

ARTICLE

Fiduciary Duty, Honor, Country:
Legislating a Theory of Agency into Strategic Civil-Military Relations

Dan Maurer*

*Major (Promotable), United States Army, Judge Advocate General's Corps and Non-Resident Fellow with West Point's Modern War Institute. His first book—on which this article expands—is *CRISIS, AGENCY, AND LAW IN US CIVIL-MILITARY RELATIONS* (2017). Special thanks to Professors Charles Dunlap, Dakota Rudesill, and Joshua Dressler for discussing their insight and arguments; nevertheless, this article represents only the author's view and does not represent policies or legal advice of the Department of Defense, the United States Military Academy, or the Army's Judge Advocate General's Corps.

Abstract

This article proposes amending the central organizing statute for the modern Department of Defense (DoD), the Goldwater-Nichols Act, for three reasons. First, in the area of national security, Congress has both the function and the desire to influence the parties to whom the Act is addressed: the senior, strategic-level political and military leadership that plans, prepares, orders, and executes U.S. defense policy. Congress, however, suffers from—and sometimes contributes to—an institutional muddling that results in a public sense that these relationships are partisan, inconsistent, and dysfunctional.¹ With a presumption that Congress would prefer to wield the sword of national defense with some parity (of ownership, not necessarily who holds it) to the Executive Branch, and presuming that it would also prefer strategic civil-military relationships that are, and are perceived to be, healthy and non-partisan, this article explores a legislative fix that gives meaningful effect to both of these preferences.

Next, these relationships are fundamentally principal-agent relationships; like other principal-agent relationships, we can pronounce and set into daily practice certain duties and standards of behavior. Finally, the Goldwater-Nichols Act already provides the legislative framework for encoding these agency-based aspirational duties, standards, and norms. If such changes are made, they can be relied upon by the parties (and external observers, like the public) to diagnose the health of those relationships.

This ability to diagnose is an acute, critical, and unmet need. Dissent, annoyance, mutual frustration, misplaced trust, breaches of confidentiality, unwelcome candor, and differing senses of obligation, loyalty, and service are all recurring themes in the day-to-day theater that is the civil-military relationship between American political and military strategic elites. The health of these relationships matters significantly for the fitness of the outcomes for which these parties are accountable. Wars (whether and how to fight them), budgets (how much to spend, on what, and for whom), force structure (how to organize the means of national defense), and personnel (who to recruit and retain, and who—if anyone—should be excluded from service) are the critical issues, and these parties often disagree over these fundamental questions. The efficiency, prioritization, thoughtfulness, and public explanations of these issues will also be turbulent in the wake of unsteady, rocky strategic civil-military relationships. Congress, no less than the Executive Branch and military leaders, has a stake and a say in these relationships.

Nevertheless, the public and the parties themselves cannot easily diagnose the health of these strategic civil-military relationships that stretch across two branches of government, implicate time-tested traditions of honor, loyalty, and

¹ David P. Auerswald & Colton C. Campbell, *Conclusion: The Future of Congressional-Military Relations*, in CONGRESS AND CIVIL-MILITARY RELATIONS 195 (Colton C. Campbell & David P. Auerswald eds., 2015).

professionalism, and provide tests of the American rule of law. Congress, in particular, has no objective means to do so because there is no generally agreed upon method for characterizing this relationship. Instead, as Phillip Carter recently wrote, we look at senior flag officers' behavior but only "see what we want to see, based on our own biases and ideologies."²

The same can be said for senior civilian policy makers. Senator Lindsay Graham prescribed a particular, un-nuanced approach to this relationship: "Listen to your generals or fire them."³ Though likely intended to remind the Commander-in-Chief that he should not micromanage the Pentagon and detail himself as a sort of General-in-Chief, the Senator's advice was nevertheless confused. On the one hand, it implied that presidents should concur and approve of military leaders' plans, given their subject matter experience and expertise. At the same time, it implied that presidents must seek, and only accept, advice from those whose opinions mirror their own. As I will explain below, the first implication reflects a traditional view of military advice: narrowly tailored and driven only by military necessity, but not squared with how the parties actually practice, or with what some would suggest is the civilian's ultimate prerogative to choose, even if "unwise." The second implication feels like an endorsement for groupthink and underwrites kowtowing rather than a respectful deference.

This means that individual episodes of dissent, annoyance, or frustration (expressed by either party) may *not* signal a stressed or pathological relationship—a "crisis" to use an over-wrought phrase—but rather a well-ordered, or at least mutually accepted, dynamic that is suited to the personalities involved, and their shared understanding of one another's respective competencies, authorities, and the outcomes they seek.

To diagnose the health of civil-military relationships, Congress must first recognize such relationships as principal-agent associations, based on three central factors: (a) their relative positions of authority; (b) differing degrees of national security/military affairs expertise that these parties exhibit; and (c) what each party expects of the other. A strategic-level civil-military relationship is fundamentally like that of a doctor-patient or lawyer-client relationship. Such principal-agent dynamics (what this article will call *jurisprudential agency*) are usually defined by codes of conduct and professionalism that guide the parties as to what their respective duties are and how to fulfill them, as well as provide a degree of expectation management for the public. These codes establish a consensus for objective norms, standards, and diagnostic criteria. Because the Goldwater-Nichols Act⁴ is fundamentally a framework of responsibilities for senior strategic-level

² Phillip Carter, *A Rorschach Test for Civil-Military Relations*, LAWFARE (Dec. 14, 2017), <https://www.lawfareblog.com/rorschach-test-civil-military-relations> [https://perma.cc/DQ7N-RZ98].

³ BOB WOODWARD, *FEAR: TRUMP IN THE WHITE HOUSE* 122 (2018).

⁴ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of Title 10) [hereinafter Goldwater-Nichols Act].

commanders and Service chiefs relative to the appointed civilian military leadership, it provides a useful legislative avenue of approach for providing just such criteria, expanding Congress's inventory of tools to regulate—and influence the Executive's use of—the military.

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I. Introduction

In the field of strategic civil-military relations, Congress faces two general problems. First, it lacks a meaningful, normative basis for evaluating those relationships as part of its national security oversight role. Nomination hearings, proposed budget testimony, and the growing reliance on *ad hoc* commissions⁵ without such a basis are insufficient.⁶ Second, without a diagnostic device, Congress as an institution cannot gauge the extent to which these relations cause or enable unwarranted national security risks or damage to political or military credibility abroad (and perhaps domestically), or instead reflect deeper institutional and constitutional tensions of which civil-military crises are but a symptom. If Congress, an entire branch of government with its own national security responsibilities, cannot diagnose, it leaves the public with very little insight into those relationships.

Recent events demonstrate these problems in action. One of the more prominent contemporary United States Senators, the late John McCain, former chairman of the Committee on Armed Forces, asserted (without legal foundation) that the senior military officer of the United States—the Chairman of the Joint Chiefs of Staff (CJCS)—is *Congress's* “principal military advisor,” a term of art with specific legal meaning.⁷ While in practice this senior ranking officer is often asked questions under oath by congressional committees, this advisory duty and the *relationship it implies* to both political branches is not grounded in law—unlike the duty the CJCS has to the President, Secretary of Defense, and the National Security Council.⁸

At the same time, Senator McCain repeatedly admonished the White House, and reminded his own colleagues that Congress ought not to simply rubberstamp Executive Branch actions—even those that historically, and practically, fall outside

⁵ Jordan Tama, *Why Policymakers Create Ad Hoc Commissions*, in CONGRESS AND CIVIL-MILITARY RELATIONS, *supra* note 1, at 53–56 (concluding that such commissions are often used to force a defense policy change, acquire expert information, or “avoid blame or kick the can down the road”). Tama also summarized the findings of others analyzing these commissions, highlighting reasons for their formation like “sidestepping legislative gridlock” or fostering Congressional consensus, especially for sensitive subjects. *Id.* at 55.

⁶ Some scholars identify four “tools” that Congress has historically employed to exert its share of control over the military—to various degrees and with varying success. See David P. Auerswald & Colton C. Campbell, *Introduction: Congress and Civil-Military Relations*, in CONGRESS AND CIVIL-MILITARY RELATIONS, *supra* note 1, at 2–7 (listing the (1) appointment and promotion of officers, (2) delegation of authority, (3) formal and informal venues for oversight, and (4) incentive creation/denial as those four primary tools).

⁷ *Hearing to Consider the Nomination of General Joseph F. Dunford, Jr., USMC, for Reappointment to the Grade of General and Reappointment to Be Chairman of the Joint Chiefs of Staff Before the S. Comm. on the Armed Forces*, 115th Cong. 5 (2017) [hereinafter Dunford Hearing] (statement of Sen. John McCain).

⁸ See 10 U.S.C. § 151 (2018).

of Congress's bailiwick.⁹ Military operational affairs being the most prominent of those Executive Branch actions, Senator McCain's verbal rebuke—along with Congress's "advice and consent" confirmation power and its authority over appropriations¹⁰—illustrates what measures the Legislative Branch currently uses for a marginal check on the modern-day president's Commander-in-Chief powers.

Coupled with explicit demands that senior military leaders' activities and decisions are transparent, and the belief that they owe near-equivalent accountability to Congress, these tactical checks are all constitutional, and occasionally successful. However, they represent a negative, reactive, and somewhat coercive form of censure, and manifest a frustration triggered by inadequate insight or influence over critical national defense actions. There are, however, positive or proactive measures that Congress may also use to reinforce its authority within, and help shape, the civil-military relationships responsible for national security.

Establishing norms and holding public officials accountable to them is one of those measures, but Congress has recently ignored the opportunity to do so. Former Secretary of Defense James Mattis's confirmation hearing offered Congress a rare occasion to consider waiving a statutory seven-year waiting period for a retired service member to be confirmed as Secretary.¹¹ In so doing, several senators aimed comments and questions at two broad targets: first, the kind of relationship Mattis would presumably have with Congress in its constitutional oversight role; and second, the relationship he would have with this particular politically- and militarily-inexperienced president.¹² The first area struck at the fundamental nature of civilian control of the military—what one would expect to be a recurring, almost *pro forma*, reminder from congressional committees to nominees for strategic positions in the Department of Defense. (It is not.)¹³ The second area struck at Congress's concern over internal Executive Branch civil-military relations.¹⁴ Senator Blumenthal, for example, implied that Mattis would be a valuable safety "check" on the "rash and potentially ill-considered use of military

⁹ Ellen Mitchell, *McCain Holds up Trump's Pentagon Nominees over Lack of Afghanistan Details*, HILL (Oct. 3, 2017), <http://thehill.com/homenews/senate/353695-mccain-holds-up-trumps-pentagon-nominees-over-lack-of-afghanistan-details> [https://perma.cc/F3K2-BQ5P].

¹⁰ U.S. CONST. art. II, §2 cl. 2 (Advice and Consent); art. I, § 8, cl. 1 (Appropriations).

¹¹ See 10 U.S.C. § 113(a) (2012).

¹² *Confirmation Hearing on the Expected Nomination of Mr. James N. Mattis to Be Secretary of Defense Before the S. Comm. on the Armed Forces*, 115th Cong. 70–71 (2017) [hereinafter *Mattis Hearing*] (statement of Sen. Richard Blumenthal).

¹³ For example, at no time during the day-long hearing in 2015 to consider the nomination of Ashton Carter to be Secretary of Defense did the issue of civilian control over the military come up. See *Hearing to Consider the Nomination of Honorable Ashton B. Carter to Be Secretary of Defense Before the S. Comm. on the Armed Forces*, 114th Cong. (2015). But see *Dunford Hearing*, *supra* note 7, at 8–9 (statement of Sen. McCain) (referring to a risk of civilian "marginalization" in the Executive Branch as a cause of concern).

¹⁴ See *Mattis Hearing*, *supra* note 12, at 93–94 (statement of Sen. Elizabeth Warren).

force.”¹⁵ This revealed an evident concern for how a recently retired four-star General would properly maintain *civilian* leadership over his former colleagues in uniform by providing “authority, direction, and control over the Department of Defense”¹⁶ while providing the best military advice to a president who, according to Senator Reed, “lacks foreign policy and defense experience, and whose temperament is far different from prior Presidents.”¹⁷ And so it was also a rare opportunity to gauge not just the health of the nascent civil-military relationships in the Trump Administration and those between the DoD and Congress, but also our fundamental understanding of modern American civil-military relationships more generally.

This traditional understanding of American strategic civil-military relationships depicts a military cadre sequestered into a professionally autonomous but completely subservient caste of uniformed officers who quietly advise the civilian politicians and quietly execute their orders even if they disagree.¹⁸ By this standard, the first year of the Trump Administration was nothing if not puzzling, even aberrant. This lead-off year included high-profile symptoms of strategic civil-military relations stress, perhaps proving the fears shared by the senators of an inexperienced, temperamental administration with an acrimonious relationship to Congress that began largely before the President even took the oath of office.¹⁹ A non-exhaustive list of these episodes would include President Trump’s arguably ambiguous grant of “total authorization” to his combat commanders fighting in Afghanistan;²⁰ senior staff and a cabinet heavily populated by former and current

¹⁵ *Id.* at 70–71 (statement of Sen. Blumenthal).

¹⁶ 10 U.S.C. § 113(b) (2012).

¹⁷ *Mattis Hearing*, *supra* note 12, at 25 (statement of Sen. Jack Reed). This desire to rely on Mattis as the first line of defense, so to speak, seems to have been confirmed by the facts, based on observations from within President Trump’s inner circle after he took office. “Chief Strategist” Steve Bannon is said to have remarked that Mattis was the “moral center of gravity of the administration,” who served two necessary roles for Trump: as a “warrior and comforter.” WOODWARD, *supra* note 3, at 51.

¹⁸ There is a wider civil-military relations field of study that evaluates trends in the cultural segregation between those in the Armed Forces and the rest of civilian society, as well as trends in the partisanship and political influence of current and retired members of the Armed Forces—especially among the more senior officers. *See generally, e.g.*, HANDBOOK OF THE SOCIOLOGY OF THE MILITARY (Giuseppe Caforio ed., 2006); REBECCA L. SCHIFF, THE MILITARY AND DOMESTIC POLITICS: A CONCORDANCE THEORY OF CIVIL-MILITARY RELATIONS (2009); James Burk, *Theories of Democratic Civil-Military Relations*, 29 ARMED FORCES & SOC’Y 7 (2002). While related in the broadest of senses, this article focuses on the day-to-day dynamics amongst those civilian and military leaders at very upper crust of the Executive and Legislative Branches.

¹⁹ *See, e.g.*, John McCain, *It’s Time Congress Returns to Regular Order*, WASH. POST (Aug. 31, 2017), https://www.washingtonpost.com/opinions/john-mccain-its-time-congress-returns-to-regular-order/2017/08/31/f62a3e0c-8cfb-11e7-8df5-c2e5cf46c1e2_story.html

[<https://perma.cc/3MJE-GESZ>] (“Congress must govern with a president who has no experience of public office, is often poorly informed and can be impulsive in his speech and conduct. We must respect his authority and constitutional responsibilities. We must, where we can, cooperate with him. But we are not his subordinates. We don’t answer to him.”).

²⁰ Helene Cooper & Mujib Mashal, *U.S. Drops “Mother of All Bombs” on ISIS Caves in Afghanistan*, N.Y. TIMES (Apr. 13, 2017), <https://www.nytimes.com/2017/04/13/world/asia/maab->

flag officers;²¹ speculation over whether he would relieve General John Nicholson from command in Afghanistan²² (an act rarely executed by presidents); the ability of Lieutenant General H.R. McMaster, as National Security Advisor, to fire hardline nationalists from the National Security Staff despite their close ideological ties to the President himself;²³ and General McMaster's own joint op-ed in the *Wall Street Journal* that seemed to strike political chords with overt statements that would have been expected coming from a politically vetted and appointed civilian in support of the politics of the Administration. He wrote: "President Trump just returned from nine days in the Middle East and Europe that demonstrated his *America First* approach to ensuring security and prosperity for our nation. America will not lead from behind. This administration will restore confidence in American leadership as we serve the American people."²⁴

Tying national security activities into a partisan, political narrative is something a bit unexpected coming from the pen of a serving general officer, and author of *Dereliction of Duty*.²⁵ Were his words indicative of a commitment to a national security strategy, or of loyalty to the top of the *Administration* that executes that strategy?²⁶ Stranger still were the days following the violent white supremacist rally and citizen counter-protest in Charlottesville, Virginia. As the President received unrelenting criticism from all corners for his delayed, then morally

mother-of-all-bombs-afghanistan.html [https://perma.cc/8MU8-SY5D]. The President's thinking behind this grant is even more ambiguous in light of his reported criticisms of the senior uniformed advisors on Afghanistan's larger end game, in which—at least at one point early in the Administration—Trump castigated both his CJCS (General Dunford) and National Security Advisor (Lieutenant General McMaster) for having weaker and more opaque recommendations than a few enlisted service-members he invited to lunch in July 2018. WOODWARD, *supra* note 3, at 123–35. His noted, long-standing antipathy toward U.S.-Afghanistan strategy raises the question: why give a longer leash and more discretion for military solutions?

²¹ Robert Costa & Philip Rucker, *Military Leaders Consolidate Power in Trump Administration*, WASH. POST (Aug. 23, 2017), https://www.washingtonpost.com/politics/military-leaders-consolidate-power-in-trump-administration/2017/08/22/db4f7bee-875e-11e7-a94f-3139abce39f5_story.html?utm_term=.14416c671975 [https://perma.cc/HT9J-UXRP].

