influence of the armed forces extends into areas that endanger liberties or the democratic process, even when that expansion is sanctioned by the civilian leadership." Id. at 343-44; see also W. Kent Davis, Swords Into Plowshares: The Dangerous Politicalization of the Military in the Post-Cold War Era, 33 VAL. U.L. REV. 61, 68-73 (1998) (warning of increasing reliance on the military for domestic purposes such as drug interdiction, border patrol, and domestic terrorism and for foreign-policy purposes in operations other than war); Dunlap, Military Coup of 2012, supra note 44 (providing a fictionalized account of how unchecked civilian admiration of the military led to weakened civil-military relations and, eventually, a military takeover of civilian government); Richard H. Kohn, Using the Military at Home: Yesterday, Today, and Tomorrow, 4 CHI. J. INT'L L. 165 (2003) (discussing the dangers posed by use of regular military forces in domestic security roles); Michael Noone, Posse Comitatus: Preparing for the Hearings, 4 CHI. J. INT'L L. 193 (2003) (advising hypothetical staff members of the congressional committee tasked to review legislation expanding the military's domestic security role).
moral terms. The distance between military and civilian societies that is evident today might have, in another time, reduced the military’s ability to influence domestic policymaking. Once the institution of the military was set out as a moral exemplar by the Court, however, it became not only possible, but more probable, that the military could be employed outside its proper constitutional role. Civilians who know little of the military and have little direct experience with it are unable to enforce constitutional boundaries. If even leading scholars of constitutional law fail to recognize when constitutional civil-military relations have gone bad, then there is little hope that civilian society will do better.

II. SYMPTOMS OF CONSTITUTIONAL WEAKNESS IN AN ALL-VOLUNTEER FORCE

No description of an institution as large and complex as the United States military can ever be absolute. The all-volunteer military is by definition composed of an amalgam of self-selected constituencies, but a central issue for the study of civil-military relations is whether the military is selling itself to potential recruits in ways that will prove to be constitutionally corrosive. There are a number of anecdotal warning signs that suggest, consistent with analyses of the Gap Project survey data, that ideological self-selection is fundamentally changing the nature of the military and degrading the constitutional health of civil-military relations. Even those researchers who minimize the civil-military gap concede that the gap is substantial with respect to the most ideologically and politically charged issues of constitutional equality, such as the proper place of women and gay people within the military. The military has effectively sold the myth that undue civilian influence on traditional military values is the primary problem in civil-military relations, but the reality is that undue military influence on civilian society is the far greater risk. The most threatening specter of poor civil-military relations today is the danger that military values and tradition will be misconstrued and distorted in politically partisan ways to influence

118. See Gibson & Snider, supra note 59, at 194 (expressing concern about the compatibility of civilian values with a professional military ethic). In 1997, Secretary of Defense William Cohen gave a speech at Yale Law School in which he placed all the blame for the civil-military gap at the feet of civilians for their failure to understand the military’s special needs. The only gap in the military’s knowledge, according to Cohen, was its failure to comprehend how civilians could be so ignorant. Cohen spoke of his challenge “to somehow prevent a chasm from developing between the military and civilian worlds, where the civilian world doesn’t fully grasp the mission of the military, and the military doesn’t understand why the memories of our citizens and civilian policy makers are so short, or why the criticism is so quick and so unrelenting.” See Secretary Cohen’s Yale Remarks, supra note 98.
matters of civilian concern, even when they offer no advantage to, or actually impede, military effectiveness.\textsuperscript{119}

\textbf{A. Race and Political Partisanship in the All-Volunteer Military}

Researchers have commented with surprise on the size of the political and ideological gap between military and civilian societies, given the substantial increase in the representation of African-Americans and women in the all-volunteer military.\textsuperscript{120} What the increase in race and gender diversity actually reveals is the enormity of the ideological shift that has taken place as a result of the all-volunteer force, because the magnitude of the divide, dramatic as it is, would have been even greater if not tempered by that diversity. Ironically, the statistics the military has relied on most heavily in defending the composition of all-volunteer force may reveal one of the mechanisms by which the civil-military gap is weakening military effectiveness. As discussed in the introduction to this Article, the DOD responded to Representative Rangel’s national service bill by raising and then rebutting the false argument that African-American servicemembers were bearing a disproportionate share of combat risk. The DOD offered statistics demonstrating that African-Americans were actually underrepresented in direct-combat specialties, in comparison to their overall military numbers, and overrepresented in combat-support and administrative specialties.\textsuperscript{121} The majority of servicemembers overall serve in positions that do not involve direct combat, and these are also the positions that are open to women without restriction.

The underrepresentation of African-American men in elite combat units has been a subject of interest in military sociology.\textsuperscript{122} Rarely, however, have researchers considered the possibility that the ideological self-selection underlying the civil-military gap may explain some of the disparity in racial representation between combat and combat-support

\textsuperscript{119} Researchers predicted in 1977 that the all-volunteer military would become ideologically skewed through a process of self-selection and that its lack of ideological representativeness could harm military effectiveness. JERALD G. BACHMAN ET AL., THE ALL-VOLUNTEER FORCE: A STUDY OF IDEOLOGY IN THE MILITARY 142 (1977). “By strengthening support for some unnecessary and perhaps counterproductive military traditions and practices, or at least reducing resistance to them, this approach could gradually widen the gap between the military and the civilian world.” Id. at 143.

\textsuperscript{120} See Desch, supra note 84, at 321-22.

\textsuperscript{121} See CONSCRIPTION THREATENS HARD-WON ACHIEVEMENTS, supra note 13, at 6-7.

positions. While the propensity of young men to enlist in the military has been decreasing since the first Gulf War, the propensity of young African-American males to enlist has fallen much more sharply. This downward trend in the percentage of African-Americans who state they will "definitely" or "probably" enlist in the military has also been unresponsive to declines in the health of the civilian economy. In contrast, statistics show that the propensity of white males to enlist is affected by civilian employment opportunity. One political scientist hypothesized that the military’s identification with a socially conservative brand of partisan Republicanism may be discouraging some African-American men from serving:

Although the evidence given here does not conclusively link these trends to the increasingly conservative and Republican image of the military, the proportion of African-American men with a high propensity to enlist has declined steadily in a way that is consistent with this hypothesis. Because the military relies on African-Americans for a disproportionate number of enlisted accessions, their declining propensity to enlist could become a problem if present trends continue.

I see the potential for a more complex connection between issues of race and political partisanship in the all-volunteer military. It is possible, as enlistment-propensity statistics suggest, that the political partisanship of the all-volunteer military will make it more difficult to recruit African-American servicemembers. The effect of an ideologically self-selected military may also manifest itself in what I suspect is an increasing divergence in the reasons that different constituencies choose to enter military service. What are the consequences of a military in which a disproportionate number of young white males enlist for

123. See Fordham, supra note 88, at 353; Eric Schmitt, Soft Economy Aids Recruiting Effort, Army Leaders Say, N.Y. TIMES, Sept. 22, 2003, at A1 (noting that the percentage of blacks among Army recruits has declined by one-third, from twenty-three percent to sixteen percent, since fiscal year 2001).

124. See Fordham, supra note 88, at 353. Interestingly, the author followed his perceptive and highly politically incorrect observation about the intersection between the military’s political partisanship and its ability to recruit and retain African-Americans with a conclusion that the problem is inconsequential, nothing a few more financial incentives couldn’t cure. See id. at 359. He failed to note that the military’s open political partisanship raises significant ethical and constitutional concerns in and of itself.

The military seems unaware of, or at least unwilling to openly consider, the possibility that the military’s declining political and ideological diversity is affecting its ability to recruit black servicemembers. Instead, military officials have speculated that the numbers of black recruits are down because of an increased recruiting focus on the college market. See Schmitt, supra note 123. I am unaware of any data that supports such a connection.
ideological reasons rooted in a perception of the moral superiority of social conservatism, but in which a disproportionate number of young African-American males enlist for non-ideological reasons? What are the consequences of a military given license by all three branches of government to distance itself from civilian society on matters as central as constitutional equality?

B. The Place of Women in an Ideologically Conservative Military

The issue is even sharper with respect to gender, likely because we have yet to reach the same level of consensus with respect to the constitutional relationship of women to the military as we have with respect to racial minorities and the military. The Gap Project survey only briefly addressed issues of race within military culture, but it contained a significant number of questions relating to military service by women. The questions concerning gender were frequently of low validity. They reflected so much ignorance about the place of women in military service and so much resistance to their presence that the questions, in and of themselves, were indicative of a substantial divide between civilian and military societies. The questions were often much more revealing than the answers.

125. See SOLDIERS AND CIVILIANS, supra note 54, at 487 (asking respondents to agree or disagree with the statement, “The U.S. military has done a much better job of eliminating racial discrimination within the military than American society in general.”).

126. Surveys of military personnel concerning the subject of military service by women are by their nature problematic. Even though women have been serving in non-traditional duties in combat support for thirty years now, surveys inevitably portray the question of women in military service as being some kind of experiment, and those who answer the surveys may be influenced to respond accordingly. For example, the Gap Project survey posed the following question: “If, under present standards, your commander was female, how would you feel?” Id. at 491 (Q54). First, the question is irrelevant, because the appropriate answer from a servicemember should be, “It doesn’t matter how I feel. She’s the commander.” Instead, respondents, particularly younger officers who are being led to believe the presence of women in positions of military authority is still an open question thirty years later, are invited to share that they would feel “more confident with [a] male commander than [a] female commander.” Furthermore, the question suggests to the respondent that female commanders would not necessarily be subject to the same standards as male commanders. Another question asked respondents whether military effectiveness has been hurt by “the tensions created when women enter a new workplace.” Id. at 486 (Q41B). In almost all instances, the last time the presence of women in a military workplace was “new” was over a generation ago. The only thing that is “new” today is a resurgence of opposition to that presence.

Other questions also introduced bias. For example, the survey asked “How would you characterize any costs associated with the effort to expand opportunities for women in the military?” Id. at 492 (Q56). Whether or not there are any additional costs associated with extending opportunities to women is often a subject of controversy, and one of the most effective ways to limit opportunities for women is to invent or exaggerate the costs of extending them. Another question used “code words” in a way that would tend to elicit resistance to the service of women and gay
Perhaps the greatest misunderstanding that civilians have with respect to women in military service is the false assumption that gender controversy is inherent in the nature of the military institution. The reality is that the transition to an all-volunteer force, not military culture in and of itself, has had the greater effect on the constitutional equality of women serving in the military. At the same time that the Court has strengthened its commitment to equality for civilian women, it has developed a doctrine of deference to military judgment that can only erode those constitutional protections for military women. Similarly, at the same time civilian society has increasingly accepted values of constitutional equality as unremarkable, the all-volunteer military has increasingly drawn self-selected constituencies on the basis of resistance to values of constitutional equality. The military has become a venue where tradition—real and imaginary—trumps the Constitution and where the clock can be turned back with the approval of the government and many of its citizens. It is difficult to overestimate the detrimental effect that ideological self-selection grounded in both social conservatism and Republican political partisanship has had on the constitutional relationship of women to military service. To be blunt, the
military increasingly sells itself as the home for the disaffected white male and, unfortunately, as a home for women who are comfortable with the disaffected white male. We are enlisting a greater number of young men, and young women as well, who are accustomed to relationships of disparate power and respect between men and women, and we are seeing the results of that dysfunctional evolution in repeated scandals of sexual harassment and assault. The military has become a quiet battleground for notions of equality and citizenship, obscured by our uncritical support for and our lack of meaningful interaction with the institution.

The symptoms of constitutional weakness in civil-military relations abound for those with the experience to recognize the drift of the all-volunteer force. The ongoing disciplinary disaster at the United States Air Force Academy has never received the attention it deserves as a marker of the decline of civil-military relations. The top four officers at the Academy were relieved of duty after reports surfaced that dozens of female cadets had been sexually assaulted by classmates, but the Academy had failed to investigate their complaints or punish the perpetrators. Some women stated that they had been discouraged from reporting assaults by the Academy’s threats to punish them for their own violations of Academy rules, such as those prohibiting alcohol

128. See Diane H. Mazur, The Beginning of the End for Women in the Military, 48 FLA. L. REV. 461, 471 (1996) (warning, eight years ago, that the military may be enlisting a greater number of men and women who view coercive sexual relationships as the norm). Another symptom is the increase in the rate of domestic violence against women in military families while civilian rates of domestic violence are declining. The Miles Foundation, an advocacy group for victims of military domestic violence, estimates that the incidence of domestic violence in the military is two to five times higher than in civilian society. See Fox Butterfield, Wife Killings at Fort Reflect Growing Problem in Military, N.Y. TIMES, July 29, 2002, at A9.

