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The Operational and Administrative Militaries

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THE OPERATIONAL AND ADMINISTRATIVE MILITARIES

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INTRODUCTION

Admiral James Stavridis collapsed in his chair, exhausted. The four-star Navy admiral had just finished a six-month whirlwind tour of over thirty nations, flying on a state-of-the-art military aircraft surrounded by an enormous staff. He met with leaders from every member of the North Atlantic Treaty Organization (NATO), the heads of Russia and Israel, and several prospective U.S. and NATO allies. Not surprisingly, he met with each nation's senior military leaders and ministers of defense in an effort to strengthen military-to-military relations and reinforce the bonds of the Atlantic Alliance that date back to General Eisenhower and the end of the Second World War.

Perhaps surprisingly, Admiral Stavridis also met with the presidents of each nation, their foreign ministers, and a host of diplomats. It was easy for his staff to set up meetings with just about anyone in Europe. Indeed, everyone was clamoring to meet Admiral Stavridis, the senior U.S. military officer in Europe who possessed enormous operational authorities central to their own nation's defense. He also brought with him the promise of foreign military sales, future military funding, and easy access to the vast Washington national security apparatus. To many, he was the most important American on the continent, a man worth knowing, and someone possessing not just a military role but also an expanding foreign relations role. When he called, presidents and prime ministers picked up the phone and made time.[1]

What position in the vast military bureaucracy did Admiral Stavridis hold? He had just been appointed by the President and confirmed by Congress as the leader of the U.S. European Command, one of five extraterritorial U.S. geographic combatant commanders.[2] These positions play an increasingly important but not well-understood role in the largest military (and bureaucracy) in the world. The 1947 National Security Act established these

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[1] This vignette is largely borrowed from JAMES STAVRIDIS, THE ACCIDENTAL ADMIRAL: A SAILOR TAKES COMMAND AT NATO 28–30 (2014). In addition to his position as U.S. European Commander, Admiral Stavridis was "dual-hatted" as NATO's Supreme Allied Commander Europe. *Id.*

[2] Donna Miles, *Senate Confirms McChrystal, Stavridis, Fraser Nominations*, AM. FORCES PRESS SERVICES (June 11, 2009), http://archive.defense.gov/news/newsarticle.aspx?id=54734.

roles[3] which some commentators have described as "viceroys"[4] or modern-day Roman "proconsuls."[5] But their full authorities lay dormant for almost forty years only to be fully actuated in 1986 via the Goldwater-Nichols Act.[6] These combatant commanders lie at the heart of what I refer to as the *operational military*, and their authorities and influence are growing, largely unrestrained by Congress and the Executive Branch.

Most reasonably well-informed people believe that executive authority over the military has grown at the expense of congressional authority for a variety of reasons, including congressional dysfunction, some version of an "executive unbound," or an "Imperial Presidency" further facilitated by the nature of modern warfare.[7] That is not untrue, but it is only part of a much larger story. Another part of the story—largely unexplored by existing legal scholarship—is the military's legal architecture and agency design.

This Article offers a new way to think about the military. In doing so, I argue that there are, in fact, two militaries residing within the Department of Defense (DoD): an "operational" and an "administrative" military.[8] Each military has its own chain of command, of critical importance to a hierarchical federal agency that is backed by the force of criminal law. Understanding this dual-military bureaucracy reveals insights into national security

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[3] 50 U.S.C. § 401 (2012).

[4] Derek S. Reveron & Michelle D. Gavin, *American Viceroys, in* AMERICA'S VICEROYS: THE MILITARY AND U.S. FOREIGN POLICY 1, 2 (Derek S. Reveron ed., 2004).

[5] DANA PRIEST, THE MISSION: WAGING WAR AND KEEPING PEACE WITH AMERICA'S MILITARY 70 (2003).

[6] *See* Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992, 992 (1986) (stating its goal is "to place clear responsibility on the commanders of the unified and specified combatant commands").

[7] *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 15 (2010) ("[L]aw does little to constrain the modern executive . . . ."); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY ix (1973) ("The assumption of that [war-making] power by the Presidency was gradual and usually under the demand or pretext of emergency. It was as much a matter of congressional abdication as of presidential usurpation."). And Congress no longer declares war—the last declaration of war dates from 1942. *See* Garance Franke-Ruta, *All the Previous Declarations of War*, THE ATLANTIC (Aug. 31, 2013) https://www.theatlantic.com/politics/archive/2013/08/all-the-previous-declarations-of-war/279246 (noting declarations against Bulgaria, Hungary, and Romania).

[8] I am the first legal scholar to describe the DoD's agency design as a two-military divide with these terms.

governance with broad implications for how administrative law interacts with the military and civilian oversight of the military.

The terms "administrative military" and "operational military" are wholly absent from the text of the Constitution, and neither is defined in law, regulation, or existing legal scholarship.[9] The first military, the operational military, is led by uniformed combatant commanders and receives direction from the Chairman of the Joint Chiefs of Staff (CJCS). Already powerful, these combatant commanders' powers are increasing.[10] They not only plan and fight the nation's wars; they now perform an expanding menu of non-traditional military functions including foreign relations-type functions that have historically been the province of the State Department.[11] Today's combatant commanders have a continuous presence abroad with massive staffs, resources, and *forces*.[12] As State Department personnel is reduced and its funding slashed, combatant commanders fill the foreign policy void as the default American representatives abroad.[13]

The operational military's origins can be found in the Constitution, statute and military doctrine.[14] It is responsible for planning and executing the nation's war fighting, training foreign forces, military-to-military engagement, and an increasing range of

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[9] The Commander in Chief Clause ensures that there is an elected civilian head of the military. *See* U.S. CONST. art. II, §2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . ."); *see also* Christopher M. Bourne, *Unintended Consequences of the Goldwater-Nichols Act,* 18 JOINT FORCES QUART. 99, 100 (1998) ("The Constitution fails to specify where the authority of the Commander in Chief ends and that of Congress begins.").

[10] *See, e.g.,* Reveron & Gavin, *supra* note 4, at 1–8 (describing the increased powers and influence of combatant commanders).

[11] *See* ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING 79 (2016) ("Across the board, the military was moving into areas more traditionally conceived of as civilian domains . . . [such as] the business of health care, education, news and information, economic development, and local politics."); PRIEST, *supra* note 5, at 61–65 (describing the rise of combatant commanders and their role in foreign policy).

[12] *See Combatant Commands,* U.S. DEP'T OF DEF., https://www.defense.gov/Know-Your-Military/Combatant-Commands/ (last visited Feb. 13, 2019) (describing and providing additional information on the current DoD international combatant commands).

[13] *See* BROOKS, *supra* note 11, at 102 (discussing the consequences of reducing professional Foreign Service officers).

[14] *See infra* Part II (explaining the origins of the operational and administrative militaries).

foreign-relations activities.[15] It receives its forces (personnel, equipment, weapons) from the administrative military.[16] Uniformed combatant commanders and subordinate joint task force commanders lead the operational military.[17] Its day-to-day implementation is governed by the doctrinal terms of combatant command, operational control, and tactical control.[18]

The administrative military's origins can be found in the Constitution, statutes, and military doctrine.[19] Its functions include personnel management, staffing, recruiting, testing, training, health care, equipping and hardware acquisition.[20] It also provides forces to the operational military.[21] The civilian Secretaries of the

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[15] The DoD and other governmental agencies also have an enormous intelligence apparatus reporting to the Director of National Intelligence pursuant to the existing intelligence statutory framework dating from 2004. It is beyond the scope of this paper to discuss the institutional mechanics of the intelligence community, but the operational and administrative military divide has enormous follow-on consequences within the intelligence community due to the 2004 Intelligence Reform and Terrorism Protection Act and the creation of the Office of the Director of National Intelligence. *See* 50 U.S.C. § 401 (2012) *et. seq*. (declaring the purposes and functions of the United States military). Further, while this Article focuses on the administrative military, there is a sub-section of the administrative military—the military defense agencies—that adds an additional layer of complexity to any analysis, but which is beyond the scope of this Article. These seventeen defense agencies, including the Defense Logistics Agency (DLA) and the Defense Finance and Accounting Service (DFAS), account for an enormous budget ($85-90 *billion*) but are not the focus of the Secretary of Defense or Congress and are subject to only sporadic oversight. *30 Years of Goldwater-Nichols Reform: Hearing Before the S. Comm. on Armed Services,* 114th Cong. 50 (2015) (statement of Dr. John Hamre, President and Chief Executive Officer, Center for Strategic and International Studies) [hereinafter *Goldwater-Nichols Hearing*]; *see also $125 Billion in Savings Ignored: Review of DoD's Efficiency Study: Hearing Before the H. Comm. on Oversight and Government Reform,* 115th Cong. 2–3 (2017) (prepared testimony of Lawrence J. Korb) ("[Secretary of the Navy] Ray Mabus . . . complained that 20 [percent] of the defense budget . . . went to the so-called 'Fourth Estate,' that is, the defense agencies . . . that provide support to the armed forces. He called this pure overhead.").

[16] *See infra* Parts II.B–C, III.

[17] *See infra* Parts II.B–C, III. The definition is largely derived from (1) Article II of the Constitution to include the Commander in Chief clause; (2) statutes addressing the roles and responsibility of the combatant commanders; and (3) the law of the chain of command and military doctrine to include combatant command control, operational control, and tactical control.

[18] *See infra* Part III.B.

[19] *See infra* Parts II.B–C.

[20] *See infra* Parts II–III.

[21] I define "forces" broadly as set forth in DoD's Dictionary of Military and Associated Terms to include "[a]n aggregation of military personnel, weapon systems, equipment, and necessary support, or combination thereof . . . [or a] major subdivision of a fleet." DEP'T OF DEF., JOINT PUBLICATION 1-02: DEP'T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS 89 (as amended through Feb. 2016) [hereinafter DOD DICTIONARY].

military departments and the uniformed heads of each military branch—the service "chiefs"—largely lead the administrative military.[22] Its implementation is governed by the doctrinal term *administrative control.*[23]

The administrative military serves the operational military.[24] While both militaries ultimately report to the Secretary of Defense and the Commander in Chief, the administrative military remains the outsized focus of congressional oversight.[25]

The two-military divide creates two main problems: (1) it incentivizes congressional focus on the administrative military at the expense of operational military oversight; and (2) it facilitates an internal bureaucratic misalignment in which the administrative military too often provides the wrong forces (personnel, equipment, weaponry) to the operational military.

Today, the DoD is the world's largest bureaucracy and employer.[26] Its organizational set-up is complex, its size vast, and its mission idiosyncratic: the DoD is responsible for the nation's defense including the lawful application of military force to fight and win the nation's wars.[27] The very nature of its activities raises

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[22] *See, e.g.,* 10 U.S.C. § 5013 (2012) (describing the administrative duties of the Secretary of the Navy). The military often uses outdated terminology to refer to these Title 10 functions as "*man*, train, and equip." I intentionally use the gender-neutral term "staffing" to better reflect the important role that women play in the Armed Forces and the current "no exceptions" combat policy.

[23] *See infra* Parts II.B–C, III. This definition is derived from (1) Article I of the Constitution; (2) statutes addressing the roles and responsibility of the Secretaries of the Military Departments; and (3) the law of the chain of command and military doctrine to include administrative control.

[24] *See infra* Parts II.B–C, III.

[25] *See infra* Part III.

[26] *See* Niall McCarthy, *The World's Biggest Employers*, FORBES (June 23, 201 5, 8:20 AM), https://www.forbes.com/sites/niallmccarthy/2015/06/23/the-worlds-biggest-employers-infographic/#104f459c686b ("[T]he US Department of Defense boasts a workforce of 3.2 million people, making it the largest global employer.").

[27] Forest L. Reinhardt & Michael W. Toffel, *Managing Climate Change: Lessons from the U.S. Navy*, HARV. BUS. REV. July/Aug. 2017, at 104 (describing one of the fundamental purposes of the Navy is to "maintain . . . forces capable of winning wars"). "Military organizations are idiosyncratic and special. Their primary 'output' is lethal force, controlled in ways that compel people to do what they don't want to do. No legitimate firm does anything remotely comparable." *Id.* The DoD mission statement states that it "shall maintain and use armed forces to support and defend the Constitution of the United States against all enemies, foreign and domestic; [e]nsure, by timely and effective military action, the security of the United States, its possessions, and areas vital to its interest; [u]phold and advance the national policies and interests of the United States." DEP'T OF DEF., DEP'T OF DEF. DIR.

questions: How is this agency designed? Does the governing agency design strengthen or undermine civilian control of the military? How is the DoD—as a federal *agency*—subject to the Administrative Procedure Act (APA) and how are its actions subject to judicial review?

The answer lies with a fuller understanding of DoD's unique and complex agency design that allocates power within the government's largest agency.[28] Consider the following examples:

Militarization of Foreign Policy. The existing legal architecture establishes a set of richly resourced and permanent geographic combatant commanders stationed overseas that are the heart of the operational military.[29] They remain busy in war and peace.[30] These commands reside throughout the world with personnel and resources far outpacing the State Department's size and budget.[31] Not only do these combatant commanders plan and fight the

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5100.01: FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MAJOR COMPONENTS (Dec. 21, 2010).

[28] For a discussion of the importance of agency design and the allocation of power within agencies, *see* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies,* 120 YALE L. J. 1032, 1057 (2011); *see also* Robert Knowles, *Warfare as Regulation,* 74 WASH. & LEE. L. REV 1953, 1955 (2017) (arguing that the U.S. government's national security activities are a form of regulatory action); Matthew Waxman, *National Security Federalism in the Age of Terror,* 64 STAN. L. REV. 289, 290–91 (2012) (describing the traditional national security scholarship focus). Understanding the DoD's agency design helps answer the question: where does all the money go? *See, e.g.,* Craig Whitlock & Bob Woodward, *Pentagon Buries Evidence of $125 billion in Bureaucratic Waste,* WASH. POST, Dec. 5, 2016, at A1 ("The Pentagon has buried an internal study that exposed $125 billion in administrative waste in its business operations amid fears Congress would use the findings as an excuse to slash the defense budget . . . .").

[29] *See* ANDREW FEICKERT, CONG. RESEARCH SERV., R42077, THE UNIFIED COMMAND PLAN AND COMBATANT COMMANDS: BACKGROUND AND ISSUES FOR CONGRESS 1–3 (2013) (outlining the provisions of the Unified Command plan which allows the DoD to create and maintain the functional combatant commands and the geographic combatant commands).

[30] *See id.* at 25 (noting, for example, that the U.S. Transportation Command is charged to provide transportation services regardless of whether it is peacetime or wartime).

[31] *See* RONAN FARROW, WAR ON PEACE: THE END OF DIPLOMACY AND THE DECLINE OF AMERICAN INFLUENCE 292 (2018) (noting that the U.S. State Department spent about $666 million on public diplomacy abroad in one recent year). The Trump Administration sought a 9.4% increase in the FY2018 DoD's budget and a 30% decrease in the State Department budget. *See* Robbie Gramer, Dan De Luce, & Colum Lynch, *How the Trump Administration Broke the State Department,* FOREIGN POLICY (Jul. 31, 2017) http://foreignpolicy.com/2017/07/31/how-the-trump-administration-broke-the-state-department/ ("[T]he administration drafted up plans to slash State and foreign aid funding and to let go of top career professionals . . . .").

nation's wars, but they are taking on an increasing role in foreign policy.[32]

Imbalance in Congressional Testimony. Each year, congressional committees with military oversight responsibilities hear testimony from civilian and uniformed military leadership.[33] The uniformed geographic combatant commanders—the heads of the operational military—are normally required to testify before Congress just once a year, and the nature of their testimony is qualitatively different: they often seek increased funding and resources.[34] In contrast, the administrative military leaders testify in front of Congress in far greater numbers, and are more likely to be called to the congressional carpet whenever there is a scandal, regardless of its nature.[35]

Congressional Funding. Each year, Congress passes the National Defense Authorization Act (NDAA), a massive funding bill that serves as a yearly litmus test for determining congressional priorities over the DoD.[36] This funding bill is heavily focused on the

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[32] *See* Edward Marks, *Rethinking the Geographic Combatant Commands,* 1 INTERAGENCY JOURNAL 19, 19–20 (2010) ("[T]he military services have increasingly become the default option for U.S. government action and response.").

[33] *See, e.g.,* HOUSE ARMED SERVICES COMMITTEE, 116TH CONG., *Rules of the Committee on Armed Services,* https://armedservices.house.gov/committee-rules#B503BFCA-B011-4BA0-A5DF-1786995BCC5F (noting the process for receiving testimony from individuals called before the committee).

[34] *See* FEICKERT, *supra* note 29, at 1 ("All Combatant Commanders testify to the Armed Services Committees on an annual basis about their posture and budgetary requirements . . . ."). The combatant commanders normally testify just once a year via "posture statements." *See generally* PATRICK J. MURPHY & MARK MILLEY, 114TH CONG., A STATEMENT ON THE POSTURE OF THE UNITED STATES ARMY 2016 (2016), https://www.army.mil/e2/downloads/rv7/aps/aps_2016.pdf.

[35] For example, in the recent mishap involving a ship collision in the Navy's Seventh Fleet, the heads of the administrative military were called before Congress. *See* Robert Faturechi et al., *Years of Warnings, then Death and Disaster: How the Navy Failed its Sailors,* PROPUBLICA (Feb. 7, 2019) https://features.propublica.org/navy-accidents/us-navy-crashes-japan-cause-mccain/. Indeed, "Congress regularly calls the Service Secretary or Service Chief on the carpet when investigating the latest acquisition foibles, even though they are not in the acquisition management chain of command." CLARK A. MURDOCK ET AL., BEYOND GOLDWATER-NICHOLS: U.S. GOVERNMENT AND DEFENSE REFORM FOR A NEW STRATEGIC ERA 94 (2005).

[36] *See* Nick Schifrin, *What's in the Defense Authorization Act,* PBS NEWS HOUR (Aug. 13, 2018, https://www.pbs.org/newshour/nation/whats-in-the-defense-authorization-act ("[The NDAA] is also a Congressional expression of concern and even a means of restraint . . . .").

administrative military while granting the operational military considerably greater discretion over spending.[37]

Special Operations and the Rise of "Secret Wars." U.S. Special Operations Forces today function as part of a super combatant command.[38] They operate almost everywhere—in 138 nations of the world in 2016.[39] They now shoulder the bulk of U.S. military's casualties.[40] As they are employed in new ways— including covert actions that are purposely kept out of the public eye—congressional oversight has lagged.[41] Congress has facilitated their rise with an increased budget, personnel, and legal authorities without a corresponding increase in oversight.[42]

The Operational/Administrative Disconnect. The two-military divide also creates a practical problem: too often the administrative

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[37] For example, the NDAA focuses on core aspects of the administrative military (health care, administration, personnel, etc). In the FY18 NDAA, there are 47 titles covering 740 pages addressing a wide variety of DoD activities. Of the 47 titles, only five address in any meaningful way operational military matters as defined earlier. *See generally* National Defense Authorization Act for Fiscal Year 2018, H.R. 2810, 115th Cong. (2017).

[38] Special Operations Command (SOCOM) is the *only* military command specifically established by Congress. *See* 10 U.S.C. § 167(a) (2012) ("[T]he President, through the Secretary of Defense, shall establish under section 161 of this title, a unified combatant command for special operations forces . . . .").

[39] *See, e.g.,* Nick Turse, *American Special Ops Forces Have Deployed to 70 Percent of the World's Countries in 2017*, THE NATION (June 26, 2017) https://www.thenation.com/article/american-special-ops-forces-have-deployed-to-70-percent-of-the-worlds-countries-in-2017/.

[40] *See* Dave Phillips, *Special Operations Troops Top Casualty List as U.S. Relies More on Elite Forces*, N.Y. TIMES (Feb. 4, 2017), https://www.nytimes.com/2017/02/04/us/navy-seal-william-ryan-owens-dead-yemen.html

[41] *See* Nick Turse, *Special Operations Forces Continue to Expand Across the World – Without Congressional Oversight*, THE NATION (July 17, 2018), https://www.thenation.com/article/special-operations-forces-continue-expand-across-world-without-congressional-oversight/ (noting that "unless they end in disaster, most missions remain in the shadows, unknown to all but a few Americans"). Covert action is defined as "[a]n activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government *will not be apparent or acknowledged publicly*." 50 U.S.C. § 3093(e) (Supp, II 2015) (emphasis added).

[42] During the recent military tragedy in Niger and Mali, where four U.S. special forces personnel were killed, Senators Schumer (D-NY) and Graham (R-SC), both charged with military oversight, professed ignorance about the fact that the U.S. military was even present in that part of the world. *See* Dionne Searcey & Eric Schmitt, *In Niger, Where U.S. Troops Died, a Lawless and Shifting Landscape,* N.Y. TIMES, Oct. 30, 2017, at A5 (quoting Senator Graham as stating, "[w]e don't know exactly where we're at in the world, militarily, and what we're doing").

military provides the operational military with the wrong "stuff."[43] Or it provides equipment that the operational military does not want or need at significant taxpayer expense.[44]

In Part II, I propose this new two-military analytical framework. This Part begins with a brief historical overview of the dual-military state and argues that these two militaries coexisted in some form since the nation's founding, grew further apart following World War II and the National Security Act, and effectively separated following the passage of the 1986 Goldwater-Nichols Act.

Part III analyzes the Goldwater-Nichols Act of 1986. This Act, largely unexamined by existing legal scholarship, establishes the lawful civil-military chain of command, critical to ensuring objective civilian control of the military. Under the DoD's agency design, the *civilian* Secretaries of the military departments are effectively relegated to a secondary role as the heads of the administrative military, in support of the *uniformed* military combatant commanders.[45] The operational military commanders, in turn, are increasingly delegated broader war-making authorities, accelerating independent executive action at the expense of congressional oversight.[46]

Part IV addresses the two-military divide's consequences, many unintended. Adrian Vermeule, David Dyzenahus, and other scholars have described the emergence of aptly named "black holes"

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[43] *See, e.g.,* Marcus Weisgerber, *Slow and Steady is Losing the Defense Acquisition Race,* GOV'T EXEC. (Nov. 11, 2014), https://www.goveexec.com/magazine/features/2014/11/slow-and-steady-losing-defense-acquisition-race/ (stating that an October poll "found more than 25 percent of Defense personnel were not at all confident that the acquisition process provides the military services with the weapons they need").

[44] Secretary of Defense Robert Gates struggled mightily to provide armored vehicles to the operational military during the heaviest fighting in Afghanistan, but he ran up against administrative military headwinds that fought his requests at every turn. Ultimately, even Gates was forced to work around the Goldwater-Nichols-designed bureaucracy that he was leading. *See* ROBERT GATES, DUTY: MEMOIRS OF A SECRETARY OF WAR 25, 120–23 (2014) (chronicling the administrative difficulties Gates faced in providing armored vehicles to operational forces).

[45] *See* 10 U.S.C. § 162(a) (2012) ("[T]he Secretaries of the military departments shall assign specified forces under their jurisdiction to unified and specified combatant commands . . . to perform missions assigned to those commands."). Within joint doctrine, the critical term "forces" is defined broadly. *See* DOD DICTIONARY, *supra* note 21, at 126.