²² Jeff Daniels, *McCain Backs General, Threatens to Craft Own Afghanistan Strategy If Trump Can't in Time*, CNBC (Aug. 3, 2017), <https://www.cnbc.com/2017/08/03/frustrated-trump-considering-replacing-us-commander-in-afghanistan.html> [https://perma.cc/W663-U2LR].

²³ Rosie Gray, *H.R. McMaster Cleans House at the National Security Council*, ATLANTIC (Aug. 2, 2017), <https://www.theatlantic.com/politics/archive/2017/08/hr-mcmaster-cleans-house-at-the-national-security-council/535767/> [https://perma.cc/2SKS-32KL].

²⁴ H.R. McMaster & Gary D. Cohn, *America First Doesn't Mean America Alone*, WALL ST. J. (May 30, 2017), <https://www.wsj.com/articles/america-first-doesnt-mean-america-alone-1496187426> [https://perma.cc/3J9Q-2PQU] (emphasis added).

²⁵ Phillip Carter is harsher, writing that McMaster "debased" himself, and calling the op-ed "vapid." *Unpresidential Command*, SLATE (July 24, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/trump_is_ordering_service_members_to_support_the_republican_agenda.html [https://perma.cc/ZH3H-8UMU].

²⁶ Lieutenant General McMaster had precedent in none other than Colin Powell. See Colin L. Powell, *Why Generals Get Nervous*, N.Y. TIMES (Oct. 8, 1992), <https://www.nytimes.com/1992/10/08/opinion/why-generals-get-nervous.html> [https://perma.cc/KK8Q-3QYL].

equivocating, response, his own Joint Chiefs of Staff, the senior uniformed leaders of the several Armed Services, uniformly and unambiguously denounced the violence and the hatred that fueled the protest in the first place.²⁷

The field of civil-military relations theory ought to feel ambushed. These comments were in tonal contrast to those of the Commander-in-Chief; moreover, military leaders commenting on such domestic uproar was neither expected nor apparently necessary. Consider this in conjunction with the CJCS's statement that DoD would not immediately move forward to implement Trump's impromptu return to a ban of transgender personnel from serving (announced via his Twitter feed, to the surprise of most) until in receipt of solid direction and policy guidance.²⁸ We see a cohort of senior military elites not resigning, but also doing something other than resolutely saluting, following orders, and staying silent.²⁹ That President Trump likely decided to publicize his transgender ban decision without consulting or even notifying the senior military leadership beforehand³⁰ is itself another warning signal of an unusual communication between the White House and Pentagon. Compare President Trump's hardline and unequivocal position he took on North Korea's increasingly belligerent rhetoric and missile testing ("Talking is not the answer!"³¹) with that of his own Secretary of Defense,

²⁷ Dave Philipps, *Inspired by Charlottesville, Military Chiefs Condemn Racism*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/us/joint-chiefs-tweets-racism-charlottesville-veterans.html> [<https://perma.cc/QGM4-D3YM>].

²⁸ Helene Cooper, *Transgender People Can Still Serve for Now, U.S. Military Says*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/27/us/politics/transgender-military-trump-ban.html> [<https://perma.cc/FVS7-YHW7>].

²⁹ For a robust discussion of whether resignation is one of many, or the only, available option for a senior military leader who disagrees with, or protests, a policy matter or action he or she has been directed to take, see, e.g., Jim Golby, *Beyond the Resignation Debate: A New Framework for Civil-Military Dialogue*, STRATEGIC STUD. Q., Fall 2015, at 19 (calling it a "stalemated debate" that "exacerbates mistrust and skepticism among civilian leaders and undermines effective civil-military dialogue").

³⁰ Chris Sommerfeldt, *U.S. Top General Was Reportedly "Not Consulted" Before President Trump Proposed Transgender Military Ban*, N.Y. DAILY NEWS (Feb. 20, 2018), <http://www.nydailynews.com/news/politics/u-s-top-general-wasn-consulted-trump-transgender-ban-article-1.3831790> [<https://perma.cc/P9RH-WZP8>].

³¹ Kevin Baron, *Trump Directly Counters Mattis, Military, in Tweet on North Korea*, DEFENSE ONE (Aug. 30 2017), <https://www.defenseone.com/politics/2017/08/trump-directly-counters-mattis-military-tweet-north-korea/140637/> [<https://perma.cc/UVN6-CDKV>]. Of course, this statement predates the Administration's turn-about, with a first-of-its-kind June 2018 summit between President Trump and Kim Jong Un of the Democratic People's Republic of Korea (DPRK), where Trump and the North Korean dictator signed a "comprehensive" agreement to commit to follow on negotiations, intended to denuclearize the Korean Peninsula and reestablish a relationship defined by "peace and prosperity." THE WHITE HOUSE, JOINT STATEMENT OF PRESIDENT DONALD J. TRUMP OF THE UNITED STATES OF AMERICA AND CHAIRMAN KIM JONG UN OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA AT THE SINGAPORE SUMMIT (2018), <https://www.whitehouse.gov/briefings-statements/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit/> [<https://perma.cc/UF8U-H65R>]. Despite the earlier saber-rattling, President Trump announced in the days after the summit that he now had a "fantastic relationship" with the government of the DPRK. Eliana Johnson, Nahal Toosi & Nancy

who also took an unequivocal stance: “[W]e’re never out of diplomatic solutions”—a contradictory sentiment echoed publicly by both the CJCS and the Commander of United States Pacific Command.³² Such positions, and continuing mistrust of the Chief Executive, led to a Senate Foreign Relations Committee hearing on the scope of the President’s authority to unilaterally order the launch of nuclear weapons—the first such congressional inquiry since 1976.³³

Finally, stories that seem to portray former Secretary Mattis as aloof from the discordant rhetoric of the Administration he served³⁴ raise questions of whether, or to what extent, the Secretary of Defense should be apolitical—that is: remote, agnostic, and silent on some policy preferences that shape, or get shaped by, military activity. Consider that Samuel Huntington’s ideal Secretary of Defense “cease[s] to act and think as a partisan when he takes office” but must remain a quintessential “policy maker” and “policy strategist” that “reconcile[s] conflicting claims and interests.”³⁵ Remarks that Mattis made to troops overseas led one

Cook, *Trump, Kim Commit to Future Meetings After Cozy Encounter*, POLITICO (June 12, 2018), <https://www.politico.com/story/2018/06/11/countdown-to-trumps-first-minute-with-kim-637363> [https://perma.cc/8Y88-TN4R].

³² General Dunford, CJCS and by law the principal military advisor to the President, said, “[t]he United States military’s priority is to support our government’s efforts to achieve the denuclearization of the Korean Peninsula through diplomatic and economic pressure.” Choe Sang-Hun, *U.S. General and South Korean Leader Push for Diplomacy on North Korea*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/world/asia/north-korea-us-joseph-dunford.html> [https://perma.cc/MAR3-Z8WN]. Admiral Harris, commander of United States Pacific Command (now called “INDOPACOM”), said, “I also firmly believe that every nation who considers itself to be a responsible contributor to international security must work diplomatically to bring Kim Jung-Un to his senses, and not to his knees.” Adm. Harry Harris, IISS Fullerton Lecture (Oct. 17, 2017), available at <http://www.pacom.mil/Media/Speeches-Testimony/Article/1345916/iiss-fullerton-lecture/> [https://perma.cc/MC9X-DKQM]. Later, Mattis expressed some frustration with how he believed the media was focusing on apparent divergence between his views and the President’s: “I’ll do my best to call it like I see it, but right now, if I say six and the president says half a dozen, they’re going to say I disagree with him.” Helene Cooper, Eric Schmitt & Glenn Thrush, *Mattis Shows How to Split With Trump Without Provoking Him*, N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/20/us/politics/jim-mattis-trump-pentagon.html> [https://perma.cc/ECC4-Z9KP].

³³ See *Authority to Order the Use of Nuclear Weapons: Hearing Before the S. Comm. on Foreign Relations*, 115th Cong. (2017).

³⁴ See, e.g., Nick Wadhams & Anthony Capaccio, *Mattis Holds Firm as Chaos Engulfs Trump’s National Security Team*, BLOOMBERG (Mar. 23, 2018), <https://www.bloomberg.com/news/articles/2018-03-23/mattis-holds-firm-as-chaos-engulfs-trump-national-security-team> [https://perma.cc/7LY7-WJBQ].

³⁵ Huntington resolved this apparent contradiction of traits by suggesting that the Secretary not harbor post-Secretarial political ambitions, but need not be politically tone-deaf. SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 448, 454–55 (1957).

professor to ask whether it uncovered such a gaping civil-military moral divide that a *coup d'état*³⁶ was made more plausible.³⁷

If the traditional view of American strategic-level civil-military relationships is to hold, it must account for and help explain this evidence. These episodes, at the very least, reveal a gap in what the traditional view maintains: “Officers have a constitutional responsibility to offer expert advice, but they should not resign or disobey a lawful order when their advice is not taken. The status of a profession relies on its ability to profess, not on its ability to dictate.”³⁸ But render expert advice to *whom*, exactly? And *on what*, exactly? And *to what extent*? What authority underlies a senator’s request for complete candor by the CJCS, “even if those views differ from the administration in power?”³⁹ Is it as simple as a loyalty litmus test: the officer’s oath to defend the United States Constitution, rather than an oath to the President? Senator McCain announced his spacious expectation of the strategic civil-military relationship as follows, in terms of what he defined as “best military advice”:

It is a duty that military officers owe to the American people and to the men and women under their command. Civilian policymakers in both the executive and legislative branches rely on our military professionals to better understand the military dimensions and the national security challenges we face, and the options at our disposal for wielding military power effectively. But, best military advice does not stop there. Military officers, and especially the Chairman of the Joint Chiefs of Staff, must tell their civilian superiors what actions they believe are best and right to take, and they must do so honestly, candidly, respectfully, but forcefully, whether civilians want to hear it or not [B]est military advice should not be

³⁶ For several helpful descriptions or definitions of a *coup d'état*, see SCHIFF, *supra* note 18, at 21.

³⁷ Pauline Shanks Kaurin, *Just Another Mattis Pep Talk?: How “Hold the Line” Speaks to Civilian and Military Audiences*, JUST SECURITY (Aug. 29, 2017), <https://www.justsecurity.org/44518/mattis-pep-talk-hold-line-speaks-civilian-military-audiences/> [https://perma.cc/LV8X-78ZA]. Ultimately, she concluded that a coup was improbable, but the relationship and temperaments of the Commander-in-Chief and his senior civilian appointee evoked such concern that asking the question seemed slightly less incredible than it has been at other times. See also Charles J. Dunlap, *The Origins of The American Military Coup of 2012*, PARAMETERS, Winter 1992–93, at 2 (imagining a hypothetical scenario in which the American military had grown disgruntled with a civilian leadership abusing its authority over the military, and the military using its increased competence in traditional civilian governance functions and frustration at losing a traditional war (the unintended consequence of the civilian government’s overreliance on the military capabilities in humanitarian and peace-keeping missions abroad) to seize governmental functions).

³⁸ Golby, *supra* note 29, at 24.

³⁹ *Dunford Hearing*, *supra* note 7, at 3 (2017) (question of Sen. McCain to Gen. Dunford). Reporting indicates that General Dunford later reversed this scenario by seeking out Lindsay Graham, Republican Senator from South Carolina, to express his concerns about Trump’s demand to review plans for a preemptive military attack on North Korean targets. WOODWARD, *supra* note 3, at 99–100.

narrowly limited to technical military matters. When the Chairman offers his best military advice, he's not simply offering the best advice "about" the military, but, rather, the best advice "from" the military. And that extends to issues of national security policy, strategy, and operations. For example, the decision to take our Nation to war properly rests with civilians. It's a policy question. But, military officers should not be prohibited from voicing their advice on such a matter. Indeed, it is their duty to do so.⁴⁰

What set of *principles* underlie the answers to these nuances of the civil-military relationship among military leaders (civilian and uniformed) and legislators and between these same leaders and the President?⁴¹ When these advisors are no longer advising at all, but are simply "holding their ground [on a particular policy issue or action] long enough for [President Trump] to lose interest,"⁴² we are justified in questioning some long-held truths about norms within American civil-military relations.

Congress has at its disposal an existing law in the Goldwater-Nichols Act, which may further describe constitutionally acceptable, pragmatic, and historically vetted norms that bind the strategic political and military elites together in their often awkward and confusing professional relations. Such codified norms may help, in Senator McCain's terms from the Mattis hearing, "restore accountability"⁴³ and in Mattis's terms, "foster an atmosphere of harmony and trust"⁴⁴ between DoD leadership and Congress itself. These codified norms promise two possibilities. First, they promise the possibility of enduring standards on which the public, Congress, presidents, and their senior military advisors may all rely, avoiding strategic-level mistrust, misunderstanding, or "incapacitation."⁴⁵ Second, these norms offer a direction from which to evaluate the conduct of the members of the strategic civil-military relationships.⁴⁶

⁴⁰ *Dunford Hearing*, *supra* note 7, at 6–7.

⁴¹ It would seem that Senator McCain adopted Professor Cohen's "unequal dialogue" prescription. *Id.* at 8. As discussed below, this prescription does not directly define its supporting theoretical basis.

⁴² Eric Levitz, *White House Officials Are Afraid of Trump's "Nuclear Button,"* INTELLIGENCER (Jan. 3, 2018), <http://nymag.com/daily/intelligencer/2018/01/white-house-officials-are-afraid-of-trumps-nuclear-button.html> [<https://perma.cc/G6GJ-Q2RF>].

⁴³ *Mattis Hearing*, *supra* note 12, at 23 (statement of Sen. McCain).

⁴⁴ *Id.* at 35 (statement of James Mattis). He further stated that "[the Secretary of Defense] is a position of civilian control that works with the Congress to maintain civilian control of the military. This is not just up to the executive branch. Civilian control of the military is also a responsibility that is shared with this committee in particular and with the broader Congress." *Id.* at 74.

⁴⁵ MACKUBIN THOMAS OWENS, U.S. CIVIL-MILITARY RELATIONS AFTER 9/11: RENEGOTIATING THE CIVIL-MILITARY BARGAIN 4 (2011).

⁴⁶ See PETER W. RODMAN, PRESIDENTIAL COMMAND: POWER, LEADERSHIP, AND THE MAKING OF FOREIGN POLICY FROM RICHARD NIXON TO GEORGE W. BUSH 4 (2009).

This article proceeds in Part II with a brief review of conventional civil-military relations theory and how recent episodes like those described above reveal cracks in those foundations.⁴⁷ This Part ends by describing an overlooked problem in strategic civil-military relations theory—the inability to diagnose pathological relationships and distinguish them from healthy, constitutionally adequate (even if tense) relationships. Part III will highlight the value of Agency Theory—in a jurisprudential form—as an objective framework that fills in those cracks. Part IV will look at the Goldwater-Nichols Act—its original purpose, subsequent history, and scope of reform—and find in it ample room to establish jurisprudential agency concepts that guide, direct, and answer conflicting tensions among these senior civil and military leaders. A result may be the useful imposition of what David Barron would call a legislative “disciplining effect”⁴⁸ on the key strategic elites that decide issues of war, peace, and everything in between.

II. Civil-Military Relations: The Standard Model(s)

A. “*The suits propose and the uniforms dispose.*”⁴⁹

The relationship between those that wield the sword for a nation’s defense and those that command them to wield it has long, complicated, dramatic history. As far back as the first scene in Homer’s *The Iliad*, we find Achilles—the Greeks’ most competent warrior—at loggerheads with his temperamental king, Agamemnon. Angry that the King’s desire for spoils of war may put him and other warriors at risk, Achilles complains:

I came not warring here for any ill the Trojans had done *me*. I have no quarrel with them. They have not raided *my* cattle nor *my* horses, nor cut down *my* harvests . . . We have followed *you*, Sir Insolence! For *your* pleasure, not *ours* – to gain satisfaction from the Trojans for *your* shameless self and for Menelaus. You forget this, and threaten rob me of the prize for which *I* have toiled . . . it is *my* hands that do the better part of the fighting. [Yet] when the sharing comes, *your* share is far the largest . . . I will not stay here dishonoured to gather gold and substance for *you*.⁵⁰

In reply, King Agamemnon retorted: “Granted the gods have made [you] a great warrior, [but] have they also given [you] the right to speak with railing?”⁵¹

⁴⁷ The author has extended and applied his discussion of Agency Theory and Goldwater-Nichols Act from portions originally appearing in DANIEL MAURER, CRISIS, AGENCY, AND LAW IN US CIVIL-MILITARY RELATIONS (2017) (primarily from Chapters 3 and 10).

⁴⁸ DAVID J. BARRON, THE CLASH BETWEEN PRESIDENTS AND CONGRESS: 1776 TO ISIS, at xiii (2016).

⁴⁹ DANIEL P. BOLGER, WHY WE LOST: A GENERAL’S INSIDE ACCOUNT OF THE IRAQ AND AFGHANISTAN WARS 423 (2014).

⁵⁰ HOMER, THE ILIAD (Samuel Butler trans., 1898), available at <http://www.gutenberg.org/files/2199/2199-h/2199-h.htm> [<https://perma.cc/LJT7-8GYE>] (emphasis added).

⁵¹ *Id.* at 27.