129. A panel appointed by the Secretary of Defense to investigate allegations of sexual misconduct at the Air Force Academy concluded that academy officials had disregarded repeated warnings of significant problems related to sexual misconduct and abuse of authority among cadets. See REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY (2003).

Sadly, this Panel found a chasm in leadership during the most critical time in the Academy’s history—a chasm which extended far beyond its campus in Colorado Springs. It is the Panel’s belief that this helped create an environment in which sexual assault became a part of life at the Academy.

The Air Force has known for many years that sexual assault was a serious problem at the Academy.

Id. at 1; see also OFFICE OF THE INSPECTOR GEN., DEP’T OF DEF., U.S. AIR FORCE ACAD., INITIAL SEXUAL ASSAULT SURVEY FINDINGS (Aug. 21, 2003 Draft), available at http://www.aog-usafa.org/images/PDFs/IG_Report_Draft.pdf (summarizing results of May 2003 survey of female United States Air Force Academy cadets, in which 18.8 % of respondents reported they had been the victim of at least one sexual assault at the Academy, with sexual assault defined as “rape, sodomy, fondling, unwanted touching of a sexual nature, and indecent sexual acts that the victim did not consent to”).
consumption or fraternization, at the time they were assaulted.\textsuperscript{130} The obliviousness of senior Air Force leadership was remarkable. Twenty-seven years after the first women joined the cadet wing, Academy officials responded to this monumental failure of military discipline with no better solution than a proposal that their female cadets—women who would soon lead both men and women in fighting and winning wars—be segregated physically from their male colleagues in Academy quarters.\textsuperscript{131} Not one admitted that the ultimate failure of military leadership occurs when servicemembers prey upon and harm their own people.

The Academy's breach of responsibility to those under its command was serious in and of itself, but the scandal was also a symptom of more significant weaknesses in civil-military relations. The story behind its failure to prosecute sexual assaults revealed a larger issue that received no serious attention: the United States Air Force Academy, the institution representing the service's present and future elite, had apparently spun out of control. In addition to numerous

\begin{itemize}
\item \textsuperscript{130} See Diana Jean Schemo, \textit{4 Top Officers at Air Force Academy Are Replaced in Wake of Rape Scandal}, N.Y. TIMES, Mar. 26, 2003, at A10. One point missed by critics of the Academy's policies is that punishment of cadets for minor disciplinary infractions is appropriate and necessary. If rules prohibiting alcohol use or improper personal relationships are violated voluntarily and not under duress (an important "if"), then both men and women should be punished in a manner proportionate to the offense. The Academy fails in its obligation, however, when it relies on minor conduct violations as a reason for not investigating and prosecuting other serious crimes, or when it equates minor and major offenses just because they were committed in the course of the same event. Women will not be deterred from reporting sexual assaults by the prospect of punishment for their own lesser failures of discipline if they are confident that men will be held accountable, in proportion to culpability, for the commission of more serious crimes. To expect any less of military women demeans them.

\item \textsuperscript{131} The Air Force's senior civilian and its senior general officer proposed the following change in Air Force Academy billeting policy to members of the House Armed Services Committee:

Rooms will be arranged in the dormitories to provide for squadron integrity. Within a squadron, rooms occupied by female cadets will be clustered in the same vicinity near the women's bathrooms. The intent is to preserve basic dignity, deter situations in which casual contact could lead to inappropriate fraternization or worse, and to aid mentoring of lower-degree female cadets by senior female cadets.


The first (and still only) woman in Congress with military experience, Representative Heather Wilson of New Mexico, see infra note 163, immediately recognized why the proposal was nonresponsive to the problem. She stated: ""This is not about segregating women from men. It's about segregating rapists from the academy."" Diana Jean Schemo, \textit{Air Force Secretary Says Academy's Leaders Could Be Punished in Rape Scandal}, N.Y. TIMES, Apr. 2, 2003, at A18.
\end{itemize}
offenses of sexual assault committed by cadets against other cadets, the Academy was responding to other cadet offenses involving the distribution and use of illegal drugs, possession of child pornography, theft and sale of government property, frequent "binge" use of alcohol to the point of unconsciousness, sexual assaults of a minor female and a disabled adult woman, provision of alcohol to two minor females by a group of cadets in a hotel room, the use of government computers to organize group-sex parties off-base, and an epidemic of abuse of cadet command authority over fellow cadets. The Academy's policy of disciplining cadets for misconduct related to alcohol and fraternization, which had the collateral effect of discouraging reports of sexual misconduct, may in fact have been the product of an attempt to establish order in an environment of disciplinary chaos.

The offenses revealed a clear pattern of pathology revolving around prodigious levels of alcohol abuse (given the controlled military setting), abuse of authority, and sexual misconduct. It is not enough to say that some or all of these problems might be found at civilian college campuses, because the Air Force Academy, like the other federal military academies, is not just another college campus. The academies are among the most selective colleges in America, in terms of the percentage of applicants admitted, and students are selected with the understanding they will be given some of the gravest responsibilities we as a nation ask young people to accept. These future officers complete four years of training under a level of minute-by-minute supervision, training, and mentorship that is second to none. If under these circumstances the Air Force Academy is still beset by breaches of discipline of this magnitude, there is a problem with the character of the applicants the Academy is attracting, or there is a problem with the way in which the Academy selects and trains its future officers, or both.

The sense of moral superiority and contempt for civilian authority that shapes the civil-military gap cannot be disregarded as a factor that contributes to—indeed attracts—the enlistment of some alienated young men into military service. The problem is magnified with respect to

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gender relations because the ideological and partisan bent of the military is grounded in a brand of social conservatism that would question the presence and influence of women in the constitutional role of citizen-soldier. It is important to remember that trends of self-selection can affect civil-military relations and military readiness long before those trends define every servicemember, most servicemembers, or even many servicemembers. I am not contending that everyone in the military is resistant to values of constitutional equality or civilian control, but when the military defines itself as an institution in terms of its distance and exemption from constitutional ideals, it is going to feel the effect. For this reason, I believe, the civil-military gap is contributing to an increase in the number of socially alienated youth who believe that military service calls specifically to them.

The ideological evolution of the all-volunteer force affects more than just the nature of the people the military will be most likely to recruit successfully. The all-volunteer military has changed the institution at senior levels of policymaking as well. One example of how a civil-military gap built on social conservatism and political partisanship can harm military readiness can be found in the controversy that erupted from the military’s policy that female servicemembers clothe themselves in traditional Islamic religious clothing when traveling off-base in Saudi Arabia, even if on official military business. Military women were required to wear a full-length gown—an abaya—and a covering head scarf. In addition, they were forbidden to drive vehicles off-base and, if there were more than two people riding in a vehicle, forbidden even to sit in the front seat as a passenger. All military women, regardless of rank, had to be escorted by at least one male at all

134. A faculty member at the United States Military Academy at West Point in the early 1990s described the form of social conservatism prevalent among cadets in the following way: “There is a tendency among the cadets to adopt the mainstream conservative attitudes, and push them to extremes. The Democratic-controlled Congress was Public Enemy Number One. Number Two was the liberal media. . . . They firmly believed in the existence of the Welfare Queen.” The faculty member concluded that “to today’s cadets at West Point, being a Republican is becoming part of the definition of being a military officer.” RICKS, MAKING THE CORPS, supra note 37, at 281.

times when traveling off-base. Irrationally, these rules applied only to American military women, not American civilian women, and they were applied at the request of the American military, not the Saudi government. Female employees of the United States State Department did not have to wear an abaya, and neither did the civilian wives of military personnel. This special form of institutional disrespect was reserved solely for women serving their country in uniform and, ironically, it operated by taking from them the honor and respect associated with wearing that uniform, substituting instead a symbol of female subservience to men.

The military’s justification for the policy, which was not a condition of service imposed by the Saudis, was so ludicrous that one is left wondering whether military leadership is that mentally dull or whether it is so comfortable with the idea of subservience in military women that it failed to notice the problem. The military argued that women should dress in traditional Islamic religious clothing for reasons of force protection, apparently believing that American military women would not be identifiable if they pretended to be Saudi women riding in cars with American military men who were wearing Western-style collared shirts and jeans and sporting blond, shaved haircuts. Military men were not required, or even permitted, to affect an Islamic appearance when off-base.

The abaya policy was challenged by Lieutenant Colonel Martha McSally, the most senior female fighter pilot (and one of the most quickly promoted pilots, male or female) in the United States Air Force. After years of attempting to change the policy internally without success, Lt. Col. McSally sued the Secretary of Defense, Donald Rumsfeld, alleging that the policy denied military women equal protection on the basis of sex, interfered with religious freedom by requiring them to wear the symbols of another faith, and violated rights of free speech by coercing a symbolic expression of support for women’s subservience to men.136 The military continued to resist,

136. See McSally Complaint, supra note 135. Not surprisingly, Lt. Col. McSally’s performance evaluations suffered after she publicized her opposition to the policy. See Gerhart, supra note 135. However, following recent reports of the Air Force Academy’s failure to control sexual misconduct and maintain order and discipline, see supra note 132, the Air Force assigned McSally to a senior command position at the Academy. See Lisa Burgess, Officer Who Challenged Rule on Abayas Named to AF Academy Post, EUR. & PAC. STARS & STRIPES, Oct. 30, 2003, available at http://www.estripes.com.

I gained a very interesting perspective on the abaya controversy when a group of senior military officers representing the United States Army War College’s Current Affairs Panel visited the University of Florida Levin College of Law in the spring of 2002. See FLALAW, Feb. 25, 2002,
offering just an ineffectual policy change that the abaya would still be “strongly encouraged,” but not mandatory.\textsuperscript{137} (There isn’t, of course, any difference between “strongly encouraged” and “mandatory” in the military.) The controversy came to an end when Congress included a provision in the National Defense Authorization Act for Fiscal Year 2003 to prohibit the military from either requiring or encouraging military women to wear the abaya in Saudi Arabia.\textsuperscript{138} Representative Heather Wilson of New Mexico said, “[i]f the best we can do to protect our forces is to make women wear a tablecloth, we’re in big trouble.”\textsuperscript{139}

C. “Don’t Ask, Don’t Tell” and the Professional Military Ethic of Subordination to Civilian Authority

Sometimes the politically partisan and socially conservative drift of the all-volunteer force changes the composition of the force because it selectively encourages and discourages persons from enlistment. For example, I believe that in the course of a generation we have lost a military that had a significant feminist presence, both male and female, and replaced it with a military whose members, both male and female, are infinitely more comfortable with traditional and stereotypical gender roles. The change far outpaces any parallel civilian trend. This is the inevitable result of an all-volunteer force that relies on ideological self-selection from an increasingly narrow segment of civilian society.


\textsuperscript{139} Lisa Burgess, House Bill Bans Military From Enforcing Garb Rules for Female Personnel in Saudi Arabia, EUR. & PAC. STARS & STRIPES, May 16, 2002, available at http://www.estripes.com. It is unusual for Congress to take action to curb the military’s enforcement of socially conservative policies, but it seems that members of Congress were particularly horrified by the degree of personal degradation that women in uniform (or in abayas) were asked to endure. See 148 CONG. REC. S5925 (daily ed. June 24, 2002) (statements of Sens. Smith, Levin, Warner, Grassley, Landrieu, and Cantwell). More typically, however, Congress takes the lead in using the military as a platform for making its own socially conservative statements, as it did when it imposed a statutory bar against submarine service by women following indications that the Navy was considering relaxing its own policy bar. See Mazur, supra note 24, at 776-80 (analyzing congressional control of submarine service as a means of perpetuating gender caste).
Sometimes, however, partisanship changes the nature of the military—and diminishes military readiness—much more directly.

The “Don’t Ask, Don’t Tell” policy that excludes gay people from military service is no doubt the best known instance in which Congress has relied on the military’s status as a constitutionally separate entity to enact a policy symbolic of the military’s new ideological and partisan identity. It is unnecessary here to review the irrationality of a policy that has become “virtually unworkable in the military—legally, administratively, and socially” and has impaired military readiness in the ten years since its legislative codification. The tale has been told many times. What is important for purposes of this Article, however, is how “Don’t Ask, Don’t Tell” became the most disturbing illustration of the constitutional decay of civil-military relations since the advent of the all-volunteer force. The controversy demonstrated that the civil-military gap has real consequences for civilian control of the military, and not only in the more indirect sense that civilian control is more difficult when civilian and military societies have become ideologically alienated from one another. The politically partisan and socially conservative nature of the all-volunteer military has real consequences for civilian control of the military because it has changed the definition of military professionalism and made it more likely that military agents will defy civilian direction.

