

**FIDUCIARY DUTY, HONOR, COUNTRY:  
DIAGNOSING THE HEALTH OF STRATEGIC CIVIL-MILITARY  
RELATIONSHIPS WITH THE LAW OF AGENCY**

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## Abstract

“Theirs not to reason why/ theirs but to do and die.”<sup>1</sup> Tennyson wrote of the futile charge of a British brigade during the Crimean War, but it speaks just as well of the historical tension between civilian political leadership and the military it commands. This tension between those who “reason why” about the employment of armed force and those that “do and die” creates two complimentary concerns in American politics: when does the military elite become too political or partisan? Or, are the political elites too involved in tactical matters best left to the uniformed experts?<sup>2</sup> Surprisingly, there is no way to currently answer either of those questions. Without clear answers to these concerns, this tension creates an unabated source of friction and frustration in American civil-military politics: the inability to distinguish between events that signal *symptoms* of unhealthy civil-military relationships from those events that are actually *remedies* for such conflict. This, in turn, means there is no objective way to diagnose the health of a strategic civil-military relationship.

This frustration, at its root, is a legal problem even if infrequently studied or described in such terms. It is a legal problem because it is fundamentally a fight over rights, authorities, and powers shared or divided between two very different kinds of parties. It is a legal problem because of its Constitutional origins, and because laws have attempted in the past to engineer the lanes in which these two parties drive. The animating concern has

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<sup>1</sup> Alfred, Lord Tennyson, *The Charge of the Light Brigade* (1854), POETRYFOUNDATION.ORG, <http://www.poetryfoundation.org/poem/174586> (last visited March 19, 2015).

<sup>2</sup> Gordon A. Craig, *The Political Leader as Strategist*, in MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE 481, 482 (Peter Paret ed., 1986) [hereinafter Craig, *Political Leader as Strategist*].

always been the feared *coup d'état*.<sup>3</sup> However, the effect has been anything but uniform. History is replete with various prescriptions for firm, even if obtrusive, civilian control under a theory that all of war is politics anyway, or prescriptions for leaving the military's hands untied under a theory that a professionally-educated warrior caste must not be micromanaged to death by civilians.<sup>4</sup>

Because civilian control of the armed forces is largely taken for granted in the United States, historically free from *coup d'états*, there is an undiagnosed or understudied element to the expected tension between strategic civilian and military policy-makers. These unequal partners tend to interact continuously in ways that leave one or the other directly (or perceived to be) disadvantaged, mistrusted, ignored, or recklessly employed. Such tensions risk unstable and unpredictable policy-making. As one prominent scholar has noted, “[t]he stakes are so high [and] the gaps in mutual understanding so stark [that] these relationships merit close attention . . . [t]hese peculiarities and conditions are unique and extreme, and they produce relationships far more complicated and tense than either citizen or soldier may expect.”<sup>5</sup> Scholars, pundits, and the actual participants in these relationships, looking only at these harmful aftershocks, however, may misrepresent the underlying concerns and result in misdiagnosing a supposed “civil-military crisis.”

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<sup>3</sup> A *coup d'état* is a form of domestic military intervention involving a planned effort by military elites to seize national power from the incumbent political elites. It is generally less expansive in effect and participation than a national “revolution” and usually does not involve large elements of the mass military. See REBECCA L. SCHIFF, *THE MILITARY AND DOMESTIC POLITICS: A CONCORDANCE THEORY OF CIVIL-MILITARY RELATIONS* 21 (2009) [hereinafter SCHIFF, *A CONCORDANCE THEORY*]; see also Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, *PARAMETERS*, Winter 2011-12 (reprint from Winter 1992-93), at 107.

<sup>4</sup> ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* 2-3 (2002) [hereinafter COHEN, *SUPREME COMMAND*].

<sup>5</sup> *Id.* at 2.

Misdiagnosis is as persistent a risk as these recurring aftershocks. It is recognized by the academic field of civil-military relations traditionally dominated by history, sociology, and political science.<sup>6</sup> However, these studies reveal an apparent gap. They lack objective criteria or published norms for assessing the relative health of these relationships in context. Despite its fundamental nature as a legal challenge, neither law nor doctrine fills in this gap with practical advice or standards for the parties to these relationships. Therefore, this thesis offers a jurisprudential approach by using a form of legal reasoning to apply a legal concept and propose a legal change in order to suggest that such criteria are both desirable and relatively achievable.

This thesis will, first, investigate the Constitution, statutes, case law, regulations, and military doctrine. Doing so will demonstrate that none of these sources provide current practitioners adequate norms, or the public an objective set of expectations, on which to diagnose the health of American strategic civil-military relationships in context. Second, it will survey the landscape of significant theoretical approaches to American civil-military relations, revealing prospective hints at how such norms and expectations might be uncovered. Third, material evidence from relevant civil-military “choice architects”<sup>7</sup>

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<sup>6</sup> One outlier to this general academic trend is John Yoo, *Administration of War*, 58 DUKE L. J. 2277 (2009). Professor Yoo applies rational actor-based agency theory, developed for civil-military relations theory by political scientist Peter Feaver (*see infra* Part II.C.4). Yoo suggests that general administrative law neglects the study of civil-military relations, but that administrative law scholars ought to study it as if it were any other constitutional and statutory interpretation problem involving the separate powers of the legislative and executive branches (“civilian Control of the military is perhaps the most important principle of the American constitutional system of government”). *Id.* at 2281. Yoo asserts that looking to government “agencies” such as the Armed Services, through a principal-agent lens, may aid the effort to re-impose proper civilian control over a “shirking” military with an unfortunate “growing policy independence.” *Id.* at 2292. Yoo’s study, as distinguished from this thesis, does not apply fiduciary duties derived from the “law of agency,” and does not address challenges to diagnosing the health of strategic civil-military relationships—it is silent on the question of whether specific “crises” are really symptoms of a pathological relationships.

<sup>7</sup> This term of art generally describes those decision-makers and their advisors who attempt to influence strategic choices through tacit manipulation of data, arguments, and evidence to help “construct” policy. *See infra* Appendix B.

demonstrates that they already behave according to principal-agent norms. Therefore, this thesis suggests that the civilian-as-principal and officer-as-agent relationship might be analogized to that of the client-as-principal and attorney-as-agent relationship. In the latter, a code of professional conduct and fiduciary responsibility sets the key expectations, norms, and responsibilities. These in turn aid in distinguishing the healthy, sound relationships between attorneys and clients from the pathologically unhealthy—those which are undesirable by society and unprofitable to the parties themselves. Adopting this paradigm of expectations, norms, and responsibilities from the law of agency can provide a mutual advantage to the strategic civil-military relationship.

A jurisprudential strategy is a reasonable extension from the current leading scholarly approaches in the study of civil-military relationships. By applying concepts from the law of agency, this strategy returns the contentious subject back to its legal roots, and yields both a way to diagnose apparent ailments and a practical treatment: the Goldwater-Nichols Defense Reorganization Act<sup>8</sup> is an appropriate statutory base on which to erect a “code-like” register of relationship norms between the senior strategic elites for whom the Act already imposes a division of labor.<sup>9</sup>

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<sup>8</sup> Goldwater-Nichols Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in scattered sections of 10 U.S.C., especially 10 U.S.C. §§ 151-155 (relating to the Chairman and Vice Chairman of the Joint Chiefs of Staff and the Joint Staff) and 161-166 (relating to the Unified Combatant Commands)) [hereinafter Goldwater-Nichols Act]. For an explanation of the Act’s history and purpose, *see infra* Part II.B.2.

<sup>9</sup> *See infra* Appendix A.

## Table of Contents

<b>I. Introduction .....</b>	<b>1</b>
A. The Strategic Civil-Military Relationship Problem .....	3
B. The Scholarship Gap: the Inability to Diagnose Poor Civil-Military Relationships ....	10
C. Applying the Law of Agency and its Implications for the Strategic Civil-Military Relationship.....	16
<b>II. Background .....</b>	<b>18</b>
A. Strategic Civil-Military Relationship “Crises” in Two Vignettes.....	18
B. Civil-Military Relations: What the Law Does (Not) Say .....	24
1. The Constitution Structures Civil-Military Relations .....	24
2. Legislation Organizes Civil-Military Relations .....	31
3. Case Law Remains Silent on Civil-Military Relations .....	45
4. Administrative Regulations Focus on Undue Personal Gain, not Civil-Military Relations .....	55
5. Military Doctrine Looks Down and In, not Up and Out .....	59
C. Civil-Military Relations Theory: Surveying the Field .....	67
1. Huntington, Professionalism, and Two Forms of Control .....	71
2. Janowitz, Civil-Military Fusion, and the Military as a Pressure Group.....	75
3. Cohen and Unequal Partnerships .....	77
4. Feaver, Agency, and Rational Actors.....	81
D. Summary .....	87
<b>III. From Agency to Norms to Diagnosis .....</b>	<b>89</b>
A. Jurisprudential Agency.....	92
B. The Fingerprints of Agency.....	97
C. Codes of Professional Responsibility as Diagnostic Devices .....	103
1. Scope of Responsibility and Authority .....	106

2. The Agent as Advisor.....	107
3. Confidentiality.....	108
4. Candor When the Organization is the Client/Principal.....	109
5. Loyalty, Without Mission-Disruption.....	112
D. Application.....	113
1. “Revolt of the Admirals”.....	114
2. Candor and Congress.....	118
E. Amending the Goldwater-Nichols Act.....	121
<b>IV. Conclusion.....</b>	<b>124</b>
<b>Appendix A. Example Draft Text of an Amendment.....</b>	<b>A-1</b>
<b>Appendix B. Strategic Civil-Military Relationships: Cast of Characters.....</b>	<b>B-1</b>
<b>Appendix C. Future Lines of Effort.....</b>	<b>C-1</b>

## I. Introduction

*The great thing about an Army officer is that he does what you tell him to do.*<sup>10</sup>

*The particulars of your plans I neither know, or seek to know. You are vigilant and self-reliant; and, pleased with this, I wish not to obtrude any constraints or restraints upon you.*<sup>11</sup>

*No major proposal for war can be worked out in ignorance of political factors; and when people talk, as they often do, about harmful political influence in the management of war, they are not really saying what they mean. Their quarrel is with the policy itself, not with its influence. If the policy is right—that is, successful—every intentional effect it has on the conduct of war can only be to the good.*<sup>12</sup>

Finding a common theme among Theodore Roosevelt, Abraham Lincoln, and Carl von Clausewitz is usually challenging. Their attitudes, however, on the complicated, contentious relationships between politicians and military leaders, revealed in these quotes, reflect the most conventional attitudes of participants in American strategic civil-military relationships. The first, coming from Roosevelt, reflects the presumption of military subservience to civil authority. The fundamental source most often cited for this axiom is the U.S. Constitution,<sup>13</sup> and those duties are reflected by the officer's oath of office.<sup>14</sup> The

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<sup>10</sup> Theodore Roosevelt, *quoted in* MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* 379 (1960) [hereinafter, JANOWITZ, *THE PROFESSIONAL SOLDIER*]. For a modern version of this sentiment, consider retired Lieutenant General Daniel Bolger's reflection on the current prevailing military views on the civil-military relationship: "[c]ivilian control of the military means the suits propose and the uniforms dispose . . . those on active duty almost always kept their opinions private [and] gave their views to the civilian officials in confidence behind closed doors." DANIEL P. BOLGER, *WHY WE LOST: A GENERAL'S INSIDE ACCOUNT OF THE IRAQ AND AFGHANISTAN WARS* 423 (2014) [hereinafter, BOLGER, *WHY WE LOST*].

<sup>11</sup> Abraham Lincoln to Lieutenant General U.S. Grant, April 30, 1864, *quoted in* LINCOLN ON WAR 244 (Harold Holzer ed., 2011).

<sup>12</sup> CARL VON CLAUSEWITZ, *ON WAR* 608 (Michael Howard, Peter Paret eds., trans., Princeton University Press 1984) (1832).

<sup>13</sup> *See infra* Part II.B.1 and Part III.B.



second quote, in a letter from President Lincoln to General Ulysses S. Grant, reflects a belief that fewer political “restraints” ought to be imposed on competent military leaders during the exigencies of war, a common belief that some scholars have begun to counter with contrary historical evidence.<sup>15</sup> The third, coming from Prussian military philosopher Clausewitz in the early Nineteenth Century, foreshadows the contemporary view that the respective fields of politics, policy, and war necessarily merge.<sup>16</sup> These quotes poignantly illustrate that the stresses in strategic civil-military relationship dynamics result from two fundamental causes. First, there is no consensus about whether all three views are simultaneously true or, if not, which of these views is, or should be, dominant in American politics or reflected in the law. Second, and in part because there is no consensus, there is no objective basis upon which to determine if the elite parties to these relationships are engaged in conduct that is unhealthy for a democracy or for the fighting in which it engages.

Part I.A of this thesis will sketch the nature of the strategic civil-military relationship problem, identifying examples of apparent conflict from recent history, and briefly describe two perspectives presumed to be irreconcilable: that such civil-military conflict is common and difficult to judge, and, second, that such conflict—*because it is common*—is a necessary and healthy aspect of American government. Part I.B will sketch the nature of the problem

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<sup>14</sup> See *infra* Part II.B.2. See also Barbara W. Tuchman, *Generalship*, PARAMETERS, Winter 2010-11, at 11, 20 (reprinting speech delivered at the U.S. Army War College, April 3, 1972):

Traditionally, the American Army has been, and consciously has considered itself, the neutral instrument of state policy . . . [and] [w]hen it is ordered into action, the Army does not ask “Why?” or “What for?” In the past that has been a fundamental presumption.

<sup>15</sup> See *infra* Part II.C.3 (reviewing the arguments of Eliot Cohen).

<sup>16</sup> See, e.g., U.S. DEP’T OF NAVY, MARINE CORPS DOCTRINE PUBLICATION (MCDP) 1, WARFIGHTING 23-25 (20 June 1997), available at <https://www.doctrine.usmc.mil/signpubs/mcdp1.pdf>; see also GIDEON ROSE, HOW WARS END: WHY WE ALWAYS FIGHT THE LAST BATTLE 3 (2010) [hereinafter ROSE, HOW WARS END], and COLIN S. GRAY, MODERN STRATEGY 30, 55 (1999), and LAWRENCE FREEDMAN, STRATEGY: A HISTORY 86 (2013).

addressed in this thesis: a critical lack of a standard from which to diagnose these relationships, distinguishing the healthy from the pathological. Finally, Part I.C will sketch the general thesis: the application of a jurisprudential agency framework to the strategic civil-military relationship, followed by the importing of key concepts akin to code of professional responsibility into existing federal law. Consequently, these two perspectives are reconcilable. Common civil-military relationship conflict can be both easy to judge and a healthy aspect of American politics.

#### A. The Strategic Civil-Military Relationship Problem

I am here in a terrible place—the enemy have from 3 to 4 times my force—the Presdt [sic] is an idiot, the old General in his dotage—they cannot or will not see the true state of affairs. Most of my troops are demoralized by the defeat at Bull Run, some [regiments] even mutinous—I have probably stopped that—but you see my position is not pleasant . . . I am weary of all this. I have no ambition in the present affairs—only wish to save my country—& find the incapables around me will not permit it!<sup>17</sup>

Three weeks after the first major battle of the American Civil War, at Bull Run, Union Major General George McClellan wrote this letter to his wife, Mary Ellen.<sup>18</sup> Though Mary Ellen likely supported her melancholic husband, it is doubtful that either she or the general understood how his plaintive, private note illustrates an important aspect of American democracy that continues today—the temporary, but tempestuous, marriage of civilian policy-maker and military leader.<sup>19</sup>

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<sup>17</sup> THE CIVIL WAR PAPERS OF GEORGE B. MCCLELLAN 85-86 (Stephen W. Sears ed., 1992) [hereinafter MCCLELLAN PAPERS]. The “old General” to whom he referred was General-in-Chief of the Army, Brevet Lieutenant General Winfield Scott. In an earlier letter home, he expressed his belief that Scott was “either a traitor or an incompetent.” *Id.* at 81 (letter dated August 9, 1861).

<sup>18</sup> *Id.*

<sup>19</sup> Civil War historian Ethan S. Rafuse would consider this letter as “private grouching that should be treated as no more than that.” Ethan S. Rafuse, *General McClellan and the Politicians Revisited*, PARAMETERS, Summer

Among the consequences of American foreign policy since the terrorist attacks on September 11, 2001, senior civilian and military strategic decision-makers<sup>20</sup> have suffered, or have appeared to suffer, from the repetitive straining of their professional relationships. For example, senior civilian appointees in the Department of Defense publically criticized General Eric Shinseki, then Army Chief of Staff, for answering a question during a Senate Armed Services Committee hearing that departed from the Bush administration's asserted number of troops required to stabilize Iraq after its military defeat.<sup>21</sup> A polarizing Secretary of Defense, Donald Rumsfeld, was seemingly intent on using the wars in Iraq and Afghanistan as proving ground for his views on modernizing (“transforming”) the military enterprise despite battlefield conditions that instead came to justify a high-manpower counterinsurgency strategy.<sup>22</sup> President George W. Bush replaced the “embattled” and heavily criticized Rumsfeld with Robert Gates, after his Republican Party lost its majority in

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2012, at 71, 83, n. 18. While this letter never made a public appearance, other conduct reveals that this “grousing” was symptomatic of a much more malignant and lifelong “disdain for politicians” (notwithstanding that McClellan ran for President in 1864). *Id.* at 74.

<sup>20</sup> By “senior civilian and military strategic decision-makers,” this thesis generally means two populations: (1) civilian elected and appointed officials in the federal government, who—by virtue of the specific office or by their scope of responsibilities—affect U.S. national security, and (2) active duty military personnel, usually of the rank of Lieutenant General or General (Army, Air Force, Marine Corps) or Vice Admiral or Admiral (Navy), in official duty positions in which their responsibilities include directly advising the civilians described above and are the key leaders of the institutional Armed Services (e.g., the Chief of Staff of the Army) or commanders of organizations in the direct chain-of-command with the President and Secretary of Defense (e.g., Commanders of Unified Combatant Commands). *See also infra* Appendix B.

<sup>21</sup> Eric Schmitt, *Threats and Responses: Military Spending; Pentagon Contradicts General On Iraq Occupation Force's Size*, N.Y. TIMES, Feb. 28, 2003, <http://www.nytimes.com/2003/02/28/us/threats-responses-military-spending-pentagon-contradicts-general-iraq-occupation.html>.

<sup>22</sup> Donald H. Rumsfeld, *Transforming the Military*, FOREIGN AFFAIRS (May/June 2002), <http://www.foreignaffairs.com/articles/58020/donald-h-rumsfeld/transforming-the-military>. In an effort to impose strict civilian control over the “transformation” of the defense enterprise, some scholars assert that he deliberately muted the voices of his senior military leaders—whome he considered a “rival political faction”—in order to intentionally disrupt a bureaucracy he viewed as a roadblock to new ideas, accountability, and military effectiveness. MATTHEW MOTEN, *PRESIDENTS & THEIR GENERALS: AN AMERICAN HISTORY OF COMMAND IN WAR* 345-47 (2014) [hereinafter MOTEN, *PRESIDENTS & THEIR GENERALS*].

congressional mid-term elections.<sup>23</sup> In 2007, after nearly three years in Iraq, and in his first appearance before Congress as the Army Chief of Staff, General George Casey stated unambiguously that his Service was “out of balance”—that it could not accomplish all it was being tasked or was expected to do.<sup>24</sup> This candid admission, at odds with the Commander-in-Chief’s wartime expectation, was remarkable if only because General Casey personally prompted the testimony himself—he was not asked by Congress for his opinion.<sup>25</sup>

Real or apparent conflict and tension did not abate with Barack Obama’s election in 2008. Two consecutive commanding generals in Afghanistan, David McKiernan<sup>26</sup> and Stanley McChrystal,<sup>27</sup> were asked to resign in the first two years of Obama’s initial term in office. Admiral William Fallon, the Combatant Commander overseeing two campaigns in the Middle East, also resigned over his tendency to publically discuss his strategic preferences despite knowing them to be at odds with the Administration’s view.<sup>28</sup> Chuck Hagel resigned from his post as Secretary of Defense amid suspicion that his views on intervention in Syria were also unaligned with the rest of the Obama Administration, despite

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<sup>23</sup> Michael A. Fletcher & Peter Baker, *Bush Ousts Embattled Rumsfeld; Democrats Near Control of Senate*, WASH. POST, Nov. 9, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/08/AR20061108011801180.html>.

<sup>24</sup> *Army Strategic Initiatives, Hearing Before the Committee on the Armed Services, United States House of Representatives*, 110<sup>th</sup> Cong. (Sept. 26, 2007) (statement of General George Casey), <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg44632/html/CHRG-110hhrg44632.htm>.

<sup>25</sup> Bryan Bender, *Army is worn too thin, warns general*, THE BOSTON GLOBE, Sep. 27, 2007, [http://www.boston.com/news/nation/washington/articles/2007/09/27/army\\_is\\_worn\\_too\\_thin\\_says\\_general/](http://www.boston.com/news/nation/washington/articles/2007/09/27/army_is_worn_too_thin_says_general/).

<sup>26</sup> Ann Scott Tyson, *Gen. David McKiernan Ousted as Top U.S. Commander in Afghanistan*, WASH. POST, May 12, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/11/AR2009051101864.html>.

<sup>27</sup> Helene Cooper & David Sanger, *Obama Says Afghan Policy Won’t Change After Dismissal*, N.Y. TIMES, June 23, 2010, [http://www.nytimes.com/2010/06/24/us/politics/24mcchrystal.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/06/24/us/politics/24mcchrystal.html?pagewanted=all&_r=0).

<sup>28</sup> Admiral Fallon’s resignation came on the heels of an article in the popular magazine *Esquire*, depicting him in heroic terms as blocking efforts and apparent desire in the George W. Bush Administration to instigate conflict with Iran. See Thomas P.M. Barnett, *The Man Between War and Peace*, ESQUIRE (April 2008), <http://www.esquire.com/news-politics/a4284/fox-fallon/>.

armed conflict in Ukraine, belligerent tension with Russia, Islamic State’s rapid advance and occupation in parts of Syria and Iraq, a pandemic threatening in Western Africa, and other lesser-known threats to American security.<sup>29</sup> It is a fair recap to conclude that the last decade of strategic civil-military relations has been marred by misplaced trust, miscommunication, candor when and where it was inappropriate, and the absence of candor when it was needed the most.<sup>30</sup>

As historian and retired Army officer Matthew Moten recently wrote of modern American political-military relationships, “[t]ension is natural . . . [c]onflict is ubiquitous.”<sup>31</sup> As a result, *unhealthy* conflict should be of concern and distinguished from conflict *per se*,<sup>32</sup> or tension between the strategic military and political elites.<sup>33</sup> Scholars have pointed to subtle dangers to the effective management of national security policy and war-fighting, such as generals who fail to advise about the “incongruence” between policy ends and military

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<sup>29</sup> Helene Cooper, *Hagel Resigns Under Pressure as Global Crises Test Pentagon*, N.Y. TIMES, Nov. 24, 2014, [http://www.nytimes.com/2014/11/25/us/hagel-said-to-be-stepping-down-as-defense-chief-under-pressure.html?\\_r=0](http://www.nytimes.com/2014/11/25/us/hagel-said-to-be-stepping-down-as-defense-chief-under-pressure.html?_r=0).

<sup>30</sup> A recent RAND study surveyed many of the experienced leaders who served in the national security establishment over this period, and arrived at the same conclusion. RAND’s study was focused on describing and assessing the state of decision-making among civilian and military elites during the so-called Global War on Terror, which led to reviewing the quality and pattern of those interactions. For details of the Study, *see infra* Part II.A.

<sup>31</sup> MOTEN, *PRESIDENTS & THEIR GENERALS*, *supra* note 22, at 370.

<sup>32</sup> The early years of the Clinton Administration, for instance, provide an example of what the media and scholars described as substantial and deviant civil-military conflict—a “full blown clash.” *See* Richard H. Kohn, *Coming Soon: A Crisis in Civil-Military Relations*, WORLD AFFAIRS J. (Winter 2008), <http://www.worldaffairsjournal.org/article/coming-soon-crisis-civil-military-relations>; *see also* *Opinion: Who’s in Charge of the Military?* N.Y. TIMES, Jan. 26, 1993, <http://www.nytimes.com/1993/01/26/opinion/who-s-in-charge-of-the-military.html>.

<sup>33</sup> As argued *infra* Part III.C, “unhealthy” can be shorthand for what will be shown to be breaches of common fiduciary duties between civilian principals and military agents.

means.<sup>34</sup> They also see generals' foot-dragging and public dissent, unbridled criticism aimed at politicians and policy-making paralysis.<sup>35</sup> It is possible that these episodes of civil-military strife are really symptoms of a chronic illness: a "lymphoma" as one scholar has described it.<sup>36</sup> They could also be warning signs of an acute wounding—the proverbial stab in the back—to one of the parties, spurred by long neglect and mutual distrust.<sup>37</sup> Alternatively, they may be simply the unavoidable give-and-take of committed and knowledgeable professionals, one constitutionally subordinate to the other, pursuing divergent policy goals in a democracy.<sup>38</sup> Indeed, some successful wartime civilian leaders often micromanaged their subordinate commanders, second-guessed military strategy, and ignored military advice with amateur-like zeal.<sup>39</sup>

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<sup>34</sup> Paul Yingling, *A Failure in Generalship*, ARMED FORCES J., May 1, 2007, <http://www.armedforcesjournal.com/a-failure-in-generalship/> (famously arguing that if a politician fails to provide the military with the means adequate to achieve his or her policy objective, the senior strategic military leader is under an obligation to advise the politician that the tool is simply not in the toolbox, or not sharp enough yet to be any real utility). Thomas Ricks referred to this as a "blistering attack" on the state of current civil-military relations. Thomas E. Ricks, *Army Officer Accuses Generals of 'Intellectual and Moral Failures'*, WASH. POST, Apr. 27, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/26/AR2007042602230.html>. Four years later, Yingling retired from Active Duty as a full Colonel. Paul Yingling, *Why an Army colonel is retiring early—to become a high school teacher*, WASH. POST, Dec. 2, 2011, [http://www.washingtonpost.com/opinions/why-an-army-colonel-is-retiring-early--to-become-a-high-school-teacher/2011/12/02/gIQAB2wAMO\\_story.html](http://www.washingtonpost.com/opinions/why-an-army-colonel-is-retiring-early--to-become-a-high-school-teacher/2011/12/02/gIQAB2wAMO_story.html).

<sup>35</sup> Charles Stevenson, *The Still Nearly Impossible Job of Secretary of Defense*, WAR ON THE ROCKS.COM (November 25, 2014), <http://warontherocks.com/2014/11/the-still-nearly-impossible-job-of-secretary-of-defense/>.

<sup>36</sup> MACKUBIN THOMAS OWENS, US CIVIL-MILITARY RELATIONS AFTER 9/11: RENEGOTIATING THE CIVIL-MILITARY BARGAIN 4 (2011) [hereinafter OWENS, RENEGOTIATING THE BARGAIN].

<sup>37</sup> See, e.g., Frank G. Hoffman, *Dereliction of Duty Redux*, FOREIGN POLICY RESEARCH INSTITUTE.COM (Nov. 1997), <http://www.fpri.org/articles/2007/11/dereliction-duty-redux>; and see H.R. MCMASTER, DERELICTION OF DUTY 5-7 (1997) [hereinafter MCMASTER, DERELICTION OF DUTY] (describing the Kennedy administration's tension with the Joint Chiefs of Staff, exacerbated by the failed Bay of Pigs operation in early 1961).

<sup>38</sup> THOMAS E. RICKS, THE GENERALS: AMERICAN MILITARY COMMAND FROM WORLD WAR II TO TODAY 450 (2013) ("sometimes contentious dialogue is a sign of healthy discourse") [hereinafter RICKS, THE GENERALS].

<sup>39</sup> COHEN, SUPREME COMMAND, *supra* note 4, at 4-8, 208-12. For instance, Secretary of Defense Robert McNamara, emboldened by his successful plan to de-escalate the Cuban Missile Crisis and his dimmed regard for the senior military advice he received, personally managed the details of the early years of the Vietnam War,

Despite a wealth of historical data in which to witness strategic civil-military relationships form, dissolve, and fracture, handicapping proper policy-making and combat operations,<sup>40</sup> some observers steadfastly maintain that all is still well. One such author wrote:

America's military operates comfortably within constitutional notions of separated powers, participating appropriately in defense and national security policymaking with due deference to the principle of civilian control. Indeed, an active and vigorous role by the military in the policy process is and always has been essential to the common defense.<sup>41</sup>

This defense of the status quo is quite reasonable if the assumption that anything short of a *coup d' état* is healthy civil-military relations in operation.<sup>42</sup> Moreover, the Services themselves seem intent on reminding their members and the public that they have always unquestionably remained, and will always remain, subservient to civilian government regardless of party identity, policy disagreement, or personal animosity.<sup>43</sup> If the Services are

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instilling nearly dominant political control over operations and strategy. SAM C. SARKESIAN ET AL., *SOLDIERS, SOCIETY, AND NATIONAL SECURITY* 117-18 (1995) [hereinafter SARKESIAN]. President Lincoln, not satisfied with being lectured by sluggishly-moving General George McClellan on the political objectives of the Civil War, went so far—literally—as to visit his army in the field, personally interrogating several of McClellan's subordinate commanders on a range of subjects, from tactics and logistics to the health of the Union troops and the disposition of the Confederate forces. LINCOLN ON WAR, *supra* note 11, at 139-42. More recently, President George W. Bush's controversial decision in early 2007 to approve the so-called "surge strategy" in Iraq put an additional 30,000 U.S. troops in theater and emphasized population security over training the Iraq security forces, was over the objection and disagreement from key military leaders, including General George Casey (Commander of Multinational Force-Iraq) and Casey's superior, General John Abizaid (Commander of Central Command at the time). Peter D. Feaver, *The Right to Be Right*, INT'L SECURITY (Spring 2011), at 87, 89.

<sup>40</sup> For example, RAND's recent survey of the civil-military strategic decision-making during the combat operations in Iraq and Afghanistan. See *infra* Part II.A.

<sup>41</sup> Colonel Richard D. Hooker, Jr., *Soldiers of the State: Reconsidering American Civil-Military Relations*, PARAMETERS, Winter 2011-12 (reprint from Winter 2003-04), at 1.

<sup>42</sup> PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 7 (2003) [hereinafter FEAVER, ARMED SERVANTS] ("there is still a range of problematic activities in which the military can engage . . . 'solving' the problem of coups does not solve, in the sense of neutralize, the general problem of control on an ongoing basis").

<sup>43</sup> *Infra* Part II.B.5.

addressing the subject of a professional “ethic” themselves,<sup>44</sup> and no serious voice has expressed a concern that a military junta is inevitable, there appears to be no urgent need for a new way to envision the strategic civil-military relationship or spend time detecting symptoms of unhealthy relations.<sup>45</sup>

Not all scholars are so optimistic. Michael Pearlman observes that while pluralism and debate often prevent authoritarianism, they also generate ambiguity and inconsistency.<sup>46</sup> Publishing a prescription for military intervention in *Foreign Affairs*, as General Colin Powell did in 1992,<sup>47</sup> might suggest a general is no longer just implementing policy, but conceiving and determining it in a way that limits options available to a public opinion-sensitive Administration. In contrast, “living deeply in the tactical weeds”<sup>48</sup> might signal that a President, or a key civilian subordinate, has detrimentally emasculated the military because he or she no longer trusts the military expertise or advice being offered.<sup>49</sup> Or, the

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<sup>44</sup> *Infra* Part II.B.5.

<sup>45</sup> Indeed, some argue that the alleged controversies are too ominously portrayed by scholars and journalists anyway. Richard Betts, for example, argues that debates over whether to intervene in a foreign crisis with force empirically depict a military just as cautious and reluctant as civilian policy-making elites. RICHARD K. BETTS, *SOLDIERS, STATESMEN, AND COLD WAR CRISES* 4-5 and Appendix A, Tables A and C (1991) [hereinafter BETTS, *COLD WAR CRISES*]. Richard Hooker argues that the public and academic portrayals of civil-military crises reflect “poor history and even poorer political science” because these tensions are actually “deeply rooted in the American system of separated powers, regulated by strong traditions of subordination.” Richard D. Hooker, Jr., *Soldiers of the State: Reconsidering American Civil-Military Relations*, *supra* note 41, at 2, 6, 11.

<sup>46</sup> PEARLMAN, *WARMAKING AND AMERICAN DEMOCRACY*, *supra* note 38, at 13.

<sup>47</sup> General Colin L. Powell, *U.S. Forces: Challenges Ahead*, *FOREIGN AFFAIRS* (Winter 1992/93), <http://www/cfr.org/world/us-forces-challenges-ahead/p7508>.

<sup>48</sup> BOB WOODWARD, *OBAMA’S WARS* 37 (2010) (paraphrasing a discussion with retired Marine General James Jones had with Barack Obama in October 2008, before his election).

<sup>49</sup> For a comparative example, consider Winston Churchill’s authority and detailed direction of the British Armed Forces, especially in the first years of World War II. Craig, *Political Leader as Strategist*, *supra* note 2, at 499 (“he sent a directive for the conduct of the campaign in the Middle East that was virtually an operations order, including detailed tactical instructions, down to the forward and rear distribution of battalions, and giving minutely detailed orders for the employment of forces”).



*opposite* conclusions may be equally drawn.<sup>50</sup> The next section describes why there is no unambiguous answer, looking at the gap in civil-military relationship studies and practice: the inability to objectively determine whether these and other similar episodes are good, bad, or inconsequential.

## B. The Scholarship Gap: the Inability to Diagnose Poor Civil-Military Relationships

The study of civil-military relations tends to split along several axes: demographic, personality, and operational.<sup>51</sup> When scholars, journalists, and pundits write of a harmful “crisis” or “gap” in modern American civil-military relations, they are typically referring to the perceived divide between military culture and the rest of society,<sup>52</sup> or a fissure between the President or politically-appointed civilian leaders in the defense establishment and uniformed leaders of the armed services,<sup>53</sup> or the gulf between what Congress or the President is willing to allocate to support national security and that which is identified as a

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<sup>50</sup> That two mutually exclusive conclusions can be drawn from the same data is easier to digest when considering the many plausible explanations for tension between strategic civil-military elites. Colin Gray suggests that the magnitude of the ever-present friction is a function of four factors, including a “culture clash,” ignorance of how the other works, their distinct responsibilities, and finally the intrinsic difficulty of “relating military action and intended political consequences.” GRAY, *MODERN STRATEGY*, *supra* note 16, at 58-63.

<sup>51</sup> See, e.g., Eliot A. Cohen, *The Unequal Dialogue: The Theory and Reality of Civil-Military Relations and the Use of Force*, in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* 429, 430 (Peter D. Feaver, Richard H. Kohn eds., 2001) [hereinafter *THE CIVIL-MILITARY GAP*], and see Peter J. Roman & David W. Tarr, *Military Professionalism and Policymaking: Is there a Civil-Military Gap at the Top? If So, Does it Matter?* [hereinafter Roman & Tarr, *Does it Matter?*], in *THE CIVIL-MILITARY GAP*, at 411.

<sup>52</sup> JASON K. DEMPSEY, *OUR ARMY: SOLDIERS, POLITICS, AND AMERICAN CIVIL-MILITARY RELATIONS* (2010) (surveying political participation, attitudes, and social opinions of Army service members); Thomas E. Ricks, *The Widening Gap Between Military and Society*, *THE ATLANTIC MONTHLY*, July 1, 1997, <http://www.theatlantic.com/magazine/archive/1997/07/the-widening-gap-between-military-and-society/306158/>; see also ANDREW J. BACEVICH, *BREACH OF TRUST: HOW AMERICAN FAILED THEIR SOLDIERS AND THEIR COUNTRY* (2013) [hereinafter BACEVICH, *BREACH OF TRUST*].

<sup>53</sup> Charles C. Moskos, Jr., *From Institution to Occupation: Trends in Military Organization*, 4 *ARMED FORCES & SOC’Y* 41 (1977), and see Richard H. Kohn, *The Erosion of Civilian-Control of the Military in the United States Today*, *NAVAL WAR C. REV.*, Summer 2002, at 9, 11-12 [hereinafter Kohn, *Erosion*] (using the metaphor of “two hostile relatives who feared and distrusted each other but realized they had to work together if both were to survive”).

need by its practitioners.<sup>54</sup> Ultimately, these axes reflect three ways of viewing the same fundamental concern: the extent to which civilians remain in control of their military.<sup>55</sup>

There is another civil-military relations gap, at which Robert Gates hints in recounting his time as Secretary of Defense.<sup>56</sup> Unaddressed by its rich theoretical and empirical study and day-to-day practice,<sup>57</sup> this gap is the inability to objectively diagnose a diseased, or at least unhealthy, relationship between these strategic policy-makers. Civil-military studies tend to conclude that there are indicators of “good” or “bad” relationships, but admit that no “simple standard” might do so definitively.<sup>58</sup> Such ambiguity has led to the American public’s confusion when viewing these suspect relationships.<sup>59</sup> Richard Betts wrote that determining if the military’s influence on policy is “too much” or “too little” does *not* vary with context, but rather “can only be a judgment that depends on one’s political

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<sup>54</sup> On the role of Congress as one part of the “civilian” arm of “civilian control,” *see generally* CHARLES A. STEVENSON, *WARRIORS AND POLITICIANS: US CIVIL-MILITARY RELATIONS UNDER STRESS* (2006) [hereinafter STEVENSON, *WARRIORS AND POLITICIANS*].

<sup>55</sup> Suzanne C. Nielson, *Civil-Military Relations Theory and Military Effectiveness*, 10 *PUB. ADMIN. & MGMT* 61, 62 (2005).

<sup>56</sup> ROBERT M. GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR* 83 (2014) [hereinafter GATES, *DUTY MEMOIRS*].

<sup>57</sup> *Infra* Part II.C (summarizing the work of significant past and present scholars in the field of Civil-Military Relations, from Samuel Huntington to Peter Feaver).

<sup>58</sup> Deborah Avant, *Conflicting Indicators of ‘Crisis’ in American Civil-Military Relations*, 24 *ARMED FORCES & SOC’Y*, 375 (Spring 1998).