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During the early days of the American Civil War, General George McClellan—then commanding the Union forces in the field—echoed Achilles’ sentiment, railing against his superiors (who would later relieve him—twice):

I am here in a terrible place—the enemy have from 3 to 4 times my force—the Prest [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!⁵²

Nearly a century later, General Douglas MacArthur, peeved at both the reason and the manner in which he was relieved by President Truman, wrote:

Since the beginning of time, commanders have been changed, some through whim, some through cause, but never in history was there a more drastic method employed than in my relief—without a hearing, without an opportunity for defense, with no consideration of the past. Up to the moment of my recall, I had been receiving laudatory commendations from the President . . . no office boy, no charwoman, no servant of any sort would have been dismissed with such callous disregard for the ordinary decencies.⁵³

Complaining of the President’s approach to the complex theater of Korea, MacArthur wrote that his Commander-in-Chief was “weakened into a hesitant nervousness indicative of a state of confusion and bewilderment.”⁵⁴ Despite the eons between these excerpts, all three exhibit ignorance of, or contempt for, what has become an alternative adage of professional military subordination: “*Theirs not to reason why, [t]heirs but to do and die.*”⁵⁵

⁵² THE CIVIL WAR PAPERS OF GEORGE B. MCCLELLAN: SELECTED CORRESPONDENCE, 1860–1865, at 85–86 (Stephen W. Sears ed., 1992). The “old General” to whom he referred was Winfield Scott, then the Union Army’s General-in-Chief, somewhat comparable to the CJCS in his duty to advise the President.

⁵³ DOUGLAS MACARTHUR, REMINISCENCES 447–49 (1965).

⁵⁴ *Id.* at 448.

⁵⁵ Alfred, Lord Tennyson, *The Charge of the Light Brigade*, lines 14–15 (1854), available at <https://www.poetryfoundation.org/poems/45319/the-charge-of-the-light-brigade> [<https://perma.cc/AVH5-6ZN5>]; see also Barbara W. Tuchman, *Generalship*, 2 PARAMETERS, no. 2, 1972, at 2, reprinted in PARAMETERS, Winter 2010–11, at 11, 20 (reprinting speech she delivered at the U.S. Army War College on April 3, 1972: “Traditionally, the American Army has been, and consciously has considered itself, the neutral instrument of state policy. . . . When it is ordered into action, the Army does not ask ‘Why?’ or ‘What for?’”).

Modern Civil-Military Relations (CMR) Theory, in scholar Peter Feaver's words, is worried about "some of the most basic questions of democracy."⁵⁶ That is, how a liberty-valuing civilian government manages its military without falling victim to its own creation. Both empirical tools and normative arguments are useful here.⁵⁷

Traditionally, CMR Theory does this by eyeing historical vignettes and anecdotes of the professional interactions between two groups of government elites.⁵⁸ The first group of elites includes senior strategy-making or strategy-approving civilians (appointed and elected) from both the Executive and Legislative Branches.⁵⁹ The more popular works, however, tend to focus on just the most obvious civilian party: the President.⁶⁰ The second group of elites includes the highest-ranking military officials in uniform, either in command of wartime operations or those charged with advising the Secretary of Defense, National Security Council, and President.⁶¹ Another strand of study looks into Congress's role overseeing the institutional structure and budget of the Armed Forces—a study of how power and influence affect (and are affected by) this corner of the administrative bureaucracy.⁶² But, as Samuel Huntington suggested long ago, this

⁵⁶ PETER D. FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* vii (2005).

⁵⁷ See Burk, *supra* note 18, at 7–8 (explaining that civil-military theory is premised on a normative axiom that democratic civilian control over military is better than a military-led authoritarian state, which forces the primary question to be "how civilian control over the military is established and maintained").

⁵⁸ See, e.g., Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, 55(3) *NAVAL WAR C. REV.* 59 (2002); A. J. Bacevich, *The Paradox of Professionalism: Eisenhower, Ridgway, and the Challenge to Civilian Control, 1953–1955*, 61 *J. MIL. HIST.* 303, 303–34 (1997).

⁵⁹ Here, we generally mean to include Presidents, Secretaries of Defense, secretaries of the individual services, the Senate and House Armed Services Committees (the Congressmen and their professional staffs), the National Security Staff and Council, and various echelons of key decision-makers and influencers within each. 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?*, in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* 403, 403–28 (Peter D. Feaver & Richard H. Kohn eds., 2001) (looking at the particular subset of senior military leaders that regularly interacts with elected and appointed political officials to adjudicate and resolve questions of preparing for violence, studying past violence, and anticipating the consequences of violence—none of which involves the actual practice of violence—which demonstrates that the "distinction between the professional advisor and policy-maker deteriorates for senior officers, particularly the chairman [of the Joint Chiefs of Staff] and vice chairman." *Id.* at 421.).

⁶⁰ See generally, e.g., ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* (2003); H.W. BRANDS, *THE GENERAL VS. THE PRESIDENT: MACARTHUR AND TRUMAN AT THE BRINK OF NUCLEAR WAR* (2016); MATTHEW MOTEN, *PRESIDENTS & THEIR GENERALS: AN AMERICAN HISTORY OF COMMAND IN WAR* (2014).

⁶¹ See generally, e.g., H. R. McMASTER, *DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT McNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM* (1998); T. HARRY WILLIAMS, *LINCOLN AND HIS GENERALS* (1952).

⁶² See generally, e.g., MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* (1960); CARL BUILDER, *THE MASKS OF WAR: AMERICAN MILITARY STYLES IN STRATEGY AND ANALYSIS* (1989).

area of tension may have more to do with the struggle for power between the Executive Branch and the Legislative, not between civilian and military.⁶³ These studies do not attempt to reveal, however, a workable framework for developing norms of interaction. Nor do they highlight the civil-military dynamic between senior uniformed officials and Congress, or anybody else. Rather, they look to describe and measure *causal* relationships between actions.⁶⁴

The theory guiding and focusing these CMR studies starts with a predicate presumption that the military is subordinate to the civilian. It also tends to cleanly divide the military from the civilians based on personalities and their roles, asserting that their respective backgrounds and professional functions cannot help but separate them into different, operationally distinct lanes (e.g., Huntington's *The Soldier and the State* and Feaver's *Armed Servants*).⁶⁵ Variations in the theory, at least applied to what James Burk calls "mature democracies" (where coups are unlikely but the division between political goals and available means, like armed force, is blurry),⁶⁶ debate how wide those respective lanes are, and who gets the right of way when the lanes seem to merge. Winston Churchill once articulated this problem and echoed Carl von Clausewitz's dictum about war being but a continuation of politics by other means: "[M]uch of the literature of this tragic century is biased by the idea that in war only military considerations count and that soldiers are obstructed in their clear, professional view by the intrusion of politicians."⁶⁷ Or, as historian Andrew Bacevich wrote: "[A]t the summit, war and

⁶³ HUNTINGTON, *supra* note 35, at 81. Perhaps the Senate's slow-walking of, or outright refusal to consider, various civilian nominations to the Department of Defense under President Trump, unless it receives more information on the Administration's strategy and plans in Afghanistan, serves as a contemporary illustration. *See also generally* Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 U. CIN. L. REV. 391 (2018) (suggesting that congressional oversight has both an internal and external dimension—the latter relating to its authority to engage in direct civilian control over certain aspects of warfighting operations, with art. I, § 8, cl. 14 providing Congress an external "power" that provides "constitutional footing" for existing national security legislation, such as the Foreign Intelligence Surveillance Act and the War Powers Resolution).

⁶⁴ *See, e.g.,* MICHAEL C. DESCH, *CIVILIAN CONTROL OF THE MILITARY: THE CHANGING SECURITY ENVIRONMENT 2* (1999) (finding that the military is easier to control in times of "challenging international threat environment[s]" and harder to control when the environment is "benign"); *see also* SCHIFF, *supra* note 18, at 32–47 (analyzing three "partners" (military, political elites, and citizenry) and their relative agreement on four indicators (social composition of the officer corps, political decision-making process, recruitment method, and "military style") as a measure of the predictability of a military's domestic intervention); RISA A. BROOKS, *SHAPING STRATEGY: THE CIVIL-MILITARY POLITICS OF STRATEGIC ASSESSMENT 4–5* (2008).

⁶⁵ *See* HUNTINGTON, *supra* note 35; FEAVER, *supra* note 56.

⁶⁶ Burk, *supra* note 18, at 8, 13.

⁶⁷ WINSTON CHURCHILL, 3 *THE SECOND WORLD WAR: THE GRAND ALLIANCE* 28 (1950). As for Clausewitz, he wrote: "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." CARL VON CLAUSEWITZ, *ON WAR* 608 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1984) (1832).

politics merge and become inexorably intertwined. A general in chief not fully attuned to the latter will not master the former.”⁶⁸

The theory does not, however, persuasively identify a conceptual *basis* for these norms—or offer a reason for their exceptions—at the strategic “summit” beyond that of a vague sense that the Constitution demands it. And this deficiency remains despite the Constitution’s saying little about how these relationships are to be practically designed and judged.⁶⁹ *Why*, for instance, is it generally held that a senior military officer should *not* resign or retire as a form of protest against perceived intrusion into the military’s field of expertise by a politician? A common answer is that resignations would lead to a politicized officer corps, and reek of attempts to bully civilians into decisions favored by the military.⁷⁰ The common counterargument is that *not* resigning would contribute to an unethical application of one’s expert knowledge.⁷¹ These answers and advice are both prescriptive and consequentialist,⁷² but not deontological answers derived explicitly from a conceptual understanding of the nature of these relationships themselves.⁷³

Political scientists—more likely than other academic specialists to stand in this corner of the scholarly field—treat the subject from a deductive, probabilistic social science perspective.⁷⁴ Often turning to a “rationalist” methodology,

⁶⁸ Andrew J. Bacevich, *Sycophant Savior*, AM. CONSERVATIVE (Oct. 8, 2007), <http://www.theamericanconservative.com/articles/sycophant-savior/> [https://perma.cc/T6TC-AZRA]; see also SUZANNE C. NIELSON, POLITICAL CONTROL OVER THE USE OF FORCE: A CLAUSEWITZIAN PERSPECTIVE 26 (2001), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a389673.pdf> [https://perma.cc/T4AK-9QB3].

⁶⁹ See HUNTINGTON, *supra* note 35, at 163–64; MAURER, *supra* note 47, at 37–41.

⁷⁰ See generally SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY, *supra* note 59, at 465–67.

⁷¹ See Don M. Snider, *Strategic Insights: Should General Dempsey Resign? Army Professionals and the Moral Space for Dissent*, STRATEGIC STU. INST. (Oct. 21, 2014), <http://strategicstudiesinstitute.army.mil/index.cfm/articles/Should-General-Dempsey-Resign/2014/10/21> [https://perma.cc/9TAW-QHWW].

⁷² See, e.g., Golby, *supra* note 29, at 24 (“[Officers] should not resign or disobey a lawful order when their advice is not taken.”); *id.* at 27 (“Military Leaders should not offer advice to achieve the policy outcomes they prefer.”).

⁷³ Don Snider’s normative argument about the military officer’s moral autonomy and protection of one’s professional expert knowledge comes very close and, as we will see below, is consistent with Huntington’s approach. See generally Snider, *supra* note 72.

⁷⁴ See FEAVER, *supra* note 56, at 3. There are other aspects of civil-military relations that touch on the divisions and similarities, or the cultural or demographic divide, between civil society and the military service-members themselves. See, e.g., JANOWITZ, *supra* note 62; Thomas Ricks, *The Widening Gap Between Military and Society*, ATLANTIC (July 1, 1997), <https://www.theatlantic.com/magazine/archive/1997/07/the-widening-gap-between-military-and-society/306158> [https://perma.cc/ZF9G-J4X5]; JASON K. DEMPSEY, OUR ARMY: SOLDIERS, POLITICS, AND AMERICAN CIVIL-MILITARY RELATIONS (2010). This article restricts “civil-military relations theory” to the field studying civilian control of the military under American constitutional premises.

empirical observations are abstracted into independent and dependent variables.⁷⁵ Multiple casts of individuals of varying ability, knowledge, motives, and experiences are often streamlined, sifted, and separated into two camps of players, each with a different decision to make related to a specific action. This analysis often relies on probabilistic “games” that create a discrete and rule-constrained interactive competition, given abridged descriptions of “payoffs” each player may acquire. Sometimes, decisions are described as potential “gains” or “losses” to study whether certain individuals will engage in “risk-averse behavior.”⁷⁶ With further simplifying assumptions,⁷⁷ and given this finite competitive problem devoid of messy unquantifiable context, the players’ future interactions are then predicted. “Equilibria solutions” are identified based on further assumptions about cost and benefit of various available choices each player could make. The analysis concludes with a patina of mathematical confidence as the theoretical predictions are matched against empirical observations.⁷⁸

⁷⁵ See, e.g., DESCH, *supra* note 64, at 6–12 (level of civilian control is a “dependent variable” with “threats to the nation” (whether domestic or foreign, or low or high intensity) being the “independent variable”). Desch’s theory predicts the most stable of civil-military relations when there is a “high external threat” coupled with “low internal threat.” *Id.* at 13.

⁷⁶ Gregory Winger, *Prospect Theory and Civil-Military Conflict: The Case of the 1976 Korean Axe Murder Incident*, 43 *ARMED FORCES & SOC’Y* 734, 735, 739–40 (2017) (applies behavioral economics’ Prospect Theory to use of force decisions and concluding “when confronted with the same scenario, civil-military leaders may frame the situation differently and exhibit strikingly different behavior that reflects their divergent attitudes toward risk”).

⁷⁷ For example, in Winger’s application of Prospect Theory to a case study involving the “Korean Axe Murder” of 1976, he selected this episode as a “feasibility study” in part because all the advisors—civilian and military—shared a basic and common understanding of the relevant facts, which eased ascertaining their relative comfort with risk and therefore predicting and explaining their policy preferences. Winger himself notes that other episodes, like the Cuban Missile Crisis, clouded by information gaps and “information asymmetry” among these leaders, would make predicting risk tolerance of individual actors extremely challenging under Prospect Theory. *Id.* at 742. This type of rationalist-based study of civil-military relations must be caveated heavily, as it assumes at least five probably unrealistic conditions: (1) the actors share knowledge about a discrete issue or dilemma and agree on relevance and materiality of that knowledge; (2) the actors agree on the bounds defining the discrete issue or dilemma, isolating it from other issues, including legal constraints or legal consequences; (3) the principal decision-maker has not signaled a preference for a policy choice or otherwise indicated his or her own risk tolerance; (4) the actors all provide advice to a degree consistent with the scope of their authority—in other words, they provide advice but “stay in their lanes”; and (5) the actors all believe that their advice and actions will have meaningful consequences on that issue, and that their motives for engaging in risk analysis (implicitly or explicitly) have something to do with this belief. With these assumptions in place, it is relatively straightforward to focus on how each actor “frames” the problem set and defines the risk. However, if any of these assumptions are removed, the question of framing becomes much more complex and risk tolerance largely unpredictable.

⁷⁸ See e.g., FEAVER, *supra* note 56, at 96–117; Peter D. Feaver, *Crisis as Shirking: An Agency Theory Explanation of the Souring of American Civil-Military Relations*, *ARMED FORCES & SOC’Y* 24, 407–34 (“[T]heory should provide the micro-foundational logic to explain the causal mechanisms . . . [and] friction in American civil-military relations reflects the kind of conflict one would expect from a certain combination of civilian choices and military responses . . . [that are] best understood as a game of strategic interaction.”).

These studies do “offer valuable insight into how conditions surrounding a leader help produce an outcome independent of the specific situation or individual.”⁷⁹ However, there remains an unfortunate and overlooked gap. The parties, themselves struggling to manage the awkward and unbalanced relationships effectively, have no means to impartially and realistically determine whether their actions (or inactions) signal symptoms of civil-military pathologies or instead signal a healthy constitutional process at work.⁸⁰

Consider President Truman’s attempt to manage such an awkward and unbalanced relationship: his relief of MacArthur from command after the General’s repeated public political disagreement with the Administration’s restrained (i.e., non-atomic) policy in Korea. Neither at the time, nor in the six decades since, has there been anything resembling consensus about Truman’s constitutional prerogative to fire his (in)subordinate general. Was it a sign that the cherished American civil-military hierarchy was safe or, instead, did it illustrate a deep structural flaw and an institutional breach in our ability to create and implement national security strategy? In a more recent example, Secretary Mattis was asked on the record why he continued to serve in the Trump Administration while it suffers record-low approval ratings, constant questions of its legitimacy, an Independent Counsel investigation into potential election wrong-doing and Trump’s firing of the FBI Director, a steady exodus of key aides, and public airings of fundamental disagreement by other Cabinet members. His response:

You know, when a president of the United States asks you do something—I don’t think it’s an old-fashioned school—I don’t think it’s old-fashioned or anything, I don’t care if it’s a Republican or Democrat, we all have an obligation to serve. That’s all there is to it. And so, you serve. First time I met with President Trump, we disagreed on three things in my first 40 minutes with him . . . and he hired me. This is not a man who is immune to being persuaded if he thinks you’ve got an argument. Anyway—press on.⁸¹

This brief insight reveals three civil-military truths, at least implied by the former Secretary’s views. First, service at that level to the civilian Commander-in-Chief is apolitical. Second, an implied task within the scope of his responsibility is to argue with the President on subjects within his area of expertise. Third, when the

⁷⁹ Winger, *supra* note 76, at 738.