One of the findings of the Gap Project was that military officers are willing to grant themselves much more civilian policymaking influence than the Constitution had in mind. The elite military officers surveyed believed they had the right—or worse, even the professional obligation—to “insist” that civilian authority follow military recommendations under certain circumstances, rather than merely advise or advocate that they do so. One of the fundamental tenets of both


141. See John D. Hutson, Retire a Bad Policy, NAT’L L.J., Aug. 11, 2003, at 30. Hutson is the Dean and President of Franklin Pierce Law Center and the former Judge Advocate General of the Navy, the service’s most senior lawyer.

142. The Gap Project survey asked respondents to “specify the proper role of the senior military leadership” with respect to various elements of a presidential decision to commit United States military forces abroad. In each situation respondents could indicate whether military
military professionalism and the constitutional principle of civilian control over the military is that civilians not only have the right to decide, but they have the right to decide even if the military believes they are fundamentally wrong. The Gap Project results indicate that the military’s understanding of its professional and constitutional obligations is undergoing fundamental change, and the nature of that change is consistent with the tenor of the civil-military gap that has developed in the all-volunteer era. This contemporary conception of military professionalism has less of a basis in the traditional understanding of constitutional subordination to civilian authority than it does in the preservation of values and norms of constitutional separatism and moral superiority along politically partisan lines.

The controversy concerning military service by gay people that led to the enactment of “Don’t Ask, Don’t Tell” was a dramatic example of military resistance to constitutional civilian authority, perhaps unprecedented in intensity and in its breadth across the military institution. This might be a surprising conclusion to many who saw the testimony of military officials before Congress as nothing more than the sharing of military expertise and judgment at the request of civilian government. It is a measure of how distant civilian society has become from the reality of military service that we no longer recognize military insubordination to the Commander in Chief when we see it. The leadership should 1) be neutral; 2) advise; 3) advocate; or 4) insist upon a particular cause of action. The percentage of elite military officers who indicated it was the military’s role to “insist” that civilians take a particular cause of action was startling high. Fifty percent or more (with percentages rounded) of officers believed that the military should “insist” with respect to “setting rules of engagement” (49.7 %); “ensuring that clear political and military goals exist” (66.5 %); “developing an ‘exit strategy’” (51.9 %); and “deciding what kinds of military units (air v. naval, heavy v. light) will be used to accomplish all tasks” (63.0 %). See Holsti, Chasms and Convergences, supra note 75, at 86-87 tbl.1.28.


144. See Kohn, Out of Control, supra note 57 (identifying General Colin Powell’s behavior during the “Don’t Ask, Don’t Tell” debate, when he “virtually defied” President Clinton and fomented military resistance from top to bottom, as the “very worst breach of civilian control”). Another outrageous instance of insubordination by General Powell occurred when he encouraged midshipmen at the United States Naval Academy to resign their commissions if their moral objection to the presence of gay servicemembers made military service intolerable for them. He said, “[i]f after those decisions are made, you still find it completely unacceptable and it strikes to the heart of your moral beliefs, then I think you have to resign.” Todd Spangler, Angry Midshipmen Fear Violence if Military Accepts Homosexuals, WASH. TIMES, Jan. 28, 1993, at A4. Powell made no mention of their obligation to serve in the military in exchange for receiving a college education. See id. Weak military leadership during the “Don’t Ask, Don’t Tell” controversy inflicted a tremendous amount of damage upon the well-being of the armed forces. In this instance, Powell
The military’s open defiance of the President was no less a breach of its professional obligation because it resisted with the assistance and cooperation of members of Congress. By that time civilian America had grown accustomed to the military as just another politically partisan actor.

In the summer of 1993, Congress used the military—and the military eagerly allowed itself to be used by Congress—to showcase a national “teach-in” for civilian America on the subject of the lack of dignity and worth of gay people. Much of the testimony arose from ignorance and some, I believe, from deliberate deception, but all validated the beliefs of a large number of future military officers who viewed physical violence against their colleagues and subordinates as inevitable and justified. See id.


146. The “Don’t Ask, Don’t Tell” debate in the United States was based on fearful guesses of what might happen if gay people were permitted to serve in the military without secrecy. However, when Australia, Britain, Canada, and Israel actually did lift their bans on gay servicemembers, in each instance the change in policy was a complete non-event, with no impact on military effectiveness or unit cohesion. See Aaron Belkin, Don’t Ask, Don’t Tell: Is the Gay Ban Based on Military Necessity?, PARAMETERS, Summer 2003, at 108, 109-10. Parameters is the senior academic journal of the United States Army, and its publication of a study tending to disprove any military justification for the policy is notable. Professor Belkin’s article summarized the results of four separate studies of the militaries of Australia, Britain, Canada, and Israel, all available at the website of the Center for the Study of Sexual Minorities in the Military, a research center based at the University of California, Santa Barbara, at http://www.gaymilitary.ucsb.edu/Publications/PublicationsHome.htm (last visited Apr. 17, 2004). See AARON BELKIN & JASON McNICHOL, THE EFFECTS OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE AUSTRALIAN DEFENCE FORCES: APPRAISING THE EVIDENCE (2000); AARON BELKIN & R.L. EVANS, THE EFFECTS OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE BRITISH ARMED FORCES: APPRAISING THE EVIDENCE (2000); AARON BELKIN & JASON McNICHOL, EFFECTS OF THE 1992 LIFTING OF RESTRICTIONS ON GAY AND LESBIAN SERVICE IN THE CANADIAN FORCES: APPRAISING THE EVIDENCE (2000); AARON BELKIN & MELISSA LEVITT, THE EFFECTS OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE ISRAELI DEFENSE FORCES: APPRAISING THE EVIDENCE (2000).

Professor Belkin was invited to discuss his research at a panel discussion of the military’s ban on gay servicemembers held at the Army War College in December 2002 before an audience of approximately three hundred senior military officers. Another speaker on the panel, Professor Charles Moskos, see infra note 158, the originator of the “Don’t Ask, Don’t Tell” policy, challenged the accuracy of Belkin’s research finding no impact on military effectiveness when foreign militaries lifted their bans. Moskos’s objection was quickly and completely refuted when three senior officers of the foreign militaries in question rose from the audience and supported Belkin’s conclusions. See Events News, CSSMM NEWSL. (Center for the Study of Sexual Minorities in the Military, University of California, Santa Barbara,) Winter 2003, at 2, at http://www.gaymilitary.ucsb.edu/Newsletter/newsletterV4N2.pdf. Under the prevailing doctrine of
members of the military undoubtedly received the clear message that it was important both to military effectiveness and to the moral purity of the armed forces to discover and expel their gay colleagues. Military effectiveness and moral superiority were consistently melded together as one irreducible concept as military witnesses all but called for violent attacks on other servicemembers in pursuit of the cause. Having whipped up a frenzy of resistance that became the subject of endless obsession within the ranks, the military then relied on the hostility it had itself manufactured and amplified to justify why it was not feasible for gay and straight servicemembers to serve with one another. In sum, the military created the conditions that would help to defeat any chance of lifting the ban. In the ten years since “Don’t Ask, Don’t Tell” was enacted, it is remarkable how much less resistant servicemembers have

judicial deference to the military, defenders of the exclusionary policy are unaccustomed to having their assertions tested by evidence.

147. General Powell testified to his belief that in three decades in the military he had never knowingly served with a gay servicemember, except for those who were discovered and discharged. See House Military Forces Hearings, supra note 145, at 62 (testimony of Gen. Colin Powell) (“I do not know any who were not discharged in the course of their service. I don’t personally know of any who completed service.”) Powell’s statement is simply not credible, because I refuse to believe he is that imperceptive. It is more likely that Powell’s testimony was convenient rather than truthful, because if he had stated he knowingly served with gay colleagues, he would have been asked to explain why he did not seek their discharge. Three other members of the Joint Chiefs chimed in along with their Chairman, testifying that they also lacked personal knowledge of any gay person who had completed a term of military service. See id. Their testimony was in significant contrast to the very matter-of-fact mention by Senator John McCain during his 2000 presidential campaign that he had served with a number of gay people when in military service. See Mike Allen, McCain Says He Can Identify Gays By Behavior, Attitudes, WASH. POST, Jan. 18, 2000, at A4.


149. See House Armed Services Hearings, supra note 145, at 171 (observing nonchalantly that gay men were sometimes thrown overboard at sea); Senate Hearings, supra note 145, at 615 (testimony by a military officer—and father of a civilian gay son—that it was “a definite possibility” that “straight males would probably murder gays” if the ban was lifted).

150. One professor of communication studies has warned of the danger that results when the military is permitted to co-opt a particular debate by defining all relevant parameters as solely within its own expertise. See Cori Dauber, The Practice of Argument: Reading the Condition of Civil-Military Relations, 24 ARMED FORCES & SOC’Y 435 (1998). This is what happened with “Don’t Ask, Don’t Tell.” The military asserted that it alone was qualified to comment on the effect of servicemembers on unit cohesion and military effectiveness, and civilian America, largely ignorant of whether or not the military’s assertions were accurate but more than willing to accept them, stepped aside and allowed the military to decide the question. See Elizabeth Kier, Homosexuals in the U.S. Military: Open Integration and Combat Effectiveness, INT’L SECURITY Fall 1998, at 5 (using social science research to dispel the military’s arguments that primary group cohesion enhances military effectiveness and that the presence of gay servicemembers disrupts cohesion).
become to the idea of gay colleagues as the level of public opposition by their commanders has declined.¹⁵¹

This is not the way the military normally operates. The military is very talented at changing people’s behavior, provided the military wants to change that behavior. The military prides itself on its ability to transform young people who are unmotivated, sloppy, self-centered, physically weak, or overweight into effective warriors,¹⁵² but it insists it is incapable of teaching servicemembers to treat their colleagues with dignity and respect when those colleagues are female or gay. Instead, the military takes one of two tacks, either segregation or exclusion. Female cadets at the United States Air Force Academy are clustered together in dormitory rooms near their bathrooms in what a smart-aleck male cadet might call a “target-rich environment,” ensuring that women never forget where they stand in the Academy order. Gay servicemembers are excluded de jure and, to the extent they avoid application of the policy, are indirectly targeted by military leadership for reprisals while serving in uniform.

Today’s all-volunteer military is showing the constitutional wear and tear of thirty years of ideologically motivated self-selection and political partisanship, the Court’s endorsement of the military as a constitutionally separate entity exempt from judicial review, and a progressively weakened professional ethic of subordination to civilian control. These effects are only exacerbated by an extraordinary level of popular approval of the military by a civilian society than has had little meaningful contact with or knowledge of military service. This confluence of factors has put the health of constitutional civil-military relations at risk and raised significant questions about whether the way in which we choose who will serve in the military is working at cross-

¹⁵¹. See Mazur, Word Games, War Games, supra note 140, at 1609 n.50 (reviewing survey data indicating that the percentage of male servicemembers who strongly disagree with lifting the ban declined by half between 1992 and 1998; the percentage who said they were “not sure” whether gay servicemembers should be admitted or excluded almost quadrupled); Major John W. Bicknell, Jr., Study of Naval Officer’s Attitudes Toward Homosexuals in the Military (unpublished M.S. thesis, Naval Postgraduate School, March 2000), at http://library.nps.navy.mil/uhthbin/cgiisirs/WGWhU8Q388/145640005/524/2863 (finding that substantial minorities of both enlisted and officer personnel in the Navy and Marine Corps personally know gay servicemembers, apparently without calamity). Major Bicknell completed this study in partial fulfillment of the requirements for an M.S. in Management at the Naval Postgraduate School, an institution devoted to academic study of defense issues by senior military and civilian defense personnel. Its library provides public electronic access to most student publications across a wide range of military subjects.

¹⁵². See generally RICKS, MAKING THE CORPS, supra note 37.
purposes to the constitutional assumption of a politically neutral military.

In an Independence Day speech in 2002, President Bush announced an Executive Order granting expedited naturalization to all non-citizens serving in the active-duty military during the period beginning on September 11, 2001 and extending indefinitely into the future, benefiting the approximately three percent of servicemembers who are not citizens of the United States. Preferential access to United States citizenship for those who have served in its military is not unusual. However, the President's words were striking in the way he described the relationship between citizenship and military service. Military service, in his view, was "the highest form of citizenship." I have absolutely no quarrel, as a general proposition, with a linkage between citizenship and responsibility for military service, and have argued elsewhere that women as a group would be best served by embracing military service as a feminist obligation. However, the constitutional ideal of civil-military relations fails if the military institution said to embody the highest form of citizenship is also defined by political partisanship, moral superiority, and constitutional resistance. Degrees of citizenship cannot be parceled out on the basis of parameters that undermine the constitutional and professional ethic of the military's political neutrality.