<sup>59</sup> For instance, after President Truman famously relieved General Douglas MacArthur in Korea for escalating the war beyond the administration’s limited political ambitions, public opinion majorities in the United States still supported the much-admired commanding general. A Gallup Poll in 1946 revealed that Douglas MacArthur was the “most admired” person in the world, among Americans, ahead of Dwight Eisenhower, President Truman, and Eleanor Roosevelt. AMERICAN INSTITUTE OF PUBLIC OPINION, *THE GALLUP POLL: PUBLIC OPINION 1935-1971* 584 (1972), *available at* <http://www.ibiblio.org/pha/Gallup/Gallup.pdf>. Yet, despite their favor, the public supported President Truman’s policy of not attacking China and broadening the war—the express objective of the general they so admired. PEARLMAN, *WARMAKING AND AMERICAN DEMOCRACY*, *supra* note 38, at 16. Upon arriving in San Francisco, a week after being relieved for insubordination, MacArthur was greeted by “hundreds of thousands” of supporters, and a parade in his honor. *Cover page*, *SAN FRANCISCO CHRON.*, Apr. 18, 1951, *available at* <http://www.sfgate.com/bayarea/article/From-the-archives-MacArthur-welcomed-in-S-F-3164481.php#photo-2296939>.

preferences.”<sup>60</sup> Another scholar compared this challenge to that of the Supreme Court’s definition of pornography: maybe we’ll just know [“bad” civil-military relations] when we see it.<sup>61</sup>

From the perspective of either of the actors, or the American public,<sup>62</sup> this gap means that rifts form, tensions build, and relationships break, with adverse consequences following. Budgets, for example, may be slashed, civilian officials may direct policy while ignoring military advice,<sup>63</sup> civil servants may become captured by special interests, senior officers may turn into political advocates, wars that should be won are lost, and wars that should never have happened become inevitable.<sup>64</sup> As described below, these rifts are well-documented in the relationship between American political and military strategy-makers.<sup>65</sup>

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<sup>60</sup> BETTS, *COLD WAR CRISES*, *supra* note 45, at xv; *see also* Jim Golby, Kyle Dropp, & Peter Feaver, *Listening to the Generals: How Military Advice Affects Public Support for the Use of Force*, Center for a New American Security (April 2013), *available at* <http://www.cnas.org/files/documents/publications/CNAS%20Generals%20report%20updated.pdf> (explaining their survey of how American public attitudes shift when military elites make their policy preferences publically known).

<sup>61</sup> Richard H. Kohn, *Out of Control: The Crisis in Civil-Military Relations*, THE NAT’L INT. (Spring 1994), <http://nationalinterest.org/article/out-of-control-the-crisis-in-civil-military-relations-343> [hereinafter Kohn, *Out of Control*] (referencing Justice Potter Stewart’s concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

<sup>62</sup> *See* Lieutenant General (Ret.) Karl W. Eikenberry & David M. Kennedy, *Americans and Their Military, Drifting Apart*, N.Y. TIMES, May 26, 2013, [http://www.nytimes.com/2013/05/27/opinion/americans-and-their-military-drifting-apart.html?\\_r=1&](http://www.nytimes.com/2013/05/27/opinion/americans-and-their-military-drifting-apart.html?_r=1&); *and see* SCHIFF, A CONCORDANCE THEORY, *supra* note 3 at 32-44.

<sup>63</sup> *See, e.g.*, General Thomas D. White, *Strategy and the Defense Intellectuals*, THE SATURDAY EVENING POST, May 4, 1963, at 10 (complaining about the “pipe-smoking, tree-full-of-owls type of so-called professional ‘defense intellectuals’ [who are often] arrogant young professors, mathematicians and other theorists” brought to the Department of Defense by Secretary McNamara). For commentary on how foreign-policy pronouncements by senior military officers may, in the eyes of Congress at least, reduce their credibility as experts even on military-centric matters, *see* Suzanne C. Nielson, *Rules of the Game? The Weinberger Doctrine and the American Use of Force*, in THE FUTURE OF THE ARMY PROFESSION 627, 647 (Lloyd Matthews ed., 2005).

<sup>64</sup> Roman & Tarr, *Does it Matter?*, *supra* note 51, at 411.

<sup>65</sup> *See infra* Appendix B for a definition that narrows that population and will be used throughout this thesis.

Not only are they prevalent in every administration and every period of armed conflict,<sup>66</sup> the framers of the U.S. Constitution anticipated and largely welcomed these kinds of episodes.<sup>67</sup> Though frequent, these contentious issues rarely rouse the American public to express grave concern because American political experience lacks the pressing probability of a *coup d'état*.<sup>68</sup> Given the institutionalized tensions<sup>69</sup> between the political and military elites, a long history of that tension becoming publically observable, and a relationship largely “take[n] for granted” by a “vast majority of Americans,”<sup>70</sup> the obvious question is whether any of this conflict between the top strategists is normatively good, bad, or inconsequential.<sup>71</sup>

The health of these normal and routine interactions is at question because there is no objective standard against which to contrast them, nor universally-accepted expectations and norms.<sup>72</sup> Because there is a difference between dissent and disobedience that “unschooled policy makers or an uninformed population”<sup>73</sup> often fail to see, a frank and “productive

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<sup>66</sup> See generally, COHEN, SUPREME COMMAND, *supra* note 4 (illustrating four wartime politicians: Lincoln, Clemenceau, Churchill, and Ben-Gurion).

<sup>67</sup> See, e.g., THE FEDERALIST NOS. 8, 24, 25, 69 (ALEXANDER HAMILTON); and see U.S. CONST. art I, § 8, and art II, § 2.

<sup>68</sup> MICHAEL C. DESCH, CIVILIAN CONTROL OF THE MILITARY: THE CHANGING SECURITY ENVIRONMENT 3 (1999) [hereinafter DESCH, CHANGING SECURITY ENVIRONMENT]; SCHIFF, A CONCORDANCE THEORY, *supra* note 3, at 19; COHEN, SUPREME COMMAND, *supra* note 4, at 226.

<sup>69</sup> See *infra* Part II.B.1 and B.2.

<sup>70</sup> A.J. Bacevich, *The Paradox of Professionalism: Eisenhower, Ridgway, and the Challenge to Civilian Control, 1953-1955*, 61 J. MIL. HIST. 303, 303 (1997) [hereinafter Bacevich, *Paradox of Professionalism*].

<sup>71</sup> OWENS, RENEGOTIATING THE BARGAIN, *supra* note 36, at 15.

<sup>72</sup> Craig, *Political Leader as Strategist*, in MAKERS OF MODERN STRATEGY, *supra* note 2, at 482 (“it is difficult to frame a theoretical definition of appropriate roles that is not so general as to be meaningless”).

<sup>73</sup> Frank Hoffman, *A New American Military Ethic*, WAR ON THE ROCKS.COM (Aug. 6, 2014), <http://warontherocks.com/2014/08/a-new-american-military-ethic/>.

exchange of views” is, by itself, an insufficient benchmark of healthy relations.<sup>74</sup> The *absence* of such a frank, candid, exchange of views is a similarly insufficient benchmark because, for some analysts, the “ultimate test” of this relationship’s health is not the extent to which policy preferences of one party dominate over the others, but rather the degree to which the relationship overall enables or cripples military effectiveness in war.<sup>75</sup> This *in extremis* perspective, however, may not always be the most relevant: the relationship between civilian and military policy-makers exists regardless of whether troops are deployed in combat. Consequently, strain on those relationships may be caused and aggravated by events unrelated to wartime decision-making and advice.<sup>76</sup>

These episodes have little to do with direct war-time success, yet illustrate profound differences of opinion among the strategic policy-makers and senior military leaders. The only thing civil-military relations theory can say about these episodes is that they certainly

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<sup>74</sup> MOTEN, PRESIDENTS & THEIR GENERALS, *supra* note 22, at 367 (describing a dysfunctional pre-Iraq war civil-military dialogue between Secretary of Defense Rumsfeld and his civilian aides and the senior uniformed leaders of the Services and commanders); *see also* GENERAL (RETIRED) MAXWELL TAYLOR, SWORDS AND PLOWSHARES 252 (1972) (reflecting on his time as the Army Chief of Staff, military representative to the President, and ultimately the Chairman during the beginning of the Vietnam War, and what he believed was the “importance of an intimate, easy relationship, born of friendship and mutual regard, between the president and the Chiefs [and which] is particularly important in the case of the Chairman [of the Joint Chiefs of Staff] . . . the Chairman should be a true believer in the foreign policy and military strategy of the administration which he serves”).

<sup>75</sup> LINDA ROBINSON ET AL., IMPROVING STRATEGIC COMPETENCE: LESSONS FROM 13 YEARS OF WAR (2014), [http://www.rand.org/pubs/research\\_reports/RR816.html](http://www.rand.org/pubs/research_reports/RR816.html) [hereinafter ROBINSON RAND STRATEGIC COMPETENCE STUDY] *and see* BETTS, COLD WAR CRISES, *supra* note 45, at 1; *see also* Allan R. Millett, Williamson Murray & Kenneth H. Watman, *The Effectiveness of Military Organizations*, INT’L SECURITY (Summer 1986), at 37, 37 (observing that “political constraints” on how a military translates allocated resources into fighting power include “national and diplomatic objectives, popular attitudes towards the military, the conditions of engagements, and civilian morale”—in other words, civil-military relations).

<sup>76</sup> For example, one month before the 1992 presidential election, the most publically-respected and influential American flag officer in a generation penned an editorial in *The New York Times* advocating for a restrained deployment of military force into Eastern Europe, and lauding his president for “understand[ing] the proper use of military force” more than any recent administration.” General Colin L. Powell, *Why Generals Get Nervous*, N. Y. TIMES, October 8, 1992, <http://www.nytimes.com/1992/10/08/opinion/why-generals-get-nervous.html>.

depict overt and covert challenges to civilian control of the military. They might reflect the driving influence of personality conflicts,<sup>77</sup> external threats,<sup>78</sup> failure to live up to professional ethos and norms,<sup>79</sup> or the inability of the civilian and military elites to “converge” in agreement on certain essential policy issues.<sup>80</sup> Ultimately, however, current theory provides no way to gauge their relevance or impact in context against some objective standard.<sup>81</sup> Other than looking at the output, like publically-disclosed expressions that may superficially look like conflict, strife, disagreement, balking, ignoring orders, or stonewalling, Michael Desch notes that civil-military relationship scholarship simply does not provide the means for this diagnosis.<sup>82</sup> Historian Andrew Bacevich, too, complains that the political scientists, sociologists, and historians who analyze this subject along certain narrow dimensions give the public:

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<sup>77</sup> The Joint Chiefs of Staff that President Kennedy inherited from Eisenhower faced an administration with a “compartmentalized” personality and an informal “hallway style” of meetings that eschewed the transparency and formal hierarchy of previous national security processes. RICHARD REEVES, *PRESIDENT KENNEDY: PROFILE OF POWER* 19, 94 (1993) [hereinafter, REEVES, *PROFILE OF POWER*]. Far from Ike’s structured National Security Council debates with his generals, Kennedy’s initial handling of the Bay of Pigs operation lacked systemic dialogue between the senior civilian commander-in-chief and his principal military advisors. *Id.* at 102-103. For an overview of President Eisenhower’s national security process and systems, see Raymond Millen, *Cultivating Strategic Thinking: The Eisenhower Model*, *PARAMETERS* (Summer 2012), at 56-70.

<sup>78</sup> DESCH, *CHANGING SECURITY ENVIRONMENT*, *supra* note 68, at 13-14.

<sup>79</sup> COHEN, *SUPREME COMMAND*, *supra* note 4, at 2; see also DON M. SNIDER, *DISSENT AND STRATEGIC LEADERSHIP OF THE MILITARY PROFESSIONS* (2008) (discussing the ethics of dissent by “strategic” leaders in uniform, based on a study of the 2006 public “revolt of the [retired] generals” in opposition to the Iraq war).

<sup>80</sup> REBECCA L. SCHIFF, *A CONCORDANCE THEORY*, *supra* note 3, at 45-47.

<sup>81</sup> The relevance of “context” of civil-military relations is discussed in an Army-sponsored RAND Arroyo Center assessment of the purported “gap” in civil-military relations, as described in both media and academic circles in the 1990s. THOMAS S. SZYANA ET AL., *THE CIVIL-MILITARY GAP IN THE UNITED STATES: DOES IT EXIST, WHY, AND DOES IT MATTER?* 15 (2007), [http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND\\_MG379.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG379.pdf).

<sup>82</sup> DESCH, *CHANGING SECURITY ENVIRONMENT*, *supra* note 68, at 3; see also Marybeth Peterson Ulrich, *Infusing Normative Civil-Military Relations Principles in the Officer Corps*, in *THE FUTURE OF THE ARMY PROFESSION* 655, 658 (Lloyd Matthews ed., 2005) (“there is no commonly accepted theoretical framework upon which to evaluate various civil-military behaviors”).

no salient context in which to evaluate the bickering, suspicion, and machinations that make their way to the surface, there to be reported by journalists who are themselves ill-equipped to interpret their significance . . . [and] [w]ithout such a context, the issue becomes mere news, of no more lasting import than a train wreck.<sup>83</sup>

Neither current law, nor the individual Service regulations, nor military doctrine, provide any objective criteria either.<sup>84</sup> However, the law of agency does have bearing on this subject, and may provide the roadmap for establishing such norms and criteria.

### C. Applying the Law of Agency and its Implications for the Strategic Civil-Military Relationship

This thesis will employ basic concepts from the law of agency to draw an analogy. Just as a lawyer is as an “agent” for his client or “principal” in that he is authorized by another person to act for that person under certain conditions,<sup>85</sup> senior civilian political leaders responsible for national security expect their military advisors and commanders in the field to perform with “utmost good faith, trust, confidence, and candor” and to “act with highest degree of honesty and loyalty.”<sup>86</sup> The civilian policy-making principal demands and creates a *de facto* fiduciary relationship with the senior policy-executing military officer

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<sup>83</sup> Bacevich, *The Paradox of Professionalism*, *supra* note 70, at 304.

<sup>84</sup> Morris Janowitz noted the same more than fifty years ago in his seminal sociological study of the military establishment. Janowitz, *THE PROFESSIONAL SOLDIER*, *supra* note 10, at 138-39 (observing that the military has “never sought to establish principles for limiting the political activities of the military profession as a pressure group on its own behalf”). There is, however, a Department of Defense policy that reminds service members that service itself does not deny them opportunity to engage in their duties as a citizen (e.g., voting, joining and participating in political organizations out of uniform), but does impose various restrictions on individual partisan behavior (e.g., participate in partisan political fundraising activities, and publically advocating for a political candidate, cause, or party). This policy does not address the strategic civil-military relationships discussed here. See Dep’t of Defense Directive (DODD) 1344.10, subject: Political Activities by Members of the Armed Forces, Feb. 19, 2008, [http://www.dod.mil/dodgc/defense\\_ethics/ethics\\_regulation/1344-10.html](http://www.dod.mil/dodgc/defense_ethics/ethics_regulation/1344-10.html).

<sup>85</sup> See *infra* Part III.A.

<sup>86</sup> BLACK’S LAW DICTIONARY 545 (8th ed. 2004) (definition of “fiduciary duty”).

agents.<sup>87</sup> An agency relationship results because the military, individually and collectively, is subject to civilian control, but the civilians must necessarily rely on the special expertise and capability possessed by their military subordinates in order to execute national policy.<sup>88</sup>

By thinking of the relationship in fiduciary terms, agency theory also provides a useful paradigm from which to establish transparent norms and expectations of the civil-military relationship.<sup>89</sup> Duties, such as candor, competence, good faith, and good conduct, will be examined, analogized to the attorney-client model, and applied to the strategic civilian-military relationship. Part II will survey key elements from the United States Constitution, federal statutes, case law, administrative regulations, and military doctrine,<sup>90</sup> demonstrating that these sources of authority are potential ways to measure or diagnose the health of these strategic relationships, but all of which remain missed opportunities to do so. After an overview of basic theoretical approaches to American civil-military relations,<sup>91</sup> Part III will describe evidence from the American armed services themselves that strongly suggest the American military establishment already views itself in agency terms; therefore, the “agency theory” of civil-military relations might be approached like that of the common law,

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<sup>87</sup> *Id.* at 1315 (definition of “fiduciary relationship”).

<sup>88</sup> RESTATEMENT (THIRD) OF AGENCY: DEFINITIONS AND TERMINOLOGY § 1.01 (2006) [hereinafter AGENCY RESTATEMENT]. The “Restatement” is an authoritative “formulation of common law and statutory elements” to summarize the “law as it currently stands,” and is published by the American Law Institute (ALI), an independent and non-profit group of lawyers, legal scholars, and judges. *See* AMERICAN LAW INSTITUTE.ORG, <http://www.ali.org/index.cfm?fuseaction=publications.faq>. The employment of agency theory in this thesis, however, is really an adaptation. Unlike in business scenarios in which legal agency theory governs, there is no “hiring” of a general or admiral, or payment of services by contract, by a civilian elected or appointed official acting as the principal. Nevertheless, the expectations and behaviors of those parties inside these relationships (*see infra* Part III.B) imply that they have implicitly adopted fiduciary principles, making agency theory a reasonable framework through which to describe how the parties relate to one another.

<sup>89</sup> MOTEN, PRESIDENTS & THEIR GENERALS, *supra* note 22, at 5.

<sup>90</sup> *Infra* Part II.B.

<sup>91</sup> *Infra* Part II.C.



jurisprudential agency model.<sup>92</sup> With that model in mind, this thesis will suggest that codified and transparent norms of conduct akin to rules of professional conduct or professional responsibility for attorneys can aid principal-agent participants and the public in diagnosing ailments in a civil-military relationship at the strategic level of policy-making. Criteria could be included within an amended Goldwater-Nichols Act.<sup>93</sup>

The principal-agent relationship is the best available description of that bargaining and tension in the civil-military relationship; the Goldwater-Nichols Defense Reorganization Act is the best available locus for establishing the norms and standards of that relationship. The result is a framework that can give all parties and observers an objective and common language by which to distinguish the healthy from pathological.

## II. Background

### A. Strategic Civil-Military Relationship “Crises” in Two Vignettes

Though a brilliant administrator and engineer, General George McClellan never lacked an enthusiastic willingness to lecture civilian superiors about policy, whom he considered his moral and intellectual inferiors.<sup>94</sup> Consider his long note to President Lincoln in July of 1862, in which he expressed his “general views concerning the existing state of the rebellion . . . although they do not strictly relate to the situation of this Army or strictly come

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<sup>92</sup> *Infra* Part III.A.

<sup>93</sup> Goldwater-Nichols Act, *supra* note 8, at §§ 151-155 (relating to the Chairman and Vice Chairman of the Joint Chiefs of Staff and the Joint Staff) and 161-166 (relating to the Unified Combatant Commands)). *Infra* Appendix B.

<sup>94</sup> Brian Holden Reid, *General McClellan and the Politicians*, PARAMETERS, Sept. 1987, at 101, 103-04.

within the scope of my official duties.”<sup>95</sup> He counseled Lincoln against waging a war in which the objective was to abolish slavery by force: “[m]ilitary power should not be allowed to interfere with the relations of servitude, either by supporting or impairing the authority of the master.”<sup>96</sup> McClellan warned his President, in not so subtle terms, that abolishing slavery would be a “declaration of radical views,” and would “rapidly disintegrate our present Armies.”<sup>97</sup> President Lincoln, of course, found McClellan’s warnings unpersuasive, and two months later announced his intent to issue the Emancipation Proclamation after the Battle of Antietam.<sup>98</sup>

As one historian notes, “[a]t the summit, war and politics merge and become inextricably intertwined. A general in chief not fully attuned to the latter will not master the former.”<sup>99</sup> After “Young Napoleon”<sup>100</sup> was fired twice from his position as the Union army

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<sup>95</sup> MCCLELLAN PAPERS, *supra* note 17, at 344-45. In contrast, McClellan’s much earlier letter from August 1861 to President Lincoln reads like a textbook illustration of military expertise advising a novice civilian politician about proposed and desired military-specific needs in order to meet political objectives. *Id.* at 71-75. McClellan made two points, in closing his letter, that are startlingly humble when contrasted against his latter frustration with politicians. First, he declined to opine definitively on various strategic options available to Lincoln, stating this was a “question entirely political, on which I do not venture to offer any opinion.” *Id.* at 74. Next, as if to confirm that his proposed military means would satisfy the political ends, he wrote: “I understand it to be the purpose of this great Nation to reestablish the power of the government, and restore peace to its citizens, in the shortest possible time.” *Id.* In effect, he was asking his civilian commander-in-chief for a political orientation to the tactical map he was creating.

<sup>96</sup> *Id.* at 344-45.

<sup>97</sup> *Id.* McClellan’s political views are important for placing this recommendation in context: he was a Democrat, and supported the Union’s initial and more limited aim of restoration, not the abolition of slavery. Reid, *General McClellan and the Politicians*, *supra* note 94, at 103.

<sup>98</sup> Historian Ethan S. Rafuse suggests that the issue of emancipation had definite military implications, and this letter only evidenced the general’s attempt to engage his Commander-in-Chief in a substantive dialogue, one “national security professional” to another, and did not inappropriately breach any civil-military divide. Rafuse, *General McClellan and the Politicians Revisited*, *supra* note 19, at 79.

<sup>99</sup> Andrew J. Bacevich, *Sycophant Savior*, THE AMERICAN CONSERVATIVE, October 8, 2007, <http://www.theamericanconservative.com/articles/sycophant-savior/>.

<sup>100</sup> McClellan earned this nickname, not intended to be flattering, as a result of his combination of intellect, apparent ego, and a willingness to pose for photographs in a classical “Napoleonic pose” with his hand slid between buttons of his jacket. Reid, *General McClellan and the Politicians*, *supra* note 94, at 104.

commander by Lincoln, and subsequently lost his presidential bid against his former Commander-in-Chief, it became clear that McClellan was not properly attuned to either.<sup>101</sup>

Nine decades later, little in this regard had changed. In the middle of the 1950s, more than a year after President Eisenhower's administration published its "New Look" defense strategy of massive atomic retaliation led by the Air Force, then Army Chief of Staff General Matthew Ridgway had grown discouraged.<sup>102</sup> He was unable to persuade his colleagues on the Joint Chiefs of Staff, the civilian political appointees on the National Security Council and staff, and President Eisenhower himself, that an atomic weapons-based strategy was morally bankrupt. Petulantly, General Ridgway presided over a complete revision of the Army's principal war fighting doctrine, Field Manual 100-5.<sup>103</sup> Countering the prevailing national security strategy, this doctrine adopted the *status quo ante*: fighting a conventional armed force (not strategic bombing of population centers) in order to avoid indiscriminate "[destruction of] the bases on which a peace can be built when the conflict is over."<sup>104</sup> Moreover, Ridgway began to speak at length, repeatedly and candidly, to other officers outside the Pentagon in the service schools. In a direct "point-by-point critique of Eisenhower's national security policies," he wrote:

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<sup>101</sup> DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 662-666 (2005) [hereinafter GOODWIN, *TEAM OF RIVALS*]. Some scholars suggest that McClellan's reputation as a politically-oriented exemplar of broken subordination to civil government is overblown: that his (in)action, reluctance to engage the Confederate Army in battle, and deliberate shielding of information from President Lincoln were partly a symptom of his suspicion that Lincoln could not keep a secret, and provided repeated fodder for the congressional "Joint Committee on the Conduct of the War" to publically denounce McClellan's warfighting strategy and his fidelity to the cause, calling him a coward and traitor. Reid, *General McClellan and the Politicians*, *supra* note 94, at 104-08.

<sup>102</sup> GEOFFREY PERRET, *EISENHOWER* 458-462 (1999); *see also* Bacevich, *Paradox of Professionalism*, *supra* note 70, at 315-16.

<sup>103</sup> U.S. DEP'T OF ARMY, *FIELD MANUAL 100-5, FIELD SERVICE REGULATIONS: OPERATIONS 5* (27 Sep 1954), available at [http://www.cgsc.edu/CARL/docrepository/FM100\\_5\\_1954.pdf](http://www.cgsc.edu/CARL/docrepository/FM100_5_1954.pdf).

<sup>104</sup> *Id.*

no concept could be more potentially dangerous, perhaps even fatal . . . [because] the only absolute weapon is man . . . only when we close with the enemy on the ground—as only armies can do—can we finally defeat his armed forces, and only by defeating enemy armed forces can we win victory over an enemy nation.<sup>105</sup>

Unlike McClellan during the Civil War, General Ridgway understood his statements implicated core tenets of military professionalism and exposed an uncomfortable truth in the Cold War American civil-military relationship.<sup>106</sup> Post-war President Eisenhower had rejected the counsel of his former Army colleague, Ridgway. He pursued a national security agenda that sharply reduced the role and budget of the Army,<sup>107</sup> spurring Ridgway to take his case to the media, to Congress,<sup>108</sup> and in policy debates at the Council on Foreign Relations in New York City.<sup>109</sup>

These two vignettes illustrate a long-standing tradition of civil-military conflict. This tradition has not faded away over time. Nor has it been kept largely quiet or shielded from public view. In December 2014, the RAND Arroyo Center<sup>110</sup> released a comprehensive study that reviewed the last thirteen years of continuous American-led war in Iraq and Afghanistan. The study included interviews of many of the civilian and military leaders who

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<sup>105</sup> Bacevich, *Paradox of Professionalism*: *supra* note 70, at 323.

<sup>106</sup> *Id.* at 311-24.

<sup>107</sup> MOTEN, *PRESIDENTS & THEIR GENERALS*, *supra* note 22, at 274 (commenting how “surprising” Eisenhower’s strategy was at the time, including his twenty percent cut to the Army’s budget).

<sup>108</sup> President Eisenhower called this “legalized insubordination.” *Id.* at 275.

<sup>109</sup> Bacevich, *Paradox of Professionalism*, *supra* note 70, at 325. Ridgway eventually retired after his first two-year tour as the Army Chief of Staff, an unusual move and indicative of his disaffection with the political administration’s handling of national defense; *see also* MOTEN, *PRESIDENTS & THEIR GENERALS*, *supra* note 22, at 274.

<sup>110</sup> The Center is part of the RAND Corporation, a federally-funded, non-profit, private think tank sponsored by the U.S. Army. *See* RAND.ORG, <http://www.rand.org/ard.html>.

participated in key strategic planning during that time.<sup>111</sup> The report concluded that senior civilian officials and military officers at the apex of the national security establishment operated poorly together in several systemic ways. First, the report identified key challenges relating to defense strategy.<sup>112</sup> Strategy-making failed to follow an “iterative process” of substantive dialogue between policy-sensitive civilian officials and technically-expert military commanders and senior strategists.<sup>113</sup> This process must, but did not, allow room for both policy-making civilians and the military leadership to discuss and revisit their assumptions, options, preferences, and priorities from the tactical up to the strategic, and touching both politics and tactics.<sup>114</sup>

Second, the report noted that key military leaders reporting to or advising the Bush and Obama administrations focused too much on tactical and operational subjects within their professional sphere of expertise, and routinely failed to ask, address, or discuss the

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<sup>111</sup> ROBINSON RAND STRATEGIC COMPETENCE STUDY, *supra* note 75.

<sup>112</sup> By “making of defense strategy,” this thesis means to encompass decisions that enable preparation for war, decisions to go to war, decisions during war, and decisions about what will end that war, all of which necessarily flow from a policy which triggered the use of military force to obtain some objective. It generally follows the definition offered by strategic theorists. See DONALD STOKER, *THE GRAND DESIGN: STRATEGY AND THE U.S. CIVIL WAR* 5 (2010) (“strategy defines how military forces is used in pursuit of the political goal”); see also GRAY, *MODERN STRATEGY*, *supra* note 16, at 17 (“[s]trategy is the bridge that relates military power to political purpose . . . [it is] the use that is made of force and the threat of force for the ends of policy”). Under Gray’s view, strategy is composed of seventeen “dimensions,” includes ethics, politics, culture, military administration, doctrine, time, and geography, among others. *Id.* at 24. Lawrence Freedman takes a more holistic approach to the study of strategic thought, noting that the term “strategy” has no generally agreed-upon definition, but rather has been applied far beyond traditional political and military contexts, and into more mundane areas of economic, social policy, personal and financial, marketing, legal, and athletic domains in which a “given destination is not straightforward or wherever judgments are required on resources needed, their effective application, and their appropriate sequence.” FREEDMAN, *STRATEGY: A HISTORY*, *supra* note 16, at ix-xi. Freedman condenses and generalizes “strategy” to mean “the art of creating power;” but for the practitioner, he suggests that the best way to think of strategy (or, to think strategically) is to think of it as a “story about power told in the future tense from the perspective of a leading character.” *Id.* at 607-08.

<sup>113</sup> ROBINSON RAND STRATEGIC COMPETENCE STUDY, *supra* note 75, at 34; see also MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR (RETIRED), *COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ 17-26* (2007) [hereinafter GORDON & TRAINOR, *COBRA II*].

<sup>114</sup> ROBINSON RAND STRATEGIC COMPETENCE STUDY, *supra* note 75, at at 35, 37.

political context and political factors influencing civilian leadership.<sup>115</sup> This failure was culture and personality-driven: a “lack of trust and [mutual] skepticism” among the key parties.<sup>116</sup> It was also due to a self-imposed stay-in-your-lane philosophy that inhibited senior military advisors from “invading” the political decision-making discussions.<sup>117</sup>

As a consequence, the RAND study suggests that the political ends of the campaigns in Iraq and Afghanistan were scrambled in their translation into deployment and rotation timelines, troop levels, kinetic targeting missions, and quantitative metrics for “building the capacity” of the nations the United States and its partners had been operating inside.<sup>118</sup> There were communications problems between civilian and military leaders: the military leadership grew frustrated by a perceived absence of clear, consistent political objectives to guide them; meanwhile, the civilian leadership felt it received nothing but narrow, ambiguous options that could not adapt to evolving social, economic, and political conditions domestically and abroad.<sup>119</sup> Each inadequacy reinforced the other:

the President and his military advisers believe different things about their respective roles and responsibilities in the decision making process. The sense that civilians are not competent to make strategy can lead the military to believe that only it has the knowledge to understand the correct course, which is the essence of a civil-military crisis.<sup>120</sup>

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<sup>115</sup> *Id.* at 46.

<sup>116</sup> *Id.* at 44.

<sup>117</sup> *Id.* at 56-59.

<sup>118</sup> *Id.* at 36, 56-57.

<sup>119</sup> *Id.* at 47.

<sup>120</sup> *Id.* at 48.

In terms of the wars in Iraq and Afghanistan since 2001, the authors conclude that the U.S. experience—partly a result of this “chronic lapse” in the strategic civil-military relationship—has been “frustrating, searing [and] controversial.”<sup>121</sup>

Though RAND focused on the last thirteen years, the “chronic lapse” they identified has a much longer history of handicapping state affairs, as evidenced by Generals McClellan and Ridgeway. So much so, that this lapse may just qualify as a normal part of pluralistic, democratic governing. Section II.B, *infra*, will investigate primary sources of law and authority that both cause and inadequately address common, strategic, civil-military conflict.

## B. Civil-Military Relations: What the Law Does (Not) Say

If any of the three parties to a strategic civil-military relationship were to search the law for standards or rules for judging the health of their interactions in context, they would be disappointed. This thesis will examine the Constitution, legislation, case law, administrative regulations, and military doctrine. These sources demonstrate the irony that the law provides both a cause of strategic civil-military friction, and a missed opportunity to establish norms and expectations for the conduct of these relationships.

### 1. *The Constitution Structures Civil-Military Relations*

The U.S. Constitution’s relevance to civil-military relations is worth exploring because, at the very least, it is referenced continuously and reverently by those in uniform as a benchmark for their subordination to civilians under the Rule of Law.<sup>122</sup> However, generic military subordination to civilian control is as explicit as the Constitution gets, for its

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<sup>121</sup> *Id.* at 1.

<sup>122</sup> *Infra* Part II.B.5.

distinctive contribution to national security rests in dividing federal power between the executive branch and the legislative.<sup>123</sup> The branches' respective spheres of influence and control within the defense establishment were designed to be equally powerful, but not equally efficient.<sup>124</sup>

This new constitutional structure was intended to strengthen the country's ability to respond militarily to both domestic insurrection and foreign enemies. However, constitutional law scholar Akhil Reed Amar argues that the "awesomeness of these new military powers, and their evident susceptibility to abuse if not properly constrained," also drove the Framers toward this simultaneous division and blurring of defense-related authority.<sup>125</sup> In crafting the federal government's war powers, the Framers were strongly influenced by Locke and Montesquieu. James Madison, for instance, argued that Montesquieu's theory on the separation of powers counseled against setting the "whole power" of multiple departments (branches of government) in a single organ of government.<sup>126</sup> This division of labor has, in effect, complicated the administration of national security, but not without justification. Supreme Court Justice Frankfurter wrote:

[b]efore the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully . . . [the Framers of the

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<sup>123</sup> See generally U.S. CONST. art. I and art. II.

<sup>124</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) (noting the differences in the speed with which the executive branch can act, contrasted against the "cumbersome, time-consuming, and apparently inefficient" legislative branch).

<sup>125</sup> AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 114-15 (2005) [hereinafter AMAR, *AMERICA'S CONSTITUTION*].

<sup>126</sup> THE FEDERALIST NO. 47 (Madison).



Constitution] rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity.<sup>127</sup>

Most of Article I, the longest section of the Constitution, establishes general administrative qualifications and minutia for Congress.<sup>128</sup> However, Clause 8 begins to identify the specific affirmative powers of Congress, including “to provide for the common Defence [sic],” to “declare War . . . and make Rules concerning Captures on Land and Water,” to “raise and support Armies,” to “provide and maintain a Navy,” and to “make Rules for the Government and Regulation of the land and naval Forces.”<sup>129</sup> These “common defense” clauses, obviously, say nothing expressly about *how* the national government should wield the Army or Navy that the Congress raises, supports, and provides.

As a result, the power-sharing and deliberate inefficiency Madison and Montesquieu preached as a necessary check on tyranny becomes manifestly necessary.<sup>130</sup> Article II, while mostly concerned with how a President is elected,<sup>131</sup> grants the President the title of “Commander in Chief” of the nation’s armed forces<sup>132</sup> and implies that this executive

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<sup>127</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 593 (Frankfurter, J., concurring).

<sup>128</sup> To wit: age requirements for election as a Senator or Representative; the effect of an impeachment; the time, place, and manner of elections; financial compensation; and determining internal “rules of its proceedings.” U.S. CONST. art I, §§ 2 – 7.

<sup>129</sup> U.S. CONST. art. I, § 8, cl. 1, 11-14.

<sup>130</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952) (holding that President Truman’s Executive Order 10340 to the Secretary of Commerce to seize private steel mills and keep them operating, in order to avoid a “catastrophic” national strike by employees in the midst of the Korean War, was unconstitutional: Article II grants the president power to see that the laws are faithfully executed, and the directive in question was precisely the kind of order that would have been constitutional if enacted by Congress under its Article I powers).

<sup>131</sup> U.S. CONST. art II, § 1.

<sup>132</sup> U.S. CONST. art II, § 2, cl. 1.

function encompasses the authority to oversee the employment of the armed forces in combat.<sup>133</sup> However, the full extent of this power is not defined or capped;<sup>134</sup> the specific functions demanded by such a role are not listed.<sup>135</sup>

Even though the Framers devoted more words to the President's oath of office clause<sup>136</sup> (fifty-four) than to the President's national security powers (only thirty-four), the text still establishes rough parameters for a division of labor in the field of defense.<sup>137</sup> For instance, the President is best equipped to unilaterally speak for the republic in affairs of state and command its military force.<sup>138</sup> But the President cannot, by constitutional authority alone, lead the country in prolonged war, or fund the Services to prepare, equip, or train them to fight without the knowledge, consent, or express action of Congress.<sup>139</sup> Congress, for its power under the Constitution's text, has no complementary authority to make war plans, or establish national security strategy based on military force, or command campaigns, or to direct specific military targets.<sup>140</sup>

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<sup>133</sup> AMAR, AMERICA'S CONSTITUTION, *supra* note 125, at 115; *see also* THE FEDERALIST NO. 69 (Hamilton).

<sup>134</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 610 (Frankfurter, J., concurring) (“[t]he powers of the President are not as particularized as those of Congress”).

<sup>135</sup> David Luban, *On the Commander in Chief Power*, 81 S. Cal. L. Rev. 477, 483 (2008) (“[t]he Commander in Chief Clause is a sphinx, and specifying its powers and the theory generating them is its riddle”).

<sup>136</sup> U.S. CONST. art II., § 1, cl. 8.

<sup>137</sup> Noah Feldman & Samuel Issacharoff, *Declarative Sentences*, SLATE.COM (Mar. 5, 2007), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2007/03/declarative\\_sentences.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2007/03/declarative_sentences.html).

<sup>138</sup> *See, e.g.*, LETTERS OF PACIFICUS, NO. 1 (Alexander Hamilton); *see also* *Haig v. Agee*, 453 U.S. 280, 291-92 (1981).

<sup>139</sup> The president can deploy combat forces to hostile areas to engage in armed fighting without the consent of Congress for limited periods of time, but with explicit notification to Congress of the executive action and purpose. *See* 50 U.S.C. 1541 *et seq.* (1973), and *infra* note 142 (discussion of the War Powers Resolution).

<sup>140</sup> *See* *Hamdan v. Rumsfeld*, 548 U.S. 557, 591-92 (2006) (*quoting* *Ex Parte Milligan*, 71 U.S. 2 (1866)). This has not stopped Congress from occasionally intervening with direct oversight of tactical and operational matters

Both Article I and II are silent about which branch must dominate in nuanced circumstances involving the combat deployment of the nation’s military,<sup>141</sup> leading to further analysis by the courts and management of this shared power through legislation.<sup>142</sup> Neither of these Articles, moreover, suggests what expectations, norms, or standards of behavior should guide the relationship between civilian and military authorities in the national government. The document is also silent as to which branch of government makes defense strategy. As a foundational charter for the new republic, the Constitution concerned only *inter-branch* authority, not the relationships inside those branches that haggle and

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during an on-going war. After an early Union failure at Ball’s Bluff in late 1861, for example, Congress established a “Joint Committee on the Conduct of War,” consisting largely of virulently anti-slavery Republicans, who repeatedly called commanding generals and other officers to testify (often about the performance of their superiors), beseeched President Lincoln to more dramatically involve himself with the tactical planning of his Army, and ardently criticized the slow-to-move General McClellan. *See* U.S. CONG., 37TH CONG., REPORT OF THE JOINT COMMITTEE ON THE CONDUCT OF THE WAR (1863), *available at* <https://archive.org/details/reportjointcomm08war>. Another example of congressional investigation into specific choices made by civil-military elites, in the midst of the war being waged by those elites, is the MacArthur Inquiry, established to investigate the circumstances of President Truman’s dismissal of General MacArthur from combat command in Korea in 1951. *Military Situation in the Far East, Hearings Before The Committee On Armed Services and The Committee On Foreign Relations United States Senate*, 82nd Cong. (1951) [hereinafter *MacArthur Senate Statement*].