[46] Harold Koh has stated that in matters of national security, the Executive Branch action "nearly always wins" due to a combination of executive initiative, congressional acquiescence, and judicial deference. HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 137–46 (1990).

and "grey holes" and their effects on administrative law governance during times of war and emergency.[47] Such holes serve as legal trap doors that exempt or modify oversight over certain agency actions depending on *external* factors.[48] But there are also *internal* factors unique to DoD and its organizational design—what I refer to as "institutional holes"—where administrative law may or may not apply. And within these institutional holes, governmental actions are often shrouded in secrecy—itself a form of regulation.[49]

Part V addresses several independent accelerants of this two-military divide. Finally, Part VI provides initial recommendations with an eye toward strengthening civilian control of the operational military and reforming national security governance. A brief conclusion follows.

II. FROM THE NATION'S FOUNDING TO THE COLD WAR: THE TWO MILITARIES' ORIGINS

Despite being hailed as a critical component and legacy of the U.S. constitutional system, the phrase "civilian control of the military" is wholly absent from the Constitution's text.[50] Indeed, civilian control of the military is best understood as a longstanding constitutional norm that can only be gleaned from the Constitution's text—in particular, from its placement of an elected civilian President as head of the Army and Navy.[51] Today, civilian control of the military is implemented via governing statutes, particularly the Goldwater-Nichols Act.[52] This reinforces civilian

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[47] DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 2 (2006); Adrian Vermeule, *Our Schmittian Administrative Law,* 122 HARV. L. REV. 1095, 1132 (2009).

[48] The term legal "black hole" was first used to describe the inapplicability of law to Guantanamo Bay detainees in the aftermath of 9/11. *See* DYZENHAUS, *supra* note 47, at 2..

[49] *See id*; *see also* Vermeule, *supra* note 47, at 1112 (describing how the early APA exemptions as applied to the military are "rarely litigated").

[50] *See* PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 81 (2003) (discussing that civilian control of the military is implied by "the presence of senior civilian officials in the Department of Defense"); *see also* Christopher M. Bourne, *Unintended Consequences of the Goldwater-Nichols Act,* 18 JOINT FORCES QUART. 99, 100 (1998) (discussing the phrase "civilian control of the army").

[51] U.S. CONST. art. II, § 2, cl. 1.

[52] *See* Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986) (stating the purpose of the Act is to "strengthen civilian authority

control of the military through the formation of a lawful chain of command that subordinates the military to civilian oversight.[53]

A. THE TWO-MILITARY GLOSSARY AND OVERVIEW OF KEY TERMS

Before I dive into the history and particulars of the DoD's legal architecture, we begin with a brief glossary of the relevant terms. The following five key terms in particular are essential to understanding the two-military state. These definitions can be traced to existing law, regulation, or doctrine.

Chairman of the Joint Chiefs of Staff (CJCS): By law, the CJCS is the principal military advisor to the President, Secretary of Defense, National Security Council, and Homeland Security Council for all military matters including the promulgation of joint doctrine.[54] The CJCS lacks formal command authority[55] but has enormous informal authority, communicating operational military orders to combatant and joint task force commanders. Members of the Joint Chiefs of Staff include the uniformed "service Chiefs," but they lack a discrete line of communication to the President and Secretary of Defense.[56]

Combatant Commanders: Within the operational military, combatant commanders are uniformed, four-star military officers who head one of the ten combatant commands and lead the operational military.[57] The five extraterritorial geographic combatant commanders as well as Special Operations Command (SOCOM) are the operational military's true "heart." They exercise

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in the Department of Defense . . . [and] to place clear responsibility on the commanders of the unified and specified combatant commands").

[53] *Id.*

[54] 10 U.S.C. §§ 151, 153 (2012).

[55] *See id.* at § 153 (noting that all of the responsibilities and functions of the CJCS are subject to the authority, direction, and control of the President and Secretary of Defense).

[56] *See* DEP'T OF DEF., JOINT PUBLICATION 1: DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, II-9, III-4, III-5 (as amended through Mar. 25, 2013) [hereinafter JOINT PUBLICATION 1].

[57] As of this writing, the ten combatant commands include six geographic commands: five overseas—Africa Command, Central Command, European Command, Northern Command, Indo-Pacific Command, and Southern Command—and four functional combatant commands—Cyber Command, Strategic Command, Special Operations Command, and Transportation Command. *Combatant Commands, supra* note 12.

an increasingly important but not well-understood role in national security law and governance.[58]

Secretaries of military departments: Within the administrative military, these politically appointed, civilian heads of the three military departments (Army, Navy, & Air Force) lead the administrative military and provide oversight over the uniformed service "chiefs."[59]

Joint: "[A]ctivities, operations, organizations, etc., in which elements of two or more military departments participate."[60]

B. THE EXECUTIVE-OPERATIONAL NEXUS AND CONGRESSIONAL-ADMINISTRATIVE NEXUS[61]

The operational military has existed in some capacity since our nation's founding.[62] Its primary legal authority can be found within the text of the Constitution, particularly in the Commander in Chief clause: "[T]he President shall be Commander in Chief of the Army of the United States, and of the Militia of the several States, when called into the actual service of the United States."[63]

The precise scope of this authority has befuddled scholars and jurists since the Constitution's inception.[64] Despite its clear modern-

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[58] *See* FEICKERT, *supra* note 29, at 1 (noting that the combatant commands are the "embodiment of U.S. policy both at home and abroad").

[59] Under existing law, the Marine Corps is part of the Department of the Navy. 10 U.S.C. § 5061 (2012); *see also* HEIDI M. PETERS, CONG. RESEARCH SERV., R7-5700, DEFENSE PRIMER: THE MILITARY DEPARTMENTS 1–2 (updated Nov. 28, 2018) (reviewing the composition of the three military departments, how they were appointed, and their oversight of chiefs).

[60] DOD DICTIONARY, *supra* note 21, at 283.

[61] Broadly speaking, Congress has the constitutional power of the "purse" while the executive has the power of the "sword." THE FEDERALIST NO. 10 (Alexander Hamilton) ("The Executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated.").

[62] *See* ROBERT K. WRIGHT, THE CONTINENTAL ARMY 10–12, 23 (1983) (stating that the First Continental Congress rejected the idea of creating a national militia force, but the Second Continental Congress did establish a Continental Army in 1775). Both the Continental Army and Continental Navy existed prior to the ratification of the Constitution. *See, e.g.,* Mark P. Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era,* 36 CARDOZO L. REV. 119, 161 (2014) (stating that the Continental Navy was founded in 1775 and the Coast Guard was founded in 1790).

[63] U.S. CONST. art. II, § 2, cl. 1.

[64] Justice Jackson famously stated, "A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision,

day importance for defining the scope of operational military matters, the clause was not discussed during the Constitutional Convention.[65] While the exact breadth and scope of this authority are not without limit, it has been consistently understood to include the authority to command and control military operations.[66] While a comprehensive review of the President's powers as Commander in Chief is beyond the scope of this Article, two views emerged during the nation's founding that are particularly relevant to the modern military divide.

The first view, held by Anti-Federalists and Thomas Jefferson, reflected an abiding faith in citizen-militias and possessed a profound suspicion of federal standing armies.[67] The second view, shared by the Federalists and Alexander Hamilton, favored centralization, envisioned the young nation's need for standing armies and navies, and favored more streamlined authority and rapid executive action.[68] In *The Federalist Papers*, Hamilton wrote that the authority of the Commander in Chief "would amount to nothing more than the supreme command and direction of the military and naval forces, as first [g]eneral and admiral of the [c]onfederacy."[69] Hamilton stated that the Commander in Chief had the authority over the tactical movement of troops and vessels,

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or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[65] *See generally, Documents from the Continental Congress and Constitutional Convention, 1774 to 1789,* LIBRARY OF CONG.: DIGITAL COLLECTIONS https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/about-this-collection/ (last visited Feb. 15, 2019) (not discussing the Commander in Chief clause in any of the documents preserved from the Constitutional Convention).

[66] *See* Fleming v. Page, 50 U.S. 603, 615 (1850) (stating that the Commander-in-Chief power is "purely military").

[67] *See* Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135, 180 (2006) ("[T]he Anti-Federalists generally held the idea of a national standing army in contempt, while bestowing praise upon the citizen militia.").

[68] *See* ROBERT CHERNOW, HAMILTON 253–60 (2004); *Goldwater-Nichols Hearing*, *supra* note 15, at 36 (statement of Jim Thomas, Vice-President and Director of Studies, Center for Strategic and Budgetary Assessments) ("The way we do command and control in the American military is exceptional . . . . [W]e have had a tension, since the founding of the Republic, between a Jeffersonian aversion to . . . the concentration of power in any military officer versus the Hamiltonian impulse toward centralization and effectiveness.").

[69] THE FEDERALIST NO. 69 (Alexander Hamilton).

foreshadowing doctrinal authorities integral to the modern operational military.[70]

This authority was understood to authorize the President to take command of the troops in the field; indeed, President Washington once did just that, personally commanding militia forces in the Whiskey Rebellion of 1794.[71] This authority also found support in the Supreme Court. In 1850, Chief Justice Taney, speaking for the Court in *Fleming v. Page*, emphasized the President's tactical command over military forces during military operations: "As commander-in-chief, he is authorized to *direct the movements* of the naval and military forces placed by law at his command, and to employ them in the manner he may deem effectual to harass and conquer and subdue the enemy."[72]

The earliest views of the Commander in Chief's authority as the tactical and operational leader of the armed forces live on in the operational military's definition and in modern legal and doctrinal authorities. In contrast, the administrative military's origins are more closely aligned with congressional authorities within the Constitution's text.[73] At the time of the Constitutional Convention, the issue of standing armies (where they should come from—states or federal—and who should control them) was hotly debated.[74]

Under the Constitution's text, Congress controls all military appropriations which include the "power of the purse" and oversight over the DoD's annual budget.[75] Congress also has the power to "declare War, grant Letters of Marque and Reprisal, and make

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[70] *Id.*

[71] *See* Nigel Anthony Sellars, *Treasonous Tenant Farmers and Seditious Sharecroppers: The 1917 Green Corn Rebellion Trials*, 27 OKLA. CITY U. L. REV. 1097, 1104 (2002) (discussing President George Washington's role in the Whiskey Rebellion).

[72] Fleming v. Page, 50 U.S. 603, 615 (1850) (emphasis added).

[73] The preamble of the Constitution foreshadows the modern military's mission when it states its goal as "to form a more perfect Union . . . and [to] provide for the common Defence." U.S. CONST. pmbl. Further, Congress "provide[s] for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl.1.

[74] *See* THE FEDERALIST NO. 8 (Alexander Hamilton) (explaining how the proposition of standing armies is problematic); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 185–86 (1996) (discussing the Anti-Federalist view on standing armies).

[75] U.S. CONST. art. 1 § 8, cl. 1. Each year, Congress passes the yearly National Defense Authorization Act (NDAA), an enormous piece of annual legislation that can surpass 1,000 pages. The majority of the subject matter is focused on administrative matters. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2018, *supra* note 37.

Rules concerning Captures on Land and Water."[76] Congress has the authority to "raise and support [a]rmies" (limited to two years) and "provide and maintain a Navy" (no time limitation)[77] as well as the constitutional authority to make regulations governing the Armed Forces.[78] In addition, under the Constitution's Militia clauses, Congress has the power "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions"[79] and the power "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."[80]

Although neither the Federalists nor the anti-Federalists could have anticipated the modern military's massive size, their competing visions continue to play out in the two-military divide. Indeed, the seeds for a two-military division were sown from the nation's founding. For example, the Hamiltonian vision of a centralized, effective, and efficient Executive and military is best reflected in the operational military with its comparably shorter chain of command and efficiency while the anti-Federalist vision of a more diffuse, de-centralized power structure lives on in the administrative military.

The size of the military waxed and waned throughout American history until the end of World War II.[81] Standing armies became a permanent fixture with the emergence of the Cold War, and the National Security Act of 1947 created the modern military infrastructure, discussed below.[82]

C. THE TWO MILITARIES' STATUTORY ORIGINS: THE NATIONAL SECURITY ACT (1947) AND THE RISE OF STANDING ARMIES AND NAVIES

The National Security Act of 1947 established the modern national security organizational structure and core institutions that

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[76] U.S. CONST. art. I, § 8 cl. 11.

[77] U.S. CONST. art. I, § 8, cl. 12–13. *See generally* Dakota Rudesill, *The Land and Naval Forces Clauses*, 86 U. CIN. L. REV. 391 (2018).

[78] *See* U.S. CONST. art. I, § 8, cl. 14.

[79] U.S. CONST. art. I, § 8, cl. 15.

[80] U.S. CONST. art. I, § 8, cl. 16.

[81] *See* DEP'T OF DEF., SELECTED MANPOWER STATISTICS: FISCAL YEAR 1997 46–51, tbl. 2-11 (1997) (displaying the number of American active duty military personnel in all recorded years from 1789 to 1997).

[82] National Security Act of 1947, Pub. L. No. 253, 61 Stat. 495.

continue in some form to this day.[83] Specifically, it created the National Military Establishment (now the DoD), Central Intelligence Agency, National Security Council, and the Secretary of Defense.[84] It also established the Office of the Secretary of Defense, ensuring civilian oversight over the entire military apparatus (operational and administrative), bringing all three services (Army, Navy, Air Force) under the Secretary of Defense's auspices.[85] The law's passage coincided with a massive and continual standing Army for the first time in American history, forever changing the allocation of power between Congress and the President.[86]

The National Security Act also demoted the Secretaries of the Army and Navy from Cabinet officials to a military department head, and created the Air Force as a new military department—an outgrowth of the Army Air Corps.[87] And in establishing a single Cabinet-level Secretary of Defense over all the services, it sought to solve a problem that persisted throughout World War II: inter-service rivalry that undermined operational military effectiveness.[88] During World War II, the uniformed heads of the Army and Navy possessed both administrative and operational authorities, but the services were often at loggerheads with one another.[89] While ultimately successful in Allied victory, the Army and Navy failed to seamlessly conduct joint Navy and Army operations throughout the war.[90] As President Truman declared,

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[83] *Id.* at § 201 (establishing the National Military Establishment as headed by the Secretary of Defense)

[84] *Id.* at § 101–03 (setting forth the parameters of the creation of each institution listed).

[85] *See* OMAR N. BRADLEY & CLAY BLAIR, A GENERAL'S LIFE 466 (1983) (explaining the office of Secretary of Defense and its control over all three Services). In 1949, two years later, the term "National Military Establishment" was changed to the Department of Defense. *Id.*

[86] *See* DEP'T OF DEF., SELECTED MANPOWER STATISTICS: FISCAL YEAR 1997, *supra* note 81, at 51–53 (showing that the standing army consisted of approximately 1.5 million soldiers in 1947 and that the standing army grew in the following decades).

[87] For roles and responsibilities of the Secretary of the Air Force, see 10 U.S.C. § 8013 (2012).

[88] *See* FEICKERT, *supra* note 29, at 10 (explaining the problem of inter-service rivalries in World War II).

[89] For example, Admiral Nimitz served as the head of the Navy in the Pacific Fleet in the Northern Pacific and General MacArthur served as head of the Army in the Southern Pacific. Joint, unified military operations were virtually non-existent in the Pacific theater. *See id.*

[90] *See id.* ("Differences between the Army and Navy precluded any sort of unified command arrangement . . . .").

"[w]e must never fight another war the way that we fought the last two. I have a feeling if the Army and Navy had fought our enemies as hard as they fought each other, the war would have ended much earlier."[91]

For this reason, the National Security Act placed the three military services under the direction, authority, and control of one civilian Secretary of Defense.[92] A civilian served as the Secretary of each military department with a senior uniformed "service chief" reporting to each Secretary.[93] The National Security Act also formed the early infrastructure for the modern military organization where civilian Secretaries of the military departments, in theory, provide the forces under the unified strategic direction of the combatant command.[94]

Following the National Security Act's passage, President Eisenhower sought to further increase the power of the Office of the Secretary of Defense and tightened civilian control of the military with follow-on reform efforts in 1953 and 1958.[95] But despite Truman and Eisenhower's efforts to reduce inter-service rivalry and improve defense acquisitions efficiency, the core problems of inter-service rivalry remained unresolved.[96]

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[91] *Id.*

[92] 50 U.S.C. § 3002 (2012).

[93] *See, e.g.,* 10 U.S.C. § 5013 (2012) (explaining that the Secretary of the Navy is "appointed from civilian life").

[94] *See* 50 U.S.C. § 3002 (2012) (providing for the civilian Secretaries of Military Departments). For example, the Department of the Navy is defined as:

> [T]he Department of the Navy at the seat of government; the headquarters United States Marine Corps; the entire operating forces of the United States Navy, including naval aviation, and of the United States Marine Corps, including the reserve components of such forces; all field activities, headquarters, forces, bases, installations, activities and functions under the control or supervision of the Department of the Navy; and the United States Coast Guard when operating as part of the Navy pursuant to law.

50 U.S.C. § 3004 (2012).

[95] *See* Reorganization Plan No. 6 of 1953, 18 F.R. 3743, 67 Stat. 638 (providing greater management flexibility to the Secretary of Defense); Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, 63 Stat. 579 (authorizing the President, acting through the Secretary of Defense with the advice of the JCS, to establish unified or specified commands, assign missions, and determine their force structure).

[96] *See* FEICKERT, *supra* note 29, at 5 (noting that there were numerous later instances of poor inter-service planning and cooperation which led to failed missions).

Indeed, this legal architecture remained in place throughout the Cold War and the Vietnam War.[97] The civilian leadership and Secretary of Defense exercised considerable control over the military throughout the 1960s and the Vietnam War.[98] Secretary of Defense Robert S. McNamara famously brought in data-driven "Whiz Kids" to the Pentagon.[99] And President Johnson and McNamara were intimately involved in operational decision-making throughout the Vietnam War.[100] The CJCS did not regularly advise the President on military matters; he only met with the President twice before the introduction of ground troops in Vietnam.[101] Commentators have argued that the absence of routine military advice led to military disaster.[102] Indeed, it was not uncommon for President Johnson and Secretary McNamara to make targeting and tactical military decisions—such decisions were, historically, made by military commanders in the field.[103]

Following the Vietnam War, the individual services were still king. They possessed enormous power and influence both in administrative and operational matters.[104] Each service continued to exercise both operational and administrative control over their respective forces: Navy admirals continued to command ships, aircraft carriers and sailors, and Army generals commanded Army brigades, tank and infantry battalions and soldiers.[105] Seldom did Navy admirals command Army soldiers and vice versa.[106] Joint,

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[97] *See id.* at 4–5 (noting how the structure of the commands has changed since the mid-1940s through the 1980s, covering the period of the Vietnam War and the Cold War).

[98] *See* H.R. MCMASTER, DERELICTION OF DUTY 14 (1997) (discussing how the Defense Reorganization Act of 1958 "aimed to centralize control over the services, remove redundancies, streamline command channels, and provide for tighter civilian control at the Pentagon").

[99] *Id.* at 2.

[100] *Id.* at 53–55. And they have been heavily criticized for their involvement. *Id.* at 54–55.

[101] *See id.* at 217–42.

[102] *See* Robert K. Brigham, Opinion, *Lyndon Johnson vs. the Hawks*, N. Y. TIMES (Aug. 29, 2017), https://www.nytimes.com/2017/08/29/opinion/lyndon-johnson-vietnam-senate.html.

[103] But not entirely, President Lincoln, for example, was intimately involved in military tactical decision-making during the Civil War. For a discussion of this civil-military dynamic, see generally *id*.

[104] *See* FEICKERT, *supra* note 29, at 4–5 (stating that from the National Security Act of 1947 until the Goldwater-Nichols DoD Reorganization Act of 1986, commanders of each service were delegated full operational control over their forces).

[105] *Id.*

[106] *See id.* (noting that once forces were assigned to certain commanders, control of those forces could only be transferred with Presidential approval).

multi-service warfare was simply not a reality between 1947 and 1986, harming operational military effectiveness. Each military service, in effect, was still "king" in joint, unified warfare. The combatant commands' operational authorities and the efficacious joint warfare had to wait until the Goldwater-Nichols Act of 1986 to be fully realized.[107]

III. THE GOLDWATER-NICHOLS ACT OF 1986 ACCELERATES THE OPERATIONAL AND ADMINISTRATIVE MILITARY DIVIDE

A casual observer may chalk up today's relative lack of civilian oversight over the operational military to an underlying tactical and technological problem: the military needs to be poised for a swift response in the face of fast-paced and complex threats facing the nation (cyber, transnational terrorism, etc.). That is not irrelevant, but there is more to it. The statutory regime adopted in 1986 which attempted to improve military operational effectiveness and to reduce inter-service rivalry, created a structure that further isolated the operational military from oversight.

The concepts of *command* and *control* are of central importance for the military and define how the DoD allocates power within the agency. Under joint military doctrine, "command" is defined as "[t]he authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment."[108] Command is "the most important role undertaken by a [joint force commander]"[109] and includes "[a]n order given by a commander; that is, the will of the commander expressed for the purpose of bringing about a particular action."[110] Control is a lesser authority.

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[107] In his last years in office, President Eisenhower sought to build upon the National Security Act reforms. He somewhat succeeded. The DoD Reorganization Act of 1958 established a clear line of command from the President through the Secretary of Defense to the combatant commands. *See* FEICKERT, *supra* note 29, at 5.

[108] JOINT PUBLICATION 1, *supra* note 56, at GL-5. Under military doctrine, command and control is "[t]he exercise of authority and direction by a properly designated commander over assigned and attached forces in the accomplishment of the mission." *Id.*

[109] *Id.* at xxii; *see* FEAVER, *supra* note 50**Error! Bookmark not defined.**, at 82–83 (noting that Congress may have "viewed the newly strengthened Joint Staff as creating yet another fire alarm"). "[U]nity of command" is defined as "[t]he operation of all forces under a single responsible commander who has the requisite authority to direct and employ those forces in pursuit of a common purpose." DOD DICTIONARY, *supra* note 21, at 252.

[110] DOD DICTIONARY, *supra* note 21, at 40.

It includes "[a]uthority that may be less than full command exercised by a commander over part of the activities of subordinate or other organizations."[111]

In the traditional employer-employee context at other federal agencies, command and control have far different meanings. Most agency and civil service employees serve within that particular agency's human resource rules and can be hired, fired, and disciplined accordingly. In contrast, the DoD is governed by a vast hierarchical structure that exerts a more coercive effect on its members: failing to obey a military supervisor's order could result in criminal prosecution.[112] There is simply no corollary in the civilian world or at other federal agencies.

This Part describes and analyzes the Goldwater-Nichols Act, focusing on its modification of command and control authorities. In the terminology of Professors Eskridge and Ferejohn, Goldwater-Nichols possesses certain "super-statute" qualities within the halls of the Pentagon.[113] Although it has yet to achieve similar super-statute appreciation outside the DoD, its effect on the DoD and its implications for civilian control of the military are enormous—further underscoring why Goldwater-Nichols merits the status as a "super-statute."

