Defining the Civil-Military Relations Norm in American National Security Law and Practice

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ABSTRACT

Scholars and pundits observing the political and legal character of American civil-military relations ("CMR") will likely agree that CMR norms exist and what they are; that CMR norms are significant because they reflect certain important democratic and constitutional values; that CMR norms guide conduct; that CMR norms are eroding; and that it is critical that CMR norms not erode. This article locates a gap in the political science and legal scholarship, and in much of the public commentary about those American CMR norms: the preliminary – but overlooked – question of what makes some phenomenon a norm in this relationship at all.

This conceptual gap, left unfilled, has underappreciated consequences for the actors in that relationship and for the public, whose security depends to a significant degree on the health of that relationship. Norms are often assigned regulatory or compulsory powers they do not deserve, and so become mistaken for rules, laws, or standard operating procedures. Norms are often – not surprisingly – comingled with the idea of the "normal" or typical routine occurrence, meaning that norms are frequently mistaken for traditions, habits, or conventions, and vice versa. Moreover, norms are sometimes confused with the qualifier "normative," conflating a behavior with a value-judgment about that (or some other) behavior. For presidents and secretaries of defense, for members of congressional oversight committees, and for the institutional leaders in uniform interacting on personnel, fiscal, operational, and strategic national security matters during war and in peacetime, mischaracterizing conduct as a "norm" when it is not, or failing to comport with a useful norm because its status as a norm was unclear or debatable, undermines the efficient functioning of that inherently asymmetric professional and legal relationship.

This results when the mutual expectations at the heart of the civil-military dynamic become muddled, ignored, or misunderstood. Presidents may demand certain obsequious obedience to partisan platforms or publicly humiliate or denigrate their choices for high military command, thereby eroding the public's belief in a nonpartisan military and undermining the trust that servicemembers must have in the credibility and competence of their superior officers. Retired generals may criticize ongoing military campaigns as tactical blunders, thereby draining off morale among the troops, inciting risks to unit discipline, and

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exposing those retiree-critics to punitive sanction under the Uniform Code of Military Justice. Senators may call for a healthy civil-military dialogue of explicit candor yet not understand what questions at a confirmation, budget, or oversight hearing would probe the nominee's adherence to, or understanding of, established civil-military expectations. The public may read headlines about a senior field commander relieved from duty because of his or her slow-rolling resistance or overt disagreement with the president's strategic aims but have no objective grounds for diagnosing this firing as a negative pathology or a positive feature of CMR.

These problematic outcomes – some implicating practical politics, others implicating military effectiveness, and others implicating legal authorities and duties – can be (and usually are) attributed to breakdowns in CMR norms. Those breakdowns, this article argues, are not just the result of the civilian principal or military agent ignoring the catalogue of current CMR norms (though that may play a role); rather, those breakdowns are also triggered and amplified by failures to sufficiently conceptualize the elements of which CMR norms are constituted. That failure can be remedied, though not without first dissecting what is really meant by a CMR norm and reconstructing the concept with greater attention to detail – the elements of who, what, why, and how some patterns of behavior or phenomenon graduate to "norm" status.

This article contributes to the interdisciplinary field of CMR by relying on a conceptual analysis methodology to justify and propose a definition that includes thirteen necessary and sufficient conditions for a pattern or phenomenon to be considered a CMR norm. Importantly, this new definition explains why breaches of CMR norms worry scholars and members of these relationships in ways that breaches of related customs and even some rules or laws do not. This new definition also incorporates the parties' motives for compliance as a constituent element of that definition. With that more nuanced conception, the parties and the public may more readily spot when CMR norms are breached (or not), when they dissipate and no longer matter, how strong or weak a supposed norm is relative to others, and more easily and accurately observe the difference between criminal noncompliance and norm noncompliance – both of which are critical threats to the constitutional supremacy of civilian authority over subordinate armed forces, but for different reasons and with far different consequences.

INTRODUCTION

> *Our ideas, predictions, and prescriptions in any field of inquiry are shaped by the methodological lens through which we study: if this lens changes, then our thinking changes.*[1]

1. Peter D. Feaver & Erika Seeler, *Before and After Huntington*, *in* AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA 72–73 (Suzanne C. Nielsen & Don M. Snider eds., 2009).

On February 21, 2025, just one month into the second Trump Administration, something exceedingly rare and highly controversial took place inside the U.S. Department of Defense ("DoD"). In what has become known as the Pentagon's "Friday Night Massacre,"[2] Secretary of Defense Pete Hegseth, acting presumably on the orders of or with the permission of President Trump, relieved from duty the chairman of the Joint Chiefs of Staff, the chief of naval operations, the vice chief of staff of the Air Force, and the judge advocates general ("TJAGs") of the Army and Air Force – the senior ranking uniformed lawyers atop their Service's Judge Advocate General Corps and principal legal advisors to the military leaders of the Services and the civilian Service secretaries.[3]

The chairman's relief was not surprising: Hegseth had foreshadowed it even before his confirmation by the Senate placed him in the position to do it.[4] Relieving the first female chief of naval operations was only slightly more surprising;[5] it remains unclear why the Air Force's vice chief was relieved. Relieving the TJAGs was a shock.[6] Civil-military relations ("CMR") scholar Eliot Cohen wrote in dismay that the "[T]JAGs embody the deep respect that the United States military has had for the rule of law. Although they merely advise and do not command, their role is a crucial one."[7] Importantly, none of these reliefs were justified by Hegseth as the consequence for wartime failures, strategic miscalculations, the proverbial "loss of confidence" in their ability to lead,[8] or personal indiscretions casting shadows on their integrity, judgment, or character. Instead, these senior military officers at the apex of the Pentagon's uniformed leadership were fired for being holdovers from the previous Democratic

2. Eliot A. Cohen, *Lawful, but Enormously Destructive*, ATLANTIC (Feb. 23, 2025), https://perma.cc/FTM2-3H59; Lesley Wexler & Anthony Ghiotto, *Let's Kill All the Lawyers: The Friday Night Massacre of Judge Advocates General*, VERDICT (Mar. 4, 2025), https://perma.cc/QQ5X-2P5D.

3. Susan Davis, Domenico Montanaro & Tom Bowman, *Trump Administration Fires Top Pentagon Officials, Military Lawyers*, NPR (Feb. 24, 2025), https://perma.cc/72A2-7MAT; Greg Jaffe, *In Pursuit of a "Warrior Ethos," Hegseth Targets Military's Top Lawyers*, N.Y. TIMES (Feb. 22, 2025), https://perma.cc/B2RJ-AXTN.

4. Luis Martinez, Matt Seyler, Rachel Scott & Katherine Faulders, *Hegseth Could Soon Fire or Remove Generals and Senior Officers, U.S. Officials Say*, ABC NEWS (Feb. 19, 2025), https://perma.cc/GSW9-R5GJ.

5. Justin Katz, Ashley Roque & Michael Marrow, *Hegseth Fires Navy's Top Officer, Air Force No. 2*, BREAKING DEF. (Feb. 21, 2025), https://perma.cc/T6WQ-25K9; John Ismay, *Hegseth Fires Navy's Top Officer*, N.Y. TIMES (Feb. 21, 2025), https://perma.cc/SQ6C-QC4Q; Tom Nichols, *The Administration Wants Military Women to Know Their Place*, ATLANTIC (July 22, 2025), https://perma.cc/Z5R4-WXKV.

6. Kelsey Baker, *The Most Shocking Pentagon Firing Wasn't the Top General, Legal Experts Say. It Was the Lawyers*, BUS. INSIDER (Feb. 25, 2025), https://perma.cc/2VSN-48TP; Trent Kubasiak, *After JAG Firings, a Difficult Truth About Military Legal Independence*, BREAKING DEF. (Mar. 3, 2025), https://perma.cc/R82M-JQ4G.

7. Cohen, *supra* note 2. *See also* Sarah Elaine Harrison, *A "Sweeping Overhaul" of the JAG Corps Poses Likely Dangers*, LAWFARE (Apr. 4, 2025), https://perma.cc/TGP7-TJQA; Steve Vladeck, *Let's Fire All the Lawyers*, CONTRARIAN (Feb. 24, 2025), https://perma.cc/M9AR-PTTW; Dan Maurer, *JAGs Alone Can't Defend the Rule of Law*, LAWFARE (Mar. 5, 2025), https://perma.cc/PK6X-WTBC.

8. Charlie Dunlap, *Can Presidents "Fire" Senior Military Officers? Generally, Yes . . . but It's Complicated*, LAWFIRE (Sep. 15, 2016), https://perma.cc/KA4H-JPUE; Jakob Hutter, *Opinion: "Loss of Confidence" Doesn't Explain Enough About Command Firings*, MIL. TIMES (Oct. 11, 2024), https://perma.cc/3ZTT-K34D.

administration with on-record public positions on diversity, equity, and inclusion that were seen as antithetical to the Trump Administration's belief about what kind of "warrior ethos" was needed within the Armed Forces.[9] Regarding the senior military lawyers fired, Hegseth offered an anemic rationale: "We want lawyers who give sound constitutional advice and don't exist to attempt to be roadblocks to anything."[10]

In the wake of the mass firings, scholars, members of Congress, and pundits leveled significant public criticism by emphasizing the imprudence of the action, the chilling effect it might have on military subordinates, and the portents for the Administration's adherence to the rule of law in future military operations.[11] The latter concern was especially sharp in light of Trump's initial tranche of executive orders, some of which presaged the use of the conventional military to augment civil enforcement of immigration law at large scales and to combat Mexican narcotics cartels newly-designated as transnational terrorist organizations,[12] both of which would present the military with hosts of new legal constraints on the use of force to which it was unaccustomed.[13] But also emphasized were these facts: that relieving them from their posts was unquestionably within the constitutional authority of the President as Commander in Chief (acting through Hegseth)[14] and that, notwithstanding their legality,[15] the reliefs further destabilized CMR by eroding norms.[16]

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9. Jack Detsch & Paul McLeary, *Trump Fires Top Military Leaders in Unprecedented Shakeup*, POLITICO (Feb. 21, 2025), https://perma.cc/X7RJ-LWMM.

