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Mark P. Nevitt

University of Pennsylvania Law School

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The Operational and Administrative Militaries

Mark Patrick Nevitt*

This Article offers a new way of thinking about the military. The U.S. military's current legal architecture arose from tragedy: in response to operational failures in Vietnam, the 1980 failed Iranian hostage rescue attempt and numerous other military misadventures, Congress enacted the Goldwater-Nichols Act. In overhauling the agency design of the Department of Defense (DoD), Goldwater-Nichols enshrined in statute two distinct militaries that endure to this day. I label these militaries the "operational military" and the "administrative military." Once opaque to the outside observer, these two militaries have gradually emerged from the shadows in light of recent conflicts. The operational military remains the focus of the executive branch, led by uniformed combatant commanders responsible for planning and fighting the nation's wars as well as an expanding menu of foreign-relations functions. In contrast, Congress primarily focuses on the administrative military, largely led by civilian Secretaries of military departments responsible for staffing, training, and equipping the nation's Armed Forces. The operational military fights. The administrative military trains and equips.

Understanding how these two militaries arose from their early constitutional origins, evolved after the Second World War, and function in the modern administrative state is essential to a complete understanding of national security governance and its corresponding effects on civilian control of the military. In this Article, I first propose this new two-military analytical framework, which has its origins in the Constitution and was effectively formalized by the Goldwater-Nichols Act. Second, I address the two-military divide's consequences – many unintended – showcasing how the Goldwater-Nichols Act incentivizes congressional attention over administrative military matters at the expense of operational military oversight. Finally, I conclude with initial recommendations to "combat" this two-military divide and

* Mark P. Nevitt is a Sharswood Fellow, Lecturer-in-Law at the University of Pennsylvania Law School. A former Navy JAG and tactical jet aviator, he most recently served as the Deputy Director of Administrative Law for the Office of the Navy JAG in the Pentagon. This Article benefitted from faculty and fellows roundtables at Georgetown, Penn Law and the AALS *New Voices in National Security Law* workshop with helpful feedback from Professors William Banks, Peter Margulies and Robert Percival. Special thanks to Professors Stephanos Bibas, Sean Burke, Angus Corbett, Geoffrey Corn, Paul Diller, Jean Galbraith, David Hoffman, Michael Horowitz, Rebecca Ingber, Sophia Lee, David Luban, Serena Mayeri, David Pozen, Dakota Rudesill, Daniel Walters, David Wishnick and Rachel VanLandingham, as well as Lieutenant Commander Brian Corcoran, Reid Hopkins and Sara Zdeb for their comments on previous drafts as well as the outstanding legal research provided by Mr. Al Dong and Ben Meltzer of the Penn Law library.

corresponding executive drift, presenting an integrated national security governance vision that draws upon expertise from other federal agencies.

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 on the continent 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 U.S. European Command, one of five extraterritorial U.S. geographic combatant commanders. These positions play an increasingly important but not well-understood role in the largest military (and bureaucracy) in the world. Described by some commentators as "viceroys"² or "modern Roman pro-consuls,"³ the 1947 National Security Act established these positions. But their authorities lay dormant for almost forty years, only to be fully actuated in 1986 via the Goldwater-Nichols Act. These combatant commanders lie at the heart of what I refer to as the

¹ This vignette is largely borrowed from ADMIRAL (RET.) JAMES STAVRIDIS, *THE ACCIDENTAL ADMIRAL* 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 DEREK REVERON, *AMERICA'S VICEROYS: THE MILITARY AND U.S. FOREIGN POLICY* 1 (2004).

³ DANA PRIEST, *THE MISSION* 61 (2002) (describing the rise of combatant commanders and their role in foreign policy).

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, or some version of an “executive unbound” or an “Imperial Presidency” further facilitated by the nature of modern warfare.⁴ That’s not untrue, but it’s 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 two militaries residing within DoD: an “operational” and “administrative” military.⁵ 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 governance, how administrative law interacts with the military, and how agency design influences 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.⁶ 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 substantial, these combatant commanders’ powers are increasing.⁷ They not only plan and fight the nation’s wars; they now perform an expanding menu of non-traditional military functions to include foreign relations-type functions that have historically been the province of the State Department.⁸ Today’s combatant commanders have a continuous presence abroad with massive staffs, resources and *forces*. As State Department billets are gapped and its

⁴ See ADRIAN VERMEULE & ERIC POSNER, *THE EXECUTIVE UNBOUND* (2010); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973). And Congress no longer declares war – the last declaration of war dates from the Second World War.

⁵ I am the first legal scholar to describe the DoD’s agency design as a two-military divide with these terms.

⁶ The Commander in Chief Clause ensures that there is an elected civilian head of the military. “The Constitution fails to specify where the authority of the Commander in Chief ends and that of Congress begins.” Christopher M. Bourne, *Unintended Consequences of the Goldwater-Nichols Act*, *JOINT FORCES QUART.* 99, 100 (Spr. 1998). *Duncan v. Kahanamoku*, 327 U.S. 304 (1945) (“The supremacy of the civil over the military is one of our great heritages.”).

⁷ See generally REVERON, *supra* note 2, at 1–14.

⁸ See ROSA BROOKS, *HOW THE MILITARY BECAME EVERYTHING AND EVERYTHING BECAME WAR* (2016); PRIEST, *supra* note 3, at 61-65 (describing the rise of combatant commanders and their role in foreign policy).

funding slashed, combatant commanders fill the foreign policy void as the default, consistent American representatives abroad.

The operational military's origins can be found in the Constitution, statute and military doctrine. It is responsible for planning and executing the nation's war fighting, training foreign forces, engagement with foreign militaries, and an increasing range of foreign-relations activities.⁹ It receives its forces (personnel, equipment, weapons) from the administrative military. Uniformed combatant commanders and subordinate joint task force commanders lead the operational military.¹⁰ Its day-to-day implementation is governed by the doctrinal terms of combatant command, operational control, and tactical control.

The administrative military's origins can also be found in the Constitution, statute, and military doctrine. It is responsible for personnel management, staffing, recruiting, testing, training, health care, equipping and hardware acquisition. It provides forces to the operational military. The civilian Secretaries of the military departments and the uniformed heads of each military branch – the service “chiefs” – largely lead the administrative military.¹¹ Its implementation is governed by the doctrinal term

⁹ 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 (IC), but the operational and administrative military divide has enormous follow-on consequences within the IC 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.*

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 17 defense agencies – to include Defense Logistics Agency (DLA) and 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 the 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*]. “[Secretary of the Navy] Ray Mabus complained that 20 percent of the defense budget went to the Fourth Estate – the defense agencies that provide support to the armed forces – and called it pure overhead.” *Hearing Before the H. Comm. on Oversight and Government Reform*, 115th Cong. 2–3 (2017) (prepared testimony of Lawrence J. Korb).

¹⁰ *See infra* Parts I.B-C, II. 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.

¹¹ *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

administrative control.¹² The two-military divide greatly incentivizes congressional focus on the administrative military at the expense of operational military oversight and 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.¹³ Its organizational set-up is complex, its size vast, and its mission idiosyncratic: DoD is responsible for the nation's defense to include the lawful application of military force to fight and win the nation's wars.¹⁴ The very nature of its activities raises 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 judicial review?¹⁵

The answers lie in the organization. In particular, they lie in a fuller understanding of DoD's unique and complex agency design that allocates

as “*man*, train, and equip.” I intentionally use the gender-neutral term “staffing” to better reflect the important role that women are increasingly playing in the Armed Forces and the current “no exceptions” combat policy in effect.

¹² See *infra* Parts I.B-C, II. 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.

¹³ See Niall McCarthy, *The World's Biggest Employers*, FORBES.COM (June 23, 2015, 8:20 AM), <http://www.forbes.com/sites/niallmccarthy/2015/06/23/the-worlds-biggestemployers-infographic/#3ae7382c51d0>. And 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. 161-62 (2014).

¹⁴ Forest L. Reinhardt & Michael W. Toffel, *Managing Climate Change: Lessons from the U.S. Navy*, HARV. BUS. REV. Jul/Aug 2017, at 102. “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; Ensure, by timely and effective military action, the security of the United States, its possessions, and areas vital to its interest; Uphold and advance the national policies and interests of the United States.” DEP’T OF DEF. DIR. 5100.01: FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MANY COMPONENTS (Dec. 21, 2010) [hereinafter DEP’T OF DEF. DIR. 5100.01]

¹⁵ I define “forces” broadly as set forth in DoD’s Dictionary of Military and Associated Terms to include “An aggregation of military personnel, weapon systems, equipment, and necessary support, or combination thereof . . . [or] a major subdivision of a fleet.” See also DEP’T OF DEF., JOINT PUBLICATION 1-02: DEP’T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 89 (as amended through Aug. 2017) [hereinafter DOD DICTIONARY].

power within the government's largest agency.¹⁶ 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. They remain busy in war and peace. These commands reside throughout the world with personnel and resources far outpacing the State Department's size and budget.¹⁷ Not only do these combatant commanders plan and fight the nation's wars, they are taking on an increasing foreign policy role.¹⁸
- *Imbalance in Congressional Testimony.* Each year, congressional committees with military oversight responsibilities hear testimony from civilian and uniformed military leadership. 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. In contrast, the administrative military leaders testify in front of Congress in far greater numbers.¹⁹ The administrative military leaders are more likely to be “called to the congressional carpet” whenever there is a scandal, regardless of its nature.²⁰

¹⁶ 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 Matthew Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012) (describing the traditional national security scholarship focus). Robert Knowles, *Warfare as Regulation*, 50 WASH. & LEE. L. REV. 2018 (forthcoming). Understanding DoD's agency design helps answer the question: where does all the money go? See, e.g., *Pentagon Buries Evidence of \$125 billion in Bureaucratic Waste*, WASH. POST, Dec. 6, 2016, at A1.

¹⁷ See generally RONAN FARROW, *WAR ON PEACE: THE END OF DIPLOMACY AND THE DECLINE OF AMERICAN INFLUENCE* (2018). The Trump Administration sought a 9.4% increase in the upcoming Department of Defense's budget and a 30% decrease in the State Department budget. While Congress ultimately bulked the State Department budget by \$11 billion, it is undergoing a dramatic reduction in resources and personnel. See Robbie Gramer, Dan DeLuce, & 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/>.

¹⁸ Edward Marks, *Rethinking the Geographic Combatant Commands*, INTERAGENCY JOURNAL 19, 19-20 (Fall 2010).

¹⁹ The combatant commanders, in contrast, normally testify just once a year via “posture statements.”

²⁰ 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. Indeed, “Congress regularly calls the Service Secretary or Service Chief on the carpet when investigating the

- *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. This funding bill is heavily focused on the administrative military while granting the operational military considerably greater discretion over spending.²¹
- *Special Operations and the Rise of “Secret Wars.”* U.S. Special Operations Forces (SOF) today function as part of a “super combatant command.²² They operate almost everywhere – 138 nations of the world at last count – *double* the number from just 10 years ago.²³ They now shoulder the bulk of the U.S. military’s casualties.²⁴ As they are employed in new ways – to include covert action authorities that are deliberately kept out of the public eye – congressional oversight has lagged.²⁵ And Congress has facilitated their rise with an increased budget, personnel, and legal authorities without a corresponding increase in oversight.²⁶
- *The Operational/Administrative Disconnect:* The two-military divide also creates a practical problem: too often the administrative military provides the operational military with the wrong “stuff.” Or it provides equipment

latest acquisition foibles, even though they are not in the acquisition management chain of command . . .” See CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, BEYOND GOLDWATER-NICHOLS: U.S. GOVERNMENT AND DEFENSE REFORM FOR A NEW STRATEGIC ERA 94 (2006).

²¹ For example, the NDAA focuses on core aspects of the administrative military (health care, administration, personnel, etc). In the most recent Fiscal Year-18 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.