A. THE LAW OF THE CHAIN OF COMMAND: THE RISE OF THE OPERATIONAL MILITARY AND THE (RELATIVE) FALL OF THE ADMINISTRATIVE MILITARY[114]

The Goldwater-Nichols Act was born from the ashes of military operational failures.[115] In addition to the tragedy of the Vietnam War, the failed Iranian hostage rescue attempt contributed to

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111 JOINT PUBLICATION 1, *supra* note 56, at GL-6.

112 *See* 10 U.S.C. § 892 (2012) (stating that "failure to obey order or regulation" is a punishable offense).

113 *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes,* 50 DUKE L.J. 1215, 1216 (2001) (noting that a super-statute tries to create a new institutional framework that impacts the public culture and has an extensive effect on the law).

114 "Relative" is placed in parenthesis on purpose—the administrative military yields enormous power in the acquisitions process and the development of equipment and weaponry. *See infra* Part IV.D (arguing that the dual-military creates issues in the administrative military's ability to equip the operational military).

115 *See* KATHLEEN MCINNIS, CONG. RESEARCH SERV., R44474, GOLDWATER-NICHOLS AT 30: DEFENSE REFORM AND ISSUES FOR CONGRESS 3 (2016) (describing the military history and failures leading up to the passage of the Act).

President Carter's electoral defeat to President Reagan in 1980.[116] It also exposed the DoD's inability to conduct joint, inter-service military operations.[117] Inter-service rivalry was not just a bureaucratic fight over funding, status, and influence—it was costing American lives.[118]

The Goldwater-Nichols Act sought to address all of these concerns by reducing inter-service rivalry and streamlining civilian authority within the Department.[119] Like a weary parent tired of sibling rivalry and bickering, Congress finally stepped in to make the services get along and work together.[120]

After years of debate and significant pushback from the Pentagon, Congress passed the bipartisan Goldwater-Nichols Act in 1986, named after Senator Barry Goldwater (R-AZ), a World War II veteran and 1964 Republican Presidential nominee and Representative Mike Nichols (D-AL), another highly decorated veteran.[121] Passed in the shadow of earlier operational military failures, supporters of the Act hoped to strengthen civilian control over the military, improve military operational effectiveness, streamline the costly and lengthy acquisitions process, and lessen inter-service rivalry through a focus on joint warfare and doctrine.[122] Specifically, Goldwater-Nichols was intended to:

> [S]trengthen civilian authority in the Department . . . improve the military advice provided to the President, the National Security Council, and the Secretary of

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[116] *See* JAMES LOCHNER, VICTORY ON THE POTOMAC 30–31 (Joseph G. Dawson III et al. eds., 2002) (describing the fall of President Carter and the election of President Regan).

[117] *See* MCINNIS, *supra* note 115, at 3 (describing the effects of the hostage rescue).

[118] *See id.* (showing that the lack of cohesiveness led to failed missions and casualties).

[119] *See id.* at 6–8 (stating the aims of the Act).

[120] *See id*. (noting the Act's goal to encourage cohesiveness between the Military Departments).

[121] *See* LOCHNER, *supra* note 116, at 96, 211, 217, 420–28 (offering an overview of the legislative history on the Goldwater-Nichols Act's passage). Senator Goldwater served as a Major General in the U.S. Air Force Reserves until his retirement from service. *Id.* at 213.

[122] *See* MCINNIS, *supra* note 115, at 7–8 (discussing the purposes of the passage of the Act). In a staff report to the Senate Armed Services Committee, four key "indicators of organizational deficiencies" for the period preceding Goldwater-Nichols were meticulously catalogued. STAFF OF S. COMM. ON ARMED SERVS., 99TH CONG., DEFENSE ORGANIZATION: THE NEED FOR CHANGE 15 (Comm. Print 1985). The four indicators include: (1) operational failures and deficiencies; (2) acquisition process deficiencies; (3) lack of strategic direction; and (4) poor inter-Service coordination. *Id.*

> Defense . . . [and] place clear responsibility on the commanders of the unified and specified combatant commands for the accomplishment of missions assigned to those commands.[123]

Yet Senator Goldwater's own views at the outset of the hearing to reform the DoD called into question the continuing importance of civilian control of the American military:

> The question is, can we, as a country, any longer afford a 207-year old concept that in military matters the civilian is supreme? . . . Now, I realize the sanctity of the idea of the civilian being supreme. It is a beautiful thing to think about. The question in my mind is, can we any longer afford to allow the expertise of [military] men and women . . . to be set aside for the decisions of the civilians . . . . We lost in Korea, no question about that, because we did not let the military leadership exercise military judgment. We lost in Vietnam . . . . If that is the way we are going to do it in the future, I think we are in trouble.[124]

The Act accomplished three main objectives, which had the effect of empowering the operational military at the expense of the administrative military.

First, it established two chains of command within the military, effectively dividing it in two.[125] In doing so, Goldwater-Nichols addressed *how* the President commands by modifying the DoD's operational chain of command to flow from each combatant commander to the Secretary of Defense to the President.[126] It also established a parallel administrative chain of command that flows from the President to the Secretary of Defense to the Secretary of

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[123] Colonel Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 351 (1994) (quoting Goldwater-Nichols Act, Pub. L. No. 99-433 §3 100 Stat. 992-93 (1986)); *see* 10 U.S.C. § 162 (a) (2012) ("[T]he Secretaries of the military departments shall assign all forces under their jurisdiction to . . . combatant commands . . . to perform missions assigned to those commands.").

[124] *Hearings Before the S. Comm. on Armed Servs.*, 98th Cong. 3 (1983) (statement of Sen. Goldwater, Member, S. Comm. on Armed Servs.).

[125] *See* 10 U.S.C. § 162(b) (2012) (describing the split in the chain of command).

[126] *Id.* (describing the operational chain of command).

each military department.[127] Under Goldwater-Nichols, the civilian heads of each military department possess authority and responsibility over twelve administrative functions.[128]

Second, Goldwater-Nichols elevated the powers of the combatant commanders, eliminating the civilian Secretaries of the military departments and the uniformed service chiefs from any operational or war-fighting function, which greatly diminished their overall authority.[129] The civilian Secretaries of the military departments are now completely outside the operational (war-fighting) chain of command and must support the combatant commander by providing all forces to the operational military: "[T]he Secretaries of the Military Departments shall assign *all forces* under their jurisdiction to . . . combatant commands . . . to perform missions assigned to those commands."[130]

The administrative military departments do not truly command any forces, although they provide a level of administrative control consistent with their twelve statutory functions.[131] In contrast, the operational military both commands and controls.[132] And under Goldwater-Nichols, the senior uniformed combatant commanders are "responsible to the President and to the Secretary of Defense for the performance of missions assigned to that command by the President or by the Secretary with the approval of the President."[133] The combatant commanders are invested with broad authority to plan and execute the nation's wars.[134] Their roles and

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[127] *See id.* (describing an administrative chain of command involving the Military Department Secretaries).

[128] These twelve functions include: "(1) recruiting; (2) organizing, (3) supplying, (4) equipping (includes research and development), (5) training, (6) servicing, (7) mobilizing, (8) demobilizing, (9) administering (including the morale and welfare of personnel), (10) maintaining, (11) the construction, outfitting and repair of military equipment, and (12) the construction, maintenance, and repair of building, structures and utilities and the acquisition of real property and interests in real property necessary to carry out the responsibilities specified in this section." 10 U.S.C. § 5013 (b) (2012).

[129] *See, e.g.,* 10 U.S.C. § 162 (2012) (altering the power and roles of several operational military actors).

[130] 10 U.S.C. § 162(a)(1) (2012) (emphasis added).

[131] *See* 10 U.S.C. § 5013(b) (outlining the twelve statutory functions of the administrative military department).

[132] *See* 10 U.S.C. § 164 (2012) (describing the authority of the operational military).

[133] 10 U.S.C. § 164 (2012).

[134] *See* Reveron & Gavin, *supra* note 4, at 1–2.

responsibilities have expanded over the years to encompass a large swath of non-military and foreign relations functions.[135]

Third, Goldwater-Nichols empowered the Office of the CJCS, boosting its stature, responsibility, and authority.[136] Under Goldwater-Nichols, the CJCS enjoys enormous authority and influence due to the centralization of military advice to the President and the way that orders are promulgated and communicated.[137] This change coincided with General Colin Powell's service as the first post-Goldwater-Nichols Chairman.[138] General Powell, a former White House Fellow and one of the first African-American four-star generals, was a particularly influential military officer who orchestrated the U.S. military operation in the Persian Gulf War.[139] Both Presidents George H.W. Bush and Bill Clinton revered General Powell's advice.[140] His remarkable political and military skills greatly bolstered the power of the Chairman's office.[141]

Communications from the operational military combatant commands are now transmitted *via* the Chairman, completely bypassing the civilian service Secretaries.[142] The CJCS translates and communicates direction and operational orders up and down the chain of command.[143] These are sent to the combatant commands and their associated operational military commanders; many of whom are engaged in major combat operations.[144] All operational orders originate from the Joint Staff, circumventing the

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135 *See id.* (describing the enlarged role of combatant commanders).

136 10 U.S.C. § 163(a)(1) (2012).

137 *Id.*

138 *See Colin Powell Biography,* BIOGRAPHY.COM (Apr. 2, 2014), https://www.biography.com/peopl/colin-powell-9445708 ("In 1989, President George H.W. Bush appointed General Colin Powell as Chairman of the Joint Chiefs of Staff.").

139 *See id.*

140 *See id.*

141 *See id.*

142 *See* 10 U.S.C. § 163(a)(1) (2012) (outlining how communications from combatant commands are transmitted). And the Joint Staff's size and stature within DoD has grown significantly in recent years. *See* LOCHNER, *supra* note 116, at 213.

143 *See* 10 U.S.C. § 163 (2012) (outlining the chain of communication for operational orders).

144 *Id.*

individual service leaders.[145] The Chairman and his highly qualified staff now implement Presidential policy and direction.[146]

Relatedly, Goldwater-Nichols established the Chairman as the *principal* military advisor to the President, Secretary of Defense, National Security Council, and Homeland Security Council.[147] This change serves to unify and channel the military advice provided to civilian decision makers—it comes from one person (rather than in a diffuse nature through the individual service chiefs). By law, the Chairman has direct access to the President in providing military advice and does not need to formally coordinate this advice via the Secretary of Defense.[148]

Finally, combatant commands have broad delegated legal authority to create new organizations and commands, so-called "Joint Task Forces," in response to an emergency, humanitarian mission, or any other military missions.[149] This takes place wholly independent of congressional oversight.[150] These Joint Task Forces are of increased importance for ongoing military operations—such as those in Syria and Afghanistan—with the combatant commands taking on more of an oversight role.[151] For example, General Miller leads the U.S. task force that is part of the NATO Resolute Support Mission in Afghanistan.[152] He reports to the Central Commander, currently General Votel.[153]

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[145] *Id.*

[146] Failure to comply with a lawful order is a firing offense and risks courts-martial. *See* Sarah Grant & Jack Goldsmith, *What if President Trump Orders Secretary of Defense Mattis to do Something Deeply Unwise?,* LAWFARE (Aug. 22, 2017, 12:36 PM), https://www.lawfareblog.com/what-if-president-trump-orders-secretary-defense-mattis-do-something-deeply-unwise.

[147] 10 U.S.C. § 151(b) (2012).

[148] 10 U.S.C. § 162(b) (2012).

[149] *See* JOINT PUBLICATION 1, *supra* note 56, at xviii (noting how and under what authority Joint Task Forces can be created).

[150] *Id.* at IV-10–IV-12 (discussing the high level of discretion that the operational military has in creating Joint Task Forces).

[151] Geography plays a role in the allocation of power and authority between combatant commands and the administrative military. Most geographic combatant commanders are outside the United States, creating additional time-distance problems, further hindering oversight. *Cf id.* (exploring the effects of geography on military oversight).

[152] Jim Garamone, *Miller Takes Over NATO, U.S. Command in Afghanistan*, U.S. DEP'T DEF. (Sept. 2, 2018), https://dod.defense.gov/News/Article/Article/1618550/miller-takes-over-nato-us-commands-in-afghanistan/.

[153] *General Joseph L. Votel,* U.S. DEP'T DEF. (Mar. 30, 2016), https://www.defense.gov/About/Biographies/Biography-View/article/602777/general-joseph-l-votel/.

In sum, due to Goldwater-Nichols, the operational combatant commanders' authorities grew significantly. So, too, did the status and power of the CJCS. The operational military commands now have broad responsibility to plan for the employment of armed forces, respond to military contingencies, and take actions to deter conflict and command the military.[154] The administrative military now supports the operational military, which possesses the legal and doctrinal authority to utilize all the breathtaking tools of modern warfare.[155]

A snapshot of the evolution of the military's chain of command is provided in Table 1, below. Two key points demand highlighting. First, the President and Secretary of Defense (both civilians) are in the lawful chain of command for both militaries.[156] Second, under Goldwater-Nichols, there are *three levels* of civilian oversight (President, Secretary of Defense, and Secretary of Army, Navy, or Air Force) within the administrative military's chain of command, but only *two levels* of civilian oversight (President and Secretary of Defense) within the operational military's chain of command.[157] The CJCS has direct access to the President for all military advice—this advice has historically focused on operational military matters.[158] The positions in italics indicate active-duty military personnel.

Table 1: The Law of the Chain of Command Through History

	1789-1947	*1947-1986*	*1986-present*
Operational Military	President[159] ↓ Secretary of War ↓ Secretary of Army;	President ↓ Secretary of Defense ↓	President ↓ Secretary of Defense ↓

[154] 10 U.S.C. § 164 (b)(3)(A)–(C) (2012) (listing the primary duties of a Commander of a combatant command).

[155] *See supra* Parts II.B–C, III (discussing how the operational military and administrative military interact with each other).

[156] 10 U.S.C. § 162(b) (2012) ("Unless otherwise directed by the President, the chain of command to a unified or specified combatant runs from the President to the Secretary of Defense.").

[157] 10 U.S.C. §§ 162(b), 164(c).

[158] 10 U.S.C. § 151.

[159] U.S. CONST. art. II, § 2, cl. 2.

	Secretary of Navy ↓ *Senior Military Officer in Army or Navy*	*Combatant Commanders*[160]	*Combatant Commanders*[161] (via *Chairman, Joint Staff*)
Administrative Military	Effectively Mirrors Operational Military Chain of Command	President ↓ Secretary of Defense ↓ Civilian Secretaries of Military Departments ↓ *Uniformed "Chiefs"*[162]	President ↓ Secretary of Defense ↓ Civilian Secretaries of Military Departments[163] ↓ *Uniformed "Chiefs"*[164]

B. HOW THE LAW OF MILITARY "CONTROL" AND THE RISE OF JOINT MILITARY DOCTRINE FURTHER DIVIDE THE TWO MILITARIES

In addition to altering the chain of command, Goldwater-Nichols fundamentally changed the way the two militaries controlled their forces. Control, a military authority that is "less than full command," defines the way the military conducts its day-to-day activities.[165] Under joint military doctrine, three of the four command authorities pertain to the operational military

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[160] The forces (people, weapons, and equipment) are administratively assigned to individual services that continue to exercise operational control over them. *Cf* 10 U.S.C §164(c) (outlining the command authority of Combatant Commanders).

[161] Forces are now assigned to combatant commands from the individual services. 10 U.S.C. § 162(a)(1) (2012). The heads of each service are not in the operational chain of command. *See generally id.* at §162(b) (not specifically including the heads of each service in the operational chain of command).

[162] Prior to Goldwater-Nichols, the senior military officer in each branch of service (Army, Navy, Air Force, Marines) exercised operational control over their individual service forces. *See* discussion *supra* Part III.A (noting the changes that occurred after Goldwater-Nichols).

[163] Following Goldwater-Nichols, the military services assigned all forces under their jurisdiction (with limited exception) to the combatant commands. 10 U.S.C. § 162 (a) (2012).

[164] *See id.*

[165] DOD DICTIONARY, *supra* note 21, at 49–50.

(combatant command, operational, and tactical).[166] Just one authority—administrative control—pertains to the administrative military.[167]

As a result, the operational military has *two* significant lines of control emanating from its forces: Personnel assigned to the combatant commands have both an operational chain of command for war-fighting and military operations that leads to the combatant commander, as well as an administrative chain of command for administrative matters that leads to the Secretaries of the military departments.[168] In contrast, the administrative military has just one—administrative control.[169]

Goldwater-Nichols also increased the role and stature of joint military doctrine, defined as "overarching guidance and fundamental principles for the employment of the Armed Forces of the United States."[170] It serves as the "bridge between policy and doctrine and describes the authorized command relationships and authority that military commanders can use and other operational matters derived from [law]."[171] Military doctrine is properly viewed as the military's day-to-day implementation guidance that is nested within existing statute; it acts as a sort of sub-regulation, at times with the force of law.[172] If the military came with a user manual,

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[166] In the control context, the confusingly named "combatant command" is also a control authority. *See id.* at 37 (defining "combatant command"); *see also id.* at 175, 234 (defining "operational control" and "tactical control" which place both within the operational military).

[167] Administrative control is inextricably linked to the statutory authority and responsibility provided to the Secretaries of the Military Departments. *See, e.g.,* 10 U.S.C. § 5013 (2012) (defining the Secretary of the Navy's role and responsibilities).

[168] 10 U.S.C. § 165(b) (2012) ("The Secretary of the Military Department is responsible for the administration and support of forces assigned by him to a combatant command.").

[169] 10 U.S.C. § 165(a) (2012) (stating that the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Secretary of the Military Department are responsible for administrative control over combatant commands).

[170] JOINT PUBLICATION 1, *supra* note 56, at ix. "[I]t specifies the authorized *command* relationships and authority that military commanders can use, provides guidance for the exercise of that military authority, provides fundamental principles and guidance for command and control, prescribes guidance for organizing and developing joint forces, and describes policy for selected joint activities. It also provides the doctrinal basis for interagency coordination and for US military involvement in multiagency and multinational operations." *Id.* at i (emphasis added).

[171] *Id.* at ix.

[172] *See* DOD DICTIONARY, *supra* note 21, at 2 ("Joint doctrine enhances the operational effectiveness of the Armed Forces by providing authoritative guidance and standardized terminology on topics relevant to the employment of military forces . . . . .").

this would be it. The CJCS issues joint doctrine, which takes precedence over all *other* doctrine to include service-specific doctrine—yet another indication of the operational military's importance.[173]

Within joint doctrine, combatant command authority is the pinnacle of military control authority, and this term can be found in both statute and doctrine.[174] Its doctrinal definition mirrors its statutory definition to include full authority for a: "combatant commander to perform those functions of command over assigned forces involving organizing and employing commands and forces; assigning tasks; designating objectives; and giving authoritative direction *over all aspects of military operations*."[175]

"Operational control" and "tactical control," the other two command authorities the operational military possesses, perform certain "stacking doll" functions that are embedded and inherent within combatant command authority.[176] Both are of significant importance to the execution of military operations and can be traced to the earliest interpretations of the Commander in Chief authority.[177] Operational control is defined as:

> the authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction over all aspects of military operations and joint training necessary to accomplish the mission. . . it does not . . . include authoritative direction for logistics or matters of administration, discipline, internal organization or unit training.[178]

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[173] JOINT PUBLICATION 1, *supra* note 56, at VI-3.

[174] *See, e.g.,* 10 U.S.C. § 164(c) (2012) (discussing combat command with respect to several areas).

[175] DOD DICTIONARY, *supra* note 21, at 37 (emphasis added).

[176] *See* discussion *supra* Part II (discussing tactical and operational control).

[177] *See, e.g.,* Fleming v. Page, 50 U.S. 603, 615 (1850) (noting that the Commander in Chief has the power to employ the military placed by law at his command and direct their movements).

[178] JOINT PUBLICATION 1, *supra* note 56, at GL-10.

Similarly, tactical control is inherent in both combatant command and operational control. It is defined as "[authority] . . . that is limited to the detailed direction and control of movements or maneuvers within the operational area necessary to accomplish missions or tasked assigned."[179]

Contrast these three control authorities of the operational military with the single control authority—administrative control—that the administrative military possesses by virtue of the administrative chain of command. Administrative control is closely linked to the statutory authority placed in the civilian military service secretaries, and defined as:

> Direction or exercise of authority over subordinate or other organizations in respect to administration and support, including organization of Service forces, control of resources and equipment, personnel management, logistics, individual and unit training, readiness, mobilization, demobilization, discipline, and other matters not included in the operational missions of the subordinate or other organizations.[180]

To highlight this division and the importance of control, consider the hypothetical of a Navy aircraft carrier with 5,000 military service members assigned to European Command. The European operational commander has broad authority to position the aircraft carrier throughout an enormous Area of Responsibility from the Arctic Ocean to the Mediterranean Sea in response to a crisis, or however he or she sees fit. The administrative military with its separate chain of command, by contrast, exercises more limited control over the sailors onboard the aircraft carrier for training, personnel management, health care, and other ministerial matters.

Table 2 presents a snapshot of the law of control for both the operational and administrative militaries.

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[179] *Id.* at GL-11–GL-12.

[180] *Id.* at V-12 (as amended through Mar. 2013). Four of the statutory functions are explicitly found in doctrine, to include equipping, training, mobilizing, and servicing. Other functions are found implicitly (e.g. administering, logistics). *Id.*

Table 2: The Hierarchy of Military Control

Operational Military	**Administrative Military**
Combatant Command ↓ Authority ↓ Operational Control ↓ Tactical Control	Administrative Control ↓ Individual Service Control

In sum, Goldwater-Nichols increased the operational effectiveness of the military, streamlined the chain of command, and generated a revolution in joint warfare.[181] But it overshot in the achievement of its goals and resulted in a *weakening* of civilian control over the military through a modification of the chain of command and a diminished role for the civilian Secretaries of the military departments. Indeed, under Goldwater-Nichols there is now just one civilian between the operational combatant commanders charged with war fighting and the President.[182] And the senior uniformed military officer, the CJCS, has direct access to the President as the principal military advisor.[183]

Today we have a standing army at a size unimaginable to the founders and a vast, complex dual-military organization continuously funded by a captured Congress.[184] The operational military now possesses a vast footprint throughout the world, consistently funded by Congress, re-affirming its own existence.[185] Inertia emerges whereby Congress cannot defund the massive military without facing enormous political risk. After all, members

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[181] *See supra* Part III (discussing how the passage of the Goldwater-Nichols Act allowed for operational and administrative efficiency).

[182] *See* 50 U.S.C. § 3002 (2012) (placing the three Military Services under the direction, authority, and control of one civilian Secretary of Defense). Former Secretary of Defense, James Mattis, was head of the most powerful combatant commander (Central Command) just four years prior to being appointed Secretary of Defense. *Biography of Secretary of Defense James N. Mattis,* U.S. DEP'T OF DEF., https://www.defense.gov/About/Biographies/Biography-View/Article/1055835/james-mattis/ (last visited Feb. 18, 2019).

[183] 10 U.S.C. § 151(b) (2012).

[184] *See* DEP'T OF DEF., STRENGTH COMPARISON (DECEMBER 2018) https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (recording that there are over 1.3 million persons in the Armed Forces as of December, 31, 2018).