<sup>141</sup> This question of how much power the President has to unilaterally employ the military without consulting Congress first, let alone get approval from that branch, remains debatable—even within an administration. In 2011, President Obama unilaterally deployed forces to fight with NATO partners in Libya, and did not seek congressional authority, arguing that the use of air strikes and missile launches in support of NATO allies and a United Nations Security Council Resolution was not the kind of “hostilities” envisioned by the 1973 War Powers Resolution, and thus required no approval from Congress to continue. Scott Wilson, *Obama Administration: Libya Action Does Not Require Congressional Approval*, WASH. POST, June 15, 2011, [http://www.washingtonpost.com/politics/obama-administration-libya-action-does-not-require-congressional-approval/2011/06/15/AGLttOWH\\_story.html](http://www.washingtonpost.com/politics/obama-administration-libya-action-does-not-require-congressional-approval/2011/06/15/AGLttOWH_story.html). However, in 2013, President Obama sought congressional authorization to deploy forces to fight in Syria. Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES, Aug. 31, 2013, [http://www.nytimes.com/2013/09/01/world/middleeast/syria.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/09/01/world/middleeast/syria.html?pagewanted=all&_r=0).

<sup>142</sup> Other than a conflict-specific “Authorization for the Use of Force” from Congress, the War Powers Resolution of 1973 is the prime example. This Joint Resolution remains highly controversial and easily avoided by presidents unwilling to subject their execution of commander-in-chief responsibilities to congressional review. *See* Authority to Use Military Force in Libya, 35 Op. O.L.C. at 8-13 (2011), [http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf). Among other things, this Joint Resolution asserted a reminder that the “constitutional powers of the President as Commander-in-Chief” to put U.S. forces into hostilities abroad was not unlimited. *See* War Powers Resolution, 50 U.S.C. 1541 *et seq.* (1973).

compromise over that authority.<sup>143</sup> To describe or define such relationships would have been wholly out of character and without great need, especially given the Framers' intent to deliberately burden the federal government by forced balancing and sharing of power.<sup>144</sup>

Further, the complex web of bureaucracies and agencies that play roles in modern national defense would have been unforeseeable to the Framers. Even if they had predicted that international events, domestic pressures, and personalities<sup>145</sup> of those in public office would likely expand expectations that both civilians and military performing duties related to national security will work in concert or collaboratively,<sup>146</sup> the Framers would have regarded the resulting tensions as inherently inseparable from their desired partition of power. As

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<sup>143</sup> The debate over how “unitary” the Executive Branch is, for instance, still finds passionate arguments on both sides. *See, e.g.*, Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (arguing that the President does not have sole authority over all administration agencies and powers that flow from his executive authority). *But see* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541 (1994) (arguing that Constitution's text and original meaning created only a “trinity” of powers, and anything not legislative or judicial in nature implicitly fell under the president's authority to “execute the laws”).

<sup>144</sup> *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting):

[t]he doctrine of the separation of powers was adopted by the Convention . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

<sup>145</sup> As President, Theodore Roosevelt was largely regarded as an expansionist, greatly swelling the role of the Chief Executive in foreign relations and expressions of military authority abroad, claiming such power vested in his office as the sovereign and needed no express constitutional basis (the “residuum of power” argument). His successor, William Howard Taft, took the opposite approach to executive authority, and limited his office to that which was explicitly authorized by the Constitution or Congress or was necessarily implied by either. PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW* 22-23 (2005); EDMUND MORRIS, *THEODORE REX* 23-24, 386-416 (2001) (wherein Morris quotes Henry Adams's famous description of Roosevelt's power after concluding the peace talks he hosted between Russia and Japan, calling him the “best herder of Emperors since Napoleon,” *id.* at 414).

<sup>146</sup> Millett et al., *The Effectiveness of Military Organizations*, *supra* note 75, at 44.

Henry Kissinger has written, “[t]he purpose of the separation of powers was to avoid despotism, not to achieve harmonious government.”<sup>147</sup>

Nevertheless, even if the Constitution is silent in these matters, practice can perfect and validate the exercise of executive authority in the domain of national security. A long-standing practice by the Executive Branch, known of by Congress and never questioned, creates a “gloss” on the President’s authority.<sup>148</sup> This “gloss” that transforms systemic practice into binding precedent is important because, as the Supreme Court recognizes, the Constitution:

contemplates that practice will integrate the dispersed powers into a workable government. . . [because it] does not disclose the measure of the actual controls wielded by the modern presidential office . . . [but rather] [s]ubtle shifts take place in the centers of real power that do not show on the face of the Constitution.”<sup>149</sup>

The same logic of precedent is true for Congress.<sup>150</sup> Strategic theorist Bernard Brodie noted that the upper level of government where this strategizing and “practice” occurs necessarily includes civilians and military elites.<sup>151</sup> Therefore, both groups must understand the “basic and prevailing conception of what any war existing or impending is really about

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<sup>147</sup> HENRY KISSINGER, *DIPLOMACY* 21 (1994).

<sup>148</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); *see id.* at 635 (Jackson, J., concurring) (“[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government”); *see also* *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (*citing* Frankfurter’s concurrence in *Youngstown*).

<sup>149</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 653 (Jackson, J., concurring).

<sup>150</sup> *Myers v. United States*, 272 U.S. 52, 283 (1926) (Brandeis, J., dissenting) (“[a] persistent legislative practice which involves a delimitation of the respective powers of Congress and the President, and which has been so established and maintained, should be deemed tantamount to judicial construction, in the absence of any decision by any court to the contrary”) (*citing* *United States v. Midwest Oil Co.*, 236 U.S. 459, 469).

<sup>151</sup> BERNARD BRODIE, *WAR AND POLITICS* 439 (1973).

and what it is attempting to accomplish,”<sup>152</sup> especially if they attempt to rationalize their conduct with the implied gloss argument rather than a reference to explicit statutory authority or a Constitutional grant of power.

For these reasons, the Constitution might be said to be the root cause of American civil-military conflict. For sound reasons, both pragmatic and philosophical, it erects formal barriers to decision-making efficiency. Further, the Constitution forces compromise among the pluralistic parties and interests that make policy and engage in subtle manipulation of each other’s behavior and choices by affecting or creating options—a practice called “Choice Architecture.”<sup>153</sup> This implies, and possibly encourages, a degree of power-sharing without an objective set of expectations or standards to govern those ambiguous and often unpredictable relationships. Legislation, as described below, fails to fill this gap inadvertently created under Articles I and II.

## *2. Legislation Organizes Civil-Military Relations*

When legislators have approached the subject of national, strategic-level policy-making by civilians and military leaders, their purpose has generally been aimed at improving the efficiency of systems and reducing redundancy among departments and agencies. The reach of those acts has been limited to roles and authorities. These acts have not addressed mutual or unilateral obligations and duties owed by one strategic party to the other. The opportunities and desirability for legislation to establish such duties are clear, but have been repeatedly missed.

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<sup>152</sup> *Id.*

<sup>153</sup> *See infra* Appendix B.

In a rather recent example, Congress passed the Iraq Liberation Act of 1998, a statement of policy advocating for regime change in Iraq, signed into law by President Clinton.<sup>154</sup> As a result, General Anthony Zinni, the Commander of Central Command (USCENTCOM) at the time, sponsored an interagency war game to envision what would likely occur after a hypothetical American invasion of Iraq to depose Saddam Hussein.<sup>155</sup> Called “Desert Crossing,” the war game’s disquieting results suggested several undesirable strategic themes that would prove prophetic.<sup>156</sup> First, the war game concluded that there was a need for hundreds of thousands of troops for an extended presence. Second, it observed that regime change would not necessarily guarantee regional stability. Third, it recommended relying almost exclusively on existing tribal and political structures to establish post-Saddam stability.<sup>157</sup> This war game was not only ignored three years later by the Bush Administration, convinced of the ability to democratize the country from the “outside-in,” but Zinni himself was prevented from advising his successor at USCENTCOM, General Tommy Franks, during the planning phase of Operation Iraqi Freedom where Franks’ mission included regime change.<sup>158</sup>

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<sup>154</sup> Iraq Liberation Act of 1998, Pub. L. 105-338, 112 Stat. 3178 (1998) (stating, *inter alia*, “[i]t is the sense of Congress that once the Saddam Hussein regime is removed from power in Iraq, the United States should support Iraq’s transition to democracy by providing immediate and substantial humanitarian assistance to the Iraqi people, by providing democracy transition assistance to Iraqi parties and movements with democratic goals”).

<sup>155</sup> MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, *THE ENDGAME: THE INSIDE STRUGGLE FOR IRAQ, FROM GEORGE W. BUSH TO BARACK OBAMA* 6-7 (2013) [hereinafter GORDON & TRAINOR, *ENDGAME*].

<sup>156</sup> For the unclassified executive summary of “Desert Crossing,” see GORDON & TRAINOR, *COBRA II*, *supra* note 113, at 668-73 (2007).

<sup>157</sup> *Id.* See also United States Central Command, *Desert Crossing Seminar: After Action Report*, [http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB207/Desert%20Crossing%20After%20Action%20Report\\_1999-06-28.pdf](http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB207/Desert%20Crossing%20After%20Action%20Report_1999-06-28.pdf).

<sup>158</sup> GORDON & TRAINOR, *ENDGAME*, *supra* note 155, at 9. Instead, Secretary of Defense Rumsfeld continuously encouraged the adoption of a campaign plan that avoided a lengthy troop build-up in the Middle East, and was

This legislative act demonstrated national commitment to replace a foreign government with one that reflected democratic values; it specifically envisioned whole-of-government assistance to the new democratic regime; and it spurred interagency assessment of the multifaceted economic, political, and security problems that would likely flow from regime change. To impose a requirement that the executive branch engage in substantial, concerted civil-military strategy-making among American policy elites would have been appropriate and consistent with the Act's purpose. Nothing, however, in the Iraq Liberation Act directly imposed or even suggested such coordination requirements. Nothing, therefore, spoke to the quality or nature of the relationships that would engage in such coordination.

This legislative problem follows a historical pattern. For instance, the National Security Act of 1947<sup>159</sup> formally institutionalized a "Joint Chiefs" organization, one whose origin sprang from President Roosevelt's decision-making methodology in World War II. This Act not only established a central committee of the highest ranking officers from each of the individual Services, it gave the Army Air Corps its own status along with the Navy and Army, created the Office of the Secretary of Defense and the "National Military Establishment."<sup>160</sup> This tentative step toward efficiency and unification however, left the Secretary of Defense weak relative to the Service Secretaries, who retained their Cabinet posts.<sup>161</sup> Amended in 1949, the revised National Security Act<sup>162</sup> created the slightly-more

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heavily reliant on "shock and awe" delivered by high-precision munitions into the heart of Baghdad and a rapid advance by a limited number of ground troops and special operations forces. *See* GORDON & TRAINOR, COBRA II, *supra* note 113, 38-40.

<sup>159</sup> National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947).

<sup>160</sup> James R. Locher III, *Has it Worked? The Goldwater-Nichols Reorganization Act*, NAVAL WAR C. REV. (Autumn 2001), at 95, 98.

<sup>161</sup> *Id.*



unified Department of Defense and an Office of the Chairman of the Joint Chiefs of Staff. However, it granted that office no more authority than that of liaison to the President and Secretary of Defense and of spokesman for the other four-star generals and admirals at the helm of their Services. The Service chiefs, in turn, remained empowered as principal military advisors to the President, each of whom remained in the operational chain-of-command.<sup>163</sup>

Over the next decade, similar attempts to reduce redundancy and improve efficiency within the national security establishment were debated. The 1953 Defense Reorganization Plan,<sup>164</sup> issued by the newly-elected Eisenhower Administration, was based on growing pains within the Department of Defense spurred by the National Security Act of 1947 and lessons learned during the Korean War. The Plan clarified the responsibilities of the Services relative to the unified commands in the field, gave the Chairman of the Joint Chiefs of Staff more control over the direction and membership of the Joint Staff, redistributed senior civilian staff functions among the Service secretariats, and reinforced ultimate civilian responsibility for the Department of Defense as a whole.<sup>165</sup> President Eisenhower wrote: “[t]here must be a clear and unchallenged civilian responsibility in the defense establishment . . . [which] is essential not only to maintain democratic institutions, but also to protect the

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<sup>162</sup> National Security Act Amendments of 1949, Pub. L. No. 81-216, 63 Stat. 578 (1949).

<sup>163</sup> Thomas L. McNaugher & Roger L. Sperry, *Improving Military Coordination: The Goldwater-Nichols Reorganization of the Department of Defense*, in WHO MAKES PUBLIC POLICY: THE STRUGGLE FOR CONTROL BETWEEN CONGRESS AND THE EXECUTIVE 219, 223 (Robert S. Gilmour & Alexis A. Halley eds., 1994).

<sup>164</sup> Defense Reorganization Plan No. 6 of 1953, *reprinted in* 67 Stat. 638 (1953), <http://www.gpo.gov/fdsys/pkg/STATUTE-67/pdf/STATUTE-67-Pg638.pdf>.

<sup>165</sup> Dwight D. Eisenhower, *Special Message to the Congress Transmitting Reorganization Plan No. 6 of 1953 Concerning the Department of Defense*, April 30, 1953, <http://www.presidency.ucsb.edu/ws/?pid=9831>.

integrity of the military profession.”<sup>166</sup> The Plan, while aiming to strengthen various political offices overseeing national security, did not aim to create an objective set of standards that would, in effect, guide the civilian and military leaders by fostering norms and expectations of that strategic relationship, given the principle of military subordination to civilian control.

Similarly, the Defense Reorganization Act of 1958<sup>167</sup> more clearly placed field commands under the direct operational authority of the Secretary of Defense, and submerged the military department civilian secretaries under the “direction, authority, and control” of the Secretary of Defense. The Act’s primary motivations were to “provide more effective, efficient, and economical administration” in the Defense Department, “eliminate unnecessary duplication,” and “provide for unified strategic direction of the combatant forces.”<sup>168</sup> Unity and efficiency were the dominant themes in this legislation; establishing norms and expectations among the civilian and military parties working (theoretically) in concert was not.

Three decades later, the Goldwater-Nichols Act of 1986 was the next, and most recent, substantial legislative effort to reform the American national security establishment. Not long before he retired in 1982, then-Chairman of the Joint Chiefs of Staff, Air Force General David Jones, testified before a House subcommittee: “[t]he corporate advice provided by the Joint Chiefs of Staff [JCS] is not crisp, timely, very useful, or very

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<sup>166</sup> *Id.*

<sup>167</sup> Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, 72 Stat. 514 (1958).

<sup>168</sup> *Id.* (amending Section 2 of the National Security Act of 1947).

influential.”<sup>169</sup> Congress wished to avoid the systemic planning faults that contributed to the aborted Iran hostage rescue operation in 1981.<sup>170</sup> Congress was also influenced by the military’s response to the bombing of the Marine Corps barracks in Beirut, the Grenada mission, and the hands-off, dissociative relationship between Secretary of Defense Casper Weinberger and military planners.<sup>171</sup> The ultimate objective of the Goldwater-Nichols Act, then, was to aid national political authority with better military advice, and rescue the JCS from its own limitations and failures. After more than four years of drafting bills in both the House and Senate and initial resistance to the JCS reform from inside the Pentagon, was again to “strengthen civilian authority” inside the Defense Department, but also to “improve the military advice provided to the President, the National Security Council, and the Secretary of Defense.”<sup>172</sup>

Recognizing that the separate Services had separate cultures, institutional identities driven by their particular historical roles and routine missions, and disjointed approaches to planning and weapons acquisition, the Act placed more responsibility and clearer lines of direct authority on the field commands to train, plan, and fund for contingencies in a more “joint” fashion. The Chairman was elevated to a position of primacy over the other members of the JCS to make him the senior officer in the United States military and principal military

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<sup>169</sup> *Reorganization Proposals for the Joint Chiefs of Staff: Hearings Before the Investigations Subcomm., H. Comm. on Armed Services, 97th Cong. 54 (1982)* (statement of General David Jones, Chairman of the Chiefs of Staff).

<sup>170</sup> James R. Locher III, *Has it Worked? The Goldwater-Nichols Reorganization Act*, *supra* note 160, at 100.

<sup>171</sup> Thomas L. McNaugher & Roger L. Sperry, *Improving Military Coordination: The Goldwater-Nichols Reorganization of the Department of Defense*, *supra* note 163, at 229.

<sup>172</sup> Goldwater-Nichols Act, *supra* note 8, at pmb1.

advisor to the President and Secretary of Defense.<sup>173</sup> The Act tasked the Chairman to assist the President and Secretary of Defense in “providing for the strategic direction of the armed forces.”<sup>174</sup> Not only was the Chairman to relay requirements from the combatant commanders, he was no longer left to negotiate with the Service chiefs to seek a unified corporate decision or recommendation.<sup>175</sup> This left the Chairman holding at least three pots: principal military advisor to the President, advisor and confidant to the Secretary of Defense, and primary advocate for the remainder of the JCS and combatant commands.<sup>176</sup>

However, precariously balancing three pots often leads to unforeseen consequences, one of which is that the Act did not expressly elevate the Chairman’s position to the most powerful or influential military officer in the strategic-civil military relationship and as a result did nothing to clarify which pot was most important if the three were in tension with each other. The Act also created the position of Vice Chairman, of equal grade, who is also appointed by the President and confirmed by the Senate.<sup>177</sup> It also required the Chairman to present dissenting views of the Service chiefs alongside his own recommendations.<sup>178</sup> The President and Secretary of Defense could still seek independent advice and recommendations from the Service chiefs.<sup>179</sup> Furthermore, the Act established a strict operational chain-of-command running from President to Secretary of Defense to commander of a “combatant

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<sup>173</sup> 10 U.S.C. § 163(b)(2).

<sup>174</sup> 10 U.S.C. § 153(a)(1).

<sup>175</sup> 10 U.S.C. § 151(b)(1).

<sup>176</sup> Peter D. Feaver, *The Right to Be Right*, *supra* note 39, at 113 (commenting on General Peter Pace’s role during the deliberation over the 2007 surge strategy in Iraq).

<sup>177</sup> 10 U.S.C § 154.

<sup>178</sup> 10 U.S.C § 151(d)(1).

<sup>179</sup> 10 U.S.C § 151(e).

command [COCOM],”<sup>180</sup> removing the Service chiefs, the Chairman, and individual military department secretaries from the operational loop,<sup>181</sup> but allowed the President or Secretary of Defense the option of inserting the Chairman into the line of communications between National Command Authority and the combatant commanders, or to “oversee the activities of” those commands.<sup>182</sup> The Act gave the commanders of the combatant commands the authority to direct and employ subordinate forces in operations, training, and logistics, and gave them veto authority over officers nominated by the Services to serve as subordinate commanders.<sup>183</sup>

The Gulf War tested this reorganization in 1990-91.<sup>184</sup> That conflict revealed that the Department of Defense’s new structure, dominated by commanders in the field rather than the individual Services in wartime, was able to better coordinate the command of Service-component forces in flexible ways, and demonstrated that this reorganization could increase the likelihood of operational success with the Chairman as the principal military advisor.<sup>185</sup>

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<sup>180</sup> There are nine COCOMs, divided between “functional” and “geographic” responsibilities: U.S. Strategic Command (USSTRATCOM), U.S. Special Operations Command (USSOCOM), and U.S. Transportation Command (USTRANSCOM) have global responsibilities based on their respective technical or tactical focus; whereas U.S. Pacific Command (USPACOM), U.S. European Command (USEUCOM), U.S. Central Command (USCENTCOM), U.S. Southern Command (USSOUTHCOM), U.S. Northern Command (USNORTHCOM), and U.S. Africa Command (USAFRICOM) have geographic areas of responsibility. *See* Department of Defense, UNIFIED COMMAND PLAN, <http://www.defense.gov/ucc/>.

<sup>181</sup> 10 U.S.C § 162(b).

<sup>182</sup> 10 U.S.C § 163(a) and (b).

<sup>183</sup> 10 U.S.C § 164.

<sup>184</sup> According to Colin Powell, the first Chairman under the new law for a full tenure, the Act’s organizational transformations were first tested by U.S. engagement in Panama (Operation Just Cause) in 1989 and in dealing with the aftermath of the fall of the Berlin Wall—crises that demonstrated the Chairman’s ability to speak for himself rather than seek a composite or consensus view from the individual Services. COLIN POWELL, *MY AMERICAN JOURNEY* 422, 438-39, 447 (1995).

<sup>185</sup> Thomas L. McNaugher & Roger L. Sperry, *Improving Military Coordination: The Goldwater-Nichols Reorganization of the Department of Defense*, *supra* note 163, at 243-44.

In effect, by rearranging the division of labor among the senior-most military elite and giving more power to the Chairman, the Act opened possibilities for new voices to work as influential agents. It transformed the Joint Staff from a rank-heavy but low-impact “think tank” to a well-publicized and high-impact “action staff.”<sup>186</sup>

While this new seating arrangement advanced the cause of improving the quality of professional advice that the Service chiefs and combatant commanders gave to policy-makers, that was the extent of the Act’s role in shaping the behaviors of the military and civilian elite relative to each other. Even though the Act established an educational “capstone course” required for newly-promoted flag officers, “designed specifically to prepare [them] to work with the other armed services,” the Act did not include a similar requirement to prepare for working with senior civilian policy-makers—in or out of the Defense Department.<sup>187</sup> The Act even refers to the Service chiefs as the “agent” of the superior civilian Service secretary.<sup>188</sup> But the Act is silent about how those agency relationships ought to normatively look. No standard, expectation, or norm is codified with respect to the overlapping or mutual duties and responsibilities in these principal-agent relationships. A powerful personality in the position of Chairman of the JCS, for instance, remained subject only to his general understanding of the Constitution’s subordination of the

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<sup>186</sup> Eliot Cohen, *In DoD We Trust*, NEW REPUBLIC (June 17, 1991) at 29, 31.

<sup>187</sup> 10 U.S.C § 663(a).

<sup>188</sup> 10 U.S.C §§ 3033(d), 5033(d), 8033(d) (perform . . . military duties . . . as are assigned to him by the President, the Secretary of Defense, or the [Service] Secretary [including] “keep[ing] the Secretary . . . fully informed of significant military operations affecting the duties and responsibilities of the Secretary [while always remaining] “[s]ubject to the authority, direction, and control of the Secretary of Defense).

military to the President, his oath of office, and any self-imposed limits beyond those established in Goldwater-Nichols.<sup>189</sup>

As a consequence, subsequent Chairmen of the Joint Chiefs of Staff, and their subordinate Joint Staffs, may in practice be relegated to quasi-informed and quasi-influential “onlookers” to wartime strategy.<sup>190</sup> As was the case with the General Tommy Franks, Commander of USCENTCOM from 2000-2003, the purposes of Goldwater-Nichols Act can become frustrated because it does not adequately establish norms for the behavior and interaction of these key strategic elites. The early months and years of the Global War on Terror reveal that circumstances may offer a potent combination of a combatant commander who distrusts and ignores the JCS but who subordinates his military experience to the will of a civilian political appointee with an “indomitable bureaucratic presence” like Donald Rumsfeld.<sup>191</sup> “Disciplined and ambitious”<sup>192</sup> but also “loyal and diligent,”<sup>193</sup> General Franks was a believer that the early Afghanistan campaign was a successful proof of concept for Rumsfeld’s ideas on military transformation, and was “uninterested” in post-war stabilization

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<sup>189</sup> Such was the case with General Powell. His long association with the Reagan and first Bush Administrations, his White House Fellowship, and his time National Security Advisor gave him unprecedented credibility with the civilian leadership. Many pundits and scholars expressed concern about his singular voice of military strategy in Washington during the Panama invasion in 1989 and the Gulf War in 1990-91, which seemed (at least to those observing from outside his inner circle) to effectively silence the Service chiefs and field commanders with their alternative views. Cohen, *In DoD We Trust*, *supra* note 186, at 34-35.

<sup>190</sup> GORDON & TRAINOR, COBRA II, *supra* note 113, at 5.

<sup>191</sup> *Id.* at 3-4, 53-54 (“Franks worked for Rumsfeld and only barely tolerated the JCS . . . [Franks] tended to view the chiefs [of the Services, members of the JCS] as meddling military bureaucrats . . . [and] resented their input”).

<sup>192</sup> *Id.* at 28.

<sup>193</sup> *Id.* at 27 (quoting General Anthony Zinni, Franks’ former superior at CENTCOM).

planning.<sup>194</sup> As a result, Franks insufficiently questioned the Secretary of Defense’s underlying assumptions or goals leading to the invasion of Iraq in 2003.

Despite the most sweeping legislative attempt to make the upper echelon of military command work more effectively and more efficiently under civilian control since World War II, the Act says nothing of accountability. The Act does not give the strategic civil-military elites or the American public any way to objectively diagnose whether that arrangement in practice is “healthy”—the relationship simply “is.” In terms of affecting American strategic civil-military relationships, the Goldwater-Nichols Act (like the legislative efforts before it) was a missed opportunity.

The oath that new military officers swear upon receiving their commissions is also provided by federal statute, and is similarly unhelpful. The oath does not specify particular duties in the strategic civil-military relationship. This oath of office obligates the officer to work loyally and diligently in support of the Constitution, but also enjoins the officer to “faithfully discharge the duties of the office” in which they serve—two responsibilities that could be mutually exclusive.<sup>195</sup> As discussed below,<sup>196</sup> one such principle is that of civilian dominance over the military. This suggests that the officer does not obligate himself to work

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<sup>194</sup> ROSE, HOW WARS END, *supra* note 16 at 267-68.

<sup>195</sup> The officer affirms:

I, [name of officer], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

5 U.S.C. § 3331; *see also* U.S. DEP’T OF ARMY, DA Form 71 (The Oath of Office – Military Personnel) (July 1999).

<sup>196</sup> *Infra* Part II.C.1 (reviewing Samuel Huntington’s “objective theory” of civilian control).



loyally, faithfully, or diligently on behalf of a particular civilian—political—superior. As this oath is generic (given to all officers, regardless of their rank, duty position, or branch of Service), such a specified duty would be out of place. Indeed, such an affirmative duty to a specific office-holder would practically be an oath of personal fidelity and would obviate any sense of a separate, apolitical military.<sup>197</sup>

As an unintended consequence of the oath’s emphasis on protecting the Constitution “against all enemies, foreign and domestic,”<sup>198</sup> it implies that the senior strategic military officer’s prime duty is to support and defend the Constitution, but leaves out any nuanced application at the strategic policy-making level of government where the Constitution leaves its mark on the separation of powers and the principle of civilian control. Further, there is a widely-held belief—at least among Army (and possibly Marine Corps) officers—that the absence of any specific duty to “obey the orders of the President of the United States” (as is required of enlisted Soldiers) implies a moral obligation to *disobey* when the order, policy, rule, or standard is “not in the best interest of the Army at that moment” and that officers are trusted by the American people to exercise such judgment.<sup>199</sup> Consequently, the oath offers little guidance to a strategic military leader, in the position of “choice architect,”<sup>200</sup> caught between faithfully implementing the political decisions of a civilian elected official which he

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<sup>197</sup> See, e.g., Major General (retired) Paul D. Eaton, *A Top-Down Review for the Pentagon*, N.Y. TIMES, Mar. 19, 2006, (calling for Donald Rumsfeld’s resignation), [http://www.nytimes.com/2006/03/19/opinion/19eaton.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2006/03/19/opinion/19eaton.html?pagewanted=print&_r=0).

<sup>198</sup> 5 U.S.C. § 3331.

<sup>199</sup> ROBERT J. DALESSANDRO, *ARMY OFFICER’S GUIDE 7* (2009); see also Lieutenant Colonel Andrew Milburn, *Breaking Ranks: Dissent and the Military Professional*, JOINT FORCES Q. (4th Quarter, 2010), at 103; and see Lieutenant General (retired) Greg Newbold, *Why Iraq was a Mistake*, TIME, Apr. 9, 2006, <http://content.time.com/time/magazine/article/0,9171,1181629,00.html>.

<sup>200</sup> See *infra* Appendix B.

believes to be contrary to principles articulated or implied by the Constitution, and a personal opinion based on military experience and expertise.<sup>201</sup>

Implying that this generic oath of office was insufficient alone, the National Defense Authorization Act for Fiscal Year 1998, Congress amended Title 10 of the U.S. Code with a short provision assigning specific duties to “commanding officers and others in authority” in the Army and Air Force.<sup>202</sup> However, this legislative provision, like the oath, offers no definitive (or even implied) guidance to participants in the strategic civil-military relationship. The amendment did not target the strategic relationship between senior military and civilian decision-makers. Rather, it sought to impose stricter accountability for commanders overseeing their subordinates, likely spurred by the basic trainee sex abuse and harassment scandal and subsequent courts-martial at Aberdeen Proving Ground in 1997.<sup>203</sup>

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<sup>201</sup> The contexts of the apparent dilemmas are important, as is the recognition that humans will often be inconsistent in their own beliefs and actions. *See, e.g.*, General Douglas MacArthur’s testimony before the Senate in the wake of his relief from command by President Eisenhower, in which he readily affirmed the President’s unilateral and uncontestable authority to fire a commanding officer as inherent to “our system,” *MacArthur Senate Statement, supra* note 140, at 26. However, when questioned as to whether a theater commander should publically express his views on the politics and policy context of the conflict in which he leads, MacArthur asserted a right of a commander to inform the public of “diverse” views on controversial issues, so that they may use the “truth” to inform their judgment and thus control the government they elect. *Id.* at 99.

<sup>202</sup> 10 U.S.C. § 3583 [Army commanding officers]; U.S.C. § 8583 [Air Force commanding officers]. As “requirement[s] of exemplary conduct,” such officers must:

show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and to take all necessary and proper measures, under the laws, regulations, and customs of the [Army and Air Force], to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

Such duties were already codified in law, dating back to 1956, in 10 U.S.C. § 5947, employing identical language, but only applied to Naval and Marine Corps officers.

<sup>203</sup> Paul Richter, *Army Women Describe Rapes as Trial Opens*, LOS ANGELES TIMES, April 15, 1997, [http://articles.latimes.com/1997-04-15/news/mn-48914\\_1\\_simpson-trial](http://articles.latimes.com/1997-04-15/news/mn-48914_1_simpson-trial).

Moreover, the text of the statute also clearly aims down and in, not up and out. It imposes a set of obligations on commanders only with respect to those service members junior in rank and subordinate to their direct command authority, and says nothing about relations with superiors, or those outside the span of the commander's authority. It was formally incorporated into, *inter alia*, Army Regulations<sup>204</sup> and several features of that regulation provide further evidence of an understanding that the general duties Congress mandated were not envisioned as guides for senior officers *qua* agents in the civil-military unequal dialogue. First, the Regulation only applies to the responsibilities of officers assigned to positions of "command."<sup>205</sup> Second, the Regulation only references the commander's relationship with the unit he or she commands and the Soldiers under his or her command authority.<sup>206</sup> Most military participants in the strategic civil-military relationship are not commanders as defined above, but advisory "choice architects" relative to the civilian officials and elected leadership.<sup>207</sup> In those roles, such as the Chairman of the Joint Chiefs of Staff, the officer has no command authority. Therefore, the moral requirements intended by this code provision apply only through a self-imposed force of personal discipline, not by force of law, on those strategic military leaders over any subordinates they directly supervise and manage.

Legislation dealing with military officers, therefore, tends to address only two issues. As the National Security Act and the Goldwater-Nichols Act illustrate, one issue is the

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<sup>204</sup> See U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 1-5c.(4)(d) (2014) [hereinafter AR 600-20].

<sup>205</sup> *Id.* at para. 1-1 and 1-5a.

<sup>206</sup> *Id.* at para. 1-5c.

<sup>207</sup> *Infra* Appendix B.

organization of the armed forces and Congress's effort to reduce redundancy and improve efficiency. The other issue pressing upon the minds of legislators is reflected by the oath of office provision and the "requirement of exemplary conduct" provision, which address a generic officer's supreme duty to the Constitution and a generic commander's responsibility for guiding the moral, ethical conduct of his or her subordinates. Neither type of legislation, however, offers a prescriptive guide for the members of the strategic civil-military relationships. Consequently, they offer no way to objectively assess the health of those relationships. The same inadequacies mar case law, as described below.

### *3. Case Law Remains Silent on Civil-Military Relations*

Just as the Constitution and legislation remain silent regarding the norms and expectations of behavior that affect the quality of a strategic civil-military relationship, U.S. case law fails to offer precedent by which to create or infer such standards. Silence from the courts in this matter is not surprising. The nature of a strategic civil-military relationship is such that the parties must coordinate, discuss, and compromise on sensitive national security and war-making decisions for which there are no "judicially discoverable and manageable standards for resolving" the conflict.<sup>208</sup> Because neither the Constitution nor statutes specify legal duties owed by these parties to each other, such problems are likely to be interpreted as nonjusticiable "political questions" by the courts.<sup>209</sup>

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<sup>208</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962) (establishing several possible reasons why a case or controversy would be considered "nonjusticiable").

<sup>209</sup> Alternatively, some scholars argue that the "political question doctrine" only applies to questions involving the separation of powers between the judicial branch and one of the political branches. Chris Michel, *Comment: There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton*, 123 *YALE L. J.* 253, 259, 261 (2013) (arguing that this case implies that a "claim to a federal statutory right can never present a political question"). This suggests that disputes between the two political branches are not "political" as defined by *Baker*, but rather the very kind of cases that implicate constitutional division of labor and thus require judicial interpretation. Nevertheless, the field of national

Moreover, the identity of the relevant cast of characters involved in such crises likely inhibit “victims” from raising claims against the “offenders” even if the courts provided a forum for such debate. These strategic relationships, for instance, are highly personnel and are largely shielded from public view and scrutiny.<sup>210</sup> The parties have no incentive to openly complain about an unhealthy or pathological relationship while still in their assignments, and certainly are incentivized to shy away from disclosing evidence of poor decision-making in which they played some part.<sup>211</sup> It is no great surprise, then, that when courts do get involved, it is in the much clearer context of criminal misconduct. Superficially, these criminal cases appear ready-made for establishing definitive boundaries on permissible conduct in civil-military relations. However, a closer look reveals them to be as unhelpful as statutes currently are. The “offender” is usually a military officer *below* the strategic policy-making level, and the offense is typically brash and obvious disrespect toward a civilian leader well above the level of any civil-military relationship in which the offender actually participates.

Illustrating the point is perhaps the best-publicized court-martial involving egregious insubordination and disrespect: the 1925 prosecution of the infamous, highly-decorated, William “Billy” Mitchell, then a Colonel and the leading advocate for an independent Air

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security and foreign affairs tends to shuffle cases involving these domains into the bin of nonjusticiable “political questions” because they invoke questions committed to the discretion of the executive and legislative branches. *See, e.g.*, *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“matters intimately relating to foreign policy and national security are rarely proper subjects for judicial intervention”). *But cf.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1436 (2012) (Alito, J., concurring) (“determining the constitutionality of an Act of Congress may present a political question in some cases”). Neither the Goldwater-Nichols Act, nor any of its predecessor legislation (*e.g.*, the National Security Act of 1947) have been addressed by the Supreme Court; these acts do not create statutory rights for any individual party. *See supra* Part II.B.2.

<sup>210</sup> DESCH, CHANGING SECURITY ENVIRONMENT, *supra* note 68, at 2.

<sup>211</sup> *Id.*

Force in the wake of the First World War.<sup>212</sup> In early September 1925, two naval air disasters consumed the public's attention, as well as the military's. Three Navy seaplanes crashed into the Pacific en route to Hawaii, and a dirigible, the Navy's U.S.S. *Shenandoah*, killed fourteen when it split in two during a thunderstorm over Ohio, falling out of the sky during its public relations flight.<sup>213</sup> As the leading proponent of military air power, reporters quickly sought Colonel Mitchell's opinion about the incidents. Though not involved in the planning or design of the aircraft, nor was he involved in the events themselves, Mitchell publically rebuked the Navy and War departments for what he called their "incompetency, criminal negligence and almost treasonable administration of our national defense."<sup>214</sup> Within days of saying that "official stupidity" was the proximate cause of the disasters,<sup>215</sup> he was charged with bringing "discredit upon the military service" for comments that were "prejudicial to good order and discipline," under Article 96 of the Articles of War.<sup>216</sup> Mitchell was convicted and sentenced to a suspension from command and rank for five years. He resigned shortly thereafter, but remained publically adored and was considered a "martyr" for the cause of an independent Air Force.<sup>217</sup>

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<sup>212</sup> Fred L. Borch III, *Lore of the Corps: The Trial by Court-Martial of Colonel William "Billy" Mitchell*, ARMY LAW., Jan. 2012, at 1 [hereinafter Borch, *Court-Martial of Billy Mitchell*].

<sup>213</sup> *Id.* See also *The "Shenandoah" Disaster*, FLIGHT, Sept. 10, 1925, at 580, available at <http://www.flightglobal.com/pdfarchive/view/1925/1925%20-%200580.html>.

<sup>214</sup> Borch, *Court-Martial of Billy Mitchell*, *supra* note 212, at 1.

<sup>215</sup> Rebecca Maksel, *The Billy Mitchell Court-Martial*, AIR & SPACE MAG., July 2009, at 46, <http://www.airspacemag.com/history-of-flight/the-billy-mitchell-court-martial-136828592/?no-ist>.