154. See Richard A. Oppel, Jr., Bush Extols Military Service and Expedites Citizenship, N.Y. TIMES, July 5, 2002, at A12; Rachel L. Swarns, Immigration: Allowing Those Who Fight for Their Country to Be a Part of It, N.Y. TIMES, May 7, 2003, at A20. The President's speech mixed praise for the military with constitutional resistance, yet another example of a disturbing juxtaposition that has become increasingly common. Those in attendance protested the Establishment Clause decision in Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003), by vocally emphasizing the words "under God" in the course of reciting the Pledge of Allegiance, and the President vowed, "No authority of government can ever prevent an American from pledging allegiance to this one nation under God." See Oppel, supra.
156. Remarks at a “Saluting Our Veterans” Celebration in Ripley, West Virginia, 38 WEEKLY COMP. PRES. DOC. 1138, 1140 (July 8, 2002).
157. See generally Mazur, supra note 39.
III. MILITARY MYTH, MILITARY RECRUITING, AND THE CITIZEN-SOLDIER QUESTION: WHY THE VOLUNTEER MILITARY IS NOT THE ANSWER

The dean of contemporary academic study of the military, Charles Moskos, a Northwestern University sociologist, likes to tell the autobiographical story of his own 1956 graduating class at Princeton University as an illustration of the tremendous change in civil-military relations since the beginning of the Cold War era. Of the 750 male graduates of Princeton that year (there were only male graduates at the time), 500 entered the then-peacetime military. Half of those serving were commissioned as officers through the Reserve Officer Training Corps (ROTC); half were draftees. Forty-three years later, just eight members of Princeton University’s class of 1999, both men and women, entered peacetime military service. In 2002, when American military forces were deployed extensively around the world in response to the threat of terrorism, the number was down to three.

The Princeton anecdote is but one illustration of the divide between today’s military institution and civilian institutions of influence. An analysis of the representation of military veterans in Congress demonstrated the same trend. In the 105th Congress, the percentage of military veterans among members of the House of Representatives who came of age during the all-volunteer era was far lower than the percentage of veterans among their colleagues who came of age during the Vietnam era, despite the common perception that the affluent and educated easily avoided the Vietnam draft. The civil-military divide is

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159. Charles C. Moskos, Address at the 121st General Conference of the National Guard Association of the United States (Sept. 5, 1999), at http://www.ngaus.org/resources/moskos99.asp.


162. Twenty-one percent (57 of 266) of representatives who came of age in the Vietnam era served in the military; only six percent (3 of 54) of representatives who came of age after the Vietnam era served in the military. Vietnam-era representatives were defined as those born between 1939 and 1955, with an expected high school graduation date between 1957 and 1973. All-
even more stark for women. The first woman with a record of military service was not elected to Congress until 1998, and Heather Wilson of New Mexico remains the only female veteran in Congress today. The near-total disconnect between civilian women of influence and military service is remarkable, and it no longer can be explained by simple lack of opportunity. Officer candidate schools and ROTC programs have been commissioning substantial numbers of female military officers for thirty years, and numerical ceilings on the enlistment of women were repealed thirty-six years ago.

Professor Moskos once conducted an informal study of the civil-military gap using Northwestern University undergraduates who were enrolled in one of his introductory sociology courses. He asked his students to report how likely they were to join the military given hypothetical options for terms of service ranging from fifteen months to four years, with increasing educational benefits with longer service. Interest in the military was very low overall: almost no one indicated a propensity to serve for three or four years, and only one in ten was interested in an enlistment term of fifteen months or two years. His students then listened as Moskos described his experience as a draftee in Germany during the early Cold War years and as a researcher studying contemporary military peacekeepers in Somalia, Haiti, Bosnia, and Kosovo. He talked about military life in terms of the opportunity it can offer to play a role in events that will become a part of international history and to experience a larger world outside the confines of the familiar. After Professor Moskos's short talk, the students' propensity to serve for two years in the military doubled, and it tripled for fifteen-month terms of service. Significantly, this increase in military propensity was unrelated to political ideology. Liberals and conservatives were

volunteer-era representatives were born in 1956 or after and would have graduated from high school in 1974 or after. See id. at 90 tbl. 2.

163. Heather Wilson, an Air Force Academy graduate and former Air Force officer, was elected to the House of Representatives from New Mexico in a special election to fill the remaining four months of an open seat; she was re-elected in the November 1998 general election. See Richard Benedetto, N.M. Campaign Ends, Rematch Begins, USA TODAY, June 25, 1998, at 3A; The Southwest, WASH. POST, Nov. 5, 1998, at A45.


165. See Rostker v. Goldberg, 453 U.S. 57, 90 n.7 (1981) (Marshall, J., dissenting) (noting that the statutory ceiling limiting the accession of women, not including nurses, to two percent of enlisted strength was repealed in 1967); Personnel Adm'tr v. Feeney, 442 U.S. 256, 269-70 n.21 (1979) (same). See generally Mazur, supra note 39 (discussing gendered nature of the civil-military divide and advocating feminist commitment to military service).

166. See Moskos, What Ails the All-Volunteer Force, supra note 158.
equally drawn to enlist, interestingly, when military service was described in professional and politically neutral terms.\textsuperscript{167}

Moskos noted that ninety percent of Northwestern students graduated in the top ten percent of their high-school class; in general, slightly over half identified as politically liberal, one-third as moderate, and fifteen percent as conservative in ideology. According to Moskos, Northwestern students "are the kinds of young people who are not joining the armed forces. In fact, the military is not even attempting to recruit them."\textsuperscript{168} (I would go one step further than Moskos and say the military affirmatively doesn't want them.\textsuperscript{169}) Yet after just one short talk from an older draftee, the same kind of talk young people might have received in years past from a relative who was a military veteran, they indicated a propensity to join the military for short terms of service that was as high or higher than that of the military's usual targets of recruitment.

The primary casualty of the gap of experience between civilian society and military service is the loss of candid and realistic discussion concerning matters of a military nature. Whether through active misrepresentation or passive acceptance, we build and maintain

\begin{itemize}
\item[167.] I was not surprised at the results. As a teacher of law students and a military veteran, I can vouch for the fact that elite students rarely have the opportunity to hear a veteran's personal description of his or her military service. Very few law students today have enough meaningful contact with the military, or with family members who have military experience, to get beyond a caricatured picture of military service that is usually tied to partisan and conservative political ideology.
\item[168.] Moskos, \textit{What Ails the All-Volunteer Force}, supra note 158, at 42.
\item[169.] Brigadier General Charles Dunlap, see supra note 44, has noted that some military officers welcomed the expulsion of ROTC from elite campuses because it reduced the potential for liberal influence on future military leaders. See \textit{Ricks}, supra note 37, at 280; see also \textit{Desch}, supra note 84, at 295-96 & tbl.8.1 (noting the contraction of ROTC, primarily at private colleges in the Northeast, and its expansion, primarily at state colleges in the South). One of the recommendations of the lead investigators in the Gap Project was to increase the percentage of military officers commissioned through ROTC, in all parts of the country, in relation to those educated at the federal military academies. See \textit{Feaver} & \textit{Kohn}, \textit{Conclusion: The Gap}, supra note 143, at 470; \textit{Desch}, supra note 84, at 299 (noting the increasing percentage of academy graduates in the officer corps during the all-volunteer era). The presence of ROTC at elite universities not only increases the ideological diversity of military officers, but also increases the opportunity for meaningful contact between the military and the non-ROTC students who will be civilian leaders in the future. ROTC is also an important source of course offerings in national security and military history. See \textit{Feaver} and \textit{Kohn}, \textit{Conclusion: The Gap}, supra note 143, at 470.
\end{itemize}

It is this kind of meaningful contact we forego when we shun the military from college campuses based on disagreement with congressional policies such as "Don't Ask, Don't Tell." Progressives unintentionally contribute to the size of the civil-military gap when they limit interaction between the military and civilians in elite educational institutions, which only postpones the day our civil-military relations will be functional enough to have a serious discussion about the need for policies such as "Don't Ask, Don't Tell."
convenient misunderstandings about the military—"military myths"—
that allow us to continue the comfortable status quo of a distant military
uninfluenced by a largely unknowledgeable civilian populace. When the
civil-military gap is wide and the level of a shared base of experience is
low, as it is today, military topics can often be kept off the table and
foreclosed from serious discussion. In turn, when military topics are
foreclosed from discussion, the size of the gap simply continues to grow.
However, constitutional civil-military relations and its practical metric,
the strength of civilian control of the military, are at their weakest when
civilians avoid active engagement with the reality of raising, supporting,
providing, maintaining, governing, and regulating the armed forces
under the Constitution.

A. The Myths of Recruitment in the All-Volunteer Force

One of the problems with proposing a different way of choosing
who will defend this country in military service is getting past the nearly
universal belief that it would be difficult for the military to become any
"better," however that quality might be defined, than it already is. Those
who oppose proposals for mandatory national service argue that the all-
volunteer force is an unqualified success.\textsuperscript{170} They believe that any effort
to expand an obligation for military service beyond those who self-select
will inevitably result in lesser-quality recruits and a weaker military.
Any debate concerning civil-military reform tends to disintegrate
quickly at that point, because who wants to be seen as favoring a weaker
military or, more inflammatory yet, as suggesting there is some
deficiency in the present force?

One of the symptoms of dysfunctional civil-military relations and a
decline in the strength of civilian control, however, is an inability or an
unwillingness to engage in realistic, constructive debate about how we
choose who will be responsible for military service and whether that
choice is consistent with a constitutional understanding of the
relationship between civilian and military institutions. We live in a time
of empty patriotism that is disconnected from constitutional ideals.

\textsuperscript{170} See CONSCRIPTION THREATENS HARD-WON ACHIEVEMENTS, supra note 13.
The [All-Volunteer Force] has far exceeded the expectations of its framers. It has
provided equal opportunities for young Americans to realize their potential and has
demonstrated its superiority to a conscripted force by any reasonable measure....
Today, more than 30 years later, we find that the Commission—and the Nation—got it
right!

\textit{Id.} at 7. The DOD also claimed, not surprisingly, that today's military was more "morally fit" than
America. \textit{Id.} at 2.
Patriotism in a true constitutional sense is not the "patriotism lite" of flag decals and reflexive admiration for a distant and unfamiliar military. A true "constitutional patriotism" with respect to national defense would instead be found in a civilian society that is sufficiently engaged with military service to contribute competently to its constitutional responsibility of civilian control. Unfortunately, it is this more constitutionally significant form of patriotism that is most actively discouraged when government, including the judiciary, acts to preserve the existing civil-military gap.

A comprehensive review of evidence concerning the quality of the all-volunteer force is far beyond the scope of this Article. The task here is not to prove empirically that a military raised in part through mandatory obligation would be "better" than one raised through the recruitment of volunteers, but simply to move the issue into the realm of debate rather than assumption or conclusion. The relative merits of the choice between recruited and conscripted militaries are not obvious, particularly if the more qualitative benefits of sound civil-military relations under the Constitution and effective civilian control are taken into account. My only intention is to introduce a small dose of reality into impossibly gauzy pronouncements about the inevitable superiority of the recruited volunteer over the obligated citizen-soldier, pronouncements which I believe are offered most often for reasons of political partisanship. It is important to remember, moreover, that a candid discussion of the difficulties of recruiting a volunteer force is not an indictment that all, most, or many servicemembers are poorly qualified to serve. The argument is that we can—and the Constitution requires that we must—do better.

The reality of the all-volunteer force today is that the military is mining for personnel in the thinnest of wedges of civilian society, with all the trends making those wedges thinner over time. We now spend twice as much to sign an individual recruit as we did in the late 1980s even though the military, and its recruiting needs, have been reduced substantially in size. The number of high school students who say they will "definitely not" serve in the military has continued to rise.


172. See Don M. Snider, Army Won't Win Recruiting Battle, WALL ST. J., Jan. 21, 2000, at A18 (discussing 1999 military recruiting shortfalls and citing as causes an increase in the percentage of college-bound high school graduates and a decrease in meaningful contact between military and civilian societies).

173. See Charles Moskos, What Ails the All-Volunteer Force, supra note 158, at 40.
Military recruiters actually troll shopping malls hoping to find drifting high school graduates who have neither enrolled in college nor found a job, who have not engaged in an excessive amount of criminal activity or drug use, and who are not physically unfit beyond all rehabilitation. One recruiter described his fortuitous spotting of “a prime target” for the military: “He was young. He looked fit. He was in the mall in the middle of the morning.”