[185] *See* FEICKERT, *supra* note 29, at 1–3.

of Congress do not want to be accused of being "against the troops" through the denial of funding to military members overseas.[186]

Finally, the DoD is best understood as an extraterritorial federal agency. Pursuant to Goldwater-Nichols, geographic combatant commanders, their large staffs, and subordinate commands are permanently stationed overseas. There is not one domestic-based military that responds to crisis abroad on a case-by-case basis.[187] There are two militaries, and the operational military's pre-existing force structure already covers the entire globe in war, peace, and everywhere in between. The continuation of the combatant commander infrastructure facilitates a certain "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned."[188] This only empowers the President, who can point to continued congressional acquiescence and its continual funding of combatant commanders as "a gloss on 'executive Power' vested in the President by § 1 of Art. II."[189]

IV. THE OPERATIONAL AND ADMINISTRATIVE MILITARY DIVIDE'S FOUR CONSEQUENCES

The two-military divide has several consequences, further accelerated by independent factors. I focus on four of these consequences including: (1) diminished civilian control of the operational military, (2) militarization of foreign policy, (3) unclear application of administrative law to the operational military, and (4) continual bureaucratic tension between the two militaries.

As Goldwater-Nichols established two militaries with two sets of authorities and two chains of command, congressional oversight over the operational military has lagged.[190] Congress often remains engaged with administrative military matters, particularly defense

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[186] *See* R. Jeffrey Smith, *Will Cutting the Defense Budget Leave America at Risk?*, THE ATLANTIC (Jan. 26, 2012), https://www.theatlantic.com/national/archive/2012/01/will-cutting-the-defense-budget-leave-america-at-risk/252010/ (discussing how debates over military spending raise fear in Americans, which are hard for politicians to navigate).

[187] *Cf* DOD DICTIONARY, *supra* note 21, at 37 (defining the broad authority of control given to combatant commanders, allowing them to respond to each perceived crisis as each sees fit).

[188] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (Frankfurter, J., concurring).

[189] *Id.* at 611.

[190] *See, e.g.,* Searcey & Schmitt, *supra* note 42, at A5 (reporting that senators are unaware of all of the United States' military activities around the world).

acquisitions that can have significant impacts on employers in a member's home district.[191] By contrast, fundamental questions about the scope and legality of operational military operations go unanswered.

To highlight one example, Congress passed the last two congressional Authorizations for the Use of Military Force (AUMF) in 2001 and 2002, and each fails to include an AUMF sunset provision or updated authorization language restricting operations.[192] In the absence of any restrictions, the operational military continues to fill the void left behind by congressional leadership.[193] Indeed, the U.S. military is operating in an increasing number of countries throughout the world, conducting an ever-expanding menu of missions without the requisite amount of oversight.[194] The discussion below articulates how the administrative military's functions are increasingly aligned with congressional interests. Congress, in turn, places too much attention on the administrative military and not enough attention on the operational military. Further, while administrative law and the APA apply to the bulk of the administrative military's actions, it remains unclear how, precisely, it applies to the operational military (if at all).[195] This Part begins by first addressing the concept of "civilian control of the military" and the health of this important constitutional norm in light of the divide.

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[191] *See* James Fallows, *The Tragedy of the American Military,* THE ATLANTIC (Jan. 2015), https://www.theatlantic.com/magazine/archive/2015/01/the-tragedy-of-the-american-military/383516/ ("Many on Capitol Hill see the Pentagon with admirable simplicity . . . [i]t is a way of directing tax money to selected districts.").

[192] *See generally* Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. (Oct. 16, 2002); Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (Sept. 18, 2001).

[193] *See* FEICKERT *supra* note 29, at 14 (noting that combatant commanders can create a Joint Task Force for a variety of reasons and that those Joint Task Forces are not disbanded until their mission is deemed accomplished by the combatant commander).

[194] *See, e.g.,* Turse, *supra* note 41 (noting that Special Operations forces have grown in every possible way from their budget to their pace of operations to the geographic sweep of their missions since September 11, 2001).

[195] *See* Kathryn E. Kovacs, *Leveling the Deference Playing Field,* 90 OR. L. REV. 583, 585 (2012) (noting that Congress made the deliberate decision to subject the military to review under the APA but not explaining how this review would affect the military's operational activities).

A. THE TWO-MILITARY DIVIDE'S FIRST LEGACY: CENTRALIZATION AND DIMINISHED CIVILIAN CONTROL OF THE OPERATIONAL MILITARY

1. Defining Civilian Control of the Military.

In political theory, "civilian control of the military" places ultimate responsibility for a country's strategic decision-making in the hands of civilian political leadership, not professional military officers.[196] Samuel Huntington, the preeminent political theorist of civil-military affairs, summarized civilian control as the "proper subordination of autonomous profession to the ends of policy."[197] Civilian control of the military is better understood not as a dichotomy but as a continual *process* whose strength ebbs and flows over time due to a variety of factors.[198] It fluctuates with political norms, institutions, and personalities. That continuum can range from "the extreme of countries ruled by military establishments, or that experience periodic *coups d'etat* and frequent direct or indirect military intervention in politics, to those that do not even possess standing military forces."[199]

The United States has a remarkably strong history of civilian control of the military since the nation's inception. This can be traced to the earliest days of the Republic and George Washington's willingness to cede power to the Continental Congress upon his defeat of the British Army.[200] But America's strong tradition of civilian control is not a foregone conclusion. It requires constant

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[196] *See* FEAVER, *supra* note 50, at 80–81 (discussing the role of civilian principals as a "screening mechanism" on military actions.

[197] SAMUEL HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 72 (1959). Huntington also noted that despite numerous historical references, a satisfactory definition of "civilian control of the military" had yet to emerge. He divided the concept into two modes of control: subjective and objective. *Subjective* civilian control maximizes "the power of civilian groups in relation to the military" via civilian institutions and constitutional norms. *Objective* civilian control "professionalizes" the military by consigning the armed forces exclusively to the apolitical task of the management of violence. *Id.* at 80–85.

[198] *See* Richard H. Kohn, *An Essay on Civilian Control of the Military*, AMERICAN DIPLOMACY (Mar. 1997) http://americandiplomacy.web.unc.edu/1997/03/an-essay-on-civilian-control-of-the-military/ ("The truth of the matter is that fundamentally, civilian control is not a fact but a process.").

[199] *Id.*

[200] *See* JOSEPH ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 145–46 (2004) (quoting George Washington at the official ceremony celebrating victory as saying, "[h]aving now finished the work assigned me . . . I retire from the great theatre of Action . . . . I here offer my Commission, and take my leave of all the enjoyments of public life").

evaluation, to include weighing the relative influence "the military and civilians have in the decisions of state concerning war, internal security, external defense, and military affairs."[201]

Within political theory, military accountability to the legislative branch is essential to the healthy maintenance of civilian control over the military.[202] Accountability to the legislative branch, in turn, helps ensure accountability to the civilian populace.[203] This fosters public discussion, debate, transparency in military affairs, clarity on military expenditures, and investigation and inquiry into military matters.[204] This authority must be actively exercised, however, lest it lie fallow, undermining civilian control.[205] Strong legislative oversight over the military actually "strengthens national defense by reinforcing military identification with the people and popular identification with the military."[206]

Congress disproportionately exercises its authority and control over the administrative military at the expense of operational military oversight.[207] Further, once Congress delegates power and statutory authority to the operational military, it is difficult to get back.[208] Inertia sets in. Consider the Special Operations Command (SOCOM), which is still the *only* military command formally established by Congress by statute (pursuant to an amendment to the Goldwater-Nichols Act in 1987).[209] Or consider Africa Command, the nation's newest geographic combatant command,

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[201] Kohn, *supra* note 198 (positing that the foundations of democratic civilian control of the military rests on four requirements: (1) democratic governance and rule of law; (2) accountability to public institutions; (3) effective countervailing power; and (4) a military tradition committed to neutrality).

[202] *See id.*

[203] *See id.* ("Accountability to parliament or to the legislature implies accountability to the populace.").

[204] *See id.*

[205] *See id.* ("[W]here civilian control is weak or nonexistent, military influence laps over into other areas of public policy and social life.").

[206] *Id.*

[207] *See* discussion *infra* Part IV.A.3. (arguing that Congress actively regulates the activities of the administrative military but not those of the operational military).

[208] *See, e.g.,* Brian McKeon & Caroline Tess, *How Congress Can Take Back Foreign Policy: A Playbook for Capitol Hill*, FOREIGN AFFAIRS (Jan./Feb. 2019) https://www.foreignaffairs.com/articles/united-states/2018-11-07/how-congress-can-take-back-foreign-policy (noting both that Congress has more authority over foreign affairs than they are utilizing and that the ability to take it back, has been "eroded by a variety of factors").

[209] *See* 10 U.S.C. § 167 (2012) (establishing SOCOM).

established in 2007.[210] Since its inception, its size, scale, and influence have grown significantly, and its headquarters staff now exceeds European Command's.[211] Once created, bureaucracies fight for status, funding, and influence, consistent with normal bureaucratic behavior—the military bureaucracy and its combatant commands are no different.[212]

Finally, the judiciary also has an important role in the maintenance of civilian control of the military. Within administrative law and § 706 of the APA, citizens can bring individual citizen suits against agencies for violating the "arbitrary and capricious" standard.[213] But the APA has an uneven application to the two-military divide: as discussed in greater detail below, the administrative military is largely subject to such suits based upon the definition of "agency," while it remains unclear how the APA applies to operational military actions. [214]

2. Goldwater-Nichols' Emphasis on Centralization

Goldwater-Nichols furthered the centralization of the operational military's power to include the streamlining of military advice via one person: the CJCS. The CJCS now has a pivotal role as the single voice and provider of legal advice to the President, Secretary of Defense, and National Security Council.[215] In the operational military context, the uniformed members of the Joint Staff are incentivized to reach a certain baseline level of consensus in their advice to the CJCS as they lack a legal mechanism to

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[210] *See* U.S. AFRICOM Pub. Affs., *U.S. Africa Command Reaches Initial Operating Capability*, UNITED STATES AFRICA COMMAND (Oct. 1, 2007), https://www.africom.mil/media-room/Article/6042/us-africa-command-reaches-initial-operating-capabi (detailing the creation of Africa Command).

[211] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-652R: DEFENSE HEADQUARTERS: GEOGRAPHIC COMBATANT COMMANDS RELY ON SUBORDINATE COMMANDS FOR MISSION MANAGEMENT AND EXECUTION 16–17 (2016) (stating that Africa Command's headquarters includes 1,734 persons while European Command's headquarters includes 1,535 persons).

[212] *See generally* JAMES Q. WILSON, ON BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989); *see also* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 71–72 (1971) (suggesting that military strategy has been driven by budget considerations).

[213] 5 U.S.C. § 706 (2012).

[214] *See* discussion *infra* Part IV.C.1.

[215] 10 U.S.C. §§ 151 (2012).

directly advise the President and Secretary of Defense.[216] As Goldwater-Nichols discourages inter-service rivalry, the role and importance of dissent was minimized.[217] Under this centralized model, the President and civilian decision-makers receive one voice from the *entire* military on operational military matters despite an increasingly complex menu of national security issues.[218] Each service provides their senior military officer to sit on the Joint Chiefs of Staff, but any dissent is filtered through the CJCS.[219]

Goldwater-Nichols also established a personnel incentive structure where joint assignments within operational military commands such as the Joint Staff and combatant commands are highly sought-after and a legal prerequisite for promotion to flag and general officer.[220] Career-minded officers are competing to "punch" a "joint ticket" within the operational military.[221] Today, the 1,000+ uniformed members of the Joint Staff may be the single most talented and effective staff in the entire U.S. government. It is enormously prestigious to work within the Pentagon's corridors, due in large part to the incentive structure established by Goldwater-Nichols.[222] The CJCS has the final say, too, on who joins the staff.[223] The Secretaries of the military departments nominate the officers—the CJCS ultimately selects who serves on the staff.[224]

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[216] *See* 10 U.S.C. § 163(a)(1) (2012) (outlining how communications from combatant commands are transmitted).

[217] *Cf* MCINNIS, *supra* note 115, at 9 (discussing that Colin Powell, the CJCS at the time, noted the lack of dissent within Operation Desert Storm).

[218] *Cf id.* (citing Leighton Smith, *A Commander's Perspective*, in THE GOLDWATER-NICHOLS DOD REORGANIZATION ACT: A TEN-YEAR RETROSPECTIVE 29, 29 (Dennis J. Quinn ed., 1999)) (stating that the White House viewed the clarification of the chain of command as contributing to Operation Desert Storm's success).

[219] *See* 10 U.S.C. § 151(d) (2012) (setting forth how opinions and advice of Joint Chiefs of Staff are to be given to the CJCS and ultimately to Washington).

[220] *See* 10 U.S.C. §§ 662, 665 (2012) (setting forth the promotion policy objectives for joint qualified officers and the policies for monitoring the careers of joint qualified officers).

[221] *See, e.g.,* James Joyner, *Military's Lock-Step Promotion System*, OUTSIDE THE BELTWAY (Feb. 15, 2012) https://www.outsidethebeltway.com/militarys-lock-step-promotion-system/ (offering an Operation Desert Storm veteran's view that the military promotion system for officers involves "successfully clearing a series of hoops" including punching a "Joint ticket").

[222] *See* Goldwater-Nichols Hearing, *supra* note 15, at 35 (statement by Dr. Hamre) ("Service chiefs are, by far, the most important people in the [Pentagon] . . . . Service Chiefs are all-powerful.").

[223] 10 U.S.C. § 155(a)(2) (2012).

[224] *Id.*

The centralization of military advice streamlines information for civilian decision-makers, but it also imposes institutional costs.[225] As Judge Posner and Professor O'Donnell have articulated in the context of intelligence reform, centralization reduces competition between agencies, places an excessive focus on consensus, and less consideration of low-probability yet high-magnitude threats.[226] No longer is inter-service rivalry the defining feature of the operational military; unification and centralization are the defining features.[227] While inter-service rivalry certainly had its costs (and still exists at some diminished level), it has decreased dramatically since President Truman's earlier warnings.[228] But the military has also lost any positive and powerful counterbalancing effects from these rivalries. Inter-service rivalry has been replaced by a single, unified military voice and with it increased military authority and influence.[229]

3. Congress Actively "Makes Rules and Regulations" for the Administrative Military but Not the Operational Military.

As discussed in Part II, Congress has an important constitutional role "to make Rules for the Government and Regulation of the land and naval Forces."[230] This is not limited solely to the administrative land and naval Forces; it also includes the entire defense establishment and operational military

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[225] *See, e.g.,* Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1729 (2006) (proposing a framework for balancing decentralization and centralization in the intelligence community).

[226] *See* RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, 42–43 (2005) (noting centralization ultimately results in depriving the President of a range of views and incomplete data).

[227] *See, e.g.,* MCINNIS, *supra* note 115, at 9 (citing Colin Powell) ("You will notice in Desert Storm nobody is accusing . . . the Army [of] fighting the Air Force and the Navy [of] fighting the Marine Corps. We are now a team. The Goldwater-Nichols legislation helped that.").

[228] *See* FEICKERT, *supra* note 29, at 3 ("Differences between the Army and Navy precluded any sort of unified command arrangement . . . .").

[229] *See* Dunlap, *supra* note 125, at 372 (noting that rivalry between military branches has been diminished); *see also* HUNTINGTON, *supra* note 197, at 87 ("If the officer corps . . . [becomes more] unified . . . ,this change will tend to increase its authority with regard to other institutions of government.").

[230] U.S. CONST. art. I, § 8, cl. 14.

organization.[231] While Congress exercised its constitutional authority through the passage of the National Security Act and Goldwater-Nichols Act, it has played a considerably more passive role in the creation and modification of the operational military structure.[232]

Under existing statutory authority and doctrine, the President has the sole authority to create new combatant commands (and subordinate war-fighting Joint Task Forces) without explicit congressional approval.[233] Further, the President may revise the mission, responsibilities or force structure of an existing combatant command independent of Congress.[234] In doing so, the President must notify Congress within 60 days, and this notification requirement is suspended during "hostilities or imminent threat of hostilities."[235] In turn, the combatant commander can create Joint Task Forces and subordinate commands without congressional approval.[236]

Congress is largely absent from the development of the Unified Command Plan (UCP), the blueprint for the operational land and naval forces that establishes and modifies the boundaries of the geographic combatant commands. The CJCS prepares the UCP, which has evolved to become an executive branch document signed by the President that establishes, defines, and describes the role of each combatant commander.[237] Driving military policy and establishing the operational military's governing infrastructure, the UCP implements the statutory guidance for combatant commands

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[231] *Cf* CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 1 (2018) (noting that some interpret the Constitution to require Congressional authorization and approval before armed forces are deployed and utilized abroad).

[232] *See, e.g.,* Nathan Smith, Opinion, *We need more congressional oversight on matters of war,* THE HILL (Apr. 24, 2018) https://thehill.com/opinion/national-security/384564-we-need-more-congressional-oversight-on-matters-of-war (criticizing Congress for its lack of oversight during the Obama and Trump administrations).

[233] 10 U.S.C. § 161(a) (2012).

[234] 10 U.S.C. § 161(b)(2) (2012).

[235] *Id.*

[236] *See* JOINT PUBLICATION 1, *supra* note 56, at IV-1 (Commanders of unified [Combatant Commands] may establish subordinate unified commands . . . .").

[237] *See* DOD DICTIONARY, *supra* note 21, at 250 (defining the UCP as "[t]he document, approved by the President, that sets forth basic guidance to all unified combatant commanders").

found in the National Security Act and Goldwater-Nichols Act.[238] Experts have described the UCP as a document "that has significant impact on how [combatant commands] are organized, trained, and resourced—areas over which Congress has constitutional authority."[239] But its development is nested within the operational military and executive branch with minimal input or oversight from Congress.[240] To highlight the importance of the combatant command process, just last year a new combatant command—Cyber Command—was established with fairly minimal public debate.[241] Perhaps not surprisingly, at the time of this writing, Cyber Command is already seeking greater operational authority to launch offensive cyber operations.[242]

Moreover, while the combatant commanders provide annual reports to Congress and testify annually, the administrative military leaders testify in front of Congress much more frequently.[243] Indeed, not only is the frequency of administrative military-based testimony significantly higher than operational military commander testimony, but the purpose and nature of the testimony is qualitatively quite different. The administrative military is often on the receiving end of congressional investigation and inquiry while the operational military commanders are afforded a remarkable level of deference.[244] The operational military is often

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[238] *See id.* The UCP elicits numerous questions that one would think would invite congressional involvement, such as: Why is Israel part of European Command, not Central Command? Why does Africa Command not include Egypt?And does Special Operations Command's lack of geographic restrictions—allowing it to move into and out of the myriad geographic commands—create tension between special operators and the geographic combatant commanders? *See* FEICKERT, *supra* note 29, at 15, 28, 39 (exploring these questions).

[239] FEICKERT, *supra* note 29, at Summary.

[240] *See, e.g.,* Turse, *supra* note 39 (noting the growth of Special Operations forces since 9/11 without the oversight of Congress).

[241] Lisa Ferdinando, *Cybercom to Elevate to Combat Command,* DOD NEWS (May 3, 2018), https://dod.defense.gov/News/Article/Article/1511959/cybercom-to-elevate-to-combatant-command/.

[242] *See* Patrick Tucker, *A Fight is Brewing Between Congress and the Military Over Cyber War,* DEFENSE ONE (Nov. 16, 2017), http://www.defenseone.com/technology/2017/11/fight-brewing-between-congress-and-military-over-cyber-war/142616/?oref=d-topstory (stating that cyber capability is progressing at a rapid pace and that the Cyber Mission Force Team would achieve full operational capability approximately one year ahead of schedule).

[243] *See supra* notes 34–35.

[244] *See* MURDOCK ET AL., *supra* note 35 (discussing how Congress regularly calls administrative military heads when investigating the latest military fumbles, even if the

advocating for increased funding in that commander's Area of Responsibility.[245] Indeed, combatant commanders' congressional testimony "can sway Congress and embarrass or impede the administration."[246] To highlight one example, the four-star combatant commander with oversight responsibilities over South America testified in front of congressional committees seventeen times in an attempt to advocate for increase funding for drug interdiction efforts.[247]

Under a principal-agent model of civil-military relations, each agent (military) competes with their principal (Congress or the President) for independence and influence.[248] And each geographic combatant commander likely competes with one another for the administrative military's forces. After all, each Army battalion, Navy carrier strike group, or Air Force fighter squadron can only be in one place at one time. This sets up a dynamic whereby the geographic combatant commands advocate strongly for their respective regions of the world at the potential expense of other regions. Under Goldwater-Nichols, combatant commanders enjoy a special status within the DoD budgetary process: the Secretary of Defense is required to submit to Congress a separate budget proposal for each combatant command.[249]

Geographically, today's operational military operates far removed from Congress in some of the most remote parts of the world, and operational military decision-making is much more

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administrative military is not responsible or in the true operational chain of command); FEICKERT, *supra* note 29, at 1 (acknowledging, in contrast, that the combatant commanders' reports typically involve budgetary matters).

[245] *See, e.g., Statement of General Joseph L. Votel On the Posture of U.S. Central Command—Senate Armed Services Committee (SASC) Hearing Feb. 5, 2019,* U.S. CENTRAL COMMAND: POSTURE STATEMENT, http://www.centcom.mil/ABOUT-US/POSTURE-STATEMENT/ (last visited Feb. 19, 2019) (thanking Congress for continual support and asking it to continue providing the Central Command with "everything they need" to accomplish their missions).

[246] Richard Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, 55 NAVAL WAR C. REV. Summer 2002, at 17.

[247] *See* Christoper J. Fettweis, *Militarizing Diplomacy, in* AMERICA'S VICEROYS 47, 53 (Derek Reveron ed., 2004) (discussing the commander's pursuit of Congressional funding through his numerous testimonies).

[248] *See generally* FEAVER, *supra* note 50.

[249] 10 U.S.C. § 166 (2012).

likely to be classified.[250] Thus, operational military commanders have a comparative information advantage over their congressional principles that are increasingly uninformed about operational decision-making, leading to further bureaucratic drift. These differences lead the administrative military, whose resource aims are aligned with congressional interests in job creation, to compete with the operational military for resources and funding, which is discussed below.

Therefore, when discussing civilian control of the military, it is important to inquire about civilian control over *which* military. Operational military authorities are increasingly delegated to the executive and the vast operational military apparatus.[251] This trend has only intensified during the Trump Administration.[252] Congress remains interested in military matters but is disproportionately focused on the nitty-gritty details of administrative military functions, such as the vast, inefficient, and costly military acquisitions process discussed below. Today, the administrative military is the outsized focus of Congress, D.C. policymakers, and the vast military contracting apparatus eager to tap into valuable DoD acquisition and procurement funds.[253] And each year Congress passes a National Defense Authorization Act (NDAA) that largely focuses on core administrative military matters.[254]

So how does Congress provide oversight over operational military matters? The most powerful tool remains funding cutoffs that target *specific* military operations.[255] But absent an express appropriations prohibition on a specific military operation, the

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[250] *See* David Vine, *Where in the World is the U.S. Military?,* POLITICO MAGAZINE (July/Aug. 2015), https://www.politico.com/magazine/story/2015/06/us-military-bases-around-the-world-119321 (noting the United States maintains approximately 800 military bases in more than 70 countries); *see also* Turse, *supra* note 41 (reporting that Congress is unaware of many current military operations).