²² And SOCOM is the *only* military command specifically established by Congress. 10 U.S.C. § 167 (2012).

²³ See, e.g., Nick Turse, *American Special Ops Forces Have Deployed to 70 Percent of the World’s Countries in 2017*, THE NATION, Jun. 26, 2017, <https://www.thenation.com/article/american-special-ops-forces-have-deployed-to-70-percent-of-the-worlds-countries-in-2017/>

²⁴ Id.

²⁵ Covert action is defined as, “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.*” 50 U.S.C. § 3093 (e) (2012) (emphasis provided).

²⁶ 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. 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”).

that the operational military doesn't want or need at significant taxpayer expense.²⁷

I propose this new two-military analytical framework in Part I.²⁸ This Part begins with a brief historical overview of the dual-military state. It argues that these two militaries co-existed 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 II analyzes the Goldwater-Nichols Act of 1986. This Act, largely unexamined by 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.²⁹ The operational military commanders, in turn, are increasingly delegated broader war-making authorities, accelerating independent executive action at the expense of congressional oversight.³⁰

Part III addresses the two-military divide's consequences – many unintended. Adrian Vermeule, David Dyzenhaus, and others have described the emergence of aptly named “black holes” and “grey holes” and their effects on administrative law governance during times of war and emergency.³¹ Such holes serve as legal trap doors that exempt or modify judicial oversight

²⁷ 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. ROBERT GATES, *DUTY: MEMOIRS OF A SECRETARY OF WAR* (2014).

²⁸ “Civilian control of military institutions” is not specifically defined or mentioned in the Constitution's text. PETER D. FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* (2003). See also Christopher M. Bourne, *Unintended Consequences of the Goldwater-Nichols Act*, *JOINT FORCES QUART.* 99, 100 (Spr. 1998).

²⁹ 10 U.S.C. § 162 (a) (2012). ASSIGNMENT OF FORCES. “. . . the Secretaries of the military departments shall assign all 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 15, at 89.

³⁰ 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* (1990).

³¹ See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 *Harv. L. Rev.* 1095 (2012); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006).

over certain agency actions depending on *external* factors.³² 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.³³

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

³² The term legal “black hole” was first used to describe the inapplicability of law to Guantanamo Bay detainees in the aftermath of 9/11. DYZENHAUS, *supra* note 31.

³³ *See id.* Cf. Vermeule, *supra* note 27, at 1112 (describing how the early APA exemptions as applied to the military are “rarely litigated”).

I. FROM THE NATION’S FOUNDING TO THE COLD WAR: THE ORIGINS OF THE TWO MILITARIES

Despite being hailed as a critical legacy of the U.S. Constitution, the term “civilian control of the military” is wholly absent from the Constitution’s text. 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.³⁴ Today, civilian control of the military is implemented via governing statutes, particularly the Goldwater-Nichols Act. This reinforces civilian control of the military through the formation of a lawful chain of command that subordinates the military to civilian oversight.³⁵

A. *The Two-Military Glossary and Overview of Key Terms*

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

- *Chairman of the Joint Chiefs of Staff (CJCS)*: By law, the principal military advisor to the President, Secretary of Defense, National Security Council and Homeland Security Council for all military matters, but has an outsized role in operational military matters. This includes the promulgation of joint doctrine.³⁶ The Chairman lacks formal command authority 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.³⁷
- *Combatant Commanders*: Within the operational military, uniformed, four-star military officers who head one of the ten

³⁴ U.S. CONST. art. II, § 2, cl. 2.

³⁵ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of Title 10).

³⁶ 10 U.S.C. § 151 (2012).

³⁷ Joint Chiefs of Staff, Joint Pub. 1, Doctrine for the Armed Forces of the United States III-4, III-5 (as amended through Mar. 25, 2013).[hereinafter JOINT PUBLICATION 1]

combatant commands and lead the operational military.³⁸ The five extraterritorial geographic combatant commanders as well as Special Operations Command are the operational military's true "heart." They exercise an increasingly important but not well-understood role in national security law and governance.

- *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."³⁹ Military departments are "agencies" within the definition of the APA.⁴⁰
- *Joint*: "[A]ctivities, operations, organizations, etc., in which elements of two or more military departments participate."⁴¹
- *Joint military doctrine*: Fundamental principles that guide the employment of United States military forces in coordinated action toward a common objective and may include terms, tactics, techniques, and procedures. Serves as a sub-regulation.⁴²

*B. The Executive-Operational Nexus and Congressional-Administrative Nexus*⁴³

The operational military has existed in some capacity since our nation's founding. Its primary legal authority can be found within the text of the Constitution, particularly in the Commander in Chief clause:⁴⁴

[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 actual service of the United States.⁴⁵

³⁸ As of this writing, the ten combatant commands include six geographic commands (five overseas): Africa Command, Central Command, European Command, Northern Command, Pacific Command, and Southern Command and four functional combatant commands – Cyber Command, Strategic Command, Special Operations Command, and Transportation Command.

³⁹ Under existing law, the Marine Corps is part of the Department of the Navy. 10 U.S.C. § 5061 (2012).

⁴⁰ 5 U.S.C. § 552(f)(1) (2012).

⁴¹ DOD DICTIONARY, *supra* note 15, at 121.

⁴² *Id.* at 123.

⁴³ Broadly speaking, Congress has the constitutional power of the "purse" while the executive has the power of the "sword." THE FEDERALIST NO. 10 (James Madison).

⁴⁴ U.S. CONST. art. II, § 2, cl. 2.

⁴⁵ *Id.*

The precise scope of this authority has befuddled scholars and jurists since the Constitution's inception.⁴⁶ Despite its clear modern-day importance for defining the scope of operational military matters, the clause was not discussed during the Constitutional Convention. 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.⁴⁷ 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 (as well as Thomas Jefferson), reflected an abiding faith in citizen-militias and possessed a profound suspicion of federal standing armies. It shared a deep aversion to the concentration of military power within any single military officer. The Federalists and Alexander Hamilton shared the second view, which favored centralized decision-making and more streamlined authority that favored rapid executive action. It saw the need and was generally more open to the idea of standing armies and navies.⁴⁸ 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 were all hotly debated.⁴⁹ In the *Federalist Papers*, Hamilton wrote that the Commander in Chief authority “would amount to nothing more than the supreme command and direction of the Military and naval forces, as first general and admiral of the confederacy.”⁵⁰ Hamilton stated that the Commander in Chief had the

⁴⁶ Justice Jackson's 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, 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.” See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

⁴⁷ *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

⁴⁸ ROBERT CHERNOW, *HAMILTON* 253-60 (2004). See also *Goldwater-Nichols Hearing*, *supra* note 33, 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. It is unlike the command and control for any other country in the world. And we 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. . .”). *Id.*

⁴⁹ *The Federalist*, No. 8 (Alexander Hamilton); see also Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 185-86 (1996).

⁵⁰ *THE FEDERALIST*, NO. 69 (Alexander Hamilton). “The President is to be commander-in-chief of the army and navy of the United States . . . [i]t would amount to nothing more than the

authority over the tactical movement of troops and vessels, foreshadowing doctrinal authorities integral to the modern operational military.⁵¹

So 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. Early Supreme Court decisions embraced this view. 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:

His duty and his power are purely military. As commander-in-chief, he is authorized to *direct the movement* 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 . . .⁵²

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.⁵³

Under the Constitution’s text, Congress controls all military appropriations to include the “power of the purse” and oversight over the DoD’s annual budget.⁵⁴ Congress also has the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”⁵⁵ It has the authority to both “raise and support armies,” (limited to two years) and “provide and maintain a Navy” (no time

supreme command and direction of the military and naval forces as first general and admiral of the Confederacy.” *Id.*

⁵¹ *Id.*

⁵² *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850). From the Federalist Papers to modern doctrine, one can see the evolution of the operational military. In modern military doctrine, tactical control, a core operational matter function, is defined as “[t]he authority over forces that is limited to the detailed direction and control of movements or maneuvers within the operational area necessary to accomplish missions or tasks assigned.” DOD DICTIONARY, *supra* note 8, at 226. This was reinforced in a case decided after the Civil War, describing the role of the President as Commander in Chief as “the command of the forces and the conduct of campaigns.” *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866).

⁵³ The preamble of the Constitution foreshadows the modern military’s mission, “in order to form a more perfect Union . . . and provide for the common Defence.” U.S. CONST. preamb. Further, Congress “provide[s] for the common Defence and general Welfare of the United States.” U.S. CONST. art. I, § 8, cl.1. *See* U.S. CONST. art. I, § 8, cl. 13-14.

⁵⁴ 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 supra* note 14.

⁵⁵ U.S. CONST. art. I, § 8 cl. 11.

limitation)⁵⁶ as well as the constitutional authority to “make regulations governing the Armed Forces.”⁵⁷ 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”⁵⁸ and the power “[to] 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.”⁵⁹

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.⁶⁰ Standing armies became a permanent fixture with the emergence of the Cold War: The National Security Act of 1947 created the modern military infrastructure, discussed below.

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 continue in some form to this day. Specifically, it created the National Military Establishment, CIA, National Security Council, and the Secretary of Defense. 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

⁵⁶ U.S. CONST. art. I, § 8, cl. 12-13. See also Dakota Rudesill, *The Land and Naval Forces Clauses*, 86 U. CIN. L. REV. (2018)(forthcoming).

⁵⁷ U.S. CONST. art. I, § 8, cl. 14.

⁵⁸ U.S. CONST. art. I, § 8, cl. 15.

⁵⁹ U.S. CONST. art. I, § 8, cl. 16.

⁶⁰ Indeed, near the turn of the century at the outbreak of the Spanish American War, the size of the New York Police Department exceeded that of the entire U.S. active-duty military.

auspices.⁶¹ 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.

The National Security Act also demoted the Secretaries of the Army and Navy from Cabinet officials to military department heads and created the Air Force as a new military department – an outgrowth of the Army Air Corps.⁶² 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. 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.⁶³ While ultimately successful in Allied victory, the Army and Navy failed to seamlessly conduct joint Navy and Army operations throughout the war. As President Truman declared,

We 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.⁶⁴

For this reason, the National Security Act placed the three military services under the direction, authority, and control of one civilian Secretary of Defense.⁶⁵ A civilian served as the Secretary of each military department with a senior uniformed “service chief” reporting to each Secretary.⁶⁶ The National Security Act also formed the early legal 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.⁶⁷

⁶¹ See, e.g., OMAR N. BRADLEY AND CLAY BLAIR, A GENERAL'S LIFE 466 (1983). In 1949, two years later, the term “National Military Establishment” was changed to the Department of Defense. *Id.*

⁶² For roles and responsibilities of the Secretary of the Air Force, see 10 U.S.C. § 8013 (2012).

⁶³ 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.

⁶⁴ See, e.g., Andrew Feickert, The Unified Command Plan and Combatant Commands: Background and Issued for Congress, Cong. Res. Serv. 3 (Jan. 3, 2013).

⁶⁵ 50 U.S.C. § 3002 (2012).

⁶⁶ See, e.g., 50 U.S.C. § 5013 (2012).

⁶⁷ 50 U.S.C. § 3002 (2012). 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

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. But despite Truman's and Eisenhower's efforts to reduce inter-service rivalry and improve defense acquisitions efficiency, the core problems of inter-service rivalry remained unresolved.

Indeed, this legal architecture remained in place throughout the Cold War and the Vietnam War. The civilian leadership and Secretary of Defense exercised considerable control over the military throughout the 1960s and the Vietnam War. Secretary of Defense Robert S. McNamara famously brought in data-driven "Whiz Kids" to the Pentagon. And President Johnson and McNamara were intimately involved in operational decision-making throughout the Vietnam War.⁶⁸ The Chairman of the Joint Chiefs of Staff did not regularly advise the President on military matters: he only met with the President twice before the introduction of ground troops in Vietnam. Commentators have argued that the absence of routine military advice led to military disaster.⁶⁹ 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.⁷⁰

In sum, following the Vietnam War, the individual services were still "king." They possessed enormous power and influence both in administrative and operational matters. 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. Seldom did Navy admirals command Army soldiers and vice versa. Joint, multi-service warfare was simply not a reality between 1947 and 1986, harming operational military effectiveness. The combatant commands'

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).