<sup>216</sup> Article 96 was the forerunner to the modern Article 134 offense in the UCMJ. Borch, *Court-Martial of Billy Mitchell*, *supra* note 212, at 3. The "commander" who exercised court-martial jurisdiction over the case, and charged Mitchell, was President Calvin Coolidge. See DAVID E. JOHNSON, FAST TANKS AND HEAVY BOMBERS 87 (2003) [hereinafter JOHNSON, FAST TANKS].

<sup>217</sup> JOHNSON, FAST TANKS, *supra* note 216, at 89.

However, even Mitchell’s sensational seven week trial, in which then-Major General Douglas MacArthur sat as a panel member, lacks substantive relevance to the question of strategic civil-military relationships.<sup>218</sup> Mitchell was a national figure, well-known throughout the military for his wartime heroics in the novel tactic of aerial bombardment and later advocating for a unified Air Force contrary to War Department policy as the Assistant Chief of the Army Air Service.<sup>219</sup> But his notoriety stemmed from opinion, rather than station, as he was only a Corps-level staff officer in San Antonio, Texas, at the time he made his criminal remarks and not in a position to officially counsel senior civilian policy-makers in the national government.<sup>220</sup> Moreover, his comments were aimed not a specific policy-maker or senior military leader, but rather the policies of the institutions of defense generally—the Navy and War Departments. As a military bureaucratic “insurgent,” fighting corporate policy and doctrine he viewed as dated or dangerous, Mitchell was historically important: his advocacy before and during the court-martial influenced Congress to pass the Air Corps Act in 1926.<sup>221</sup> But as a model for how military justice can or should guide public or strategic civil-military relations, Mitchell’s trial offers no relevant lessons.

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<sup>218</sup> There is little historical record suggesting General MacArthur’s later controversial views, expressing a political opinion contrary to his civilian superiors, was influenced by his participation in Mitchell’s court-martial. We are left to speculate. See WILLIAM MANCHESTER, *AMERICAN CAESAR* 149-51 (1978). Not only did the two men consider themselves friends, but among the ironies of this court-martial that brought MacArthur and Mitchell together was that—a quarter century earlier—nineteen year-old MacArthur vainly attempted to court Mitchell’s sister in Wisconsin. *Id.* at 61. The association of these two, both known for their confrontations with civilian and military authority they viewed as ignorant and shortsighted, goes back even further. As a young lieutenant in the Signal Corps, Mitchell served under General *Arthur* MacArthur in the Philippines in 1898. Mitchell’s own father, by then a Senator, had also served with then-Lieutenant Arthur MacArthur when he served in with the 24<sup>th</sup> Wisconsin Infantry during the Civil War. *Id.* at 43.

<sup>219</sup> JOHNSON, *FAST TANKS*, *supra* note 216, at 87.

<sup>220</sup> Borch, *Court-Martial of Billy Mitchell*, *supra* note 212, at 1-2.

<sup>221</sup> Pub. L. No. 69-446, 44 Stat. 780 (1926). This Act officially established the Army “Air Corps” and, *inter alia*, increased the number of personnel assigned or detailed to support it, ordered it to maintain 1,800

In the two-thirds of a century since the Uniform Code of Military Justice [UCMJ] was first enacted, the *only* case involving an officer's contempt toward civilian officials, for which there is binding precedent on any relevant subsequent cases, was the 1965 court-martial of Second Lieutenant Henry Howe. Howe was charged with violating Article 88, UCMJ,<sup>222</sup> for carrying a protest sign that, in part, read "Let's have more than a choice between petty ignorant facists [sic] in 1968" on one side, and on the other side of the sign, the words "End Johnson's Facist [sic] aggression in Viet Nam."<sup>223</sup> Lieutenant Howe was certainly not engaged in a strategic argument with senior civilian officials when he wrote these words, nor was he privy to the planning, debate, and arguments of the military and civilian leaders he implicitly denounced in his protest sign.

The purpose of the punitive UCMJ article with which Howe was charged was to prohibit military officers from engaging in "contemptuous speech" against certain high-ranking civilian officials, thereby implicitly strengthening the principle of subordination to civilian constitutional authority over the military.<sup>224</sup> Yet, the crime's definition itself comes

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serviceable aircraft, and established a new "air section" in each War Department General Staff division. *See* JOHNSON, FAST TANKS, *supra* note 216, at 89-90.

<sup>222</sup> Article 88, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 888:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

<sup>223</sup> *United States v. Howe*, 37 C.M.R. 429, 432 (1967).

<sup>224</sup> Lieutenant Colonel Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW. 1 (July 1999); *see also* *Hearing Before the House Comm. On Military Affairs on H.R. 23628* (Statement of Brigadier General Enoch H. Crowder, the Judge Advocate General of the Army), May 23, 1912 (discussing proposed revisions to the United State Articles of War, the forerunner to the Uniform Code of Military Justice), at 55, *available at* [http://www.loc.gov/rr/frd/Military\\_Law/pdf/hearing\\_comm.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/hearing_comm.pdf).



with caveats that leave application to the *strategic* civil-military relationship highly improbable. Unlike comments that may be personally contemptuous, an officer's *adverse criticism of the President, Congress, or the Secretary of Defense in the course of political discussion and debate* is not a criminal offense.<sup>225</sup> Further, "expressions of opinion made in a purely private conversation should not ordinarily be charged" under this crime.<sup>226</sup> Politically-oriented criticism, or the perception of it among the parties, is obviously a source of continuous strain and tension that often leads to what appear to be civil-military "crises" and may substantively affect national security decision-making, as discussed above.<sup>227</sup> As a consequence, the UCMJ's focus on preventing contemptuous and public disrespect aimed at the civilian official *qua* their individual person, rather than their policy decision, makes Article 88 an irrelevant stick by which to prod the military members into appropriate behavior relative to their civilian partners in the strategic civil-military relationship.

The nature of more common cases involving officers implicating this article of the UCMJ are illustrated by the investigation, fine, and forced retirement of an Air Force Major General in 1993, who publically referred to President Clinton as "gay-loving," "womanizing," "draft-dodging," and "pot-smoking" at an Air Force banquet speech.<sup>228</sup> Just as with Lieutenant Howe, this general officer intended to disparage the personal conduct and history of his commander-in-chief, not engage in an academic policy debate. All other criminal investigations and prosecutions of senior military officers tend to deal not with their

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<sup>225</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 12c (2012) [hereinafter MCM].

<sup>226</sup> *Id.*

<sup>227</sup> *Supra* Parts I.A. and II.A.

<sup>228</sup> John Lancaster, *General Who Mocked Clinton Set to Retire, Punishment Follows Remarks at Banquet*, WASH. POST, June 19, 1993, <http://www.highbeam.com/doc/1P2-951902.html>.

relationships across the civil-military divide related to strategic decision-making and policy, but rather with their improper personal or sexual relationships with subordinates or their financial misconduct.<sup>229</sup>

Other avenues of UCMJ prosecution include charges of Dereliction of Duty,<sup>230</sup> Conduct Unbecoming an Officer and Gentleman,<sup>231</sup> or Conduct Prejudicial to Good Order and Discipline.<sup>232</sup> In practice, however, these appear as unlikely deterrents to pathological civil-military relationships as the Contempt offense under Article 88 of the UCMJ. No such charges, or even the hint that they might be employed, were made during the two most public and controversial episodes in which a President has relieved a senior officer of command in wartime in the last sixty years. President Truman relieved General Douglas MacArthur for exceeding his operational mandate, and for MacArthur's impolitic public statements about doing so, in Korea.<sup>233</sup> General Stanley McChrystal resigned after being recalled to Washington, D.C., by President Obama, from his command headquarters in Afghanistan. McChrystal and his staff had been interviewed by an embedded magazine journalist in which candid, disparaging remarks aimed at the President Obama's administration, inner circle of

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<sup>229</sup> See, e.g., Craig Whitlock, *Military brass, behaving badly: files detail a spate of misconduct dogging armed forces*, WASH. POST, Jan. 26, 2014, [http://www.washingtonpost.com/world/national-security/military-brass-behaving-badly-files-detail-a-spate-of-misconduct-dogging-armed-forces/2014/01/26/4d06c770-843d-11e3-bbe5-6a2a3141e3a9\\_story.html](http://www.washingtonpost.com/world/national-security/military-brass-behaving-badly-files-detail-a-spate-of-misconduct-dogging-armed-forces/2014/01/26/4d06c770-843d-11e3-bbe5-6a2a3141e3a9_story.html).

<sup>230</sup> Article 92, UCMJ; see also MCM, *supra* note 225, at pt. IV, ¶ 16c(3).

<sup>231</sup> Article 133, UCMJ; see also MCM, *supra* note 225, at pt. IV, ¶ 59c.

<sup>232</sup> Article 134, UCMJ, see also MCM, *supra* note 225, at pt. IV, ¶ 60.

<sup>233</sup> *MacArthur Senate Statement*, *supra* note 140; see also W.H. Lawrence, *Truman Relieves M'Arthur of All His Posts; Finds Him Unable to Back U.S.-U.N. Policies; Ridgway Named to Far Eastern Commands*, N.Y. Times, April 11, 1951, <http://www.nytimes.com/learning/general/onthisday/big/0411.html#article>.

advisors, and war-fighting strategy were voiced, suggested, or otherwise countenanced.<sup>234</sup> Both cases involved patent insubordination and unvarnished disrespect.<sup>235</sup> However, neither case was seriously considered a crime for which these popular and competent generals would have been court-martialed or disciplined.

The reluctance to prosecute these striking examples of public conflict at the highest political-military level of policy-making suggests that punitive criminal law has little bearing on the question of deterring or punishing such breaches of the civil-military relationship, let alone diagnosing the health of such strategic relationships. As journalist Thomas Ricks wrote, to equate such failure to a criminal offense would likely chill any motive to innovate—that is, to risk failure or breach a status quo or doctrine.<sup>236</sup> Moreover, in General McChrystal’s case, any proposal to consider admonishment or discipline under the UCMJ would have been weakened by the fact that nobody believed tension with the Administration was borne of personal disgust or animosity with President Obama, or even the result of a substantive policy disagreement.<sup>237</sup>

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<sup>234</sup> Michael Hastings, *The Runaway General*, ROLLING STONE, June 22, 2010, <http://www.rollingstone.com/politics/news/the-runaway-general-20100622>; for background on the journalist and his personal views on General McChrystal, as well as speculation on the latter’s motivation to be interviewed by the popular magazine, see BOLGER, *WHY WE LOST*, *supra* note 10, at 339-42.

<sup>235</sup> Marybeth P. Ulrich, *The General Stanley McChrystal Affair: A Case Study in Civil-Military Relations*, PARAMETERS (Spring 2011), 86-100 [hereinafter Ulrich, *The General Stanley McChrystal Affair*].

<sup>236</sup> RICKS, *THE GENERALS*, *supra* note 38, at 451-53.

<sup>237</sup> ADMIRAL JAMES STAVRIDIS, *THE ACCIDENTAL ADMIRAL: A SAILOR TAKES COMMAND AT NATO* 109-13 (2015) [hereinafter STAVRIDIS, *ACCIDENTAL ADMIRAL*] (Stavridis was McChrystal’s superior, serving as the North Atlantic Treaty Organization [NATO] Supreme Allied Commander for Operations [SACEUR] at the time). See also Ulrich, *The General Stanley McChrystal Affair*, *supra* note 235, at 86. Indeed, in the immediate aftermath of the offending article’s publication in *Rolling Stone*, the debate over whether President Obama should relieve McChrystal, or simply recall and censure him, was widespread—both in public editorials and inside the White House. *Id.* at 90. Arguments for and against relief were premised on whether the general’s presumed ability (according to Eliot Cohen, a “selfless, fearless, and inspiring . . . military genius”) to accomplish the strategic mission before him was more important than his staff’s imprudent comments. Eliot A. Cohen, *Why McChrystal Has to Go*, WALL STREET J., June 23, 2010,

Ultimately, President Obama’s decision to accept General McChrystal’s tendered resignation was likely a calculation prompted by several factors, none of which included the relevance of a potential criminal prosecution.<sup>238</sup> First, underlying President Obama’s decision was his aides’ deep distrust of the Pentagon, at least with respect to its support for the administration’s strategic review of the Afghanistan mission.<sup>239</sup> Second, an earlier McChrystal public gaffe, in which he implicitly criticized both Vice President Biden’s preferred strategy and the amount of time these strategy review sessions were taking in Washington, served as the trigger for his first “warning.”<sup>240</sup> Finally, President Obama’s decision would inevitably be viewed in historic terms: inspired by the history of American general officer tension with the Oval Office during a war, in which the latter’s authority seems challenged, the presidential precedent has been to relieve the offending officer, laud his long and skilled service and honorable sacrifice, but force him into retirement.<sup>241</sup> Public opinion approved of President Obama’s decision by a wide margin.<sup>242</sup>

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<http://www.wsj.com/articles/SB10001424052748704853404575322800914018876> (arguing that he should be relieved); Greg Jaffe & Ernesto Londono, *Is General Stanley McChrystal Someone the President Can Afford to Fire?*, WASH. POST, June 22, 2010 (quoting both Eliot Cohen and Peter Feaver as saying this was a “firing offense”), <http://www.washingtonpost.com/wpdyn/content/article/2010/06/22/AR2010062202069.html>; see also Max Fisher, *7 Cases for Keeping McChrystal*, THE ATLANTIC, June 22, 2010, <http://www.thewire.com/politics/2010/06/7-cases-for-keeping-mcchrystal/23976/>.

<sup>238</sup> In fact, the Department of Defense [DoD] Inspector General conducted an investigation into the episodes captured in the *Rolling Stone* article and did not release its findings until nine months after McChrystal’s forced resignation, and concluded that there was insufficient evidence to prove any violation of the UCMJ or DoD policy or rules. See Memorandum from Michael S. Child, Jr., Acting Deputy Inspector General, Department of Defense, for Inspector General, Department of the Army, subject: Review of Army Inspector General Agency Report of Investigation (Case 10-024) (8 April 2011), <http://www.dodig.mil/fo/Foia/PDFs/ROI-508.pdf>.

<sup>239</sup> Ulrich, *The General Stanley McChrystal Affair*, *supra* note 235, at 89; see also WOODWARD, *OBAMA’S WARS*, *supra* note 48, at 371-74.

<sup>240</sup> Ulrich, *The General Stanley McChrystal Affair*, *supra* note 235, at 88-89; see also GATES, *DUTY MEMOIRS*, *supra* note 56, at 491, and LEON PANETTA, *WORTHY FIGHTS* 253 (2014) (calling General McChrystal’s remarks at a London think tank as probably right, but “ill-advised” for appearing to “box in” the administration).

<sup>241</sup> See GATES, *DUTY MEMOIRS*, *supra* note 56, at 487-91 (Secretary of Defense Robert Gates’ memory of the White House response to the *Rolling Stone* article). See also President Harry Truman, Statement by the

In sum, punitive criminal law does not envision addressing civil-military conflict at the strategic level either as a deterrent or as a guide for promulgating or imputing norms or expectations of conduct. The cases that *have* gone to trial feature relatively low-ranking officers contemptuously attacking the personal attributes of one or more civilians (Howe’s case), or the organization as a whole (Mitchell’s case). The manner in which courts have punished the offender, the rank of the offender relative to the civilian “victim,” and the dearth of legal precedent on the subject, all illustrate that neither the UCMJ itself nor criminal case law offers any direct or implied norms to guide the relationship between senior strategic civilian and military leaders. Finally, the cases that *could have* been prosecuted but were not (as with MacArthur and McChrystal) remind all parties to the strategic civil-military relationship that conspicuous controversy will likely be addressed via political, not legal, means. Ultimately, the result has been a periodic reassertion of civilian control over a “runaway” military by removing the offending military agent from the relationship altogether.<sup>243</sup> In the absence of relevant Constitutional guideposts, statutory requirements, or case precedent, the next most relevant potential source of criteria ought to be found within regulatory provisions, or the tools through which the Executive Branch administers itself. Unfortunately, as described below, these sources again offer missed opportunities.

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President, April 10, 1951,  
<http://www.pbs.org/wgbh/amex/macarthur/filmmore/reference/primary/officialdocs02.html>; compare President Barack Obama, Statement by the President in the Rose Garden, June 23, 2010, *available at* <http://www.whitehouse.gov/the-press-office/statement-president-rose-garden>.

<sup>242</sup> Jeffrey M. Jones, *Most Approve of Obama’s Decision to Remove Gen. McChrystal*, GALLUP.COM, <http://www.gallup.com/poll/141041/approve-obama-decision-remove-gen-mcchrystal.aspx> (reporting on a June 25, 2010 USA Today/Gallup poll).

<sup>243</sup> GATES, DUTY MEMOIRS, *supra* note 56, at 491; see also BARRY POSEN, THE SOURCES OF MILITARY DOCTRINE 45 (1984) [hereinafter POSEN, SOURCES OF MILITARY DOCTRINE].

4. *Administrative Regulations Focus on Undue Personal Gain, not Civil-Military Relations*

Regulations issued within the Executive Branch, either by the President or subordinate agencies, appear suited as means by which to prescribe norms of behavior for those parties engaged in strategic civil-military relationships. As illustrated below, however, regulations miss this opportunity, just as Congressional legislation does. Where statutes impose organization, aiming to reduce redundancies,<sup>244</sup> internal executive branch directives that implement ethics policy focus largely on personal financial responsibilities and prohibiting conflicts of interest that affect the public's perception of, or actual impact on, an impartial government workforce. These sources are silent, like case law,<sup>245</sup> on the unique fiduciary responsibilities that are created and managed by the parties to civil-military relationships.

For example, President George H.W. Bush issued an Executive Order in 1989, titled "Principles of Ethical Conduct for Government Officers and Employees."<sup>246</sup> This Order was intended to "establish fair and exacting standards of ethical conduct for all executive branch employees" thereby "intend[ing] only to improve the internal management of the executive branch."<sup>247</sup> This Order is largely relevant for establishing the now well-known fourteen principles of ethical conduct.<sup>248</sup> At first glance, it is ripe for articulating a set of norms that

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<sup>244</sup> *Supra* Part II.B.2.

<sup>245</sup> *Supra* Part II.B.3.

<sup>246</sup> Exec. Order No. 12,674, 5 C.F.R. 2635 (1989), *modified by* Exec. Order No. 12,731, 5 C.F.R. 2635 (1990).

<sup>247</sup> *Id.* at pmb. and § 504.

<sup>248</sup> 5 C.F.R. 2635.101(b)(1)-(14) (Standards of Ethical Conduct for Employees of the Executive Branch).

might guide members of a strategic civil-military relationship, and therefore create an objective means to diagnosis suspected pathologies in that relationship:

Public service is a public trust. Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain.<sup>249</sup>

Reviewing the subsequent principles, however, the President clearly wished to reinforce a basic commitment to running a government that was (and was perceived to be) impartial, honest, and fair. But each principle is narrowly tailored: other than the general expectation to “place loyalty to the Constitution, the laws and ethical principles above private gain,”<sup>250</sup> six of the fourteen principles relate exclusively to an employee’s financial decision-making and are prohibitions<sup>251</sup> on unethical “private gain” at the expense of government (public) interests.<sup>252</sup> The remaining affirmative duty principles<sup>253</sup> simply direct the employee to engage in “honest effort,” to act impartially, to “protect and conserve Federal property,” to “disclose waste, fraud, abuse, and corruption,” to pay their taxes, to obey equal opportunity laws, and to avoid creating the appearance that they are violating an ethical precept.<sup>254</sup> Not one of the fourteen principles relate to the advice and counsel that military officers must provide to the civilian policy-makers and elected officials in whom the Constitution grants

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<sup>249</sup> *Id.* at 2635.101(a).

<sup>250</sup> *Id.* at 2635.101(b)(1).

<sup>251</sup> Identified by “shall not.”

<sup>252</sup> 5 C.F.R. 2635.101(b)(2), (3), (4), (6), (7), and (10).

<sup>253</sup> Identified by “shall.”

<sup>254</sup> 5 C.F.R. 2635.101(b)(5), (8), (9), (11), (12), (13), and (14).

ultimate national security authority. The remainder of the implementing regulation simply discusses these duties in greater detail.<sup>255</sup>

The Joint Ethics Regulation [JER],<sup>256</sup> a Department of Defense [DoD] publication, is also nearly silent on the subject. Other than referencing the fourteen principles of ethical conduct,<sup>257</sup> its “political activities” chapter<sup>258</sup> is focused exclusively on reminding employees that they are not prevented from exercising basic obligations of “citizenship,” and is concerned with preventing undue influence of partisan political organizations, members of Congress, or political parties in personnel management decisions.<sup>259</sup> The closest the JER comes to providing a helpful diagnostic tool to the participants in strategic civil-military relationships is in the final chapter, which describes “ethical values” and “ethical decision-making.” Here, the DoD lists nine “primary ethical values,” including honesty, accountability, fairness, caring, promise-keeping, and responsible citizenship.<sup>260</sup> Only two of these values appear to have applicability to the strategic civil-military relationship. The JER defines “honesty” by listing its various attributes, one of which is “candor,” defined as the “forthright offering of unrequested information . . . [which is] necessary in accordance with

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<sup>255</sup> See, e.g., 5 C.F.R. 2635, subparts B – H. The later supplementing regulation was specifically aimed at employees of the Department of Defense, but it too lacks any relevance to the strategic civil-military relationship. 5 C.F.R. 3601 (Supplemental Standards of Ethical Conduct for Employees of the Department of Defense). This regulation identifies “additional exceptions for gifts from outside sources,” “limitations on gifts between DoD employees,” “limitations on solicited sales,” and restrictions on “outside employment and business activities” of defense employees. *Id.* at 3601.102, 103, 104, 106, and 107. Nothing addresses any larger principle beyond those prohibiting unethical private (financial) gain.

<sup>256</sup> U.S. DEP’T OF DEFENSE, DIR. 5500.07-R, JOINT ETHICS REGULATION, CHANGES 1-7 (11 Nov 2011) [hereinafter JER].

<sup>257</sup> *Id.* at Chapter 12.

<sup>258</sup> *Id.* at Chapter 6.

<sup>259</sup> *Id.* at para. 6-203.

<sup>260</sup> *Id.* at para 12-400.



the gravity of the situation and the nature of the relationships.”<sup>261</sup> Given the strategic policy-making level at which these parties interact, with decisions ultimately affecting how wars are waged and the lives of those Americans who wage them, it would not be surprising that candor is a virtue highly touted by senior officials in these civil-military relationships.<sup>262</sup>

Furthermore, the JER describes “responsible citizenship” as the “civic duty of every citizen” to “exercise discretion [in] personal judgment in the performance of official duties within the limits of their authority so that the will of the people is respected in accordance with democratic principles.”<sup>263</sup> This definition begs for clarification: it leaves at least four questions unanswered, including what the government employee should do if “promise-keeping” means being deferential toward a partisan position that the employee believes is in the best of the country; how the employee should act if his or her office has no explicit “limit on authority;” whether the “will of the people” is best captured by the Presidential administration or by Congress; finally, it fails to answer what should guide one’s discretion.<sup>264</sup>

Failing to address these questions, let alone answer them, reflects poorly on the JER’s capacity to serve as a functioning administrative guide for participants in strategic civil-

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<sup>261</sup> *Id.* at para. 12-400a.(3).

<sup>262</sup> *See, e.g.,* LEON PANETTA, WORTHY FIGHTS, *supra* note 240, at 195, 213, 226, 349-51; *see also* GATES, DUTY MEMOIRS, *supra* note 56, at 22, 84 (recounting his first meeting as Secretary of Defense with the Joint Chiefs of Staff), 87, 91 (espousing the virtue of candor toward Congress), 95 (recounting President George W. Bush’s expectation for candor from his senior flag officers), 134 (quoting Gates’ 2008 speech to cadets at the United States Military Academy), 188, and 576; *see also* COLIN POWELL, IT WORKED FOR ME 97, 113, 121-23 (2012); *and* COLIN POWELL, MY AMERICAN JOURNEY, *supra* note 184, at 448.

<sup>263</sup> JER, *supra* note 256, at para 12-400j.

<sup>264</sup> Moreover, these values are generically applied to every DoD employee from the civilian paralegal specialist working in the Fort Polk, Louisiana, Office of the Staff Judge Advocate to the Secretary of Defense. In sum, these internal Executive Branch regulations and directives appear relevant to the subject of strategic civil-military relations, but do little to establish a diagnostic mechanism for assessing their vitality or pathology.

military relationships, or as tool to diagnose their relative health. As the JER and other administrative regulations do not create viable norms, expectations, and standards for the complex interpersonal interactions among the nation's elite policy-makers and military leaders, the final source of possible authority left to examine is military doctrine. Like the higher orders of law and precedent describe above, however, this source has no definitive answer either.

##### 5. *Military Doctrine Looks Down and In, not Up and Out*

The American military defines “doctrine” as the set of “fundamental principles by which the military forces or elements thereof guide their actions in support of national objectives.”<sup>265</sup> Doctrine represents the military’s preferences for what “means” to employ and how to employ them, in context of a given “end” or national policy, and explains why those means will be successful.<sup>266</sup> Douglas Macgregor wrote that doctrine is generally “collective body of thinking and writing that . . . exerts a unifying influence and supports the coordination of operations, tactics, training, and modernization”<sup>267</sup> But as “collective body of thinking and writing,” doctrine is not proclaimed in a vacuum. Instead, doctrine evolves much like scientific paradigms.<sup>268</sup> The how, what, and why described by doctrine are questions answered partly by the organization’s historical experience, specialized technical

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<sup>265</sup> DEP’T OF DEFENSE, JOINT PUB. 1-02, DEP’T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, 73 (8 Nov. 2010). The individual Services’ definitions are identical. *Compare*, NAVAL DOCTRINE PUB. 1, NAVAL WARFARE, 48 (March 2010), *and* ARMY DOCTRINE PUB. 1-02, OPERATIONAL TERMS AND MILITARY SYMBOLS, Glossary-1, (31 Aug. 2012).

<sup>266</sup> POSEN, SOURCES OF MILITARY DOCTRINE, *supra* note 243, at 7, 13.

<sup>267</sup> DOUGLAS A. MACGREGOR, BREAKING THE PHALANX: A NEW DESIGN FOR LANDPOWER IN THE 21ST CENTURY 143-44 (1997).

<sup>268</sup> DAVID E. JOHNSON, MODERN U.S. CIVIL-MILITARY RELATIONS: WIELDING THE TERRIBLE SWIFT SWORD vi-viii (1997).

knowledge, geography, traditions, the capabilities of likely enemies, and assumptions about how civilian policy-makers will employ the organization.<sup>269</sup> This final factor can be quite influential: the military's sense of how it is to remain objectively aloof or professionally apolitical, based on Constitutional principles, will determine the extent to which it will necessarily defer to civilian control.<sup>270</sup> Military doctrine, ultimately, is a collection of related approaches which guide and justify future decision-making, built upon appreciation of external circumstances and internal capabilities, generally agreed upon and followed by a specific population.

Thus, like the Constitution, legislation, case law, and regulations, military doctrine appears to be a possible resource for identifying, or at least imputing, specific objective criteria that guide strategic civil-military relationships.<sup>271</sup> In several ways, however, doctrine remains a missed opportunity despite its ability to evolve over time as a function of the proponent organizations' self-criticism, external political influence, or the organization's interpretation of how it will answer policy demands.

First, the Department of Defense's capstone joint doctrine<sup>272</sup> is not purposed to provide such a tool. Rather, it describes in great detail the complicated structure of U.S. national security, including key organizations like the National Security Council relative to the Department of Defense, and the planning and resourcing processes that shape routine and

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<sup>269</sup> POSEN, SOURCES OF MILITARY DOCTRINE, *supra* note 243, at 14; JANOWITZ, THE PROFESSIONAL SOLDIER, *supra* note 10, at 257.

<sup>270</sup> JANOWITZ, THE PROFESSIONAL SOLDIER, *supra* note 10, at 257.

<sup>271</sup> POSEN, THE SOURCES OF MILITARY DOCTRINE, *supra* note 243, at 16.

<sup>272</sup> DEP'T OF DEFENSE, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES (25 March 2013).

contingency decision-making.<sup>273</sup> However, any reference to “unity of effort” and “coordination” is limited to coordination among the executive branch departments and agencies, non-governmental organizations, the private sector, and other nations.<sup>274</sup> As its focus is the enabling of joint planning and operations among the separate Services, this doctrine is not oriented on the subtleties or nuances of particular relationships among civilian and military strategic policy-makers.

Second, doctrine promulgated by the various Services falls short in the same way. The Army’s senior institutional leader, its Chief of Staff, publishes his “vision” of what the Army is, does, how it does it, and its future, in a capstone doctrine document simply called, “The Army.”<sup>275</sup> In its most recent form, this doctrine is aimed at all uniformed service members and civilian employees of the Department of Army, and espouses “four essential characteristics” of the Army professional: military expertise, honorable service, *esprit de corps*, and stewardship.<sup>276</sup> Like the JER, the doctrine emphasizes the virtue of “trust,” and the commensurate requirement of candor that enables trust to form. However, the doctrine’s subsequent discussion of trust relates generically to the relationship between Soldiers fighting for each other on the battlefield and between Soldiers and their uniformed chain-of-command.<sup>277</sup>

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<sup>273</sup> *Id.* at Chapter II, especially Figures II-1 and II-3.

<sup>274</sup> *Id.* at i, and para. V-14.

<sup>275</sup> ARMY DOCTRINE PUB. 1, THE ARMY iii (Sept. 17, 2012).

<sup>276</sup> *Id.* at para, 2-1.

<sup>277</sup> *Id.* at paras. 2-2, 2-3, and 2-4.

While this doctrine does specifically mention “civil-military relations” and highlights military subordination as a key “cornerstone,” it applies vaguely to all service members regardless of rank and position, and only requires that a military professional “understand” the role of the civilian leader and “understand” their responsibilities to the civilian leadership.<sup>278</sup> The general observation that military “input is vital” to the policy-making process is the extent to which this doctrine details those responsibilities. It says nothing of the specific relationship between senior participants in the strategic civil-military relationship, notwithstanding a recent history of apparent and public conflict, tension, and resignations.<sup>279</sup>

The closest this doctrine comes to relating practical standards is in its “reference publication,” the document that expounds on the principles identified in the original doctrine.<sup>280</sup> Here, the Army specifically mentions “senior Army leaders,” but in context of their maintaining the trust “with the American people.”<sup>281</sup> Certainly, it is possible to impute that “the American people” is meant here to encompass their elected representatives in Congress and with the President.<sup>282</sup> However, the remaining three paragraphs in all of Army doctrine devoted to “civil-military relations” do not explain how to pragmatically maintain this trust, except through, by inference, “understand[ing] and appreciat[ing] the critical role

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<sup>278</sup> *Id.* at para. 2-26.

<sup>279</sup> *Supra* Part I.A.

<sup>280</sup> ARMY DOCTRINE REFERENCE PUBLICATION [hereinafter ADRP] 1, THE ARMY PROFESSION, Preface (14 June 2013).

<sup>281</sup> *Id.* at para. 6-9.

<sup>282</sup> *Id.* at para. 6-10.

that civilian control of the military has played throughout our history.”<sup>283</sup> The only hint at what could be interpreted as general prescriptive criteria for strategic civil-military relationships is the “duty to ensure that the military perspective is candidly and professionally presented in all appropriate forums.”<sup>284</sup> Readers are left to speculate what “professionally” means if it is something distinct from “candid” and what an “appropriate forum” would be under given circumstances. This duty, then, would be unhelpful if assessing General Shineski’s testimony before Congress in 2003 about the number of troops required in post-war Iraq, widely interpreted as contrary to known civilian leadership preferences.<sup>285</sup> Was it a valid trigger for civil-military strife or was it instead a valid articulation of a candid, “professional” opinion borne of military judgment as the Goldwater Nichols Act authorizes?

Though it does not help answer that question, the doctrine attempts to further explain that a “key condition” of proper civil-military relations” is the “mutual respect and trust between civilian and military leaders,” which is fulfilled “by strictly adhering to a set of norms established by law and past practice.”<sup>286</sup> However, several features render this prescription too indefinite to be of any great assistance, much as Mackubin Owens’ three criteria are too vague.<sup>287</sup> As discussed above, there is no definitive “set of norms established by law.” Moreover, if Betts is correct that only one’s political perspective offers a way to

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at para. 6-11.

<sup>285</sup> *Supra* Part I.A.

<sup>286</sup> ADRP 1, *supra* note 280, at para. 6-12.

<sup>287</sup> *Infra* note 390.

judge the behaviors of these parties,<sup>288</sup> then “past practice” is often an inconsistent or irrelevant guide, serving as weak precedent.

Indeed, by reminding Army professionals that their advisory role is “confined . . . to the policy-making process [but not] to engage publically in policy advocacy or dissent,” the doctrine does not address formidable, but foreseeable, situations. For example, it does not define “advocacy,” nor suggest any, let alone proper, course of action when a senior military professional believes answering a question would reflect personal judgment without the intent to advocate or the reasonable expectation that the statement could be interpreted as “boxing in” the civilian leadership.<sup>289</sup> This prohibition on “dissent” and “advocacy” is so nonspecific that it appears, at least, contrary to the common interpretation of the officer’s oath, which implies a higher duty to Constitutional principles, than to any specific policy or practice.<sup>290</sup>

Additionally, the doctrine does not put the military professional on notice that the demands, expectations, and norms associated with advising civilians at the strategic level can and will shift between one political administration and the next, nor that they may change dramatically within the same administration based on civilian leaders’ experiences and exposure to military advice. Third, it only generically addresses all “military professionals,” and imprecisely refers to “elected and appointed officials,” and the civilians in “other federal

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<sup>288</sup> BETTS, COLD WAR CRISES, *supra* note 45, at xv.

<sup>289</sup> See, e.g., Suzanne C. Nielson, *Rules of the Game? The Weinberger Doctrine and the American Use of Force*, in THE FUTURE OF THE ARMY PROFESSION 627, 627 (Lloyd Matthews ed., 2005) (commenting on General John Shalikashvili’s 1995 remarks at George Washington University, as Chairman of the Joint Chiefs of Staff, clearing advocating for a policy that disassociated the U.S. from “nation-building”).

<sup>290</sup> DALESSANDRO, ARMY OFFICER’S GUIDE, *supra* note 199, at 7.

and states entities.”<sup>291</sup> This leaves the question of how civilian control is to be observed in the context of a senior military official’s relationship with another agency or department, other than the Department of Defense, unanswerable. If there is a difference in the degree, extent, or nature of the candid advice to be offered in those circumstances, this doctrine does not describe it or justify it.

In July 2014, the Army recognized an “omission in [its] doctrine” and issued a white paper to “glean [the] fundamental nature” of, and to express, the “Army Ethic.”<sup>292</sup> According to the Army’s leadership, this Ethic is designed to explain “why we conduct ourselves morally and ethically . . . [and it] provides motivation and inspiration for each of us to perform our Duty in a manner worthy of the Trust of the American people and each other.”<sup>293</sup> Despite the potential to encompass within this Ethic a nuanced description of the duties, expectations, and norms in the strategic civil-military relationship, the white paper reads like training material provided to the Army as a corrective measure, responding to uncomfortable history of well-publicized moral lapses, “double standards, evidence of unfaithfulness, [and] disregard for the law” since military combat operations began in October, 2001.<sup>294</sup> The histories of the Abu Ghraib prison torture scandal,<sup>295</sup> the Afghanistan mass murder conviction of Staff Sergeant Robert Bales,<sup>296</sup> and the infidelity and abuse by

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<sup>291</sup> ADRP 1, *supra* note 280, at para. 6-10.

<sup>292</sup> CENTER FOR THE ARMY PROFESSION AND ETHIC [hereinafter CAPE], U.S. ARMY TRAINING AND DOCTRINE COMMAND, *The Army Ethic*, at i (11 July 2014) [hereinafter *Army Ethic*].

<sup>293</sup> *Id.* at 1.

<sup>294</sup> *Id.* at 2.

<sup>295</sup> See, e.g., *Final Report of the Independent Panel to Review DoD Detention Operations* (August 2004), available at <http://www.defense.gov/news/Aug2004/d20040824finalreport.pdf>.

<sup>296</sup> Kirk Johnson, *Guilty Plea by Sergeant in Killing of Civilians*, N.Y. TIMES, June 5, 2013, [http://www.nytimes.com/2013/06/06/us/sergeant-robert-bales-testimony.html?\\_r=0](http://www.nytimes.com/2013/06/06/us/sergeant-robert-bales-testimony.html?_r=0).



Brigadier General Jeffrey Sinclair,<sup>297</sup> among other crimes, need not be recounted here, but seem to have inspired the Army’s self-searching inquiry to define and publish an understandable code that will “serve as the foundation for developing the moral identity of Army Professionals.”<sup>298</sup> As the white paper demands: “unethical practices must not be tolerated.”<sup>299</sup>

Evidently, the white paper was not concerned, just like the doctrine it sought to update, with the particulars of stressed, strained, or fractured strategic civil-military relationships, which are often not ethical dilemmas at all and rarely criminal.<sup>300</sup> Rather, civil-military strain is usually based on misconceptions, failed communications between parties, intemperate overstatements, or attempts by one body of professionals to expand the “jurisdiction” of their influence, intruding into another group’s domain of assumed expertise or legitimate authority.<sup>301</sup> The Army, in contrast, seeks to establish an Ethic that will “prevent misconduct . . . [and] to stop unethical practices.”<sup>302</sup> In sum, Army doctrine does

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<sup>297</sup> Craig Whitlock, *Disgraced army general, Jeffrey A. Sinclair, receives fine, no jail time*, WASH. POST, March 20, 2014, [http://www.washingtonpost.com/world/national-security/disgraced-army-general-jeffrey-a-sinclair-receives-fine-no-jail-time/2014/03/20/c555b650-b039-11e3-95e8-39bef8e9a48b\\_story.html](http://www.washingtonpost.com/world/national-security/disgraced-army-general-jeffrey-a-sinclair-receives-fine-no-jail-time/2014/03/20/c555b650-b039-11e3-95e8-39bef8e9a48b_story.html).

<sup>298</sup> CAPE, *Army Ethic*, *supra* note 292, at 2.

<sup>299</sup> *Id.*

<sup>300</sup> *Supra* Part II.B.3.