[251] *See* Michael Gordon, *Trump Shifting Authority Over Military Operations Back to Pentagon,* N.Y. TIMES, Mar. 19, 2019, at A1 (noting the current executive administration's efforts to control military operations).

[252] *Id.*

[253] *See* Fallows, *supra* note 191 (noting that a large portion of debates in D.C. on the military surround the budget given to the administrative military).

[254] *See* Schifrin, *supra* note 36 (noting that the NDAA is one of Congress's primary tools to define the military's direction in the upcoming year).

[255] *See generally* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS20775, CONGRESSIONAL USE OF FUNDING CUTOFFS SINCE 1970 INVOLVING U.S. MILITARY FORCES AND OPERATIONAL DEPLOYMENTS (Jan 16, 2007).

already established operational military structure located throughout the world continually tips the balance in favor of the Commander in Chief in operational matters. Further, combatant commanders may continually capitalize upon their statutory authority to establish subordinate commands—the all-important joint task forces—that are even further removed from administrative law and congressional oversight.[256]

B. THE TWO-MILITARY DIVIDE'S SECOND LEGACY: THE MILITARIZATION OF FOREIGN POLICY

Under the operational and administrative military divide, the geographic combatant commanders now exercise an increasingly important role in America's foreign policy.[257] They are increasingly seen as "effectively displac[ing] American ambassadors and the State Department as the primary instruments of American foreign policy."[258] The combatant commanders' core mission includes the broadly defined military to military engagement and fostering close relations with host nations (many of them economic beneficiaries of DoD's overseas apparatus).[259] And the status of the geographic combatant commanders has only increased since Goldwater-Nichols's passage in 1986.[260] Indeed, the capstone billet for senior officers is now serving as the head of a geographic combatant command or CJCS, not as the heads of the Army, Navy, Air Force, and Marines.[261]

For example, General James Jones departed his administrative military position as Commandant of the Marine Corps to serve as the European Commander—demonstrating that even the hallowed position of Commandant was a mere stepping-stone to something

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[256] John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2283–92 (2008) (discussing the military's growing independence from political leadership since the end of World War II).

[257] *See* Reveron & Gavin, *supra* note 4, at 1–15 (discussing the power and influence of Combatant Commanders in foreign policy).

[258] Kohn, *supra* note 246, at 17.

[259] *See* FEICKERT, *supra* note 29, at 1 (stating that the combatant commands, and thus the combatant commanders as their leadership, are responsible for both executing military policy and for playing an important role in foreign policy).

[260] *See* discussion *supra* Part IV.A..

[261] *See* Reveron & Gavin, *supra* note 4, at 1–2 (noting the prestige of the Combatant Commander role).

bigger in the operational military.[262] While the military has always conducted a host of activities that are closer to traditional foreign policy functions, its role in diplomacy has grown substantially in the recent past.[263]

This trend will persist at least for the near term, due to actions within the Trump Administration that amplify the operational military's foreign policy influence. The military is increasingly called upon to perform traditional foreign policy functions and fill the void left behind by massive personnel shortages at the State Department.[264] Geographic combatant commanders are already present throughout the world and possess comparably large staffs and deep relationships with the nations in their region.[265] State Department ambassadorships remain unfilled.[266] Diplomats are resigning en masse and may never be replaced.[267] The preexisting massive overseas operational military apparatus thus becomes the *de facto* voice of both the American military and diplomacy. The

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[262] *See Jim Jones Fast Facts,* CNN.COM (Jan. 2, 2019, 2:54 PM), https://www.cnn.com/2013/08/20/us/jim-jones-fast-facts/index.html.

[263] *See, e.g.*, Reveron & Gavin, *supra* note 4, at 2–3 (outlining the importance of the diplomatic dimensions of combatant commanders' roles in recent decades).

[264] Within military doctrine, the United States employs all the instruments of national power under the "DIME" paradigm (diplomatic, informational, military, and economic). *See* JOINT PUBLICATION 1, *supra* note 56, at I-4 ("[W]aging war should involve the use of all instruments of national power that one group can bring to bear against another (diplomatic, informational, military, and economic).").

[265] *See Combatant Commands, supra* note 12 (listing the places where geographic combatant commanders are stationed around the world).

[266] *See Ambassador Assignments Overseas,* U.S. DEP'T OF ST., https://www.state.gove/documents/organization/288550.pdf (Jan. 2, 2019, 12:13PM) (listing every State Department ambassadorship and denoting the posts which are vacant).

[267] *See, e.g.,* Lesley Wroughton, *Top U.S. Diplomat for Europe Resigns, Cites Personal, Professional* Reasons, Reuters (Jan. 22, 2019), https://www.reuters.com/article/us-usa-europe-diplomat/top-u-s-diplomat-for-europe-resigns-cites-personal-professional-reasons-idUSKCN1PG24Z (reporting the resignation of diplomat Wess Mitchell); John Hudson et al., *U.S. Envoy to Coalition Fighting ISIS Resigns in Protest of Trump's Syria Decision,* WASH. Post (Dec. 22, 2018), https://www.washingtonpost.com/world/national-security/us-envoy-to-coalition-fighting-isis-resigns-in-protest-of-trumps-syria-decision/2018/12/22/a5f42bc0-0606-11e9-b5df-5d3874f1ac36_story.html (reporting the resignation of diplomat Brett McGurk); Gardiner Harris, *Diplomats Sound the Alarm as They Are Pushed Out in Droves,* N.Y. TIMES (Nov. 24, 2017), https://www.nytimes.com/2017/11/24/us/politics/state-department-tillerson.html (discussing the departure of Bill A. Miller). For an in-depth critique of American foreign policy and its increasing reliance on the military, *see generally* FARROW, *supra* note 31.

combatant commanders and their staffs provide continuity—albeit a military-focused one—through changeovers in administrations.[268]

Military geographic combatant commanders also have several strategic advantages over the State Department and its diplomatic corps. Ambassadorships and foreign policy officials overseas are assigned to a single nation.[269] And ambassadorships often remain vacant for extended periods.[270] Combatant commands are *never* vacant.[271] Further, military combatant commanders have a broader scope and can focus on enormous geographic regions of fifty-plus nations within their respective Area of Responsibility.[272] Their permanent headquarters staff often exceeds 1,000 military officers, and subordinate commands under their control far exceed that number.[273]

Beyond their headquarters staffs, military combatant commanders have military attachés in each nation that work hand in hand with host nations and their foreign policy apparatus.[274] Their relationships run deep.[275] Foreign military sales and the allure of additional military funding incentivize foreign government

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[268] *See* Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, 2007 ARMY L. 45, 58 (2007) (discussing the continuity fostered by the combatant command structure).

[269] *See Ambassador Assignments Overseas*, *supra* note 266 (listing the individual countries to which each ambassador is assigned).

[270] *See, e.g.,* Thomas F. Farr & William L. Saunders, Jr., *The Bush Administration and America's International Religious Freedom Policy*, 32 HARV. J.L. & PUB. POL'Y 949, 956 (2009) (noting that an ambassadorship remained vacant for almost twenty months until John V. Hanford III took the post).

[271] *See DoD News Briefing with Secretary Gates from the Pentagon*, U.S. DEP'T OF DEF. (Apr. 23, 2008), http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4216 (demonstrating the rapidity with which combatant command posts are filled once vacant, so as to virtually never be vacant).

[272] *See European Command Fact Sheets,* U.S. EUROPEAN COMMAND http://www.eucom.mil/about/history/fact-sheets (last visited Feb. 2, 2017) (providing an overview of the European Command); *see also Area of Responsibility*, U.S. AFR. COMMAND, https://www.africom.mil/area-of-responsibility (last visited Feb. 9, 2019) (listing the fifty-three nations within the U.S. African Command's Area of Responsibility).

[273] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 211, at 12.

[274] *See, e.g., About the Command*, U.S. AFR. COMMAND, https://africom.mil/about-the-command (last visited Feb. 19, 2019) (noting that "the command's program in Africa are coordinated through Offices of Security Cooperation and Defense Attaché Offices").

[275] *See, e.g., id.* (listing all the ways by which the African combatant command is able to "establish and sustain relationships").

to strengthen those relationships.[276] There is a blurring of the lines between traditional military-to-military engagement and more traditional diplomatic functions.[277] Indeed, combatant commanders have an important voice on such matters, and Congress funds them extremely well.[278] Further, they have at their disposal an enormous personal staff and their own "mini-airline" to include a fleet of military aircraft with secure communications.[279] Combatant commanders can be whisked away at a moment's notice anywhere they please.[280] When foreign governmental leaders look at American actors overseas and assess who is truly well-funded and resourced, the geographic combatant commanders surely come out on top.

Consider the case of European Command, which has been in place since 1946 with an enormous engagement mission.[281] Just eighteen combatant commanders have led European Command since the end of World War II.[282] How many individual U.S. ambassadorships across Europe have been held throughout that timeframe? The headquarters staff alone has a permanent presence of over 1,500 personnel; that number triples when taking into account subordinate staffs.[283] Today, there are 50,000-plus active-duty personnel in Europe spread over 250 pieces of individual real estate.[284]

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[276] *See* Reveron & Gavin, *supra* note 4, at 4–7, 101 (describing how U.S. Military funding to foreign governments encourages cooperation and fosters strong foreign relationships).

[277] *See id.* at 7 ("The advantages of the [DoD] and disadvantages of the State Department facilitate the ability of combatant commanders to influence policy.").

[278] *See id.* at 6 ("In 2006, combatant commanders are expected to control $30 billion compared to $400 million in the past.").

[279] *See, e.,g., About USTRANSCOM,* U.S. TRANSP. COMMAND, https://www.ustranscom.mil/cmd/aboutustc.cfm (last visited Feb. 10, 2019) (listing the number of aircrafts available for combatant commands).

[280] *See id.* ("USTRANSCOM delivers globally integrated mobility, deployment and distribution solutions, and enabling capabilities for full-spectrum requirements in support of national objectives.").

[281] *See History,* U.S. EUROPEAN COMMAND, https://www/eucom.mil/about/history/history (last visited Feb. 10, 2019).

[282] *See Gen. Curtis M. Scaparrotti*, EUCOM, https://www.eucom.mil/commander (last vistied Feb. 19, 2019) (listing Scaparrotti as the Combatant Commander of European Command since late spring of 2016, taking over from General Breedlove as the 18th Commander).

[283] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 211, at 12 (charting the thousands of personnel working for European Command).

[284] *See European Command Fact Sheets, supra* note 272 (listing the number of active duty personnel and the locations of European Command).

Finally, geographic combatant commanders increasingly play a leadership role within the executive branch and foreign relations more generally following their retirement from the military.[285] For example, General James Mattis (former Central Commander) was recently the Secretary of Defense,[286] and General John Kelly (former Southern Commander) served as White House Chief of Staff from 2017 to early 2019.[287] Admiral Harry Harris (head of Pacific Command) is America's newest ambassador to South Korea.[288] A former Pacific Commander (Admiral Joseph Prueher) served as the U.S. ambassador to China upon his retirement.[289] General Anthony Zinni (former Central Commander) served as U.S. special envoy to the Middle East,[290] and General James Jones (former European Commander) served as President Obama's National Security Advisor.[291] And of course the first CJCS after Goldwater-Nichols, Colin Powell, served as Secretary of State.[292]

C. THE TWO-MILITARY'S THIRD LEGACY: ADMINISTRATIVE LAW AND THE ADMINISTRATIVE PROCEDURE ACTS'S (APA) UNEVEN APPLICATION TO THE TWO MILITARIES

While the judiciary has historically been the least influential of the three branches in ensuring civilian control over the military, judicial review via the APA remains an important vehicle in ensuring accountability over all federal agencies, and the DoD is no

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[285] *See* Mark R. Shulman, *Support and Defend: Civil-Military Relations in the Age of Obama,* 443 FORDHAM INT'L L.J. 409, 443 (2012) ("[T]he United States has experienced a militarization of foreign relations. The increased resources invested in diplomacy, public diplomacy, and nonmilitary foreign aid pale in comparison to the . . . influence of Regional Combatant Commands . . . .").

[286] *James N. Mattis Biography*, U.S. DEP'T OF DEF., https://dod.defense.gov/About/Biographies/Biography-View/Article/1055835/james-mattis/ (last visited Feb. 19, 2019).

[287] *John F. Kelly Biography*, U.S. DEP'T OF DEF., https://dod.defense.gov/About/Biographies/Biography-View/Article/602724/john-f-kelly/ (last visited Feb. 19, 2019).

[288] *Ambassador Harry Harris,* U.S. EMBASSY & CONSULATE IN S. KOR., https://kr.usembassy.gov/our-relationship/our-ambassador/ (last visited Feb. 19, 2019).

[289] *See* Reveron & Gavin, *supra* note 4, at 2.

[290] *Anthony Zinni Biography*, U.S. CENTRAL COMMAND, https://www.centcom.mil/ABOUT-US/LEADERSHIP/Bio-Article-View/Article/904782/anthony-zinni/ (last visited Feb. 19, 2019).

[291] *General James L. Jones, Jr.,* ATLANTIC COUNCIL, https://www.atlanticcouncil.org/about/experts/list/james-jones#fullbio (last visited Feb. 19, 2019).

[292] *See* Reveron & Gavin, *supra* note 4, at 2.

exception.[293] Indeed, citizen suits—particularly in environmental law—ensure a continual level of accountability between the military and the citizenry.[294] The APA provides that connective tissue between the citizenry and the military (via the judiciary).[295] In light of the DoD's unique mission, and the two-military divide, a fundamental question arises: Should administrative law and the APA treat the operational military differently from the administrative military?

Despite the DoD's size, budget, and idiosyncratic mission, administrative law scholarship has "generally passed over the study of the military in favor of the domestic agencies."[296] Indeed, very little legal scholarship has addressed the APA's applicability to the DoD (despite its status as the largest federal agency).[297]

The APA (passed in 1946, just one year before the National Security Act) provides for judicial review over agency actions and sets out procedures that agencies must follow when promulgating rules and adjudicating conflicts.[298] The APA has been described as a "mini-Constitution" and widely praised as a mechanism to help ensure democratic accountability and oversight over federal agencies.[299] But the APA was designed for a far different time and does not adequately take into account: (1) the DoD's existing legal architecture and two-military divide; and (2) the complexity of

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[293] *See* Dunlap, *supra* note 125, at 368–70 (providing a brief overview of the Supreme Court's jurisprudence regarding the military).

[294] *See, e.g.,* Winter v. Nat. Res. Def. Council, 555 U.S. 7, 16 (2008) (suing Donald C. Winter, Secretary of the Navy, for violating environmental laws).

[295] *See* Arthur E. Bonfield, *Military and Foreign Affairs Rule-Making Under the APA*, 71 MICH. L. REV. 221, 221–26 (1972) (discussing how the APA ensures public participation in the administrative rulemaking schemes, including those of the military).

[296] Yoo, *supra* note 256, at 2281. For additional discussions of administrative-law scholarship on the military, *see generally* Thomas R. Folk, *The Administrative Procedure Act and the Military Departments,* 6 J. NAT'L ASS'N OF ADMIN. L. JUD. 109 (1986); Bonfield, *supra* note 295.

[297] There are some rare exceptions. *See* Kovacs, *supra* note 195, at 584 (arguing that there is no basis for courts to give greater deference to the military); Jonathan Masur, *A Hard Look or a Blind-Eye,* 56 HASTINGS L.J. 441, 512 (2006) (discussing how the Department of Justice, DoD, Department of Homeland Security, and other war-related agencies are subject to review under APA §706 but that this is often overlooked).

[298] *See, e.g.,* JAMES RASBAND ET AL. NATURAL RESOURCES LAW AND POLICY 223 (2009) (praising the many virtues of the APA in democratic governance).

[299] *See* ABA, Resolution Adopted by the House of Delegates August 8–9, 2011, R.124 (2011) ("Over time, the APA has become a 'mini Constitution' that provides fundamental fairness for litigants before administrative agencies.").

modern military operations to include the numerous military activities that take place overseas outside of war. The APA was better suited to regulate military activities, but it has not kept pace with changes to the massive military organization and the nature of modern warfare. This results in a disconnect between the APA's text and its ongoing applicability to the modern military organization.

1. The APA's Definition of Agency Clearly Applies to the Administrative Military but Lacks a Clear Application to the Operational Military

The APA broadly defines "agency" as "each *authority* of the Government of the United States, whether or not it is within or subject to review by another agency."[300] Congress, courts, and governments of the United States are specifically exempt from the agency definition.[301] While the President is not specifically exempt, courts have routinely held that the President is *not* an agency within the APA's meaning.[302] This is of particular importance for military matters due to the President's role as Commander in Chief.

However, "agency" includes the Secretary of Defense and the civilian Secretaries of the military departments who remain subject to suit under the APA. This conclusion is reaffirmed by the text of the APA's Freedom of Information Act (FOIA) section, which specifically applies to any executive department or military department.[303] And the Secretary of Defense and civilian Secretaries of the military departments are routinely sued.[304] Because the APA "agency" definition clearly applies to the civilian heads of the administrative military, it follows that APA litigation

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[300] 5 U.S.C. § 551(1) (2012) (emphasis added).

[301] 5 U.S.C. § 551(1)(A)–(D) (2012).

[302] *See* Dalton v. Spencer, 511 U.S. 462, 470 (1994) ("The actions of the President, in turn, are not reviewable under the APA because . . . the President is not an 'agency.'").

[303] The full section states that "agency" includes "any executive department, military department, Government corporation, Government controlled corporation, or *other establishment* in the executive branch." 5 U.S.C. § 552(f)(1) (2012). And Section 552a of the APA, entitled "Records maintained on individuals" shares this same definition of "agency." 5 U.S.C. § 552a (2012). *See also* Mark P. Nevitt, *Defending the Environment: A Mission for the World's Militaries,* 36 HAW. L. REV 27, 36 (2014) (describing how the APA serves an important role in helping to ensure civilian control over the military).

[304] *See, e.g.,* Winter v. Nat. Res. Def. Council, 555 U.S. 7 (2008) (suing the Secretary of the Navy for violating environmental laws).

is focused on administrative military functions via lawsuits against the Secretary of Defense or civilian Secretaries of military departments. For example, the Secretaries of Defense and military departments were the defendants in numerous lawsuits challenging the forthcoming change in transgender service policy.[305]

It is less clear whether the heads of the operational military (combatant commands and joint task force commands) are an "authority of the Government of the United States" within the APA's agency definition.[306] Although the operational military is not specifically exempt from judicial review, it remains unclear how the APA applies to the operational military. No lawsuit to date has held that an agency includes a combatant commander or subordinate operational commander, although a suit against the Secretary of Defense as the head of the operational military remains possible.[307]

In addition, much of the operational military's decision-making (particularly by the geographic combatant commanders) takes place outside the United States, where it is not clearly subject to the APA's reach, which lacks a clear extraterritorial application.[308] Finally, for an APA suit to come forward, actual knowledge of an agency action is required; a particular problem for operational military matters that occur outside the United States, are out of sight, and are often classified.[309] Secrecy is itself a form of regulation, bypassing traditional forms of judicial review or civilian control.[310]

Daugherty v. United States, a non-precedential opinion, remains the one federal case addressing the peculiarities of the APA and the

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[305] *See* Mark P. Nevitt, *A Tumultuous Year for Transgender Service Members,* REG. REV., (Jan. 31, 2018) https://www.theregreview.org/2018/01/31/nevitt-tumultuous-year-transgender-service-members/ (providing a timeline of these actions).

[306] 5 U.S.C. §551(1) (2012).

[307] Nor have they held otherwise. The law remains unsettled on this point. *See infra* notes 311–35 and accompanying text.

[308] *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality.").

[309] *See* David Pozen, *Deep Secrecy,* 62 STAN. L. REV. 257, 272 (2010) (providing a textualist view on how the President's designation as Commander in Chief provides authority to conceal some military information).

[310] *See* DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 59–80 (1998) (devoting a chapter to the different ways government can regulate what its citizens know).

Goldwater-Nichols two-military divide.[311] In *Daugherty* a service member attached to an operational military command in Spain filed a tort claim against the Secretary of Defense and Navy (among others).[312] He asserted that the Goldwater-Nichols Act divested the Navy of any type of authority over him.[313] The Tenth Circuit rejected that argument, focusing instead on the Act's establishment of the administrative chain of command that served as an umbilical cord between the Navy and the service member.[314] This administrative chain of command, as discussed in Part III, runs from the military member to the Secretary of the Navy and the Secretary of Defense. The court did not specifically address the combatant commander's role; the judgment focused solely on administrative functions that could be traced back to the Secretaries of the military departments.[315] There was no discussion of the operational chain of command, or on whether the European Commander and the operational military leadership are subject to suit.[316]

To be clear, I am not advocating that the APA should apply to truly operational military matters such as the tactical movement of forces or military raids. However, there is an expanding menu of activities undertaken by the operational military that have administrative components—hiring and firing personnel, responding to FOIA requests, issuing routine guidance—that is outside the formal rulemaking process and may not be subject to judicial review.[317] Hence, to borrow from the nomenclature adopted by Professors Adrian Vermeule and David Dyzenhaus, an *institutional hole* emerges within the operational military.[318] Any

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311 *See* 73 Fed. Appx. 326, 327–32 (10th Cir. 2003) (concluding that the APA claim was not justiciable, due to the bifurcated authority within the military). This is a non-precedential 10th Circuit opinion, further underscoring the lack of authority on the subject.

312 *Id.* at 328.

313 *Id.*

314 *See id.* at 331 ("[S]ection 165 of the Goldwater-Nichols Act . . . provided for the Secretary of the Navy to remain responsible for the administration of forces assigned to combatant commands.").

315 *See id.* at 327–32 (not discussing the role of a combatant commander).

316 *See id.* (addressing neither the operational chain of command nor the liability of the Commander of European Command and the operational military leadership).

317 *See* Adrian Vermeule, *supra* note 47, at 1112 (noting that the "APA explicitly excludes 'military or foreign affairs' functions from its procedural requirements," but that these functions are not explicitly defined).

318 *See supra* note 47 and accompanying text.

function associated with the three different types of operational military control (combatant command,[319] operational control, or tactical control[320]) remains outside the APA's reach. How does administrative law account for these activities? To date courts have yet to "pierce the operational veil" in applying the APA to such matters.[321] Perhaps this stems from confusion about the two-military chain of command or deference to military operational commanders. Regardless of the reason, it appears that the administrative military will continue to be subject to APA while courts will provide additional (if not absolute) deference to the operational military.

2. APA Military Exemptions and Military Deference as Applied to the Operational and Administrative Militaries

Since its passage in the aftermath of World War II, the APA has specifically exempted certain military activities based upon *when* they are occurring and *what* they do.[322] Despite repeated calls to address or reform the APA's military exemptions, they persist and are virtually unchanged from their original form.[323] These express exemptions include "military authority exercised in the field in the time of war or in occupied territory" and "military or foreign affairs *functions* of the United States."[324] They amount to APA "black holes"

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[319] *See* 10 U.S.C. § 164(c)(1)(A)–(G) (2012) (outlining the command authority of combatant commanders). Under joint doctrine, this includes "[n]ontransferable command authority, which cannot be delegated, of a combatant commander to perform those functions of command over assigned forces involving organizing and employing commands and forces; assigning tasks; designating objectives; and giving authoritative direction over all aspects of military operations, joint training, and logistics necessary to accomplish the missions assigned to the command." DOD DICTIONARY, *supra* note 21, at 37.