⁶⁸ And he has been heavily criticized for this. *See, e.g.*, H.R. MCMASTER, DERELICTION OF DUTY (1997).

⁶⁹ *See id.*

⁷⁰ 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* MCMASTER, *supra* note 68.

operational authorities were fully actuated via the 1986 Goldwater-Nichols Act, discussed below.⁷¹

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

An 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's not irrelevant, but there's more to it. The statutory regime adopted in 1986 in an attempt to improve military operational effectiveness and 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 "the authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment."⁷² Command is "the most important role undertaken by a joint force commander"⁷³ 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."⁷⁴ Control is a lesser authority. It includes "authority that may be less than full command exercised by a commander over part of the activities of subordinate or other organizations."⁷⁵

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

⁷¹ 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. FEICKERT, *supra* note 64, at 5.

⁷² JOINT PUBLICATION 1, *supra* note 37, at GL-5. Under military doctrine, command and control is "the exercise of authority and direction by a properly designated commander over assigned and attached forces in the accomplishment of the mission." *Id.*

⁷³ *Id.* at xxii. FEAVER, *supra* note 28, at 82-83. "Unity of command" is defined as "The 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 15, at 248.

⁷⁴ DOD DICTIONARY, *supra* note 15, at 41.

⁷⁵ JOINT PUBLICATION 1, *supra* note 37, at GL-6.

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.⁷⁶ 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.⁷⁷ In the terminology of Professors Eskridge and Ferejohn, Goldwater-Nichols possesses certain “super-statute” qualities within the halls of the Pentagon with enormous implications for civilian control of the military.⁷⁸

A. *The Law of the Chain of Command: The Rise of the Operational Military and the (Relative) Fall of the Administrative Military*⁷⁹

The Goldwater-Nichols Act arose from the ashes of military operational failures. Following the operational mishaps in the Vietnam War, the failed Iranian hostage rescue attempt contributed to President Carter's electoral defeat to President Reagan in 1980 and exposed the DoD's inability to conduct joint, inter-service military operations.⁸⁰ Inter-service rivalry was not just a bureaucratic fight over funding, status, and influence – it was costing American lives.

The Goldwater-Nichols Act sought to address all of these concerns by reducing inter-service rivalry and streamlining civilian authority within the Department. Like a weary parent tired of sibling rivalry and bickering, Congress was finally stepping in and making the services get along and work together. 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 Defense . . . [and] place clear responsibility on the commanders of the unified and specified

⁷⁶ See 47 U.S.C. § 892 (2012). Under the Uniformed Code of Military Justice, “failure to obey order or regulation” is a punishable offense.

⁷⁷ JOINT PUBLICATION 1, *supra* note 37.

⁷⁸ William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L. J. 1215, 1216 (2001).

⁷⁹ “Relative” is placed in parenthesis on purpose – the administrative military yields enormous power in the acquisitions process and the development of equipment and weaponry.

⁸⁰ See generally Kathleen McInnis, Goldwater-Nichols at 30: Defense Reform and Issues for Congress, Cong. Res. Serv. (Jan. 5, 2017).

combatant commands for the accomplishment of missions assigned to those commands.⁸¹

After five years of debate and significant pushback from the Pentagon, Congress passed the bi-partisan Goldwater-Nichols Act in 1986, named after Senator Barry Goldwater (R-AZ), a World War II veteran and 1964 Presidential Republican nominee and Representative Mike Nichols (D-AL), another decorated veteran.⁸² Passed in the shadow of these earlier operational military failures, Goldwater-Nichols' supporters expressly sought to strengthen civilian control over the military, improve military operational effectiveness, streamline the costly and lengthy acquisitions process, and reduce inter-service rivalry.⁸³ Yet Sen. Goldwater's own views at the outset of the hearing to reform the DoD called into question the very 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 . . . [w]e 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.⁸⁴

⁸¹ 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.” See also Colonel Charles J. Dunlap, Jr., USAF, *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 351 (1994). The Joint Chiefs of Staff includes the Chairman and Vice-Chairman as well as the military heads of the Army, Navy, Air Force, Marines, and Chief, National Guard Bureau. 10 U.S.C. § 151 (2012).

⁸² For an outstanding overview of the legislative history and fight over Goldwater-Nichols passage, see JAMES LOCHER, *VICTORY ON THE POTOMAC* (2002). Senator Goldwater served as a Major General in the U.S. Air Force Reserves until his retirement from service.

⁸³ See *id.* In the staff report to the Senate Armed Services Committee entitled *Defense Organization: The Need for Change*, four key “indicators of organizational deficiencies” for the period preceding Goldwater-Nichols were meticulously catalogued. U.S. CONGRESS, SENATE COMMITTEE ON ARMED SERVICES, *DEFENSE ORGANIZATION: THE NEED FOR CHANGE* 15-16 (1985). The four goals include: (1) operational failures and deficiencies; (2) acquisition process deficiencies; (3) lack of strategic direction; (4) poor inter-Service coordination - the programs of the individual military services do not appear to be well integrated around a common purpose that clearly ties means to goals. *Id.*

⁸⁴ *Hearings Before the S. Comm. on Armed Services*, 98th Cong. 1–2 (1983) (statement of Sen. Goldwater, Member, Senate Comm. on Armed Services).

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 distinct chains of command within the military, effectively dividing it in two.⁸⁵ 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. It also established a parallel administrative chain of command that flows from the President to the Secretary of Defense to the Secretary of each military department (Army, Air Force, Navy). Under Goldwater-Nichols, the civilian heads of each military department possess authority and responsibility over twelve administrative functions, which serve as its core authorities.⁸⁶

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. This greatly diminished their overall authority. 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:⁸⁷

The Secretaries of the Military Departments shall assign *all forces* under their jurisdiction to . . . combatant commands to perform missions assigned to those commands.⁸⁸

Today's service-focused administrative military departments do not command any forces although they provide a level of administrative control consistent with its twelve statutory functions. In contrast, the operational military both commands and controls. And under Goldwater-Nichols the

⁸⁵ 10 U.S.C. § 162 (b) (2012).

⁸⁶ DEPT OF DEF. DIR. 5100.01, *supra* note 14, at 25. The Chairman, Vice-Chairman and four senior military officers (Chief of Naval Operations, Commandant of the Marine Corps, Chief of Staff of the Army, Chief of Staff of the Air Force) all comprise the Joint Chiefs of Staff. The civilian Secretaries of the military departments are *not* members of the Joint Chiefs of Staff. These 12 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).

⁸⁷ 10 U.S.C. § 162(a)(1) (2012).

⁸⁸ *Id.*

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.”⁸⁹ The combatant commanders are invested with broad authority to plan and execute the nation’s wars. And their roles and responsibilities have expanded over the years to encompass a large swath of non-military and foreign relations functions.⁹⁰

Third, Goldwater-Nichols empowered the Office of the Chairman of the Joint Chiefs of Staff (CJCS), boosting its stature, responsibility and authority. Under Goldwater-Nichols, the Chairman of the Joint Chiefs of Staff enjoys enormous authority and influence due to the centralization of military advice to the President and the way that orders are promulgated and communicated. The Hamiltonian vision of a powerful, centralized, and responsive executive-military lives on. This change coincided with General Colin Powell’s service as the first post-Goldwater-Nichols Chairman of the Joint Chiefs of Staff. General Powell was a particularly influential military officer who orchestrated the successful U.S. military operation in the Persian Gulf War. Both Presidents George H.W. Bush and Clinton revered General Powell’s advice. His notable political and military skills greatly bolstered the power of the Chairman’s office in the immediate aftermath of the Act’s passage.

Communications from the operational military combatant commands are now transmitted *via* the Chairman, completely bypassing the civilian service Secretaries.⁹¹ The CJCS translates and communicates direction and operational orders up and down the chain of command. These are sent to the combatant commands and their associated operational military commanders, many of whom are engaged in major combat operations. All operational orders originate from the Joint Staff, circumventing the individual service leaders. The Chairman and his highly qualified staff now implement Presidential policy and direction.⁹²

⁸⁹ 10 U.S.C. § 164 (2012).

⁹⁰ *See, e.g.*, REVERON, *supra* note 2, at 1-2.

⁹¹ 10 U.S.C. § 163 (a)(1) (2012). And the Joint Staff’s size and stature within DoD has grown significantly in recent years. LOCHER, *supra* note 82. Many commentators believe that the Joint Staff is comprised of the most talented individuals in government.

⁹² 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://lawfareblog.com/what-if-president-trump-orders-secretary-defense-mattis-do-something-deeply-unwise>

Relatedly, Goldwater-Nichols established the Chairman as the *principal* military advisor to the President, Secretary of Defense, National Security Council and Homeland Security Council.⁹³ This change serves to unify and channel the military advice provided to civilian decision makers – it comes from one person (not in a diffuse nature through the individual service chiefs). By law, the Chairman has direct access to the President of the United States in providing military advice and does not need to formally coordinate this advice via the Secretary of Defense.

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. This takes place wholly independent of congressional oversight. These Joint Task Forces are of increased importance for ongoing military operations – such as operations in Syria and Afghanistan – with the combatant commands taking on more of an oversight role.⁹⁴ For example, General Nicholson leads the U.S. task force that is part of the NATO Resolute Support Mission in Afghanistan. He reports to the Central Commander, currently General Votel.⁹⁵

In sum, due to Goldwater-Nichols the operational combatant commanders’ authorities grew significantly. So, too, did the status and power of the Chairman of the Joint Chiefs of Staff. 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.⁹⁶ The administrative military now supports the operational military, which possesses the legal and doctrinal authority to utilize all the breathtaking tools of modern warfare.

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. Second, under Goldwater-Nichols there are

⁹³ 10 U.S.C. § 151(b) (2012).

⁹⁴ And geography plays a role in the allocation of power and authority between combatant commands and the administrative military. Most of the geographic combatant commanders are outside the United States, creating additional time-distance problems, further hindering oversight.

⁹⁵ *Resolute Support*, U.S. CENTRAL COMMAND, <http://www.centcom.mil/OPERATIONS-AND-EXERCISES/RESOLUTE-SUPPORT/> (last visited Feb. 14, 2018). General Votel previously led Special Operations Command. *General Joseph L. Votel, Commander, U.S. Central Command*, U.S. DEP’T DEF., <https://www.defense.gov/About/Biographies/Biography-View/article/602777/general-joseph-l-votel/> (last visited FEB. 14, 2018).

⁹⁶ 10 U.S.C. § 164 (b)(3)(A)-(C) (2012).

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. And the Chairman of the Joint Staff has direct access to the President for all military advice – this advice has historically focused on operational military matters. 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 ⁹⁷ ↓ Secretary of War ↓ Secretary of Army; Secretary of Navy ↓ <i>Senior Military Officer in Army or Navy</i>	President ↓ Secretary of Defense ↓ <i>Combatant Commanders</i> ⁹⁸	President ↓ Secretary of Defense ↓ <i>Combatant Commanders</i> ⁹⁹ (via <i>Chairman, Joint Staff</i>)
Administrative Military	Mirrors Operational Military Chain of Command	President ↓ Secretary of Defense □ ↓ Civilian Secretaries of Military Departments ↓ <i>Uniformed “□□□□□□□□ Chiefs”</i> ¹⁰⁰	President ↓ Secretary of Defense ↓ Civilian Secretaries of Military Departments ¹⁰¹ ↓ <i>Uniformed “□□□□□□□□ Chiefs”</i> ¹⁰²

⁹⁷ U.S. CONST. art. II, § 2, cl. 2.