<sup>301</sup> According to Don Snider, professional groups such as the collective body of military officers—usually at the strategic level of rank and authority—“engage in competition and negotiation for legitimate jurisdictions within which to apply their expertise . . . [so] the task of the profession’s strategic leaders is to identify its competitors, carefully analyze the competition, renegotiate jurisdictions, and create and maintain professional legitimacy.” Don M. Snider, *The U.S. Army as Profession*, in *THE FUTURE OF THE ARMY PROFESSION* 3, 26 (Lloyd Matthews ed., 2005).

<sup>302</sup> CAPE, *Army Ethic*, *supra* note 292, at 7.

not describe critical reasons for friction in these relationships, at what echelon they occur, how to avoid or relieve tensions, or provide historical vignettes as illustrations.<sup>303</sup>

### C. Civil-Military Relations Theory: Surveying the Field

American civil-military relations describe the political, legal, and sociological relationship between three heterogeneous communities: a nation's military forces; the civilian population from which the military is drawn and which it protects; and the nation's civil government for which the military provides a monopoly on armed force for the professional service of national security.<sup>304</sup> In its broadest sense, the state of civil-military

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<sup>303</sup> The other Services suffer the same faults: their doctrine also aims “down and in” to manage their service members’ generic relationships and duties with each other, promoting values like integrity and selfless service, with vague expressions of general respect for the chain-of-command, and reminders that civilians control the military. The Air Force has a punitive directive that “provides specific guidance on required standards of conduct, performance, and discipline.” DEP’T OF AIR FORCE, INSTRUCTION 1-1, AIR FORCE STANDARDS (7 Aug 2012), <http://www.180fw.ang.af.mil/shared/media/document/AFD-120820-005.pdf>. This directive discusses everything from legal use of social media by airmen, to religious accommodation, political activities, and personal grooming. It also restates the Air Force core values of “integrity first, service before self, [and] excellence in all we do.” *Id.* at 4. The foreseeable strain and tension in civil-military relationships is nowhere addressed. The Air Force’s capstone doctrine similarly is silent. The only reference to policy or politics is a curt warning that military doctrine should be free from the fashionable political fads that too quickly change, free from the influence of “budget battles” and the cult of personalities placing their stamp on what should be solely based on the “lessons of warfare.” DEP’T OF AIR FORCE, DOCTRINE DOCUMENT 1 (AFDD 1), AIR FORCE BASIC DOCTRINE, ORGANIZATION, AND COMMAND 6-7 (14 October 2011). Navy doctrine is not any more explicit with regard to strategic civil-military relationships than the Army or Air Force. It has no explicit doctrine *per se* concerning foundational moral guidelines. However, like the Air Force, the Navy does publish a “core values charter” listing three attributes expected of all sailors, regardless of rank and including civilian employees of the Department: honor, courage, and commitment, *available at* <http://ethics.navy.mil/content/corevaluescharter.aspx> (the same three values are espoused by the Marine Corps, <http://www.hqmc.marines.mil/hrom/NewEmployees/AbouttheMarineCorps/Values.aspx>). Under “honor,” the Navy reminds its professionals to “make honest recommendations to [their] seniors” and to “deliver bad news forthrightly”—clearly implied tasks if candor is a valued attribute. *Id.* The Navy recognized the doctrinal gap, as the Army did, in a recent report from the U.S. Naval War College. *Ethics in the Navy* (24 March 2014), <https://www.usnwc.edu/getattachment/4fdc7dfe-2b5b-46da-aad8-670628c6fbe2/Ethics-in-the-US-Navy-24-March-2014.aspx>. This report called for institution-wide reassessment of the Navy Ethic, seeking to make it proactive and preventive across the organizational culture. However, it too seems more concerned with stemming illegal and unethical choices of its sailors, arguing they undermine war-fighting capabilities. *Id.* at 5. Nothing expressly relates to the senior flag officer and the relationship with strategic policy-makers; instead, obvious truisms and generalizations are commonplace. *See, e.g.,* THOMAS J. CUTLER, THE BLUEJACKET’S MANUAL 555 (2009) (observing that “one of our governing principles is civilian control of the military” is a matter that makes the Navy a “more complicated organization than we might wish for”).

<sup>304</sup> James Burk, *Theories of Democratic Civil-Military Relations*, 29 ARMED FORCES & SOC’Y, at 7, 7 (Fall 2002).

relations is a portrait of how military power and influence is expressed toward the achievement of a policy objective, by two dominant authorities. Each authority has a particular domain of expertise: civil government with a mandate to representatively govern, and its subordinate but more technically expert armed forces.<sup>305</sup>

But in a narrower sense, scholars are interested in what could be called tactical and operational concerns: how a liberal democratic nation recruits, administers, retains, and controls its military, and against which adversaries that nation aims it, and for what objective or objectives.<sup>306</sup> These are questions that implicate the idiosyncratic histories, personalities, political ends, economic and wartime conditions of these three broad communities. Multiple “hands on the sword” mean there are is no dearth of subject-matter expertise competing with statutory responsibilities and public opinion.<sup>307</sup> As discussed more thoroughly in Part II.B, *infra*, Congress has authority to investigate the Services and the Department of Defense, and has constitutional authority to appropriate funds for national security programs and materiel.

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<sup>305</sup> Sometimes this “portrait” is like a watercolor: blurred distinctions between these domains of expertise. One early example would be Athens before and during the Peloponnesian War, in the Fifth Century, B.C.E. Its ten generals were directly elected by Athenian citizens for one-year terms, and though they personally led militaries in combat, were also subject to intense review of their conduct by the democratic Assembly, which also debated and legislated specific strategies, tactics, timing of deployments, and missions of the Athenian armed forces. DONALD KAGAN, *ON THE ORIGINS OF WAR AND THE PRESERVATION OF PEACE* 25-26 (1995).

<sup>306</sup> For instance, who, among the people, matters the most for the recruitment or drafting of a capable armed force? ADMIRAL (RET.) GARY ROUGHEAD & KORI SCHAKE, *NATIONAL DEFENSE IN A TIME OF CHANGE* 12-15 (2013). Should the answer change as a function of the type of conflict in which that armed force engages? DAVID E. JOHNSON, *HARD FIGHTING: ISRAEL IN LEBANON AND GAZA* (2011); *see also* FRANK G. HOFFMAN, *CONFLICT IN THE 21<sup>ST</sup> CENTURY: THE RISE OF HYBRID WARS* (2007). Should the military intervene, even unobtrusively, in civilian policy-making if the civilians themselves sanction and welcome it? Colonel Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 *WAKE FOREST L. REV.* 341, 344 (1994). How detached—economically, socially, geographically—should military communities be from civilian society? Phillip Carter & David Barno, *Military bases are our most exclusive gated communities — and that hurts veterans*, *WASH. POST*, Nov. 8, 2013, [http://www.washingtonpost.com/opinions/military-bases-are-our-most-exclusive-gated-communities--and-that-hurts-veterans/2013/11/08/27841b1e-47cb-11e3-a196-3544a03c2351\\_story.html](http://www.washingtonpost.com/opinions/military-bases-are-our-most-exclusive-gated-communities--and-that-hurts-veterans/2013/11/08/27841b1e-47cb-11e3-a196-3544a03c2351_story.html).

<sup>307</sup> Mackubin Thomas Owens, *What Military Officers Need to Know About Civil-Military Relations*, *NAVAL WAR C. REV.*, Spring 2012, at 67, 67; Deborah Avant, *Conflicting Indicators of “Crisis” in American Civil-Military Relations*, 24 *ARMED FORCES & SOC’Y*, at 375, 375 (Spring 1998).

The President is the Commander-in-Chief and the ultimate authority in diplomatic affairs and the conduct of combat once engaged. Civilian appointees within the Department of Defense and the officers in critical strategic command and staff billets make day-to-day operational, tactical, and administrative decisions and advise the President on critical issues and long-term planning. The legal, political, and pragmatic conditions under which that sword is wielded, against whom it is thrust, and what resources should be used to sharpen or sheath that sword compose the more granular issues that occupy the modern study of American civil-military relations.<sup>308</sup>

All of these studies, despite their differences, share at least one common principle. Under modern liberal democratic governance, and American government in particular, civilian control over a subordinate and obedient military professional class is normatively preferable to a military-controlled or dominated political system.<sup>309</sup> As many scholars have noted, however, the absence of a *coup* in American history is not proof of a strong, healthy marriage between the parties in the civil-military relationship, nor a confirmation that the sword has been drawn wisely or will be used skillfully.<sup>310</sup> The extent to which military elites ignore, subvert, or publically dissent from executive or legislative branch civilian authority may be one symptom of an unhealthy relationship.<sup>311</sup> The degree to which the military community diverges or segregates itself from civilian communities, geographically and

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<sup>308</sup> SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 2 (1957) [hereinafter HUNTINGTON, *THE SOLDIER AND THE STATE*].

<sup>309</sup> Burk, *Theories of Democratic Civil Military Relations*, *supra* note 304, at 7.

<sup>310</sup> Owens, *What Military Officers Need to Know About Civil-Military Relations*, *supra* note 307, at 72.

<sup>311</sup> David Kaiser, *Back to Clausewitz*, 32 *J. STRATEGIC STUD.* 667, 670 (2009).

representatively, may be another.<sup>312</sup> The debate over, and balance between military budgets and future forecasts of strategic threats may be a third.<sup>313</sup>

The existence of multiple case studies and theoretical models, which offer different independent variables driving the behavior of civil and military elites, complicate the potential for unification (and simplification) of the field of civil-military relations theory.<sup>314</sup> Unfortunately for the three parties actually practicing and observing the civil-military relationship, these models and theories tend to equate “good” relations to those which demonstrate strong civilian control over the military. These case studies and models do little to answer the basic diagnostic problem: gauging the relative health of a particular relationship against objective criteria in context. Though this thesis will not exhaustively summarize all major contributions to the study of American civil-military relations, it will begin by recounting the dominant views from the field that seem to tease out the possibility of a potential objective diagnostic device.

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<sup>312</sup> Avant, *Conflicting Indicators of ‘Crisis’ in American Civil-Military Relations*, *supra* note 58, at 378-79.

<sup>313</sup> See generally, GORDON ADAMS, *THE ROLE OF DEFENSE BUDGETS IN CIVIL-MILITARY RELATIONS* (1992).

<sup>314</sup> Michael Desch’s claim that threats to the nation, based on whether they are domestic or foreign and low or high intensity, affect the relationship is one example. DESCH, *CHANGING SECURITY ENVIRONMENT*, *supra* note 68, at 6-14 (predicting that the most stable civil-military relationships exist when there is a high external threat and low internal threat, but the “weakest” civilian control when there is a low external threat but high domestic, internal, threat). Schiff’s argument that domestic military intervention is less likely when there is a “concordance” or agreement among the civilian leadership, citizens, and military elites on four generic issues (demographic and social composition of the officer corps, political process, recruitment method, and military group identity or “style”) is another. SCHIFF, *A CONCORDANCE THEORY*, *supra* note 3, at 32-47. In contrast, some conceive of the relationship itself as the independent variable, with “good” relations leading to collaborative partnerships, military cohesion, and successful war-operations. SARKESIAN, *supra* note 39, at 2-3.

### 1. Huntington, Professionalism, and Two Forms of Control

Professor Samuel Huntington's relevance to the subject of civil-military relations, and political science more generally, is unquestioned.<sup>315</sup> His seminal work, *The Soldier and the State*,<sup>316</sup> remains the field's common point of departure, even though published in 1957.<sup>317</sup> Given that a nation's security is affected by the quality of its internal military institutions, Huntington argued that national security was shaped by two basic forces that molded these institutions: a "functional imperative" (the threats to a state's security) and a "societal imperative" (the mix of social dynamics, "ideologies, and institutions dominant within the society").<sup>318</sup> These two forces "come[] to a head" in the "relation of the officer corps to the state" and therefore provided the focus of his study.<sup>319</sup>

Huntington's view of the military officer's professionalism is critical to understanding his Cold War-era theory, and his ultimate relevance and contribution to the field decades later. For Huntington, a professional was a "peculiar type of functional group with highly specialized characteristics," distinct from a trade, craft, or vocation.<sup>320</sup> Huntington chose to illustrate this with the example of lawyers and doctors, both of whom

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<sup>315</sup> DESCH, CHANGING SECURITY ENVIRONMENT, *supra* note 68, at xi.

<sup>316</sup> HUNTINGTON, THE SOLDIER AND THE STATE, *supra* note 308.

<sup>317</sup> Don M. Snider, *Strategic Insights: Should General Dempsey Resign? Army Professionals and the Moral Space for Military Dissent*, STRATEGIC INSIGHTS (Strategic Studies Institute) (October 21, 2014), <http://www.strategicstudiesinstitute.army.mil/index.cfm/articles/Should-General-Dempsey-Resign/2014/10/21>; *see also* FEAVER, ARMED SERVANTS, *supra* note 42, at 7; *and see* EMILE SIMPSON, WAR FROM THE GROUND UP: TWENTY-FIRST-CENTURY COMBAT AS POLITICS 112-13 (2013) [hereinafter SIMPSON, WAR FROM THE GROUND UP].

<sup>318</sup> HUNTINGTON, THE SOLDIER AND THE STATE, *supra* note 308, at 2.

<sup>319</sup> *Id.* at 3 (for instance, the strata of society from which officers are drawn and what philosophy seems to drive their perspective on the use of force).

<sup>320</sup> *Id.* at 7.

“pursue a ‘higher calling’ in service of society.”<sup>321</sup> Three characteristics elevated a profession above a vocation: expertise, responsibility, and corporateness. Expertise was in a “significant field of human endeavor” and based on a combination of education and experience, and evaluated by “objective standards of professional competence.”<sup>322</sup> Responsibility meant unselfishly “performing a service” that was “essential to the functioning of society.”<sup>323</sup> Finally, members of that profession illustrate corporateness by sharing a sense that they were a “group apart from laymen” guided by self-created standards and able to enforce those standards on one another.<sup>324</sup> For Huntington, officership was “strongest and most effective when it closely approaches” this professional “ideal.”<sup>325</sup>

Meeting this ideal, he conceded, was not easy for military officers over much of history, and was not dominant in the United States until the late Nineteenth Century.<sup>326</sup> To be an expert military officer, one had to be proficient in the “management of violence.”<sup>327</sup> This necessarily included duties of organizing, equipping, and training a force, planning its actions, and directing it during combat—a suite of abilities that became an “extraordinarily complex intellectual skill requiring comprehensive study and training.”<sup>328</sup> To be a responsible military officer meant using his knowledge and ability only for “socially-

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<sup>321</sup> *Id.* at 7-8.

<sup>322</sup> *Id.* at 8.

<sup>323</sup> *Id.* at 9.

<sup>324</sup> *Id.* at 10.

<sup>325</sup> *Id.* at 11.

<sup>326</sup> *Id.* at 22-58 (describing the evolution of the officer from mercenary to aristocrat to professional, across the modern history of France, Prussia, and Great Britain).

<sup>327</sup> *Id.* at 11 (quoting Harold Lasswell).

<sup>328</sup> *Id.* at 13.

approved purposes” and never in a way that would “wreck the fabric of society.”<sup>329</sup> To be part of the corporate body, a military officer must segregate, at least to a degree, from society in terms of where he lives and other visual signals, like their uniforms, autonomously applying his expertise in a responsible manner for the benefit of those he guards.<sup>330</sup>

As a natural consequence of these characteristics of the modern professional officer, Huntington concluded that the professional military ethic was an attitude of “conservative realism.”<sup>331</sup> This attitude was contrary to the liberalism of the political elites for whom the military worked, and prevailed as the way in which officers approached and defined challenges they faced. For example, conflict was a universal part of human nature according to the military mindset; the future was never realistically foreseeable; the disciplined, cohesive organization was greater than individual ability and accomplishment; policy should be premised on the worst-case scenario, erring on the side of caution by emphasizing the immediacy and strength of potential threats.<sup>332</sup> Most importantly, Huntington noted that this ethic depended on being passively apolitical.<sup>333</sup>

“Politics,” he wrote, was “beyond the scope of military competence.”<sup>334</sup> But as the personalized instrument of policy, Huntington suggested that the military officer shouldered

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<sup>329</sup> *Id.* at 13-14.

<sup>330</sup> *Id.* at 16-17.

<sup>331</sup> *Id.* at 61. *But see* SIMPSON, *WAR FROM THE GROUND UP*, *supra* note 317, at 113 (arguing that Huntington’s approach was both “unrealistic” and “seriously out of date” and wrongfully “elevates” the military ethic to that of a “cult”).

<sup>332</sup> HUNTINGTON, *THE SOLDIER AND THE STATE*, *supra* note 308, at 63-66.

<sup>333</sup> *Id.* at 68-69.

<sup>334</sup> *Id.* at 71.



three “responsibilities” or functions: representative, advisory, and executive.<sup>335</sup> First, the officer had the right to present expert views of the military needs and objectives to Congress and the administration. Second, the officer had a duty to analyze and discuss alternative courses of action with civilian leaders, offering a risk assessment in military terms. Third, the officer was duty-bound to implement policy decisions even if they deviate or counter his expert military judgment.<sup>336</sup>

The crux of the civil-military relationship problem, for Huntington, was discovering how to set the conditions necessary to achieve effective military operations externally against an adversarial state or military while diminishing the military as a politically-powerful actor internally, bounding its ability to compete for political power domestically with elected civilians. This implied the military, despite a role in representing, advising, and executing, has no comparable “Veto Function.” In his view, the only way to achieve that goal given the fundamental military ethic of conservative realism and the inherent differences between civilian policy-making and military action was to maximize the sense of professionalism. To “box in” the military, Huntington advocated a combination of extreme professional autonomy to carry out activities within a defined military sphere of expertise, responsibility, and corporateness while enforcing rigid subordination to civilian control. This state of affairs he labeled “objective control”<sup>337</sup> and it has outlasted all other theoretical competitors. It

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<sup>335</sup> *Id.* at 72. This article will return to these “functions” below, suggesting a deep parallel between the attorney-client relationship and the strategic civil-military relationship. *See infra* Part III.C.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 83-85. For some observers, the planning and operations of the air and ground offensive campaigns in the 1990-91 Gulf War exemplified Huntington’s ideal of “objective control.” ROSE, HOW WARS END, *supra* note 16, at 220, 267; *and see* COHEN, SUPREME COMMAND, *supra* note 4, at 7-8 (observing the popular perception that the Gulf War was a “model of beign tactical neglect by an enlightened civilian leadership”).

remains firmly fixed as the prevailing view in the United States among national security practitioners.<sup>338</sup>

## 2. *Janowitz, Civil-Military Fusion, and the Military as a Pressure Group*

Morris Janowitz, a sociologist, had a different objective in mind. His 1960 work, *The Professional Soldier: A Social and Political Portrait*, studied the military as a social organism to “describe the professional life, organizational setting, and leadership of the American military.”<sup>339</sup> Like Huntington, though, Janowitz also analogized military professionals to other specialized professionals: lawyers and doctors.<sup>340</sup> As Huntington suggested by his explanation of professional expertise, responsibility, and corporateness, Janowitz too suggested that professional groups of officers develop self-identity and a “system of internal administration . . . [leading to] the growth of a body of ethics and standards of performance.”<sup>341</sup>

Unlike Huntington, however, Janowitz argued for a less rigid and explicit division of labor, observing that some officers are positioned to blur the Huntingtonian ideal of distinctly separate spheres: “while every military task ultimately impinges on international politics, some senior officers have tasks which involve direct political planning and political negotiation.”<sup>342</sup> He explicitly points to “every field commander stationed abroad” and the members of the Joint Chiefs of Staff who, “as principal military advisors, are thoroughly

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<sup>338</sup> COHEN, SUPREME COMMAND, *supra* note 4, at 229.

<sup>339</sup> JANOWITZ, THE PROFESSIONAL SOLDIER, *supra* note 10, at liv.

<sup>340</sup> *Id.* at 5, 135, 228-31.

<sup>341</sup> *Id.* at 6.

<sup>342</sup> *Id.* at 70.

enmeshed in the political estimates as they prepare their strategic plans.”<sup>343</sup> Despite this inevitable “fusion” of roles, Janowitz noted the wide-spread military cultural “mechanical acceptance of civilian supremacy” without establishing “principles for limiting the political activities of the military profession as a pressure group on its own behalf.”<sup>344</sup>

Three trends seemed, at the time, to encourage the military’s behavior as a pressure group, which dimmed unequivocal civilian authority. Janowitz suggested that these were inter-service rivalries,<sup>345</sup> the limited role of Congress in overseeing the day-to-day affairs of the Armed Forces, and the “intensified struggle [by military elites] to gain access to the pinnacle—to the Chief Executive and to the National Security Council.”<sup>346</sup> Countering these trends, he observes, are various “mechanisms” that civilian leadership can employ to dampen military assertiveness.<sup>347</sup>

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<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 138-39.

<sup>345</sup> For example, competition over missions, roles, and budget shares between the Department of the Army and the Department of the Navy.

<sup>346</sup> JANOWITZ, *THE PROFESSIONAL SOLDIER*, *supra* note 10, at 349-50.

<sup>347</sup> *Id.* at 363-65. Janowitz wrote that they can and will allocate funds between and among the various Services; they can and will allocate missions and responsibilities between and among the Services; and they retain the ultimate constitutional trump card: the responsibility for advising the President and Cabinet on military aspects of international relations. However, Janowitz did not seem to acknowledge that these control devices may serve less ably as checks and more as triggers for tension. First, they do not expressly prohibit the means by which the military can “exercise considerable initiative.” *Id.* at 367. For example, extensive relationship building through military-to-military engagements abroad. Second, these devices amplify strains on the relationship when there are unresolved personality differences and policy disagreements between military elites and political leadership. For example, internal executive branch disagreements, as when a Secretary of Defense is “outmaneuvered” by policy advisors in the National Security Council, preventing the former’s views from proper articulation during cabinet-level discussion. *See, e.g.*, Kiron Skinner, *A Secretary of Defense With a Doctrine Could Help Obama*, N.Y. TIMES, November 30, 2014, and John Nagl, *The President Needs a Secretary of War*, N.Y. TIMES, November 30, 2014 (discussing, *inter alia*, the relationship between President Obama and his first three Secretaries of Defense: Robert Gates, Leon Panetta, and Chuck Hagel), <http://www.nytimes.com/roomfordebate/2014/11/30/what-kind-of-pentagon-chief-does-obama-need/the-president-needs-a-secretary-of-war>.

This required accepting the notion of civil supremacy and an agency-like subordination to it.<sup>348</sup> For Janowitz, this implied that military education must change so that its students develop not just a general commitment to the American democratic system, but also as a forum for discussing the “standards that should govern the behavior of officers vis-à-vis civilian appointees and Congress.”<sup>349</sup> Janowitz himself left these standards unarticulated.

### 3. *Cohen and Unequal Partnerships*

Eliot Cohen departs from Huntington and Janowitz in several ways. First, he is skeptical of the analogy of military officers to professional lawyers and physicians: “[u]nlike law [and] medicine . . . [the military profession] binds its members to one employer, the state, and has only one fundamental form, the large Service branch.”<sup>350</sup>

Cohen also claims that officers have “hazier” ultimate purposes.<sup>351</sup> Not all roles, responsibilities, and missions assigned to the Soldier are as clear-cut as “win the battle and

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<sup>348</sup> JANOWITZ, *THE PROFESSIONAL SOLDIER*, *supra* note 10, at 426.

<sup>349</sup> *Id.* at 429.

<sup>350</sup> Eliot A. Cohen, *The Unequal Dialogue*, *supra* note 51, at 448. This assertion, however, is debatable: a private lawyer also has arguably only one employer at a time for each particular case: his or her particular client, for which codified rules of professional responsibility exert control on the lawyer’s ability to deviate from that client’s strategic objectives and prevent representation of conflicting interests simultaneously. *See, e.g.*, American Bar Association Model Rule of Professional Conduct, Rule 1.6 and Rule 1.7 (prohibiting, *inter alia*, an attorney from representing conflicting interests of two separate clients in the same litigation or proceeding), [http://www.americanbar.org/groups/professional\\_responsibility/html](http://www.americanbar.org/groups/professional_responsibility/html). Under normal circumstances, a lawyer—like the military officer—is also bound to one principal client. There are contexts in which attorneys serve and represent clients without specific individual identities, such as general counsel for corporations or other organizations. Military lawyers represent the interests of the command or unit to which they are assigned unless specifically detailed as a defense counsel in a military justice capacity or represent the interests of qualified recipients of basic legal assistance services. *Infra* Part III.C.

<sup>351</sup> Cohen, *The Unequal Dialogue*, *supra* note 51, at 448.

go home,” he suggests.<sup>352</sup> According to Cohen, they also “anticipate [war’s] requirements, they study past uses of violence, they practice simulations, but very rarely engage in the *central activity* that defines their profession.”<sup>353</sup>

In another relevant way, however, Cohen convincingly departs from the forefathers of American civil-military relations theory. He argues that the classical or “normal” theory, which treats Huntingtonian “objective control” as the ideal, is both unrealistic and ineffective.<sup>354</sup> Instead, Cohen portrays the elites as if they were in a limited partnership.<sup>355</sup> Civilian leaders, generally expected to set policy goals, identify long-term objectives and provide resources, are like senior partners in a firm. They have general liability for profit, obligations, and debts, but are ostensibly superior to the military elites, who are akin to junior partners with limited liability, and little management accountability. In this analogy, there are blurred, not impermeable, lines dividing civilian and military respective spheres of work. Politicians do not simply “fire and forget,” selecting a policy objective in wartime and then allowing maximum discretion to the field commanders. They also coax, negotiate, and

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<sup>352</sup> *Id.* at 452.

<sup>353</sup> *Id.* at 452 (emphasis added). This conclusion about “hazier” purposes, too, is debatable on two grounds. First, military professionals’ central *purpose* may be to engage in combat on behalf of the nation and at the direction of civilians, but their “central activity” is usually not serving in harm’s way. Given the amount of time officers spend in training, initial and continuing education, and various garrison duties other than direct combat, the *central* activity of the profession may just be the opposite of Cohen’s description: to prepare for combat, not to execute it. U.S. DEP’T OF ARMY, PAM. 600-3, COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT chapter 4 (1 Feb. 2010) (describing the Army officer’s professional military education over the course of a career, from branch basic courses to the Senior Service Colleges). Second, contrasting officers against other professionals in this way is too unsophisticated a distinction. Lawyers and doctors have roles that demand preventative actions or treatment, imply education of the client or patient, and require varying degrees of subject matter expertise across a broad range of knowledge under myriad conditions created by, or affecting, the client or patient. Just as military officers do not simply “fight, win, and go home,” all lawyers are not litigators (and litigators do more than just go to trial) and all doctors are not surgeons.

<sup>354</sup> COHEN, SUPREME COMMAND, *supra* note 4, at 7-8 ; Cohen, *Unequal Dialogue*, *supra* note 51, at 447.

<sup>355</sup> This conceit is the author’s, not Cohen’s.

sustain alliances with foreign powers, decide what “acceptable risk” is for a given campaign or operation, communicate their decisions to the public, and “arbitrate” tactical differences that arise among their operational military advisors.<sup>356</sup>

However, Cohen suggests that this overlap in roles imposes a moderate burden on the military too. Military strategic leaders must understand the political context in which policy decisions are made or debated in order to properly frame options and advise the civilian leadership about risk.<sup>357</sup> For Cohen, a realistic strategic civil-military relationship should be described as an “unequal dialogue:”

the ultimate domination of a civilian leader is contingent, often fragile, and always haunted by his own lack of experience at high command . . . [f]or a politician to dictate military action is almost always folly. Civil-military relations must thus be a dialogue of unequals and the degree of civilian intervention in military matters a question of prudence, not principle.<sup>358</sup>

Cohen concludes that the most effective leaders knowingly crossed the objective line separating civilian from military responsibility when the circumstances<sup>359</sup> required more than simply “ratifying” a military course of action.<sup>360</sup> By this style of management, some politicians behaved much the way a senior law firm partner might intrude into the handling

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<sup>356</sup> COHEN, SUPREME COMMAND, *supra* note 4, at 10.

<sup>357</sup> *Id.* at 7-8 (quoting Clausewitz, and noting that “there is no field of military action that might not be touched by political considerations”).

<sup>358</sup> *Id.* at 12.

<sup>359</sup> For example, the nature and scope of the conflict, personalities of subordinates, and relationships with other civilian elites.

<sup>360</sup> *Id.* at 208-12.

of a particular litigation or client when the firm's larger goals for profit or keeping a long-term client are threatened by the action or inaction of a junior partner or associate.<sup>361</sup>

According to Cohen's "unequal dialogue" framework, the "challenge of a supreme [civilian] leader lies not in choosing at which level of guidance or abstraction to function, but rather in . . . understanding the forest by examining certain copses and even individual trees with great care."<sup>362</sup> But even this framework, where the subordination of military to civilian is presumed to be an inviolable tenet, does little to define conditions in which displays of distrust or insubordination are symptomatic of an unhealthy and ill-functioning relationship.

Further complicating efforts to define the quality of a particular strategic civil-military dialogue is what could be called the public relations "sunscreen." As explained by Michael Desch, scholarly interest in these crises remains high while public interest remains unaffected for two reasons. First, civilian leaders have "little interest in publicizing their ongoing problems with the American military because these problems make the civilian leader look weak."<sup>363</sup> Second, the military is reluctant to signal strife with politicians because the "notion of subordination to civilian authority is so deeply embedded in its professional culture that it is difficult for most military officers to admit publically" their concerns or grievances.<sup>364</sup> As a result, two of the parties to the relationship liberally screen the public from information that would place them under the unwanted glare of attention, preventing the parties in the relationship from being burned by adverse publicity.

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<sup>361</sup> His view reflects themes in Clausewitz's admonition, *supra* Part I.A.

<sup>362</sup> COHEN, SUPREME COMMAND, *supra* note 4, at 212.

<sup>363</sup> DESCH, CHANGING SECURITY ENVIRONMENT, *supra* note 68, at 2.

<sup>364</sup> *Id.*

Though tempting to simply say the winner of disputes between strategic civilian and military leaders is the party whose preference was eventually adopted or executed, Desch also attributes the diagnostic challenge to the *real politik* nature of the relationship itself.<sup>365</sup> The positions on an issue or policy debate may change frequently, or be strategic in the sense that they might not reflect true personal preferences but rather organizational preferences, or vice versa. Moreover, compromises and negotiated resolutions to various internal disagreements are common and do not necessarily signal the victory of one side over another, or whether it was the military elite's direct personal influence that changed policy.<sup>366</sup> Therefore, "control" as it exists between the parties is not easily defined, and only looking at disputes will distort how conflict-ridden the relationship actually is.<sup>367</sup>

#### 4. *Feaver, Agency, and Rational Actors*

Peter Feaver's explicit adoption of a "principal-agent" framework comes closest to hinting that there might be a way to diagnose the health of a strategic-level civil-military relationship in an objective way and based on context clues. Focusing on episodes of tension and conflict, Feaver argues that "friction . . . reflects the kind of conflict one would expect from a certain combination of civilian choices and military responses. Civil-Military Relations are best understood as a game of strategic interaction."<sup>368</sup> From that perspective,

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<sup>365</sup> DESCH, CHANGING SECURITY ENVIRONMENT, *supra* note 68, at 5 (identifying this as an obstacle to assessing civil-military relations based on "who prevails when [their] preferences diverge").

<sup>366</sup> BETTS, COLD WAR CRISES, *supra* note 45, at 250, n. 3. *See also* MOTEN, PRESIDENTS & THEIR GENERALS, *supra* note 22, at 349 (describing the 2011 Quadrennial Defense Review, in which the Army was able to avoid cutting four combat divisions, despite Secretary of Defense Rumsfeld's preference for the cut; the "save" only served to exacerbate Rumsfeld's frustration with the individual Services and provoked his vocal ire).

<sup>367</sup> COHEN, SUPREME COMMAND, *supra* note 4, at 2-5.

<sup>368</sup> Peter D. Feaver, *Crisis as Shirking: An Agency Theory Explanation of the Souring of American Civil-Military Relations*, 24 ARMED FORCES & SOC'Y 407, 407 (Spring 1998).



he analyzes the behavior of two parties in stark, rational actor, terms: a “game-theoretic approach” that, he claims, reveals the “micro-foundational logic” and causation, even if it might lose some color of realism as a result of its methodology.<sup>369</sup>

In crafting his “alternative theory,” intended to update certain aspects of Huntington’s theory,<sup>370</sup> Feaver argues that civilian elites’ behavior is generally focused on monitoring the military to varying degrees depending on how high an expectation the civilians have that the military will obey direction and policy faithfully.<sup>371</sup> Because the civilians, not the military, have a constitutionally-granted superior position, and serve as representatives of the public, they can claim “the right to be wrong,”<sup>372</sup> something akin to parental scrutiny of a child’s behavior.<sup>373</sup>

Using terms from microeconomic principal-agent theory, Feaver categorizes military officer corps behavior as a choice between “working” and “shirking,” a decision dependent on the military’s expectation of being detected shirking and whether it will be punished by civilian leadership for doing so.<sup>374</sup> Under this view of civil-military relations, Feaver argues

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<sup>369</sup> *Id. and see* FEAVER, ARMED SERVANTS, *supra* note 42, at 13.

<sup>370</sup> FEAVER, ARMED SERVANTS, *supra* note 42, at 3, 9.

<sup>371</sup> *Id.* at 2-3.

<sup>372</sup> *Id.* at 9.

<sup>373</sup> Feaver grants civilian officials the “privileged position” with “legitimate authority over the military” because, metaphorically, “civilians invent the military, contracting with it to protect society from enemies” in a way analogous to a employer contracting with a potential employee, delegating to that employee the power to execute business decisions on the employer’s behalf. *Id.* at 54-55, 57. Feaver does acknowledge the contextual differences that surface when trying to apply a formal principal-agent model (noting the “information asymmetries” that favor the military agent due to superior technical knowledge and proximity to the battlefield, as well the scale of harm if the civil-military relationship becomes “pathological:” a potential *coup* or battlefield defeat). *Id.* at 69-72. He compares this principal-agent relationship to that of a stockholder (principal) and board of directors (agent), employer (principal) and employee (agent), and voter (principal) and politician (agent). *Id.* at 12-13.

<sup>374</sup> *Id.* at 3.

that a “working” military is one that performs according to how the principal (civilian leadership) would ideally desire, assuming that principal had complete knowledge of what the agent could do and was, in fact, doing.<sup>375</sup> On the other hand, “shirking,” under this view, did not imply laziness or non-industriousness. Rather, he defined it as deliberate conduct other than as directed or authorized by the principal when the military agent disagrees with how, when, where, or why to best provide for national security in a specific instance.<sup>376</sup> For example, a combatant commander would be “shirking” if he knowingly provided the President or Secretary of Defense with an inflated estimate of what a military operation would cost (in dollars or lives) in order to shape the forthcoming policy choice along lines preferred by the military.<sup>377</sup> Perhaps more egregiously, shirking would include unauthorized public protests or appeals to other political actors, or “bureaucratic foot-dragging” in order to delay implementation of a policy deemed unfavorable by the military.<sup>378</sup>

Though Feaver acknowledges that this model does not predict whether, or explain why, “good” or “bad” national security outcomes will occur,<sup>379</sup> he does propose that the model describes the quality of this “strategic interaction” on a spectrum in terms of consequences or effects. For example, “unsavory options” like failing to carry out a policy directive, or inflating budget requirements occur would tilt toward the more benign side of

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<sup>375</sup> *Id.* at 61.

<sup>376</sup> *Id.* at 59-60.

<sup>377</sup> *Id.* at 68. If the senior military officer made repeated comparisons of current facts to earlier, negative, images from recent history of ill-fated operations or serious and unexpected losses, that officer is attempting to influence the lawmakers to view the current situation less than objectively, inviting them to rely subconsciously on what is familiar, even if irrational to do so. See RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 25 (2009) [hereinafter THALER & SUNSTEIN, NUDGE].

<sup>378</sup> FEAVER, ARMED SERVANTS, *supra* note 42, at 68

<sup>379</sup> *Id.* at 66.

the spectrum. At the extreme end of the shirking spectrum, Feaver argues that the ultimate form of shirking would manifest as either a battlefield defeat or a coup.<sup>380</sup> The rational civilian principal, though, has a spectrum of scalable options through which to monitor and punish the military agent's behavior to offset the risk of, or damage caused by, by shirking. Such options range from complete dominion over budgets and doctrine, unilaterally changing wages and benefits, and modifying accessions policy, to case-by-case restrictions on how much power it delegates to the military,<sup>381</sup> to actual "punishment."<sup>382</sup>

Feaver's principal-agent framework, nevertheless, remains problematic for the generation of objective criteria in five ways. First, his model assumes rational actors and aggregates the conduct and decisions of many individuals on both sides of the civil-military divide. Consequently, it ignores irrational behavior, subsumes motives and competence, and only looks to the outcome or effect of those choices of working, shirking, monitoring, and punishing.<sup>383</sup> It does not take into account the less-than-fully educated biases and heuristics

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<sup>380</sup> *Id.* at 58-59.

<sup>381</sup> *Id.* at 75-77.

<sup>382</sup> For example, holding up or denying a promotion, cutting the defense budget, administrative discharge or criminal sanction for violating the Uniform Code of Military Justice. *Id.* at 91-94, and Table 3.2. *But see infra* Part II.B.3 for a discussion on the limits of criminal law in the context of managing strategic civil-military relationships. Such restrictions might come in the form of formal restraints on military autonomy: imparting policy preferences into rules of engagement and other standing orders, or even shifting responsibility for a particular mission to other agencies. *Id.* at 75-77. Or, restraints may be more subtle: civilians may cause or exploit inter-service rivalries, providing civilians the opportunity to arbitrate in what Feaver calls an "institutional check." *Id.* at 81. Alternatively, he suggests that imposing regular and intrusive reporting requirements and audits, or bloating the size of the civilian secretariats in the Department of Defense relative to the uniformed staffs, have the same restraining effect. *Id.* at 84.