[320] *See* DOD DICTIONARY, *supra* note 21, at 175, 243 (defining both operational and tactical control).

[321] The definition of combatant command includes an administrative component: "coordinating and approving those aspects of administration and support (including control of resources and equipment, internal organization, and training) and discipline necessary to carry out missions assigned to the command." 10 U.S.C. § 164 (c)(1)(F) (2012).

[322] *See* 5 U.S.C. § 551(1)(A)–(H) (2012) (listing exemptions to the definition of agency which include courts martial, military commissions and military authority exercised in the field in time of war); *see also* Kovacs, *supra* note 195, at 584 (arguing that there is no basis for courts to give greater deference to the military); Masur, *supra* note 297, at 512 (noting exemptions to the APA for military purpose).

[323] *See* Bonfield, *supra* note 295, at 240–44 (discussing the APA exemption of "military function").

[324] 5 U.S.C. §§ 551(1)(G), 553(a)(1) (2012) (emphasis added).

where military activities occur outside the constraints of judicial review.[325]

The terms "military authority" and "in the field in the time of war" lack a clear definition (and we have not had a formal declaration of war since 1942).[326] As this provision has not been modified since 1946, courts have struggled to apply this exemption to modern conflicts.[327] As a fundamental matter, modern military activities cannot be neatly placed in clear legal categories. The division between war and peace remains murky.

The APA's rulemaking and adjudications section exempts "military or foreign affairs *functions* of the United States."[328] The term "military function" is of central importance but it, too, lacks a clear statutory definition.[329] Despite this exemption's broad implications as applied to DoD, it has not been the subject of much legal scholarship; nor have judicial decisions provided helpful guidance on its precise meaning.[330] The APA also broadly excludes from review agency action "committed to agency discretion by law."[331] This catchall exclusion has been used to preclude review in national security contexts.[332]

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[325] *See* Vermeule, *supra* note 47, at 1107–1117 (defining APA "black holes").

[326] The last time the United States Congress exercised its constitutional authority to do so was 1942 in the middle of the Second World War when the U.S. declared war against Bulgaria, Hungary, and Romania. *See* Franke-Ruta, *supra* note 7 (noting all three declarations in table 1).

[327] *See* Doe v. Sullivan, 938 F.2d 1370, 1381 (1991) (determining that the decision to use unapproved drugs on servicemen in combat during the Persian Gulf War was subject to judicial review); *see also* Thomas R. Folk, *The Administrative Procedure Act and the Military Departments,* 6 J. NAT'L ASS'N OF ADMIN. L. JUDGES 109, 114 (1986) (noting the lack of guidance given by courts).

[328] 5 U.S.C. § 553(a)(1) (2012) (emphasis added).

[329] *See* Bonfield, *supra* note 295, at 240–42 (discussing different possible interpretations of "military function").

[330] This exemption has only been comprehensively addressed by a single law review article dating back forty years. *See* Bonfield, *supra* note 295, at 240–41 (arguing that based on the plain meaning, the exemption applies to the extent that there are "'clearly and directly' involved in . . . matters specifically fitted for, appropriate to, or expected of the armed forces in light of their peculiar nature and qualifications").

[331] 5 U.S.C. § 701(a)(1)–(2) (2012).

[332] *See, e.g.,* Riverkeeper Inc. v. Collins, 359 F.3d. 156, 171 (2d Cir. 2004) (holding that Congress through the APA has not given the court's jurisdiction to review agency action the national security context).

Perhaps not surprisingly, the DoD has often sought a broad interpretation of these APA exemptions.[333] This is somewhat understandable; it seems absurd to subject critical war making and tactical decision-making to judicial review.[334] In addition, courts will always afford a certain amount of deference to the DoD in reviewing its actions, regardless of its activity.[335]

The question remains, what level of deference should be afforded to the expanding menu of military actions performed by an operational military commander outside of an armed conflict such as training, engagement, or routine administrative functions (FOIA, hiring and firing, etc.) embedded within the command? It is unclear what level of deference a court can or should afford to the operational military vis-à-vis the administrative military and how to weigh the relevant factors in determining the deference afforded.[336] And rules regulating military functions as applied to military contractors are exempt from following the APA rulemaking process.[337]

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[333] *See* Bonfield, *supra* note 295, at 257 ("The term 'military function' is viewed by those who must apply it as being very broad in scope. . . . . The [DoD], for example, is likely to rely on the 'military function' exemption. . . .").

[334] *See* Wu Tien Li-Shou v. United States, 777 F.3d 175, 186 (4th Cir. 2015) (refusing to call into question the command structures of an existing military operation).

[335] *See, e.g.,* Chappell v. Wallace, 462 U.S. 296, 300 (1983) (noting that the Court will "hesitate long" before interfering in the relationship between military personnel and their superior officers); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (holding that the Court is not well positioned to interfere in composition, training, equipping and control of the military force, or core administrative military functions).

[336] In a Supreme Court decision dating from 2006, Justice Breyer struggled with the level of deference that should be afforded to the military in *Winter v. NRDC*.

> I don't know anything about this. I'm not a naval officer. But if I see an admiral come along with an affidavit that says . . . you've got to train people [when there are certain types of oceanographic conditions] all right, or there will be subs hiding there with all kinds of terrible weapons, and he swears that under oath. And I see on the other side a district judge who just says, you're wrong, I then have to look to see what the basis is, because I know that district judge doesn't know about it either.

Transcript of Oral Argument at 35, Winter v. Nat. Res. Def. Council, 55 U.S. 7 (2008) (No. 07-1239) [hereinafter Breyer Oral Argument].

[337] *See* Indep. Guard Ass'n, Local No. 1 v. O'Leary, 57 F.3d 766, 770 (9th Cir. 1995) (construing the military function narrowly as applied to the Department of Energy while noting that "[t]o our knowledge, no court has ever considered whether the military function exception applies to civilian contractors").

Doe v. Sullivan may offer some guidance.[338] In *Doe,* a service member used the APA to challenge the HHS Secretary's decision to allow DoD to use an unapproved drug in the event of a chemical nerve gas attack.[339] In dismissing the service member's complaint, the court refused to apply the "military authority" exception, not seeing this decision as part of a military exigency.[340] Nevertheless, the court hinted in dicta of a more generalized Commander-in-Chief exemption that if applied broadly would eliminate an enormous swath of operational military decisions from examination under the APA (as opposed to statutory delegation based on other constitutional provisions).[341] This would appear to "immunize administrative actions that rely upon the President's constitutional Commander-in-Chief power,"[342] an authority wholly independent of APA oversight with an outsized effect on operational military matters:

> Plaintiffs seek review under the Administrative Procedure Act . . . of a rule published in the Federal Register by the Secretary of HHS, who is not part of any military chain of command . . .[w]hen he adopted the rule, [the Secretary] did not purport to be exercising the President's powers as Commander in Chief . . . .[343]

Courts have struggled mightily to apply a consistent and uniform standard when determining the level of deference to afford to the military. For example, in *Gilligan v. Morgan,* the Court stated:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a

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338 938 F.2d 1370 (D.C. Cir. 1991).

339 *Id.* at 1380.

340 *See id.* at 1380–81 (finding the matter suitable for judicial review because it was "not a dispute over military strategy or discipline, not one between soldiers and their superiors, but one over the scope of the authority Congress has entrusted to the FDA").

341 *See* Masur, *supra* note 297, at 513 (describing how the dicta in *Doe*, if adopted would shield many actions from scrutiny).

342 *Id.*

343 *Doe*, 938 F.2d at 1380 (quoting plaintiff's counsel).

> military force are essentially military judgments, subject *always* to the civilian control of the Legislative and Executive Branches.[344]

The military deference doctrine is premised on both the Executive and Legislative Branches exercising some modicum of control.[345] But there has been a continual derogation of civilian control over operational military matters.[346] How should administrative law account for this?

And for the first time in modern history, the Supreme Court lacks active-duty veteran representation among its members.[347] While it still remains unclear what impact this will have on the Court's application of the military deference doctrine, the Court's firsthand wartime military knowledge has disappeared for the time being.[348] Further complicating matters, military deference standards are flexible and prone to manipulation in the national security context: "federal courts manipulate flexible legal standards to accord heightened deference to federal agencies during national crises, transforming standards such as 'reasonableness' and 'good cause' into 'grey holes.'"[349]

3. Secrecy as Self-Regulation[350]

Finally, a significant number of military actions occur without the knowledge of the American public and are afforded what

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[344] *Gilligan*, 413 U.S. at 10; s*ee also* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (stating that the judiciary "must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest").

[345] *See Gilligan,* 413 U.S. at 10 (basing the Court's deference on the commitment of control to the Legislative and Executive Branches).

[346] *See infra* Part IV.A (describing the centralization of military power and the diminishing civilian control of the operational military).

[347] *See* Andrew Cohen, *None of the Supreme Court Justices Has Battle Experience*, THE ATLANTIC (Aug. 13, 2012), https://www.theatlantic.com/national/archive/2012/08/none-of-the-supreme-court-justices-has-battle-experience/260973 (noting that with the retirement of Justice Stevens in 2010, the Supreme Court lacked a justice with wartime military experience for the first time since 1936).

[348] *See id.* (noting that Justice Alito served in the Army Reserves in the 1970s and that Justice Breyer was in the Army briefly during college in 1957).

[349] Evan Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. COLLOQUY 309, 309 (2010).

[350] This term is borrowed from the writing of Daniel Patrick Moynihan, discussed *supra* note 310.

amounts to blanket military deference.[351] This further shields the operational military from civilian and administrative law oversight. Compounding matters, while much of the administrative military's actions and regulations are open, easily accessible, and unclassified, much of the operational military's internal regulations and decision-making are outside the public domain and hidden.[352]

Within the DoD, over-classification of documents and material that do not merit classification remains a continual problem.[353] Indeed, citizen suits and judicial review are predicated on actual knowledge of the underlying regulation and some degree of familiarity to understand the regulation and its practical impact. This is particularly difficult for operational military matters that occur outside the United States.[354] After all, how can the public make a determination whether an agency properly interpreted its internal guidance if it is classified or otherwise not easily accessible to the public?[355]

Finally, in the national security context, courts will often ascertain whether there is an affirmative legal obligation when determining if an agency action is even reviewable.[356] The operational military has considerably more discretion in its actions

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[351] *Cf* Masur, *supra* note 297, at 449 (describing the court's acceptance of the Executive argument that "an entire range of military questions . . . are entirely beyond the court's reach").

[352] For example, the Department of Defense and all the Secretaries of the Military Departments have open websites that organize all the applicable internal regulations to that agency. *See, e.g., Forms, Directives, and Instructions,* U.S. DEP'T OF DEF., https://dod.defense.gove/Resources/Forms-Directives/ (last visited Feb. 19, 2019) (compiling links to internal regulations). Contrast this to the operational combatant commands whose regulations and policies are not easily accessible to the public and are oftentimes classified. *See, e.g., Freedom of Information (FOIA Request),* U.S. CYBER COMMAND, https://www.cybercom.mil/FOIA/Making-a-Freedom-of-Information-Act-FOIA-Request/ (last visited Feb. 19, 2019) (displaying only an explanation on how to make a FOIA request rather than offering relevant information about regulations and policies on the website).

[353] *See* U.S. DEP'T OF DEF., INSPECTOR GENERAL, DOD EVALUATION OF OVER-CLASSIFICATION OF NATIONAL SECURITY INFORMATION (2013) (acknowledging and evaluating persistent misclassification and over-classification of documents within the DoD)..

[354] *See* Pozen, *supra* note 309, at 299 ("[T]he United States has a long and pervasive history of executive branch secrecy in matters relating to internal deliberations and military strategy.").

[355] *See id.*, at 286 (discussing arguments against state secrecy and stating that concealing activities "reduces the ability of the people . . . to monitor those activities and to identify and debate relevant issues in an informed manner").

[356] *See, e.g.,* ACLU v. NSA, 493 F.3d 644, 678 (6th Cir. 2007) (discussing in dicta the meaning of "agency action" under the APA).

as compared to the administrative military; this adds a final level of deference in determining whether their action is reviewable. For example, a federal court that recently considered the National Security Agency's program for warrantless electronic surveillance of suspected terrorists stated (in dicta) that the terrorist surveillance program was *not* an "agency action" covered by the APA as there was no legal obligation to conduct the surveillance.[357]

D. THE TWO-MILITARY DIVIDE'S FOURTH LEGACY: AN INCREASINGLY DIVIDED MILITARY, UNDERMINING OPERATIONAL EFFECTIVENESS

First, the two-military divide leads to continual, bureaucratic tension between the administrative military leaders and the operational, uniformed military commanders. Consider this comment from a DoD expert on the dual administrative and operational military divide:

> Service chiefs are, by far, the most important people in the [Pentagon] when it comes to physical things, real things, people, equipment, training, et cetera. Service chiefs are all-powerful. When it comes to operations in the field, they're not in the game . . . we've got two different channels where power is exercised, but it only comes together at the Secretary [of Defense].[358]

As discussed in Part III, under Goldwater-Nichols there are two distinct chains of command with the administrative military legally required to provide forces to the operational military.[359] The parallel chains of command only meet at the very top of the DoD at the Secretary of Defense.[360] This places an enormous strain on one person, the Secretary of Defense, who suffers from continual overextension as the critical intermediary between the two

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[357] *See id.* (stating that plaintiffs failed to complain of "agency action" as it was defined in the APA because the surveillance program constituted "conduct, not 'agency action'"). Since this ruling, Cyber Command has been split off from the NSA and is now a full-fledged combatant command. *See* Ferdinando, *supra* note 241 (announcing the creation of Cyber Command).

[358] Goldwater-Nichols Hearing, *supra* note 15, at 35.

[359] *See supra* Part III; *see also* 10 U.S.C. § 162(b) (2012) (describing the split in the chain of command).

[360] *See* Goldwater-Nichols Hearing, *supra* note 15, at 35.

militaries and must continuously bridge the operational and administrative military divide while reconciling their competing interests.[361]

As new weapons are produced, older weaponry continues to be maintained.[362] The maintenance cost for the older weaponry and material is often much, much lower, but the money, jobs, and governmental funding lies in the newer, shinier equipment.[363] So a perverse incentive emerges to fund new equipment and weaponry, regardless of whether the operational military even needs it.[364] This has led to bizarre instances where the DoD receives weapons and equipment that it has not asked for and does not want.[365] Consider the following two examples.

First, the tension between the operational and administrative military over replacing the A-10 "Warthog" attack jet, a Vietnam-era plane that was widely lauded by operational military commanders,[366] with the Joint Strike Fighter (JSF). [367] As the JSF came into production, Congress sought to phase out the Air Force's use of the A-10 earlier than desired by the operational military commanders.[368] Keeping the A-10s in service would lower the number of JSFs that the DoD purchased.[369] A standoff occurred

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[361] *See id.* at 116 (discussing generally the problems associated with this divide and pointing to a "ponderousness, if not paralysis, because so many different organizations had to be involved in even the smallest decisions").

[362] *See id.* at 456–60 (discussing the problem of weaponry overspending and waste).

[363] *See* GATES, *supra* note 44, at 459 ("The history of the Defense Department acquisition and development of new programs is rich in over-cost, overdue, and flawed programs.").

[364] *See* Matthew Cox, *Pentagon Tells Congress to Stop Buying Equipment it Doesn't Need,* MILITARY.COM (Jan. 2015), https://www.military.com/daily-news/2015/01/28/pentagon-tells-congress-to-stop-buying-equipment-it-doesnt-need.html (noting, for example, that Congress continues to give the Army millions of dollars for tank upgrades when the Army notes they "simply don't have the structure" for such tanks anymore).

[365] *Id.*; GATES, *supra* note 44, at 459–60 (discussing the cult of spending in the DoD).

[366] *See* Martha McSally, Opinion, *Saving a Plane that Saves Lives*, N.Y. TIMES (April 20, 2015), https://www.nytimes.com/2015/04/20/opinion/saving-a-plane-that-saves-lives.html (praising the A-10 from her experience as an Air Force Colonel).

[367] *See* Thomas Gibbons-Neff, *The A-10 Get a Lease on Life–at Least Through 2017,* WASH. POST (Jan. 14, 2016) https://www.washingtonpost.com/news/checkpoint/wp/2016/01/14/the-a-10-gets-a-lease-on-life-at-least-through-2017/?noredirect=on&utm_term=.94fc9b6b05f0 ("[T]he Air Force decided to retire the A-10 to make way for more modern aircraft like the [JSF].").

[368] *See id.* (reporting that the then-Defense Secretary Ash Carter noted commanders' demand for the A-10 in the fight against the Islamic State).

[369] *See* Lara Seligman, *Air Force Clarifies A-10 Retirement Plans*, DEFENSE NEWS (Mar. 17, 2016), https://www.defensenews.com/air/2016/03/17/air-force-clarifies-a-10-retirement-

between the Air Force, Congress, and the operational military commanders.[370]

While the standoff was ultimately resolved and the A-10 was given a temporary reprieve, its long-term future remains very much in doubt.[371] The JSF case study highlights a new phenomenon within the DoD: the administrative military provides forces to the operational military, but this occurs outside a direct command and control relationship or any clear accountability mechanism.[372] Again, it is only the Secretary of Defense who has the legal authority to referee disputes between the two militaries, but congressional interests can hinder even his authority.[373] While the acquisition, testing, and development of the JSF is a core administrative military function, its eventual day-to-day operation overseas under the command of a combatant commander is an operational military function.[374] And the administrative military is not clearly accountable to the operational military: under Goldwater-Nichols, they are not in the same direct chain of command.[375] While the operational military is focused on operational military effectiveness on the battlefield above all else, the administrative military leaders operate under significant constraints and a far different incentive structure.[376] This includes the watchful eye of Congress members, many of whom are interested in economic benefits to their individual congressional districts.[377]

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plans/ (stating that the budget for the Air Force would delay the A-10's retirement and replacement with JSFs).

370 *See* Gibbons-Neff, *supra* note 367 (discussing the "Congressional blockade" and other strong stances about whether or not the A-10 should be retired).

371 *See id.* (stating that the A-10 will continue to be used beyond 2017); *see also* Seligman, *supra* note 369 (indicating that the A-10 could live on into the fiscal year of 2022).

372 *See id.* at 458–60 (discussing problems with Joint Strike Fighter acquisitions, which was "over budget and behind schedule").

373 *See id.* at 116 (discussing the divides that the Secretary of Defense has to scale and the multiple interests that must be accounted for in each decision).

374 *See id.* at 458–60 (noting the different interests and authorities at play in the Joint Strike Fighter acquisition).

375 *See* 10 U.S.C. § 162(b) (setting forth the chain of command for the operational military to not include leadership of the administrative military).

376 *See* GATES, *supra* note 44, at 116–17 (discussing the dichotomy between incentive structures for command and administrative military personnel in decision making).

377 *See* Fallows, *supra* note 191, at 72 (arguing that many in Congress view military spending primarily as a way to bring jobs to their district).

Second, former Secretary of Defense Robert Gates's frustrations in getting the administrative military to provide responsive and necessary equipment and weaponry to the operational military engaged in war-fighting.[378] For example, upon a visit to the operational military, then-Secretary Gates saw firsthand the desperate need for soldiers in Afghanistan to receive Mine Resistant Armored Personnel (MRAP) carriers to protect their lives.[379]

However, due to a quirk of Goldwater-Nichols, the Secretary of Defense must approve the transfer of all forces between combatant commands, regardless of their size or mission.[380] Gates was increasingly frustrated with this process, which took too long and did not properly take into account the real-time force requirements of the operational military.[381] Much to his dismay, Gates had to work creatively outside the existing force assignment system to ensure that the soldiers in the field received the equipment that they needed.[382]

In sum, the Secretaries of the military departments (and Congress) are disproportionately focused on the long-term defense acquisitions process that addresses future threats at the expense of meeting current threats.[383] The combatant commander receives forces from the individual services, but the services are not *directly* accountable for the type of equipment and personnel assigned.[384] This creates an administrative-operational disconnect in which the operational military's real-time requirements are often out of sync with what is supplied by the administrative military, a fourth legacy of the two-military divide.

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[378] *See* GATES, *supra* note 44, at 121–22 (discussing Gates's experience bridging the divide between the administrative and operational sides of the military).

[379] *See id.* at 119–26 (discussing Gates's perceptions about operational needs in Afghanistan).

[380] *See* 10 U.S.C. § 162 (a)(3) (2012) (mandating that any force assigned to a combatant command may only by transferred from that command pursuant to the authority of the Secretary of Defense).

[381] *See* GATES, *supra* note 44, at 117–18 (describing his frustration with the process).

[382] *See id.* at 121–23 (outlining how Gates worked around the difficulties that Goldwater-Nichols created to supply soldiers with MRAPs).

[383] *See* MCINNIS, *supra* note 130, at 14 (quoting Secretary of Defense Robert Gates who stated that "[t]he Department of Defense is structured to plan and prepare for war, but not to fight one").

[384] *See id.* (discussing Gates's personal reflections on the structural issues he experienced within the DoD).

V. THREE KEY FACTORS ACCELERATING AND EXACERBATING THE TWO-MILITARY DIVIDE

In this Part, I identify and analyze the three additional factors that are exacerbating and accelerating the two-military divide. They include: (1) Congressional focus on the administrative military and the rise of the military-industrial-*congressional* complex; (2) the decline in veterans serving in Congress influencing operational military oversight; (3) and the tools of modern warfare that empower the operational military.

A. THE TWO-MILITARY DIVIDE'S FIRST ACCELERANT: THE RISE OF THE MILITARY-INDUSTRIAL-CONGRESSIONAL COMPLEX

In his 1961 Farewell Address, President Dwight Eisenhower famously warned of a "military-industrial complex."[385] Eisenhower, the Allied Commander in World War II, warned of the rise of a vast military organization and a persistent and powerful defense establishment whose interests were increasingly and inextricably linked with congressional interests.[386] Noting that "[o]ur military organization today bears little relation to that known by any of my predecessors in peacetime," President Eisenhower continued:

> [W]e have been compelled to create a permanent armaments industry of vast proportions. Added to this, three and a half million men and women are directly engaged in the defense establishment. We annually spend on military security more than the net income of all United States corporations . . . . In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the *military-industrial* complex.[387]

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[385] *See Military-Industrial Complex Speech, Dwight D. Eisenhower, 1961*, YALE LAW SCHOOL: THE AVALON PROJECT, http://avalon.law.yale.edu/20th_century/eisenhower001.asp (last visited Feb. 21, 2019).

[386] *Id.* ("We must never let the weight of this combination endanger our liberties or democratic processes.").

[387] *Id.* (emphasis added).