⁹⁸ The forces (people, weapons, equipment) are administratively assigned to individual services that continue to exercise operational control over them.

⁹⁹ Forces now assigned to combatant commands from the individual services. 10 U.S.C. § 162 (a) (2012). The heads of each service are not in the operational chain of command.

¹⁰⁰ 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 II.A.

¹⁰¹ 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).

¹⁰² *See id.*

B. 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.¹⁰³ Under joint military doctrine, three of the four command authorities pertain to the operational military (combatant command,¹⁰⁴ operational, and tactical). Just one authority – administrative control – pertains to the administrative military.¹⁰⁵

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.¹⁰⁶ In contrast, the administrative military has just one – administrative control.

Goldwater-Nichols also increased the role and stature of joint military doctrine, defined as “fundamental principles and overarching guidance for the employment of the Armed Forces of the United States.”¹⁰⁷ 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].”¹⁰⁸ 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

¹⁰³ DOD DICTIONARY, *supra* note 8, at 56.

¹⁰⁴ In the control context, the confusingly named “combatant command” is also a control authority.

¹⁰⁵ 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).

¹⁰⁶ 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.”)

¹⁰⁷ JOINT PUBLICATION 1, *supra* note 37, at i. “[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.*

¹⁰⁸ *Id.* at ix.

with the force of law.¹⁰⁹ If the military came with a user manual, this would be it. The Chairman of the Joint Chiefs of Staff issues joint doctrine, which takes precedence over all *other* doctrine to include service-specific doctrine – yet another indication of the operational military’s importance.¹¹⁰

Within joint doctrine, combatant command authority is the pinnacle of military control authority and this term can be found in both statute and doctrine. 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* . . .
111

“Operational control” and “tactical control,” the other two command authorities the operational military possesses, perform a certain “stacking doll” function that are embedded and inherent within combatant command authority. Both are of significant importance in the conduct of military operations and can be traced to the earliest interpretations of the Commander in Chief authority.¹¹² 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.¹¹³

Similarly, tactical control is inherent in both combatant command and operational control. And it is closely linked to the earliest pronouncements of Commander in Chief authority in American law.¹¹⁴ It is defined as:

¹⁰⁹ “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. . .” DOD DICTIONARY, *supra* note 8, at 1.

¹¹⁰ JOINT PUBLICATION 1, *supra* note 37, at VI-3.

¹¹¹ 10 U.S.C. § 164 (c) (2012). *See also* DOD DICTIONARY, *supra* note 15, at 39.

¹¹² *See, e.g.,* Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

¹¹³ JOINT PUBLICATION 1, *supra* note 37, at GL-10.

¹¹⁴ *See* discussion at *supra* Part I.

[authority] . . . that is limited to the detailed direction and control of movements or maneuvers within the operational area necessary to accomplish missions or tasks assigned.¹¹⁵

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, unit logistics, individual and unit training, readiness, mobilization, demobilization, discipline, and other matters not included in the operational missions of the subordinate or other organizations.¹¹⁶

To highlight this division and the importance of control, consider the case 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.

¹¹⁵ JOINT PUBLICATION 1, *supra* note 37, at GL-11.

¹¹⁶ JOINT PUBLICATION 1, *supra* note 37, 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). *See id.*

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

Table 2: The Hierarchy of Military Control

Operational Military	Administrative Military
Combatant Command Authority ¹¹⁷ □□□□□□□□ ↓ Operational Control ¹¹⁸ □□□□□□□□ ↓ Tactical Control ¹¹⁹	Administrative Control ¹²⁰ ↓ Individual Service Control ¹²¹

In sum, Goldwater-Nichols increased the operational effectiveness of the military, streamlined the chain of command, and generated a revolution in joint warfare. But it overshot in the achievement of its goals. It led to 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.¹²² And the senior uniformed military officer, the Chairman of the Joint Chiefs of Staff, has direct access to the President as the principal military advisor.¹²³

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. The operational military now possesses a vast footprint throughout the world, funded by Congress, re-affirming its own existence. Inertia emerges whereby Congress cannot defund the massive military without facing enormous political risk. After all, members of Congress do not

¹¹⁷ 10 U.S.C. § 164 (c) (2012). *See also* DoD DICTIONARY, *supra* note 15, at 39.

¹¹⁸ JOINT PUBLICATION 1, *supra* note 37, at GL-10.

¹¹⁹ *Id.* at GL-11.

¹²⁰ *See, e.g.*, 10 U.S.C. § 5013 (2012); *see also* JOINT PUBLICATION 1, *supra* note 37, at V-12.

¹²¹ *See* 10 U.S.C. § 5013 (2012) (describing the roles and responsibilities of the Secretary of the Navy).

¹²² And at the time of this writing, the currently serving civilian Secretary of Defense, James Mattis was head of the most powerful combatant commander (Central Command) just five years ago. *Biography of Secretary of Defense James N. Mattis*, U.S. DEPT OF DEF., <https://www.defense.gov/About/Biographies/Biography-View/Article/1055835/james-mattis/> (last visited Aug. 2, 2018).

¹²³ 10 U.S.C. § 151(b) (2012).

wants to be accused of being “against the troops” through the denial of funding to military members overseas.

Finally, the DoD is properly understood as an extraterritorial federal agency. Pursuant to Goldwater-Nichols, geographic combatant commanders and 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. 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. Indeed, 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” in the language of the *Steel Seizure* case.¹²⁴ 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.”¹²⁵

III. THE OPERATIONAL AND ADMINISTRATIVE MILITARY DIVIDE’S FOUR CONSEQUENCES

The two-military divide has several consequences: I focus on four below. These consequences have been further accelerated by independent factors (discussed in Part IV). The four consequences include:

- (1) Diminished civilian control of the operational military;
- (2) Militarization of foreign policy;
- (3) Unclear application of administrative law to the operational military;
- (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. Congress often remains engaged with administrative military matters, particularly defense acquisitions that can have significant impacts on employers in a member’s home district. By contrast, fundamental questions about the scope and legality of operational military operations go unanswered. To highlight one example, the last two congressional Authorizations for the Use of Military Force (AUMF) date from 2001 and 2002.

¹²⁴ *Youngstown*, 343 U.S. 610-611 (Frankfurter, J., concurring).

¹²⁵ *Id.*

In the absence of an AUMF sunset provision or updated authorization language restricting operations, the operational military continues to fill the void left behind by congressional leadership. 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.¹²⁶ 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). 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.

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.¹²⁷ Samuel Huntington, the preeminent political theorist of civil-military affairs, summarized civilian control as "the proper subordination of a competent, professional military to the ends of policy as determined by civilian authority."¹²⁸ Civilian control of the military is better understood not as a factual matter (i.e. you have it or you don't) but as a continual *process* whose strength ebbs and flows over time due to a variety of factors.¹²⁹ It fluctuates with political norms, institutions, and personalities:

[Civilian control of the military] exists along a continuum of more or less, civilian control from the extremes of countries ruled by military

¹²⁶ See, e.g., Turse, *supra* note 23.

¹²⁷ FEAVER, *supra* note 24. See also SAMUEL HUNTINGTON, *THE SOLDIER AND THE STATE* (1959).

¹²⁸ HUNTINGTON, *supra* note 127, at 80-85. 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.

¹²⁹ RICHARD H. KOHN, *AN ESSAY ON CIVILIAN CONTROL OF THE MILITARY* (1997).

establishments or that experience periodic *coups d'état* or frequent direct or indirect military intervention in politics to those that do not even possess standing military forces.¹³⁰

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.¹³¹ But America's strong tradition of civilian control is not a foregone conclusion. It requires constant 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."¹³²

Within political theory, military accountability via the legislative branch is essential to the healthy maintenance of civilian control over the military.¹³³ Accountability to the legislative branch, in turn, helps ensure accountability to the civilian populace.¹³⁴ This fosters public discussion, debate, transparency in military affairs, clarity on military expenditures, and investigation and inquiry into military matters.¹³⁵ This authority must be actively exercised, however, lest it lie fallow, undermining civilian control. Strong legislative oversight over the military actually "strengthens national defense by reinforcing military identification with the people and popular identification with the military."¹³⁶

Congress disproportionately exercises its authority and control over the administrative military at the expense of operational military oversight. Further, once Congress delegates power and statutory authority to the operational military, it is difficult to get back. Inertia sets in. Consider the case of Special Operations Command, ("SOCOM") still the *only* military command formally established by Congress by statute (pursuant to an amendment to the Goldwater-Nichols Act in 1987).¹³⁷ Consider, too, Africa Command, the nation's newest geographic combatant command, established

¹³⁰ *Id.*

¹³¹ See JOSEPH ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 145-46 (2004).

¹³² *Id.* Professor Kohn posits 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.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* "The judiciary plays a supporting, but nonetheless indispensable role, holding military individuals personally accountable in ways that prevent military interference in politics and assure that officers know that they will be punished for violations of the law."

¹³⁶ *Id.*

¹³⁷ 10 U.S.C. § 167 (2012).

in 2007. Since its inception, its size, scale, and influence have grown significantly – its headquarters staff now exceeds European Command’s.¹³⁸ And Africa Command has rapidly expanded its operation (often with the help of Special Operations Command) on the continent of Africa itself. Once created, bureaucracies fight for status, funding, and influence, consistent with normal bureaucratic behavior – the military bureaucracy and its combatant commands are no different.¹³⁹

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. 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.

2. Goldwater-Nichols’ and the Centralization of Military Advice

Goldwater-Nichols furthered the centralization of the operational military’s power to include the streamlining of military advice via one person: the Chairman of the Joint Chiefs of Staff. The Chairman of the Joint Chiefs now has a pivotal role as the single voice and provider of legal advice to the President, Secretary of Defense and National Security Council. 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 Chairman as they lack a legal mechanism to directly advise the President and Secretary of Defense. As Goldwater-Nichols discourages inter-service rivalry, the role and importance of dissent was minimized. 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.¹⁴⁰ Each service provides their senior military officer to sit on the Joint Chiefs of Staff, but any dissent is filtered through the Chairman.¹⁴¹

¹³⁸ U.S. Gen Accounting Office, GAO-16-652R: Defense Headquarters 12 (2013).

¹³⁹ *SEE* JAMES Q. WILSON, ON BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989); WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38, 71 (1971) (suggesting that military strategy has been largely driven by budget considerations).

¹⁴⁰ Service chiefs could, of course, bypass the legal advice structure established by Goldwater-Nichols but that comes with obvious career and professional risks.

¹⁴¹ 10 U.S.C. § 151 (d) (2012).

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.¹⁴² Career-minded officers are competing to “punch” a “joint ticket” within the operational military. Today, many believe that the 1,000+ uniformed members of the Joint Staff are the single most talented and effective staff in the entire U.S. government hand-chosen by the Chairman and out-working many of their civilian counterparts. It is an enormously prestigious place to work within the Pentagon’s corridors, due in large part to the incentive structure established by Goldwater-Nichols. The Chairman has the final say, too, on who joins his staff.¹⁴³ The Secretaries of the military departments merely nominate the officers – the Chairman ultimately selects who serves on his staff.¹⁴⁴

The centralization of military advice streamlines information for civilian decision-makers, but it also imposes institutional costs.¹⁴⁵ 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.¹⁴⁶ No longer is inter-service rivalry the defining feature of the operational military; unification and centralization are the defining features. 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. But so, too, have its positive and powerful counterbalancing effects within the military. Inter-service rivalry has been replaced by a single, unified military voice, and with it increased military authority and influence.¹⁴⁷

3. Congress Actively “Makes Rules and Regulations” for the Administrative Military But Not the Operational Military

As discussed in Part I, Congress has an important constitutional role “to make Rules for the Government and Regulation of the land and naval

¹⁴² 10 U.S.C. §§ 661-662 (2012).