<sup>383</sup> What is "rational" is often formally defined as that decision which exhibits internal coherence, maximizing utility, and ignoring "irrelevant" alternatives. But this excludes decisions logically made based on personal preferences and the actor's long-term objectives—aims that might trigger the actor to act "irrationally" in the short-term, or logical decisions based on limited information about what choices can be made by the actor. Kahneman suggests that "substantive" criteria should expand the meaning of "rational actor" to include the actor's evolving expectations as they experience positive and negative consequences of their actions, not just their expectations before making a decision. Daniel Kahneman, *New Challenges to the Rationality Assumption*,

or the personal relationships often formed by participants in the professional civil-military relationship, generating actions less informed by self-interest and more spurred by a “sense of fairness and concern about reputation . . . [that would be critical for establishing and maintaining] “social networks” and “group cohesion.”<sup>384</sup> His model does not seem to account for choices of actors, like geographic combatant commanders, who straddle the civil-military divide and are neither a pure principal nor a pure agent.<sup>385</sup> Nor does his model seem to accept that supposedly rational decisions by the civilian principal to monitor or punish the military agent may backfire, inciting the military to shirk in ways the monitoring and punishment was meant to deter, as Janowitz noted as early as 1960.<sup>386</sup> Moreover, his model offers no apparent way to evaluate the underlying contextual reasons, whether rational or not, behind the choices and voices expressed in what Cohen called the “unequal dialogue” between the civilian and military elites.

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J. INSTITUTIONAL & THEORETICAL ECONOMICS 150/1 (1994), at 18, 19-21 (distinguishing between *experienced utility* and *decision utility*).

<sup>384</sup> See FREEDMAN, STRATEGY: A HISTORY, *supra* note 16, at 593-95 (reviewing scholarship from behavioral economics on “bounded rationality” that criticized the false realism of “rational actor” theories in the social sciences); see generally Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, SCIENCE, Sept. 1974, at 1124 (explaining various cognitive factors influencing how people generally come to believe certain forecasts, probabilities, and other uncertainties) (“ people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations . . . these heuristics are quite useful, but . . . they lead to severe and systematic errors”).

<sup>385</sup> For example, the Under Secretary of Defense for Policy or the members of the Joint Chiefs of Staff. See JANOWITZ, THE PROFESSIONAL SOLDIER, *supra* note 10, at 70; COHEN, SUPREME COMMAND, *supra* note 4, at 10. Even the Secretary of Defense could be considered in a hybrid position, appointed and serving at the pleasure of the president, but also in the operational chain-of-command and directly responsible for overseeing the entire defense establishment as the “agent” of the president. See, e.g., Ashton Carter’s comments upon his nomination as Secretary of Defense, *quoted in* Craig Whitlock, *Ashton Carter, passed over before, gets picked by Obama to be defense secretary*, WASH. POST, Dec. 5, 2014, [http://www.washingtonpost.com/world/national-security/ash-carter-passed-over-before-gets-picked-by-obama-to-lead-pentagon/2014/12/05/33a2429a-7c95-11e4-9a27-6fdb612bff8\\_story.html](http://www.washingtonpost.com/world/national-security/ash-carter-passed-over-before-gets-picked-by-obama-to-lead-pentagon/2014/12/05/33a2429a-7c95-11e4-9a27-6fdb612bff8_story.html) (“If confirmed in this job, I pledge to you my most candid strategic advice . . . and I pledge also that you will receive equally candid military advice.”).

<sup>386</sup> JANOWITZ, THE PROFESSIONAL SOLDIER, *supra* note 10, at 349-50, 367.

Finally, though asserting that his theory adopts and extends Huntington in a way that avoids Huntington's outdated assumptions, Feaver does not address the more nuanced and realistic contexts where there is dispute or tension among senior military advisors, as between a combatant commander and a Service Chief of Staff, about long-term objectives and the number of troops needed to meet those objectives;<sup>387</sup> or in which agents and principals work, shirk, monitor, and punish with respect to the three broad functions of advising, representing, and executing that these agents perform.<sup>388</sup> While his theory is potentially predictive of civilian control over the subordinate military, Feaver comes close to, but not quite, being able to provide all three parties a way to gauge the health of that strategic relationship in context against objective criteria.

These academic approaches to the behavior within these strategic civil-military relationships are helpful in a theoretical sense: their efforts bring certain issues into sharp relief<sup>389</sup> and suggest two important and enduring attributes of this subject. First, the main scholarly voices from Huntington and Janowitz during the Cold War, to Cohen and Feaver in a more recent era, recognize two autonomous classes with distinct core competencies, comparative advantages, and socially-expected functions. Where these scholars appear to diverge is the extent to which these autonomous classes do, in practice, merge or blend, under what conditions they merge, and whether those mergers have short- or long-term

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<sup>387</sup> WOODWARD, *OBAMA'S WARS*, *supra* note 48, at 241-43, 257-60 (revealing apparent tension between then-commander of Central Command, General Petraeus and the Chairman of the Joint Chiefs of Staff, Admiral Mullen, during a strategy session with President Obama, describing various proposals for a troop "surge" in Afghanistan; describing President Obama's meeting with the Service Chiefs—without the presence of the USCENTCOM Commander or his subordinate theater commander, General Stanley McChrystal—to elicit their candid opinions about strategy in Afghanistan).

<sup>388</sup> HUNTINGTON, *THE SOLDIER AND THE STATE*, *supra* note 308, at 72.

<sup>389</sup> MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* xi (1992).

benefits and costs. The second enduring attribute evidenced by the scholarship is that many extant theories hint at the possibility of, but do not overtly establish, a mechanism by which to assess the health of these relationships in their circumstantial contexts, against an objective standard.<sup>390</sup>

#### D. Summary

Civil-military relations scholarship, from Huntington to Feaver, does not provide a consistent diagnostic framework. Not only does the literature not fully answer these questions, but there is no clear answer to be found in the law or other forms of written authority either. The Constitution, as discussed above, provides a shell or structure for the federal government, and assigns roles related to national security that are divided between executive and legislative authorities in power-sharing scheme designed to be turbulent,

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<sup>390</sup> Mackubin Thomas Owens offers three “criteria for judging the health of civil-military relations:” the “relative harmony between civilians and the military,” the “effectiveness of the armed forces in executing missions,” and “constitutional balance” between the executive and legislative branches. OWENS, RENEGOTIATING THE BARGAIN, *supra* note 36, at 15. These criteria are a step forward. They are not directly tied to a crisis or overt dispute between civilian and military elites, thus avoiding the ambiguous signals such events often portray. They also incorporate Owens’s observation that this relationship is a bargain among three parties: the people of the state, the government, and the military. Though one step forward, Owens’ criteria are also two steps back. These criteria, for instance, are too ambiguous to be of any additional practical help in objectively diagnosing the health of a strategic civil-military relationship. The “harmony” of the relationship is not defined, qualitatively or quantitatively, and Owens does not say against what standard that harmony is “relative”—historically similar episodes? Some known objective benchmark of “good” or “harmonious” relations? Furthermore, the “effectiveness” of a military completing its mission is notoriously complex and contentious, with little agreement about how it is to be measured. *See, e.g.*, Major Shon McCormick, *A Primer on Developing Measures of Effectiveness*, MIL. REV. (July-August 2010), at 60-66 (discussing challenges of “measuring problematic variables” in military contexts, like stability operations). Moreover, what is “victory” and who decides when it has arrived? *See* J. Boone Bartholomees, *Theory of Victory*, PARAMETERS, Summer 2008, at 25-36; and *see* Eric Schmitt, *Threats and Responses: Military Spending; Pentagon Contradicts General On Iraq Occupation Force’s Size*, N.Y. TIMES, Feb. 28, 2003, <http://www.nytimes.com/2003/02/28/us/threats-responses-military-spending-pentagon-contradicts-general-iraq-occupation.html>. Is “victory” even possible in modern armed conflict? Former Secretary of Defense Robert M. Gates asks this very question. GATES, DUTY MEMOIRS, *supra* note 56, at 567. Finally, as described above, it is difficult to determine if the “constitutional balance” has been upset if there are no constitutional benchmarks for the strategic civil-military relationship. *Supra* Part II.B.1. This leaves Owens’ three-part test for civil-military relationships important because it recognizes a need to judge their health, but largely impotent because the judging criteria are too vague, leaving the participants and the public not much wiser or capable of diagnosing ill-health.

uncomfortable, and inefficient.<sup>391</sup> Statutes, like the National Security Act and the Goldwater-Nichols Act, provide no clarity either as they tend to reorganize executive branch agencies and departments for the greater purpose of finding efficiencies, streamlining processes and systems in order to achieve greater transparency in decision-making, or to reduce costly redundancies that complicate joint operations and planning.<sup>392</sup>

Case law that does address civil-military strife focuses only on criminal insubordination and disrespect, ignores episodes of strategic civil-military tension, and therefore offers no precedent as a guide to the participants of those relationships.<sup>393</sup> Administrative regulations are oriented on eliminating conduct that appears like unjust enrichment and personal gain at government expense among *all* service members regardless of rank or position.<sup>394</sup> Finally, military doctrine aims “down and in” not “up and out,” proposing to express moral codes of generic virtues to guide service members’ ethical decision-making.<sup>395</sup>

As well-established and accepted rules, standards, and codified norms of behavior, all of these sources of authority offer potential venues for articulating an objective means for diagnosing unhealthy strategic civil-military relationships. Unfortunately, all remain missed opportunities and the academic literature does not overtly suggest a diagnostic tool. In Part III, *infra*, this thesis will describe evidence from the Armed Services themselves that strongly

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<sup>391</sup> *Supra* Part II.B.1.

<sup>392</sup> *Supra* Part II.B.2.

<sup>393</sup> *Supra* Part II.B.3.

<sup>394</sup> *Supra* Part II.B.4.

<sup>395</sup> *Supra* Part II.B.5.

suggest the American military establishment already views itself in agency terms. Therefore, the “agency theory” of civil-military relationships might be approached like that of the legal agency model, rather than the current microeconomic agency model,<sup>396</sup> or as an unequal dialogue,<sup>397</sup> or as fraternal twins with distinct professional autonomy.<sup>398</sup> From that perspective, this thesis will suggest that codified and transparent norms of conduct akin to rules of professional conduct or professional responsibility for attorneys can aid principal-agent participants and the public in diagnosing ailments in the health of a strategic civil-military relationship. Objective criteria, like duties of candor, competence, communication, scope of responsibility, and conflict of interest provisions could be included within an amended Goldwater-Nichols Act, reflecting the professional nature of strategic military agents and deflecting their opportunity to engage in negative and controversial “pressure group” activities<sup>399</sup> for their own benefit.

### III. From Agency to Norms to Diagnosis

In the aftermath of the failed Bay of Pigs invasion by Cuban exiles, trained by the Central Intelligence Agency, President Kennedy felt compelled to reassert his expectations of the senior-ranking uniformed officers:

I expect the Joint Chiefs of Staff to present the military viewpoint in governmental councils in such a way as to assure that the military factors are clearly understood before decisions are reached . . . *While I look to the Chiefs to represent the military factor without reserve or hesitation, I regard them to be more than military men and expect their help in fitting military*

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<sup>396</sup> As described by Feaver, *supra*, Part II.C.4.

<sup>397</sup> As described by Cohen, *supra*, Part II.C.3.

<sup>398</sup> As described by Huntington, *supra*, Part II.C.1.

<sup>399</sup> As described by Janowitz, *supra*, Part II.C.2.



*requirements into the over-all context of any situation, recognizing that the most difficult problem in Government is to combine all assets in a unified, effective pattern.*<sup>400</sup>

Notwithstanding this invitation to the Service chiefs to actively express their “more than military” strategic views, Kennedy assertively closed the door to such views during the Cuban Missile Crisis in October 1962.<sup>401</sup> The chiefs, already immersed in planning for a large-scale U.S. invasion of Cuba to remove Castro from power while simultaneously signaling strength to the Soviet Union, advocated for confrontation: direct air strikes on the missile launch sites, coupled with a blockade and ground troops. Believing that these views ignored relevant political, diplomatic, and military constraints that would likely escalate armed tension with the Soviet Union, Kennedy instead relied solely on Chairman of the Joint Chiefs of Staff, General Maxwell Taylor, for military advice. At the precipice of a major war, he was the only member of the secret Executive Committee (“ExComm”) of the National Security Council meeting during those tense thirteen days wearing a uniform, for he was the only military officer Kennedy trusted.<sup>402</sup>

It is neither intuitively nor objectively clear that this was *unhealthy* civil-military tension. If we look at the outcome from the much clearer vantage of historical hindsight,

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<sup>400</sup> National Security Action Memorandum 55 from President John F. Kennedy, to The Chairman, Joint Chiefs of Staff, subject: Relations of the Joint Chiefs of Staff to the President in Cold War Operations (28 June 1961), <http://www.ratical.org/ratville/JFK/USO/appE.html#NSAM55> (emphasis added). According to historian and Kennedy advisor Arthur Schlesinger, Jr., Kennedy was deeply “disappointed” in his senior military advisors for what he viewed as a “cursory review” of the CIA’s plan leading the Bay of Pigs debacle. ARTHUR M. SCHLESINGER, JR., *A THOUSAND DAYS* xvi, 295 (2002) (“after the Bay of Pigs, Kennedy had little regard for the JCS and their recommendations”). According to historian Matthew Moten, General Maxwell Taylor was the primary author of this memorandum, as a recommendation to President Kennedy following Taylor’s personal investigation of the Bay of Pigs debacle. MOTEN, *PRESIDENTS & THEIR GENERALS*, *supra* note 22, at 279-80.

<sup>401</sup> MCMASTER, *DERELICTION OF DUTY*, *supra* note 37, at 24-29.

<sup>402</sup> *Id.*

relying on advice from the Joint Chiefs very well could have triggered World War III.<sup>403</sup> On the other hand, the Kennedy Administration's distrust of its senior flag officers may have bled into Lyndon Johnson's subsequent administration, affecting the outsize influence of Robert McNamara during the gradual escalation in Vietnam.<sup>404</sup> From the various participants' perspectives, Kennedy's invitation to the Chiefs to actively consider political contexts in rendering their counsel would probably have breached tenets of Huntington's "objective control" theory<sup>405</sup> in the same way that the civilian-led Defense Department was perceived to negatively micromanage the operational aspects of combat in Southeast Asia later that decade. If the Joint Chiefs had been more outspoken in their counsel during the beginning moves of the Vietnam War, it is not clear at what point their dissent, debate, or disagreement would have crossed the line into outright insubordination or obstruction.<sup>406</sup> Nor is it clear whether their public statements implicitly criticizing the Administration would have been viewed, in the light of history, as *remedies* for a pathologically unhealthy civil-military relationship, or as *symptoms* of the unhealthy relationship.

As explained in Part II, neither scholarly theory nor the law adequately provide the means to diagnose strategic civil-military tensions and apparent conflict. Nevertheless, there is evidence outside of doctrine that suggests that the Armed Services themselves intrinsically

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<sup>403</sup> See Craig, *The Political Leader as Strategist*, *supra* note 2, at 482 ("inability or unwillingness on [the part of civilian leaders] to exercise critical control over such plans and decisions runs the risk of placing in military hands powers that can jeopardize the national security for which the political leadership has ultimate responsibility").

<sup>404</sup> MOTEN, PRESIDENTS & THEIR GENERALS, *supra* note 22, at 292-93 (as an example, Moten notes that President Lyndon Johnson's first meeting as President on the subject of Vietnam did not include any member of the JCS).

<sup>405</sup> *Supra* Part II.C.1.

<sup>406</sup> MCMASTER, DERELICTION OF DUTY, *supra* note 37, at 332-33.

adopt a role in these relationships that is akin to a “principal-agent” dynamic. First, this thesis will broadly describe a framework on which to view the evidence: agency under the law. Second, it will present that evidence. Third, it will argue by analogy that elements of the former, including fiduciary concepts like actual and apparent authority, and duties like candor, loyalty, and good conduct, can be applied explicitly by the participants in the strategic civil-military relationships.

#### A. Jurisprudential Agency

“Agency” as applied in the argument below is not the “agency” modeled by the work of scholars like Peter Feaver. Feaver’s theory of civil-military relations,<sup>407</sup> is limited by assuming and portraying the participants as rational actors, ignoring their motives, competence, information asymmetry, and foreseeable irrational decision-making. Feaver’s theory also aggregates the participants into broad civilian and military categories, without consideration for nuanced personalities or positions that might behave as both principal and agent simultaneously. Finally, it does not explain behavior that superficially appears irrational but is driven by unpublicized ulterior motives, like the agent’s understanding of what a particular duty suggests he or she should do in a given situation. This thesis does not contend that Feaver’s rational actor model fails to accurately predict or explain civil-military elites’ behavior; rather, it bears noting explicitly that the agency theory he has portrayed has no intent of, or capacity for, diagnosing the *health* of a strategic civil-military relationship against objective criteria.

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<sup>407</sup> *Supra* Part II.C.4.

In contrast, the legal concept of agency does offer a basis on which to build such criteria. Unlike Feaver’s model that depicts agency as “strategic interaction,”<sup>408</sup> agency as understood by lawyers is a defining *characteristic, attribute, or trait* of a relationship between two or more parties, acting in their best interest, and which consequently imposes obligations on those parties relative to each other.<sup>409</sup> This form of agency is not *premised* on rational behavior, nor does it need to aggregate the personalities into categorical groups, nor does it propose a narrow band of possible actions and reactions by the participants (like working, shirking, monitoring, and punishing<sup>410</sup>). Rather, agency under the law is

the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.<sup>411</sup>

There is a “meeting of the minds” or mutual agreement that the principal shall be in the legitimate and superior decision-making or decision-approving position relative to the agent; the agent, in turn, shall engage in activities on behalf of the guiding interests and objectives of the principal.<sup>412</sup> By legally binding the principal to obligations and actions of the agent,

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<sup>408</sup> *Supra* Part II.C.4.

<sup>409</sup> Deborah A. DeMott, *The Lawyer as Agent*, 67 *FORDHAM L. REV.* 301, 301-02 (1995) (distinguishing the common law of agency from the “agency” employed in other fields, such as economics, based in part on the assertion that lawyers are also officers of the court and members of a self-regulating profession).

<sup>410</sup> *Supra* Part II.C.4.

<sup>411</sup> AGENCY RESTATEMENT, *supra* note 88, at § 1.01.

<sup>412</sup> *See* DeMott, *The Lawyer as Agent*, *supra* note 409, at 302-03 (“the defining elements of the relationship are mutual manifestation of consent, the agent’s undertaking to act on behalf of the principal, and the principal’s right to control the agent . . . [where ‘control’ means] prescribing on an ongoing basis what the agent shall or shall not do”).

who has undertaken those obligations or acted for the principal, the principal augments his or her native capacity and expands the scope of his or her capabilities.<sup>413</sup>

Under this view of agency, the roles of “principal” and “agent” have certain technical, but rather simple, meanings. A principal is “one who authorizes another to act on his her behalf” and is usually liable for conduct of the agent he or she employs.<sup>414</sup> An agent, therefore, is “one who is authorized to act for or in place of another; a representative.”<sup>415</sup> The bond that exists between these two participants is “fiduciary”—that is, a “relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship.”<sup>416</sup> As expressed by the terms of the agreement between them, this duty arises in circumstances in which a principal seeks to rely on the expertise or advice of the agent in order to accomplish some goal that the principal cannot or will not achieve on its own.<sup>417</sup> This leaves the principal partially dependent on the skill and conduct of the agent.<sup>418</sup> These generic definitions capture an enormous range of transactions, leading one scholar to call agency “indispensable to even the simplest functions of modern life.”<sup>419</sup> For example,

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<sup>413</sup> BLACK’S, *supra* note 86, at 67 (definition of “fiduciary duty”).

<sup>414</sup> *Id.* at 1230 (definition of “principal”).

<sup>415</sup> *Id.* at 68 (definition of “agent”).

<sup>416</sup> *Id.* at 1315 (definition of “fiduciary relationship”).

<sup>417</sup> *Id.* at 1315 (definition of “fiduciary relationship”). In this sense, the agent is an “instrument” or “technology” that “enhances a person’s ability to act.” Paula J. Dalley, *A Theory of Agency*, 72 U. PITT. L. REV. 495, 498 (2011).

<sup>418</sup> Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 800 (1983).

<sup>419</sup> Dalley, *A Theory of Agency*, *supra* note 417, at 497 (“[t]he foundational principle of agency law is that the principal, who has chosen to conduct her business through an agent, must bear the foreseeable consequences created by that choice. Conversely, as the bearer of the risks, the principal is entitled to receive the benefits created by the agency relationship”). See also Frankel, *Fiduciary Law*, *supra* note 418, at 798 (“our society is evolving into one based predominantly on fiduciary relations”).

the trustee-beneficiary, guardian-ward, and attorney-client relationships are fiduciary in nature and fit the principal-agent mold.<sup>420</sup>

Such relationships necessarily impose duties on the agent: faithful integrity and loyalty, “good faith, trust, confidence, and candor” among them.<sup>421</sup> Furthermore, the law of agency generally imposes other objectively-determined duties of “care, competence, and diligence” to assure the principal that certain basic expectations will be met when delegating authority to the agent.<sup>422</sup> Notwithstanding their own special skill, knowledge, competence, and diligence, the agent is not permitted to freelance. Agents have a duty to “take action only within the scope of the agent’s actual authority” and to “comply with all lawful instructions received from the principal.”<sup>423</sup> Moreover, such actions must be “reasonable” and “refrain from conduct that is likely to damage the principal’s enterprise.”<sup>424</sup> This raises

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<sup>420</sup> BLACK’S, *supra* note 86, at 1315 (definition of “fiduciary relationship”). See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. b (2000) (“[l]egal representation saves the client’s time and effort and enables legal work to be delegated to an expert. Lawyers therefore are recognized as agents for their clients in litigation and other legal matters.”) See also James A. Cohen, *Lawyer Role, Agency Law, and the Characterization “Officer of the Court,”* 48 BUFF. L. REV. 349 (2000);

<sup>421</sup> BLACK’S, *supra* note 86, at 545 (definition of “fiduciary duty”). The “duty of candor” is further defined as “duty to disclose material facts.” *Id.*, at 544. The “Duty of Good Faith” requires fair dealing such that neither party is prevented from “realizing the agreement’s benefits.” *Id.*, at 544-45. See also AGENCY RESTATEMENT, *supra* note 88, at § 8.15 (“Principal’s Duty To Deal Fairly And In Good Faith”). The “Duty of Loyalty” requires that the agent abstain from “self-dealing” or using their position to further his or her own interests, rather than the principal’s interests. BLACK’S, *supra* note 86 at 545. See also AGENCY RESTATEMENT, *supra* note 88, at § 8.01 (“General Fiduciary Principle”). See also Grace M. Geisel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 351-52 (2007) (suggesting that independent contractors are sometimes agents when they work on behalf of a principal’s interests, as—for example—an attorney, and distinguishing them from a “master-servant” form of agency (now called “employer-employee” in common law) in which the principal retains the right to positively control the physical “attributes” of the agent’s conduct).

<sup>422</sup> AGENCY RESTATEMENT, *supra* note 88, at § 8.08.

<sup>423</sup> *Id.* at § 8.09 (“Duty to Act Only Within Scope of Actual Authority . . .”).

<sup>424</sup> *Id.* at § 8.10 (“Duty of Good Conduct”). But see W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 53 (1999) (discussing the challenge of applying pure agency theory to the attorney-client relationship in light of situations in which the attorney—holding to their role as an independent professional with a code of responsibility and as officer of the court system—must depart from or confront an illegal or morally-disagreeable choice of the client).

the obvious question: what happens when the agent's actions conflict with those of the principal because they are not "reasonable" from the perspective of the principal, or exceed the scope of authority granted, or hinder the principal's objectives? This "Agency Problem" is well-known in the literature,<sup>425</sup> and implies that the agent behaves according to precepts or *internalized* ethical rules that diverge from the standards or boundaries set by the principal—called an exercise of *moral agency*.<sup>426</sup>

Because these duties legally bind the principal, and will determine the extent to which an agent has breached the terms of the agreement, the definition of "authority" is critical.<sup>427</sup> Authority vested in an agent can be *actual*: that is, the agent has acted reasonably based on manifestations made by the principal to the agent that the principal "wishes the agent so to act."<sup>428</sup> Those "manifestations" may be express or implied by the principal, but in either case the agent is limited to conduct that is reasonably believed to be "necessary or incidental to achieving the principle's objectives."<sup>429</sup> Alternatively, authority may be only *apparent*: that is, power to act on behalf of the principal in relation to a third party, but only based on that

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<sup>425</sup> Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57, 58 (1989).

<sup>426</sup> See generally James Burk, *Responsible Obedience by Military Professionals: the Discretion to do What is Wrong*, in AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA 149, 151-54 (Suzanne C. Nielson, Don M. Snider eds.) (2009) (arguing that the "discretionary application of professional knowledge cannot depend on unthinking obedience" and that there is a "protected space" of decision-making afforded to military professionals that, in effect, gives them the moral authority or legitimate grounds on which to disobey or question an order—that is, an execution of "responsible obedience" based on a duty to serve the nation's best interests during some of their interaction with and work for their civilian principals). Thanks to Dr. Don M. Snider for suggesting that aspect of the agency subject was worth noting here. Part III.C., *infra*, suggests that codes of professional responsibility help mitigate undesirable "agency problems" by offering the strategic-level parties a consistent, shared, set of expectations, norms, and standards by which to guide their principal-agent relations, in effect ensuring that the parties develop fewer "conflicts."

<sup>427</sup> See, e.g., Geisel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, *supra* note 421, at 353-55 (describing various forms of authority under agency law, and citing to numerous jurisdictions for cases defining the legal characteristics of these forms of authority).

<sup>428</sup> AGENCY RESTATEMENT, *supra* note 88, at § 2.01 ("Actual Authority").

<sup>429</sup> *Id.* at § 2.02 ("Scope Of Actual Authority").

*third party's* reasonable belief that the actor has the authority, and the belief is “traceable to the principal’s manifestations.”<sup>430</sup> Such acts bind the principal, even if that authority was not intended to be vested in the agent.<sup>431</sup> Finally, the agent’s authority to act may be *implied*: “authority intentionally given by the principal to the agent as a result of the principal’s conduct, such as the principal’s earlier acquiescence to the agent’s actions.”<sup>432</sup>

Described below, these concepts from the law of agency, especially the fiduciary duties and types of authority, can be inferred as tacit elements of strategic civil-military relationships from the way in which key participants have described their roles and responsibilities relative to one another.

## B. The Fingerprints of Agency

The military’s reluctance to encode in its doctrine a set of criteria or norms that would both guide the participants in strategic civil-military relationships and offer all three populations (military, civilian leadership, and the public) a means for objectively assessing the health of those relationships is understandable. With nothing in the Constitution,<sup>433</sup> statutes,<sup>434</sup> regulations,<sup>435</sup> or case law<sup>436</sup> to guide it, doctrine has no commonly-accepted or consistent policy from which to derive an applicable standard.<sup>437</sup> Nevertheless, there is

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<sup>430</sup> *Id.* at § 2.03 (“Apparent Authority”).

<sup>431</sup> BLACK’S, *supra* note 86, at 142 (definition of “Apparent Authority”).

<sup>432</sup> *Id.* at 143 (definition of “Implied Authority”).

<sup>433</sup> *Supra* Part II.B.1.

<sup>434</sup> *Supra* Part II.B.2.

<sup>435</sup> *Supra* Part II.B.3.

<sup>436</sup> *Supra* Part II.B.4.

<sup>437</sup> *Supra* Part II.B.5.



circumstantial evidence from the civilian and uniformed strategic leaders of the military that strongly suggests a wide-spread, tacit, acceptance of fiduciary duties and an “agency” role, much the way that the Supreme Court has interpreted “systematic, unbroken” conduct by the President, and to which Congress acquiesces, forms a precedential “gloss” on the expressed constitutional and statutory authority of the Chief Executive.<sup>438</sup>

Two civilian national security leaders provide starting points. In his memoirs, Robert Gates distilled lessons from his four years serving as Secretary of Defense for two Presidents. “Widely considered the best defense secretary of the post-World War II era,”<sup>439</sup> he described as his unique position as a broker between the President and the Pentagon, designing a process by which candid military opinions would be offered and heard.<sup>440</sup> To Gates, the President is “ultimately accountable for success or failure” of military operations and decisions as the Commander-in-Chief.<sup>441</sup> That view reflects basic agency law: a “principal” is legally bound by actions taken by his agent, provided those actions were in furtherance of the agent’s responsibilities, within the scope of his authority to act on behalf of the principal, or were directed by the principal.

Secretary Gates’ further prescriptions for the conduct between a President and senior military officers reinforce the image of the “principal-agent” dynamic. For example, the

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<sup>438</sup> See *supra* Part II.B.1 and B.2, and see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

<sup>439</sup> Greg Jaffe, *Book Review: ‘Duty: Memoirs of a Secretary at War,’* WASH. POST, Jan.7, 2014, [http://www.washingtonpost.com/opinions/book-review-duty-memoirs-of-a-secretary-at-war-by-robert-m-gates/2014/01/07/0d8acad0-634d-11e3-a373-0f9f2d1c2b61\\_story.html?hpid=z1](http://www.washingtonpost.com/opinions/book-review-duty-memoirs-of-a-secretary-at-war-by-robert-m-gates/2014/01/07/0d8acad0-634d-11e3-a373-0f9f2d1c2b61_story.html?hpid=z1).

<sup>440</sup> GATES, DUTY MEMOIRS, *supra* note 56, at 70-71, 82-83 (describing how the Secretary of Defense straddles two teams: as a member of the hand-picked cabinet, “serving only at the pleasure of the President,” and on the “broader national security team”).

<sup>441</sup> *Id.* at 574-75.

President must give his senior military advisors a reception for their opinions, even if contrary to his preference; senior officers must provide their “best and most candid advice” to the President; the senior officer must “obey loyally, especially when they are overruled;” senior officers should not make, even if asked, public statements to third parties like the media or directly to a public audience that actually, or appear to a reasonable observer to, impose limits on the President’s freedom of choice, or freedom of action; finally, senior officers should never “speak out” on “politically sensitive issues” or “matters beyond their area of responsibility” or “expertise.”<sup>442</sup> These expressions of candor, responsibility, and lanes of authority between a recognized superior and a subordinate with technical or specialized knowledge, are fundamentally fiduciary concepts reflecting the dynamic between a principal and agent.

Interviewed by Bob Woodward of *The Washington Post*, President Obama implicitly concurred with Gates’ observations as he reflected on his relationship with his senior officers:

I also had a lot of confidence . . . that the way our system of government works [is that] civilians have to make policy decisions. And then the military carries them out. You know, I don’t see this as a civilian versus military situation the way I think a lot of people coming out of Vietnam do . . . a lot of the political frames through which these debates are being viewed don’t really connect with me generationally. I’m neither intimidated by our military, nor am I thinking that they are somehow trying to undermine my role as commander in chief.<sup>443</sup>

When publically commenting on General McChrystal’s resignation in 2010, President Obama noted themes of complete military subordination to civilian policy and the implied

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<sup>442</sup> *Id.*

<sup>443</sup> WOODWARD, OBAMA’S WARS, *supra* note 48, at 377.

principal-agent virtue of “trust,” as well as implying that an unwritten code of conduct established the objective basis for his decision.<sup>444</sup>

This perspective is shared widely across the senior military leadership, assuming the words of various combatant commanders and Chairmen of the Joint Chiefs of Staff are representative of the larger population of senior uniformed leaders. After President Truman relieved General Douglas MacArthur from command in Korea in 1951, MacArthur testified before a joint committee of Congress during which he described a general duty to obey a lawful order, regardless of its merit or “wisdom.”<sup>445</sup> The next general to be relieved by a President from combat command for an apparent breach of civilian control, General McChrystal, also noted themes of subordination to the civilian decision-maker, as well as the confidentiality of the communications between these “unequal” partners:

I wanted to stay . . . but I wanted to do what was best for the mission . . . I felt whatever that the president felt was best for the mission was what I needed to do, so I was happy to go with whatever decision that he made.<sup>446</sup>

He refused to disclose, even three years after his forced resignation, the conversation in the White House that led to the ultimate decision and public announcement: “what is said between the president and I in the Oval Office really needs to be between us.”<sup>447</sup>

Several recent Chairmen of the Joint Chiefs of Staff have echoed themes of candor and unequivocal responsibility to act within the confines (or “scope”) of legitimate military

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<sup>444</sup> Statement by the President in the Rose Garden, 23 June 2010, <http://www.whitehouse.gov/the-press-office/statement-president-rose-garden>.

<sup>445</sup> *MacArthur Senate Statement*, *supra* note 140, at 27-28.

<sup>446</sup> Eun Kyung Kim, *McChrystal on resignation: 'I wanted to stay in the job,'* TODAY.COM, <http://www.today.com/news/mcchrystal-resignation-i-wanted-stay-job-1B7854301>.

<sup>447</sup> *Id.*

authority and expertise. General Martin Dempsey, Chairman since 2011, said “[a]ll of my predecessors . . . when they came to educate me about my job, the single consistent, persistent theme was candor . . . relationships are based on candor.”<sup>448</sup> In several white papers he produced earlier, when Commander of the Army’s Training and Doctrine Command, he believed the same but implicitly acknowledged the inherent tension between candor and respect for the scope of one’s authority: “In all aspects of its existence and operations the American Profession of Arms advises with disciplined candor and is willingly subordinate to, and a servant of, civilian authorities.”<sup>449</sup> He noted:

[c]ivilian leaders, duly elected by the people, Congress and the Executive branch, have ultimate authority over the Army . . . at the same time, owing to their moral obligation to speak truth and bear true witness to all their fellow citizens, Army professionals and particularly its leaders must always exercise disciplined candor and avoid political alignments when advising the leaders that they serve under, both political and military.<sup>450</sup>

General Dempsey acknowledged that in the strategic civil-military relationship, the “agent’s” subject-matter expertise can conflict with the desires of the superior “principal,” but must still be articulated:

[m]ilitary professionals hold unique expertise and their input is vital to formulating and executing effective policy. This requires that the military’s unique perspective and advice be heard in the formulation of laws and policies that create, support, and employ our armed forces, or its effectiveness can be reduced to the detriment of the Republic.<sup>451</sup>

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<sup>448</sup> Jim Garamone, *Dempsey Speaks on Experiences in Civil-Military Relations*, DOD NEWS, DEFENSE MEDIA ACTIVITY, 20 Nov 2014, <http://www.defense.gov/news/newsarticle.aspx?id=123693>.

<sup>449</sup> CENTER FOR THE ARMY PROFESSION AND ETHIC, *ARMY: PROFESSION OF ARMS 15* (7 Oct 2010), <http://www.cape.army.mil>.

<sup>450</sup> *Id.*

<sup>451</sup> U.S. ARMY TRAINING AND DOCTRINE COMMAND, *The Profession of Arms: An Army White Paper*, at 26 (8 Dec 2010), available at <http://www.benning.army.mil/armor/content/PDF/Profession%20of%20Arms%20White%20Paper%208%20Dec%2010.pdf>

General Dempsey's predecessor as Chairman, Admiral Michael Mullen, was similarly predisposed. "The more you personally disagree with a policy, the harder you have to absolutely advocate for it once the decision is made."<sup>452</sup> Pre-decision, however, Mullen was also concerned with military actions that reduced, or at least appeared to reduce, the number of available options or "decision-space"<sup>453</sup> open to the civilian principal, thereby limiting his or her ability to make fully informed policy within the civilian's legitimate prerogative.

Gates, Obama, MacArthur, McChrystal, Dempsey, and Mullen all imply that the strategic civil-military relationship is one that closely resembles jurisprudential concepts of agency, whether it is between a Secretary of Defense and the Chairman of the Joint Chiefs of Staff, or between a President and a theater combatant commander. The expert's subordination to the non-expert; the desirability for confidentiality; loyalty to both the policy and policy-maker once the decision has been cast, even if the expert's advice was not heeded or heard; and the military leader's duty to refrain from speaking beyond his or her capacity, authority, or responsibility are recurring themes. With this evidence in hand, jurisprudential agency is a proper basis upon which to look for objective criteria that may help all the parties diagnose whether a particular episode signals conflict, whether that conflict is symptomatic of an unhealthy relationship, or if it, instead, exemplifies solid and sound democratic politics.

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<sup>452</sup> Julian Barnes & Adam Entous, *Interview Excerpts: Adm. Mike Mullen*, WALL STREET J. (September 28, 2011), <http://www.wsj.com/articles/SB10001424052970204831304576597291196115556>.

<sup>453</sup> *Id.*

### C. Codes of Professional Responsibility as Diagnostic Devices

Given the principal-agent character of the strategic civil-military relationship, finding such standards or criteria is relatively straightforward. The attorney-client relationship is one such principal-agent dynamic,<sup>454</sup> and it is guided by codified rules and norms that allow the profession to self-regulate based on concepts derived from the law of agency. Aside from peer-to-peer accountability, such codes of ethics, or “professional responsibility,” simultaneously signal to an audience of clients, prospective clients, and the public at large the expectations reasonably imposed on lawyers.<sup>455</sup> These codified norms attempt to manage the tacit and explicit bargaining among *three* constituent parties: the attorney, the client, and the legal system itself, which both creates and channels disputes affecting the client and establishes a technical bureaucracy through which only a qualified lawyer is licensed to navigate. Moreover, the rules emphasize the donning of many hats: the advisor, providing a client with informed understanding of rights, obligations, and consequences; the advocate, zealously advancing the client’s position; the negotiator, intermediary, spokesperson, and evaluator; the “officer of the legal system;” and the “public citizen having special responsibility for the quality of justice.”<sup>456</sup>

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<sup>454</sup> Geisel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, *supra* note 421, at 347-48 (citing various jurisdictions for the proposition that there is “no disagreement on [the] basic premise” that the attorney-client relationship is a principal-agent relationship).

<sup>455</sup> MODEL RULES OF PROF’L CONDUCT, Pmb. and Scope, at paras. 10-13 (1983).

<sup>456</sup> U.S. Dep’t of Army, Regulation 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS paras. 6a., b., e., and g. (1 May 1992) [hereinafter AR 27-26]. Similarly, then-Major Mark S. Martins described the “four distinct roles” of military lawyers: the representative advocate of a client; the judge-like function of objective interpretation of the law; the “conscience of the unit” that “injects humanitarian considerations into military decisions;” and the “counselor” providing preventive advice. Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, at 107-08 (1994) [hereinafter Martins, *Rules of Engagement for Land Forces*].