To fill recruitment needs throughout the 1990s, the military granted a substantial number of waivers to recruits who were unable to meet the services’ entrance qualification standards for moral character, which is a heavy dose of irony for an institution that has come to define itself in terms of moral superiority to civilian society. In a report to the Senate Armed Services Committee, the United States General Accounting


The New York Times published a series of articles chronicling the enlistment and basic training of a typical post-September 11 recruit. See Sara Rimer, A Self-Described Slacker Decides He’s Ready to Be a Soldier, N.Y. TIMES, Nov. 12, 2001, at B1; Sara Rimer, Training Pvt. Evans: 4 Months From a Slacker to a Soldier, N.Y. TIMES, Dec. 15, 2001, at B1 [hereinafter Rimer, Training Pvt. Evans]; Sara Rimer, Home Hardships End Private’s Army Career, N.Y. TIMES, Mar. 10, 2002, § 1, at 33 [hereinafter Rimer, Home Hardships]. Kirk Evans was a “self-described slacker” who had not sought civilian employment following graduation from high school. In the Army’s eyes, however, he was a star:

The Army could not wait to sign him up. He did not drink or use drugs and had never been in any trouble. And while his lack of trying had earned him C’s and D’s in high school, he had scored in the top 4 percent on the Army aptitude tests.

Rimer, Training Pvt. Evans, supra. Private Evans never made it through basic training. He asked to be released from his military commitment after the death of his stepfather, although it was unclear how he would be able to assist his family financially without a job. The Army investigated the possibility that Pvt. Evans’s mother and siblings could qualify as his dependents for the purpose of receiving medical benefits, but he was not interested. He seemed most upset at the news that his $10,000 enlistment bonus, over and above his regular military compensation, would be considered taxable income. Private Evans lost his bonus, of course, when he left the Army. See Rimer, Home Hardships, supra. This series of articles provides a good illustration of how difficult it can be for the military to find recruits outside the college-bound market who are sufficiently intelligent, motivated, and mature.

175. See RICKS, MAKING THE CORPS, supra note 37, at 45 (noting that half of all Marine Corps recruits enlisted under a waiver for crimes, drug use, or medical and psychological problems); Dave Moniz, Army and Navy Granting More Felony Waivers: Exceptions Made to Help Boost Number of Recruits, USA TODAY, at 7A (stating that the number of Army recruits with felony arrest records increased from 166 in 1998 to 357 in just the first three quarters of the 2000 recruiting year; the Navy enlisted 47 recruits with felony arrest records in 1998, 165 in 1999, and 131 through the first three quarters of 2000). A retired Marine Corps recruiting commander explained: “You look to where you can expand your market. The easiest way is to grant more waivers.” Id.
Office determined that approximately 192,000 of the 1.5 million persons who enlisted in the military between 1990 and 1997 had to be granted a waiver for reasons of moral character. The data on moral character waivers tend to fluctuate because the services have sometimes redefined the nature or the quantity of misconduct that requires a waiver, but the bottom line is that the military is required to look the other way regarding a substantial amount of substance abuse and criminal activity to fill out the armed forces at the margins.

Recent figures show that the attrition rate for servicemembers in their first term of enlistment is at an all-time high, which is probably an indicator of the degree to which the military "reaches" during the enlistment process. At least one-third of new recruits fail to complete the initial period of service they contractually agreed to provide, which can range from as short as two years to as long as five or six years, although a significant portion of that attrition takes place in the first six months of training. Part of the attrition problem is a continuation of the enlistment-qualification issue discussed above, as some servicemembers are separated after discovery of disqualifying conditions or histories after enlistment. Most of the remaining servicemembers who fail to complete their military commitment are unable to perform adequately because of behavioral, physical, or academic problems, and the services have been instituting new remedial programs to address those deficiencies.

176. See U.S. GEN. ACCOUNTING OFFICE, MILITARY RECRUITING: NEW INITIATIVES COULD IMPROVE CRIMINAL SCREENING HISTORY 1 (1999), available at http://www.gao.gov. Of additional concern is the fact that the military relies heavily on self-reporting by potential recruits to uncover disqualifying offenses. The military's criminal history checks do not include fingerprint searches, and state law often restricts access to criminal-history information, particularly with respect to juvenile records. See id. at 10-13.

177. See id. at 2-3 (categorizing the nature of offenses that require waivers, from felonies down to repeated traffic offenses; requiring a waiver, for example, for Navy recruits with six or more moving violations in a twelve-month period), 27-28 (discussing policy changes in waiver criteria). From 1990-97, over 86,000 individuals (forty-five percent of all moral-character waivers granted) were permitted to enlist with criminal histories that included felonies or major misdemeanors, such as assault and petty larceny. Id. at 28 tbl.1.2.


179. See id. at 21-22 (noting that approximately one-fourth of attrition in the first six months is the result of erroneous or fraudulent enlistment).

180. See id. at 23-25. Interestingly, the attrition rate in the peacetime draft between the Korean and Vietnam conflicts was only ten percent during a typical two-year term of enlistment, which probably reflects the fact that a draft-based military does not have the luxury of allowing people to just walk away. See Moskos, What Ails the All-Volunteer Force, supra note 158. I suspect that another powerful factor in the increase in attrition rates today is that draft-era youth had a much
The military's recruitment difficulties are also reflected in the size of the compensation premium, in comparison to civilian wages and benefits, the military pays to entice young people to enlist. Many people assume (and politicians pontificate, in the never-ending arms race of who "supports the troops" the most) that servicemembers are poorly paid in comparison to their civilian counterparts.\textsuperscript{181} With respect to the junior enlisted persons closer to the "recruitment" end of the pay scale, the assumption is pure myth.\textsuperscript{182} I raise the compensation issue not to diminish the contribution that servicemembers make, but only to highlight evidence that the military is having difficulty attracting young people from an ever-smaller segment of the potentially eligible pool. The personnel demands of all-volunteer recruitment have brought about significant increases in military compensation. For example, the per capita cost in 1999 of a servicemember in the all-volunteer force was

\textsuperscript{181} A good example can be found in the controversy concerning military personnel on food stamps that became an issue in the 2000 presidential campaign. See Frank Bruni, \textit{Bush Questions Gore's Fitness for Commander in Chief}, N.Y. TIMES, May 31, 2000, at A20 (citing Governor Bush's charge that receipt of food stamps by military personnel was a sign of the deterioration of the military during the Clinton administration). Most military personnel who received food stamps were able to qualify for them because they were permitted to exclude from their reportable income the value of housing and utilities provided by the military "in kind." (Of course, many more civilians would qualify for food stamps if the amount they spent on housing was not included in their reportable income.) Most of the remainder qualified because they were very junior personnel with an unusually high number of children. As noted, delicately, by the Assistant Secretary of Defense for Public Affairs, Kenneth H. Bacon, "[w]e do get obviously into issues when people have large families at a young age." U.S. Department of Defense, DoD News Briefing (Apr. 18, 2000), at http://www.dod.mil/news/news/Apr2000/04182000_0418asd.html. The DOD initially intended to reduce the number of military personnel on food stamps by including the value of government-provided housing in eligible income, but there was such an uproar at taking money from the deserving servicemember that the department reversed course. Military personnel generally would no longer receive food stamps, but instead an even greater number of personnel would be paid an additional allowance, the Family Subsistence Supplemental Allowance, of up to five hundred dollars per month. See National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 604, 114 Stat. 1654 (2000). It is interesting how the "irresponsible" (but civilian) working poor, criticized for having more children than they can afford at a young age, suddenly become "responsible" and immune from criticism once they join the military.

\textsuperscript{182} There is a much stronger argument that military pay scales have become so compressed from top to bottom as a result of increases in pay for first-term servicemembers that some senior enlisted personnel are not fairly compensated in comparison to civilian opportunity. See Moskos, \textit{What Ails the All-Volunteer Force}, supra note 158 (noting that a senior non-commissioned officer today is paid only twice the compensation of a junior enlisted person, whereas the ratio in the draft era was seven to one). However, the military's custom of paying all servicemembers of equal rank an equal compensation, regardless of career specialization, contributes to the unfairness of the pay scale. Some military specialties require skills that would be in high demand in civilian life, but some do not.
more than twice as high, in constant dollars, as it was during the Vietnam draft era.\textsuperscript{183}

A brief primer on military compensation illustrates the point. One of the reasons military pay is so easily misrepresented as being low (imposing, no doubt, an unintentional drag on recruitment) is that overall military compensation is broken up into numerous and complex subcomponents of salary, allowances, and substantial "in-kind" payments.\textsuperscript{184} (Another reason, of course, is that the civil-military gap makes it easy to misrepresent just about anything related to military service, because civilian society lacks the expertise and interest to engage in any meaningful scrutiny.) The military cash compensation referred to as "basic pay" best approximates what civilians would call a salary or wage, but it may represent only half of a typical servicemember’s total compensation. Arguments about military pay frequently compare basic pay to civilian pay, and basic pay alone may lag behind civilian compensation for comparable employees.

However, basic pay is only the first component of a military compensation system designed to provide housing, utilities, and food in addition to basic pay. The principal components of military pay and benefits include basic pay, which is the same for all military personnel of the same rank and time in service; enlistment bonuses of up to $20,000 for some occupational specialties,\textsuperscript{185} family medical benefits; housing and utilities, either provided in-kind or by a non-taxable cash allowance, indexed for regional housing costs and protected against inflation by cost-of-living increases;\textsuperscript{186} meals in kind for the servicemember, or a non-taxable cash allowance for subsistence,

\textsuperscript{183} See Moskos, What Ails the All-Volunteer Force, supra note 158, at 33 (citing cost of an individual servicemember as $29,140 in 1964 and $63,812 in 1999, in constant dollars).


\textsuperscript{186} In 2003, Basic Allowance for Housing covered all but 7.5% of average out-of-pocket housing costs for servicemembers not living in government-provided housing; the DOD plans to cover 100% of average costs by 2005. For example, servicemembers living in the civilian community near Fort Stewart, Georgia received $617 per month in housing allowance in 2002, while servicemembers living in Los Angeles, California received $1382 per month. These housing allowances are paid over and above each servicemember’s basic pay. See generally U.S. DEP’T OF DEF., A PRIMER ON BASIC ALLOWANCE FOR HOUSING FOR THE UNIFORMED SERVICES (2002), at http://www.defenselink.mil/militarypay/pay/bah/bah_primer.pdf.
indexed for increases in the price of food; commissary privileges (groceries at item cost plus five percent, a savings of approximately twenty-five percent in comparison to "civilian" supermarkets), additional cost-of-living allowances for non-housing expenses in high-cost United States locations and overseas; subsidized child care; paid tuition for college courses taken while in the military; educational benefits for college after leaving the military, as high as $50,000 and earned by just a single term of enlistment, or repayment of student loans up to $65,000; thirty days of vacation per year; space-available vacation travel on military aircrafts; enlistment and re-enlistment bonuses for certain hard-to-fill career fields; and retirement benefits and lifetime health care after twenty years of service.

For example, a twenty-year-old servicemember who had enlisted in the military directly from high school two years earlier, and who now has a spouse and one child, would be paid $1442.10 per month ($17,305.20 annually) in basic pay, assuming a normal rate of promotion. A fair comparison to the civilian world would ask how


190. See RICHARD BUDDIN & KANIKA KAPUR, RAND NAT'L DEF. RESEARCH INST., TUITION ASSISTANCE USAGE AND FIRST-TERM MILITARY RETENTION xi (2002), available at http://www.rand.org/publications/MR/MR1295/MR1295.pdf (describing the Tuition Assistance Program, which reimburses servicemembers for one hundred percent of their college tuition expenses). The Army is also expanding its distance-learning capability through the "eArmyU" program, which gives soldiers free computers and access to on-line courses at twenty colleges around the country. Soldiers are required to serve in the Army for at least three years after enrollment. The eArmyU program is designed to supplement traditional college courses offered on military installations, offering greater flexibility for soldiers who are deployed away from home.

"The goal was to take the classes to them." See Fred Bernstein, Booting Up Before Taps, Soldiers Pursue College Degrees, N.Y. TIMES, Aug. 15, 2002, at G4.


192. See Schmitt, supra note 123.

193. The DOD provides military-pay calculators on the internet that crunch all relevant factors and provide an estimate of total military compensation. See Stay Navy, Official U.S. Navy Website, at http://www.staynavy.navy.mil (last visited Apr. 22, 2004); Office of the Secretary of Defense, Military Compensation, at http://www.defenselink.mil/militarypay/ (Apr. 22, 2004). The sample twenty-year-old servicemember with a rank of E-3 would be paid almost $30,000 per year just in basic pay and housing and subsistence allowances. The department estimates the value of medical,
many twenty-year-old high-school graduates with a family (and without college) have $1442.10 left over from their paycheck each month after paying for housing and part of the food bill, assuming they could even find a job offering full benefits. The answer must be close to zero.\textsuperscript{194} In today's service-oriented economy, a typical high-school graduate without college cannot reasonably expect to receive the level of compensation and comprehensive social welfare support that the military provides.\textsuperscript{195} Indeed, one of the constituencies that is likely self-selecting into the all-volunteer force in disproportionate numbers is the teenager or young adult with children whose need for family support far exceeds the ability or willingness of the civilian economy to provide it, a development that plays havoc with military readiness.\textsuperscript{196}

The point of this exercise, once again, is not that young servicemembers are paid more than they deserve to be paid in a hypothetical economy of unlimited resources. The point is that we pay an extraordinary compensation premium—a pay scale that essentially...
starts, at the recruiting stage, at a level greater than any comparable
civilian opportunity—to attract an increasingly narrow, self-selective
segment of youth into military service.