¹⁴³ 10 U.S.C. § 155 (a)(2) (2012).

¹⁴⁴ *Id.*

¹⁴⁵ 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 (2006).

¹⁴⁶ See *id.* RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, 42-43 (2005).

¹⁴⁷ Dunlap, *supra* note 81, at 372. Samuel Huntington asserted, “[As the officer’s corps becomes more unified, this will increase the military’s authority with regard to other institutions of government . . .]” HUNTINGTON, *supra* note 127, at 87.

Forces.”¹⁴⁸ This is not limited solely to the administrative land and naval Forces – it also includes the entire defense establishment and operational military organization. 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.

Indeed, under existing statutory authority and doctrine, the President has the sole authority to create entirely new combatant commands (and subordinate war-fighting joint task forces) *without explicit* congressional approval.¹⁴⁹ Further, the President may revise the mission, responsibilities or force structure of an existing combatant command independent of Congress.¹⁵⁰ In doing so, the President must notify Congress within 60 days, and this notification requirement is suspended during “hostilities or imminent threat of hostilities.”¹⁵¹ In turn, the combatant commander can create Joint Task Forces and subordinate commands without congressional approval.¹⁵²

In addition, 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 Chairman of the Joint Chiefs of Staff 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.¹⁵³ The UCP implements the statutory guidance for combatant commands found in the National Security Act and Goldwater-Nichols Act, driving military policy and establishing the operational military’s governing infrastructure.¹⁵⁴ Experts have described the UCP as a

¹⁴⁸ U.S. CONST. art. I, § 8, cl. 14.

¹⁴⁹ 10 U.S.C. § 161 (b) (2012).

¹⁵⁰ 10 U.S.C. § 161 (b)(2) (2012).

¹⁵¹ *Id.*

¹⁵² JOINT PUBLICATION 1, *supra* note 37, at IV-1.

¹⁵³ The Department of Defense defines the Unified Command Plan (UCP) as: The document, approved by the President, that sets forth basic guidance to all unified combatant commanders; establishes their missions, responsibilities and force structure; delineates the general geographic area of responsibility (AOR) for geographic combatant commanders; and specifies functional responsibilities for functional combatant commanders. DOD DICTIONARY, *supra* note 15, at 385.

¹⁵⁴ Numerous questions unfold when looking at the UCP that one would think would invite congressional involvement. Here are but a few: Israel is part of European Command, not Central Command. Africa Command is the newest combatant command but it does not include Egypt. Special Operations Command is *not geographically* restricted. They can flow into and out of the myriad geographic commands, a source of great operational flexibility but can create tension between special operators and the geographic combatant commanders.

document “that has significant impact on how [combatant commands] are organized, trained and resourced – areas over which Congress has constitutional authority.”¹⁵⁵ But its development is nested within the operational military and executive branch with minimal input or oversight from Congress.

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. Perhaps not surprisingly, at the time of this writing, Cyber Command is already seeking greater operational authority to launch offensive cyber operations.¹⁵⁶

Finally, while the combatant commanders provide reports to Congress and testify annually, the administrative military leaders testify in front of Congress much more frequently. Indeed, not only is the frequency of administrative military-based testimony (e.g., civilian Secretaries of the Military Departments and their military service chiefs) 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.¹⁵⁷ The operational military is often advocating for increased funding in that commander’s Area of Responsibility. Indeed, combatant commanders’ congressional testimony “can sway Congress and embarrass or impede their administration.”¹⁵⁸ To highlight one example, the four-star combatant commander with oversight responsibilities over South America testified in front of congressional committees 17 times in an attempt to advocate for increase funding for drug interdiction efforts.¹⁵⁹

Under a principal-agent model of civil-military relations, each agent (military) competes with their principal (Congress or the President) for

¹⁵⁵ FEICKERT, *supra* note 64. As discussed in Part I, Congress has the constitutional authority to “raise and support Armies,” “provide and maintain a Navy,” and “to make rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art. I, § 8 cl. 12-14.

¹⁵⁶ Patrick Turner, *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>. Its cyber capability is progressing at a rapid pace, achieving full cyber capability one year ahead of schedule. *Id.*

¹⁵⁷ *Supra* note 13.

¹⁵⁸ Richard Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, 16 NAVAL WAR COLLEGE REVIEW (2002).

¹⁵⁹ Christopher J. Fettweis, *Militarizing Diplomacy*, in AMERICA’S VICEROYS 47, 53 (DEREK REVERON, 2004).

independence and influence.¹⁶⁰ And each geographic combatant commander 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. Further, 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.¹⁶¹

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 likely to be classified. In turn, 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.¹⁶²

Finally, the administrative military competes with the operational military. Increasingly, the administrative military's fight for resources is aligned with congressional interests in job creation and resources, discussed below.

In sum, 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. This trend has only intensified during the Trump Administration.¹⁶³ 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. And each year Congress passes a National Defense Authorization Act (NDAA) that largely focuses on core administrative military matters.¹⁶⁴

¹⁶⁰ See generally FEAVER, *supra* note 24.

¹⁶¹ 10 U.S.C. § 166 (2012).

¹⁶² *Id.*

¹⁶³ See, e.g., Michael Gordon, Trump Shifting Authority Over Military Operations Back to Pentagon, N.Y. TIMES, Mar. 19, 2017, at A1.

¹⁶⁴ See *supra* note 14 and accompanying text.

So how does Congress provide oversight over operational military matters? The most powerful tool remains funding cutoffs that target *specific* military operations.¹⁶⁵ But absent an express appropriations prohibition on a specific military operation, the 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.¹⁶⁶

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.¹⁶⁷ They are increasingly seen as “effectively displac[ing] American ambassadors and the State Department as the primary instruments of American foreign policy.”¹⁶⁸ 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). And the status of the geographic combatant commanders has only increased since the passage of the Goldwater-Nichols Act in 1986. Indeed, the capstone billet for senior officers is now serving as the head of a geographic combatant command or Chairman of the Joint Chiefs of Staff, not as the heads of the Army, Navy, Air Force, and Marines.

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 bigger in the operational military.¹⁶⁹ While the military has always conducted a host of

¹⁶⁵ 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).

¹⁶⁶ John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2283-92 (2008). Joint task forces were set up in military operations in Iraq, Afghanistan, and Libya. They are “constituted and so designated by the Secretary of Defense, a combatant commander, a sub-unified commander, or an existing joint task force commander.” DOD DICTIONARY, *supra* note 8, at 132.

¹⁶⁷ REVERON, *supra* note 2, at 1-15 (2004).

¹⁶⁸ Kohn, *supra* note 158.

¹⁶⁹ *Id.* at 1-2.

activities that are closer to traditional foreign policy functions, their role in diplomacy has grown substantially in the recent past.¹⁷⁰

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.¹⁷¹ Geographic combatant commanders are already present throughout the world and possess comparably large staffs and deep relationships with the nations in their region. State Department ambassadorships remain unfilled. Diplomats are resigning en masse, never to be replaced.¹⁷² The pre-existing massive overseas operational military apparatus becomes the *de facto* voice of both the American military and diplomacy. The combatant commanders and their staffs provide continuity – albeit a military-focused one – through changeovers in administrations.

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. And ambassadorships often remain vacant for extended periods. Combatant commands are *never* vacant. Further, military combatant commanders have a broader scope and can focus on enormous geographic regions of 50+ nations within their respective Area of Responsibility.¹⁷³ Their permanent headquarters staff often exceeds 1,000 military officers and subordinate commands under their control far exceed that number.¹⁷⁴

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. Their relationships run deep. Foreign Military Sales and the allure of additional military funding incentivize foreign government to strengthen those relationships.¹⁷⁵ There is a blurring of the lines between traditional military-to-military engagement and more traditional diplomatic functions. Indeed, combatant commanders

¹⁷⁰ See generally PRIEST, *supra* note 3.

¹⁷¹ Within military doctrine, the United States employs all the instruments of national power under the “DIME” paradigm (diplomatic, informational, military, & economic). JOINT PUBLICATION 1, *supra* note 37, at I-4.

¹⁷² For an in-depth critique of American foreign policy and its increasing reliance on the military, see RONAN FARROW, WAR IN PEACE (2018).

¹⁷³ *European Command Fact Sheets*, U.S. EUROPEAN COMMAND <http://www.eucom.mil/about/history/fact-sheets> (last visited Aug. 2, 2018).

¹⁷⁴ U.S. Gen. Acct. Off., GAO-16-652R, Defense Headquarters 12 (2013).

¹⁷⁵ REVERON, *supra* note 2, at 4–7, 101.

have an important voice on such matters and they are extremely well funded. And they have at their disposal an enormous personal staff and their own “mini-airline” to include a fleet of military aircraft with secure communications. Combatant commanders can be whisked away at a moment’s notice anywhere they please. When foreign governmental leaders look at American actors overseas and assess who is truly well funded and resourced, the geographic combatant commanders come out on top.

Consider the case of European Command, which has been in place since World War II with an enormous engagement mission. Just 18 combatant commanders have led European Command since the end of World War II.¹⁷⁶ 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. Today, there are 50,000+ active-duty personnel in Europe spread over 250 pieces of individual real estate.¹⁷⁷

Finally, geographic combatant commanders increasingly play a leadership role within the executive branch and foreign relations more generally following their retirement from the military. Currently General Mattis (former Central Commander) is the Secretary of Defense and General John Kelly (former Southern Commander) is the White House Chief of Staff. Admiral Harry Harris (head of Pacific Command) is under consideration as America’s newest ambassador to South Korea. A former Pacific Commander (Admiral Preuher) served as the U.S. ambassador to China upon his retirement.¹⁷⁸ General Zinni (former Central Commander) served as U.S. special envoy to the Middle East and General Jones (former European Commander) who served as President Obama’s National Security Advisor. And of course the first Chairman of the Joint Chiefs of Staff after Goldwater-Nichols, Colin Powell, served as Secretary of State.¹⁷⁹

C. The Two-Military’s Divide’s Third Legacy: Administrative Law’s Uneven Application

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

¹⁷⁶ *European Command Fact Sheets*, U.S. EUROPEAN COMMAND <http://www.eucom.mil/about/history/fact-sheets> (last visited Aug. 2, 2018).

¹⁷⁷ *Id.*

¹⁷⁸ REVERON, *supra* note 2, at 2.

¹⁷⁹ *Id.*

federal agencies, and DoD is no exception.¹⁸⁰ Indeed, citizen suits – particularly in environmental law – ensure a continual level of accountability between the military and the citizenry. The APA provides that connective tissue between the citizenry and the military (via the judiciary). In light of 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.”¹⁸¹ Indeed, very little legal scholarship has addressed the APA’s applicability to the DoD (despite its status as the largest federal agency).¹⁸²

The APA (passed in 1946, just one year before the National Security Act) provides for judicial review over certain agency actions and sets out procedures that agencies must follow when promulgating rules and adjudicating conflicts.¹⁸³ 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. But the APA was designed for a far different time and does not adequately take into account: (1) DoD’s existing legal architecture and two-military divide; and (2) the complexity of 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. The result: there is now a continual disconnect between the APA’s text and its ongoing applicability to the modern military organization.

¹⁸⁰ Dunlap, *supra* note 81, at 368-70.

¹⁸¹ John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2281 (2008) (stating that “civilian control over the military is perhaps the most important principle of the American constitutional system of government”). Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 6 J. OF NAT’L ASS’N OF ADMIN. L. JUD. 109 (1986); Arthur E. Bonfield, *Military and Foreign Affairs Rule-making Under the APA*, 71 MICH. L. REV. 221 (1972).

¹⁸² The rare exceptions include Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 ORE. L. REV. 583 (2010) (arguing that there is no basis for courts to give greater deference to the military) and Jonathan Masur, *A Hard Look or a Blind-Eye*, 56 HASTINGS L.J. 441, 512 (2006).