10. Sarah Fortinsky, *Hegseth: Fired Military Lawyers Were Potential "Roadblocks" to Trump Orders*, HILL (Feb. 24, 2025), https://perma.cc/6FUH-8XDQ.

11. Sen. Jack Reed, *Opinion: Firing Military Officers for Perceived Disloyalty Endangers the Nation*, WASH. POST (Feb. 21, 2025), https://perma.cc/V8XD-C75K ("[F]iring the military's most senior legal advisers is an unprecedented and explicit move to install officers who will yield to the president's interpretation of the law, with the expectation they will be little more than yes men on the most consequential questions of military law."); Baker, *supra* note 6 (quoting Professor Franklin Rosenblatt, a retired judge advocate officer in the Army, as saying, "I do see this as one of the bigger threats to the rule of law that the Pentagon has faced in a long time."); Mark Nevitt, *How the Pentagon Personnel Firings Threaten Our Apolitical Military*, JUST SEC. (Feb. 24, 2025), https://perma.cc/7M2R-TFM7 ("[T]hese firings are extraordinary and destabilize a longstanding norm of separating uniformed military members from politics. It is not an overstatement to characterize these firings as unprecedented and dangerous.").

12. Exec. Order No. 14,167, Clarifying the Military's Role in Protecting the Territorial Integrity of the United States, 90 Fed. Reg. 8613 (Jan. 20, 2025), https://perma.cc/UD45-FRWJ.

13. Dan Maurer, *Border Militarization Blurs the Distinction Between 'Policing' Immigration and 'Combating' Immigrants*, LAWFARE (Apr. 30, 2025), https://perma.cc/AHF6-997A.

14. 10 U.S.C. § 1161 prevents a president from unilaterally, at his own discretion, dismissing any officer from the service unless "in time of war." Removing them from their position and duties (commonly called a "relief") remains within the president's discretion. William A. Galston, *Does the President Have the Power to Fire or Punish Military Officers?*, BROOKINGS (Feb. 21, 2025), https://perma.cc/A5GE-NBZL.

15. Professor Steve Vladeck suggests that the firing of the TJAGs might violate 10 U.S.C. § 3037(e) (respecting the Army's Judge Advocate General) and 10 U.S.C. § 8037(f) (respecting the Air Force's Judge Advocate General), which state, "No officer or employee of the Department of Defense may interfere with—(1) the ability of the Judge Advocate General to give independent legal advice to the [Secretary or senior uniformed officer of the service branch]; or (2) the ability of judge advocates of the [service branch] assigned or attached to, or performing duty with, military units to give independent legal advice to commanders." Vladeck, *supra* note 7.

16. Dave Barno & Nora Bensahel, *Rough Seas Ahead: Steering the Military Profession*, WAR ON THE ROCKS (Mar. 4, 2025), https://perma.cc/5YE9-34XG.

But does the mere fact that a certain action taken by the president or secretary of defense is unusual (that is, not *normal*) – mass firing of members of the Joint Chiefs, including the chairman, as well as the TJAGs – mean that its irregularity, by itself, violates a "norm" in American CMR? Likewise, if behaviors by senior military professionals are routine and typical – for example, the Joint Chiefs *not* resigning despite serving in an administration whose ethos and decision-making they view as repugnant – does that regularity, by itself, make it a "norm?" If these irregular or regular actions are thought to be positive for the health of military subordination to civil government, does that affirmation, itself, make it a "norm?"

Norms feature prominently in CMR – whether analyzed academically or debated in popular media.[17] Left unaddressed and assumed away, however, is a consensus about the abstract category of conduct we might refer to as a CMR norm; that is, about what a norm in the civil-military relationship context actually *is*. By analogy, this is like having a criminal statute that prohibits and punishes the breach of certain customs, but without specifying *which* customs,[18] or a criminal code that fails to define a "crime" in general by failing to mention its fundamental constituent elements (like a voluntary act or omission and a culpable *mens rea*).[19]

This definitional hole leads to difficulties. Agreement by scholars, practitioners, and the public on when an apparent norm falls into desuetude (because it has atrophied, decayed, or died out) is challenged. So too are attempts to agree whether some *new* set of behaviors or conduct *is now* best thought of as a relevant CMR norm. How many instances, for example, of a certain behavior in a certain context – or its frequency, its duration, or its effect – will constitute a norm worth paying attention to?[20] For that matter, is a CMR norm inherently value-laden or is

17. Dan Lamothe, Missy Ryan & Alex Horton, *Pentagon Anticipates Major Upheaval with Trump's Return to White House*, WASH. POST (Nov. 8, 2024), https://perma.cc/488T-JF8L.

18. Article 92(3) of the UCMJ punishes dereliction of duty. 10 U.S.C. § 892(3). A "duty" can be "imposed by treaty, statute, lawful order, standard operating procedure, or custom of the service." UNITED STATES MANUAL FOR COURTS-MARTIAL IV-28, para. 18(c)(3)(a) (2024) [hereinafter M.C.M.]. However, Article 134 – punishing "disorders and neglects to the prejudice of good order and discipline in the armed forces" – can be violated by breaching a "custom of the service," defined as

> more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long-established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned.

Id. at IV-140, para. 91(c)(2)(b) (discussing 10 U.S.C. § 934).

19. *See, e.g*., MODEL PENAL CODE § 2.01(1) (A.L.I. 2007) ("A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.").

20. This sort of question, about identity and boundaries of concepts, has ancient philosophical roots and by rough analogy is something akin to the "Paradox of the Heap" or the "Sorites Paradox" (at what point does a pile of grains of sand constitute a "heap" of sand, and when does a heap of sand no longer constitute a heap when removing a grain at a time?). *See* Roy A. Sorensen, *Sorites Arguments*, *in* A COMPANION TO METAPHYSICS 565 (Kim Jaegwon, Ernest Sosa & Gary S. Rosenkrantz eds., 2009) (describing this classical metaphysical problem in logic).

it naturally values-neutral? If the former, *whose* values and *which* values? If the latter, why ought one follow it, and what justifies punishing its breach?

More importantly, agreement on when a breach has occurred or even weighing the value or criticality of one norm against another is futile if there is no conceptual consensus on what makes some behavior or phenomenon between CMR parties a norm in the first place. Moreover, what is often described as a "norm" may be better characterized as "*normatively* preferable behavior" – that is, a description of what ought to be the case rather than a description of what actually *is* the case, though some scholars appear to conflate the two.[21] It may be that a particular norm, in a given situation, is normatively preferable; but it may also be that this particular norm, in another situation, is not preferable; or that a particular norm is – in *any* situation – undesirable. Eliot Cohen's "unequal dialogue"[22] describing the dynamic of advice-giving on national security matters (expert military advice to amateur political authority, where the amateur by law retains supremacy) could be taken as an example of a supposed norm or at least a model of what the relationship *ought* to be,[23] whereas Peter Feaver's related "right to be wrong"[24] may not be – it might rather be a statement of a legal authority granted to the elected civilian under conditions created by the U.S. Constitution's principle of civilian supremacy over the military.[25] If the parties *regularly behave in a manner that supports this recognition of legal authority*, it may indeed be a CMR norm too.

Without a clear statement of generic CMR norm properties, it is difficult to state exactly why the unequal dialogue could be a CMR norm but the "right to be wrong" might not be. Accounting for, let alone diagnosing and remedying, pathologies in CMR without a firmer grasp on what it means to say "this is a CMR

21. SCOTT J. SHAPIRO, LEGALITY 41 (2011). *See also* HEIDI A. URBEN, PARTY, POLITICS, AND THE POST-9/11 ARMY 202–03 (2021) (defining "norms" as "informal mechanisms that govern behavior . . . [for example] how officers should behave – even when certain activities may technically be allowable"). Earlier in her book, Urben appears to conflate the "normatively correct" choices of disavowing public expressions of political beliefs by military officers and not publicly criticizing senior civilian officials with the "norm of nonpartisanship*." Id*. at 78–80.

22. ELIOT A. COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME 12, 247 (2002).

23. Joseph J. Collins, *US Civil-Military Relations Are Complicated, but Not Broken*, DEFENSEONE (June 18, 2021), https://perma.cc/H24M-HTXM (referencing the unequal dialogue as a fundamental to American civil-military relations); Polina Beliakova, *Erosion by Deference: Civilian Control and the Military in Policymaking*, 4 TEX. NAT'L SEC. Rev. 55, 58–60 (2021) (referencing the unequal dialogue indirectly as a civil-military norm); Jim Golby, *Beyond the Resignation Debate: A New Framework for Civil-Military Dialogue*, 9 STRATEGIC STUD. Q. 18, 28 (2015) (positioning the unequal dialogue as a sort of meta-norm: "Military leaders need more robust norms and guidelines that can help them understand how to find their voice in the unequal dialogue."); Janine Davidson, *The Contemporary Presidency: Civil-Military Friction and Presidential Decision Making: Explaining the Broken Dialogue*, 43 PRESIDENTIAL STUD. Q. 129, 133 (2013) (referring to the unequal dialogue as a prescriptive "model" that "draws clear lines around the roles each side should play").

24. PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 65, 172 (2003). *See infra* Part V.B.2.

25. U.S. CONST. art. I, § 8, cl. 11–16 (detailing war powers of Congress); U.S. CONST. art. II, § 2, cl. 1 (president's commander in chief duty). *See generally* Kenneth W. Kemp & Charles Hudlin, *Civil Supremacy over the Military: Its Nature and Limits*, 19 ARMED FORCES & SOC'Y 7 (1992).

norm" in the first place also poses a vexing problem. Without that ability, it is difficult to know whether certain facts, like a particular military officer's duty position or the subject matter of the advice she gives to the civilian principal, are even *relevant* to the conversation about the supposed norm.

This article constructs a tentative recipe of CMR norm ingredient properties among civilian principals and military agents. Part I describes the general nature of civilian supremacy and argues that the very concept of a "civil-military norm," in the context of the relationship between senior political elites and senior military elites, is neither defined nor are its outer borders marked despite an apparent consensus that certain conduct between these parties *are* civil-military norms. Federal law – constitutional, administrative, and criminal – structures *some* of the expectations and limits on these parties, confining the military to a properly subordinate role. Another guardrail ensuring military subordination is a widely-adopted professional ethos, and there are two somewhat contradictory theories describing and possibly predicting (or at least prescribing) how that ethos is to be practiced – the classic view of CMR first articulated by Samual Huntington in the 1950s, and a more contemporary framework that identifies elite civilian authorities as principals and the senior miliary officers as agents.

Part II explains the use and value of conceptual analysis, developing the methodology employed here to identify what could be considered the necessary and sufficient elements for *any* conduct or behavior to constitute a civil-military norm. Part III surveys various attempts to define "norms" generally, across the several academic disciplines that already invest in attempts to make sense of American CMR. Part IV provides a brief definition of CMR before cataloguing the most commonly discussed "norms" apparently guiding the behavior and decisions of the CMR parties. Relying on a three-part generic definition of a "norm" taken from sociology as a starting framework,[26] Part V sketches the relevant properties and fundamental attributes of a generic CMR norm and assesses whether conduct currently considered to be a CMR norm still fits that definition. The conclusion suggests some benefits that this generic CMR norm definition offers for the political and military actors in the relationship, the public, and scholars: among others, that Congress's responsibility for oversight – including its "advice and consent" duty for senior military elite nominations[27]– is made easier when it has an objective basis for diagnosing pathologies (and preventing them from arising) between these two unequal partners inside the executive branch.[28]

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26. Jack P. Gibbs, *Norms: The Problem of Definition and Classification*, 70 AM. J. SOCIO. 586, 589–91 (1965).

27. U.S. CONST. art. II, § 2, cl. 2; 10 U.S.C. § 152(a) (describing the appointment and consent requirements for the position of Chairman of the Joint Chiefs of Staff).

28. Daniel Maurer, *Fiduciary Duty, Honor, Country: Legislating a Theory of Agency into Strategic Civil-Military Relations*, 10 HARV. NAT'L SEC. J. 259, 289–91 (2019) [hereinafter Maurer, *Fiduciary Duty, Honor, Country*]; *see generally* DANIEL MAURER, CRISIS, AGENCY, AND LAW IN US CIVIL-MILITARY RELATIONS (2017) [hereinafter MAURER, CRISIS] (describing CMR pathologies and

I. CIVILIAN SUPREMACY AND ASSUMPTIONS OF AMERICAN NORMS

Civilian supremacy over the American military is so much a part of the fabric of the country's legal tradition that it predates the Constitution itself. Its threads are apparent in the Declaration of Independence, listing among the "abuses and usurpations" that the king "has kept among us, in times of peace, standing armies, without the consent of our legislatures" and "has affected to render the military independent of and superior to the civil power."[29] The Constitution later split civilian hegemony over the military between the President (wearing the operational and administrative hat of Commander in Chief[30]) and the Congress (with its enumerated list of war powers, including the power to declare war, to fund the creation and sustainment of the Army and Navy, to call forth the militia in times of crisis, and to make rules to regulate the conduct of servicemembers[31]). The Framers were manifestly aware of the dangers posed by a standing army garrisoned in their cities and a naval fleet anchored offshore.[32] They designed a constitution that made the military difficult for one person alone to wield,[33] and they ensured that *final* decisions about how force could be used, where and when it could be used, against whom it could be used, and why it would be used were left to elected civilian officials and their appointed civilian subordinates, not to military officers.

A. Military Subordination Under the Law

The Constitution confers upon the civilian president the duties of commander-in-chief of the armed forces.[34] What that title implies about the president's *specific* duties and authorities relative to the military remains unclear today.[35]

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suggesting the use of agency law fiduciary duties as analogies on which to encode healthy CMR relationship norms).

29. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

30. U.S. CONST. art. II, § 2, cl. 1.

31. U.S. CONST. art. I, § 8, cl. 11–16.

32. THE FEDERALIST No. 8 (Alexander Hamilton) (seeking to quell fears that of a standing army controlled by Congress); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 326 (Madison's Notes, Aug. 18, 1787, referring to comments by George Mason), 329 (Madison's Notes, Sep. 5, 1787, referring to comments by Elbridge Gerry) (Max Farrand ed., 1911); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 45, 114–19 (2005).

33. The real debate over war powers rests in the extent to which the President can initiate (at least some forms of) armed conflict without prior Congressional approval – thus an interbranch separation of powers problem, not a debate over the role that the military should have in war-making policy. *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 690, 693 (2008) ("[E]ven when hostilities are underway, the Commander in Chief often operates in a legal environment instinct with legislatively imposed limitations."); *cf.* LOUIS FISHER, PRESIDENTIAL WAR POWER 291 (3d ed. 2013) (noting a shift in how presidents have interpreted their power to wage war "single-handedly" but arguing that this shift toward unilateral war powers was "not the framers' model"). For an expansive originalist defense of such unilateral war powers, see the works of Professor Yoo, including John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

34. U.S. CONST. art. II, § 2, cl. 1.

35. H. JEFFERSON POWELL, THE PRESIDENT AS COMMANDER IN CHIEF: AN ESSAY IN CONSTITUTIONAL VISION 3 (2014).

Judicial precedent and presidential practice make it well-established that the president may make decisions about how, when, where, and to what extent military force is used in foreign countries – under certain conditions, unilaterally without seeking an "authorization for the use of force" or a "declaration of war" from Congress.[36] But if Congress wished to dictate the tactical rules of engagement in a particular theater of active armed conflict, a task historically executed by the secretary of defense and the military chain-of-command, could it do so without breaching the president's Article II powers?[37] Would a presidential command to the military to conduct operations in a way that would violate international humanitarian law be a lawful order that must be followed by military subordinates under penalty of court-martial prosecution?[38] Can the president unilaterally exclude a class of persons as *per se* ineligible to enlist or remain in the armed forces?[39] Can the president determine that the amount of force used by the military conducting domestic law enforcement operations under the authority of the Insurrection Act[40] may be greater than that degree of force permitted by the Fourth Amendment?[41] Can a president order a military subordinate to refuse a congressional subpoena to testify, or punish the subordinate that obeys that

36. The academic literature discussing these precedents in courts and the Oval Office is quite copious. For a sample, see, e.g., Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander-in-Chief*, 80 VA. L. REV. 833, 836–37 (1994) (reviewing "restrictive national security appropriations" in the Vietnam War and the Iran-Contra Affair); Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 450–51 (2011); Geoffrey S. Corn & Eric Talbot Jensen, *The Political Balance of Power over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOU. L. REV. 553, 564–65 (2007); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L. J. 672, 701–02 (1972); Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 133–34 (1971); William W. Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 2 (1972); Jules Lobel, *Conflicts Between the Commander-in-Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 393 (2008); Oona A. Hathaway, Tobias Kuehne, Randi Michel & Nicole Ng, *Congressional Oversight of Modern Warfare: History, Pathologies, and Proposals for Reform*, 63 WM. & MARY L. REV. 137, 143–45 (2021); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 364–68 (2008).

37. Dan Maurer, *Congress and the Operational Disciplining of the Use of Armed Force: Are Rules of Engagement Within the Preclusive Core of the President's War Powers?*, 84 OHIO ST. L.J. 1393, 1394–98 (2024); Dan Maurer, *Congress and the Operational Disciplining of the Use of Armed Force, Part II: Rules of Engagement and a "Military-Agency Test" for the Separation of War Powers*, 85 OHIO. ST. L.J. 893, 894–96 (2024) (arguing that Congress does have constitutional authority to dictate the form and substance of at least some operational rules of engagement).

38. John C. Dehn, *Why a President Cannot Authorize the Military to Violate (Most of) the Law of War*, 59 WM. & MARY L. REV. 813, 813–14 (2018); Dan Maurer, *Can the Military Disobey Orders in the SEAL Team 6 Hypothetical?*, LAWFARE (July 8, 2024), https://perma.cc/N9VB-FTSM.