Eisenhower lamented that he was unable to tame the military-industrial complex during his tenure, "lay[ing] down [his] official responsibilities in this field with a definite sense of disappointment."[388] Today, the "military establishment [is] large enough to shape our dealings in the world and seriously influence our economy."[389]

Following World War II, the U.S. military did not shrink to a small peacetime size with the Soviet threat and dawn of the nuclear age. Despite Eisenhower's warnings, the military-industrial complex endures and evolves.[390] Today, Congress is intimately involved with the defense acquisition process, a core administrative military function.[391] Eisenhower's warnings about the military-industrial complex can be more accurately described today as the military-industrial-*congressional* complex, as military expenditures are even more closely linked to jobs in congressional districts.[392] Following World War II, the defense industry became a major part of the U.S. economy.[393] As a military-legal scholar has noted, "Congress [makes] defense decisions based on parochial, constituent interests rather than national concerns."[394]

As whole communities and congressional districts became dependent on military bases and local jobs that flow from the military-industrial-congressional complex, congressional interests and incentives became increasingly aligned with the administrative military's authorities.[395] Indeed, the actions of the civilian Service

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[388] *Id.*

[389] Fallows, *supra* note 191.

[390] President Eisenhower once famously quipped, "God help this country when someone sits in this chair who doesn't know the military as well as I do." MELVIN A. GOODMAN, NATIONAL INSECURITY: THE COST OF AMERICAN MILITARISM 193 (2013).

[391] *See* Fallows, *supra* note 191 (discussing Congress's efforts to bring military spending to their own districts).

[392] *See id.* ("Political Engineering is the art of spreading a military project to as many congressional districts as possible, and thus maximizing the number of members of Congress who feel that if they cut off funding, they'd be hurting themselves.").

[393] *See* Louis Uchitelle, *The U.S. Still Leans on the Military-Industrial Complex,* N.Y. TIMES (Sept. 22, 2017), https://www.nytimes.com/2017/09/22/business/economy/military-industrial-complex.html (reporting that 10% of U.S. factory output is sold to the DoD).

[394] Dunlap, *supra* note 125, at 379.

[395] *See infra* Part IV.A.3. While it is beyond the scope of this Article to address this thoroughly, the explosion of campaign financial contributions has coincided with congressional involvement (and receipt of campaign contributions) from the defense industry. *See, e.g.,* Clay Dillow, *Defense Contractors Outgun Other Industries in Corporate PAC Donations*, FORTUNE (Jul. 15, 2015), http://fortune.com/2015/07/15/defense-contractors-pac/

Secretaries and civilian defense acquisitions professionals are increasingly aligned; after all, the administrative military can win and lose jobs in congressional districts.[396]

Despite the constitutional provision limiting Army appropriations to two years, it is now politically impractical for Congress to cut funding to military members (and their families).[397] Cuts do occur during the periodic Base Realignment and Closure (BRAC) process, but often only after bitter fights in the halls of Congress.[398] After all, what may be good for the DoD may not be good for members of Congress and their constituents. For example, in 2010 then-Secretary of Defense Robert Gates sought to save DoD funds by closing the Joint Forces Command in Norfolk, VA, an obsolete and duplicative military command.[399] However, members of the Virginia congressional delegation fought Gates's goal of shuttering the command at every turn as they saw jobs leaving their districts and their influence waning.[400]

When looking at Congressional interests vis-à-vis the two militaries, the JSF again provides an instructive example of how the two-military divide informs and shapes the modern acquisitions process. As discussed in Part III, the Goldwater-Nichols Act heavily emphasized joint warfare throughout its statutory scheme, leading to a revolution in joint warfare and an increasing focus on interoperability among the three services.[401] Defense contractors realize that "jointness" is the defining feature of the Goldwater-

(noting that defense industry PACs made up the majority portion of the top contributors to Congress in the first quarter of 2015).

396 *See, e.g.,* Fallows, *supra* note 191 ("In the late 1980s, a coalition of so-called cheap hawks in Congress tried to cut the funding for the B-2 bomber. They got nowhere after it became clear that work for the project was being carried out in 46 states and no fewer than 383 congressional districts (of 435 total).").

397 *See* Rudesill, *supra* note 77, at 467–72 (providing several reasons why Congress cannot cut funding).

398 *See, e.g.,* Eric Schmitt, *States and Communities Battling Another Round of Base Closings,* N.Y. TIMES (Mar. 20, 2005), https://www.nytimes.com/2005/03/20/politics/states-and-communities-battling-another-round-of-base-closings.html (stating that Congress created the base-closing process at the end of the Cold War and describing efforts by, among others, Governors Bush (FL) and Schwarzenegger (CA), to stave off significant funding cuts during the 2005 BRAC cycle).

399 *See* GATES, *supra* note 44, at 461–62 (discussing Gates's decision to close the Norfolk-based Joint Forces Command).

400 *See id*. at 461–62 (describing how the Virginia delegation "went wild" after the proposed closing announcement).

401 *See supra* Part III (discussing the Goldwater-Nichols legislation).

Nichols military, and the JSF is being manufactured against this backdrop across the three military branches that fly fixed-wing aircraft (Navy, Air Force, and Marine Corps).[402]

An enormously ambitious project, the total lifecycle cost for the purchase of the 2,000-plus JSF planes now exceeds $1.1 trillion.[403] Likely cognizant that the manufacture of this massively expensive weapon would receive great scrutiny and interest from Congress, the manufacturer (Lockheed Martin) of the JSF placed the location of its various parts throughout nearly all 50 states and across even more congressional districts.[404]

Shrewdly marketed and manufactured, the JSF has proven too big to fail. While the JSF has been the subject of numerous investigations, cost overruns, and criticisms concerning its safety and operational effectiveness, its manufacture continues apace.[405] Members of Congress, in turn, can point to "victories" in their respective districts—manufacturing jobs that bolster their individual standing and re-election bids. In a rare moment of bipartisanship, Democratic and Republican members of Congress even established a "Joint Strike Fighter Caucus" in an effort to protect the JSF from budget cuts.[406]

The rise of the military-industrial-congressional complex and its corresponding incentive structure has led to strange military-congressional bedfellows. For example, Senator Bernie Sanders (I-VT) can fairly be described as skeptical of both the operational

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[402] *See* Christian Davenport, *Under Trump, the F-35's Costs, More Than $1 Trillion Over 60 Years, Continues to Draw Scrutiny*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/12/08/under-trump-the-f-35s-costs-more-than-1-trillion-over-60-years-continue-to-draw-scrutiny/?utm_term=.ca7416ffdd3a ("The F-35 comes in three variants, one each for the Air Force, the Navy and the Marines . . . .").

[403] *See id.* (noting that the project is projected to top $1 trillion over its 60-year life-span).

[404] *See* Daniel Bukszpan, *Why Bernie Sanders is Backing a $1.5 Trillion Military Boondoggle,* CNBC (Jul. 12, 2016, 9:52 AM), https://www.cnbc.com/2016/07/12/why-bernie-sanders-is-backing-a-15-trillion-military-boondoggle.html (noting that 45 states and Puerto Rico are involved in the production of the aircraft).

[405] *See* Davenport, *supra* note 402 (noting billions of dollars in cost overruns and years of delays caused by technical difficulties).

[406] *See* T.W. Farnam, *Caucus Forms to Save the F-35 From Budget Cuts,* WASH. POST (Nov. 23, 2011), https://www.washingtonpost.com/politics/caucus-forms-to-save-the-f-35-from-budget-cuts/2011/11/22/gIQA6QDupN_story.html?utm_term=.32f9d2f05d9a (describing the caucus formation and membership, specifically noting the location of Lockheed Martin's main airline-assembly plant in one of the caucus co-founder's districts).

military's role in U.S. national security and defense spending more generally.[407] But he has been a consistent and reliable booster of the JSF, irrespective of escalating costs.[408] Vermont has benefitted from this military largesse toward the JSF; Lockheed Martin established a manufacturing plant outside of Burlington, bringing thousands of jobs to Vermont.[409] Additionally, Vermont is the first state scheduled to receive the new JSFs, with a shipment slated for the Vermont Air National Guard in 2019.[410] Senator Sanders has clearly taken notice of these developments and has consistently voted for Vermont jobs and jets.[411]

B. THE TWO-MILITARY DIVIDE'S SECOND ACCELERANT: THE DECLINE IN FIRSTHAND CONGRESSIONAL MILITARY EXPERIENCE[412]

Second, the dramatic decrease in the number of veterans serving in Congress has further accelerated the two-military divide's effects. The military is an increasingly independent institution in both perception and practice that is further removed from civil society.[413] The discontinuation of the draft in 1973 ended compulsory military service.[414] Military service is no longer a shared societal experience in the age of an all-volunteer force.[415] In addition, congressional military experience and oversight of military matters have fallen to

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[407] *See* Bukszpan, *supra* note 404 (describing Sanders's relatively dovish military policy proposals).

[408] *See id.* (noting Sanders's continued support for the program).

[409] *See id.* (describing the 1,400 jobs created in Chittenden County as a result of the F-35 program).

[410] *See* Jess Aloe, *F-35 in Vermont: The Economic Footprint,* BURLINGTON FREE PRESS (Sept. 14, 2018, 6:30 AM), https://www.burlingtonfreepress.com/story/news/2018/09/14/f-35-jet-vermont-economic-footprint-air-national-guard/1041153002/ (discussing when the Guard will receive a shipment of the FSJs).

[411] *See* Bukszpan, *supra* note 404 (restating some of Sanders's comments about the program's benefits for the state of Vermont).

[412] For a wider discussion of the methodology of this study, see Danielle L. Lupton, *Out of the Service, Into the House: Military Experience and Congressional War Oversight,* 70 POL. RES. Q. 327 (Jan. 2017).

[413] *See* BROOKS, *supra* note 11, at 14 ("[T]he U.S. military itself—as a human institution—has grown more and more sharply delineated from the broader society . . . .").

[414] *See* David E. Rosenbaum, *Nation Ends Draft, Turns to Volunteers,* N.Y. TIMES (Jan. 28, 1973), https://www.nytimes.com/1973/01/28/archives/nation-ends-draft-turns-to-volunteers-message-from-laird-hopes.html (noting the end of the draft in January 1973).

[415] *See* David Auerswald & Colton Campbell, *Introduction, in* CONGRESS IN CIVIL-MILITARY RELATIONS 202 (2015) (observing a trend in the United States "where the volunteer military is increasingly disconnected from the average American").

historic lows. For example, Goldwater-Nichols was passed when military service in both congressional chambers was near 70%.[416] Now, it has plummeted to below 20%, and this decline has led to oversight ramifications.[417] The rise of the operational military has coincided with a decrease in congressional standing and trust as a public institution; in contrast, the military remains one of the few public institutions that enjoys a favorable standing in the eyes of the American public. A recent Gallup poll showed that 72% of people had "a great deal" or "quite a lot" of confidence in the military but only 12% of the population felt the same about Congress.[418] Congress, in turn, has been overly deferential in operational military matters.[419]

Recent political science research has begun to shine light on the consequences of this decrease in the number of veterans in Congress for voting patterns and oversight over operational military matters.[420] Two statistically significant voting trends are emerging. First, members of Congress with military experience were *more likely* to vote to increase congressional access to information during the wars in Iraq and Afghanistan.[421] This trend is intuitive. Veteran members of Congress—regardless of political party or gender—will better understand the type of information necessary to wage war, contextualize it accordingly, and not excessively defer to the

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[416] *See* Mary Jordan, *After Iraq and Afghanistan, Pioneering Women in the Military Set Sights on Congress,* WASH. POST (Feb. 7, 2018), https://www.washingtonpost.com/politics/2018/02/07/237865a2-fad7-11e7-8f66-2df0b94bb98a_story.html?utm_term=.76efdf93b911 ("In the 1980s, more than 70 percent of House and Senate members had served in the military.").

[417] *See* Lupton, *supra* note 412, at 331–32 (discussing the drop in Congress members who have served in the military); *see also* Jordan, *supra* note 416 (noting that in 2018 about 20% of Congress members had served in the military).

[418] *See* Jordan, *supra* note 416 (discussing the Gallup polls of confidence regarding the military and Congress).

[419] *See* Kohn, *supra* note 246, at 17 (explaining the deference military officials feel in operational decision-making).

[420] *See* Danielle Lupton, *Having Fewer Veterans in Congress Makes it Less Likely to Restrain the President's Use of Force*, WASH. POST (Nov. 10, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/10/fewer-veterans-serve-in-congress-every-term-that-makes-congress-less-likely-to-rein-in-the-presidents-use-of-force/?utm_term=.a9a5f427634f (discussing Lupton's research on voting patterns and operational oversight by Congress).

[421] *Id.*

military.[422] Veterans in Congress are more likely to ask the right questions and not give military leadership a pass.[423] Second, members of Congress with military experience are more likely to limit the use of troops in Iraq and Afghanistan, limit their redeployment to an operational theater, and exercise control over American military personnel in a combat theater.[424]

Goldwater-Nichols was passed during a time of relatively high levels of firsthand military experience in Congress.[425] Those days are long gone and, absent a draft, those numbers are not returning. These early political science findings have implications for war termination, further accelerating the decline in civilian control of the operational military.[426]

Congress's lack of familiarity with operational military matters should not be confused with a lack of *interest*. Consider the recent operational military tragedy in Niger, where four special operations forces were tragically killed in an operation largely out of sight of the American people.[427] The existence of troops in Africa caught many Americans—and foreign policy experts in Congress—off-guard.[428] Many senior members of Congress with military oversight responsibilities professed ignorance of the very existence of military troops in Niger and neighboring African countries.[429] But the existence of these troops should have come as no surprise. After all, Africa Command is the newest geographic combatant command and

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[422] *See id.* (arguing this thesis to explain the data on voting patterns discussed); *see also* Auerswald & Campbell, *supra* note 415, at 4 (explaining that civilians do not easily understand military operations compared to veterans).

[423] *See* Lupton, *supra* note 412, at 333–36 (discussing veteran Congress members' general scrutiny on military issues and policy).

[424] *See id.* (noting the general trends in veteran Congress members' voting on military policy and issues).

[425] *See* Jordan, *supra* note 416 (noting the percentage of veterans in Congress overtime).

[426] *See* Lupton, *supra* note 420, at 333–36 (arguing the effects of this decrease in veteran representation in Congress).

[427] *See* James G. Meek, *U.S. Soldiers killed in Niger were outgunned, 'Left Behind' in Hunt for ISIS Leader,* ABC NEWS (May 3, 2018, 1:05 PM), https://abcnews.go.com/International/us-soldiers-killed-niger-outgunned-left-hunt-isis/story?id=54909240 (stating that four special operations soldiers were killed); *see* Searcy & Schmitt, *supra* note 42, at A5 (explaining that congressmen did not know of troops in Niger).

[428] *See* Searcey & Schmitt, *supra* note 42, at A5 ("The United States has about 800 service members in Niger, yet the scale of its military operations there surprised even two high-ranking senators . . . .").

[429] *See id.*

has been fully operational since 2008.[430] Military operations in Africa have steadily increased since that time.[431] The Pentagon has also consistently maintained that Congress was appropriately informed in accordance with the War Powers Resolution.[432]

C. THE TOOLS OF MODERN WARFARE FURTHER EMPOWER THE OPERATIONAL MILITARY

Finally, the remarkable tools of modern warfare further empower the operational military at the expense of civilian oversight. Today, these operational military commanders—often out of sight and far removed from the American public—increasingly possess the awesome legal authority to utilize all the tools of modern warfare.[433] Military and Executive Branch officials increasingly favor utilizing all the tools of modern warfare including cyber warfare, special operations forces, and drones.[434]

The rise of special operations forces illustrates this trend.[435] SOCOM is the very embodiment of the operational military, with special training and amplified operational legal authorities.[436] Increasingly SOF operates pursuant to covert action authorities,

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[430] *See About the Command,* U.S. AFRICA COMMAND, https://www.africom.mil/about-the-command (last visited Feb. 23, 2019) (explaining that African Command started initial operations in 2007 and became fully operational in 2008).

[431] *See, e.g.,* Eric Schewe, *Why is the U.S. Military Occupying Bases Across Africa?,* JSTOR: DAILY (April 11, 2018), https://daily.jstor.org/why-is-the-u-s-military-occupying-bases-across-africa/ (suggesting that involvement in Africa has increased since President Bush's administration and that it continues today).

[432] *See, e.g.,* Alice Friend, *DoD's Report on the Investigation into the 2017 Ambush in Niger,* CTR. FOR STRATEGIC AND INT'L STUD. (May 15, 2018), https://www.csis.org/analysis/dods-report-investigation-2017-ambush-niger (stating that the Trump administration maintains it can continue operations in Niger because of War Powers notifications).

[433] *See, e.g.,* David E. Sanger, *Pentagon Puts Cyberwarriors on the Offensive, Increasing the Risk of Conflict,* N. Y. TIMES (June 17, 2018), https://www.nytimes.com/2018/06/17/us/politics/cyber-command-trump.html (explaining that the United States has switched from a defensive to offensive position with cyber-attacks); W.J. Hennigan, *The New American Way of War,* TIME (Nov. 30, 2017), http://time.com/5042700/inside-new-american-way-of-war/ (describing the widespread use of special operations); Ken Dilanian & Courtney Kube, *Trump Administration Wants to Increase CIA Drone Strikes,* NBC NEWS (Sep. 18, 2017) https://www.nbcnews.com/news/military/trump-admin-wants-increase-cia-drone-strikes-n802311 (reasoning that Trump plans to expand the use of drones for airstrikes).

[434] *Id.*

[435] *See* Hennigan, *supra* note 433 ("Name a country in the world's most volatile regions and it is likely that Special Operations forces are deployed there).

[436] *See* 10 U.S.C. § 167 (2012) (giving special operations the power to train and other generally broad powers).

secret operations where Congress and the American people may never be notified of their occurrence.[437] Elite, well-trained, possessing a "light footprint," and incredibly effective, special operators have become the darling of Congress and the Executive Branch with a corresponding massive increase in budget in recent years.[438] The public, too, has become enamored with their exploits, fueled by Hollywood films and media stories about their heroism.[439] Clearly, special forces are a brilliant tactical tool. However, their widespread (and possibly excessive) use as *the* military tool of choice raises fundamental concerns about how the U.S. goes to war and conducts operations. The widespread employment of special operations forces since 9/11 (often unknown to the American people) helps avoid broader discussions of the number of "boots on the ground" in a particular conflict that could raise questions about how the U.S. military is employing its forces overseas.[440]

The Nunn-Cohen Amendment to the Goldwater-Nichols Act established SOCOM.[441] It is a unique functional combatant command in that it also possesses awesome operational military authorizations and additional administrative military authorities.[442] It is not limited by geographic boundaries.[443] And it is no exaggeration to state that special operations forces operate nearly everywhere—at last count they were in 137 nations.[444] Despite being a small fraction of the military at just 5%, they now

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[437] *See* 50 U.S.C. § 3093(e) (2012) (defining "covert action"); *see generally,* SEAN NAYLOR, RELENTLESS STRIKE: THE SECRET HISTORY OF JOINT SPECIAL OPERATIONS COMMAND (2015) (discussing the rise of Joint Special Operations Command).

[438] *See* Todd South, *Special Operations Command Asks for More Troops, Biggest Budget Yet,* MIL. TIMES (Feb. 24, 2018), https://www.militarytimes.com/news/your-army/2018/02/23/special-operations-command-asks-for-more-troops-biggest-budget-yet/ (stating that between fiscal year 2017 and fiscal year 2018, the special operations budget increased from 11.8 billion to 12.6 billion dollars.).

[439] *See, e.g.,* ZERO DARK THIRTY (Columbia 2012) (depicting the special operation to kill Osama Bin Laden).

[440] *See* Hennigan, *supra* note 433 (noting that special forces have become "an alternative to sending thousands of conventional military forces to hot spots and risking the political blowback").

[441] *See* 10 U.S.C. § 167 (2012) (establishing special operations).

[442] *See id.* (describing the powers given to special operations).

[443] *See id.* (describing the powers of combatant command without mentioning geography); *see also* JOINT PUBLICATION 1, *supra* note 56, at II (describing worldwide goals).

[444] *See* Turse, *supra* note 41 (stating that special operations are deployed in seventy percent of the world and have been deployed to 137 countries in 2017).

account for the *majority* of casualties.[445] Because of their stealth, lethality, and expertise, special operations forces are increasingly the tools of choice for Executive Branch officials.[446] SOCOM's activities are often cloaked in secrecy and occur outside the United States.[447] Special operations often operate in so called "gray zone" conflicts pursuant to covert action authorities that are often out of sight of the American public.[448] But is Congress attempting to reign in or otherwise examine the widespread use of special operations in light of this dramatic shift in the nature of warfare? No.[449]

Congress has facilitated the rise of SOCOM by routinely increasing SOCOM's role and expanding its budget.[450] It has also seen an expansion of legal authorities where all active and reserve special operations forces stationed in the United States are assigned to SOCOM, creating what has been described as a "fifth branch of the military" to complement the Army, Navy, Air Force, and Coast Guard.[451] Not only do special operations forces enjoy dual operational and administrative authorities, they increasingly operate pursuant to both title 10 and title 50 (covert action) authorities, providing the President with remarkable lethality, flexibility, and a truncated decision-making process.[452] Because of these dual command authorities, SOCOM may be fairly described

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[445] *See* Hennigan, *supra* note 433 (stating that special operations forces comprise almost all casualties despite only being 5% of military forces).

[446] *See, e.g., id.* ("Obama had shifted the burden of the fight against the insurgencies to commandos.").

[447] *See* Searcey & Schmitt, *supra* note 42, at A5 (noting that Congress has little insight into how special operations forces are used).

[448] *See* 50 U.S.C. § 3093(e) (2012) ("'[C]overt action' means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government *will not be apparent or acknowledged publicly*. . . ." (emphasis added)); *see* Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539–54 (2012) (describing the conflict between Title 10 and Title 50 and the implications on public knowledge).

[449] *But see* 10 U.S.C. § 130(f) (2012) (requiring that Congress be informed of military operations under certain circumstances); Rudesill, *supra* note 77, at 64 (asserting that the DoD "increasingly reports to Congress about such operations in a manner that begins to approach the covert action process").

[450] *See* ANDREW FEICKERT, CONG. RESEARCH. SERV., RS21048, U.S. SPECIAL OPERATIONS FORCES (SOF): BACKGROUND AND ISSUES FOR CONGRESS 1–2 (updated October 29, 2018) (outlining changes in special operations over the past years).

[451] *See* 10 U.S.C. § 167(b) (2012) (stating how assignments of reserve members will occur).

[452] *See* Chesney, *supra* note 448, at 539–40, 601–02 (discussing presidential power within the context of the emerging trend of convergence in military operations).

as a "super combatant-command."[453] Within SOCOM, the executive branch increasingly uses Joint Special Operations Command (JSOC) for the most dangerous missions; its truncated chain of command, expertise, lethality, and overall effectiveness is legendary.[454] In addition, while all agencies are delegated authority from Congress, the DoD delegates internally from the President as Commander in Chief to lower tactical commanders.[455] These delegations have been primarily focused on providing increased authority to the operational military commanders, which often involves the loosening of the rules of engagement.[456]

In sum, if civilian control of the military is better understood as a process, Congress should continue to play a more meaningful role in this process. The Legislative Branch serves as the connective tissue between the military and citizenry. However, Congress is largely absent from existing core processes including the operational military's creation and design as set forth by the UCP plan and the yearly NDAA budget process where Congress focuses disproportionately on administrative military matters.[457] The lack of firsthand congressional military experience that influences voting in operational military matters further exacerbates this absence. Meanwhile, the operational military's power and influence continues to grow without comparable oversight.