It takes little imagination to see a parallel to the military officer's relationship with a "client" civilian official. Because of their expertise in the "management of violence,"<sup>457</sup> their public-granted monopoly on the ability to organize and use armed force, and their self-imposed oath to uphold the Constitution (and by implication its principle of absolute civilian control), Huntington first argued that military professionals serve three generally similar functions relative to civilian leadership and the public: a representative function, an advisory function, and an executive function.<sup>458</sup> This parallel between the abstract functions of the military officer relative to civilians and the attorney's multifaceted functions or roles relative to the legal system and client is noteworthy. The parallel highlights the potential diagnostic value of agency-based rules of professional conduct: they create *de facto* accountability standards that can be objectively interpreted and applied to case-by-case episodes of suspect conduct. As Janowitz noted more than fifty years ago, it is a "system of internal administration . . . [leading to] the growth of a body of ethics and standards of performance."<sup>459</sup>

This thesis will look at two versions of these "bod[ies] of ethics and standards of performance" in order to note potential norms, standards, or rules that may easily transfer to the context of strategic civil-military relationships: the American Bar Association's (ABA) *Model Rules of Professional Conduct*, and the Army's *Rules of Professional Conduct for Lawyers*. The ABA's *Model Rules* are a comprehensive framework governing attorney

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<sup>457</sup> HUNTINGTON, *THE SOLDIER AND THE STATE*, *supra* note 308, at 11 (quoting Harold Lasswell).

<sup>458</sup> *Id.* at 72; *supra* Part II.C.1. See also DON M. SNIDER, *DISSENT AND STRATEGIC LEADERSHIP OF THE MILITARY PROFESSIONS* 16-18 (Feb. 2008), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB849.pdf>.

<sup>459</sup> JANOWITZ, *THE PROFESSIONAL SOLDIER*, *supra* note 10, at 6.

conduct in the practice of law and representation of clients.<sup>460</sup> It is the model for state bar codes of professional responsibility in forty-nine states, as well as the Virgin Islands and the District of Columbia.<sup>461</sup> The *Model Rules* promulgate both prescriptive, mandatory rules, providing objective bases on which to punish a violation of an ethical imperative,<sup>462</sup> as well as descriptive, permissive rules that allow the attorney to exercise judgment and discretion in determining proper conduct in certain ambiguous situations.<sup>463</sup> The Army's *Rules of Professional Conduct for Lawyers*<sup>464</sup> are based, almost entirely, on the ABA's *Model Rules*.<sup>465</sup> The Army's *Rules* promulgate "comprehensive rules governing the ethical conduct of Army lawyers, military and civilian, and of non-governmental lawyers appearing before Army tribunals in accordance with the Manual for Courts-Martial."<sup>466</sup> Like the *Model Rules*, the Army's *Rules* come in obligatory and permissive forms.<sup>467</sup> Not every Rule is transferable to the strategic civil-military relationship. Rules governing lawyer advertizing and solicitation of clients; fees; the unauthorized practice of law; and trial publicity are specifically oriented toward a professional context unique to lawyers. However, several Rules are worth highlighting for their apparent transferability.

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<sup>460</sup> MODEL RULES OF PROF'L CONDUCT, *supra* note 455, at Pmbl. and Scope, at para. 16.

<sup>461</sup> Only California has declined to adopt the ABA Model. *See* American Bar Association, Center for Professional Responsibility webpage ("Alphabetical list of States Adopting Model Rules"), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html).

<sup>462</sup> MODEL RULES OF PROF'L CONDUCT, *supra* note 455, at Pmbl. and Scope, at para. 20.

<sup>463</sup> *Id.* at para. 14.

<sup>464</sup> AR 27-26, *supra* note 456.

<sup>465</sup> *Id.* at 1, para. 7b.

<sup>466</sup> *Id.* at i ("Summary").

<sup>467</sup> *Id.* at 1, para.7c.



### 1. *Scope of Responsibility and Authority*

A lawyer’s “scope of representation and allocation of authority,” for example, *requires* the counselor to:

abide by a client’s decision [for] the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer *may* take such action on behalf of the client as is impliedly authorized to carry out the representation.<sup>468</sup>

Importantly, this “scope” provision reminds outside observers and clients that the “lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”<sup>469</sup> By assuring the client’s possession of ultimate authority over the purposes of the relationship, “within the limits imposed by the law,”<sup>470</sup> this Rule, by analogy, reflects similar principles implied by the constitutional separation of powers and the apolitical subordination of the military to a civilian commander-in-chief,<sup>471</sup> as well as values—like nonpartisan military advice—reflected in the officer’s oath<sup>472</sup> and in doctrine.<sup>473</sup> Furthermore, Cohen’s description of the civil-military “unequal dialogue”<sup>474</sup> can be inferred from the Rule’s allocation of authority:

[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly

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<sup>468</sup> MODEL RULES OF PROF’L CONDUCT, *supra* note 455, at R. 1.2 (a) (emphasis added).

<sup>469</sup> *Id.* at R. 1.2(b).

<sup>470</sup> *Id.* at R.1.2 cmt.

<sup>471</sup> *Supra* Part II.B.1.

<sup>472</sup> *Supra* Part II.B.2.

<sup>473</sup> *Supra* Part II.B.5.

<sup>474</sup> *Supra* Part II.C.3.

with respect to technical [and] tactical matters. . . [c]onversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for a third person who might be adversely affected.<sup>475</sup>

The “special knowledge and skill” of the agent-lawyer is analogous to the technical and tactical knowledge and skill of the agent-military officer. Similarly, the lawyer’s deference to the client’s perspective on “expenses” and the adverse effect on third parties is analogous to the officer’s deference to the civilian policy maker’s perspective on political cost and public opinion incited by the decision. Such similarities align this particular fiduciary duty neatly with the potential principal-agent pair in a strategic civil-military relationship.

## 2. *The Agent as Advisor*

The lawyer is permitted to “discuss the legal and moral consequences of any proposed course of conduct with the client.”<sup>476</sup> As the “advisor,” the lawyer “shall exercise independent professional judgment and render candid advice . . . and may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”<sup>477</sup> By analogy, the senior military leader would be permitted to present not only military-specific facts and opinions within his or her specialized field, but also the “moral” danger or benefits of a proposed course of action, even if the civilian principal is “disinclined to confront” unpleasant realities or undesirable alternatives.<sup>478</sup> While the Rule admits that the line between “objective” and “means” is

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<sup>475</sup> MODEL RULES OF PROF’L CONDUCT, *supra* note 455, at R.1.2 cmt.

<sup>476</sup> AR 27-26, *supra* note 456, at R. 1.2(d).

<sup>477</sup> MODEL RULES OF PROF’L CONDUCT, *supra* note 455, at R. 2.1.

<sup>478</sup> *Id.* at R. 2.1 cmt.

sometimes blurred and ambiguous, an officer's explicit opinion on the political value of a military course of action would be prohibited.<sup>479</sup>

### 3. Confidentiality

Confidentiality rules also illustrate the principal-agent analogy. Though laws, regulations, doctrine, and the officer's oath do not establish a specific affirmative duty to maintain the confidentiality of communications between strategic civilian and military leaders (other than federal law or an Executive Order regarding classified information<sup>480</sup>), such a requirement is easily and lawfully established by either a direct order from the civilian-principal to the military officer-agent, or by the implicit expectations of the civilian-principal. With limited, narrow, exceptions, both the ABA's *Model Rules* and the Army *Rules* state that the "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."<sup>481</sup> Unless the disclosure is *implicitly* authorized in order to carry out the agent's tasks, the public interest affected by disclosure must outweigh the countervailing public interest in preserving a client's confidences: for example, when the lawyer reasonably believes the breach of confidentiality would be life-saving, crime-preventing, fraud-mitigating, or to comply with law or a court order.<sup>482</sup>

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<sup>479</sup> AR 27-26, *supra* note 456, at R. 1.2, cmt.

<sup>480</sup> *See, e.g.*, 18 U.S.C. § 798 ("Disclosure of classified information"); 5 U.S.C. 552(b), 32 C.F.R. 518.13 (Freedom of Information Act, exemptions).

<sup>481</sup> MODEL RULES OF PROF'L CONDUCT, *supra* note 455, at R. 1.6(a); *compare* AR 27-26, *supra* note 456, at R. 1.6(a).

<sup>482</sup> MODEL RULES OF PROF'L CONDUCT, *supra* note 455, at R. 1.6(b)(1)-(7). The principal's "informed consent" is a critical element guiding this Rule in practice too (*id.* at R. 1.6 cmt) and explains many of the sentiments of shock and dismay expressed by presidents and other civilian leaders in the aftermath of what appeared to be senior military officers "freelancing" with public statements that contradicted or criticized internal administration deliberations and strategy-making. *See, e.g.*, GATES, DUTY MEMOIRS, *supra* note 56, at 187-88, 339. In those cases, it was not immediately obvious that the military opinions offered were of such valuable public interest as to outweigh the expectations of civilian leadership. Deliberations on topics of

#### 4. *Candor When the Organization is the Client/Principal*

The involvement of more than one “principal” relevant to a particular event or apparent “civil-military crisis” creates a foreseeable wrinkle, challenging the agent to identify, understand, and act in accordance with both direct and implied authorities in a way that does not appear—at least to one principal—as a conflict of interest. Likewise, the public, as an outside observer, would be challenged if attempting to hold a principal accountable (e.g., through an election, impeachment, or media-driven criticism) for conduct that impaired or handicapped the strategic civil-military relationship.

The ambiguous identity of the principal imparts another potential wrinkle. Like the expectation senior civilian leaders have of their military advisors, candor is a significant element underlying rules of professional responsibility for lawyers. The *Model Rules* explicitly prohibit the lawyer from making a “false statement of fact or law to a tribunal<sup>483</sup> or fail to correct a false statement of material fact or law previously made by the tribunal by the lawyer,”<sup>484</sup> as well as taking “remedial measures” (like disclosure to the court) if the lawyer, the client, or a witness, has offered material evidence he or she comes to know is false.<sup>485</sup>

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sensitive, or even classified, nature would be expected to remain free from public commentary, and that lawful policies would be followed unhesitatingly, regardless of the advice, and irrespective of adverse consequences from a military perspective. As Feaver observed, the civilian leader has the “right to be wrong.” FEAVER, *ARMED SERVANTS*, *supra* note 42, at 9.

<sup>483</sup> MODEL RULES OF PROF’L CONDUCT, *supra* note 455, at R. 1.0(m):

“Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

<sup>484</sup> *Id.* at R. 3.3(a)(1).

<sup>485</sup> *Id.* at R. 3.3(a)(3).

Notably, there is a general obligation to “inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.”<sup>486</sup> This mandate reinforces the role of the lawyer as an “officer of the court” who must comport himself in a way that does not “undermine the integrity of the adjudicative process.”<sup>487</sup> The fundamental proposition is that no lawyer shall mislead the court, based on the fundamental premise that the lawyer owes an additional duty of allegiance and trust to the legal system distinct from that which is owed to the client.

In that sense of “candor,” the agent owes the fiduciary duties of honesty and loyalty to a principal who is more general and nonspecific than a particular individual. In the context of strategic civil-military relations, this ambiguity can cause some consternation. The Chairman of the Joint Chiefs of Staff lacks command authority himself, but is both the highest ranking military officer, subject only to the command authority of the President of the United States, and the principal military advisor to the President, Secretary of Defense, and National Security Council.<sup>488</sup> While required to furnish advice to these principals on demand, the Chairman “may” also advise Congress and make recommendations regarding the Department of Defense “as he considers appropriate.”<sup>489</sup> He *must* also develop and furnish a “National Military Strategy” and “Chairman’s Risk Assessment” to Congress.<sup>490</sup> With such statutory obligations and outlets, the Chairman serves many masters. This servitude is made more complex when set against that officer’s oath to uphold the

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<sup>486</sup> *Id.* at R. 3.3(d).

<sup>487</sup> *Id.* at R. 3.3 cmt.

<sup>488</sup> 10 U.S.C. §§ 151(b) and 152(c).

<sup>489</sup> 10 U.S.C. § 151(e) and (f).

<sup>490</sup> 10 U.S.C. § 153(b).

Constitution and implicitly its principle of subordination to civilian authority and the more implicit “trust” relationship with the public.<sup>491</sup>

The *Model Rules* anticipate such ambiguities. They distinguish the individual client from the “organization as client.”<sup>492</sup> When, for instance, the lawyer is employed by the organization (itself a “legal entity”), not a specific individual, the lawyer’s ultimate responsibility is to act in the best interests of the organization, not the individual leaders of that organization, notwithstanding that the organization “cannot act except through its officers, directors, employees, shareholders and other constituents.”<sup>493</sup> This duty includes revealing confidential information relating to the representation when the lawyer reasonably believes that an actor or actors within the organization (e.g., directors, shareholders, officers) have caused (or will likely cause) “substantial injury to the organization.”<sup>494</sup> The public interest served by the disclosure may be, the Rule acknowledges, of much greater weight—and therefore more easily outweigh the duty of confidentiality—when the organization is a public government entity, agency, bureau, or department. In such cases, the lawyer might “question such [illegal, fraudulent, questionable, or potentially injurious] conduct more extensively than” a lawyer in private capacity.<sup>495</sup>

The Army’s *Rules* follow a similar logic. Unless an Army lawyer has been “assigned to represent an individual who is subject to disciplinary action or administrative proceedings,

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<sup>491</sup> See *supra* Part II.B.2, especially note 195 and accompanying text.

<sup>492</sup> MODEL RULES OF PROF’L CONDUCT, *supra* note 455, at R. 1.13.

<sup>493</sup> *Id.* at R. 1.13(b) and cmt.

<sup>494</sup> *Id.* at R. 1.13(c)(2).

<sup>495</sup> *Id.* at R. 1.13 cmt.

or to provide civil legal assistance to an individual, the Army lawyer’s default client is the Army itself.<sup>496</sup> The Army is “represented” by the director, commander, or other designated official leading the organization to which the Army lawyer is assigned. Therefore, the attorney-client, agent-principal relationship exists between the lawyer and the organization, provided the conduct on which the attorney advises is within the scope of the official business of the organization.<sup>497</sup> A colonel assigned as the staff judge advocate to a maneuver division, for example, represents the *division* as an entity, through his or her provision of legal advice and services to the Major General in command of the division and subordinate elements.<sup>498</sup>

##### 5. *Loyalty, Without Mission-Disruption*

The rules of professional responsibility also impart a default presumption that the client—the principal—is correct. Under the Army’s *Rules*, for instance, lawyers are advised that “[w]hen the officers, employees, or members of the Army make decisions for the Army, the decisions ordinarily must be accepted even if their utility or prudence is doubtful. Decisions concerning policy . . . including ones entailing serious risk, are not as such in the lawyer’s province.”<sup>499</sup> Where loyalty to one’s principal is clouded by the ambiguous nature of the principal’s identity—as an individual or organizational entity—and the agent reasonably believes that the principal’s conduct or decision will subject the organization to

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<sup>496</sup> AR 27-26, *supra* note 456, at R.1.13(a) and (g).

<sup>497</sup> *Id.* at R. 1.13(a).

<sup>498</sup> Notably, the Army’s *Rules* expressly prohibit the commander, director, or other leader from invoking the rule of confidentiality for his or her own personal benefit, but may invoke it “for the benefit of the Army,” subject to being overruled by higher command authority. *Id.*

<sup>499</sup> *Id.* at R. 1.13 cmt.

harm, the *Rules* permit a range of responses requiring the agent’s discretionary judgment. For example, in order to “proceed as is reasonably necessary in the best interest of the Army,” the Army’s *Rules* suggest that the lawyer consider the “seriousness of the violation and its consequences, the scope and nature of the representation, the responsibility . . . and the apparent motivation of the person involved . . . and any other relevant considerations.”<sup>500</sup> Because the client is the Army itself, the *Rules* warn, any preventive or reactive measure the lawyer takes “shall be designed to minimize disruption of the Army and the risk of revealing information relating to the representation to persons outside the Army.”<sup>501</sup>

In sum, these rules governing scope of representation, allocation of authority, confidentiality, the agent’s role as advisor to the principal, the organization as the client, and candor, appear well-suited for analogous application to strategic civil-military relationships. To test this value proposition, several of these rules will be applied in context of apparent civil-military crises.

#### D. Application

While certainly not exhaustive histories, nor the most overt examples of civil-military crises in the American experience, the following two episodes illustrate recurring sources of strategic civil-military friction. These brief summaries also illustrate the challenge that participants and outside observers face if trying to diagnose the health of the relationships involved by relying on existing theory, doctrine, and law: they fail to accurately distinguish between events that are symptomatic of a pathology or are, instead, remedies being applied.

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<sup>500</sup> *Id.* at R. 1.13(c).

<sup>501</sup> *Id.*



1. “*Revolt of the Admirals*”

Anticipating massive budget cuts after World War II, and in retaliation for the Defense Department’s cancellation of the first “super carrier,” eight Navy admirals (including the Chief of Naval Operations) publically testified before Congress in 1949.<sup>502</sup> With extraordinary candor, they asserted that the Secretary of Defense, colluding with the Air Force, was systematically dismantling the capabilities of the Navy, diminishing its role relative to the other Services. Moreover, the admirals accused the Secretary of implicitly lying to the public, to Congress, and to the President about the Air Force’s priority procurement of a new bomber, inflating its capabilities and shrinking its estimated cost. Their candor before Congress was not rewarded. When it was time for Chairman of the Joint Chiefs of Staff, General Omar Bradley, to testify that October, he lashed back at his Navy comrades, accusing them of “open rebellion against the civilian control.”<sup>503</sup> Nearly all of the admirals involved were forced to resign or retired in the immediate aftermath.<sup>504</sup>

Under Feaver’s view of agency, such testimony (an episode of “strategic interaction” in his terms) would be characterized as unproductive “shirking” that could reasonably be “punished” by the civilian leadership.<sup>505</sup> Janowitz, however, might have argued that the admirals were merely behaving as an organized pressure group in the face of external threats

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<sup>502</sup> The author wishes to thank Lieutenant General H.R. McMaster for this reference.

<sup>503</sup> Keith D. McFarland, *The 1949 Revolt of the Admirals*, PARAMETERS, June 1981, at 53, 60.

<sup>504</sup> *Id.* at 61.

<sup>505</sup> Feaver applied his theory to testimony from General Colin Powell and General Norman Schwarzkopf to the Senate Armed Services Committee in 1993. By recommending what amounted to the “Don’t Ask, Don’t Tell” compromise, they implicitly argued against President Clinton’s proposal to end the ban on allowing “open” homosexuals to serve, constituting unhealthy “shirking.” FEAVER, ARMED SERVANTS, *supra* note 42, at 202-03; see Eric Schmitt, *Compromise on Military Gay Ban Gaining Support Among Senators*, N.Y. TIMES, May 12, 1993, <http://www.nytimes.com/1993/05/12/us/compromise-on-military-gay-ban-gaining-support-among-senators.html>. The author thanks David E. Johnson for pointing out this example.

to their institution and traditions, and in the absence of any specific legal bar in doing so.<sup>506</sup> Under Huntington's theory, in contrast, the Navy was merely caught between its view of the "functional imperative" (threats to national security) and a "societal imperative" that included a defense establishment in need of post-war downsizing and reorganization in light of new technological capabilities.<sup>507</sup> Under Cohen, it might be reasonable to ask whether the Secretary of Defense had stepped too much into the lane of professional Naval expertise, thereby unreasonably stretching the "unequal dialogue" beyond rational limits, and giving the admirals a valid cause of action to bring before Congress.<sup>508</sup> None of these theoretical perspectives on civil-military relations provide any criteria for objectively determining a diagnosis—whether this historic, and very public, confrontation was an unhealthy civil-military conflict, as General Bradley believed.

From the norms gleaned from principal-agent codes of professional responsibility, like the *Model Rules*, this uncertainty becomes far more resolved. First, in order to apply concepts like authority and scope, and to identify the agent and principal, analysis is helped by establishing the fundamental context of the episode, rather than assess the action-reaction in a vacuum. Here, the admirals first argued within the Department and sought to change the Navy's policy (and the Secretary's preferences) through internal procedures. When those failed to change course, the senior uniformed leaders of the Navy went to Congress—which has the Constitutional power of funding the Services—to, in effect, complain that the civilian leaders within the Executive Branch were failing in their duties to maintain a well-resourced military capability, thereby degrading the nation's ability to defend itself. This was not a

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<sup>506</sup> *Supra* Part II.C.2.

<sup>507</sup> *Supra* Part II.C.1.

<sup>508</sup> *Supra* Part II.C.3.

case of unambiguous insubordination or disrespect aimed at a particular official; no order was disobeyed or ignored; no *coup* was planned.

Reviewing this “revolt” now seems to raise the prospect of the so-called Agency Problem which arises when agents are not easily and directly supervised by their principals, and those agents choose to act in a way that dissents from the principals’ policy or guidance because they perceive a conflict between their desires or goals and those of their principal.<sup>509</sup> The admirals’ testimony suggested that the flexing of their *moral* agency, in contravention to the implied or expressed terms of their actual authority, was the fuel animating that strategic civil-military conflict.<sup>510</sup> In James Burks’ terms, they exercised “responsible disobedience.”<sup>511</sup> The officers’ choice to object to superior civilian authority violated the civilian *expectation* of loyalty and subordination but, from the perspective of the agents themselves, it was consistent with their oath of office and fulfilled their superior moral obligations to support their *institution* rather than salute and quietly obey the political leadership quietly.<sup>512</sup>

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<sup>509</sup> Eisenhardt, *Agency Theory: An Assessment and Review*, *supra* note 425, at 58 (describing the “agency problem”). Feaver addresses this as an example of the “moral hazard problem” in principal-agent dynamics, suggesting that the principal should “shape the relationship so as to ensure that his employees [agents] are carrying out his wishes.” FEAVER, *ARMED SERVANTS*, *supra* note 42, at 55.

<sup>510</sup> James Burk, *Responsible Obedience by Military Professionals: the Discretion to do What is Wrong*, *supra* note 426, at 151-54.

<sup>511</sup> *Id.*; see also Owens, *What Military Officers Need to Know About Civil-Military Relations*, *supra* note 307, at 74 (“officers have an obligation to make their case as strongly as possible but do not have the right to “insist” that their advice be accepted. However, there must be a ‘calculus of dissent’”).

<sup>512</sup> Milburn, *Breaking Ranks: Dissent and the Military Professional*, *supra* note 199, at 101. *But see* Paul Yingling, *Breaking Ranks?*, *SMALL WARS J.* (Sept. 30, 2010), <http://smallwarsjournal.com/jrnl/art/breaking-ranks> (arguing that the officer’s oath precludes a conscience-based dissent to policy that is post-deliberative). In some cases, strategic military officers may believe that obeying quietly actually advances their long-term goals to protect their institution, thereby justifying what amounts to silence and a lack of candor before Congress. See, e.g., MCMMASTER, *DERELICTION OF DUTY*, *supra* note 37, at 327-28, 330-31 (discussing his view that the JCS collectively failed to render proper advice or to “challenge the direction of the administration’s military policy” to Congress, leading to short-term benefits for each individual service).

From a basic jurisprudential agency framework, the admirals worked for the Department of the Navy, and the Secretary of Defense, and ultimately the President as Commander-in-Chief, by applying their specialized experience and knowledge on behalf of the guiding interests and objectives of the Administration—their principal. On the other hand, the oath they swore was to defend the Constitution, not a particular political party that happened to be elected to govern, or the civilians appointed to upper management by the elected officials. Therefore, the admirals could justify seeking redress from the branch of government that ostensibly represented the public, held the purse, and which served as a check on an Executive they viewed as engaging in conduct that was fraudulent and not in the best interests of the defense establishment as a whole.

Though their complaint looked like unabashed institutional self-interest and Service parochialism, the admirals arguably viewed their effort as a remedial measure to correct the Navy civilian leadership's misinformation and an unreasonable breach of the normal civil-military scope of authority. In response, the admirals appeared to shift the identity of the principal to Congress, granting them a venue to express their professional views candidly and apolitically. If the parties had been working from commonly-accepted fiduciary duties, the risk of the Agency Problem may have been abated. Even if such duties would not have prevented the so-called "revolt," all parties and the public would have possessed a common frame and lexicon by which to judge the actions of the admirals and the political leadership. Provided that it was reasonable to recast Congress as the relevant principal under these circumstances, and provided that the admirals' testimony was accurate, material, and within

their scope of expertise, the jurisprudential agency view of this civil-military tension looks much less like “open rebellion.”<sup>513</sup>

## 2. *Candor and Congress*

On July 18, 2013, General Martin Dempsey and Senator John McCain sparred during Dempsey’s nomination hearing for reappointment as Chairman of the Joint Chiefs of Staff.<sup>514</sup> During a “heated exchange,”<sup>515</sup> Senator McCain repeatedly criticized General Dempsey, apparently as a proxy of the Obama Administration, for allowing the Assad regime to

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<sup>513</sup> At this point, it becomes clear that a technique to guide the application of agency concepts may be useful. Correctly, or at least reasonably, identifying the principal and agent in a given context, as well as the bounds imposed on the agent’s actual or implied authority and scope of responsibility is critical to interpreting the duties of loyalty, candor, and communication in context. One technique may be found in Justice Robert Jackson’s famous concurring opinion in *Youngstown*, the case famous for its interpretation of the President’s executive power in wartime relative to that of Congress. *Supra* Part II.B.1. Jackson suggested a “somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity”: that the President’s executive power is at its greatest strength when he or she operates with clear Constitutional authority plus a mandate, or delegation of power, to act from Congress. He suggested that a President’s power was at its “lowest ebb” when he or she acted in defiance of, or contrary to, expressed or implied Legislative will. In the middle, what Jackson called a “zone of twilight,” is when the President acts absent any implied or express direction from Congress, and must rely on his or her independent power and discretion. That discretion must consider the extent to which “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring). If, by analogy, the President can be likened to an “agent” and Congress to a “principal,” it becomes clear that this three-part scale of legitimate executive discretion can help in determining the case-by-case extent of authority in other settings. Since the President obviously does not “work for” Congress, this case is not a perfect analogy. However, the value of this analogy is not dependent on the case’s focus on Presidential authority: the relevant connection is that Jackson’s framework attempts to work out a practical guide for the application of discretionary authority between two parties that each have some degree of power, a distinct lane of responsibility, but share a blurry division of labor in some contexts, much like the generic principal-agent dynamic, and therefore akin to the strategic civil-military relationships discussed in this thesis.

<sup>514</sup> *Nominations of Gen Martin E. Dempsey, USA, for Reappointment to the Grade of General and Reappointment as Chairman of the Joint Chiefs of Staff; and ADM James A. Winnfeld, Jr., USN, for Reappointment to the Grade of Admiral and Reappointment as Vice Chairman of the Joint Chiefs of Staff, Before the Senate Comm. on the Armed Forces*, 113th Cong. 782-85 (2013) (statement of General Martin E. Dempsey) [hereinafter *Dempsey Nomination Hearing*], <http://www.armed-services.senate.gov/hearings/2013/07/18/nominations>.

<sup>515</sup> Kathleen Hennessey, *McCain threatens to hold up Gen. Dempsey’s Joint Chiefs reappointment*, LOS ANGELES TIMES, July 18, 2013, <http://articles.latimes.com/2013/jul/18/world/la-fg-wn-dempsey-testimony-20130718>.

“prevail on the battlefield,” and permit the deaths of 100,000 Syrians.<sup>516</sup> McCain forcefully argued that U.S. policy should be to “stop a massacre that is going on . . . [and try to] stop the Hezbollah with thousands of troops.”<sup>517</sup> In an obvious attempt to goad General Dempsey into a political assessment, Senator McCain asked:

Do you believe the continued costs and risks of our inaction in Syria are now worse for our national security interests than the costs and risks associated with limited military action?<sup>518</sup>

After General Dempsey responded that the “emergence of violent extremist organizations” increased risk to U.S. national security, Senator McCain accused the chairman of skirting the question, and asked it again. In reply, General Dempsey said:

With all due respect, Senator, you are asking me to agree that we have been inactive, and we have not been inactive.<sup>519</sup>

Unsatisfied, Senator McCain continued his cross-examination:

MCCAIN: I will ask you for the third time. Do you believe we should take military action? Which has greater risk? . . . Which do you think is the greater cost? The action that we are taking now, which has had no effect on the battlefield equation, or doing nothing?<sup>520</sup>

DEMPSEY: . . . the question of whether to support it [the Assad opposition forces in Syria] . . . *is a decision for our elected officials, not for the senior military leader of the nation.*<sup>521</sup>

. . .  
I have given those views [on the potential use of kinetic strikes] to the President. *We have given him options.* Members of this committee have been

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<sup>516</sup> *Dempsey Nomination Hearing, supra* note 514, at 783.

<sup>517</sup> *Id.* at 784.

<sup>518</sup> *Id.* at 782.

<sup>519</sup> *Id.* at 783.

<sup>520</sup> *Id.* at 783.

<sup>521</sup> *Id.* at 783 (emphasis added).

briefed on them in a classified setting. *We have articulated the risks. The decision on whether to use force is the decision of our elected officials.*<sup>522</sup>

MCCAIN: . . . I am asking for your opinion.

DEMPSEY: about kinetic strikes? That issue is under deliberation inside of our agencies of Government, *and it would be inappropriate for me to try to influence the decision with me rendering an opinion in public about what kind of force we should use.* . . . I will rather let this committee know what my recommendations are at the appropriate time.<sup>523</sup>

General Dempsey's answers illustrate a strong reluctance to breach his limited scope of authority, duty of loyalty, and confidentiality within the administration during the deliberative strategy-making process. Such a reluctance to portray his own opinion before Congress (and thereby the public at large) stands in contrast to General MacArthur's expressed belief that the oath to uphold Constitutional principles established a duty to expose his candid opinion, even if contrary to that of his civilian commander-in-chief.<sup>524</sup>

Again, whether General Dempsey was correct is not intuitively or objectively clear. If the Mullen episode was viewed by the Obama Administration, and under an objective agency lens, as *unhealthy*, does the Dempsey-McCain row depict a civil-military relationship between the President and his Chairman, or the Chairman and Congress, which is in *good health*?<sup>525</sup>

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<sup>522</sup> *Id.* at 784 (emphasis added).

<sup>523</sup> *Id.* at 785 (emphasis added).

<sup>524</sup> *MacArthur Senate Statement, supra* note 140, at 99.

<sup>525</sup> An ironic fact is that, under the guidance provided by General Dempsey himself, that question is unanswerable. According to the *Army: Profession of Arms*, a Training and Doctrine Command (TRADOC) paper he published as that organization's Commanding General in 2010, "owing to their moral obligation to speak truth and bear true witness to all their fellow citizens, Army professionals and particularly its leaders must always exercise disciplined candor and avoid political alignments when advising the leaders that they serve under, both political and military." CAPE, ARMY: PROFESSION OF ARMS, *supra* note 431, at 15. Nevertheless, in a subsequent paper, General Dempsey's view was more ambiguous: when the nation is formulating laws and

From an agency view, Dempsey’s unwavering effort to remain silent about the internal dynamics of the Syria debate appears reasonable—even admirable. As long as he believed that the Administration’s conduct (or inaction) regarding Syria at the time was not causing “substantial injury to the organization” (arguably, the military Services over which he served as the senior-ranking official), General Dempsey’s resistance to Senator McCain’s questions eliciting a personal opinion—one already given to the President—about the *use of military force* was not foot-dragging, policy paralysis, or obstructionism (all potential symptoms of a pathological civil-military relationship). In this context of a discussion about the exercise of a power granted to the Commander-in-Chief by the Constitution and implied by the War Powers Act, the nation’s principal military advisor protected the confidences of *his* principal, and demonstrated the duty of loyalty by not exposing potentially uncomfortable facts about the deliberative process that would have likely narrowed the President’s (the principal’s) freedom of decision.

#### E. Amending the Goldwater-Nichols Act

Despite Congress’s attempt with the Goldwater-Nichols Act to restructure and improve the Department of Defense, the Act is a missed opportunity to provide a “quality assurance/quality control” mechanism for those relationships. While the Act provides *venues* for expressing candid military advice, and expands the influence of some participants, it does not include any standard or norm for how that relationship should or could be expressed in good faith under particular but foreseeable circumstances. It fails in this regard because there

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policies that “create, support, and employ our armed forces,” the “unique perspective and advice” of the military (contra the political perspective) should be offered. TRADOC, *The Profession of Arms: An Army White Paper*, *supra* note 431, at 26. From his reticence to offer his “personal opinion” about the employment of force in Syria to Senator McCain, General Dempsey seems to have selectively followed his own prescriptions.



is no singular framework on which to create such norms and expectations. It fails because it does not overtly adopt an agency lens.

There are two considerations which provide evidence that amending the Act to make agency explicit is a reasonable method by which to establish criteria for assessing the health of these relationships in context.<sup>526</sup> First, the Act already portrays, implicitly, these relationships in agency terms. Second, the participants already view themselves in this principal-agent dynamic. Adding normative language to the provisions that already detail roles and organizational responsibilities is a relatively straightforward exercise.<sup>527</sup>

The draft amendment in Appendix A is not intended to be an exhaustive codification of agency-based norms and duties. Nor is it intended to be only applicable to the “choice architects”<sup>528</sup> assigned as members of the Joint Chiefs of Staff. It is easily repeatable, with some modifications, to provisions regulating the specific functions of the Chairman,<sup>529</sup> Vice Chairman,<sup>530</sup> Combatant Commanders,<sup>531</sup> and the senior ranking officers of the Army, Navy, Marine Corps, and Air Force.<sup>532</sup> Likewise, subsection (I) could be adopted by an order or Service regulation to apply to other military “choice architects” positioned to serve as fiduciary agents to civilian principals within the national security establishment. Moreover,

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<sup>526</sup> *Supra* Part II.B.2 (describing, *inter alia*, the history of legislative efforts to reform the national security process, leading to the Goldwater-Nichols Act of 1986).

<sup>527</sup> *See infra* Appendix A for draft amendment language.

<sup>528</sup> *Infra* Appendix B.

<sup>529</sup> 10 U.S.C. § 153.

<sup>530</sup> 10 U.S.C. § 154.

<sup>531</sup> 10 U.S.C. § 164(b).

<sup>532</sup> 10 U.S.C. §§ 3033, 3034, 5033, 5035, 5043, 5044.

to the extent that the draft provision illustrates basic fiduciary duties owed by the military agent, analogous provisions related to the principal's role could be added to the Act in sections regulating civilian leadership of the Department of Defense, including the Secretary of Defense<sup>533</sup> and the Service Secretaries.<sup>534</sup> Regardless of how many official job descriptions would be amended to reflect these norms, expectations, and duties, the obvious consequence is the *de facto* establishment of criteria that may be used by the participants themselves or the public to diagnose the health of a strategic civil-military relationship.

Such a diagnostic device sidesteps the disadvantages of other potential sources of criteria. Where military doctrine vaguely but repeatedly reveres constitutional principles of military subordination, and aim “down and in,”<sup>535</sup> this code provision aims “up and out” and captures the nuanced dynamic between strategic policy-makers of national security where the line of demarcation between the civilian “objective” and the military “means” is often blurred. Where regulations narrowly prohibit unethical behaviors that place personal ambition and gain above public interests, a code provision targets the continual relationship and the natural tensions that form between these participants when they all believe they are acting ethically, within legal bounds, and in the best interest of the country. Finally, it expresses what many current and former participants in this relationship already intrinsically practice and believe. Even if such criteria fail to *definitively* answer whether a particular episode or “strategic interaction”<sup>536</sup> is unhealthy or flawed, agency norms at least establish

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<sup>533</sup> 10 U.S.C. § 113.

<sup>534</sup> 10 U.S.C. §§ 3013 (Secretary of the Army), 5013 (Secretary of the Navy), 8013 (Secretary of the Air Force).

<sup>535</sup> *Supra* Part II.B.5.

<sup>536</sup> Peter D. Feaver, *Crisis as Shirking: An Agency Theory Explanation of the Souring of American Civil-Military Relations*, *supra* note 368, at 407.

criteria that all observers could employ as the common language through which to debate it—a feature currently absent in American civil-military relations literature and debate.

#### IV. Conclusion

A jurisprudential agency theory, invoking fiduciary duties of candor, trust, communication, among others, is a reasonable framework for describing the day-to-day “strategic interaction”<sup>537</sup> among senior civilian and military policy-makers, as Gates’ memoirs attest.<sup>538</sup> Conflict, strife, tension, and so-called “crises” occur regularly in the American history of civil-military relations, and the lack of an American *coup d’état* does not reverse the evidence of poor war-time decision-making, degraded or defective strategies, and unprincipled public criticism. Having never suffered a life-threatening illness does not make a person the paragon of health.

Neither current civil-military relations theory, nor law, nor policy, nor doctrine, provide anything resembling criteria by which to judge these relationships in context and thereby hold the participants—those “who reason why” and those who “do and die”<sup>539</sup>—accountable for breaches of duty that detrimentally affect national security. Agency concepts offer candidate criteria when duties are incorporated into codified norms, expectations, and standards akin to rules of professional responsibility. Three relevant results are critical. Foremost, at least some of the generic, agency-based, fiduciary duties can be adopted as

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<sup>537</sup> *Id.*

<sup>538</sup> GATES, *DUTY MEMOIRS*, *supra* note 56, at 573-75.

<sup>539</sup> Tennyson, *supra* note 1.

criteria useful for diagnosing the health of these relationships.<sup>540</sup> Second, such criteria would not be alien to the participants in these relationships, as they already informally accept many of their key premises. Third, regardless of how these duties are applied, their *adoptability* fosters the “pluralism and debate [that] often prevent[s] authoritarianism,” and helpfully reduces the “ambiguity and inconsistency” normally associated with that debate.<sup>541</sup>

This jurisprudential agency analogy provides a way to develop a “commonly accepted theoretical framework upon which to evaluate various civil-military behaviors.”<sup>542</sup> Ultimately, it is a novel approach for distinguishing between episodes of civil-military conflict that are symptomatic of disease from those episodes that, instead, signal a healthy and functioning immune system.