⁸⁰ See, e.g., DESCH, *supra* note 64, at 3; 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) (“[T]here is no commonly accepted theoretical framework upon which to evaluate various civil-military behaviors”); MAURER, *supra* note 47, at 28 (“Military leaders need more robust norms and guidelines that can help them understand how to find their voice in the unequal dialogue.”).

⁸¹ Paul Szoldra, *Mattis was asked why he agreed to serve under Trump—here’s what he said*, *BUS. INSIDER* (Aug. 31, 2017), <http://www.businessinsider.de/mattis-serve-under-trump-2017-8?r=US&IR=T> [<https://perma.cc/TA7R-KCET>].

ability or opportunity to persuade is spent and unsuccessful, the default to which one returns is truth number one: obligation to service. These three truths are likely the outcome of a long career in uniform indoctrinated by the Huntingtonian view of civil-military relations.⁸² But are they the end-all and be-all of the normatively proper relationship? Do they apply equally to the Chief of Staff of the Air Force arguing about a fiscal year budget cut as they do the Commander of Central Command overseeing combat operations, or to an active duty general serving as Assistant to the President for National Security Affairs? If they do apply differently based on facts, job titles, and responsibilities, what is the underlying rationale that justifies the case-by-case application?

B. *Huntington's Safe Bet: A Military "politically sterile and neutral" is Most Professional, Most Capable, and Most Subordinate*

Huntington asserted that the military is most effective in its natural duty to defend the nation *and* most effectively bound in a subordinate station to political authority under constitutional expectations when it functions in a state of "objective civilian control."⁸³ This essentially means a "militarized" (as opposed to civilianized or politicized) military cadre with extraordinary power, usable in a very narrow fashion. Objective control would seek to maximize adherence to a professional ethic that demands autonomous, expert management of the instruments and ways of war, on behalf of the republic but under direction by whatever representative political power that happens to be chosen (provided it was legitimately chosen).⁸⁴ But it minimizes the military's power to its lowest ebb relative to civilian authority, thus keeping the polity safe from the fearsome *coup d'état*.⁸⁵

Huntington's premise for objective control imagines the civilian and military groups rigidly adhering to separate, unequal castes. The division between castes is based on how they tend to define and solve problems of national security as well as the state of mind that applies meaning and value to those problems and resolutions. *Policy and political risk-taking*, he suggested, are based on subjective, "indefinite" and "ambiguous" facts, assumptions, and sometimes wishful thinking.⁸⁶ In contrast, "criteria of military efficiency are limited, concrete, and relatively objective . . . [p]olitics is an art, military science a profession."⁸⁷

⁸² Huntington's study is a primary work in the field. It is introduced to many a student of undergraduate politics and senior service colleges attended by Army, Air Force, Marine Corps colonels and Navy Captains, as the "dominant theoretical paradigm in civil-military relations" with "prescriptions for how best to structure civil-military relations" that "find a very receptive ear within . . . the American officer corps itself." FEATHER, *supra* note 56, at 7; *see also* DESCH, *supra* note 64, at xi ("Anyone writing in the area of civil-military relations has to reckon with [Huntington's] *The Soldier and the State*").

⁸³ HUNTINGTON, *supra* note 35, at 83–84.

⁸⁴ *See id.*

⁸⁵ *See id.* at 85.

⁸⁶ *Id.* at 76.

⁸⁷ *Id.*

Therefore, he wrote: “[T]he military profession is expert and limited. Its members have specialized competence within their field and lack that competence outside their field. The relation of the profession to the state is based upon this natural division of labor.”⁸⁸ In other words, it is too much to ask of the civilian politician to understand enough about the expert management of violence in warfare that manifests his policy goals. Likewise, it is too much to ask the military professional to understand enough of the social, economic, partisan and ideological forces that coalesce into policy aims and how certain political risks are weighed. Huntington believed that this was the point justifying General MacArthur’s removal from command in Korea: he had willfully encroached into the political risk-accepting business without a legitimate, legal, claim that his “wisdom” was any better politically than Truman’s. It was a “clear invasion of the [civilian politician’s] professional realm.”⁸⁹

Military officers, he argued, are professional in the sense that they collectively share characteristics of expertise, responsibility, and corporateness, having a “sense of organic unity and consciousness of themselves as a group apart from laymen”⁹⁰ and guided by a “higher calling” in service to society, like lawyers and doctors.⁹¹ The military is, he suggested, boxed in by this sense of self-identity.⁹² Their expertise lies in an “extraordinarily complex intellectual skill requiring comprehensive study and training,”⁹³ to be internally and externally evaluated by “objective standards of professional competence”⁹⁴ (again, not unlike doctors and lawyers). To apply its expertise in a socially-responsible way, the military (unlike other professions) must be somewhat separate and apart from the society it serves, in the sense of strict entrance requirements, daily activities, visible markers of the vocation (e.g., uniforms, rank structure), and where its members live and work.⁹⁵

Huntington further defined the scope of the military professional’s expertise: a “[p]ublic bureaucratized profession[,] expert in the management of violence and responsible for the military security of the state.”⁹⁶ This, in turn, demands that the military leadership fulfill three functional responsibilities for their civilian masters: they *represent* the military point of view, they *advise* the decision-maker of what course of action to adopt, and they *execute* the implied and specified tasks associated with the civilian’s ultimate decision.⁹⁷ Performing these three functions reveals that “conservative realism” is the dominant philosophy and ideology of the “military mind”—a “unique perspective on the world” that justifies

⁸⁸ *Id.* at 70.

⁸⁹ HUNTINGTON, *supra* note 35, at 76–77.

⁹⁰ *Id.* at 10.

⁹¹ *Id.* at 7–8, 15.

⁹² *Id.* at 83–85.

⁹³ *Id.* at 13.

⁹⁴ HUNTINGTON, *supra* note 35, at 7–8.

⁹⁵ *Id.* at 16–17.

⁹⁶ *Id.* at 61.

⁹⁷ *Id.* at 72.

what they do.⁹⁸ Huntington described this professional military attitude as passively apolitical, planning according to worst-case scenario in which the future is never foreseeable but in which conflict is an unavoidable part of human nature, and erring on side of caution to stress the immediacy and strength of potential threats.⁹⁹

For Huntington, the evolution of the military into a profession of arms, defined by this military conservative outlook on human nature and conflict, and charged with its three responsibilities, is *the* cause of modern civil-military relationship tension.¹⁰⁰ Moreover, it is this fuel for the occasional so-called crisis¹⁰¹ because the “exact character of the relationship which should exist between statesman and military officer cannot be defined precisely.”¹⁰²

Basically, Huntington understood the relationship to be most respectful of constitutional strictures and most amenable to fundamental wartime needs under two conditions. First, when the military leadership is fundamentally autonomous in its “management of violence”¹⁰³ but, second, strictly subject to the veto authority and explicit direction provided by the civilian political authority. The practical need that underwrites both conditions, he believed, was that fundamentally distinct moral codes and responsibilities animate the two groups.

Given the national and international changes since it was first published in 1957, it is not surprising then to find hosts of Huntington critics who attack some of his now-outdated descriptions of the officer corps relative to enlisted troops, his focus on Cold War-era international problems, and his neater-than-necessary division of the military “sphere” from civilian concerns.¹⁰⁴ Indeed, as early as 1960, the military sociologist Morris Janowitz observed that “every ranking field commander stationed abroad is, by virtue of his position, a ‘political agent’” and that the “Joint Chiefs of Staff, as principal military advisors, are thoroughly enmeshed in political estimates as they prepare their strategic plans.”¹⁰⁵

This turn away from theory and toward a more realistic description of the civil-military relationships at the Pentagon and White House has continued into contemporary studies of the subject. As the Cold War ended, a corresponding view of these civil-military parties as polar opposites has become less convincing and less helpful when understanding the fractious character of modern conflict, and the United States’ many forms of military commitment abroad—from advise-and-

⁹⁸ *Id.* at 61–69, 79.

⁹⁹ HUNTINGTON, *supra* note 35, at 62–79.

¹⁰⁰ *Id.* at 7.

¹⁰¹ *Id.* at 19.

¹⁰² *Id.* at 70.

¹⁰³ *Id.* at 11; *see also* JANOWITZ, *supra* note 62.

¹⁰⁴ *See, e.g.*, EMILE SIMPSON, *WAR FROM THE GROUND UP: TWENTY-FIRST CENTURY COMBAT AS POLITICS* 112–15 (2013); Burk, *supra* note 18, at 13; FEAVER, *supra* note 56, at 16–38; Donald S. Travis, *Saving Samuel Huntington and the Need for Pragmatic Civil-Military Relations*, 43 *ARMED FORCES & SOC’Y* 395, 396 (2002).

¹⁰⁵ JANOWITZ, *supra* note 62, at 70.

assist missions in Afghanistan to counter-terrorism efforts in North Africa, and from humanitarian assistance in the Pacific to building partner capacity in Eastern Europe. Michèle Flournoy, Undersecretary of Defense for Policy in the first Obama Administration, recently warned that senior uniformed leaders have been inadequately prepared and tutored for strategic dialogue with civilian political leaders—especially with those who lack government or military experience themselves—in part because of “theories taught in war colleges that may have little grounding in reality.”¹⁰⁶ As one recent commentator explained, “the reality is [that] good war-waging decisions are most likely to emerge from a set of political and military leaders bluntly and continuously arguing with one another in an attempt to identify strategy, policy, campaign, and organizational solutions.”¹⁰⁷ Dubik, the author of this assertion, is a retired general and combat commander with a doctorate in philosophy, and one practiced in the “management of violence.” His observation is consistent with a recent approach to updating Huntington, called “Pragmatic Civilian Control” (in the tradition of John Dewey’s philosophy of Pragmatism), in which two variables—the “*kind of conflict* that is waged and the context of the environment”—determine the sometime blurry practical application of civil-military relationships in which Huntington’s separate civil and military spheres are not rigidly observed.¹⁰⁸ Eliot Cohen’s astute observation falls within this realist tradition:

[T]he ultimate domination of a civilian leader is contingent, often fragile, and always haunted by his own lack of experience at high command . . . for a politician to dictate military action is almost always folly. Civil-military relations must be a dialogue of unequals and the degree of civilian intervention in military matters a question of prudence, not principle.¹⁰⁹

Of course, this does not help address whether the degree of *military intervention in political or policy discussion* is a matter of prudence or principle. Moreover, the traditional—even realist—view, does not account for a president that fails to engage in such policy discussions and arguments with his military advisors, or does not offer consistent guidance or direction for them to implement.

Peter Feaver, looking back at his mentor’s Cold War-based theory, finds Huntington’s “identity-driven” analysis to depend on “non-material determinants

¹⁰⁶ MICHÈLE A. FLOURNOY, CENTER FOR NEW AMERICAN SECURITY, NINE LESSONS FOR NAVIGATING NATIONAL SECURITY 8 (2016), <https://s3.amazonaws.com/files.cnas.org/documents/CNASReport-9Lessonsbody-160217.pdf?mtime=20160910130218> [<https://perma.cc/2P3A-2WZ6>].

¹⁰⁷ JAMES DUBIK, JUST WAR RECONSIDERED: STRATEGY, ETHICS, AND THEORY 91 (2016).

¹⁰⁸ Travis, *supra* note 104, at 400 (advocating a kind of case-by-case “cooperative pluralism” that acknowledges the value gained from military and civilian leaders working together, while sustaining Objective Control’s military specialization and expertness, and allowing for military leaders to help shape *military* policy through a political process without being “ideological”) (emphasis in original).

¹⁰⁹ COHEN, *supra* note 60, at 12.

of behavior,” particularly an emphasis on the ethos of professionalism.¹¹⁰ Instead, he opts to study the “strategic interaction and punishment—how civilians anticipate military behavior, how military obedience is not foreordained, and how the likelihood that civilians will detect and punish military misbehavior shapes interactions”¹¹¹ with a “rationalist method” that assigns the parties positions of relative authority (the civilian principal and the military agent).¹¹² For reasons described below, Feaver’s technique is useful in terms of building a diagnostic framework only in that he accurately depicts the parties engaged in a principal-agent relationship (though not the most appropriate principal-agent model). Beyond Huntington’s seminal objective control theory lies another predominant perspective.

C. Feaver’s Calculations: Using Micro-economic Agency to Model, and Predict, CMR Outcomes

Agency Theory as applied to civil-military relationships—largely the work of Feaver and a few other scholars¹¹³—combines some elements of Janowitz (the military as a coherently separate pressure group) and Huntington (the military leader as a professional, with distinct viewpoints and incentives that may be, compared to political goals, misaligned): “Most of democratic theory is concerned with devising ways to insure that the people can remain in control even as the business of government is conducted by professionals. Civil-Military relations are just a special extreme case, involving designated political agents controlling designated military agents.”¹¹⁴

This “special extreme case” is special and extreme, according to logic of Agency Theory, because it involves trade-offs on visceral and emotional subjects. It is a calculation for a civilian political principal who theoretically neither has time nor aptitude to oversee the complexity of modern national security management, and the expert professional military agent who must decide where, how, when, and whether it is in his or her best interests to work as the principal intends. Such decisions are often fundamentally incompatible or irreconcilable, especially on issues of boots-on-ground, budgets for long-term investment strategies, deployment timelines, and personnel make-up (e.g., transgender support, female combat exclusion rules, implementation and repeal of “Don’t Ask, Don’t Tell”); when they

¹¹⁰ FEAVER, *supra* note 56, at 13.

¹¹¹ *Id.* at 14

¹¹² *Id.* at 12–13.

¹¹³ See generally Deborah Avant, *Conflicting Indicators of “Crisis” in American Civil-Military Relations*, 24 ARMED FORCES & SOC’Y 375 (1998).

¹¹⁴ Feaver, *The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control*, 23 ARMED FORCES & SOC’Y 149, 153 (1996).

are felt to be incompatible or are, in fact, irreconcilable, friction and “crises” emerge in the civil-military relationship.¹¹⁵

Agency Theory approaches this friction with an eye toward predicting it. The theory, as offered by Feaver, simplifies the nature of the relationship down to a principal (civilian) and the agent (military), and granting them a limited arsenal of decisions and reactions. Civilians monitor the military (at the level of organization, institution, or individual) to a degree that depends on the civilian expectation that the military will obey civilian policy, orders, or rules faithfully. The military’s obedience is gauged by assessing whether or not the military “works” or “shirks.”¹¹⁶ The military’s activity, for its part, is based in its expectation of how likely the civilian leadership will detect its behavior and punish its “shirking.”¹¹⁷ This is a “parental scrutiny-of-teenagers” model of civil-military relationships.¹¹⁸

Like teenagers and parents, the civil and military elites with whom Agency Theory is concerned are vastly unequal in power, possess widely differing experience levels, and often approach national security dilemmas with contrasting moral perspectives. These “players have different moral and political competencies,” writes Feaver. “The military officer is promising to risk his life, or to order his comrades to risk their lives, to execute any policy decision. The civilian actor is promising to answer to the electorate for the consequences of any policy decisions . . . [t]he civilian is claiming the right to be wrong.”¹¹⁹

Agency Theory is a valuable, but extremely limiting, point of view. Feaver admits that his employment of these techniques is, at least in part, because they have “wide currency” within the political science academic discipline.¹²⁰ But what should be obvious is, as mentioned earlier, these techniques squeeze out the emotional, irrational, unexpected, and plain crazy from the real life confusion, friction, and biases that shape real-world interactions and decisions under stress and uncertainty.¹²¹ They may provide political scientists abstract ways for hypothesizing future conduct (or explaining historical vignettes), but they do not

¹¹⁵ See Feaver, *supra* note 78, at 408–09; see generally Richard H. Kohn, *Coming Soon: A Crisis in Civil-Military Relations*, 170 *WORLD AFF. J.* 69 (2008).

¹¹⁶ FEAVER, *supra* note 56, at 59–61 (defining “working” as “ideal conduct that the agent would perform if the principal had full knowledge of what the agent could do and was in fact doing” and “shirking” as working in a way other than as directed and authorized by the principal because the military agent disagrees with how, when, where, or why to best provide for national security in general or in specific instances).

¹¹⁷ *Id.* at 3.

¹¹⁸ However, given that Feaver tends to roll all civilian leadership into a single player, and all relevant military actors into a single “military,” perhaps a more accurate description is the school administration-student body model of CMR.

¹¹⁹ FEAVER, *supra* note 56, at 8–9, 71–72.

¹²⁰ *Id.* at 12, 13.