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[453] *See id.* (discussing the difficulties arising between title 10 and title 50*); see* also JOINT PUBLICATION 1, *supra* note 56, at III-6, III-7 ("[SOCOM] is unique among the [Combatant Commands] in that it performs Service-like functions [to] organize, train, equip, and provide combat-ready SOF to the other [Combatant Commands] . . . .").

[454] *See* Chesney, *supra* note 448, at 574–75 (describing JSOC's rise in the post-911 era).

[455] *See supra* Part III.A.

[456] *See id.* at 540 (demonstrating how increased convergence of military operations blurs the lines of acceptable conduct under the rules leading to less accountability).

[457] *See supra* notes 47–48 and accompanying text.

VI. RECOMMENDATIONS TO REMEDY THE TWO-MILITARY DIVIDE'S EFFECTS

A. IMPROVING CIVILIAN CONTROL OF THE MILITARY AND CONGRESSIONAL OVERSIGHT WITH A NEW MODEL FOR NATIONAL SECURITY GOVERNANCE

Goldwater-Nichols, passed in the aftermath of military tragedy, was in many ways a stunning success. It improved war-fighting, empowered operational military commanders, diminished inter-service rivalry, and centralized the way the President and civilian military leadership received military advice.[458]

However, its legacy is mixed, and its ambitions overshot in many important respects. At its core, Goldwater-Nichols is a Cold War statute designed for a far different time. The world has changed dramatically since the law's passage in 1986, and the military is becoming an increasingly independent institution further removed from the American citizenry that it is sworn to protect.[459] Goldwater-Nichols empowered the operational combatant commanders in invisible or unintended ways; the result is to weaken civilian control of the operational military and create an enduring two-military bureaucracy.[460] The law incentivized congressional focus on administrative matters at the expense of operational ones, accelerating the two-military divide—and despite its stated objective, it failed to rein in the massively inefficient administrative bureaucracy and expensive acquisitions process.[461]

It remains unclear whether members of Congress understand the scope and scale of institutional executive drift, despite some hopeful, initial steps by ranking members (themselves veterans) of

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458 *See* infra Part III (discussing Goldwater-Nichols).

459 *See* Yoo, *supra* note 256, at 2283–92 (discussing the military's growing independence from political leadership since the end of World War II). It is also becoming increasingly outdated, as was evidenced by James Lochner's statement that "[t]he typical 20th century organization has not operated well in a rapidly changing environment. Structure, systems, practices, and culture have often been more of a drag on change than a facilitator. If environmental volatility continues to increase, as most people now predict, the standard organization of the 20th century will likely become a dinosaur." *Goldwater-Nichols Hearings, supra* note 15, at 5–6 (statement of James Locher).

460 *See supra* Part IV.

461 *See* James R. Locher III, *Has it Worked?—The Goldwater-Nichols Reorganization Act*, 54 NAVAL WAR COLL. REV. 95, 95–96, 111–12 (2001) (examining the changes instituted by the Goldwater-Nichols Act and assessing whether they have worked).

the Senate Armed Services Committee (SASC) to revise Goldwater-Nichols 30 years after its passage.[462] Indeed, the time is right for a third major national security act to complement and partially replace the National Security Act and Goldwater-Nichols Act. This new act should first take an honest assessment of how the military functions across the world and address the operational military's ever-expanding foreign relations and non-military functions. Lawmakers should acknowledge that the expanding definition of "national security" should not default to military solutions.[463] Today, other agencies (USAID, State) play an increasingly important role in national security governance and decision-making, but their budgets (and influence) are waning.[464] While all agencies now compete with one another for personnel and funding, the DoD is by far the largest agency at 3.2 million people and a budget in excess of $680 billion a year.[465]

This Part presents recommendations to increase congressional oversight and to update the Goldwater-Nichols Act for the twenty-first century. After 9/11, Congress passed the comprehensive Intelligence Reform and Terrorism Prevention Act that reformed the intelligence community and established the Secretary of Homeland Security as a Cabinet-level official.[466] Yet no such act emerged to address DoD's governing legal architecture. The Goldwater-Nichols Act remains largely unchanged from its Cold War origins. And despite calls for defense reform, it remains intact.

Concerns about the derogation of civilian control of the military are more important and timelier than ever. At the time of this writing, there are just two civilians providing executive branch

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462 See generally *Goldwater-Nichols Hearings*, *supra* note 15.

463 National security is not defined in law, but is defined by DoD in joint doctrine. Its capacious definition includes "[a] collective term encompassing both national defense and foreign relations of the United States with the purpose of gaining . . . [a] military or defense advantage over any foreign nation . . . [a] favorable foreign relations position . . . [a] defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert." DOD DICTIONARY, *supra* note 21, at 162.

464 *See generally* OFFICE MGMT. & BUDGET, AN AMERICAN BUDGET: BUDGET OF THE U.S. GOVERNMENT (2019) (detailing each department's and agencies' budget for the fiscal year 2019 as well as the goals for this year's budget).

465 *See id.* (noting the changes in commands and overseas operations for the fiscal year); *see also* McCarthy, *supra* note 26 (discussing the DoD's large employment power).

466 *See generally* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004) (citing its purposes as the reform of the intelligence community and its related activities).

oversight over the operational military: President Trump and acting Defense Secretary Patrick Shanahan. And the President has shown an increased willingness to delegate more authority to operational military commanders in the field, at times loosening rules of engagement while delegating responsibilities to his military operational commanders.[467] Money continues to flow to the DoD as one of the few federal agencies receiving funding increases.[468]

A new national security law should address the complex international security environment through the establishment of a more holistic government approach to complex international security issues. A more balanced and interagency-focused Goldwater-Nichols would better integrate other agencies into the national security apparatus. What Goldwater-Nichols did for "jointness" in bringing the different services together,[469] a new law can do for an interagency national security apparatus. Consider the following five ideas.

First, we are simply asking too much from one person, the Secretary of Defense, to referee disputes between the administrative and operational militaries as well as civilian and military leadership. Within the operational military's chain of command there is just one level of civilian oversight (the Secretary of Defense) before reaching the Commander in Chief.[470] In contrast, the administrative military has two levels of oversight, ensuring an additional "civilian buffer."[471] One immediate, logical step is to simply require a commensurate amount of civilian control across *both* militaries. If *three* civilians oversee the administrative military, why should *two* civilians be responsible for operational military oversight? To remedy this, a new law should create a civilian "combatant commander secretary" to help oversee the military combatant commands and operational military. This would

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[467] *See* Helene Cooper, *Trump Gives Military New Freedom, but With That Comes Danger*, N.Y. TIMES, Apr. 5, 2017, at A12 (suggesting that a new command style may increase the potential for civilian casualties).

[468] *See* OFFICE MGMT. & BUDGET, AN AMERICAN BUDGET: BUDGET OF THE U.S. GOVERNMENT, *supra* note 464 (discussing the budget for military activities).

[469] *See* discussion *supra* Part III (noting the strengths of the Goldwater-Nichols Act in fostering more unity in the military).

[470] *See* 10 U.S.C. § 113 (2012) (setting forth the role the Secretary of Defense).

[471] *See* discussion *supra* Part III (arguing that Goldwater-Nichols further allowed for the administrative military to have far more oversight than the operational military).

provide an equal level of civilian oversight of both militaries, freeing up the Secretary of Defense to delegate certain oversight authorities to these combatant command officials.

This would provide several advantages and would obviate any perception that the Secretaries of the military departments provide some modicum of control over operational military matters. Ideally, the civilian combatant command secretary would be a senior official with deep foreign policy experience and relationships within a particular geographic area. He or she could guide the military combatant commander as the military combatant commander learns the Area of Responsibility (AOR). Oftentimes, the military combatant commander was never stationed in that particular part of the world and faces a steep learning curve with regards to the area's language, culture, and regional dynamics. And there is precedent for such a role: we recognized the importance of having senior diplomats in both Iraq and Afghanistan during major combat operations with the appointment of Ambassador Ryan Crocker to Iraq and Ambassador Richard Holbrooke to Afghanistan.[472]

Alternatively, co-equal ambassadors or foreign policy experts could be incorporated into the operational military's command to guide and assist the geographic combatant commanders. This is an intermediate step to help ensure a more holistic, integrated government approach to foreign policy. These co-equal ambassadors should be placed directly in the chain of command and staffed accordingly. This would help ensure continuity and a cohesive diplomatic/military voice in international relations.

Taking this first step adds an additional layer of civilian control of the military, mirroring the administrative military. It also ensures foreign policy expertise and a non-military voice on complex international relations and foreign policy matters. It is also a frank acknowledgment that the military is called upon to do numerous missions, not because they have the expertise, but because they are there. Too often this leads to military solutions for non-military

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[472] *See* Scott Shane, *Ryan Clark Crocker, a Diplomat Used to Danger,* N.Y. TIMES (Jan. 6, 2007), https://www.nytimes.com/2007/01/06/world/middleeast/06crocker.html (discussing Ambassador Ryan C. Crocker appointment to Iraq); *see also* Robert D. McFadden, *Strong American Voice in Diplomacy and Crisis,* N.Y. TIMES (Dec. 14, 2010), https://www.nytimes.com/2010/12/14/world/14holbrooke.html?mtrref=www.google.com&gwh=CFFD0B5B1A2D73E0C6F2DE24F79AD423&gwt=pay (discussing Ambassador Richard Holbrooke and his appointment).

problems. If you are a hammer, complex national security problems too often appear as nails. And that hammer is only getting bigger.[473] This is also a realistic, rational step to help counteract the massive budgetary discrepancy between the DoD and other national security-related agencies.

Second, the combatant commands, Office of the Secretary of Defense, State Department, and intelligence community all lack an aligned geographic framework for defining the regions of the world. Why? Too often they are, literally, not on the same page (or map).[474] Even the Office of the Secretary of Defense is organized differently than the Unified Command Plan.[475] This unnecessarily handicaps policy development and integration across the government. One agency zigs while the other zags. As national security governance requires tools of diplomacy, intelligence, military, and economics, there should be one, single aligned national security and foreign policy "map" that integrates all critical actors and takes advantage of the power of alignment.

Third, we should strongly consider providing a more formalized mechanism for dissent and take steps to decentralize the military advice that is given to the President, Security of Defense, and National Security Council. Centralization and unification has advantages, but it also comes with costs.[476] Under Goldwater-Nichols, military advice is now transmitted via one person, the CJCS.[477] While each member of the Joint Chiefs of Staff (Army,

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[473] *See* Cooper, *supra* 467 (discussing the military's new freedom under the Trump administration).

[474] For example, the combatant commands have six geographic combatant commands (Northern, Southern, Africa, Europe, Pacific, and Central) while the State Department has six different regions (Africa, Europe and Eurasia, Near East, Western Hemisphere, East Asia and Pacific, and South Asia), and the CIA Intelligence Directorate has five (Asia Pacific, Latin America, Africa, Near East and South Asia, and Russia and Europe). *See* MURDOCK ET AL., *supra* note 35, at 37–38 (recommending the creation of a "common regional framework" across the U.S. government).

[475] *See id.* at 37 n.28 ("The Office of the Secretary of Defense divides the world into four regions: Africa, Asia and Pacific, Near East and South Asia, and Western Hemisphere.").

[476] *See* POSNER, *supra* note 226, at 42–43 (noting the difficulties of transmitting intelligence information in a centralized structure).

[477] *See* 10 U.S.C. § 151(d) (2012) (setting guidelines for communicating opinions of members other than the Chairman).

Navy, Air Force, Marines) may submit a matter in dissent, that opinion is transmitted via the CJCS, who submits his own advice.[478]

Unlike the other members of the Joint Staff, the CJCS has several advantages. First, he is widely recognized as the senior military officer in the DoD, affording him a special status as "first among equals" as the face of the military to the media and American public.[479] Second, the CJCS is focused on operational military matters and lacks administrative responsibilities such as staffing, training, and equipping that are the outsized focus of the administrative military leadership.[480] Finally, the Chairman's Joint Staff may be the most effective staff in government, and the staff is predominantly composed of active-duty military forces.[481] Day to day, the Chairman and his staff only serve the operational military and the operational chain of command,[482] potentially undermining the important role of the civilian Office of the Secretary of Defense.

A revised Goldwater-Nichols should authorize a legal mechanism for the top civilian leaders to hear a wide variety of voices across the services and provide mechanisms for dissent. This would have the additional benefit of providing a more direct linkage between the operational military and administrative military.

Fourth, we should review and overhaul the national security budgetary process. The National Defense Authorization Act (NDAA) funds the DoD,[483] while a separate funding process exists for the other national security agencies (e.g. State, USAID, Homeland Security).[484] While Congress often focuses on administrative matters within the NDAA, it does receive a baseline

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[478] *See id.* ("A member . . . may submit to the Chairman advice or an opinion . . . [which] the Chairman shall present . . . at the same time he presents his own advice. . . .").

[479] *See Chairman of the Joint Chiefs of Staff*, JOINT CHIEFS OF STAFF https://www.jcs.mil/About/the-Joint-Staff/chairman/ (last visited Feb. 23, 2019) (recognizing the "Chairman of Joint Chiefs of Staff as the senior ranking member of the Armed Forces").

[480] *See* MURDOCK ET AL., *supra* note 35, at 24 (noting that the Chairman's chief responsibilities are operational in nature).

[481] *See About the Joint Chiefs of Staff,* JOINT CHIEFS OF STAFF, https://www.jcs.mil/About/ (last visited Feb. 23, 2019) (noting that the Joint Chiefs of Staff consists of at least one representative from each of the branches of military—Army, Navy, Air Force, Marine Corps, and National Guard).

[482] *See Chairman of the Joint Chiefs of Staff, supra* note 479 (noting that the Chairman and his staff "transmit communications to the combatant commands").

[483] *See supra* notes 36–37 and accompanying text.

[484] *See* MURDOCK ET AL., *supra* note 35, at 34, 42 (noting the inconsistencies in budgeting processes across individual agencies and pointing out the need for interagency budgeting).

of congressional attention every year. A massive monetary infusion in USAID and State is unlikely anytime soon, but they clearly play a critical (albeit diminished role) in responding to national security crisis. Why not integrate State and USAID funding into the existing NDAA process? Alternatively, the NDAA could include an operational/foreign policy section that integrates the budgets for the core national security agencies or reinvigorate the Office of Management and Budget's role in refereeing national security priorities.

Fifth, the administrative military should be accountable to the operational military for the equipment, weapons, and personnel that it provides to the commanders in the field. Put simply, the DoD and administrative military "is structured to plan and prepare for war, but not to fight one."[485] A revised Goldwater-Nichols should mandate a synchronization cell with command and control authority to ensure that the administrative military is responsive in real time to the requirements of the operational military. At this time, this is done via the Joint Requirements Oversight Council (JROC), but this entity lacks full legal authority to ensure oversight.[486]

Finally, while there are signs that Congress might take a fresh look at Goldwater-Nichols with the potential of breathing new life into legislative oversight, more must be done. In 2016, Senators McCain (R-AZ) and Reed (D-RI) held bipartisan hearings on the need for a new Goldwater-Nichols Act, but future legislation remains uncertain.[487] Any legislative change should focus on breathing life into legislative oversight of the operational military, addressing the core unintended consequence of the Goldwater-Nichols Act. This includes members of Congress taking a greater role in the combatant commanders' budget process and developing a better understanding of their roles in foreign policy. Right now, the geographic combatant commanders are required to brief

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485 *See* MCINNIS, *supra* note 130, at 14 (quoting former Secretary of Defense Robert Gates).

486 *See* 10 U.S.C. § 181 (2012) (describing mission and composition the JROC).

487 *See Sen. McCain Issues Opening Statement at Hearing on Defense Budget Request for FY 2017,* TARGETED NEWS SERV., Mar. 17, 2016 (quoting Sen. John McCain) ("[A]nother priority of this Committee will remain the defense reform effort that we began last year, including a review of the Goldwater-Nichols legislation that is now marking its thirtieth anniversary.").

Congress once a year.[488] In light of their already robust role in foreign policy and statecraft, they should be required to brief congressional leaders semi-annually.

And Congress should be actively engaged in exercising its investigatory power to better understand where combatant commanders are requesting forces to be deployed throughout the world—particularly special operations forces. This is particularly important for areas that are seeing an increased American force presence (Philippines, Africa, Southeast Asia).[489] Too often, Congress appears to be caught off-guard about these operations.[490] With a continual Authorization for Use of Military Force (AUMF) in place and a NDAA passed every year, combatant commanders possess the legal and fiscal authority to conduct a wide range of missions outside the public eye.[491] Congress should be better informed and engaged on these missions.

B. REFORMING THE ADMINISTRATIVE PROCEDURE ACT TO BETTER REFLECT MILITARY ORGANIZATIONAL REALITIES

As discussed in Part IV, the APA is no longer aligned with the organizational realities of the two-military state. The APA was passed just one year before the National Security Act and forty years prior to Goldwater-Nichols and remains antiquated as applied to the modern military.[492] As a general matter, most *administrative* military actions that occur within the United States remain subject

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[488] *See supra* note 34 and accompanying text.

[489] *See* Brad Lendon, *China's reaction to U.S. Navy Operation: We Have Missiles,* CNN (Jan. 10, 2019, 8:03 PM), https://www.cnn.com/2019/01/10/asia/china-missiles-south-china-sea-intl/index.html (noting Chinese displeasure with U.S. Naval presence in South China Sea); Greg Myre, *The Military Doesn't Advertise It, But U.S. Troops Are All Over Africa*, NPR (Apr. 28, 2018), https://www.npr.org/sections/parallels/2018/04/28/605662771/the-military-doesnt-advertise-it-but-u-s-troops-are-all-over-africa (noting the U.S. presence in Africa extends across roughly 20 African countries).

[490] *See, e.g.,* Daniella Diaz, *Key Senators Say They Didn't Know the U.S. Had Troops in Niger*, CNN (Oct. 23, 2017), https://www.cnn.com/2017/10/23/politics/niger-troops-lawmakers/index.html ("'I did not,' Sen. Bob Casey, D-Pennsylvania, responded to CNN's Chris Cuomo on 'New Day' Monday whether he knew there were troops in Niger.").

[491] *See supra* Part III (noting how the operational military has been granted broader war-making authority at the expense of congressional oversight).

[492] *See supra* Part IV.C.

to the APA while most operational military actions taken by combatant commands are *not* subject to the APA.[493]

First, the definition of "agency" should be updated. Specifically, the APA is silent on how administrative law should address actions taken by combatant commanders. Both the Secretaries of the military departments and combatant commands are one step below the Secretary of Defense in the DoD hierarchy, but only the Secretaries of the military departments are "agencies" within the plain meaning of the APA.[494]

Second, the APA exemptions should be reformed to eliminate "the time of war" exemption to more precisely address the military activities that take place in peace and the expanding menu of actions short of war. For example, the operational military does conduct certain "gray area" activities that are neither purely administrative nor operational.[495] Both the United States Navy and Coast Guard conduct a wide range of activities on the high seas and outside the United States that may be fairly described as "readiness" activities that are hard to clearly define and are not purely wartime activities.[496] As operational activities, however, they currently fall outside the APA's jurisdiction.

The military function exception should also be updated and defined more precisely. Rulemaking and adjudications that involve "the conduct of military or foreign affairs functions" are exempt.[497] Notice of a proposed rule, opportunity for public comment, and publication of the final rule are central to administrative law. Courts have struggled to determine what, exactly, is a military function, applying the military function exemption to the creation of temporary security zones[498] and to the determination of death of

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493 *Compare* Story v. Marsh, 574 F. Supp. 505, 514 (E.D. Mo. 1983*), rev'd.,* 732 F.2d 1375 (8th Cir. 1984) (holding that an Army Corps administrative decision was a "rulemaking decision" within the meaning of and subject to the APA) *with* Masur, *supra* note 297, at 512–13 (stating that "the only cognizable exceptions that might exempt a military agency . . . from APA strictures are the narrow ones written into the statute itself" including military authority exercised in the field during "time of war").

494 *See* 5 U.S.C. § 552(f)(1) (2012) (listing military departments under "agency" definition).

495 *See supra* Part IV.C.1.

496 *See* Breyer Oral Argument, *supra* note 336, at 35 (discussing the difficulty for judges to make to make these types of determinations).

497 5 U.S.C. § 553(a)(1) (2012); 5 U.S.C. § 554(a)(4) (2012).

498 *See* United States v. Ventura-Melendez, 321 F.2d. 320, 323 (2003) (holding that establishing a security zone is exempt from APA rules under 10 U.S.C. §§ 552–553).

a service member because it involved military affairs and public benefits.[499]

Of course, any attempt to reconcile the APA with the modern military organization may run against significant headwinds within the DoD. And they will likely assert that this will only harm military readiness by exposing an increased number of activities to judicial review. But the APA has had an enormous impact in making governmental activity "more open, accountable, and responsive to the public than in any other country"[500] and can play a powerful role in ensuring civilian control of the military.[501]

CONCLUSION

The Goldwater-Nichols Act, passed in 1986 in the aftermath of several military misadventures, managed to reduce interservice rivalry through emphasis on joint warfare but failed to reinforce civilian control over the military. Instead, it *discouraged* congressional involvement in the hard questions by increasing the authority and autonomy of geographic combatant commanders at the heart of the operational military. Today, Congress remains focused on the administrative military. We are witnessing increased executive drift facilitated by this Act and the two-military divide.

This trend comes into sharper relief as the military looks to future conflicts and takes on new missions. The administrative military is legally and doctrinally at the operational military's service, and its leadership is accountable when forces are not combat ready. But it is strange indeed to assign accountability when the administrative military lacks control over its own priorities, which are shaped by congressional preferences.

When the Congress focuses solely on the administrative military, it abrogates its constitutional *responsibility* to be a coequal partner in answering the following questions: Should we be operating in hundreds of nations in such a manner? What is the precise scope of the AUMF? What is the desired end state? At the time of this

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499 *See* McDonald v. McLucas, 371 F. Supp. 837, 840 (1973) (holding that the APA did not apply).

500 *See* JAMES RASBAND ET AL., *supra* note 298, at 223.

501 *Id.*

writing, we are still in the longest period of armed conflict in American history—when will this end?

The answers to these questions will remain unsatisfactory absent a congressional awakening or renewed interest by the American public. Our nation's strong tradition of civilian control of the military is shaped more by historical practice and constitutional norms than by the few black letter legal provisions. As we look to the military's future in increasingly dangerous times with growing pressures on civil-military relations, we must understand the military's modern agency design and its consequences. Only then can we act to shape the future of civil-military relations and sustain a military that safeguards our national security while remaining subordinate to civilian leadership.

The Congress owes it to the American people to engage with matters of state. Our nation's strong tradition of civilian control of the military is shaped more by custom than law and cannot be taken for granted. And as the Supreme Court noted in *Duncan v. Kahanamoku*, "[t]he supremacy of the civil over the military is one of our great heritages."[502]

[502] 327 U.S. 304, 325 (1945).