39. Exec. Order No. 14,183, 90 Fed. Reg. 8757 (Jan. 27, 2025) (reinstating a ban of transgender servicemembers). This Executive Order is currently in litigation. *See* Deena Zaru, *Transgender Service Members Say They Face 'Heartbreaking' Decision amid Trump Ban: Leave Military or Get Kicked Out*, ABC NEWS (May 19, 2025), https://perma.cc/JMS6-CHJT.

40. The Insurrection Act is codified at 10 U.S.C. §§ 251–55.

41. Maurer, *supra* note 13 (highlighting the potential conflict between domestic "rules for the use of force" ostensibly regulating miliary conduct and standards of "reasonableness" under the Fourth Amendment).

subpoena?[42] Can a president order a military subordinate to write an op-ed for a major media outlet espousing the administration's preferred national security strategy?[43] May a president treat principled dissent as disobedience or contempt, both of which are military crimes?[44] May a president or secretary of defense override existing Department of Defense regulations by screening soldiers for partisan or ideological preferences before allowing them to attend presidential remarks (standing behind the president during his speech) at a major Army installation?[45]

Importantly, there is no instance or exception in which a senior military commander – even in the middle of an armed conflict – can lawfully veto, ignore, or disobey an otherwise lawful order from the president or secretary of defense.[46] The civilian leader's determination of how, when, where, and to what extent force is used against an adversary is dispositive, exclusive, and preclusive relative to the military chain-of-command, regardless of the determination's strategic or tactical folly.[47] The U.S. Supreme Court has long recognized this degree of supremacy:

> The power of the executive to establish rules and regulations for the government of the army is undoubted . . . . The power to establish implies necessarily the power to modify or repeal or to create anew. The Secretary of War is the regular constitutional organ of the president for the administration of the military establishment of the nation, and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such be binding upon all within the sphere of his legal and constitutional authority. Such regulations cannot be questioned or denied because they may be thought unwise or mistaken.[48]

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42. Richard Primus & David Schulz, *Alexander Vindman's Lawsuit Is Right on the Law*, JUST SEC. (Feb. 3, 2022), https://perma.cc/WUV4-WEHY.

43. *See*, *e.g.*, H.R. McMaster & Gary D. Cohn, *America First Doesn't Mean America Alone*, WALL ST. J. (May 30, 2017), https://perma.cc/GS7Q-8CJB.

44. *See generally* Ryan Burke & Jahara Matisek, *Trump(ing) Tradition: Old Laws, New Norms, and the Danger to Civil–Military Relations*, 51 ARMED FORCES & SOC'Y 794 (2024) (suggesting that 10 U.S.C. § 888, criminalizing contemptuous speech against certain civilian officials, is unenforced by the military authorities to deter and punish retired senior officer speech that would undermine norms of civil-military relations and subordination to civil authority and arguing that this law should be either enforced, amended, or abolished because non-enforcement also erodes military professionalism).

45. Todd South, *Soldiers Screened for Appearance and Politics Ahead of Trump Visit*, ARMY TIMES (June 12, 2025), https://perma.cc/2LXH-KX7X.

46. *See* Martin v. Mott, 25 U.S. 19, 31 (1827) ("The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it."); *see also* Parker v. Levy, 417 U.S. 733, 751 (1974) ("The military establishment is subject to the control of the civilian Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.").

47. Peter D. Feaver, *Civil-Military Relations*, 2 ANN. REV. POL. SCI. 211, 216 (1999) (discussing the civilian leader's "right to be wrong"); *but see* Ronald R. Krebs, Robert Ralston & Aaron Rapport, *No Right to Be Wrong: What Americans Think About Civil-Military Relations*, 21 PERSPS. ON POL. 606, 613 (2023) (finding evidence from survey data that a majority of polled Americans do not accept the premise that civilian political leadership has that "right").

48. United States v. Eliason, 41 U.S. 291, 301–02 (1842).

Additionally, Congress – not the military – determines the amount of money spent (and perhaps even priorities) on military preparedness, training, personnel, construction, arms and materiel procurement, and even combat operations.[49] The Constitution also wisely provides Congress the authority to "make rules" for the "government and regulation" of the armed forces,[50] even if those rules would not be thought wise or practical within the military. The uniformed leaders can – and often do – seek to influence and inform Congress in these decisions before enacted, but have no right or authority to countermand, ignore, or otherwise violate the prescriptions and prohibitions that make their way into the U.S. Code.

Unsurprisingly, therefore, federal statutes rather than the Constitution take up most of the burden of establishing the relationship between the military and civilian government. Among other things, federal laws provide the means by which the President exercises some of his or her more explicit Article II authorities, like the appointment of "public minsters and consuls . . . and all other officers of the United States . . . ."[51] Federal law makes it specific: the president nominates and supervises key national security officials like the civilian secretary of defense,[52] the uniformed chief of naval operations,[53] and the hosts of other senior uniformed and civilian leaders in the Defense Department.[54] Some of those officials (for example, the chief of staff of the Air Force) "serve at the pleasure of the president" and are "subject to the authority, direction, and control of the [civilian] Secretary" of the military service, but their offices are further regulated by detailed nomination prerequisites established by Congress.[55] These military officers are also required to perform certain designated tasks by statute fully outside whatever other duties are imposed by the secretary of defense or president.[56]

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49. This "power of the purse" operates as a substantial incentive though which Congress might exercise its constitutional power over the armed forces. DAVID P. AUERSWALD & COLTON C. CAMPBELL, *Introduction: Congress and Civil-Military Relations*, *in* CONGRESS AND CIVIL-MILITARY RELATIONS 1, 6 (Colton C. Campbell & David P. Auerswald eds., 2015); Barry M. Blechman, *The Congressional Role in U.S. Military Policy*, 106 POL. SCI. Q. 17, 31–32 (1991); Zachery C. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 361 (2018) (referring to the president's exercise of authority over these military decisions as "resource-dependent" where those "resources" are the funds appropriated by Congress).

50. U.S. CONST. art. I, § 8, cl. 14; *see generally* Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 U. CIN. L. REV. 391 (2018) (arguing that this clause provides two distinct authorities: "internal regulation" over the armed forces personnel and "external government" or rulemaking for certain operational actions taken domestically and abroad).

51. U.S. CONST. art. II, § 2, cl. 2.

52. 10 U.S.C. § 113(a)(1).

53. 10 U.S.C. § 8033(a)(1).

54. *See, e.g.*, 10 U.S.C. § 154(a)(1) (requiring advice and consent for the position of Vice Chairman of the Joint Chiefs of Staff, appointed "from the officers of the regular components of the armed forces"); *id.* § 134(a) (advice and consent for position of Under Secretary of Defense for Policy, "appointed from civilian life").

55. 10 U.S.C. § 9033(a)-(d) (statutory prerequisites for appointment as the Chief of Staff of the Air Force and subordination to the civilian Secretary of the Air Force).

56. *See, e.g.*, 10 U.S.C. § 153(b) (requirement on the Chairman of the Joint Chiefs of Staff to update or produce a new "national military strategy" every other year, independent of any "authority, direction, and control" exercised over him by the President or Secretary of Defense); *id.* § 153(c) (requirement to

Moreover, Congress has included within the Uniform Code of Military Justice ("UCMJ")[57] a provision that authorizes the president to "prescribe" rules of evidence and procedure for courts-martial.[58] The Court of Appeals for the Armed Forces, the nation's highest appellate court for military justice matters other than the U.S. Supreme Court, has established that presidential definitions, discussion, and explanations of the statutory elements of the UCMJ's substantive criminal offenses found in Part IV of the Manual for Courts-Martial[59] are persuasive, though not binding on the courts.[60] And according to statute, the secretary of defense exercises plenary "authority, direction, and control over the Department of Defense" subject only to the direction of the president and further obligations (like reporting requirements to Congress) provided by law.[61]

B. Military Subordination as a Professional Ethos

The late political scientist Samuel Huntington's seminal *The Soldier and the State*[62] originated what is now considered the classical view of the relationship between the military as a profession, the civilian authority it obeys, and the civilian public it protects and from which its members are drawn.[63] Huntington's "objective control" theory envisioned the military acceding to civilian domination and tacitly promising to abstain from politics in exchange for autonomy in its own separate sphere in which military skills and effectiveness are the only normative measures of competent professionalism.[64] This theory was premised on categorically distinguishing the civilian national security official from the senior

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submit an annual report to the congressional defense committees on the requirements of the various combatant commands, also independent of "authority, direction, and control" by the President or Secretary of Defense).

57. 10 U.S.C. §§ 801–946a.

58. 10 U.S.C. § 836(a).

59. M.C.M., *supra* note 18, at pt. IV.

60. United States v. Miller, 47 M.J. 352, 356 (1997) ("'Manual explanations of codal offenses are not binding on this Court,' [but] they are persuasive indications of how the President, as head of the Executive Branch of Government, perceives an offense, including limitations on the Executive power that are not required by the Code or other applicable law" (quoting *United States v. Gonzalez*, 42 M.J. 469, 474 (1995) (internal quotations omitted))). Additionally, "absent a contrary intention in the Constitution or a statute, this Court should adhere to the Manual's elements of proof. Where the President's narrowing construction is favorable to an accused and is not inconsistent with the language of a statute, 'we will not disturb the President's narrowing construction, which is an appropriate Executive branch limitation on the conduct subject to prosecution.'" United States v. Guess, 48 M.J. 69, 71 (1998) (quoting *United States v. Davis*, 47 M.J. 484, 486–87 (1998) (internal quotations omitted)).