¹²¹ See LAWRENCE FREEDMAN, *STRATEGY: A HISTORY* 593–95 (2015); see generally Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124 (1974).

provide the parties themselves—or the public, or Congress—any meaningful way to diagnose the health of those real relationships in context, using objective norms or standards. The closest it comes is saying that, at the end of the day of working, shirking, monitoring, rewarding, and punishing, the sacrosanct civilian authority is safe provided only that the civilian preference won out over the military agent’s preference.¹²²

If reality is more complicated than a neat hierarchical division between civilian and military preferences, then several questions ought to follow. For instance, how should Agency Theory, or even CMR Theory generally, account for a situation in which an unequivocal and publically-announced civilian preference (e.g., banning transgender persons from remaining in, or accessing into, the Armed Forces) was “slow-walked” by the military leadership and bureaucracy? What if, to complicate matters, that preference was confronted by multiple preliminary injunctions by federal courts (on grounds that such a ban would likely violate the Constitution’s Fifth Amendment) before that preference could be executed?¹²³

In mid-September 2017, fifty-one days after President Trump announced the prospective ban, Secretary Mattis issued “interim guidance” to the Services that effectively put a stay on the Chief Executive’s order.¹²⁴ Notably, Mattis emphasized that the final plan to implement the President’s directive would be “consistent . . . with applicable law,”¹²⁵ a subtle acknowledgement that the legality of the directive was, at best, contentious—if not unsustainable. (This caveat was not similarly found in the President’s Directive of August 25, 2017, in which he explicitly based his decision on his unilateral Constitutional authority over the personnel management of the Armed Forces as Commander-in-Chief.)¹²⁶ The Secretary’s guidance had two primary effects, one explicit and one tacit. First, it permitted continuation of service and re-enlistment opportunities for transgender members during the period in which the interim guidance was effective.¹²⁷ Second, it tacitly engineered a window of time in which the courts would hear and could decide on lawsuits brought by transgender service-members that challenged the President’s

¹²² FEAVER, *supra* note 56, at 59 (“[C]ivilian preferences must prevail over military preferences in a democracy”).

¹²³ See Cooper, *supra* note 28; see also, e.g., Doe v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017); Karnoski v. Trump, No. C17-1297-MJP, 2017 U.S. Dist. LEXIS 203481 (W.D. Wash. Dec. 11, 2017) (order granting in part and denying in part defendants’ motion to dismiss, and granting plaintiffs’ motion for preliminary injunction).

¹²⁴ JAMES MATTIS, MEMORANDUM FOR SECRETARIES OF MILITARY DEPARTMENTS, ET AL., SUBJECT: MILITARY SERVICE BY TRANSGENDER INDIVIDUALS – INTERIM GUIDANCE (Sep. 14, 2017), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF> [<https://perma.cc/4298-V5CS>] [hereinafter Transgender Interim Guidance].

¹²⁵ *Id.*

¹²⁶ See DONALD J. TRUMP, PRESIDENTIAL MEMORANDUM FOR THE SECRETARY OF DEFENSE AND THE SECRETARY OF HOMELAND SECURITY, SUBJECT: MILITARY SERVICE BY TRANSGENDER INDIVIDUALS (Aug. 25, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security/> [<https://perma.cc/9QH6-EUC2>].

¹²⁷ Transgender Interim Guidance, *supra* note 126, at 32.

directive. In such a case, it would appear that democratic values of dialogue, public debate, fairness, and due process triumphed over the civilian leader's preference. I doubt that Agency Theory advocates would suggest that the military's decision in this matter nonetheless undermined the democracy; however, such episodes undermine the theory's universal proscriptions for military deference.

D. Room to Extend Current Theory

Neither the Huntington model nor the Agency methodology are adequate solutions to the overlooked problem of how Congress might improve its role in overseeing strategic level civil-military relationships, and participating in them. That is, how can Congress know whether these episodes of strife or friction—of apparent “shirking” and “punishment,” of “unequal dialogue” (to use Cohen's term), of separate and highly-developed military professionalism with a sense of moral superiority—really reflect case-by-case pathologies, dysfunction, or instead a deliberately tension-filled drama fully consistent with constitutional themes?

Consider this partial hypothetical as a demonstration: at a four-star general's confirmation hearing for CJCS, a senator unearths an old article the general wrote in *Joint Forces Quarterly*. In his thought piece, the general suggested various characteristics of an ideal chairman: specifically, that he ought to be a “true believer in the foreign policy of the administration which he serves,”¹²⁸ and refers to Colin Powell as one exemplar. The senator quotes from the article, then asks the nominee: “if the Senate were on the record disagreeing with, or even censuring, the President for national security decision-making, and we were to conduct an oversight hearing into the matter and called you to testify, how candid and open should we expect you to be?”

Under such facts, we see both the general and Congress stuck. The general must now answer truthfully, which may undercut the President if he were to voice them to Congress candidly; Congress is stuck because it literally has no standard against which to judge the general's assertion about the proper “belief” such a position should hold. This is a problem that cuts into the Huntingtonian narrative that the apex of the military leadership is (or should be) professionally aloof and unequivocally disinterested in political wrangling, policy-making, and policy outcomes. That officer, valuing the “mutual regard” and “friendship” he has with his Commander-in-Chief, may restrain himself from publicly acknowledging the military risk of a particular foreign policy, or that the military opinion is different than the political preference. Moreover, he may not have objectively and dispassionately investigated such risks at all if he is already a “true believer.” This scenario also cuts against Cohen's prescription of the “unequal dialogue” that

¹²⁸ This scene is a fiction, but the quotation is not. MAXWELL TAYLOR, *SWORDS AND PLOWSHARES* 252 (1972). General Taylor served as Army Chief of Staff under President Eisenhower, retired and wrote a popular book advocating a foreign policy of limited war, and was called back to serve as a first-of-its-kind “Military Representative to the President” under Kennedy, then recalled to Active Duty to serve as the CJCS. See MAURER, *supra* note 47, at 119–24.

asserts a case-by-case determination of how prudently it might be for the civilian leader to dig deep into the tactical weeds or for the military leader to discuss political contexts.¹²⁹ The question Congress must face is not just whether the procedural act of holding a hearing is sufficient oversight, but a more substantive one: whether such a uniformed disciple of the President sees his role as subordinate to the Constitution, to the public, to Congress, or only to the President, and whether he is fulfilling the statutory scope of responsibility expected of a CJCS.

Agency Theory also leaves something to be desired when thrown against scenarios in which the Commander-in-Chief has established an expectation of his senior military advisors that forces them to think and advise outside of their usual military lanes, as President Kennedy did in the wake of the Bay of Pigs failure.¹³⁰ Instead of a rational actor choosing among alternative options based on a cost-benefit analysis tied to whether he or she can get away with avoiding, delaying, or ignoring the civilian command, such a relationship presupposes that the strategic military elites must participate, at least to a degree, in the art of politics and policy-making. Indeed, it is not unusual to read of modern presidents asking for or accepting such open-ended advice, as when General Dunford, as CJCS, gave a “spirited defense” of NATO’s utility, squarely contrary to the President’s public and private denunciations of the mutual defense pact and organization.¹³¹ Micro-economic agency theory says nothing at all about whether such a relationship is inherently healthy or—in a case-by-case study—effective at achieving the parties’ expectations and desired outcomes.

Agency theory of this stripe does not fully capture the complexity of a situation where the entire Department of Defense—after spending substantial time to research and evaluate legal parameters and potential consequences of full transgender integration—is shocked by a single tweet from the Commander-in-Chief effectively reversing the momentum and assumed policy direction.¹³² When the leaders of the military publicly announce that no such immediate policy reversal was going into effect without more specific direction from the President, are we to assume a major substantive and communication fissure between Pentagon and White House exists? Under Agency Theory, this would be labeled “shirking,” in much the way that Feaver labeled the testimony of Colin Powell and Norman

¹²⁹ COHEN, *supra* note 60, at 12.

¹³⁰ See JOHN F. KENNEDY, NATIONAL SECURITY ACTION MEMORANDUM No. 55 (June 28, 1961), available at <http://www.ratical.org/ratville/JFK/USO/appE.html#NSAM55> [<https://perma.cc/9GUH-DXHS>] (“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 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.”).

¹³¹ WOODWARD, *supra* note 3, at 77 (urging President Trump to think of NATO as a critical glue that keeps “Europe united politically, strategically, and economically”).

¹³² See generally Note, *In Tweets, President Purports to Ban Transgender Servicemembers*, 131 HARV. L. REV. 934 (2018).

Schwarzkopf when they told Congress they favored the “Don’t Ask, Don’t Tell” compromise to President Clinton’s proposal for complete, open, service regardless of orientation.¹³³

On the contrary, neither the manner in which this executive decision was made, nor its substantive merit or demerit, incensed a strategic military leader to resign or publicly dissent. Nor did the military’s delayed response trigger a relief of any senior commander, Service Chief, or political appointee in the DoD. Whatever angst the manner and timing of the communication fueled, or whatever frustration the generals’ “slow-walking” incited, was siphoned away *sub rosa*. This may not, therefore, suggest a *dysfunctional* civil-military relationship characterized by an intrusive civilian monitoring and punishing the military (collectively, the Department’s senior civilian and military leadership) caught in a moral agency dilemma.¹³⁴ Instead, it might be simply a combination of (1) a poorly-executed delivery of policy direction from the civilian leadership to the military’s, inadequately accounting for the Department’s historical work and institutional momentum for change already generated; (2) public disapproval that was poorly-anticipated, or perhaps deliberately ignored; and (3) the military’s request for more functional guidance on how to implement that policy direction. In other words, by looking past the narrow confines of what (economic) Agency Theory can demonstrate, we can begin to ask whether or not this episode was symptomatic of a CMR pathology, or perhaps something more benign.

Finally, despite routine references by all involved to constitutional values,¹³⁵ neither the Constitution itself nor case law that interprets it have spoken clearly as to what the nature of a healthy relationship ought to look like according to certain standards, consistent with its generic elevation of civilian political authority over military matters. Specific duties and prescriptions for how to manage them with a uniformed, unelected, military at the President’s control are not described¹³⁶ because the Constitution is a charter for the separation of powers among its three branches.¹³⁷ It was not intended to engineer the relationships within each of those branches, or detail standards of conduct for them, in part because it

¹³³ FEAVER, *supra* note 56, at 202–203.

¹³⁴ See Kathleen M. Eisenhardt, Agency Theory: An Assessment and Review, 14 ACAD. MGMT. REV. 57, 58 (1989); see also James Burk, *Responsible Disobedience 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).

¹³⁵ See, e.g., United States Army, Army Doctrine Reference Publication 1, The Army Profession, at Preface, and paras. 6-9, 6-10, 6-11, 6-12 (June 14, 2013).

¹³⁶ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“The powers of the President are not as particularized as those of Congress”); see also David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 483 (2008) (“The Commander in Chief Clause is a sphinx, and specifying its powers and the theory generating them is a riddle”).

¹³⁷ See Katherine Scott, *A Safety Valve: The Truman Committee’s Oversight during World War II*, in CONGRESS AND CIVIL-MILITARY RELATIONS, *supra* note 1, at 17.

was not clear how the parties would need to distribute authorities and responsibilities amongst themselves in the unforeseeable future.¹³⁸

E. *The Strategic CMR Diagnostic Problem*

The episodes recounted earlier do not demonstrate the enduring value of a rigid civilian “objective control” theory first articulated by Samuel Huntington. Nor do they seem to demonstrate a series of rational actors directing their behavior according to notions of their utilitarian best interests, as described by Feaver. Nor do they demonstrate what Eliot Cohen would describe as a limited partnership between a senior political leader and subordinate military elites engaged in a case-specific and prudence-based “unequal dialogue.” Instead of evidence in support, they elicit more questions. Do they depict a military (or retired military) cadre delivering palliative explanations of their Commander-in-Chief’s own militant messages?¹³⁹ Do they reflect an administration utterly at ease with a military kept on a long leash by its proud handler?¹⁴⁰ Do they reveal a subordinate staff of advisors unable to achieve cohesion as a team (even if as a “team of rivals”), or coherence in support of the president, and consistency in policy-making? Should the civilian Secretary of Defense be held to the same norms of resolute military obedience to his Commander-in-Chief as the Secretary’s own military staff and commanders are, or may he slow-walk the implementation of policies he finds disagreeable?¹⁴¹ The uncertainty breeds the kind of public confusion and questioning of legitimacy that the Mattis Senate hearing seemed to corroborate. These episodes, unlike the so-called “civil-military crises” in the mid-1990s and mid-2000s,¹⁴² do not prove that the military leadership is drifting in a direction farther from the tight grip of civilian domination; instead, they seem to point in no definitive direction at all.¹⁴³

Even accounting for updates by Feaver and Cohen, the Huntingtonian model of civilian dominance over the military’s conduct, and the military leader’s

¹³⁸ See MAURER, *supra* note 47, at 37–74, for a slighter longer exposition on “what the law does (not) say” about structuring civil-military relationships.

¹³⁹ See Julia Manchester, *Mattis warns North Korea of “massive military response” if it threatens US, allies*, HILL (Sept. 3, 2017), <http://thehill.com/policy/defense/349081-mattis-on-north-korea-we-are-not-looking-for-the-annihilation-of-north-korea> [<https://perma.cc/H5PW-X89G>].

¹⁴⁰ Or, at the very least, keeping one “Mad Dog” on a long leash. See Helene Cooper, Eric Schmitt & Glenn Thrush, *supra* note 32.

¹⁴¹ *Id.*

¹⁴² Mackubin Thomas Owens, *What Military Officers Need to Know About Civil-Military Relations*, 65 NAVAL WAR C. REV. 67, 68 (2012) (pointing to the collapse of the USSR as triggering a “period of drift that had an impact on Civil-Military Relations” revealing alienation from civilian leadership, a politicized military, resistance to political oversight, etc., and then—in 2006—the so-called “revolt of the [retired] generals” criticizing President George W. Bush’s strategy in Iraq).

¹⁴³ Chris Cillizza, *Donald Trump’s secret? There is no secret*, CNN (Nov. 28, 2017), <https://www.cnn.com/2017/11/28/politics/trump-shutdown-zero-dimensional/index.html> [<https://perma.cc/G6CN-CMBE>] (“Trump is playing -- and has always been playing -- zero-dimensional chess. There is no grand strategy. There is no broad blueprint. There is just impulse, reaction and then reaction to the reaction.”).

proper role relative to civilian politicians, proves to be inadequate in this case. Ironically, this was evident as early as Mattis's confirmation hearing. Senators were left to quote from a book Mattis *himself* had recently co-edited and to which he had contributed a chapter on civil-military relations¹⁴⁴ as their only written guide for anticipating his behavior at the apex of military strategy. Senator Elizabeth Warren seized on his words, demanding that he "frankly and forcefully" advocate his best advice to other senior national security professionals and to the President.¹⁴⁵ Congress, keen on ensuring that it retains its constitutional authority over aspects of the national security establishment and processes,¹⁴⁶ and keen on checking Executive Branch policy-making, should not be relegated to basing its expectations and oversight on such slim foundations.

Instead, Congress should have a means by which it can establish expectations for future leaders and incumbents at the civil-military nexus: in other words, who should be *assessing* security risks, versus who should get to *judge* whether the risk is politically or socially acceptable?¹⁴⁷ With expectations, such episodes can be evaluated and the relative health of those relationships diagnosed, so that political decision-making over defense budgets, procurement, personnel, and the use of military force is not undermined by a relatively small but powerful and partisan pressure group (or even disproportionately influenced without the consent of the political authorities).¹⁴⁸ But assessment and diagnosis, let alone normative prescriptions, require neutral principles at the heart of accepted standards.

Unfortunately, Congress currently employs no such means—other than questioning the occasional high-profile DoD political or military nominee or during regular oversight hearings, formal commissions, or during informal conversations with senior departmental bureaucrats and subject matter experts.¹⁴⁹ Moreover,

¹⁴⁴ WARRIORS AND CITIZENS: AMERICAN VIEWS OF OUR MILITARY (Jim Mattis & Kori N. Schake eds., 2016).

¹⁴⁵ *Mattis Hearing*, *supra* note 12, at 93–94 (Statement of Sen. Warren).

¹⁴⁶ U.S. CONST. art. I, § 8, cl. 1, 11–14; *see also* Katherine Scott, *A Safety Valve: The Truman Committee's Oversight during World War II*, in CONGRESS AND CIVIL-MILITARY RELATIONS, *supra* note 1, at 36, 49–50 (arguing that Congress's use of an ad hoc commission or committee as an investigative body serves as both a "benevolent policeman" and "safety valve" or way in which to vent genuine civilian concerns over wartime policies and spending while still maintaining a united home front of support for the troops fighting).

¹⁴⁷ FEAVER, *supra* note 56, at 6 ("[T]he military can describe in some detail the nature of the threat posed by a particular enemy, but only the civilian can decide whether to feel threatened and, if so, how or even whether to respond. The military assesses the risk, the civilian judges it.").

¹⁴⁸ JANOWITZ, *supra* note 62, at 234, 349–50, 374 ("[S]train on contemporary political institutions arises rather from the lack of clarity regarding ruled for governing the behavior of the military as a 'pressure group' in influencing both legislative and executive decisions.").

¹⁴⁹ Brian J. Cook, *Principal-Agent Models of Political Control of Bureaucracy*, 83 AM. POL. SCI. REV. 965, 969 (1989) ("Congressional committees and subcommittees do not attempt to influence agency behavior just through discrete 'interventions.' Use of such direct controls is infrequent, although regular in the case of appropriations. But committees also try to work their will by establishing a long-term pattern of interaction and communication with agency bureaucrats.").

neither military doctrine nor its various martial codes, nor DoD ethics policy, provide for clear-cut standards or impose relevant, material neutral principles for these strategic actors.¹⁵⁰ Indeed, many commentators lament the lack of these principles anywhere at all.¹⁵¹ To put it most bluntly, the strategic civil-military problem is that we do not know when there is, in fact, a problem.