¹⁸³ See, e.g., JAMES RASBAND, JAMES SALZMAN, & MARK SQUILLMAN, *NATURAL RESOURCES LAW* 223 (2009) (praising the many virtues of the APA in democratic governance).

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 . . .”¹⁸⁴ Congress, courts, and governments of the United States are specifically exempt from the agency definition.¹⁸⁵ While the President is not specifically exempt, courts have routinely held that the President is *not* an agency within the APA’s meaning, of particular importance for military matters due to the President’s role as Commander in Chief.¹⁸⁶

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 FOIA section, which specifically applies to any “executive department or military department.”¹⁸⁷ And the Secretary of Defense and civilian Secretaries of the Military Departments are routinely sued.¹⁸⁸ Because the APA “agency” definition clearly applies to the civilian heads of the administrative military, it follows that APA litigation 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.¹⁸⁹

¹⁸⁴ 5 U.S.C. § 551(1) (2012) (emphasis added).

¹⁸⁵ 5 U.S.C. § 551(1)(A)-(D) (2012).

¹⁸⁶ *Dalton v. Spencer*, 511 U.S. 462, 470 (1994).

¹⁸⁷ The full section states that “agency” includes “any executive department, military department, Government corporation, Government controlled corporation, or *other establishment* in the executive branch . . .” The heads of each military department (Army, Navy, Air Force) are the civilian Secretaries. 5 U.S.C. § 551 (f)(1) (2012). And Section 552a of the APA, entitled “Records maintained on individuals” shares this same definition of “agency.” 5 U.S.C. § 552 a(a)(1) (2012). *See also* *Winter v. NRDC*, 555 U.S. 7 (2008). *See also* Mark Nevitt, *Defending the Environment: A Mission for the World’s Militaries*, 36 HAW. L. REV. 27 (2014) (describing how the APA serves an important role in helping to ensure civilian control over the military).

¹⁸⁸ 5 U.S.C. § 706 (2012). *See, e.g., Winter v. NRDC*, 555 U.S. (suing the Secretary of the Navy for violating environmental laws). This mirrors the Freedom of Information Act (FOIA) definition of agency, which specifically includes “any executive department, military department . . . or other establishment in the executive branch of the Government . . .” 5 U.S.C. § 552(f) (2012).

¹⁸⁹ For example, the Secretary of the Military Departments and the Secretary of Defense were sued pursuant to the transgender personnel policies. For a timeline of these actions, *see* Mark P. Nevitt, *A Tumultuous Year for Transgender Service Members*, PENN REG.

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. 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.¹⁹⁰

The APA lacks a clear extraterritorial application.¹⁹¹ This diminishes its influence on the operational military, which takes place outside the United States and is not clearly subject to the APA’s reach. Finally, for an APA citizen suit to emerge, 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.¹⁹² Secrecy is itself a form of regulation, bypassing traditional forms of judicial review or civilian control.¹⁹³

United States v. Daugherty, a non-precedential opinion, remains the one federal case addressing the peculiarities of the APA and the two-military divide.¹⁹⁴ 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). He asserted that the Goldwater-Nichols Act divested the Navy of any type of authority over him.¹⁹⁵ 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.¹⁹⁶ This administrative chain of command, as discussed in Part II, 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 – in *Daugherty* only administrative functions that could be traced back to the Secretaries of the Military Departments were the subject of the judgment. There was no discussion of the operational chain

REVIEW, Jan. 31, 2018, <https://www.theregreview.org/2018/01/31/nevitt-tumultuous-year-transgender-service-members/> (last visited Feb. 2, 2018).

¹⁹⁰ Nor have they held otherwise. The law remains unsettled on this point.

¹⁹¹ See *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

¹⁹² See David Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

¹⁹³ DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 87 (1998).

¹⁹⁴ *Daugherty v. United States*, 73 Fed. Appx. 326 (10th Cir. 2003). This is a non-precedential 10th Circuit opinion, further underscoring the lack of authority on the subject.

¹⁹⁵ *Id.* at *328.

¹⁹⁶ *Id.*

of command and whether the European Commander and the operational military leadership is subject to suit.

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. But 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. Hence, to borrow from the nomenclature adopted by Professors Adrian Vermeule and David Dyzenhaus, an *institutional hole* emerges within the operational military. Any function associated with the three different types of operational military control (combatant command,¹⁹⁷ operational control, or tactical control¹⁹⁸) largely remains outside the APA’s reach. How does administrative law account for these activities? How should it? To date courts have yet to “pierce the operational veil” in applying the APA to such matters.¹⁹⁹ 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.²⁰⁰ Despite repeated calls to address or reform the APA’s military exemptions, they persist and are virtually unchanged

¹⁹⁷ 10 U.S.C. § 164(c)(A)-(G) (2012). Under joint doctrine, this includes “[n]ontransferable command authority which cannot be delegated 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 15, at 39.

¹⁹⁸ “The authority over forces that is limited to the detailed direction and control of movements or maneuvers within the operational area necessary to accomplish missions or tasks assigned.” DOD DICTIONARY, *supra* note 15, at 226.

¹⁹⁹ 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)(F) (2012).

²⁰⁰ 5 U.S.C. § 551 (A)-(H) (2012). The APA also similarly exempts courts-martial and military commissions. *Id.* See also Kovacs, *supra* note 182 (arguing that there is no basis for courts to give greater deference to the military); Masur, *supra* note 182, at 512.

from their original form.²⁰¹ 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.” They amount to APA “black holes” where military activities occur outside the constraints of judicial review.²⁰²

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 1943).²⁰³ As this provision has not been modified since 1946, courts have struggled to apply this exemption to modern conflicts.²⁰⁴ 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.”²⁰⁵ The term “military function” is of central importance to understand how the APA applies to the DoD as an agency, but it, too, lacks a clear statutory definition. Despite this exemption’s broad implications, it has not been the subject of much legal scholarship. Nor have judicial decisions provided helpful guidance on its precise meaning.²⁰⁶ In addition, the APA broadly excludes from review agency action “committed to agency discretion by law.”²⁰⁷ This catchall exclusion has been used to preclude review in national security contexts.²⁰⁸

Perhaps not surprisingly, the DoD has often sought a broad interpretation of the built-in APA exemptions. This is somewhat understandable – it seems absurd to subject critical war making and tactical

²⁰¹ Arthur E. Bonfield, *Military and Foreign Affairs Rulemaking Under the APA*, 71 MICH. L. REV. 221 (1972).

²⁰² Vermeule, *supra* note 29, at 1107-1117.

²⁰³ The last time the United States Congress exercised its constitutional authority to do so was in the middle of the Second World War when the U.S. declared war against Bulgaria, Hungary, and Romania.

²⁰⁴ See, e.g., *Doe v. Sullivan*, 938 F.2d 1370 (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 Department*, 6 J. NAT’L ASS’N OF ADMIN. L. JUDGES 109, 114 (1986).

²⁰⁵ 5 U.S.C. § 553 (a)(1) (2012).

²⁰⁶ And this exemption has only been comprehensively addressed by a single law review article dating back forty years. See Arthur Bonfield, *Military and Foreign Affairs Function Rulemaking Under the APA*, 71 MICH. L. REV. 222 (1972) (arguing that based on the plain meaning, the exemption applies to the extent that there are “clearly and directly involved matters specifically fitted for, appropriate to, or expected of the armed forces in light of their peculiar nature and qualifications”).

²⁰⁷ 5 U.S.C. § 701(a)(1)-(2) (2012).

²⁰⁸ See, e.g., *Riverkeeper Inc. v. Collins*, 359 F. 3d. 156 (2d Cir. 2004).

decision-making to judicial review.²⁰⁹ But courts will always afford a certain amount of deference to the DoD in reviewing its actions, regardless of its activity and regardless of the definition of “military or foreign relations function.”²¹⁰

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, routine agency actions) embedded within an operational command? Again, the APA’s text offers limited guidance. Indeed, it is unclear what level of deference a court can or should afford to the operational military vis a vis the administrative military and how to weigh the relevant factors in determining the deference afforded.²¹¹ And rules regulating military functions as applied to military contractors are exempt from following the APA rule making process.²¹²

Doe v. Sullivan may offer some guidance. In *Doe*, a service member used the APA to challenge the HHS Secretary’s decision to allow DoD the use of an unapproved drug in the event of a chemical nerve gas attack.²¹³ In dismissing the service member’s complaint, the court refused to apply the “military authority” exception. 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 (as

²⁰⁹ See *Wu Tien Li-Shou v. United States*, 777 F.3d 175 (4th Cir. 2015) (refusing to call into question the command structures of an existing military operation).

²¹⁰ See, e.g., *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, core administrative military functions); *Chappelle v. Wallace*, 462 U.S. 296, 300 (1983) (court will “hesitate long” before interfering in relationship between military personnel and their superior officers).

²¹¹ 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 there with all sorts 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.” Oral Argument of Justice Breyer, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (No. 07-1239), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1239.pdf. [hereinafter Breyer Oral Argument].

²¹² *Independent Guard Ass’n, Local No. 1 v. O’Leary*, 57 F.3d 766 (9th Cir. 1995) (construing the military function narrowly as applied to the Department of Energy while noting that “to our knowledge, no court has ever considered whether the military function exception applies to civilian contractors”).

²¹³ *Doe v. Sullivan*, 938 F.2d 1370 (1991).

opposed to statutory delegation based on other constitutional provisions).²¹⁴ This would appear to immunize administrative actions that rely upon the President’s Commander in Chief power, 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 . . . when he adopted the rule [the Secretary] did not purport to be exercising the President’s powers as Commander in Chief. . . .²¹⁵

Outside the APA context, courts have struggled mightily to apply a consistent and uniform standard when determining the level of deference that should be afforded 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 military force are essentially military judgments, subject always to the civilian control of the legislative and executive branches.²¹⁶

The military deference doctrine is premised on both the executive and legislative branch exercising some modicum of control.²¹⁷ But as discussed in Part III.A., there has been a continual derogation of civilian control over operational military matters – 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.²¹⁸ While it still remains unclear what impact this will have on the Court’s application of the military deference doctrine, the Court’s firsthand military knowledge has

²¹⁴ Masur, *supra* note 181, at 513-14.

²¹⁵ *Id.* at 1380.

²¹⁶ *Gilligan v. Morgan*, 413 U.S. 1, 4 (1973). *See also* *Goldman v. Weinberger*, 475 U.S. 508, 509 (1986). The judiciary “must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” *Id.*

²¹⁷ *Id.*

²¹⁸ Justice John Paul Stevens served as a naval officer during combat operations in World War II. He left the Court in 2010. Justice Alito served as an officer in the Army Signal Corps Reserves, seeing sporadic service in the 1970s. Throughout its history, the Supreme Court has nearly always had veteran representation. There was a brief time between 1932 and 1936 when Justice Holmes (a combat veteran wounded at the Battle of Antietam left the Court) and Justice Hugo Black (an Army captain) was appointed to the Court.

disappeared for the time being. 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.’”²¹⁹

3. Secrecy as Self-Regulation²²⁰

A significant number of military actions occur without the knowledge of the American public and are afforded what amounts to blanket military deference. 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 militaries’ internal regulations and decision-making remain opaque and outside the public domain.²²¹

And within the DoD, over-classification of documents and material that do not merit classification remains a continual problem.²²² 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. 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?²²³

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. The operational military has considerably more discretion in its actions as compared to the administrative military. This adds yet another level of deference in determining whether their action was reviewable. A federal court that recently considered the National

²¹⁹ Evan Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. L. REV. 309 (2010).

²²⁰ This term is borrowed from the writing of Daniel Patrick Moynihan, discussed *supra* note 192.

²²¹ 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. Contrast this to the operational combatant commands whose regulations and policies are not easily accessible to the public and are oftentimes classified.