61. 10 U.S.C. § 113(b).

62. *See generally* SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS (1957).

63. Barry McCaffrey, *Foreword*, *in* AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA xiii (Suzanne C. Nielsen & Don M. Snider eds., 2009) ("The senior military leadership must be objective, expert, and determinedly nonpartisan."). *See also* Suzanne C. Nielsen & Don M. Snider, *Introduction*, *in* AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA 2 (Suzanne C. Nielsen & Don M. Snider eds., 2009) ("Seeking to advance the theoretical literature as well as to address pressing policy concerns relating to both partners in the civil-military relationship, this book follows the trail that Huntington blazed.").

64. HUNTINGTON, *supra* note 62, at 7–18, 83–85.

military officer (based on their presumed categorically "different moral and political competencies"[65]). This theory rejected "liberalism" or "individualism" as the guiding ideology within the military in favor of inculcating a martial mindset of "conservative realism" that refused to look at the world through rose-tinted glasses, never failed to diagnose threats, considered policy options based on the worst-case scenario, valued disciplined and cohesive organizations over individual ability, erred on the side of caution, and esteemed warfighting and the guardianship of the nation's security over any other objective.[66]

Huntington argued that there was a preferred mechanism for ensuring civilian control over a military led by those senior generals and admirals. To be in accord with the Constitution's demand for subordination, while still ensuring that the military remained capable of providing for the nation's security, the mechanism was "rendering [military officers] politically sterile and neutral"[67] or "passively apolitical."[68] He was worried that duly elected civilian authority would be forced to protect itself from military influence if it believed that senior officers' partisan preferences and loyalties were factors in how they performed their security functions. If the civilian government is concerned about protecting itself from uniformed leaders "superimposing" their "political considerations and values" over top martial considerations and values, it is – he suggested – less concerned with the military's technical competence and more concerned with imposing political will on what is assumed to be a politically agnostic institution.[69]

The military's political abstinence (as an organization and as individual senior leaders) would earn and justify the military's (limited) independence in exercising its unique responsibilities and skills: a monopoly in the "management of violence" in the nation's name, and self-cohesive "corporateness" – a reinforced sense that the profession of arms is a "group apart from laymen" guided by their own standards and norms.[70] But two additional values, expertise and responsibility, were vital to Huntington's theory too: the routine application of specialized learned knowledge and skill coupled with a societal service obligation.[71] Professionalization of the military was, therefore, both a means and the end of positive CMR: civilian authority protected against military interference while the state remains protected, competently, by its military.

These premises have endured today in the Department of Defense policy on partisan political participation.[72] Its leadership doctrine manuals reflect this separate, rigidly divided, and unequal distribution of authority.[73] Federal law imposes

65. FEAVER, *supra* note 24, at 7–8.
66. HUNTINGTON, *supra* note 62, at 61, 63–66.
67. *Id*. at 84.
68. MAURER, *supra* note 28, at 77.
69. HUNTINGTON, *supra* note 62, at 35.
70. *Id*. at 8–11.
71. *Id*. at 9–10.
72. *See generally* DoD Directive 1344.10, Political Activities by Members of the Armed Forces (2008), https://perma.cc/X77X-M2D8.
73. ADP 6-22: ARMY LEADERSHIP AND THE PROFESSION 1–9 (2019), https://perma.cc/VQK5-K8WU.

specific professional prerequisites and qualifications for military officers before a president may assign them to certain positions of high responsibility, such as the four-star generals and admirals assigned to be commanders of the combatant commands.[74] And the UCMJ criminalizes conduct ranging from disobedience to orders,[75] "contempt toward officials,"[76] "conduct unbecoming an officer,"[77] conduct "prejudicial to good order and discipline,"[78] and conduct "of a nature to bring discredit upon the armed services."[79] Though first published in 1957, Huntington's core concepts are evident, even if not cited, in the U.S. Supreme Court's precedents rationalizing a separate justice system that prohibits conduct that would otherwise be constitutionally protected for civilians.[80] Moreover, these concepts remain on the syllabi at the war colleges attended by senior officers.[81] And according to leading scholars like Peter Feaver, Huntington's "approach . . . continues to frame analyses of democratic control over the military . . . [and his] prescriptions for how best to structure civil-military relations continue to find a very receptive ear within one very important audience, the American officer corps itself, and this contributes to his prominence in the field."[82]

This strictly bifurcated view of the professional military leadership operating within a subordinate and more constrained sphere seems to have been the one adopted by the second Trump Administration's Defense Department in the early months of 2025. As described above,[83] Secretary Hegseth fired the chairman of the Joint Chiefs of Staff, the chief of naval operations, the vice chief of staff of the Air Force, and two service TJAGs, for reasons strongly suspected to do with these leaders' support for diversity, equity, and inclusion initiatives within the

74. 10 U.S.C. § 164(a).

75. 10 U.S.C. § 890; *see also* M.C.M., *supra* note 18, at IV-24, para. 16(c) (discussing and explaining the statutory elements of this offense).

76. 10 U.S.C. § 888; *see also* M.C.M., *supra* note 18, at IV-21, para. 14(c) (discussing and explaining the statutory elements of this offense).

77. 10 U.S.C. § 933; *see also* M.C.M., *supra* note 18, at IV-139, para. 90(c) (discussing and explaining the statutory elements of this offense).

78. 10 U.S.C. § 934; *see also* M.C.M., *supra* note 18, at IV-141, para. 91(c)(2) (discussing and explaining the statutory elements of this offense).

79. 10 U.S.C. § 934; *see also* M.C.M., *supra* note 18, at IV-141, para. 91(c)(3) (discussing and explaining the statutory elements of this offense).

80. *See, e.g.*, Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian."); Parker v. Levy, 417 U.S. 733, 743 (1974) ("[T]he military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history.").

81. HUNTINGTON, *supra* note 62, at 237–39; *see also* William E. Rapp, *Civil-Military Relations: The Role of Military Leaders in Strategy Making*, 45 PARAMETERS 13, 13 (2015) ("Soldiers have been raised on Huntingtonian logic and the separation of spheres of influence since their time as junior lieutenants."); U.S. ARMY WAR COLLEGE, *Civil-Military Relations: Professional Foundations for Senior Leaders* (YouTube, Oct. 27, 2011), https://perma.cc/P3BN-ZQTD; Mackubin Thomas Owens, U.S. Air Force Academy 2013 Ira C. Eaker Distinguished Lecture on National Defense Policy: What Military Officers Need to Know About Civil-Military Relations (May 2013), https://perma.cc/T9B2-WEF6.

82. FEAVER, *supra* note 24, at 7.

83. *See supra* Introduction.

DoD or views about the role of international law in restraining the use of armed force – both of which undermined public policy positions taken by President Trump and Secretary Hegseth.[84] Nevertheless, even *if* the Administration was justified in questioning these senior leaders' political agnosticism or their "conservative realism,"[85] and thought they were working for a "liberal" adversarial partisan agenda to the detriment of building warfighting capability (and there is no evidence that these officers were), a problem remains. Their abrupt and highly unusual forced retirements opened the Trump Administration, ironically, to accusations that it valued partisan loyalty over the professional skills, knowledge, temperament, and experience that these officers presumptively possessed.[86] The risk of indoctrinating a culture of military loyalty to the sitting Administration – either personally or ideologically – is that the very expertise and judgment demanded of effective "management of violence"[87] will be ignored, dismissed, punished, or silenced. But the extent to which this approach generates *new* norms of compliance or fealty to the President rather than to the office or Constitution, or dissolves old norms of non-partisanship, remains hindered by the theory's inattention to defining the concept of a CMR norm as a predicate matter.

Scholars are taking note of the various subtle tensions driven by the very act of adhering to Huntington's objective control-inspired norms. For example, Professor Risa Brooks notes the fence between professional military affairs and political or policy engagement, at the heart of Huntington's theory, "does not require or inspire (and may even inhibit) the introspection and understanding necessary to assure officers remain apolitical."[88] She also notes that the prevailing views of professionalism "foster an antagonism toward bureaucracy and bureaucratic processes" – a danger to "politico-strategic effectiveness" given the role that interagency cooperation plays in war-fighting.[89] She warns that these inescapable ironies of Huntington's objective control theory will drive behaviors "and mindsets within the officer corps that work to facilitate political behavior, subvert civilian control of military activity, compromise strategic effectiveness, and even undermine some aspects of military professionalism itself."[90]

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84. Davis, *supra* note 3; Jaffe, *supra* note 3.

85. HUNTINGTON, *supra* note 62, at 71–74, 79.

86. Phil Stewart & Idrees Ali, *Trump Fires Top US General in Unprecedented Pentagon Shakeup*, REUTERS (Feb. 22, 2025), https://perma.cc/LKH2-JVEN (quoting Senator Jack Reed: "Firing uniformed leaders as a type of political loyalty test, or for reasons relating to diversity and gender that have nothing to do with performance, erodes the trust and professionalism that our servicemembers require to achieve their missions."); *Retired Rear Admiral Fears Trump Replacing Military Leaders with Those "Loyal to Him"*, PBS NEWS HOUR (Feb. 24, 2025), https://perma.cc/LK6B-9LN7. Sen. Tammy Duckworth, *Why Trump's Pattern of Purging Our Highest-Performing Military Officers Is Dangerous* (Apr. 13, 2025), https://perma.cc/D8AG-W5X2.