III. Fiduciary Duty, Honor, Country

A. *Three Principles*

If we accept the Constitution's Article I and II delegation powers, along with the military's own self-abnegation as part of its internal "ethic," as suggestive of the nature of the American strategic civil-military relationship, we can derive three interrelated principles that help point the way toward a rationale underpinning how these relationships ought to function in practice. The first principle is that there is a *difference by degree*. It reflects a common, long-held appreciation that at the summit of national security, formal distinctions begin to break down.¹⁵² The second principle is *amateur authority over professional specialization*; it relates to how we distinguish those degrees and how to anticipate which element will ultimately have the largest trump card in a controversy. The third principle is derived from the first two: it states that the professional specialization, extant on behalf of the civilian authority, rests in the technical advice she provides, the action she puts into motion and directs, and the expert ability with which she does both. We might call this the *advice-action-ability* principle.

President Kennedy's admonishment of his Joint Chiefs after the Bay of Pigs incident, and his elevation of retired General Maxwell Taylor as the Military Representative to the President, illustrates the first principle. The episode demonstrates how one civilian leader required his military experts to expand their views beyond traditional military estimates.¹⁵³ Lincoln's admonishments of his first field commander, George McClellan, demonstrate another civilian leader's own "digging into the tactical weeds," thus expanding the traditional role of the civilian Commander-in-Chief into the decision making of a general in combat.¹⁵⁴ Former CJCS, Colin Powell, made forays into op-eds, written and published while still on

¹⁵⁰ See MAURER, *supra* note 47, at 53–60.

¹⁵¹ RODMAN, *supra* note 47, at 4; Gordon A. Craig, *The Political Leader as Strategist*, in MAKERS OF MODERN STRATEGY 481, 482 (Peter Paret ed., 1986) ("[I]t is difficult to frame a theoretical definition of appropriate roles that is not so general as to be meaningless.").

¹⁵² VON CLAUSEWITZ, *supra* note 67, at 608; *see also, e.g.*, U.S. DEP'T OF NAVY, 1 MARINE CORPS DOCTRINE PUBLICATION, WARFIGHTING 24 (June 20 1997), *available at* <https://www.marines.mil/Portals/59/Publications/MCDP%201%20Warfighting.pdf> [<https://perma.cc/2G3N-RKZJ>]; GIDEON ROSE, HOW WARS END: WHY WE ALWAYS FIGHT THE LAST BATTLE 3 (2010); COLIN S. GRAY, MODERN STRATEGY 30, 55 (1999); FREEDMAN, *supra* note 121, at 86 (2013); Craig, *supra* note 151, at 482, 499; JANOWITZ, *supra* note 62, at 70; COHEN, *supra* note 60, at 7–12; DUBIK, *supra* note 107, at 24, 36, 144.

¹⁵³ See NATIONAL SECURITY ACTION MEMORANDUM NO. 55, *supra* note 130.

¹⁵⁴ MAURER, *supra* note 47, at 117–18.

active duty,¹⁵⁵ showcasing yet another way in which the fine line between civilian and military policy-making might dissolve in particular cases. In such cases, we sense only a spectrum of civilian politicians and military politicians, with the latter limited only by what amount of risk a civilian elite wishes to take by publicly repudiating it or not at all. These strategic political and military elites may have distinct and opposing views for how best to provide for that defense (which may trigger acts of disobedience or “shirking”). They may have different specific roles to play in advancing, promulgating, or vetoing those ways and means. They may each assess their problems with different analytical arguments and institutional biases,¹⁵⁶ which they may answer to the public in different ways. Nevertheless, these parties are all—at one level of abstraction—senior national security authorities in the sense that they each contribute their varied efforts toward the same overarching end: national defense in the public interest.

While they are all national security authorities in the broadest of senses, and separated by only gradient degrees, the second principle—*amateur authority over professional specialization*—emphasizes the space between them. Where Eliot Cohen conceptualizes the “unequal dialogue,” this principle describes *why* there is a dialogue at all and *why* it is among *unequal* partners. First, to manifest her authority in the realm of national defense, the civilian will usually require specialized knowledge to inform a judgment or to give practical effect to that decision (usually both). This knowledge, as Huntington, Janowitz, Snider, and others have persuasively argued, is the province of a certain class of professionals. Hence, the “amateur authority” distinguished from “professional specialization” branches of the national security enterprise.

That specialized knowledge, however, is used lawfully only at the discretion and direction of—by the command of—superior politically-legitimized civilian leaders. Military elites, whether a Combatant Commander, a Service Chief of Staff, or CJCS, can never elect their way to a winning argument. That is to say, they cannot take their dispute to the streets for a public airing and vote. They cannot enjoin Congress, or their fellow officers, to vote a proposed policy up or down and thereby countermand a directive issued by a president or a secretary of defense: they must, as Robert Gates wrote, “obey loyally, especially when they are overruled.”¹⁵⁷

Nor can they be elected to serve in military positions. Rather, they serve “at the pleasure of” the President. They lack a society-wide imprimatur of legitimate civilian authority. Their *only* authority, and freedom to express it in various forms, is in the “management of violence”¹⁵⁸ (at various scales and before, during, and after armed conflict) and is a subordinate power derived from the executive

¹⁵⁵ See, e.g., Powell, *supra* note 26 (noting that military means must match political objectives and that President George H.W. Bush understood this “more than any other recent president.”).

¹⁵⁶ See generally BUILDER, *supra* note 62 (describing the various “personality” types of the separate Armed Services).

¹⁵⁷ ROBERT GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR* 574–75 (2014).

¹⁵⁸ HUNTINGTON, *supra*, note 35, at 11 (quoting Harold Lasswell).

authority of the President (and tangentially by Congress if it confirmed the flag officer to the position and when Congress calls on the officer to testify). Hence, the amateur authority is always “over” (that is, with a capacity to enjoin, direct, monitor, hire, and fire) the professional specialist. Whether a president or secretary of defense fires a commanding officer is a calculated decision based in part on ascertained political risk and military need. General McClellan, General MacArthur, and General McChrystal did not question the authority of their Commanders-in-Chief to remove them.¹⁵⁹ They may have complained,¹⁶⁰ but there was no military rebuttal. Such removal decisions, and the scope of responsibility carved out for the military leader, is a question of prudence, practicality, and politics. But the principle remains: the President *can* remove such a military strategic elite at will and there is no political or administrative recourse for that military officer. Thus, it is an amateur—lacking technical and professional experience in the field of war *as compared to* the military strategic elite he appoints—that has the final say.

Given this civilian supremacy, the civilian relies on the military elite for three tasks for which the civilian lacks technical competence or adequate time, or both. This “advice-action-ability principle” states, akin to Huntington’s original explanation of the military’s “responsibilities” (representative, advisory, and executive),¹⁶¹ that the military strategic elite’s unique contributions to national security are threefold. First, the military elite is a repository of subject-matter expertise and experience in preparing for, waging, or recovering from armed conflict and its derivative organizational and institutional requirements. The civilian political authority relies on the candid *advice* drawn from this expertise and experience.¹⁶² Second, the military elite—when granted express or implied authorization from the political leader—is triggered to *action*. The military elite employs the skills, resources, or organization at his or her disposal to bring the policy decision to fruition within the political aims of the civilian. When they fail to act according to those demands, they are subject to being relieved of their senior responsibilities or from command. Third, such reliance on the military elite’s judgment (a hopeful combination of expertise and experience), and the amount of discretion afforded that military elite to act, is reasonably dependent on the

¹⁵⁹ See, e.g., *Hearing on the Dismissal of General Douglas MacArthur Before the Joint Committee S. Comm. on Armed Services and S. Comm. on Foreign Relations*, 82nd Congress 27–28 (1951) (statement of Gen. Douglas MacArthur); Eun Kyung Kim, *McChrystal on resignation: “I wanted to stay on the job,”* TODAY (Jan. 7, 2013), <http://www.today.com/news/mcchrystal-resignation-i-wanted-stay-job=1B7854301> [<https://perma.cc/ZJV2-WURZ>].

¹⁶⁰ See MAURER *supra* note 47, at 161–67.

¹⁶¹ HUNTINGTON, *supra* note 35, at 72.

¹⁶² GATES, *supra* note 157, at 574–75; see also CTR. FOR THE ARMY PROFESSION AND ETHIC, ARMY: PROFESSION OF ARMS 15 (Oct. 7, 2010), <http://www.cape.army.mil> [<https://perma.cc/6LFF-2SU2>]; U.S. ARMY TRAINING AND DOCTRINE COMMAND, THE PROFESSION OF ARMS: AN ARMY WHITE PAPER 26 (Dec. 8, 2010), available at <http://www.benning.army.mil/armor/content/PDF/Profession%20of%20Arms%20White%20Paper%208%20Dec%202010.pdf> [<https://perma.cc/PQH3-ML88>].

civilian's trust in the *ability* or competence of the military elite. If the subordinate's competence, diligence, or resourcefulness is questioned, he or she remains subject to the senior's varying intrusiveness, observation, micromanagement, or condemnation.

None of these three principles contradict the works of Huntington, Cohen, Feaver, or other historians and political scientists engaged in studying these dynamics. In fact, they are fairly uncontroversial statements about the generic relationship between civilian and military elites.¹⁶³ It is their nature as uncontroversial statements, however, that makes the strategic civil-military relations problem—the gap in diagnostic ability described earlier—so perplexing. These three principles are the conventional elements of a standard fiduciary relationship in a jurisprudential principal-agent dynamic, like that between a lawyer and client. In other words, the strategic civilian political elite is to the strategic military elite as the client is to the client's lawyer.¹⁶⁴

B. *Jurisprudential Agency Fiduciary Duties*

While neither political science scholarship nor the Constitution provide for objective standards that could distribute authority, allocate responsibility, and impose expectations on these civil-military elites, there is a branch of law that could.¹⁶⁵ And this branch of law just happens to be built on the three principles described above. Jurisprudential agency is a model that characterizes certain relations among parties in which one dictates the end and uses the other party to practically achieve it, with legal consequences for certain deviations or breaches. Each party is presumably acting in their own best interest (whether that interest is objectively reasonable or rational is immaterial), labor is divided and unequal, and—consequently—the relationship imposes obligations on, and expectations of, those parties relative to one another. 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

¹⁶³ In a similar argument, others have argued about whether the relationship between the president and his or her Supreme Court nominees are that of principal and agent. *See, e.g.*, CHRISTINE L. NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH 33–34 (2007); RICHARD A. POSNER, HOW JUDGES THINK 126 (2008) (questioning which “principal” to whom the Justice owes agent-like duties—current president, past president, the Constitution, etc.).

¹⁶⁴ Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L. J. 969, 971 (2013) (“[F]iduciary duties are pervasive in modern civil society. Whether we are aware of it or not, virtually all of us have, in our lives or upon our deaths, interest subject to the discretion of a fiduciary. In most cases, where we rely on another person to represent us or to take care of our person or property, we do so within a fiduciary relationship. Fiduciary law, as much as contract, property, or tort law, is a dominant mode of imposing legal structure on day-to-day-life.”).

¹⁶⁵ Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 BOSTON U. L. REV. 1289, 1299 (2011).

act.”¹⁶⁶ A fiduciary duty, under this theory, has come to mean performance to achieve the principal’s goals with “utmost good faith, trust, confidence and candor” and to “act with the highest degree of honesty and loyalty” on behalf of the directing principal.¹⁶⁷ The principal, as the ultimate bearer of risk, enjoys the benefits of outsourcing to the agent many of the expertise-laden and time-consuming tasks required to achieve his or her aims, and enjoys the benefits of having the agent owe these duties of care and loyalty.¹⁶⁸

The resulting entangled fiduciary relationship is characterized by both shared and individual responsibilities, built on a trifecta of mutual understanding, mutual need, and mutual accountability (though here, mutual need not mean “equal”).¹⁶⁹ Fiduciary law scholar Tamar Frankel simplifies these structures to just two “components.” First, agents offer a socially-significant service, like legal counsel, estate management, accounting, or medical aid (echoing Huntington’s view of the nature of a “professional” military). Second, such relationships involve “entrustment”—principals trust the agent’s greater access to relevant information and their experience (usually) and therefore hand over some sphere of control and discretion to make certain decisions.¹⁷⁰ This is, at a basic level, the role of a lawyer relative to a client.¹⁷¹

¹⁶⁶ RESTATEMENT (THIRD) OF AGENCY: AGENCY DEFINED § 1.01 (Am. Law Inst. 2006).

¹⁶⁷ BLACK’S LAW DICTIONARY 545 (8th ed. 2004) (definition of “fiduciary duty”); *id.* at 1315 (definition of “fiduciary relationship”); *see also* Frankel, *supra* note 165, at 1291.

¹⁶⁸ Paula J. Dalley, *A Theory of Agency*, 72 U. PITT. L. REV. 495, 497 (2011); Miller, *supra* note 164, at 976 (referring to the “cardinal duty” of loyalty). This duty brings significant concerns to the principal-agent relationship between a civilian politician and military leader, as civilians do not directly remunerate military officers for their particular job assignment—say as Commander of a Combatant Command—but rather every officer’s pay is part and parcel of the annual fiscal appropriation from Congress, and the officer’s base salary is based on rank and time in service, not the specific duties to which they are assigned (with minor exceptions to this rule, including special incentive and bonus pay for certain types of specialized career paths or hazardous duty, and additional pay allowances to compensate certain senior officers for ceremonial costs they tend to incur as recurring and expected elements of their title). *See* DEP’T OF DEFENSE, DOD 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 7A, ch. 31 (2015). At its core, however, this sense of loyalty can be generalized as one of avoiding a conflict between the military’s own ambitions and interests and the cardinal subordination to the rule of law (i.e., civilian supremacy) as embodied by the lawful discretionary aims of the civilian principal. Miller, *supra* note 164, at 977. This, of course, is not as simply executed in practice: the military elite may not fully acknowledge or recognize that his or her actions may signal such contrary ambitions, but may view their actions—or inaction—as sacrifice for the “good of the nation” or to “support and defend” the constitution. CTR. FOR THE ARMY PROFESSION AND ETHIC, *supra* note 162.

¹⁶⁹ *See* Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301, 302–03 (1995); DUBIK, *supra* note 107, at 22.

¹⁷⁰ *See* Frankel, *supra* note 165, at 1293. *But see* Miller, *supra* note 164, at 983 (arguing that the law of fiduciary relationships is built on an “interaction for the exclusive benefit of one party”).

¹⁷¹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. b (2000); *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); *see also* James A. Cohen, *Lawyer Role, Agency Law, and the Characterization “Officer of the Court,”* 48 BUFFALO L. REV. 349, 388 (2000).

Just as any principal—be it an attorney’s client, a doctor’s patient, or trustee’s beneficiary—relies on the subject-matter expertise, experience, and judgment of their agents, the strategic civilian elite likewise remains partially dependent on the skill, conduct, and judgment of the strategic military elite.¹⁷² Just as any principal gives up some degree of personal ownership for solving or monitoring a problem or advancing his or her interests to gain time or to gain even greater expertise of the agent, the strategic civilian elite empowers the strategic military elite to manage, conserve, and employ military resources, and to provide expert counsel on questions of using armed force for which the civilian is legally and politically accountable.

These relations are further described by various duties, mostly falling on the shoulders of the agent, which guide the agent’s performance in light of the principal’s direction, expectations, and risk assumption.¹⁷³ The agent is generally bound by duties of good faith (called “fair dealing”), loyalty, candor and honesty, confidentiality, trust (absence of the agent’s “self-dealing” or self-promotion at odds with the principal’s own goals for which the agent was hired), and due diligence.¹⁷⁴ All of that is a fairly useless scaffolding of obligations owed by the agent unless both parties mutually agree and understand the agent’s scope of responsibility or authority that serves as a foundation for keeping the agent from freelancing, acting irresponsibly against the interests of the principal, or knowingly and willfully disobeying the principal’s direction or intent.¹⁷⁵

With these duties in hand, it becomes easier to assess, judge, and diagnose strategic civil-military relationships against well-known norms. For example, when a senior military professional answers questions posed by Congress about how many troops an invasion and post-victory stabilization or occupation will likely demand, as former Army Chief of Staff Eric Shinseki was on the eve of Operation Iraqi Freedom, we can evaluate his answer in terms of his duty of candor to a congressional oversight committee against any possible duty of confidentiality and trust he may have had with the President or the Secretary of Defense. Consequently, we can begin to diagnose potential pathologies in the relationship he had with these

¹⁷² It is not always the case that a non-expert relies on an expert in a principal-agent fiduciary relationship. See Miller, *supra* note 164, at 982. A trustee is very often not any more skilled with finances or estate planning than the beneficiaries. A lawyer may also rely on another lawyer for representation. A political elite may have significant expertise in the field for which he empowers military agents (to wit: Secretary of Defense James; President Dwight D. Eisenhower).

¹⁷³ Some theorists of Agency law suggest that, rather than a “description” of a fiduciary relationship, these duties are only necessary consequences—legally enforceable—of the parties having entered into such an association. See, e.g., *id.* at 971–72.

¹⁷⁴ BLACK’S, *supra* note 167, at 544–45; see also RESTATEMENT (THIRD) OF AGENCY, *supra* note 166, at §§ 8.01, 8.10, 8.15.

¹⁷⁵ RESTATEMENT (THIRD) OF AGENCY, *supra* note 166, at § 8.09; but see W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 53 (1999); Burk, *supra* note 134, at 151–54.

civilian elites who publically contradicted him a short time later.¹⁷⁶ When a president relieves a combat commander, as Lincoln did with McClellan (for incompetence), Truman did with MacArthur (for disobeying a direct order to stop speaking publically about the nation's foreign policy with respect to China and the Korean War), and Obama did with McChrystal (for apparent inability to check his subordinates' disrespect to office of the President and other civilian national security staff), we can assess these supposed "crises" against neutral norms. Their decisions can be checked against the agent's granted scope of authority, the agent's duty of care and competence, and the principal-agent meeting of the minds concerning the ultimate ends for which the relationship exists and the ways and means anticipated for its execution.