²²² See, e.g., Ilan Goldberg & Loren Schulman, *Too Many Secrets*, SLATE (Feb 7, 2018), <https://slate.com/news-and-politics/2018/02/the-top-secret-nunes-memo-illustrates-abuse-of-our-intelligence-classification-system.html>.

²²³ See also Pozen, *supra* note 192.

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 prescriptive legal obligation to conduct the surveillance.²²⁴

D. The Two-Military Divide's Fourth Legacy: An Increasingly Divided Military

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].²²⁵

As discussed in Part II, under Goldwater-Nichols there are two distinct chains of command with the administrative military legally required to provide forces to the operational military.²²⁶ The parallel chains of command only meet at the very top of the DoD at the Secretary of Defense. This places an enormous strain on one person who suffers from continual "bandwidth" problems as the critical intermediary between the two militaries and must continuously bridge the operational and administrative military divide while reconcile their competing interests.

As new, more expensive weapons are produced, older weaponry continues to be maintained. 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. So a perverse incentive emerges to fund new equipment and weaponry, regardless of whether the operational military even needs it. This has led to bizarre instances where the DoD receives weapons and equipment that it hasn't asked for and doesn't want.²²⁷ Consider the following two examples.

²²⁴ ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007). Since this ruling, Cyber-Command has been split off from the NSA and is now a full-fledged combatant command.

²²⁵ Goldwater-Nichols Hearing, *supra* note 33.

²²⁶ 10 U.S.C. § 162 (c) (2012).

²²⁷ GATES, *supra* note 20.

First, the Joint Strike Fighter (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. 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. 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. 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. The Secretary of Defense (and his or her staff) must referee disputes between the two. 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. This includes the watchful eye of Congress members, many of whom are interested in economic benefits to their individual congressional districts.

This bureaucratic tension between the operational and administrative military came to the fore in congressional hand wringing over the A-10 “Warhog” attack jet, a Vietnam-era plane that was widely lauded by operational military commanders. Yet Congress and administrative military leaders viewed the A-10 with suspicion. Why? The JSF was on track to fully replace the A-10 once it was out of service. Keeping the A-10s in service could lower the number of JSFs that the DoD purchased.

A bureaucratic struggle ensued. 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. A standoff emerged between the Air Force, Congress, and operational military commanders. While it was ultimately resolved and the A-10 was given a temporary reprieve, its long-term future still remains very much in doubt.²²⁸

Second, former Secretary of Defense Robert Gates was continually frustrated by the challenges he experienced during his tenure as Secretary of Defense and head of the two militaries, as evidenced by his efforts to force the administrative military to provide responsive and necessary equipment and weaponry to the operational military engaged in war-fighting.²²⁹ These challenges can be traced to the military’s legal architecture. Due to a quirk of

²²⁸ Thomas Gibbons Neff, *The A-10 Get a Lease on Life—at Least Through 2017*, WASH. POST, Jan. 14, 2016, at A1.

²²⁹ GATES, *supra* note 20.

Goldwater-Nichols, the Secretary of Defense must approve the transfer of all forces between combatant commands, regardless of their size or mission.²³⁰ Gates was increasingly frustrated with DoD's agency design – this took too long and did not properly take into account the real-time force requirements of the operational military. 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.²³¹ Much to his dismay, Gates had to work creatively outside the existing force assignment system designed by Goldwater-Nichols to ensure that the soldiers in the field received the equipment that they needed.

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.²³² The combatant commander receives forces from the individual services, but the services are not *directly* accountable for the type of equipment and personnel assigned. This creates an administrative-operational disconnect in which the operational real-time requirements needs are often out of sync with the administrative military, a fourth legacy of the two-military divide.

IV. THREE KEY FACTORS 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; and
- (3) The tools of modern warfare that empower the operational military.

²³⁰ 10 U.S.C. § 162 (a)(3) (2012) (mandating that any force assigned to a combatant command may only be transferred from that command pursuant to the authority of the Secretary of Defense).

²³¹ GATES, *supra* note 20.

²³² MCINNIS, *supra* note 80 (quoting Secretary of Defense Robert Gates who stated that “we have a military designed to plan for war, not fight a war.”).

A. *The Two-Military Divide's First Accelerant: The Rise of the Military-Industrial-Congressional Complex*

In the 1961 Farewell Address, President Dwight Eisenhower famously warned of a “military-industrial complex.”²³³ 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. Noting that “our 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 . . . [i]n the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the *military-industrial* complex.²³⁴

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.”²³⁵ Today, the “military establishment [is] large enough to shape our dealings in the world and seriously influence our economy.”²³⁶

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.²³⁷ Despite Eisenhower’s warnings, the military-industrial complex endures and evolves. Today, Congress is intimately involved with the defense acquisition process, a core administrative military function. 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

²³³ See PRESIDENT DWIGHT D. EISENHOWER, FAREWELL ADDRESS (1961), http://avalon.law.yale.edu/20th_century/eisenhower001.asp (last visited March 9, 2018).

²³⁴ *Id.* (emphasis added).

²³⁵ *Id.*

²³⁶ James Fallows, *The Tragedy of the American Military*, THE ATLANTIC, Jan./Feb. 2015, at 72. “Many on Capitol Hill see the Pentagon with admirable simplicity . . . [i]t is a way of directing tax money to selected districts. It’s a part of what they were elected to do.” *Id.*

²³⁷ 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 MILITARIZATION 193 (2013).

more closely linked to jobs in congressional districts.²³⁸ Following World War II, the defense industry became a major part of the U.S. economy. As former Secretary of Defense Robert Gates has noted, “Congress [makes] defense decisions based on parochial, constituent interests rather than national concerns.”²³⁹

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 more closely aligned with the administrative military’s authorities.²⁴⁰ Indeed, the actions of the civilian Service Secretaries and civilian Defense acquisitions professionals are increasingly aligned; after all, the administrative military can win and lose jobs in congressional districts.²⁴¹

Despite the constitutional provision limiting Army appropriations to two years, it is now politically impossible for Congress to cut funding to currently serving standing military members (and their families). Reductions do occur during the periodic Base Realignment and Closure (BRAC) process, but only after bitter fights within the halls of Congress. And what may be good for the health of the military may not be good for members of Congress and their constituents. For example, former Secretary of Defense Robert Gates sought to save DoD funds by closing Joint Forces Command in Norfolk, VA, an obsolete and duplicative military command. Yet his goal of shuttering the command was fought by members of the Virginia congressional delegation at every turn, who saw jobs leaving and their influence waning.²⁴²

When looking at Congressional interests vis-à-vis the two militaries, the Joint Strike Fighter (JSF) again provides an instructive example of how the two-military divide informs and shapes the modern acquisitions process. As discussed, 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.²⁴³ It has not been lost on defense contractors that “jointness” is the defining feature of the Goldwater-Nichols military, and the JSF is being manufactured against

²³⁸ Fallows, *supra* note 235.

²³⁹ Dunlap, *supra* note 81, at 379.

²⁴⁰ *Id.* at 379. 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. This corresponded with a rise in massive amounts of fundraising and money in political elections.

²⁴¹ Fallows, *supra* note 235.

²⁴² GATES, *supra* note 20.

²⁴³ See *supra* Part II.

this backdrop. It is produced across the three of the military branches that fly fixed-wing aircraft (Navy, Air Force, Marine Corps).

An enormously ambitious project, the total lifecycle cost for the purchase of the 2,000+ JSF planes to include purchase, operations and maintenance now exceeds \$1.1 trillion.²⁴⁴ Cognizant that the manufacture of this massively expensive weapon would receive great scrutiny and interest from Congress, the manufacturer (Lockheed Martin) of the JSF purposely placed the location of its various parts throughout nearly all of the 50 states and as many congressional district as possible.

Shrewdly marketed and manufactured, the JSF is truly 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. Members of Congress, in turn, can point to “victories” in their respective district – manufacturing jobs that bolster their individual standing and re-election bids. In a rare moment of bipartisanship, Congress even established a “Joint Strike Fighter Caucus” composed of Democrats and Republicans in an effort to protect the JSF from budget cuts.²⁴⁵

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 the operational military’s role in U.S. foreign policy and defense spending more generally. But he has been a consistent and reliable booster of the JSF, irrespective of escalating costs. Indeed, his support was seen as critical to the overall success of the program. Vermont has benefitted from this military largesse: Lockheed-Martin established a manufacturing plant in Vermont outside Burlington, bringing thousands of jobs to Vermont. And the first state scheduled to receive the new JSFs? The

²⁴⁴ It is estimated the final cost of the total combined cost of the JSF will exceed \$1 trillion dollars (this is not a typo). Christian Davenport, *Under Trump, the F-35 Costs More Than \$1 Trillion Over 60 Years Continues to Draw Scrutiny*, WASH. POST, Dec. 8, 2017, at A1.

²⁴⁵ T.W. Farnam, *Caucus forms to save the F-35 from budget cuts*, WASH. POST, Nov. 23, 2011, at A1.

Vermont Air National Guard.²⁴⁶ Senator Sanders took notice, and has consistently voted for Vermont jobs and jets.²⁴⁷

*B. The Two-Military Divide's Second Accelerant: A Decline in Congressional Military Experience*²⁴⁸

Second, two recent trends demand a closer look and further accelerate the two-military divide's effects. The military is increasingly an independent institution in both perception and practice that is further removed from civil society.²⁴⁹ The end of the draft in 1973 ended compulsory military service. Military service is no longer a shared societal experience in the age of an all-volunteer force. In addition, congressional military experience and oversight of military matters have fallen to historic lows. Goldwater-Nichols was passed when prior military service in both congressional chambers was near 70%. Since that time, it has plummeted to below 20% and this decline has begun to influence congressional oversight over the military.²⁵⁰

The rise of the operational military has coincided with a dramatic decrease in the number of veterans serving in Congress and a decrease in congressional standing and trust as a public institution.²⁵¹ In contrast, the military remains one of the few public institutions that enjoys a favorable standing in the eyes of the American public. Its standing is in sharp contrast to Congress': a recent Gallup poll showed that 72 percent of people had "a great deal" or "quite a lot" of confidence in the military but only 12 percent of the population felt the same for Congress.²⁵² With that decrease has come a significant decline in firsthand knowledge and relevant expertise over DoD matters. Congress, in turn, has been overly deferential in operational military matters.

Recent political science research has begun to shine light on the consequences of the decrease in the number of veterans in Congress. Two

²⁴⁶ The "Green Mountain Boys" of the 158th Fighter Wing are the modern successor to the Revolutionary-era Vermont militia. See *About the Green Mountain Boys, 158th Fighter Wing*, VERMONT AIR NATIONAL GUARD, http://www.158fw.ang.af.mil/vtang_about/ (last visited Aug. 2, 2018).

²⁴⁷ David Bukszpan, *Why Bernie Sanders is Backing a \$1.5 Trillion Military Boondoggle*, CNBC, Jul. 12, 2016, <https://www.cnbc.com/2016/07/12/why-bernie-sanders-is-backing-a-15-trillion-military-boondoggle.html> (last visited Feb. 2, 2018).

²⁴⁸ 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).

²⁴⁹ See generally BROOKS, *supra* note 22.

²⁵⁰ Lupton, *supra* note 247.

²⁵¹ Mary Jordan, *'This Isn't the Country We Fought For,'* WASH. POST, Feb. 8, 2017, at A17.

²⁵² *Id.*

statistically significant voting trends are beginning to emerge. 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.²⁵³ This makes intuitive sense. 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 military.²⁵⁴ They are more likely to ask the right questions and not give military leadership a pass. 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.²⁵⁵

Goldwater-Nichols was passed during a time of relatively high levels of firsthand military experience in Congress. Those days are long gone and, absent a draft, these numbers are not returning. These early political science findings may have implications for termination of hostilities, further accelerating the decline in civilian control of the operational military.²⁵⁶

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. The existence of troops in Africa caught many Americans – and foreign policy experts in Congress – off-guard.²⁵⁷ Many senior members of Congress with military oversight responsibilities professed ignorance of the very existence of military troops in Niger and neighboring African countries. But the existence of these troops should have come as no surprise. After all, Africa Command is the newest geographic combatant command and has been fully operational since 2007. Military operations in Africa have steadily increased since that

²⁵³ *Id.* at 336-338 (“stating that military service is an incredibly unique experience that instills a distinct set of values within its members”).