Research on the civil-military gap suggests we may be significantly
shrinking the pool of candidates who would consider enlisting in the
military when we allow or encourage the military to sell itself through
appeals to political partisanship, moral superiority, and constitutional
resistance. This trend not only threatens the health of civil-military
relations under the Constitution by undermining the military’s
professional ethic of civilian control, but it also undermines military
effectiveness by driving away youth who might make a commitment to
uniformed service if it was not laden with a particularly partisan and
constitutionally-unfriendly form of social conservatism. Allegiance to
the constitutional ideal of a politically neutral military is not necessarily
inconsistent with military effectiveness; in fact, one may feed the
strength of the other.

The military desperately needs smart, “short-timer” citizen-soldiers,
but it has been resistant at every turn to proposals for broadening its
recruitment pool beyond those who self-select on the basis of ideology,
caste, or economic advantage. Ironically, much of the military’s
recruitment appeals are directed to high-school seniors who see
themselves as “lifers” in the military, which will often be a conclusion
based on the young person’s perception of ideological compatibility with
the military institution. However, this is a particularly self-defeating way
for the military to recruit because, first, the lifetime aspirations and plans
of seventeen-year-olds are not particularly reliable and, second, the
promotion ladder for military service is designed in a pyramid-style, “up
or out” structure. The military enlists large numbers at the bottom of the
pyramid with the expectation that only a small percentage—currently
about fifteen percent—will remain for a twenty-year career. Even if
the military could accurately identify recruits who wished to stay in the
military for a career, most would not be permitted to do so. Military
force structure is deliberately designed to avoid a “top-heavy”
distribution of rank and seniority, and servicemembers who fail to be
promoted with their peers may be involuntarily separated. The

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197. See SHEILA NATARAJ KIRBY & HARRY J. THIE, RAND NAT’L DEF. RESEARCH INSTITUTE,
ENLISTED PERSONNEL MANAGEMENT: A HISTORICAL PERSPECTIVE 1 (1996), available at
http://www.rand.org/publications/MR/MR755/. Only 3.5 % of the total enlisted strength of the
armed services are permitted to hold the top two enlisted ranks, E-8 (2.5 %) and E-9 (1 %). See 10

198. See generally KIRBY & THIE, supra note 197.
military has little need to recruit for ideological, political, or cultural “lifers,” yet when it does, it increases the size of the civil-military gap and weakens constitutional civil-military relations.

B. Congressional Proposals to Broaden the Base for Military Recruitment

There is a small but growing sense among policymakers that the military’s loss of representativeness in relation to civilian society is a troubling development. John Lehman, Secretary of the Navy under President Ronald Reagan, published an editorial shortly before the 2003 invasion of Iraq in which he described the corrosive effects of the transition to an all-volunteer force.\(^\text{199}\) He noted that today’s military has “surprisingly little social, economic or political diversity.” In contrast to the “disruptive, irreverent, unorthodox, and renewing” presence of citizen-soldiers from all segments of society in a force that includes draftees, the all-volunteer military has drifted through a process of self-selection to a culture that, in Lehman’s view, embraces “orthodoxy, resistant to and isolated from change,” conservatism, and career-consciousness.\(^\text{200}\) Lehman blamed a military recruitment bureaucracy that is more enamored of enlisting young people on the basis of their potential to be cultural “lifers” in the military than on the basis of their merit and talent. He argued that the system now systemically discourages the participation of the educationally privileged, unlike past generations in which the elite shared the burdens of military service.

Lehman’s criticisms focused on the important, but indirect, harms to civil-military relations and to civilian control of the military that were a consequence of shutting off the supply of draftees to the military a generation ago. However, more direct and immediate operational concerns have also led some to reconsider the utility of a military draft.\(^\text{201}\) There is a growing sense that today’s military may not be numerically and logistically capable of supporting its current engagements on an indefinite basis if limited to volunteers. The military

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200. Id.
is already relying disproportionately on reservists in Iraq and Afghanistan because the skills of peace-keeping and nation-building—military police and civil affairs—are concentrated disproportionately in the Reserve and Guard rather than in the active-duty military.\textsuperscript{202} The difficulties of relying on reserve forces are only aggravated by the reality that a significant number of reservists are domestic “first responders” in civilian life, serving as civilian police officers, firefighters, and medical professionals, with responsibilities for domestic security that have only increased in scope since September 11, 2001.\textsuperscript{203} The military is aware that reserve forces are overextended to a degree that cannot realistically be maintained for the indefinite length of any military response to the threat of terrorism, yet there is no particular plan for how to find and retain sufficient personnel to fulfill the wide range of our domestic and international security obligations.\textsuperscript{204}

1. The Universal National Service Act of 2003

This was the context in which Representative Charles Rangel introduced the Universal National Service Act of 2003.\textsuperscript{205} Rangel’s proposal that all young adults be required to perform a period of military or civilian duty in service to the country was a very simple one in that it imposed a mandatory obligation with minimal exemptions and also granted great discretion to the President in working through the details of such an enormous undertaking. Under his bill, it would be “the obligation of every citizen of the United States, and every other person residing in the United States, who is between the ages of 18 and 26 to perform a period of national service,” and the length of that service

\begin{footnotesize}
\begin{enumerate}
\item See Christopher Cooper, \textit{As U.S. Tries to Bring Order to Iraq, Need for Military Police is Rising}, \textit{N.Y. Times}, Aug. 21, 2003, at A1 (noting that military-police reservists engaged in peacekeeping duty in Iraq were approaching two-year limit of active service, the longest reserve deployments since Vietnam; many were called up from civilian law enforcement duties); Sarah Kershaw, \textit{For Citizen Soldiers, an Unexpected Burden}, \textit{N.Y. Times}, Sept. 15, 2003, at A1; Schmitt, \textit{supra} note 123 (reporting that the Army National Guard expected to fall short of recruitment goals this year but still maintain overall force levels because fewer soldiers were permitted to separate); Thom Shanker, \textit{Threats and Responses: The Military; U.S. Considers Limits on Role of the Reserves}, \textit{N.Y. Times}, Jan. 26, 2003, § 1, at 1 (noting that almost all Army civil-affairs personnel, and two-thirds of military-police battalions, are in reserve forces).
\item See Dean E. Murphy, \textit{Citizen Soldiers Leave Big Gaps on Home Front}, \textit{N.Y. Times}, Feb. 1, 2003, at A9 (“The problems associated with the stepped-up mobilizations are particularly acute for law enforcement. Just as their ranks are being depleted, local authorities are being asked to take on new responsibilities related to domestic security.”).
\end{enumerate}
\end{footnotesize}
would be two years. The preamble to the bill makes clear, just in case anyone was inclined to read "citizens" or "persons" subject to the draft as comprising only male citizens or persons, that the obligation attaches to "all young persons in the United States, including women." National service would include military duty, in either the active or reserve components of the armed forces, or civilian duty that "as determined by the President, promotes the national defense, including national or community service and homeland security." Whether any particular individual would be required to perform military duty is difficult to predict under the language of the bill. The bill defers to the President in determining the number of persons needed for military duty and in selecting them from the eligible population, with the military apparently receiving "first dibs"; persons not selected for military duty would be assigned to civilian duty to complete their obligation. Military draftees would have to meet the same health and physical qualifications applicable to voluntary enlistees and be acceptable to the Service Secretary involved.

Exemptions under the Rangel bill would be few and limited. The only educational exemption allows young adults to defer service for the purpose of continuing a standard, full-time program of study for a high school diploma, provided they have not yet reached the age of twenty. Discretionary deferments could be granted for extreme hardship or physical or mental disability, but standards of fitness for civilian service were not required to be as stringent as those for military service, and the bill seemed to contemplate a wide range of civic contributions from persons of various abilities. Finally, persons with conscientious objection to combatant training based on religious belief could be assigned to military service that would not require combatant training or to civilian service.

The rest of the details were for the President to consider and resolve through regulation, including the designation of eligible forms of civilian

206. Id. §§ 2(a), 3(a).
207. See also id. § 10 (amending the Military Selective Service Act, 50 U.S.C. § 453(a) (2000), to remove gendered references to men and substitute gender-inclusive language of "himself or herself," "person," and "persons").
208. Id. § 2(b).
209. See id. §§ 2(d), (e).
210. See id. § 7(a).
211. See id. § 6 (explaining deferments for high-school attendance, extreme hardship, or physical or mental disability).
212. See id. § 5(d) (allowing "different classification standards for fitness for military service and fitness for civilian service").
213. See id. § 8.
service, standards for its performance, penalties for failure to perform satisfactorily, and the level of compensation and benefits to be paid.\textsuperscript{214} It would have been difficult for Representative Rangel to be more deferential to the President and to the military in attempting to reconstruct the concept of the citizen-soldier. Even if enacted, the bill would not require the military to accept a single conscript without its consent. The category of "volunteer," however, would certainly receive a significant boost through the pressure of the draft if conscripts for civilian service were ever called. Given the inevitability of a two year obligation of service, military or civilian, the military could expect to gain a number of "volunteers" who would not have self-selected in the absence of a draft, particularly if conscripted military service was more attractive than conscripted civilian service in terms of pay, education, or training.

2. The Universal Military Training and Service Act of 2001

Interestingly, Representative Rangel's Universal National Service Act of 2003 was not the only post-September 11 bill related to military conscription, although it was the only one to attract such prominent and senseless ridicule.\textsuperscript{215} Inexplicably—at least on the surface—another military conscription bill was introduced but entirely ignored. On December 20, 2001, little more than a year before Rangel offered his national service proposal, Representative Nick Smith, a Republican from Michigan, was the principal sponsor of the Universal Military Training and Service Act of 2001.\textsuperscript{216} The bill, in contrast to what its title might suggest, did not require any military service at all, but only military training. All persons subject to the Act would be required to complete a relatively brief course of military training, but without any subsequent obligation for a term of productive national service using that training. The only persons subject to the Universal Military Training and Service Act of 2001, however, were men—specifically not women—between the ages of eighteen and twenty-two.\textsuperscript{217} These young men would be inducted

\begin{footnotes}
\footnotetext[214]{See id. § 4(b).}
\footnotetext[215]{See supra INTRODUCTION.}
\footnotetext[217]{See id. § 3(a) ("It is the obligation of every male citizen of the United States, and every other male person residing in the United States, who is between the ages of 18 and 22 to receive basic military training and education as a member of the armed forces unless the citizen or person is exempted under the provisions of this Act."). Women had no obligation under the Act, but they were expressly permitted to "volunteer for enlistment in the armed forces to receive basic military training and education under this Act." The decision whether to accept a female's offer to enlist for}
\end{footnotes}
into the military for the purpose of receiving between six months and one year of military training and, upon completion of that obligation, would be discharged and returned to civilian life, "not subject to any further training or service under this Act." Discretionary deferments would be available in cases of "extreme hardship or physical or mental disability." The bill did not specify the particular type of specialized military training conscripts would undergo after the standard "basic training" of two to three months that all members of each of the services receive, leaving that decision to the discretion of the Secretary of Defense.

A number of factors probably help to explain why the Universal Military Training and Service Act of 2001 failed to elicit the reflexive, irrational opposition that the more comprehensive Universal National Service Act of 2003 did. Indeed, it failed to elicit any attention at all. Perhaps the lack of efficacy of a bill that proposed only military training without asking for any productive contribution to national defense explains why it was simply ignored rather than targeted for very high-profile opposition. The Universal National Service Act of 2003, in contrast, envisioned that all young people would have a real and shared obligation for military service. The most serious proposals for reform of the all-volunteer force will always be the least likely to receive rational consideration when there is a substantial civil-military gap.

Second, the Universal National Service Act of 2003 was introduced in the context of opposition to a significant, imminent mobilization of military personnel for war in Iraq, while the Universal Military Training and Service Act of 2001 could be viewed merely as a statement of hypothetical patriotic sacrifice issued shortly after the events of September 11, 2001, perhaps the legislative equivalent of an American flag decal on the bumper of one's sport-utility vehicle. It may never have been a proposal that anyone, even its sponsor, took seriously. It is telling that Representative Smith, supposed advocate of universal military training, distanced himself from Representative Rangel's bill, even though both proposals could be grounded in the same ideal of shared responsibility for national defense in a time of crisis.