These duties provide an opportunity even today. When a president grants his military commanders and senior strategic elites "total authorization" to engage the enemy on the field with little to no political input, critical evaluation, or criticism, as President Trump seems to have granted to Secretary Mattis and the commanders in Iraq and Afghanistan,¹⁷⁷ we may assay this development and subsequent actions of both parties in terms of what scope of authority this principal granted his agents, and whether those agents requested or required such latitude to effectively achieve the policy aims established by their principal.

Finally, these fiduciary duties present Congress with well-known terms of art and objective norms for any number of routine but critical roles the legislative branch bears, not the least of which is a better lexicon for probing nominees for these appointed strategic-level positions, whether civilian or military. These duties, as they do for other professions, provide these parties with substantive expectations based on a rationale derived from the *purpose* of their relationship. Therefore, they provide a means for deconstructing apparent civil-military crises, parsing the pathological relationships from the healthy ones. This is a thought not lost on the strategic leadership of the military, in the wake of almost two decades of warfighting, as illustrated by this conclusion from a report produced at the National Defense University (NDU) in 2015: "Good working relationships between civilian and military partners, despite differences that may arise on specific issues, will go far toward resolving the natural tension inherent in the civil-military relationship."¹⁷⁸

¹⁷⁶ Eric Schmitt, *Threats and Responses: Military Spending; Pentagon Contradicts General On Iraq Occupation Force's Size*, N.Y. TIMES (Feb. 28, 2003), <https://www.nytimes.com/2003/02/28/us/threats-responses-military-spending-pentagon-contradicts-general-iraq-occupation.html> [<https://perma.cc/H4XQ-87PF>].

¹⁷⁷ See Cooper & Mashal, *supra* note 20.

¹⁷⁸ LESSONS ENCOUNTERED: LEARNING FROM THE LONG WAR 9 (Richard D. Hooker, Jr. & Joseph J. Collins eds., 2015). The authors of the study, summarizing advice from an interview with former CJCS, General (Ret.) Martin Dempsey, observed that:

Civilian national security decision-makers need a better understanding of the complexity of military strategy and the military's need for planning guidance.

Other than often citing Cohen’s formulation of the “unequal dialogue,”¹⁷⁹ the NDU study does not explicitly define objective duties that direct both the strategic civilian and military leaders in their day-to-day norms. It suggests that good relationships will overcome the “natural” and unavoidable tensions between the two dissimilar groups, and suggests that “good” simply means engaging in “vigorous discussion” and pressing for “clarity” from the civilian leadership when uncertain about policy ends, but noting that “this conversation must be carried on in private, not in the public square.”¹⁸⁰ The authors further conclude that “senior military figures also have an obligation to provide their military expertise and, if necessary, their respectful dissent to help prevent strategic disaster.”¹⁸¹ These recommendations are all tacit reminders of a fiduciary-type relationship among these strategic leaders. The next step ought to be granting those reminders an explicit justification, and broadcasting them, so that those bound by them are on notice of the expectation. To encode and promulgate an articulated set of norms, directed at certain members of the public, as a means for shaping their future conduct and instituting standards for judging that conduct, just another way of saying: “legislate.”

IV. Goldwater-Nichols as a (de facto) Code of Professional Responsibility

Uncontroversially, lawyers’ fiduciary duties to their clients are listed, defined, and explained in codes of professional responsibility. These codes are promulgated by their respective state bars. Lawyers must obey these rules, or faithfully follow those that are “aspirational,” lest they become subject to discipline (ultimately, disbarment, but in extreme cases may accompany actual criminal charges). Military service-members have their own martial codes of professional ethics and regulations, but as I have described elsewhere, these are either too vague, or focus exclusively on preventing unjust personal enrichment.¹⁸² These general admonitions and self-subordination are fundamentally ill-suited to describe or direct the relationships among senior strategic civil and military elites.¹⁸³ And, of course, there is nothing in case law—nor regulations imposed on strategic civilian elites—that comes close to providing any guidance whatsoever.¹⁸⁴ Adding discussion of this fiduciary nature of the strategic civil-military relationship to

Senior military officers for their part require a deep understanding of the interagency decision-making process, an appreciation for civilian points of view, and a willingness to appreciate the complexities and challenges inherent in our system of civilian control.

Id. at 7. This need for mutual understanding that underlies grasping one’s scope of responsibility is at heart of the fiduciary responsibilities in a jurisprudential agency relationship. The authors’ observation is creditable, and certainly well-sourced, but lacks explicit grounding that justifies and explains those observations.

¹⁷⁹ *Id.* at 7, 72.

¹⁸⁰ *Id.* at 8.

¹⁸¹ *Id.*

¹⁸² MAURER, *supra* note 47, at 53–60.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 48–53.

existing federal law *that already purports to assign some functional divisions of labor and established particular responsibilities* among the military elite would, therefore, be as uncontroversial, and fulfill many of the same needs, as a lawyer's code of professional ethics. The Goldwater-Nichols Act appears to be this ready-made legislative vehicle, and would likely fit within Congress' rule-making powers under Article I, section 8, clause 14 of the Constitution.¹⁸⁵

A. *Purpose of the Goldwater Nichols Act*¹⁸⁶

Enacted in 1986, the Goldwater-Nichols Act is the most recent, comprehensive, and legislative ordering of the nation's defense establishment. It remains, in a recent Defense Secretary's words, a "critical organizational framework."¹⁸⁷ The Act's primary function, by reducing certain inefficiencies, clarifying the operational chain-of-command and distinguishing it from the president's principal military advisors, was to improve the military's ability to operate jointly, orchestrating all of its Services (Army, Navy, Air Force, Marine Corps, Coast Guard) in concert.¹⁸⁸ Not long before he retired in 1982, then-CJCS, 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 influential."¹⁸⁹ He wanted to convince Congress that the current structure and relationships should be fundamentally reconsidered to avoid the systemic planning faults that contributed to the aborted Iran hostage rescue operation in 1981.¹⁹⁰ Congress was also influenced by the military's response to the bombing of the Marine Corps barracks in Beirut, the Grenada mission, and a dysfunctional relationship between Secretary of Defense Casper Weinberger and military planners.¹⁹¹ 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

¹⁸⁵ See, e.g., Rudesill, *supra* note 63, *passim* (suggesting that this clause carries two implicit Congressional powers: to regulate the internal structure, organization, and discipline of the Armed Forces, as well to justifying Congressional efforts to regulate the "external," operational actions of the Armed Forces that are commanded by the president).

¹⁸⁶ Goldwater-Nichols Act, *supra* note 4, at §§ 151-155 (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)). A version of this section appears in MAURER, *supra* note 47, at 43-46.

¹⁸⁷ Aaron Mehta and Joe Gould, *Carter Unveils Goldwater Nichols Reform*, DEFENSE NEWS (Apr. 5, 2016) (quoting Secretary Ash Carter), <https://www.defensenews.com/breaking-news/2016/04/05/carter-unveils-goldwater-nichols-reform/> [<https://perma.cc/8WGU-CFF9>].

¹⁸⁸ KATHLEEN J. MCINNIS, CONG. RESEARCH SERV., R44474 GOLDWATER-NICHOLS AT 30: DEFENSE REFORM AND ISSUES FOR CONGRESS 7-8 (2016).

¹⁸⁹ *Reorganization Proposals for the Joint Chiefs of Staff: Hearings Before the Investigations Subcomm., H. Comm. on Armed Services*, 97th Cong. 54 (1982) (statement of Gen. David Jones, Chairman of the Chiefs of Staff).

¹⁹⁰ James R. Locher III, *Has it Worked? The Goldwater-Nichols Reorganization Act*, 54(4) NAVAL WAR COLL. REV. 100 (2001).

¹⁹¹ THOMAS L. MCNAUGHER & ROGER L. SPERRY, IMPROVING MILITARY COORDINATION: THE GOLDWATER-NICHOLS REORGANIZATION OF THE DEPARTMENT OF DEFENSE 229 (1994).

bills in both the House and Senate and initial resistance to the JCS reform from inside the Pentagon, the final Act was 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.”¹⁹²

Among other things, the Act placed more responsibility and clearer lines of direct authority on the field commanders to train, plan, and fund for contingencies in a more “joint” fashion, thereby elevating the role and importance of the “Combatant Commands” spread around the globe.¹⁹³ It established an operational chain-of-command running from President to Secretary of Defense to the Combatant Commander (four-star General or Admiral, depending on the Command), removing the Service chiefs (also four-star Generals and Admirals), the Chairman, and individual military department (civilian) Secretaries from the operational loop.¹⁹⁴ It also allowed the President or Secretary of Defense the option of keeping the Chairman in the line of communications between National Command Authority and the Combatant Commanders, or to “overseeing the activities of” those commands.¹⁹⁵ The Act gave these Commanders 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.¹⁹⁶ The Chairman, however, was elevated over the other members of the JCS to make him, clearly, the senior officer in the United States military and principal military advisor to the President and Secretary of Defense.¹⁹⁷ Not only could the Chairman relay requirements from his fellow four-star Combatant Commanders, he was no longer left to negotiate with the Service chiefs to seek a unified corporate decision or recommendation.¹⁹⁸ It also required the Chairman to present dissenting views of the Service chiefs alongside his own recommendations,¹⁹⁹ and of course the President and Secretary of Defense could

¹⁹² Goldwater-Nichols Act, *supra* note 4, at pmb1.

¹⁹³ There are nine Combatant Commands, 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, COMBATANT COMMANDS, <https://www.defense.gov/know-your-military/combatant-commands> [https://perma.cc/3NTW-FXYX] (last visited Nov. 4, 2018). In August 2017, President Trump announced a tenth COCOM: U.S. Cyber Command, formerly a sub-unified command under USSTRATCOM. *See* THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, STATEMENT BY PRESIDENT DONALD J. TRUMP ON THE ELEVATION OF US CYBER COMMAND, (Aug. 18, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/18/statement-donald-j-trump-elevation-cyber-command> [https://perma.cc/G4WH-GMM9].

¹⁹⁴ 10 U.S.C. § 162(b) (2018).

¹⁹⁵ 10 U.S.C. § 163(a)–(b) (2018).

¹⁹⁶ 10 U.S.C. § 164 (2018).

¹⁹⁷ 10 U.S.C. § 163(b)(2).

¹⁹⁸ 10 U.S.C. § 151(b)(1) (2018).

¹⁹⁹ 10 U.S.C. § 151(d)(2).

still seek recommendations from the Service chiefs, independent of the CJCS or VCJCS, though those Service chiefs must first notify the Joint Chiefs.²⁰⁰

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 DoD.²⁰¹ The Act even refers to the Service chiefs as the "agent" of the superior civilian Service secretary.²⁰² 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 CJCS, for instance, remained subject only to his general understanding of the Constitution's subordination of the military to the President, his oath of office, and any self-imposed limits beyond those established in Goldwater-Nichols.²⁰³

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.²⁰⁴ In the case of General Tommy Franks, Commander of USCENTCOM from 2000–2003, the purposes of the Goldwater-Nichols Act became frustrated because it did 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 revealed 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

²⁰⁰ 10 U.S.C. § 151(d).

²⁰¹ 10 U.S.C. § 663 (2018).

²⁰² 10 U.S.C. §§ 3033(d), 5033(d), 8033(d) (2018) (The Chief of Staff shall "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.").

²⁰³ Such was the case with General Powell. His long association with the Reagan and George H.W. Bush Administrations, his White House Fellowship, and his time as 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. See Eliot Cohen, *In DoD We Trust*, NEW REPUBLIC, June 17, 1991, at 34–35.

²⁰⁴ MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, *COBRA II* 5 (2006).

Rumsfeld.²⁰⁵ “Disciplined and ambitious”²⁰⁶ but also “loyal and diligent,”²⁰⁷ 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 planning.²⁰⁸ As a result, General Franks insufficiently questioned the Secretary of Defense’s underlying assumptions or goals leading to the invasion of Iraq in 2003.

In the subsequent years, despite a growing mass of civil-military debate and apparent tension amongst those filling these positions, very little has fundamentally changed in the Act. Prodded by a sense that the Pentagon’s vast bureaucratic mindset and organizations were unfit to adapt to a post-9/11 world of asymmetric and terrorist threats, violent non-state actors, warfare waged with unbalanced coalitions (in terms of ability, capacity, and national willpower), and the terminal velocity (so to speak) of information around the world, both the DoD and Congress appeared ready to reexamine the Act.²⁰⁹ The Center for Strategic and International Studies (CSIS) offered an “open letter” in which notable practitioners and scholars weighed in on the Act and “national security reform more generally.”²¹⁰ The authors condemned the inefficient layering of structure, duplication of efforts, and “sclerotic” fixation on processes over products. As unassailable foundations, though, CSIS reminded Congress and defense reformers of two principles: “First, we must sustain civilian control of the military through the secretary of defense and the president of the United States and with the oversight of Congress. Second, military advice should be independent of politics and provided in the truest ethos of the profession of arms.”²¹¹

During the 114th Congress, the Senate and House Armed Services Committees invited testimony from retired military leaders, civilian national security professionals, and scholars, and heard more than one hundred proposals for DoD reform, suggesting that, at thirty years old, the Goldwater-Nichols Act was primed for change.²¹² None of these recommendations, however, sought to critically examine the *nature* of the strategic civil-military relationship, nor provide its participants with meaningful standards or norms derived from that nature.²¹³

²⁰⁵ *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 meddlesome military bureaucrats . . . [and] resented their input”).

²⁰⁶ *Id.* at 28.

²⁰⁷ *Id.* at 27 (quoting General Anthony Zinni, Franks’ former superior at CENTCOM).

²⁰⁸ ROSE, *supra* note 152, at 267–68.

²⁰⁹ MCINNIS, *supra* note 188, at 13–14.

²¹⁰ *Open Letter on Defense Reform*, CTR. FOR STRATEGIC AND INT’L STUDIES (Mar. 14, 2016), <https://www.csis.org/news/open-letter-defense-reform> [<https://perma.cc/CF3Q-DW74>].

²¹¹ *Id.*

²¹² See, e.g., *Goldwater-Nichols Reform: The Way Ahead: Hearing Before the H. Comm. on Armed Services*, 114th Cong. (2016); *30 Years of Goldwater-Nichols Reform: Hearing Before the S. Comm. on Armed Serv.*, 114th Cong. (2015).

²¹³ MCINNIS, *supra* note 188, at 24–28.

The National Defense Authorization Act of 2017 included a relatively minor amendment (minor considering that it was how the relationship had evolved in practice anyway).²¹⁴ It specified that the CJCS position would be a four year term (as opposed to the traditional norm of two years, followed by a nearly *pro forma* re-nomination and confirmation to a second two year term), provided opportunity for the Defense Secretary to delegate to the CJCS authority to approve the shifting and sharing of resources from one Combatant Command to another,²¹⁵ and ordered Combatant Commanders to “provide such information to the [CJCS] as may be necessary for the Chairman to perform the duties of the Chairman.”²¹⁶

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 still says nothing of accountability within these relationships. 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 was, and remains, a missed opportunity.

B. *Amending the Text in Three Short Illustrations*

Below, I have provided sample amendments of three key provisions of the Goldwater-Nichols Act. The first would amend the “policy” formulation behind the Act, adding statements describing the amendment’s purpose—that is, using principles of jurisprudential agency theory to encode norms, standards, and expectations of the relationship between key strategic leaders at the helm of U.S. national security. These policy statements, shifting from the original Act’s focus on streamlining the structure—the architecture—of overall combat-related command and “jointness,” to focus on the interactions among those inside building itself. The second and third draft amendments address the fiduciary relationship between members of the Joint Chiefs of Staff, Combatant Commanders, the President, and the Congress. Such duties, it will be evident, may create a potential “conflict of interest” dilemma in which the military agent is seemingly caught between duties of loyalty to two contrary civilian principals. Therefore, such encoded norms and standards are not without risk and inherent ambiguities. These will be taken up in Section C below.

²¹⁴ Mehta & Gould, *supra* note 187.

²¹⁵ 10 U.S.C. § 153(a)(3)(B).

²¹⁶ 10 U.S.C. § 164(h) (as amended 2017).

These draft amendments are offered solely in the spirit of illustrating how certain fiduciary duties—long established in written codes of professional responsibility for other types of agents and their principals—might appear encoded within legislation that already seeks to structure the relationship.

Example Draft Text of an Amendment

Policy: In enacting these revisions,²¹⁷ 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. It is not the intent of Congress to create or implicitly sanction any private cause of action by or against the United States, its agencies, its officers or employees, or any other person.*

[Amended] § 151. Joints Chiefs of Staff: composition; functions; fiduciary duties

[Author’s 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

²¹⁷ Author’s revisions are indicated by italicized text.

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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 President as Commander-in-Chief, to the extent that such actions are consistent with the lawful objectives, lawful responsibilities, and with the lawful intent of the President.