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<sup>540</sup> For the reader interested in how this framework aids the practicing judge advocate officer, this thesis implies two indirect value propositions. First, senior judge advocates are in positions to advise the military and civilian leaders who participate in these strategic civil-military relationships. As then-Major Mark Martins wrote, lawyers serve not just as advocates but as “counselors” and the “conscience of the unit.” Martins, *Rules of Engagement for Land Forces*, *supra* note 456, at 107-08. It is foreseeable that judge advocates would find such objective criteria and the agency analogy useful in preparing their “principal” to, for example, testify before a congressional committee, or in helping their “client” develop cogent and conscientious arguments when a policy he or she disagrees with evolves from being deliberative to being enacted. A shared lexicon of what the military agent is expected to know and do on behalf of the civilian principal may help develop a more literate translation of policy into strategy and strategy into tactics. See Colonel (retired) Kevin Benson, *A War Examined: Operation Iraqi Freedom, 2003*, PARAMETERS (Winter 2013-14), at 119, 122. The second value proposition, from the point of view of a judge advocate, is that this agency-based proposal was built by analogy to a well-known legal concept, for use by practitioners who are not themselves lawyers. It provides, therefore, “evidence” that lawyers may possess certain tradecraft techniques and concepts that can be exported to help advise *other* kinds of “agents” working through their own principal-agent dilemmas.

<sup>541</sup> PEARLMAN, WARMAKING AND AMERICAN DEMOCRACY, *supra* note 38, at 13. Even if identifying the principal in these strategic relationships is challenging, the potential value of this agency-based framework is undiminished. At worst, the participants in the relationship and any observers will debate that identity in order to assess *how* the norms, expectations, and standards driven by the fiduciary duties will apply in a given situation—but *not whether* they apply at all.

<sup>542</sup> Marybeth Peterson Ulrich, *Infusing Normative Civil-Military Relations Principles in the Officer Corps*, *supra* note 82, at 658.

## Appendix A. Example Draft Text of an Amendment

**Policy:** In enacting these revisions, it is the intent of Congress, consistent with the congressional declaration of policy in section 3 of the Goldwater-Nichols Defense Reorganization Act of 1986 —

- (1) to strengthen civilian control over the Department of Defense;
- (2) to improve the military advice provided to the President; the National Security Council; the Secretary of Defense; and the Secretaries of the Armed Services;
- (3) to increase the transparency of the information, including the purposes, bases, biases, and limits of the information, expressed between civilian leadership and their military advisors;
- (4) to recognize the inherent tensions and ambiguities unique to the relationship that exists and evolves between military and civilian leaders responsible for national security policy-making at the strategic level;
- (5) to articulate generic expectations and norms of the civil-military relationship as manifested by the senior civilian and military leaders inside the Department of Defense, including the Office of the Secretary of Defense, the Joint Chiefs of Staff, the Joint Staff, the Departments of the Army, Navy, and Air Force, and the unified and specified combatant commands;
- (6) and to provide a consistent and universal set of criteria by which the American public and participants in the strategic civil-military relationships may infer or adduce the strength and health of those relationships in context.
- (7) Violations of these revisions do not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers or employees, or any other person.

### **[Amended] § 151. Joints Chiefs of Staff: composition; functions; fiduciary duties**

*Note: 10 U.S.C. § 151(b) describes the function of the Chairman as the “principal military advisor to the President, The National Security Council, and the Secretary of Defense” and the other members of the Joint Chiefs as “military advisors” to the same. Section 151(c) describes the Chairman’s permissive ability to seek the advice of the other members of the Joint Chiefs of Staff and the combatant commanders. Section 151(d) describes the ability of the other members of the Joint Chiefs of Staff to offer advice or a dissenting opinion to the Chairman, the President, the National Security Council, or the Secretary of Defense. Section 151(e) describes the requirement to furnish advice upon request from the President, the Secretary of Defense, or the National Security Council.*

**(f)** in carrying out the functions described in subsections (b), (c), (d), and (e), the Chairman, Vice Chairman, the Chief of Staff of the Army, Chief of Staff of the Air Force, the Chief of Naval Operations, the Commandant of the Marine Corps, and the Chief of the National Guard Bureau shall recognize and abide by the following core principles consistent with their oath of office, and fidelity to the Constitution of the United States:

- (1)** the relationship between the military officer in the positions listed above and the President of the United States is a fiduciary relationship. In the President’s role under Article II of the Constitution as the Commander-in-Chief of the Armed Forces, the

President acts as the “principal,” relying on the technical expertise, practical experience, and professional judgment of the officers nominated and confirmed as members of the Joint Chiefs of Staff in the execution of the President’s constitutional responsibilities and authorities. The individual officer member of the Joint Chiefs of Staff shall act as the agent of the civilian principal, acting in the principal’s best interests to the extent that such actions are consistent with the lawful objectives and with the lawful intent of the President.

**(2)** in fulfilling the expectations of the civilian principal and consistent with the specified advisory functions described in subsection (b), (c), (d), and (e), and in §151(b)(2), § 153 (Chairman: functions), § 154 (Vice Chairman), § 3033(c), (d)(3) and(d) (6) [Chief of Staff of the Army], §5033(c), (d)(3) and (d)(6) [Chief of Naval Operations], § 5043(d), (e)(3) and (e)(6) [Commandant of the Marine Corps], and § 8033(c) and (d)(3) and (d)(6) [Chief of Staff of the Air Force], the military agent:

**(A)** shall ensure that the agent’s scope of responsibility and authority to act on the explicit and implied direction of the President (or other civilian principal relevant under the circumstances) is reasonably clear, unambiguous and transparent to the agent and to third parties;

**(B)** to the extent that the agent’s scope of responsibility and authority to act is ambiguous or apparently inconsistent with earlier direction or guidance from a principal, shall seek clarification from the President (or other civilian principal relevant under the circumstances) before acting in such a manner as to be perceived, or reasonably likely to be perceived by the President (or other civilian principal relevant under the circumstances) as breaching or attempting to breach the agent’s authority or expressing a position inconsistent with the policy or proposed policy of the Administration;

**(C)** shall abide by any lawful restriction imposed by the President (or other civilian principal relevant under the circumstances) on the agent’s exercise of independent professional judgment to the extent that it encompasses moral, economic, social, political, or other non-military factors;

**(D)** shall abide by any lawful restriction imposed by the President (or other civilian principal relevant under the circumstances) on the agent’s exercise of independent professional judgment to the extent that the exercise of such judgment communicates the intentions, motivations, constraints, or content of deliberations engaged in by the principal, with or without the agent’s knowledge or participation, to third parties;

**(E)** shall keep the President (or other civilian principal relevant under the circumstances) reasonably informed, promptly comply with reasonable requests for information, and discuss any relevant limitations on the agent’s ability to carry out the objectives of the President;

**(F)** shall explain a matter to the extent reasonably necessary to permit the President (or other civilian principal relevant under the circumstances) to make informed decisions;

**(G)** if asked by a member of Congress in an official and public forum to offer a professional or personal opinion on a matter the agent knows or reasonably should know is expected to be withheld in confidence until authorized by the President (or other civilian principal relevant under the circumstances), the

agent shall consider whether the public interest, candor toward Congress, and fidelity to Constitution outweigh, under the circumstances, fiduciary duties of confidentiality and loyalty toward the President as Commander-in-Chief under the circumstances then known;

**(H)** shall not, consistent with any prohibitions on the disclosure of confidential, secret, or otherwise classified material established under any law, offer to any third party (individual, person, agency, organization, or business entity) a professional or personal opinion on a matter the agent knows or reasonably should know is expected to be withheld in confidence until authorized by the President (or other civilian principal relevant under the circumstances);

**(I)** may impose the aforementioned duties on any subordinate member of the Armed Forces under circumstances which cast, or are reasonably likely to be interpreted as casting, that military subordinate as an agent in the execution of the President's objectives.

(g) The provisions in (f)(1) and (f)(2) shall apply to all situations in which the military agent knows or reasonably should know under the circumstances that the agent is to perform lawful duties and responsibilities on behalf of a civilian principal appointed by the President.

## Appendix B. **Strategic Civil-Military Relationships: Cast of Characters**

This thesis has narrowed the enormous subject of American civil-military relations. It did not address the “demographic” axis—those issues surrounding the recruitment, retention, selection, and beliefs of those serving in the military as contrasted with the rest of society. Rather, it focused on the “personality” and the “operational” axes: the interpersonal lines of authority between legitimate civilian policy-makers and strategic leaders in the Armed Forces, as they engage in the management, direction, and execution of defense-related missions. Second, because this population of relationships is potentially overwhelming due to the immense size of the American defense establishment, the dizzying diversity of missions it undertakes, and the number of echelons of command that could be studied, this thesis narrowed the relevant sample further.

Specifically, it addressed and considered two populations. First: civilian leaders either in Congress<sup>543</sup> or in the Executive Branch<sup>544</sup> responsible for the management, oversight, and policy direction of the nation’s defense and security institutions and organizations. Second: generals and admirals in positions who engage in official, routine contact with these civilian leaders, with whom these officers must formally report or provide advice. Because even those populations are still too large, this thesis further considered those civilians and military officers who engage in this dynamic in a way that amounts to what behavioral economist Richard Thaler and law professor Cass Sunstein call “Choice

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<sup>543</sup> This category includes legislators and both personal and professional staff members.

<sup>544</sup> This category includes officials appointed and elected into public office.



Architecture.”<sup>545</sup> Choice Architecture, or “nudging,” is simply “organizing the context in which people make decisions” in order to purposively influence those decisions in manner preferred by the “architect” because it is thought to be in the best interest of some party.<sup>546</sup> Usually, the context in which nudging occurs is a certain class of decision-making: decisions which are difficult because one’s experience only provides an ambiguous guide, the need to decide is infrequent, the decision offers little or no immediate feedback, and the consequences are delayed or hard to envision.<sup>547</sup> An attorney who counsels a stubborn client accused of a serious crime about potential incarceration in order to “nudge” them toward accepting a particular variation of a plea agreement offer from the prosecutor acts a choice architect. A commanding general of a U.S-led multinational coalition of ground forces who presents military options to the Secretary of Defense with projected resource demands, timelines, casualties, and a risk assessment in order to influence an Administration’s expectation level acts as a choice architect.<sup>548</sup>

As an activity in which strategic leaders interact, Choice Architecture usually considers only those choices which are *not* mandated or directed.<sup>549</sup> For that reason, under all conditions in which a military is constitutionally subordinate to civilian authority, that

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<sup>545</sup> THE NUDGE BLOG, <http://nudges.org/> (John Balz ed.). To “nudge” in this context is to alter a person’s “behavior in a predictable way without forbidding any options or significantly changing” their incentives. See THALER & SUNSTEIN, NUDGE, *supra* note 377, at 6.

<sup>546</sup> *Id.* at 3.

<sup>547</sup> *Id.* at 75-79.

<sup>548</sup> See, e.g., GORDON & TRAINOR, COBRA II, *supra* note 113, at 27-29, 54-59; see also STAVRIDIS, THE ACCIDENTAL ADMIRAL, *supra* note 237, at 10-12, 121 (recounting some of his impressions and interactions with members of Congress as Combatant Commander of USSOUTHCOM and USEUCOM, and his implicitly necessary engagements with academic, media, think tanks, and other “thought leaders” outside of government while in command of these organizations).

<sup>549</sup> THALER & SUNSTEIN, NUDGE, *supra* note 377, at 6.

military has a population of leaders who may act as choice architects for civilians appointed or elected to positions above them.<sup>550</sup> However, because of this institutionalized imbalance in authority, civilians in the national security and defense establishment need not resort to this subtle form of behavior manipulation because they may be free to mandate action without consultation or input from military officers by virtue of their elected role or appointed position. For the civilian participants in the strategic relationship under review here, at least, engaging in subtle Choice Architecture may be a choice itself.

Those officers identified by Roman and Tarr as sitting at the “pinnacle of America’s military leadership” and constituting the “core group” of “very influential officers”<sup>551</sup> sometimes behave as choice architects. To illustrate, in 2010, General James “Hoss” Cartwright, United States Marine Corps, tested the extent of the Vice Chairman’s ability to influence policy-makers when he formally dissented in writing to the “Surge” in Afghanistan, then supported by Generals McChrystal and Petraeus, and the Chairman of the Joints Chiefs of Staff, Admiral Mullen. In concert with the Vice President Biden’s view, Cartwright’s “contrarian” military view was perceived, by the commanders and by some senior leaders in the Pentagon, as a ploy to garner political favor with an Administration seemingly predisposed to prefer fewer “boots on ground” unless they were of the counter-terrorism, special operations variety.<sup>552</sup>

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<sup>550</sup> Depending on their particular assignment, rank, and scope of duties.

<sup>551</sup> Roman & Tarr, *Does it Matter?*, *supra* note 51, at 404 (including the Chairman and Vice Chairman of the Joint Chiefs of Staff, the Service Chiefs of Staff and their Vice Chiefs, the Commanders and Deputies of the Unified Combatant Commands, the Assistant to the Chairman of the Joint Chiefs, the Director of the Joint Staff, and key operations and policy chiefs on the Joint Staff).

<sup>552</sup> See GORDON & TRAINOR, *THE ENDGAME*, *supra* note 155, at 658-62.

From Cartwright's perspective, his dissent was designed to expand the number of options the President would consider. Because it came from the second-ranking officer in the Armed Services, and was an argument against the consensus proposal of the field commanders, it would have to be viewed as a legitimate, if not reasonable, alternative. Consequently, the political influence of the Chairman of the Joint Chiefs, and the independent chain-of-command running from the President, through the Secretary of Defense, to the combatant commanders, was strained in a way unaccounted for by the Goldwater-Nichols Act.<sup>553</sup> The Act opened the door for his dissent as an influential choice architect, but offered no principled justification or condemnation for it.

But, under the criteria described above, this pinnacle is too narrow. Senior officers assigned to key legislative liaison positions in the headquarters of their respective Services,<sup>554</sup> officers assigned to senior advisory positions in other Executive Branch agencies and Departments,<sup>555</sup> those assigned as the senior military advisors to civilian Service Secretaries and the Secretary of Defense may be relevant cast members.<sup>556</sup> On the civilian side, this broader population obviously includes the President, but might include elected members and senior professional staff of the House Armed Services Committee, the Secretary of Defense and Deputy, the Service Secretaries and Under Secretaries, the Under

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<sup>553</sup> *Id.*

<sup>554</sup> STEPHEN K. SCROGGS, *ARMY RELATIONS WITH CONGRESS: THICK ARMOR, DULL SWORD, SLOW HORSE* 31-49 (2000).

<sup>555</sup> For example, the Lieutenant General assigned as the Director of Strategic and Operational Planning at the National Counterterrorism Center, and the Lieutenant General assigned as the Military Representative to NATO's Military Committee.

<sup>556</sup> GATES, *DUTY MEMOIRS*, *supra* note 56, at 44, 81.

Secretary of Defense for Policy, senior civilian policy advisors to combatant commanders,<sup>557</sup> the Assistant Secretary of State for Political-Military Affairs, various subject-matter or regional directors on the National Security Council Staff, and the National Security Advisor and Deputy to the extent that they represent the view or forward directives from the Commander-in-Chief.<sup>558</sup> In all of these cases, the military officers doing the “nudging” and the civilians being “nudged” are participants in the strategic civil-military relationship. They participate in conceiving, debating, implementing, and executing policies with respect to the use of armed force to achieve a political end, or with respect to the administration of the Armed Forces themselves as they prepare, train, equip, move to, and recover from that use of force.<sup>559</sup>

Classic civil-military relations theory has depicted the relationship in much narrower terms: as the “continuous negotiation” between a President and active duty flag officers,<sup>560</sup>

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<sup>557</sup> For example, consider the job description of the Deputy to the Commander of the United States Africa Command (AFRICOM) for civil-military engagement, a “senior diplomat:”

In addition to providing policy direction and guidance to the command, [he] . . . also supports the command’s engagement with our European and African partners in terms of security policy cooperation . . . as well as assuring that policy development and implementation are consistent with U.S. Foreign Policy. He also coordinates U.S. interagency activities within the command.

See <http://www.africom.mil/about-the-command/leadership/deputy-to-the-commander-for-civil-military-engagement>.

<sup>558</sup> I.M. Destler, *The Power Brokers*, FOREIGN AFFAIRS.COM (September/October 2005), <http://www.foreignaffairs.com/articles/61036/i-m-destler/the-power-brokers>; and see BROOKINGS INSTITUTE.COM, “The National Security Council Project,” <http://www.brookings.edu/about/projects/archive/nsc/overview>.

<sup>559</sup> Another example of “nudging:” senior officers responsible for developing Service-specific budget proposals with long-range geopolitical challenges in mind act as choice architects to the extent that they attempt to nudge their civilian superiors in ways that “protect the institution, individual careers, and specific services.” SARKESIAN, *supra* note 39, at 14.

<sup>560</sup> See, e.g., MOTEN, PRESIDENTS & THEIR GENERALS, *supra* note 22, at 373-80.

usually by examining conditions in which civilian control over the subordinate military is diminished or subverted. Despite the numerous factors theorized as “causes” for changes in this relationship, nearly all relevant studies tend to portray the participants in a principal-agent relationship. What makes the “choice architecture” playing out in these relationships so compellingly interesting, and so challenging to analytically describe, is the variety of ways in which the numerous actors arrange themselves. For instance, President Franklin Roosevelt’s July 1939 Executive Order, formally permitting Army Chief of Staff George Marshall’s direct access to the Oval Office, ostensibly cut the Secretary of War out of the policy advising loop.<sup>561</sup> President Kennedy created the position of personal “Military Representative to the President” and hired the recently retired General Maxwell Taylor (the former Army Chief of Staff) to serve as this trusted counselor. This act ostensibly benched his statutory military advisors and placed them on second team status.<sup>562</sup> Doing so, however, allowed unfiltered, immediate military advice from a single source who shared the administration’s use-of-force policy preferences.<sup>563</sup>

Both episodes illustrate how the “personality” and “operational” axes in the study of civil-military relations often blend, and that each administration may see ebbs and flows in

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<sup>561</sup> FORREST C. POGUE, GEORGE C. MARSHALL: ORDEAL AND HOPE 1939-1942 40-43 (1965).

<sup>562</sup> MOTEN, PRESIDENTS & THEIR GENERALS, *supra* note 22, at 271-72.

<sup>563</sup> REEVES, PRESIDENT KENNEDY: PROFILE OF POWER, *supra* note 77, at 183; *compare* MCMASTER, DERELICTION OF DUTY, *supra* note 37, at 10-17 (describing the mutual affinity shared between Maxwell Taylor and President Kennedy, and describing the former’s job scope:

The military representative is a staff officer to advise and assist the President with regard to those military matters that reach him as Commander-in-Chief of the Armed Forces. The Military Representative is not interposed between the President and any of his statutory advisors or advisory bodies such as the Secretary of Defense, JCS or the NSC but maintains close liaison with them and is prepared to give his personal views to assist the President in reaching decisions. He is available to represent the President when the latter desires senior military representation at home or abroad . . .

the informal accumulation of power shared or hoarded among the civilians and military leaders in the defense establishment.<sup>564</sup>

However, a third party cannot be ignored. As several scholars note about democratic and politically stable nations, the body politic is a relevant participant in this relationship because it regularly elects the civilians to offices overseeing the national security enterprise, it provides the source of manpower from which to recruit military personnel, and it serves as a *de facto* “audience” observing and commenting on the conduct of the other two institutional parties.<sup>565</sup> Clausewitz’s famous “trinity” depiction of the nature of war necessarily included the public as the animating source of enmity, hate, and war fervor. This component of war was the “passion” that could be harnessed by the government in recruiting and supporting its policies abroad, and tapped by the military for building and sustaining morale.<sup>566</sup> Moreover, because, in Clausewitz’s largely accepted view, “war cannot be divorced from political life”<sup>567</sup> and is a “continuation of political intercourse, with addition of other means,”<sup>568</sup> the

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<sup>564</sup> For other examples, consider the advent of quantitative systems analysis by civilian “Whiz Kids” in the Department of Defense under Robert McNamara elevated certain offices with the Department to near-cabinet level authority, diminishing the advisory role (and analytical products) of the individual Services and the Joint Staff. MCMASTER, *DERELICTION OF DUTY*, *supra* note 37, at 18-21.

<sup>565</sup> DESCH, *CHANGING SECURITY ENVIRONMENT*, *supra* note 68, at 12; Owens, *What Military Officers Need to Know About Civil-Military Relations*, *supra* note 307, at 67; HUNTINGTON, *THE SOLDIER AND THE STATE*, *supra* note 308, at 15 (arguing that the officer corps’ “client” is also “society”); S.E. FINER, *THE MAN ON HORSEBACK* 88 (1962) (suggesting that the public’s “involvement in and attachment to” civil institutions and procedures, as well as “cohesive” social and occupational affiliations, are factors influencing a state’s “political culture”—a check on the military’s opportunity to intervene in domestic affairs and policy).

<sup>566</sup> CLAUSEWITZ, *ON WAR*, *supra* note 12, at 89; *see also* PEARLMAN, *WARMAKING AND AMERICAN DEMOCRACY*, *supra* note 38, at 6. This argument can even be traced back to Machiavelli’s Sixteenth Century treatises, *The Art of War* and *The Prince*, in which he argued that successful campaigns must build, sustain, and rely on the patriotism and fervor of the population. Felix Gilbert, *Machiavelli: The Renaissance of the Art of War*, in *MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE* 11, 26-27 (Peter Paret ed., 1986). *See* Niccolo Machiavelli, *ARTE DELLA GUERRA* 4, 17-21, 30-31 (*THE ART OF WAR*) (Ellis Farnsworth trans., Da Capo Press, 1965) (1521) (on the virtues of raising and employing citizen armies, rather than hiring mercenaries whose motives lie in profit rather than peace of their own country).

<sup>567</sup> CLAUSEWITZ, *ON WAR*, *supra* note 12, at 605.

public necessarily plays a role. They vote politicians into office and are afforded the right to openly condemn, criticize, or applaud political choices. As a result, they behave as choice architects. By considering voting patterns and opinion polls, politicians are directly or tacitly “nudged” toward or away from certain decisions, or re-frame their arguments in order to attract larger, or more valued, constituent support for decisions they have not yet made but anticipate.<sup>569</sup> Just as Clausewitz described war as a trinity of forces<sup>570</sup> that were constantly evolving and interacting with each other, strategic civil-military relations might also be described as a trinity of cast members, dominated by the policy-making civilian elite.<sup>571</sup>

In their capacity as an audience, though, citizens have no objective means by which to judge, assess, or otherwise characterize strategic civil-military interactions in context and against some set of expected norms or criteria, just as the civilian and military strategic leaders lack those means. A military *coup* would certainly prove unambiguously that the “bargain” has been breached—that the military acted in a manner contrary to norms and expectations of society.<sup>572</sup> Unanticipated battlefield losses, as RAND observed,<sup>573</sup> may also suggest a breakdown in effective relations,<sup>574</sup> but those may occur anyway due to American

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<sup>568</sup> *Id.*

<sup>569</sup> See, e.g., McFarland, *The 1949 Revolt of the Admirals*, *supra* note 503, at 58.

<sup>570</sup> CLAUSEWITZ, *ON WAR*, *supra* note 12, at 89 (“these three tendencies are . . . deeprooted . . . and yet variable in their relationship to one another”). According to Lawrence Freedman, the “dynamic interplay of these three factors” left the trinity “superced[ing] the dictum” that war is a “continuation of policy by other means.” FREEDMAN, *STRATEGY: A HISTORY*, *supra* note 16, at 86-87.

<sup>571</sup> See, e.g., MAJOR SUZANNE C. NIELSON, *POLITICAL CONTROL OVER THE USE OF FORCE: A CLAUSEWITZIAN PERSPECTIVE* (Strategic Studies Institute, 2001), at 13-14.

<sup>572</sup> MOTEN, *PRESIDENTS & THEIR GENERALS*, *supra* note 22, at 6.

<sup>573</sup> See *supra* Part I.C.

<sup>574</sup> MOTEN, *PRESIDENTS & THEIR GENERALS*, *supra* note 22, at 3 (“these negotiations materially affect the making of national security policy and military strategy [because] [t]he outcomes of the decisions taken matter

forces' incompetence, enemy ability, or pure happenstance (or some combination of the three)—even if the relationship between elite military and civilian policy-makers is relatively harmonious and collaborative.<sup>575</sup> Short of a coup, then, the public lacks a clear mechanism to diagnose whether a pathological or unhealthy strategic civil-military relationship is a root factor of poor combat performance.

The three parties to the strategic civil-military relationship lack this mechanism in part because the discipline that rigorously studies the subject matter has yet to develop a way to translate the desire for “control” in these relationships into normative guideposts, standards, norms, or expectations. As Gordon Craig wrote, it is simple enough in theory to observe that war is the continuation of policy by other means, and therefore assumes civilian supremacy in strategy-making.<sup>576</sup> The “difficult question,” though, is:

how much of the deriving and assessing and measuring and charting falls within the political leader's purview and how much of it becomes a military function . . . [clearly] this cannot be answered by any categorical formulation, even one that is invested with the authority of Clausewitz's name.<sup>577</sup>

The use of triangle figure below, with elected civilians at the apex, is potentially helpful in visualizing the three parties of the strategic civil-military relationship. Civilian elected politicians with constitutionally-assigned national security responsibilities are few in number and strictly superior to the military.<sup>578</sup> Immediately below that corner, and gradually increasing in area, is the space representing that larger population of civilians appointed to

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in the lives of every American . . . [a]s concerned and conscientious citizens, we need to understand better the dynamics of their working relationships”).

<sup>575</sup> *Id.* at 8.

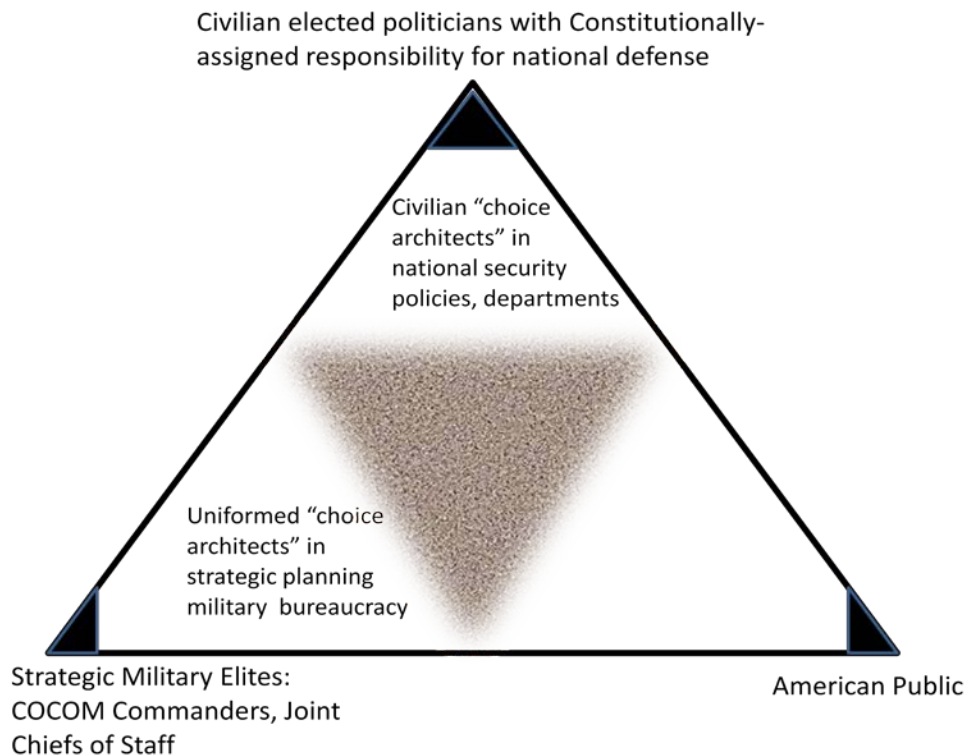
<sup>576</sup> Craig, *The Political Leader as Strategist*, *supra* note 2, at 481.

<sup>577</sup> *Id.*

<sup>578</sup> For example, the President, Vice President, and Members of Congress occupy the very condensed space at the top corner of this triangle.



manage, oversee, or guide specific programs, policies, departments, agencies, or activities affecting national security.<sup>579</sup> The dark lower left corner represents the elite military leaders identified by Roman and Tarr.<sup>580</sup> Extending out from that corner, and gradually increasing in area, is the space representing that larger population of uniformed choice architects that occupy relevant posts or perform relevant duties closely associated with strategic defense policy-making in concert with the civilians assigned to do the same. Finally, the dark lower right corner represents the public.<sup>581</sup>



<sup>579</sup> For example, the Secretary of Defense and key civilian subordinates; professional staff members in the House and Senate Armed Services Committees.

<sup>580</sup> For example, members of the Joint Chiefs of Staff, Combatant Command Commanders and their deputies, key advisors on the Joint Staff. Roman & Tarr, *Does it Matter?*, *supra* note 51, at 404.

<sup>581</sup> The minute apex at that corner illustrates the tiny fraction of the public either unaffected by or unconcerned with (even unconsciously) the effect of decisions made by civilian and military policy-makers—in other words, the vast majority (represented by the ever increasing area extending out from that corner) are at least indirectly relevant to the civil-military relationship.

Consider the solid lines connecting the three corners as ties connecting nodes in a social link diagram. The left diagonal line represents the direct access the senior military elite advisors and commanders and senior civilian policy-makers share. The right diagonal line represents the direct access the public has to civilian elites: they may run for office themselves, they may seek appointment to an office, they may vote, protest, or otherwise publically communicate their attitudes, opinions, and beliefs to the civilians representing them in national politics. Finally, the bottom line represents the “demographic” axis of civil-military relations.<sup>582</sup> In sum, this graphic is a way to depict and simplify the complex relationship between three heterogeneous groups of choice architects.<sup>583</sup>

However, the cast of characters in the strategic civil-military relationships are not, in practice, static and equally-positioned. The civil-military trinity illustrated is more like an idealized and balanced equilibrium. In reality, however, each of these communities is fractious and composed of shifting and unstable social networks of varying power (tacit and formal).<sup>584</sup> These networks continually realign over time, growing or shrinking in influence, resolve, and interest relative to the other two communities. What specific actors within these communities do, or say, is partly a function of their resources and how well they use them,

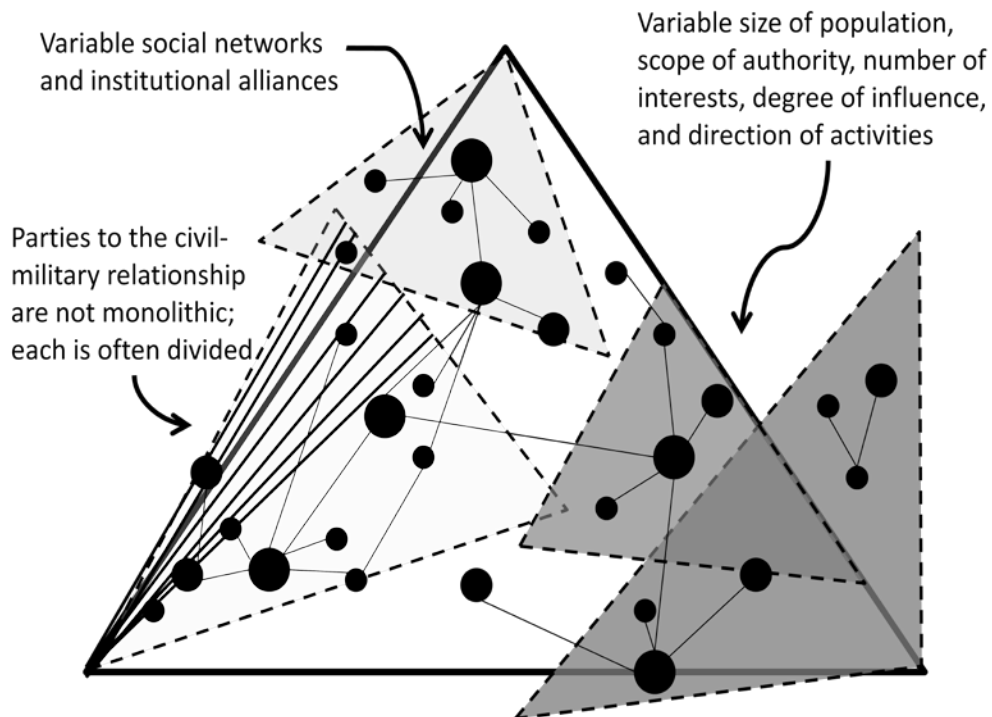
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<sup>582</sup> The public’s ability to enlist in, earn an officer’s commission for, or work for the military; the public’s opportunity to debate and criticize military elites or military policies; the socio-economic ties between domestic civilian and military communities; the extent to which military members and their families share or diverge from political and social beliefs of other citizens; and the direct impact military operational success or failure has on the lives of those serving in harm’s way.

<sup>583</sup> The dark blurry central space in the middle of this “trinity” represents how context and circumstances will invariably shift the boundaries between these three parties.

<sup>584</sup> STANLEY WASSERMAN & KATHERINE FAUST, *SOCIAL NETWORK ANALYSIS: METHODS AND APPLICATIONS* 6 (1994); compare ALBERT-LASZLO BARABASI, *LINKED* 30-34 (2003); see generally, Francesca Gains, *Executive Agencies in Government: the Impact of Bureaucratic Networks on Policy Outcomes*, *J. PUB. POL’Y*, January 2003, at 55-79.

the “value system” that animates them individually or as an organization,<sup>585</sup> planned opportunities and spontaneous reactions to events,<sup>586</sup> the degree of certainty they possess in the information they know,<sup>587</sup> and the actual or foreseeable reaction to their conduct by others.<sup>588</sup> The figure below attempts to depict this chaotic distribution and changing alignment of the three parties.



<sup>585</sup> M.L.R. Smith & John Stone, *Explaining Strategic Theory*, INFINITY J., Fall 2011, at 27.

<sup>586</sup> See, e.g., General Colin L. Powell, *U.S. Forces: Challenges Ahead*, FOREIGN AFFAIRS (Winter 1992/93), <http://www/cfr.org/world/us-forces-challenges-ahead/p7508>.

<sup>587</sup> LINCOLN ON WAR, *supra* note 11, at 139-42 (describing Lincoln’s trip to southeastern Virginia during the Peninsula Campaign).

<sup>588</sup> SIMPSON, WAR FROM THE GROUND UP, *supra* note 317, at 4, 228-29.

By incorporating social networks, organizational and institutional culture,<sup>589</sup> and time, this diagram highlights just a few of the salient factors<sup>590</sup> that make this three-way relationship so complex a subject of study and perhaps explains the lack of theoretical ability to unify around a single set of independent variables affecting civilian control.<sup>591</sup>

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<sup>589</sup> CARL H. BUILDER, *THE MASKS OF WAR: AMERICAN MILITARY STYLES IN STRATEGY AND ANALYSIS* 7-10, 17-30, 127-129 (1989) (describing the distinct “personalities” of the separate Services, and how they drive each to different conclusions about what forces to acquire, how to train, and where to engage).

<sup>590</sup> David Kaiser, *Back to Clausewitz*, *supra* note 311, at 676.

<sup>591</sup> Burk, *Theories of Democratic Civil-Military Relations*, *supra* note 304, at 7.

## Appendix C. **Future Lines of Effort**

As Brigadier General Kimberly Field wrote, there are genuinely difficult questions on which the public, civilian, and military leaders have not yet debated.<sup>592</sup> Though this thesis attempted a comprehensive review of both current civil-military relations scholarship and the applicability of various jurisprudential agency norms, there is significant room for further research. One such line of research might be the conditions under which the parties to a strategic civil-military relationship shift identities or roles from principal to agent or agent to principal. Another approach could address the strategic conditions which create co-principals and co-agents, and the implications for establishing consistent, transparent fiduciary duties when there is such turbulence in the cast of characters.

Another line of research could apply this jurisprudential framework to case studies between combatant commanders and country ambassadors to assess whether it applies with similar force. Furthermore, the external conditions or factors that might produce ad hoc, short-lived principal-agent relationships between civilian officials and military leaders are worth studying, if only because the shorter relationship duration could impact the extent of an agent's implied authority. Likewise, the external conditions—perhaps war, or a congressional investigation—that are likely to short-circuit functioning and well-regarded principal-agent relationships are ripe for study.

Other lines of inquiry could focus on the extent to which these fiduciary duties and the particular nuances of strategic civil-military relationships should be included within existing military ethics doctrine. The possible merits and foreseeable risks of implementing

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<sup>592</sup> Kimberly Field, *Whose Breach, Whose Trust?*, PARAMETERS, Autumn 2014, at 126 (reviewing BACEVICH, BREACH OF TRUST, *supra* note 52).

these fiduciary duties with an executive order directed at specific strategic civil-military relationships as a reasonable alternative to a statutory amendment should also be thoughtfully considered.

Some thought should also be devoted to implementation. Regardless of format or publication document, the civilian and military participants in these relationships (and potential future participants) should be exposed to expectations created by these fiduciary duties in ways that allow for considered debate, discussion, and study in order to institutionalize the premise that these relationships create such duties, and that those duties in turn create objective standards by which the relationship can be judged. Possible venues include the individual Service war colleges, the National Defense University, short courses for newly-promoted general and flag officers and civilian members of the Senior Executive Service, and orientation seminars for political appointees. The mechanics of pollinating the national security establishment with this framework are numerous and should be considered.

Finally, though purely speculative, a transparent diagnostic device like this jurisprudential agency framework might aid in bridging the three “axes” (demographic, operational, and personality<sup>593</sup>) of civil-military relations. As James Fallows recently wrote, and many commentators have observed, there is a vast gap in American cultural appreciation and public understanding of the military and its wartime sacrifices.<sup>594</sup> It is not immediately clear how, in the absence of a draft, more than a miniscule percentage of Americans will serve in the military or routinely associate themselves with those that do serve.<sup>595</sup> Taking

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<sup>593</sup> *Supra* Part I.B.

<sup>594</sup> James Fallows, *The Tragedy of the American Military*, THE ATLANTIC (Jan/Feb 2015), at 73-80, 83-90.

<sup>595</sup> See BACEVICH, BREACH OF TRUST, *supra* note 52, at 14.

that demographic disparity as granted, agency theory applied to strategic civil-military relationships and codified in law offers the public a tool for scrutiny and measure of accountability over a military with which they have no habitually deep or widespread personal connection. If this speculation is at all defensible, the historical space between the demographic, operational, and personality-focused study of civil-military relations may become much narrower, and may close entirely.