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218. See id. § 4(a). High school dropouts would be required to serve for an additional six months of "extended training and educational services," over and above the baseline obligation. See id. § 4(b).
219. Id. § 12.
220. Id. § 8(b).
221. See Carl Hulse, Threats and Responses: The Draft: A New Tactic Against War: Renew
The third factor that likely explains why Smith’s Universal Military Training and Service Act of 2001 was quietly ignored but Rangel’s Universal National Service Act of 2003 was loudly condemned—and the factor that may have been the most unconsciously powerful—was the latter’s inclusion of women within persons who would have an obligation for national defense. The question of whether women should be subject to a draft for military service is at the center of any debate about contemporary civil-military relations because it captures the nature of the civil-military gap with exquisite accuracy. The place of women as citizens with an obligation for defense of country is an issue that pushes all the buttons of the ideological civil-military gap as constructed by the United States Supreme Court.

Proposals that rely on involuntary military conscription, such as Rangel’s Universal National Service Act of 2003 (universal among the population) or Smith’s Universal Military Training and Service Act of 2001 (universal among half the population), are not the only means available for leavening an ideologically, politically, or culturally insular military or for expanding the military’s recruitment base. Volunteer-based recruiting programs also have the potential to bridge the civil-military gap if they are successful in attracting into military service a different breed of volunteer, one that, for whatever reason, was not self-selecting under the current all-volunteer structure. The only recent legislative proposal designed to change the ideological mix of those who serve in the military that has survived and been passed into law, in fact, has been of the volunteer variety. The proposal sought to package military service in a way that would appeal to those without a pre-existing propensity to serve, and in particular tried to alter the usual recruiting equation that tended disproportionately to attract young adults who thought, however unrealistically, that they would stay in the military for a full career even before they served for a day in uniform. Ultimately, the proposal was enacted, but not before it had been watered down into ineffectiveness through both legislative tinkering and the military’s intransigence. It had been stripped of any practical relevance for reasons, I believe, that are tied to the grip that political partisanship and ideology hold on military policy. The reaction of Congress, and of the military, to the bill was instructive in understanding how entrenched the civil-military gap has become, opening a fascinating window for study of how we as a nation choose who will serve in the military, the

Talk About Draft, N.Y. TIMES, Feb. 9, 2003, § 1, at 17 (reporting that an aide had said Smith had no interest in helping Rangel with his proposal for mandatory national service).
motivations for that choice, and the effect of that choice on the constitutional health of the military and the nation.

3. The Call to Service Act of 2001, Enacted as the National Call to Service Program

Senator John McCain, a Republican from Arizona, and Senator Evan Bayh, a Democrat from Indiana, were the principal sponsors of the Call to Service Act of 2001, introduced in the Senate on December 10, 2001.222 The bill was intended to increase interest in military service by offering a shorter term of enlistment than had previously been available in the all-volunteer era. Unlike the Rangel proposal, which sought to achieve shared obligation through mandatory and universal national service, the Call to Service Act of 2001 was designed to at least spread the obligation wider by reaching out to young people who may have assumed military service was incompatible with their educational plans. Persons opting to join the military under the McCain/Bayh bill would serve for just eighteen months on active duty and then for an additional eighteen months in the “drilling” reserves after returning to civilian life.223 Upon completing a three-year term of service, half active and half reserve, the servicemember would receive a lump-sum $18,000 bonus, hence McCain’s informal reference to the Call to Service Act proposal as the “18-18-18 enlistment option.”224 College students who had “stopped out” for military service could use the bonus for their future education or to repay or reduce earlier educational debt. The servicemember would otherwise receive the same pay and benefits as any other member of the military of the same rank.

Senator McCain’s statement accompanying introduction of the Call to Service Act was noteworthy in that it openly acknowledged the toll that political partisanship and conservative ideology has taken on the health of civil-military relations. He said:

Our legislation is not a Democratic or Republican initiative. Duty, honor, and country are values that transcend party or ideology. This is a uniquely American moment in which a crisis becomes an opportunity

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222. See Call to Service Act of 2001, S. 1792, 107th Cong. (2001). In addition to short-term military enlistments, the Call to Service Act of 2001 also provided for an expansion of AmeriCorps and an increase in the percentage of jobs funded through the College Work-Study Program that are devoted to public service. See id. §§ 104, 131. Counterpart legislation to the Senate’s Call to Service Act of 2001 was introduced in the House on Dec. 12, 2001. See Call to Service Act of 2001, H.R. 3465, 107th Cong. (2001).
to harness our unity and channel [us] into what historian Stephen
Ambrose describes as "common-patriotism."

... 

We should also be concerned by the growing gap between our nation's
military and civilian cultures. While the volunteer military has been
successful, fewer Americans know first-hand the sacrifices and
contributions of their fellow citizens who serve in uniform.225

The McCain-Bayh bill arose out of proposals crafted by Professor
Charles Moskos to resuscitate the tradition of citizen-soldiering and
increase the exchange of experience between military and civilian
spheres. Moskos favored a return to the draft,226 but he also
recommended the less drastic option of appealing to the type of
volunteer that has usually remained beyond the military's recruiting
reach.227 Moskos argued that short-term military enlistments would
break down the divide that, in practice, has made college attendance and
military service mutually exclusive for young people just graduating
from high school. He disagreed with the conventional wisdom that a
weak economy drives people to volunteer for military service: "The
competition for recruiters is college attendance, not the economy."228 A
New York Times report on the representativeness of the American
military seemed to concur when it recently described the armed forces as
resembling "the makeup of a two-year commuter or trade school outside
Birmingham or Biloxi far more than that of a ghetto or barrio or four-
year university in Boston."229 Researchers who study the science of
military recruitment have concluded that the most difficult challenge in
recruiting may be to make the military more attractive to college-bound
youth as the rate of college attendance continues to grow.230

225. Id. at S12775-76.
226. See MOSKOS, A CALL TO CIVIC SERVICE, supra note 158; Charles Moskos & Paul
Glastris, Now Do You Believe We Need a Draft? We're in a New Kind of War; Time for a New Kind
of Draft, WASH. MONTHLY, Nov. 1, 2001, at 9; Paul Glastris, First Draft: The Battle to Create
Universal National Service Has Just Started; Here's How It Can Be Won, WASH. MONTHLY, Mar.
1, 2003, at 11.
227. See Moskos, What Ails the All-Volunteer Force, supra note 158, at 41.
228. See id. at 42.
230. See BETH J. ASCH ET AL., RAND NAT'L DEF. RESEARCH INST., ATTRACTING COLLEGE-
BOUND YOUTH INTO THE MILITARY: TOWARD THE DEVELOPMENT OF NEW RECRUITING POLICY
college-enrollment rates have risen as market demand for college-educated workers and the "college
premium" they earn in comparison to the average wage of a high school graduate have both
Moskos saw short-term enlistments as a proposition without a downside because they would appeal to college students or college graduates who would consider a long-term commitment to the military inconsistent with their educational goals. For Moskos, the list of benefits was a comprehensive one.  

First, shorter enlistments would draw higher aptitude recruits who could be trained more quickly, would have a lower rate of attrition, and would be less expensive to support because they were less likely to be married and less likely to have children. Second, the traditional citizen-soldier, one that enlists without intending to make the military a career, is a perfect fit for the peacekeeping duties that have become such a large part of the military’s mission since Bosnia and Kosovo, and now in Afghanistan and Iraq. Third, the proposal’s incorporation of reserve duty following active service would help relieve the present shortfall in reserve capacity as measured against the domestic and international missions the reserves are asked to fill. Fourth, and most fundamental in a constitutional sense, the increase in military experience among those who will be our future elite would begin to break down the divide of our civil-military gap, strengthening the health of our civil-military relations and increasing the level of our public discourse on matters of military concern.

So what’s not to like? The reflexive response of the military to proposals to expand its recruitment base into previously untapped segments of society, whether on the basis of conscription or short-term enlistments, is to argue that these recruits would not be sufficiently professional or experienced to meet the standards of the present all-volunteer force. However, the military’s position is weak, motivated more by an opposition to change than an assessment of evidence. The fact that some positions, or even a substantial number of positions, in the all-volunteer force require extensive skill, training, and experience does not mean that all, or even most, do. The military’s resistance requires it to ignore both recent history and present operational reality. Moskos explains why short-term citizen-soldiers would be so valuable to the military:

Let us remember that in World War II, Korea, and Vietnam, the vast majority of combat soldiers had only six months (sometimes less) of
training before being sent to war. Further, the training required to serve as a military policeman, the kind of role often required for peacekeeping, takes only about six months. When we consider that the typical Bosnia or Kosovo assignment is six months, the rationale for a short enlistment seems apparent.232

The military's insistence on the exclusive need for professional, career soldiers seems unreasonable when one considers that forty percent of our current overall military force has from zero to four years of service.233 The services are far from top-heavy with extensively trained and experienced servicemembers and, in fact, expect and depend upon significant turnover to maintain a vigorous and economical force. Finally, it is difficult to credit the military's assertion that short enlistments would interfere with the stability of the armed forces when one-third of current volunteers wash out before they complete their first contractual term of service.234 The average length of military service for enlisted persons in the all-volunteer force is not dramatically longer than it was at the end of the draft era, increasing moderately from approximately 6.5 years in 1972 to approximately 7.5 years in 1994.235 The difference is certainly not sufficient to foreclose any reasonable discussion of the utility of enlisting high-quality people for shorter periods of time.

The short-term enlistment proposal initiated by Professor Moskos and introduced in Congress by Senators McCain and Bayh was amended significantly before enactment, principally by increasing the length of the obligation and reducing the incentives for service.236 As codified, National Call to Service participants would be required to serve on active duty for fifteen months in addition to any required training period,

232. Moskos, What Ails the All-Volunteer Force, supra note 158. This article was written long before the current conflict in Iraq, and even before the terrorist attacks of September 11, 2001. What is remarkable is how well Moskos's recommendations fit the needs of a military now tasked in a drastically different manner. See Moskos & Glastris, supra note 226 (making the same proposal shortly after September 11, 2001); Glastris, supra note 226 (making the same proposal once again on the eve of the 2003 invasion of Iraq).

233. See Kirby & Thie, supra note 197, at 1.

234. See supra notes 178-80.

235. See Kirby and Thie, supra note 197, at 36 fig.4.5. The average length of service of military officers has also increased moderately in the all-volunteer era, from 116 months in 1973 to 129 months in 1996, a difference of slightly more than one year. See Desch, supra note 84, at 300, 301 fig.8.5. The DOD's conclusion that "[s]horter enlistment terms, characteristic of a draft, result in high personnel turnover and a degradation in unit stability and performance," CONSCRIPTION THREATENS HARD-WON ACHIEVEMENTS, supra note 13, at 3, seems to be at least an exaggeration.

in contrast to the original bill’s uniform eighteen-month active obligation.\textsuperscript{237} The clock would not start on fifteen months of active service until the servicemember reported to a permanent duty station following completion of both basic training and any advanced specialty training, which could extend the required period of active service by as much as an additional six months, for a total of twenty-one months. The required period of “drilling” reserve duty was also lengthened, from eighteen to twenty-four months following release from active duty. The enactment also cut back financial incentives sharply. Instead of the original bill’s bonus of $18,000 for completion of service, National Call to Service participants would receive their choice of 1) a $5,000 bonus or 2) payment of outstanding principal and interest on an existing student loan, in an amount to be determined by the individual services but not exceeding $18,000.\textsuperscript{238}

The increase in length of active service from the introduced to the enacted version of the National Call to Service program was significant because the military commitment was now nearly indistinguishable from two-year terms of enlistment (including training) that were already offered by the Army, the largest military service.\textsuperscript{239} If the intention of Congress was to create a patriotic splash without actually offering an option that was different from the status quo, then it was successful. If anything, enlistment as a National Call to Service participant was a financially poor bargain because, unlike “regular” two-year recruits, those answering the call for a “new” kind of recruit were specifically ineligible for one of the principal benefits of military service, the Montgomery GI Bill.\textsuperscript{240}

Although it is unclear why college-bound and college-educated young people would enlist for a term of military service that was only a few months shorter than one that offered greater benefits, the military services worked to ensure that, in any event, only an insignificant number of slots would be available for the National Call to Service program. The implementation report submitted by the DOD limited the total number of National Call to Service enlees to approximately one percent of military accessions in each of the services during the current

\textsuperscript{237} See id. § 510(c).
\textsuperscript{238} See id. § 510(e).
fiscal year. For an indication of where the military’s priorities lie, the Army allocates approximately five percent of its accessions for the "GED Plus" program, which allows persons to enlist in the military who have not only dropped out of high school but who have also failed to obtain a General Educational Development ("GED") credential.