(2) the relationship between the military officer in the positions listed above and the United States Congress is a fiduciary relationship, but of a more limited scope than that existing between the officer and the President. In the Congress's role under Article I of the Constitution, the Congress—by and through its individual members and relevant committees—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 providing the Congress accurate, complete, and relevant information about subjects within that officer's scope of responsibility. In providing candid assessments and advice regardless of apparent or foreseeable political risk, the individual officer member of the Joint Chiefs of Staff shall act as the agent of the Congress, to the extent that such actions are consistent with the lawful objectives, lawful responsibilities, and with the lawful intent of the Congress. Such candor before the Congress shall not be construed by any elected official or politically-appointed official in the Department of Defense or Executive Office of the President, as breaches of loyalty, confidentiality, or other duty.

(3) 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 military agent knows or reasonably should know is expected to be withheld

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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) if asked by a member of Congress in an official and public forum to offer a professional or personal opinion on matter the officer knows or reasonably should know is contrary to that of his or her political principal and has been tacitly or expressly overridden by a strategy, decision, directive, or order communicated to that officer, the officer shall first presume that his or her opinion is confidential and will not disclose that opinion, or that such an opinion exists, in an official and public forum unless in receipt of express and knowing consent of the principal; if the principal's knowing consent to disclosure is ambiguous or unknown, the agent shall presume no consent has been given;

(I) 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);

(J) 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.

[Amended] §164

Responsibilities of Combatant Commanders. [Author's note: only recommended additions to the existing text of §164 appear below]

(d) in carrying out the functions described in subsections (b) and (c), the Combatant Commander 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 position listed above and the President of the United States and Secretary of Defense is a fiduciary relationship. In the President's role under Article II of the Constitution as the Commander-in-Chief of the Armed Forces, and through the Secretary of Defense at the President's discretion, the President acts as the principal, relying on the technical expertise, practical experience, and professional judgment of the officers nominated and confirmed as Combatant Commander in the execution of the President's constitutional responsibilities and authorities. The individual officer shall act as the agent of the President as Commander-in-Chief, to the extent that such actions are consistent with the lawful objectives and with the lawful intent of the President.*

(2) *the relationship between the military officer in the position listed above and the United States Congress is a fiduciary relationship, but of a more limited scope than that existing between the officer and the President. In the Congress's role under Article I of the Constitution, the Congress—by and through its individual members and relevant committees—acts as the principal, relying on the technical expertise, practical experience, and professional judgment of the officers nominated and confirmed as Combatant Commanders in providing the Congress accurate, complete, and relevant information about subjects within that officer's scope of responsibility. In providing candid assessments and advice regardless of apparent or foreseeable political risk, the individual officer shall act as the agent of the Congress, to the extent that such actions are consistent with the lawful objectives, lawful responsibilities, and with the lawful intent of the Congress. Such candor before the Congress shall not be construed by any elected official or politically-appointed official in the Department of Defense or Executive Office of the President, as breaches of loyalty, confidentiality, or other duty.*

(3) *in fulfilling the expectations of the civilian principal and consistent with the specified advisory functions described in subsection (b) and (c), 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, such as the Secretary of Defense), 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*

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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 military 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) *if asked by a member of Congress in an official and public forum to offer a professional or personal opinion on matter the combatant commander knows or reasonably should know is contrary to that of his or her political principal and has been tacitly or expressly*

overridden by a strategy, decision, directive, or order communicated to that commander, the commander shall first presume that his or her opinion is confidential and will not disclose that opinion, or that such an opinion exists, in an official and public forum unless in receipt of express and knowing consent of the principal; if the principal's knowing consent to disclosure is ambiguous or unknown, the agent shall presume no consent has been given;

(J) 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);

(K) 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.

(e) The provisions in (d)(1) and (d)(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.

The language above applies well-known duties, but incorporating them this way and applying them to strategic civil-military relationship contexts like those described earlier in Part I are subject to reasonable theoretical and practical objections. Lifting a well-established legal framework from one type of jurisprudence and transplanting it into current statute for an entirely new and novel purpose comes with a fair share of risk, and should be scrutinized. These challenges are taken up in the next section.

C. Flank Attacks on this Statutory Proposal

1. The Litigation Problem

Consider, for example, that Agency is a legal framework that traditionally imposes legally-enforceable obligations on the parties. In the context of the often-secret and underpublicized conversations and the information by which these civil-military leaders make decisions, a legal framework might harmfully encourage litigation as the remedy for resolving disputes over issues that may not normally,

and should not in many instances, see the light of day.²¹⁸ As if the public firestorm over the MacArthur-Truman crisis was not sufficiently heated, its translation into a legal conflict over either party's inherent or specified authorities could have generated a true crisis over the meaning of the president's Commander-in-Chief powers, and additional debate over the extent to which the public should know of such a dispute, let alone the arguments themselves. During a time of war, opponents of such jurisprudential agency duties for CMRs would persuasively contend that such internecine battles pose an unacceptably high risk of sapping troop morale, further dividing or dissolving public support, and distracting operational planning of actual battles.

This concern is not as significant a deterrent as it would appear on first glance. As Michael Desch has noted, neither civilian nor military elites are prone to publicizing their grievances with one another. Political leaders worry about appearing "weak" next to their uniformed and more technically-experienced military officers; military leaders worry about the appearance of violating the sacrosanct subordination to civilian authority.²¹⁹ These are profoundly powerful motivators, coupled with historical precedent and cultural attitudes within the national security establishment, to shield and screen contentious relationships from the public view; the likely remedies afforded by a judicial proceeding may seem both insignificant and too distant to incentivize pursuing the day-in-court strategy. Second, an amended Goldwater-Nichols Act could include a private cause of action disclaimer clause. Ruling out the possibility of a political or military elite as a plaintiff, it could state: "It is not the intent of Congress to create or implicitly sanction any private cause of action by or against the United States, its agencies, its

²¹⁸ A so-called "secret" court, created by Congress, that could adjudicate these issues involving highly classified information might resolve discrete disputes, but would prove ill-suited for giving the public a better sense of how these relationships ought to function. Moreover, such a secret court's mandate—as interpreted by its judges or as granted to it by Congress—could expand well-beyond the initial premise of objectively refereeing between senior political and military leaders within the executive branch or between the executive and legislative branches. *See, e.g.,* Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT. SEC. J. 241, 303 (2015) (discussing the evolution of the Foreign Intelligence Surveillance Court [FISC]); Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513, 1514 (2014) (suggesting that the FISC became a separate regulatory body and "ex parte" adversarial "law-making" organ, well beyond its initial duty to review classified national security-based warrant applications).

²¹⁹ DESCH, *supra* note 64, at 2. Of course, there are exceptions. Lieutenant General H.R. McMaster, serving as National Security Advisor, received a very public (and arguably demeaning) reprimand via President Trump's Twitter account for acknowledging the "incontrovertible" proof of Russian election interference, and for *not* claiming, on behalf of the Administration, that "Crooked H[illary Clinton]" colluded with the Democratic Party and the Russian government; not long after, Trump replaced McMaster with John Bolton "after months of friction." Jordan Fabian, *Trump replaces McMaster with Bolton as national security advisor*, HILL (Mar. 22, 2018), <http://thehill.com/homenews/administration/379852-trump-replaces-mcmaster-with-bolton-as-national-security-adviser> [<https://perma.cc/8RG9-WM9S>]. LTG McMaster publicly defined his departure as "requesting retirement." *READ: H.R. McMaster's departure email to the NSC*, CNN (Mar. 22, 2018), <https://www.cnn.com/2018/03/22/politics/mcmaster-departure-email-nsc/index.html> [<https://perma.cc/QQ5W-US5A>].

officers or employees, or any other person.” Such a disclaimer puts all on notice of clear congressional intent for the scope and purpose of this amended Act—that it provides, only, a reference of well-known norms and standards by which it, as a political body vested with oversight responsibilities, may objectively evaluate those relationships that are central to the subject of their oversight.

Finally, assuming *arguendo* that Congress did not include the disclaimer or it was inartfully drafted, the substantive issue on which a cause of action might be asserted would very likely be non-justiciable under the *Baker v. Carr*²²⁰ formulation of the “political question doctrine.” In light of the six *Baker* factors, the issue is a political question—and therefore outside the purview of the courts—if there are few or no “judicially discernable and manageable standards” for adjudicating it or the political decision, having been made, demands an “unusual” degree of “unquestioning adherence” in light of the context and possible consequences if the court were to intervene. An affirmative to either of these, or the remaining four factors, is grounds to declare the question’s non-justiciability.²²¹

For several reasons, the non-justiciability of jurisprudential agency encoded into Goldwater-Nichols under the political question doctrine remains secure. First, the Constitution may not expressly provide for such duties nor define the parameters of the strategic civil-military relationships, but it does provide for civilian superiority over the military via its Commander-in-Chief Clause²²² and gives Congress rule-making authority over the institutional military (the same rule-making authority behind, among many other examples, the original Goldwater-Nichols Act itself).²²³ As a general matter, then, any particularized question implicating the role of the superior civilian authority over the military agent, or the very legality of Congress’s use of such Agency standards or duties in its oversight role, are swallowed by the Constitution’s “commitment” of them to the political branches. Moreover, the Framers used Article I to grant Congress the discretion to create, at any later point, new judicial tribunals via statute.²²⁴ If the Constitution had intended courts—rather than Congress—to create, interpret, and adjudicate such rules for the relationship between civilian and military strategic leaders, it would have expressed such a limitation in Article I or grant in Article III.

Moreover, such controversies among strategic level civil-military elites, when *fait accompli*, should be respected by the courts with an “unusual” and

²²⁰ 369 U.S. 186 (1962).

²²¹ *Id.* at 217. The rest of the *Baker v. Carr* factors to consider are whether (a) the Constitution arguably commits its resolution to the legislative or executive branches; (b) adjudicating it would “express[] [a] lack of respect due” to the political branches; (c) a political policy determination is a *de facto* prerequisite for resolving the issue; or (d) it would—essentially—look bad for the three branches of government to be authoritatively weighing in on a single point of legal contention.

²²² U.S. CONST. art. II, § 2, cl. 1.

²²³ *Id.* at art. I, § 8, cl. 1, 11–14.

²²⁴ *Id.* at cl. 9. This is the Constitutional authority for the creation of the Foreign Intelligence and Surveillance Court under Foreign Intelligence and Surveillance Act of 1978, § 1566, 10 U.S.C. § 801 *et seq.* (2018), and the military criminal court system, including the Court of Appeals for the Armed Forces, under the Uniform Code of Military Justice, 10 U.S.C. § 801 (2018) *et seq.*

“unquestioning” deference. Imagine if a senior combat commander were to seek judicial redress for what he believes to be an unjust relief from command by the President, arguing that it was unfairly based on his principal’s flawed interpretation of the scope of the commander’s authority and discretion as a battlefield leader. A non-ruminative judicial remedy would likely be an injunction or restoration of his position. A court imposing such a remedy would be signaling (even if not directly stating) that the tactical, operational, or strategic decision for which he was relieved was correct, implying that the President’s was incorrect. This poses potential challenges for the chain-of-command attempting to instill and sustain “good order and discipline” among the troops, who must ultimately follow the orders of the Commander-in-Chief, whether militarily sound or not. And given the province of the judicial branch, a court is underqualified to render such a technical judgment about combat and warfare, and would restrain itself from doing so for many of the same reasons that the President does not “go to the field” and personally command troops from a bunker, headquarters, or the front line.²²⁵ The civilian government, as discussed in detail earlier, has the military (as a subordinate specialized institution and organization) to render the government expert advice and provide that expertise in action; therefore, a legal process purporting to judge *how* that principal-agent relationship *should* have worked in the field is ironically snubbing tenets of the principal-agent relationship in its act of protecting it.

For such practical and theoretical reasons, a court is going to punt, rather than parse between the CMR parties’ respective duties and responsibilities. As the Supreme Court said in *Baker*, that the issue has significant political *consequence* does not mean that it is a political *question* that ought to be answered by the non-political judicial branch.²²⁶

²²⁵ Even military courts of law are circumscribed; their jurisdiction begins and ends with criminal law (and the Law of War), and do not pass judgment on operational considerations, plans, or activities unless they are materially relevant to the commission of an offense. *See* 10 U.S.C. §§ 817–821, 866–867, 869 (2018); JOINT SERV. COMM. ON MIL. JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES 1 (2016).

²²⁶ 369 U.S. at 217. On several fronts, however, strategic CMRs guided by Agency law principles encoded in a statute could, at first, appear to be justiciable. It may be true, or at least a fair assertion, that a court could credibly adjudicate a particular CMR dispute without implying disrespect toward one or both of the other branches. Such a controversy might arise when the senior military agent decides to “slow walk” or ignore a presidential order on grounds that the order would place the military leader in some form of personal legal jeopardy, or would open the Department of Defense to civil litigation based on a constitutional due process violation. The president, relying on Agency law principles and duties encoded into a hypothetical Goldwater-Nichols amendment, may want to avoid the unpopular political repercussions of simply firing the recalcitrant general or admiral, and instead seek a court order for specific performance to force his subordinate agent’s compliance and thereby establish precedent within his or her administration. It may also be true that courts do have “discernable and manageable standards” to resolve such a claim: the hypothetically-amended statute purposefully and explicitly adopts Agency law duties, by which harms, breaches, and remedies may be deduced and applied to this type of principal-agent relationship. Imagine a scenario in which a Combatant Commander, having been overruled by the Secretary of Defense, makes a public statement offering to testify to the Senate Armed Services Committee (based on his belief about a

2. The Distinction Problem

Perhaps the strongest argument against encoding Agency law principles into Goldwater-Nichols could be labeled the “Distinction Problem.” Even if CMRs should be understood as a principal-agent dynamic, Agency law does not organize its duties into a normative hierarchy. In theory, one duty is not any more “important” than another; they are not objectively ranked, prioritized, or weighted. Therefore, Agency law is of little practical value when the military agent must act or provide advice in the face of apparently conflicting duties to a *single* principal, or may owe duties to more than one principal whose interests may not align. Is a Navy admiral’s duty of candor to the Senate, who consented to her nomination and which demands an oath of honesty during testimony in an oversight hearing, weaker or stronger than that admiral’s duty of confidentiality to the office of the Commander-in-Chief that nominated her and involves her in the operational chain-of-command? Does honest dealing matter more, or less, than due diligence? If the answers are “it depends on the questions being asked or the prior restraints imposed (or discretion allowed) by the President,” then what real value does this jurisprudential framework have? Why not simply adopt situation-specific pragmatism (looking at possible consequences of various alternatives, what consequence or effect is most desirable?), or utilitarianism, and evaluate behaviors solely based on criteria of what creates the greatest good?

Adopting pragmatic and utilitarian approaches to assessing the strategic civil-military relationship, however, is precisely why the CMR diagnostic problem has long hindered clear discussion of appropriate norms and expectations (and the failures to meet either one). Though the distinction or lack of hierarchy problem is a powerful counterargument for a practical professional, it is also simply rebutted. Frankly, it does not matter what *specific* duties corral the CMRs, or what their *precise* definitions are. The salient fact is whether there exists a set of mutually accepted, understood, and applied duties upon which an oversight body, like Congress (or the parties themselves) may rely on to frame debate, clarify roles, and distinguish between healthy dynamics and pathological ones. Agency law seems to provide the most logically coherent and accessible set of duties, standards, and norms, reasonably derived from the nature of these professional relationships.

How well these possible objections are acknowledged by the conceivable legislative amendments offered above will, ultimately, determine whether such a legislative fix is acceptable to Congress, suitable for its intended purpose, and feasible in practice.

“duty of candor”) about an earlier recommendation for the number of troops and type of combat operation that ought to be employed in a particular theater. Under such a hypothetical amendment, the Secretary may seek a court’s gag order or injunction to prevent that testimony, relying on Agency duties like confidentiality and loyalty to the principal, now encoded into Goldwater-Nichols. While its case-specific questions may be novel, the underlying legal standards for agency-based candor, loyalty, and confidentiality are well-established in state and federal courts.

V. Conclusion

This article has attempted to demonstrate that Congress faces a solvable challenge when it tries to understand, diagnose, intervene, or control the dynamics and subtleties of strategic level civil-military relationships. These tasks are intrinsic to Congress's role as a participant in, and watchdog over, these relationships. They are challenging because none of the parties or Congress currently rely on a set of objective criteria that function like standards, norms, and expectations from which deviations or pathologies can be addressed with as little partisanship as possible. As a consequence, Congress lacks a consistent metric—or even consistent strategy—for handling controversial “crises,” or correctly interpreting possible friction, between the civilian political elites responsible for national security and the senior military elites that are relied upon for expert advice, expert action, and expert ability in support of the civilian-led objectives. This is not a new problem—its history is as old as the Republic itself and regularly reveals itself in very public episodes of dissent, mistrust, alleged disloyalty, and battlefield confusion.

Nevertheless, this challenge is solvable given a few key evidenced-based suppositions: (a) Congress wishes to responsibly and reasonably influence these relationships; (b) these relationships are fundamentally principal-agent relationships; (c) like other principal-agent relationships, certain duties and standards of behavior can be articulated and encoded into daily practice, and used by the parties and external observers to diagnose the health of those relationships in context; (d) the Goldwater-Nichols Act already provides a relevant statutory vehicle for encoding these Agency-based aspirational duties, standards, and norms.

With such a diagnostic device, Congress can position itself to more expressively and dispassionately interact with senior strategic civil and military elites, with a more complete understanding of their association's fundamental nature, and offer its criticism from the reasonable perspective of known duties and expectations. Jurisprudential agency provides this diagnostic tool; indeed, it has been here all along, waiting to be recognized.