87. HUNTINGTON, *supra* note 62, at 11 (quoting Harold D. Lasswell, *The Garrison State*, 46 AM. J. SOCIO. 455, 463 (1941)).

88. Risa Brooks, *The Paradoxes of Huntingtonian Professionalism*, *in* RECONSIDERING AMERICAN CIVIL-MILITARY RELATIONS: THE MILITARY, SOCIETY, POLITICS, AND MODERN WAR 17, 20 (Lionel Beehner, Risa Brooks & Daniel Maurer eds., 2021).

89. *Id*. at 28–29.

90. *Id*. at 17–18.

Huntington's theory focusing on separate spheres of professional duties may be dominant, but it is far from ubiquitous. An increasingly conventional way of describing the strategic civil-military relationship is to consider it as a principal-agent relationship.[91] The civilian "principal" (*e.g.*, the president, secretary of defense, or other senior appointed political leaders in the Defense Department) gives direction and intent, and expressly or implicitly establishes the scope of the subordinate military leader's limited authority,[92] who as the "agent" must act for the best interests of the civilian authority in achieving the principal's intent. Unlike other principal-agent relationships (like the lawyer-client relationship), the interests of the civilian's office, not the individual person occupying it, are relevant and earn the agent's fidelity. The agent is not free to act for her own personal self-interest or the perceived interest of the military as an organization if it conflicts with the lawful interests and direction of the civilian principal.

Professor Peter Feaver, a leading champion of this model of CMR, has described the relationship as a "game of strategic interaction."[93] His theory intends to displace that of Huntington, relying on mathematical tools from micro-economics and game theory to describe and predict military and political elites' behaviors as they interact.[94] Feaver's model is less focused on the institutional and cultural differences between the civilian and military professionals and more with mechanisms of control: how, and under what conditions, the civilian leader monitors and punishes the military (individually or institutionally) to ensure the conduct of the military agent does not interfere with or undermine the civilian's authorities left to him by the Constitution and statute.[95]

Feaver's model provides a refined perspective of the civil-military relationship, characterized by "shades of overlapping (but not entirely) authority [and a] mutually agreeable and defined scope of responsibility."[96] However, this model can be criticized on the grounds that it assumes the actors are rational; it aggregates the conduct of myriad individuals into simplified categories (which necessarily

91. *See generally* FEAVER, *supra* note 24; David Pion-Berlin & Danijela Dudley, *Civil-Military Relations: What Is the State of the Field*, *in* HANDBOOK OF MILITARY SCIENCES 14 (Anders McD Sookermany ed., 2020); Patricia M. Shields, *Civil-Military Relations: Changing Frontiers*, 66 PUB. ADMIN. REV. 924, 925 (2006); Pauline Shanks Kaurin, *An "Unprincipled Principal": Implications for Civil-Military Relations*, 15 STRATEGIC STUD. Q. 50, 53 (2021).

92. By "leader," we can also mean the small group of very senior military officers helming each of the Armed Services who are members of the Joint Chiefs of Staff, as well as the four-star generals and admirals serving as combatant commanders who report directly to Secretary of Defense and the President. *See The Joint Staff*, JOINT CHIEFS OF STAFF, https://perma.cc/DJ4J-5PWW; 10 U.S.C. § 151 (describing duties of the Joint Chiefs of Staff); 10 U.S.C. § 7033 (describing duties of the Chief of Staff of the Army); 10 U.S.C. § 8081 (describing duties of the Chief of Naval Operations); 10 U.S.C. § 9033 (describing duties of the Chief of Staff of the Air Force); 10 U.S.C. § 9082 (describing duties of the Chief of Space Operations); 10 U.S.C. § 164(b) (describing responsibilities of combatant commanders).

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

94. FEAVER, *supra* note 24, at 13.

95. *Id.* at 3, 59–68.

96. MAURER, CRISIS, *supra* note 28, at 86. For further criticism of Feaver's method and conclusions, see JAMES M. DUBIK, JUST WAR RECONSIDERED: STRATEGY, ETHICS, AND THEORY 64–67 (2016).

ignores the relevance and effect of personal motives, reputations, competencies, and interpersonal alliances); and it does not account for military agents whose duties definitively span the political-military divide, making decisions that are not driven solely by military expertise[97] (for example, the chairman of the Joint Chiefs of Staff or geographic combatant commanders).

Alternatively, Professor Eliot Cohen describes the civil-military dynamic (at least at the strategic elite level) as an "unequal dialogue."[98] In this asymmetry, the civilian principal's

> ultimate domination . . . is contingent, often fragile, and always haunted by his own lack of experience at high command . . . [f]or a politician to dictate military action is almost always folly. Civil-military relations must thus be a dialogue of unequals and the degree of civilian intervention in military matters a question of prudence, not principle.[99]

Under Cohen's interpretation, it *may* be practically justified for a President to step across the Huntingtonian division of labor and expertise to dictate tactical, operational decisions for the military, instead of ratifying or modifying the suggestions offered by military leadership. His emphasis on "prudence" suggests that the "dialogue" is sometimes more like a soliloquy than a conversation – an order, not a discussion – but the degree to which this happens fluctuates depending upon context: the nature of the decision; the expertise of the military advisor; the relationship of trust and deference between the civilian leader and the military leader or the military as an institution; the civilian's own earlier military experience or lack of it; precedent in similar circumstances earlier in the administration; or political considerations whose value or weight may be dispositive or at least persuasive (*e.g.*, risk tolerance, an upcoming election, negotiations with Congress on other matters, public opinion or approval ratings; relations with foreign allies, partners, or adversaries).

A hybrid view accepts Cohen's dynamical and unpredictable unequal dialogue, Huntington's characterization of the military officer's representative, advisory, and executive functions,[100] and Feaver's agency characterization of the military but without relying on a rational actor assumption. The principal-agent relationship between civilian and military elites can be analogized, under this view, to other principal-agent dynamics, like clients and their lawyers.[101] But unlike Huntington, who also drew generic professional ethos parallels to lawyers and

97. MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT 70 (1960).

98. Eliot A. Cohen, *The Unequal Dialogue: The Theory and Reality of Civil-Military Relations and the Use of Force*, *in* SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY 429, 429 (Peter D. Feaver & Richard H. Kohn eds., 2001).

99. ELIOT A. COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME 12 (2002).

100. HUNTINGTON, *supra* note 62, at 72.

101. MAURER, CRISIS, *supra* note 28, at 78–80. This is not a novel view. *See* JANOWITZ, *supra* note 97, at 5, 135, 228–31. *See also* HUNTINGTON, *supra* note 62, at 7–8.

doctors, this view takes the analogy more literally: it proposes that the military agent is bound by fiduciary-like duties to the oversight of civilian political control, whether in Congress or the White House.[102] Under this legal agency model, duties of care, competence, diligence, and concepts like "conflict of interest" and "scope of authority," suggest a degree of solicitude and deference to the ultimate objectives of the civilian principal (assuming they are legal ends and using lawful means).[103] Such relationships also imply a duty of "candor" to certain external oversight bodies that are not typically considered "principals," like courts,[104] and they obligate officers to make good faith, non-frivolous, and meritorious claims.[105] And like lawyers have a superseding professional duty to uphold the Constitution as an officer of the legal system, military agents' ultimate professional fidelity is not to the sitting president or even to the office of the president, but to the Constitution.[106]

Notwithstanding the myriad ways in which scholars have attempted to prescribe or describe the relationship between civilian and military actors, there is surely no consensus as to what the exact framework is or ought to be, though Huntington's objective control theory remains dominant in practice. Despite a lack of consensus, we might acknowledge the features common to each of them. First, they all recognize an authority asymmetry between the civilian and military elite. Second, if left unchecked, the asymmetric balance of power and influence might swing in ways the other party does not foresee or benefit from. Third, all recognize that both the civilian and military elites have professional interests worth defending against infringements. Fourth, all are necessarily based on an axiom: that the senior-subordinate relationship is derived clearly from the Constitution's allocation of national defense authorities among Congress and the President – ambiguous as they may be.[107] Finally, none of these CMR theories define the required elements or structure of a generic CMR norm despite implying that certain norms naturally develop between these parties.

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102. For a more episode-specific discussion of these themes, see Maurer, *Fiduciary Duty, Honor, Country*, *supra* note 28; Dan Maurer, *Paved with Good Intentions?: Civil-Military Norms, Breaches, and Why Mindset Matters*, 11 J. NAT'L SEC. L. & POL'Y 343, 352–53 (2021) [hereinafter Maurer, *Paved with Good Intentions*].

103. MAURER, CRISIS, *supra* note 28, at 102–05.

104. MODEL RULES OF PRO. CONDUCT r. 3.3 (A.B.A. 1983) (Candor Toward the Tribunal).

105. *Id*. r. 3.1 (Meritorious Claims and Contentions).

106. *To Support and Defend: Principles of Civilian Control and Best Practices of Civil-Military Relations*, WAR ON THE ROCKS (Sep. 6, 2022), https://perma.cc/7KJC-U6C8 (open letter co-signed by eight former secretaries of defense and five former Chairmen of the Joint Chiefs of Staff). *See also* John C. Dehn, *The Good Officer: President Trump, General Milley, and the "Necessity" of Constitutional Fidelity*, 90 BROOK. L. REV. 1, 5 (2024); Joseph G. Amoroso & Lee Robinson, *Military Personnel Swear Allegiance to the Constitution and Serve the American People – Not One Leader or Party*, CONVERSATION (Apr. 3, 2024), https://perma.cc/56FM-GP9E.

107. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("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.").

C. Norms Fill the Gaps

This "American constitutional tradition" of civilian supremacy[108] includes the historically anomalous fact that there has never been a military-led *coup d'etat* in the United States.[109] But the Constitution's text and the historical subordination of the military to civilian government, regardless of political party, neither fully accounts for nor guides the day-to-day operational relationships between the political elite and the military elite at the strategic, policymaking levels of the national security establishment.[110] No constitution can.[111] Statutes provide these parties with duty titles, establish job qualifications, and impose requirements designed to facilitate congressional oversight.[112] Other statutes keep the military away from civilian law enforcement duties[113] (with some exceptions[114]) and the electoral process.[115]

But statutes do not guide the day-to-day operational relationships between the civil-military elites either. When a senior military officer of flag rank is nominated by the president to a certain position – for example, the chairman of the Joint Chiefs of Staff – the Senate Armed Services Committee hearing on that officer's nomination usually includes some conversation about CMR. But the hearings cover disproportionately little of it and are either too abstract or narrowly focused on discrete statutory requirements. In his opening comments during General Charles Brown's confirmation hearing, for example, Senator Reed said:

> I am concerned about the health of our nation's civil and political military relationships. More and more, the military is being dragged into political fights, and public trust in the military is eroding because of it. Civilian control of the military is a sacred duty that must be carried out responsibly, not be exploited. General, I would like to know how you will work to help improve civil-military relations and demonstrate this ethos yourself.[116]

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108. Greer v. Spock, 424 U.S. 828, 839 (1976).

109. *See generally* Glenn Harlan Reynolds, *Of Coups and the Constitution*, 48 COLUM. HUM. RTS. L. REV. 111 (2017) (proposing reasons why military-led coups have not been a significant threat in American political history). However, there was a wellspring of grievance at the close of the American Revolutionary War in 1783 threatening to spark a coup against the Continental Congress, which was decisively quelled by then-Lieutenant General George Washington. *See generally* Richard H. Kohn, *The Inside History of the Newburgh Conspiracy: America and the Coup d'Etat*, 27 WM. & MARY Q. 187 (1970) (describing this episode).

110. MAURER, CRISIS, *supra* note 28, at 17.

111. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 99 (2018).

112. MAURER, CRISIS, *supra* note 28, at 141–48; *see* 10 U.S.C. § 890; M.C.M., *supra* note 18, at IV-24, para. 16(c) (discussing and explaining the statutory elements of this offense). *See also supra* text accompanying note 75.

113. 18 U.S.C. § 1385 (the Posse Comitatus Act).

114. Most notably, 10 U.S.C. §§ 251–255 (the Insurrection Act).

115. 18 U.S.C. §§ 592–593 (criminal prohibition on military presence at polling stations and other forms of electoral "interference" in elections).

116. *Hearing to Consider the Nomination of: General Charles Q. Brown, Jr., USAF for Reappointment to the Grade of General and to be Chairman of the Joint Chiefs of Staff Before the S. Comm. on Armed Servs.*, 118th Cong. 5–6 (2023), https://perma.cc/2F4S-8FX2.

But the only actual question and response related to CMR during that hearing came from Senator Wicker, reminding the General of the statutory requirement to submit the Chairman's Risk Assessment on time every year, as part of the National Military Strategy, to facilitate Congress's oversight function.[117]

Questions *not* addressed by these statutes or at nomination hearings reveal the blurred lines demarcating civilian and military elites' operational relationships. How much deference should be afforded, or is necessary, to the civilian leader if that official makes an error in judgment about military affairs? Does it matter whether that error in judgment relates to the employment of armed force or instead relates to the constitutional and statutory rights of servicemembers? When is it permissible for the senior military leadership to dissent or disobey an order from the president?[118] Other than resign in protest,[119] what other options are available to a military leader who cannot reconcile her conscience or moral code with the civilian's decision? To what extent do senior military leaders base their advice on partisan preferences or policy goals of the administration, especially when those leaders occupy their position due to that president's nomination? To what extent should they? Do civilian leaders use servicemembers' partisan support as campaign leverage? Should this be permissible? Do civilian leaders always defer to the tactical judgment of commanders in the field? Should they? In the absence of explicit textual authorities in the Constitution and legislative prescriptions or proscriptions, only "norms" are left to model and justify how these two very different parties in the civil-military relationship do or should interact with one another and the expectations each imposes on the other.

Scholars of American CMR – specifically, the subset of CMR related to the functional relations between senior civilian political authorities and senior military leaders[120] – probably agree on five points. First, that CMR norms

117. *Id*. at 19–20.

118. Dehn, *supra* note 106.

119. *See generally* Peter D. Feaver, *Resign in Protest? A Cure Worse Than Most Diseases*, 43 ARMED FORCES & SOC'Y 29 (2016) (arguing this is a poor strategy for "senior" officers); *see generally* Don M. Snider, *Dissent, Resignation, and the Moral Agency of Senior Military Professionals*, 43 ARMED FORCES & SOC'Y 5 (2017) (arguing that senior military leaders may have a duty to dissent and even resign under certain conditions as stewards of the profession and its ethos). There are recent examples of principled resignation but generally at lower-level ranks. *See, e.g*., Anthony Guerrero, *Opinion: I'm a Conservative Evangelical. I'm Done With the Army*., N.Y. TIMES (June 30, 2025), https://perma.cc/L6QH-8CC4 (op-ed by active-duty Army officer serving as a professor at the U.S. Military Academy describing his reason for submitting his resignation in protest of President Trump's transgender ban); Ellen Mitchell, *Pentagon Intelligence Officer Quits in Protest of Israel-Hamas War in Gaza*, HILL (May 13, 2024), https://perma.cc/226X-5TD3 (regarding an Army major's resignation to protest President Biden's support for Israel in its military campaign in Gaza).

120. Though somewhat oversimplifying and limiting, this article will include in this category the following positions: the President of the United States; the Secretary of Defense, Deputy Secretary of Defense, and the six Under Secretaries of Defense (and their deputies); the nineteen Assistant Secretaries of Defense; the civilian secretaries of the Army, Navy, and Air Force and their respective staff of Under Secretaries and Assistant Secretaries [in other words, all civilian policy-making officials in the Office of the Secretary of Defense and in the three military departments whose appointments must be confirmed by the Senate]; the Secretary of Homeland Security; the Special Assistant to the President for National Security Affairs ("national security advisor"); members of the House and Senate armed

exist.[121] Second, that CMR norms are significant because they reflect certain politically important values.[122] Third, that CMR norms guide conduct.[123] Fourth, that CMR norms are "eroding." Fifth, that this is a definitively negative development that should be curbed.[124]

Scholars of national security law have taken note of CMR norms as well, but this should not be surprising.[125] Norms may evolve from the parties' efforts to comply with a law or vague constitutional duties or constitutional authorities.[126] Using – or abstaining from using – a legal authority under certain conditions may

services committees; the Chairman and Vice Chairman of the Joint Chiefs of Staff, the Chiefs of Staff of the Army and Air Force, Chief of Naval Operations, Chief of Space Operations, Commandant of the Marine Corps, and Chief of the National Guard Bureau; and the commanders of the unified and specified combatant commands.

121. Marybeth P. Ulrich, *Civil-Military Relations Norms and Democracy: What Every Citizen Should Know*, *in* RECONSIDERING AMERICAN CIVIL-MILITARY RELATIONS: THE MILITARY, SOCIETY, POLITICS, AND MODERN WAR 41 (Lionel Beehner, Risa Brooks & Daniel Maurer eds., 2021).

122. Jim Golby & Hugh Liebert, *Keeping Norms Normal: Ancient Perspectives on Norms in Civil-Military Relations*, 4 TEX. NAT'L SEC. REV. 75, 78 (2021).

123. Patrick Paterson, *Civil-Military Relations: Guidelines in Politically-Charged Societies*, 52 PARAMETERS 5, 14 (2022); Risa Brooks, *Paradoxes of Professionalism: Rethinking Civil-Military Relations in the United States*, 44 INT'L SEC. 7, 8 (2020).

124. Carrie Lee & Max Margulies, *Rethinking Civil-Military Relations for Modern Strategy*, MOD. WAR INST. (Aug. 14, 2023), https://perma.cc/UR76-HJL8; Frank Sobchak, *Civil Military Relations in the United States*, SMALL WARS J. (Mar. 5, 2025), https://perma.cc/WQ6Q-MEYR.

125. *See generally* Joshua Kastenberg, *The Crisis of June 2020: The Case of the Retired Generals and Admirals and the Clarion Calls of the Critics in Lex Non Scripta (Historic) Perspective*, 99 NEB. L. REV. 594 (2021); Maurer, *Fiduciary Duty, Honor, Country*, *supra* note 28; Maurer, *Paved with Good Intentions*, *supra* note 102; Colonel Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341 (1994); Joshua E. Kastenberg, *General Ludendorff's Ghost: Insurrection, Accountability and the Retired Generals in Military Law, a National Security Imperative in the Aftermath of Donald Trump and January 6, 2021*, 48 AM. J. CRIM. L. 137 (2021); Anthony J. Ghiotto, *The Presidential Coup*, 70 BUFF. L. REV. 369 (2022); Corn & Jensen, *supra* note 36; Hannah Martins Miller, Note, *Generals & General Elections: Legal Responses to Partisan Endorsements by Retired Generals*, 73 VAND. L. REV. 1209 (2020); Lindsay Lyon Rodman, *Doing Away with the Military Deference Doctrine*, 99 N.D. L. Rev. 327 (2024); Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 U.C.L.A. L. REV. 1815 (2007).