C. Why Proposals for Volunteer Citizen-Soldiering Miss the Point

Why did the military passively resist an opportunity to expand its base for recruitment across a broader cross-section of American society? The military never openly criticized the National Call to Service program, but it didn’t need to. The program’s obligations and incentives had already been rebalanced by Congress in a way sure to discourage most volunteers, except perhaps for the unusual recruit intent on joining one of the smaller services, such as the Air Force, that had not already been offering short-term enlistment options. The DOD further marginalized the program by assigning only an insignificant handful of slots for this new breed of recruit, insuring that there would be far too few of them to have any effect in making the military more


243. The National Call to Service proposal was also opposed by the Non-Commissioned Officers Association (NCOA), a lobbying organization for former military enlisted personnel. “With no apparent feedback from the various services and a generally negative response from the Association’s members, NCOA believes that this program needs further analysis to determine its long-term effects on the services and their recruiting practices.” FY 2003 Appropriations: Hearing Before the Subcomm. on Defense of the Senate Appropriations Comm., 108th Cong. (2002) (statement of Kimberlee D. Vockel, Director of Legislative Affairs, Non-Commissioned Officers Association), available at 2002 WL 20318011.
representative of civilian society or in diminishing the civil-military gap. Why isn’t the military interested in recruiting proposals that have the potential for real impact?

The answer is that the military and its civilian leadership have a greater interest in maintaining the military as an ideologically and politically unrepresentative institution. Unfortunately, even those who craft legislation specifically designed to increase the military’s representativeness seem not to understand the fundamental nature of the resistance. To the extent initiatives like the National Call to Service program remove any barriers to a more representative military—and it is unlikely the new program does—they remove the wrong ones. I disagree in part with Professor Charles Moskos when he says that a commitment to college education is the primary factor that interferes with military recruitment as it operates today. College education is certainly an important part of the equation that separates those with propensity for military service from those without it, but I believe the college variable is confounded with a much more powerful and constitutionally significant determinant. Young people are self-selecting into or away from military service in response to the military’s conscious effort to recruit on the basis of political partisanship and social conservatism, in particular on the basis of those strains of partisanship and conservatism that center on issues of constitutional equality and constitutional resistance. Young people are choosing to join or to avoid the military on the basis of perceived ideological compatibility with an institution that has disregarded its constitutional obligations to be representative of the society from which it draws its members and to maintain its political neutrality with respect to its civilian principals.

Military recruitment proposals that reduce the impact of self-selection by establishing a draft for which conscripts are universally eligible, even if they are not universally called, will always be the most suspect because they strike at the very mechanism that maintains the military’s cultural insularity. When the proposal also includes women within the universe of people with an obligation to defend the nation, as did Representative Rangel’s Universal National Service Act of 2003, mere opposition moves to another level, escalating into misrepresentation and irrational bluster. Those who rely on the existence of a civil-military gap realize that it would be impossible to preserve the military institution as an enclave of political partisanship, moral superiority, and constitutional resistance if women were responsible for defense of country on the same basis as men. Any truly universal draft obligation or eligibility for both men and women will be opposed by
WHY PROGRESSIVES LOST THE WAR

those with a vested interest in the present nature of the all-volunteer force and the civilian-military divide. Even Professor Moskos, normally respectful of women’s military service, was careful to distinguish between conscription-based and volunteer-based recruitment when assessing the obligation that women should have for national defense. He believed it was inappropriate to draft women for military service, although he was willing to support drafting them for civilian jobs in homeland security or community service.\textsuperscript{244} The only possible explanation for drawing a line between similar duties in and out of uniform is the desire to preserve the military as a comfortable enclave for traditional definitions of women’s constitutional roles.\textsuperscript{245}

Only if three factors converge in a single recruiting initiative—an obligation for conscripted national service, full military status, and the inclusion of women—will opposition peg off the end of the scale. Remove any one of them, and the threat to maintenance of the civil-military gap and preservation of the military as a zone of constitutional immunity will be diminished. Representative Rangel’s Universal National Service Act of 2003 combined all three and received the commensurate off-the-scale response. Representative Smith’s Universal Military Training and Service Act of 2001 touched on only a single factor, the mandatory nature of conscription for training. Conscription, even if it applies only to men, does have the potential to trigger resistance because it would upset the ideological self-selection of the all-volunteer force to some degree. However, these conscripts would not really be in the military, and they most certainly would not be female. These men would be trained briefly and then sent home, and so the bill, never a serious proposal to begin with, could safely be ignored.

The enacted National Call to Service program registered on two factors under the equation, but avoided the most powerful one: the involuntary conscription that would interfere with the ideologically self-selected nature of the all-volunteer military. National Call to Service participants are full members of the military serving in the same uniform and performing the same duties as their “regular” colleagues, and both men and women are eligible to volunteer for the program’s slightly shorter terms of enlistment. These parameters, however, also describe the state of the current all-volunteer military. What is most critical to maintenance of the status quo of civil-military relations is the

\textsuperscript{244} See Moskos & Glastris, supra note 226.
\textsuperscript{245} No one can seriously contend that the asserted factual foundation for Rostker v. Goldberg, 453 U.S. 57 (1981)—that women would be of no utility to the military in the event of a draft—still exists, if it ever did. See supra note 93 (discussing the reasoning of Rostker v. Goldberg).
preservation of the same recruiting mechanism that both permits and encourages ideological and partisan self-selection into military service, and the enactment was successful in that respect. Particularly because the National Call to Service program offers little incentive not already offered by the military, the program is unlikely to enlist volunteers that differ in any significant respect from recruits the military already draws.

The only way to achieve a more ideologically and politically representative military, one that is committed to its constitutional obligations of political neutrality and subordination to civilian control, is to break the connection between the military's ideological appeal and a prospective recruit's ideological self-selection. The military dragged its feet on the National Call to Service program, shunting the initiative into practical irrelevance, at least in part, I believe, because it feared this connection would be weakened if fewer recruits chose military service on the basis of perceived ideological compatibility. The National Call to Service program originally envisioned exactly the kind of servicemember the all-volunteer military has little interest in: the enlistee that former Secretary of the Navy John Lehman referred to as "disruptive, irreverent, unorthodox, and renewing."246 This enlistee was more likely to be politically and ideologically representative of civilian society because he or she was more likely to enlist for reasons that were independent of politics or ideology. Only if the connection between political partisanship, conservative ideology, and military service is severed can we have a reasonable expectation that the military will meet its constitutional obligations. If the connection remains, the risk to civil-military relations and to robust civilian control of the military will persist.

If the argument is stated in more direct and human terms, rather than in the context of broader constitutional ideals, the message is even more compelling. If the doctrine of judicial deference to the military and to its congressional governance permits the military to be used as a platform for resistance to constitutional ideals, then young people who support those constitutional ideals will not view military service as a responsibility that all have some obligation to carry. When the military uses its constitutional autonomy to diminish the status of women in ways that would not be permitted in civilian life—and does so even though it harms military effectiveness—it would be ignoring reality to believe it has no effect on who chooses to join the military. When the military uses its constitutional autonomy to teach young people that they should fear

246. See Lehman, supra note 199.
and despise their gay colleagues—and does so even though it harms military effectiveness—it will have an effect on who chooses to join the military.

There may be a correlation between a commitment to college education and a commitment to a constitutional equality that protects those without majority influence. Perhaps the college-bound are disproportionally less likely to be attracted to an all-volunteer military that marginalizes itself from civilian society on the basis of resistance to the Constitution. A focus on college attendance itself, however, as the factor that directly makes or breaks propensity for military service is one step removed from the principal cause of the civil-military gap. The gap was not created by an educational divide, but by an ideological divide. It is ironic that we find ourselves in much the same position with respect to college attendance and military service that we were in a generation ago. During most of the Vietnam War, the government offered deferments from military service for college attendance, creating a cultural and educational divide that was ultimately perceived as the most inequitable aspect of the military draft. Today, those who are invested in the cultural and political insularity of the all-volunteer force resist initiatives that would bring more college-educated youth into the military, instead preferring to maintain a system that tends in its effect to exclude the educationally advantaged, even if it no longer does so by law. Ironically, we have achieved the exemption of the elite from military service by other means, but for a purpose that is much more constitutionally corrosive.

CONCLUSION

In the late 1990s, the United States Army became extremely concerned when voluntary attrition rates among its captains soared to an all-time high. These junior but experienced officers were choosing to leave military service at an alarming rate once they had completed their initial terms of obligated service. Because the military, obviously, only promotes from within, the unexpectedly high rate of departure among a particular cohort of officers had the potential to inflict great harm on the strength of military leadership for as long as two decades.

247. See Leonard Wong, Generations Apart: Xers and Boomers in the Officer Corps (Strategic Studies Institute, U.S. Army War College, 2000), at http://carlisle-www.army.mil/ssi/pubs.html (studying the generational differences between officers born during the years 1960-80 (the "Xers") and those born during the years 1943-60 (the "Boomers"); see also Robert Suro, Captains' Exodus Has Army Fearing for Future, WASH. POST, Oct. 16, 2000, at A2.
into the future. One experienced researcher suggested that a lost sense of military professionalism was at the root of the problem. He argued that the most effective way to increase loyalty and retention within the junior officer corps would be to reinforce the professional and institutional aspects of military service instead of the occupational or careerist: “If the Army can offer the camaraderie and cohesion desired by Generation X officers (and often lacking in the civilian world), then Xers will stay regardless of the economic situation.”

Researchers failed to consider, however, whether retention of junior officers was declining not as a result of too little military professionalism, but as a result of the wrong kind of military professionalism. The face of military professionalism today is grounded in political partisanship and social conservatism, not traditional military values. This country does not need a more “professional” military when professionalism is defined in terms of the contemporary civil-military divide rather than in terms of a traditional ethic of political neutrality and subordination to civilian control. Our problem is not that we have an “occupational” military; our problem is that we have an institutional military that has developed constitutionally unhealthy values and norms. It is the worst of both worlds. The all-volunteer military of the last generation not only has become distant from civilian society, but it has defined its separateness in ways that severely undermine the constitutional health of civil-military relations.

In today’s military, professionalism is too often defined in terms of denigration of and lack of loyalty to others, including, most devastatingly, fellow servicemembers. When an institution’s sense of professionalism is defined in terms of resistance to constitutional values of equality, military cohesion is inevitably diminished. Constitutional resistance creates wedges within the community of servicemembers, and it takes its toll on the very sense of military community that researchers believe must be strengthened to increase retention. When an institution’s sense of professionalism is defined in terms of moral superiority, moreover, servicemembers are obliquely encouraged to maintain that superiority by judging their fellow Americans, and some of their colleagues, to be less than worthy for military service.

Military policies and practices, formal and informal, that fail to respect constitutional values of equality inflict great damage on military

248. WONG, supra note 247, at 20. For a discussion of the occupational/institutional theoretical debate within the academic study of the military, see Charles Moskos, From Institution to Occupation: Trends in Military Organization, 4 ARMED FORCES & SOC’Y 41 (1977).
effectiveness because it is impossible for servicemembers to turn a commitment to unit cohesion on and off repeatedly, supporting some colleagues and undermining others. The military was once a place in which the principal element of cohesion was an understanding that all wore the same green or blue uniform, and that alone was enough. As a result of the civil-military divide that has developed in the all-volunteer era, however, we ask servicemembers to be loyal to one another in an atmosphere that diminishes some and elevates others on the basis of socially conservative and politically partisan judgments of merit. Loyalty and cohesion can only be diminished under those circumstances. I believe retention of junior officers is declining because they eventually become disillusioned with an institution that values an allegiance to ideology more than it values an allegiance to its people, even when the ideology happens to cut in their favor.

So what should be done? The civil-military gap that developed as a result of transition to the all-volunteer force has been corrosive to civil-military relations, to the strength of civilian control of the military under the Constitution, to constitutional values of equality, and even to military effectiveness itself. We must seriously consider whether an all-volunteer military is consistent with a constitutionally sound relationship between the military and civilian society. Conscription for military service offers, perhaps counterintuitively, the benefit of tempering the military's influence on civilian society, particularly when the military's presence within civilian society is conspicuous, as it is today. When we instead allow the military to become a separatist institution that is unrepresentative of, distant from, and constitutionally unaccountable to the greater society, we lose the democratic component that civilian control of the military under the Constitution seems to assume. Unlike the patriotism of flag decals, a true constitutional patriotism is found in a civilian society that has a connection with military service strong enough to enable its citizens to contribute to the constitutional responsibility of civilian control.