²⁵⁴ *Id.* at 330. See also David Auerswald & Colton Campbell, *Congress in Civil-Military Relations* (2015).

²⁵⁵ LINDA FOWLER, *WATCHDOGS ON THE HILL: THE DECLINE OF CONGRESSIONAL OVERSIGHT OF U.S. FOREIGN RELATIONS* (2015). See also 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=.c61026fda741.

²⁵⁶ Lupton, *supra* note 247.

²⁵⁷ Dionne Searcey & Eric Schmitt, *In Niger, Where U.S. Troops Died, a Lawless and Shifting Landscape*, N.Y. TIMES, Oct. 30, 2017, 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 . . .” *Id.*

time. The Pentagon, too, has consistently maintained that Congress was appropriately informed in accordance with the War Powers Resolution.

C. The Tools of Modern Warfare Further Empower the Operational Military

Finally, the awesome 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. Military and executive branch officials increasingly favor utilizing all the tools of modern warfare including cyber warfare, special operations forces, and drones.

The rise of special operations forces illustrates this trend. Special Operations Command (SOCOM) is the very embodiment of the operational military, with special training and amplified operational legal authorities. Increasingly special operations forces operate pursuant to covert action authorities, secret operations where Congress and the American people may never be notified of their occurrence.²⁵⁸ 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. The public, too, has become enamored with their exploits, fueled by Hollywood films and media stories about their heroism.²⁵⁹ Clearly, special forces are a brilliant tactical tool. But their widespread (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.

The Nunn-Cohen Amendment to the Goldwater-Nichols Act established Special Operations Command (SOCOM).²⁶⁰ It is a unique functional combatant command in that it also possesses awesome operational military authorizes and additional administrative military authorities. It is not limited by geographic boundaries.²⁶¹ And it is no exaggeration to state

²⁵⁸ 50 U.S.C. § 3093 (e) (2012); *see also* SEAN NAYLOR, *RELENTLESS STRIKE: THE SECRET HISTORY OF JOINT SPECIAL OPERATIONS COMMAND* (2015) (discussing the rise of Joint Special Operations Command).

²⁵⁹ *See, e.g.*, *ZERO DARK THIRTY* (Columbia 2012).

²⁶⁰ 10 U.S.C. § 167 (2012).

²⁶¹ 10 U.S.C. § 167 (2012). *JOINT PUBLICATION 1*, *supra* note 37.

that special operations forces operate nearly everywhere – at last count they were in 137 nations. Despite being a small fraction of the military (just five percent), they now account for the *majority* of casualties.²⁶² Because of their stealth, lethality, and expertise, special operations forces are increasingly the tools of choice for executive branch officials. SOCOM's activities are often cloaked in secrecy and occur outside the United States. 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.²⁶³ 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.²⁶⁴

Congress has facilitated the rise of SOCOM by routinely increasing its role and expanding its budget.²⁶⁵ 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 special operations command, creating what has been described as a “fifth branch of the military” to complement the Army, Navy, Air Force, and Coast Guard.²⁶⁶ 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.²⁶⁷ Because of these dual command authorities, SOCOM may be fairly described as a “super combatant-command.”²⁶⁸ Within SOCOM, the executive branch increasingly uses Joint Special Operations Command (JSOC) for the most dangerous missions: its

²⁶² W.J. Hennigan, *The New American Way of War*, TIME (Nov. 30, 2017), <http://time.com/5042700/inside-new-american-way-of-war/>.

²⁶³ 50 U.S.C. § 3093 (e) (2012). “Covert 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). Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539 (2012).

²⁶⁴ *But see* 10 U.S.C. § 130 (f) (2012); Rudesill, *supra* note 56, at 64 (asserting that the DOD “increasingly reports to Congress about such operations in a manner that begins to approach the covert action process”).

²⁶⁵ Andrew Feickert, U.S. SPECIAL OPERATIONS FORCES (SOF): BACKGROUND AND ISSUES FOR CONGRESS, CONG. RESEARCH. SERV. (Jan 6, 2017).

²⁶⁶ 10 U.S.C. § 167 (b) (2012). Feickert, *supra* note 265.

²⁶⁷ *See* Chesney, *supra* note 259.

²⁶⁸ *See generally* JOINT PUBLICATION 1, *supra* note 37, at III-6, III-7 (“SOCOM is unique among the combatant commands in that it performs service-like functions [to include] organize, train, equip, and provide combat-ready SOF to the other combatant commands . . .”) *Id.*

truncated chain of command, expertise, lethality, and overall effectiveness is legendary.²⁶⁹

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. These delegations have been primarily focused on providing increasing authority to the operational military commanders and often involve the loosening of the rules of engagement.

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. But Congress is largely absent from existing core processes to include 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. This absence is further exacerbated by less firsthand congressional military experience that influences voting in operational military matters. Meanwhile, the operational military's power and influence continues to grow without comparable oversight.

V. 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 that military advice was provided to the President and civilian military leadership.

But 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.²⁷⁰ Goldwater-Nichols empowered the operational combatant

²⁶⁹ Consider the military mission leading to the killing of Osama bin Laden in Pakistan, a raid that was conducted pursuant to operational military authorities.

²⁷⁰ Yoo, *supra* note 185, at 2283-2292. It is also becoming increasingly outdated ("The typical 20th century organization has not operated well in a rapidly changing environment.

commanders in invisible or unintended ways; the result is to weaken civilian control of the operational military and create an enduring two-military bureaucracy.²⁷¹ 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.²⁷²

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 the Senate Armed Services Committee (SASC) to revise Goldwater-Nichols 30 years after its passage. Indeed, the time is right for a third major national security act to complement and partially replace the National Security Act and Goldwater-Nichols. 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.²⁷³ Today, other agencies (USAID, State) play an increasingly important role in national security governance and decision-making but their budgets (and influence) are waning. While all agencies now competes with one another for personnel and funding, the DoD is by far the largest agency at 3.1 million people and a budget in excess of \$700 billion a year.²⁷⁴

This Part presents recommendations to increase congressional oversight and updating 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. Yet no such act emerged to address DoD's governing legal architecture. The

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 33 at 2 (statement of Mr. James Locher).

²⁷¹ See *supra* Part III.

²⁷² James R. Locher III, *Has it Worked? The Goldwater Nichols Reorganization Act*, 54 NAVAL WAR COL. REV. 111, 112 (2001).

²⁷³ National security is not defined in law, but is defined by DoD in joint doctrine. It has a capacious definition to include "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 8, at 162.

²⁷⁴ The Department of Homeland Security is also taking on an increased operational role overseas.

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 oversight over the operational military: President Trump and Secretary Mattis (himself a former combatant commander, requiring a congressional waiver as part of the confirmation process²⁷⁵). And the President has shown an increased willingness to delegate greater and greater authorities to the operational military commanders in the field, at times loosening rules of engagement while delegating responsibilities to his military operational commanders.²⁷⁶ Money continues to flow to DoD as one of the few federal agencies receiving funding increases.

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, it 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. In contrast, the administrative military has two levels of oversight, ensuring an additional “civilian buffer.” 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 provide equal level of civilian oversight of both militaries, freeing up the Secretary of Defense to delegate certain oversight authorities to these combatant command officials.

²⁷⁵ 10 U.S.C. § 113 (2012).

²⁷⁶ Helene Cooper, *Trump Gives Military New Freedom, But With That Comes Danger*, N.Y. TIMES, Apr. 5, 2017, at A12.

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 he or she 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 curve in learning the language, culture, and regional dynamics. And there is precedent for such a move: we recognized the importance of having senior diplomats in both Iraq and Afghanistan during major combat operations with the appointment of Ambassadors Ryan Crocker and Richard Holbrooke to Iraq and Afghanistan, respectively.

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 problems – if you are a hammer, complex national security problems too often appear as nails. And that hammer is only getting bigger. 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.²⁷⁷ Why? Too often they are,

²⁷⁷ 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 CENTER FOR

literally, not on the same page (or map). Even the Office of the Secretary of Defense is organized differently than the Unified Command Plan. 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 de-centralize 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.²⁷⁸ Under Goldwater-Nichols, military advice is now transmitted via one person, the Chairman of the Joint Staff.²⁷⁹ While each member of the Joint Chief of Staff (Army, Navy, Air Force, Marines) may submit a matter in dissent, that opinion is transmitted via the Chairman, who submits his own advice.²⁸⁰

Unlike the other members of the Joint Staff, the Chairman 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. Second, the Chairman is focused on operational military matters and lacks the “staffing, training, and equipping” administrative responsibilities that are the outsized focus of the administrative military leadership. 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. Day to day, the Chairman and his staff only serve the operational military and the operational chain of command, 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.

²⁷⁸ Posner, *supra* note 145, at 42-43.

²⁷⁹ 10 U.S.C. § 151 (d) (2012).

²⁸⁰ *Id.*

Fourth, we should review and overhaul the national security budgetary process. The National Defense Authorization Act (NDAA) funds the DoD while a separate funding process exists for the other national security agencies (e.g. State, USAID, Homeland Security). While Congress often focuses on administrative matters within the NDAA, it does receive a baseline 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."²⁸¹ 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.

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. Senators McCain (R-AZ) and Reed (D-RI) have held bi-partisan hearings on the need for a new Goldwater-Nichols Act, but future legislation remains uncertain.²⁸² 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 Congress once a year. 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

²⁸¹ MCINNIS, *supra* note 80, at 14 (quoting Secretary Robert Gates).

²⁸² Remarks by Senator John McCain, Senate Armed Services Committee Holds Hearing on the Defense Department Budget Posture, XX CONG. Q. XX (March 1, 2016).

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). Too often, Congress appears to be caught off-guard about these operations. 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. 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 III, 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. As a general matter, most *administrative* military actions that occur within the United States remain subject to the APA, while most operational military actions taken by combatant commands are *not* subject to the APA.²⁸³

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.

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 or operational. 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.²⁸⁴ As operational activities, however, they currently fall outside the APA’s jurisdiction.

²⁸³ See, e.g., *Story v Marsh*, 574 F. Supp. 505 (1983), *revd. on other grounds*, 732 F.2d 1375 (CA8 Mo. 1984). Masur, *supra* note 181, at 512-513 (stating that “the only cognizable exceptions that might exempt a military organization. . . from APA strictures are the narrow ones written into the statute itself.”)

²⁸⁴ Breyer Oral Argument, *supra* note 215.

The military function exception should be updated and defined more precisely. Rulemaking and adjudications that involve "the conduct of military or foreign affairs functions" are exempt.²⁸⁵ 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,²⁸⁶ and to the determination of death of a serviceman because it "involved military affairs and public benefits."²⁸⁷

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"²⁸⁸ and can play a powerful role in ensuring civilian control of the military.²⁸⁹

CONCLUSION

The Goldwater-Nichols Act, passed in 1986 in the aftermath of several military misadventures, managed to reduce inter-service rivalry through emphasis on joint warfare, but failed to reinforce civilian control over the military. Instead, it *discouraged* congressional involvement in the hard questions faced 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 co-equal partner in

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

²⁸⁶ *United States v. Ventura-Melendez*, 321 F.2d. 320 (2003).

²⁸⁷ *McDonald v. McLucas*, 371 F. Supp. 837 (1973).

²⁸⁸ JAMES RASBAND, JAMES SALZMAN, & MARK SQUILLMAN, *NATURAL RESOURCES LAW* 223 (2009).

²⁸⁹ *Id.*

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 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. 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.