126. *See* Keith Whittington, *The Role of Norms in our Constitutional Order*, 44 HARV. J. L. & PUB. POL'Y 17, 17–18 (2021) ("the Constitution vests a great deal of discretion in government officials of all sorts, and that norms are part of the process—part of the sub-constitutional sets of practices and rules—by which we make the constitutional system operate effectively, despite the fact that it entrusts vast discretion to government officials"); *see generally* Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws*, 15 J. EUR. ECON. ASS'N 245 (2017) (employing game theory to show a relationship between law compliance and pre-existing norms but noting that, historically, some social norms have evolved rapidly to comply with new laws and their enforcement); *c.f.* Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 367–68 (1997) ("Law can combat bad norms by reducing the benefits of compliance. For example, creating effective legal remedies for deliberate injuries reduces the benefits of a vengeance norm founded on an exaggerated concern for per sonal honor. An alternative would be to increase the costs of complying with the bad norm, as in laws making dueling a crime … [and] [l]aw can be expected to attach a sanction to a violation of a good norm when the private benefits of violation are great or the private costs (whether in loss of advantageous trans actions or in guilt) are slight, so that not everyone obeys the norm all the time, and where in addition the violation inflicts substantial social costs.").

itself be a CMR norm.[127] The breach of a norm may also be a breach of a specific authority-granting statute[128] and thus potentially expose the military member in that relationship to criminal sanction.[129] On an interbranch level, the federal judiciary's long-standing deference to the president's decisions as commander-in-chief, or deference to military practices specifically, may also constitute a kind of CMR norm.[130] Donald Trump's first administration was replete with accounts of CMR norm-breaking, often observed by administration insiders and the military

127. One example in the national security context may include the rare invocation of the Insurrection Act. *See* Elizabeth Goitein & Jospeh Nunn, *An Army Turned Inward: Reforming the Insurrection Act to Guard Against Abuse*, 13 J. NAT'L SEC. L. & POL'Y 355, 373–74 (2023) ("In general, presidents have shown considerable moderation in their use of this powerful tool. Events in 2020 and 2021, however, revealed how easily the Insurrection Act could be abused and reminded us that we cannot rely on tacit, nonbinding norms of presidential self-restraint to prevent such abuses."). Another example may be the practice of presidents complying with the reporting requirements of the War Powers Resolution ("WPR") while nevertheless decrying that at least some parts of the WPR are unconstitutional. For descriptions of this tradition or recurrence (and possibly a "norm"), see Richard F. Grimmett, CONG. RSCH. SERV., RL 33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE (2012), https://perma.cc/D9EN-7UFX; Scott R. Anderson, *The Underappreciated Legacy of the War Powers Resolution*, LAWFARE (Nov. 9, 2023), https://perma.cc/BB7Q-FSA3.

128. For example, early in his second term, President Trump invoked the Alien Enemies Act to enable the detention and rapid removal of illegal immigrants, at least insofar as they were determined to be members of Tren de Aragua. Proclamation No. 10903, 90 Fed. Reg. 13033 (Mar. 15, 2025). The Act had only ever been used during war with foreign nation states, apparently consistent with its text and original intent. This order was immediately challenged on grounds that the predicate facts necessary to invoke the Act's wartime powers were not met: the United States was not suffering an "invasion" or "predatory incursion" by Venezuela, where this transnational criminal gang originated. *See* Trump v. J.G.G., 604 U.S. 670, 672–74 (2025) (per curiam) (holding that the individuals detained pending removal were owed due process before their removal). At the time of this article's drafting, the underlying question of whether Trump's invocation of this Act that defied historical practice is unlawful remains undecided.

129. For example, President Trump, through Secretary of Defense Hegseth, ordered the deployment of active-duty Marines to Los Angeles in early June 2025 to provide security to Immigration and Customs Enforcement ("I.C.E.") agents executing arrests and raids on suspected illegal immigrants. This use of the military to support federal law enforcement operations – ostensibly to provide security for federal officers and property during civil protests of those operations – raised questions about whether the military was exposing its servicemembers to claims that they were violating the Posse Comitatus Act (18 U.S.C. § 1385), a criminal statute, designed to ensure that the armed forces are not employed by the federal government in civil policing. Qasim Nauman & John Yoon, *Marines Deployed by Trump over Newsom's Objections Arrive in L.A. Area*, N.Y. TIMES (June 10, 2025), https://perma.cc/89ZV-8C83; Lawrence Hurley, *Military Deployment in L.A. Puts Trump's Authority to Use Troops at Home in the Spotlight*, NBC NEWS (June 10, 2025), https://perma.cc/BGC4-R9AT.

130. Rodman, *supra* note 125; *see, e.g.*, Solorio v. United States, 483 U.S. 435, 448 (1987) ("[C]ivil courts are 'ill equipped' to establish policies regarding matters of military concern . . . .") (quoting *Chappell v. Wallace*, 462 U.S. 296, 305 (1983)). The issue of judicial deference to national security determinations made by presidents is implicated by Trump's invocation of the Alien Enemies Act outside of a traditional war context to address illegal immigration. Katherine Yon Ebright & Leah Tulin, *Courts Can Check the Executive Branch's Military Judgment*, BRENNAN CTR. FOR JUST. (July 10, 2025), https://perma.cc/MR6C-MW29 (discussing recent litigation over this issue and relevant Supreme Court precedent (including *Sterling v. Constantin*, 287 U.S. 378 (1932)) and the proper degree of deference to the executive branch, in the U.S. Court of Appeals for the Fifth Circuit).

elites themselves.[131] Therefore, to say that norms feature prominently in any discourse about CMR – academically or in popular media – is a gross understatement.

But in what seems to be a critical omission, there appears to be no agreement or identifiable consensus on what a norm in the civil-military relationship context actually *is*. This is not to say that scholars lack examples of supposed CMR norms. Rather, the participants in the CMR and the academic communities that study CMR lack a statement of the fundamental properties of *any* CMR norm.[132] Even the courts – to the limited extent that they address *intra*-executive branch civil-military relationships – are at best imprecise and at worst unhelpfully oversimplified: they express the legal redlines, but not the extent to which they are based on norms, meant to protect or create new norms, or whether following that legal requirement is itself a norm.[133]

To the extent such norms are discussed by scholars, emphasis has always been placed on cataloguing current norms of CMR or arguing that certain norms ought to exist; that is, literature has either been descriptive or prescriptive.[134] Many behaviors and expectations are referred to as "norms," including: senior military leaders will not resign when they disagree or dissent from a president's or defense secretary's order or policy (as both descriptive and normatively preferable);[135] members of the military will not publicly criticize senior civilian political leaders (as "normatively correct behavior");[136] the President will not select senior officers for nominative positions based on a prospect's political alignment;[137] and retired

131. Dan Lamothe, Missy Ryan & Alex Horton, *Pentagon Anticipates Major Upheaval with Trump's Return to White House*, WASH. POST (Nov. 8, 2024), https://perma.cc/23TT-TAAU; Tom Nichols, *The General's Warning*, ATLANTIC (Oct. 16, 2024), https://perma.cc/GQ2Y-JE67; *see generally* PETER BERGEN, TRUMP AND HIS GENERALS: THE COST OF CHAOS (2019); BOB WOODWARD & ROBERT COSTA, PERIL (2021); BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE (2019); MARK T. ESPER, A SACRED OATH: MEMOIRS OF A SECRETARY OF DEFENSE DURING EXTRAORDINARY TIMES (2022); H.R. MCMASTER, AT WAR WITH OURSELVES: MY TOUR OF DUTY IN THE TRUMP WHITE HOUSE (2024) (first-hand account by Lieutenant General (ret.) McMaster about his service as Trump's National Security Advisor for thirteen months).

132. In fact, there is no standard definition of the broader concept of "norm" across disciplines. Golby & Liebert, *supra* note 122, at 79. This problem has been known – and attempts have been made to solve it at least from a sociological point of view – for decades. *See, e.g.*, Gibbs, *supra* note 26, at 586 (noting the absence of generic definition of "norm," absence of a typology of different norms, and absence of a method to distinguish absolute from contingent norms).

133. *See* Greer v. Spock, 424 U.S. 828, 837–38 (1976) (citing U.S. CONST. pmbl., art. I, § 8, art. II, § 2, and quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) for the proposition that "this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable."). *Greer* also refers to the "American constitutional tradition of a politically neutral military establishment under civilian control. It is a policy that has been reflected in numerous laws and military regulations throughout our history." Greer, 428 U.S. at 839.

134. Golby & Liebert, *supra* note 122, at 77–78.

135. Richard B. Myers & Richard H. Kohn, *The Military's Place*, 86 FOREIGN AFFS. 147, 149 (2007); Dave Barno & Nora Bensahel, *Rough Seas Ahead: Steering the Military Profession*, WAR ON THE ROCKS (Mar. 4, 2025), https://perma.cc/52BM-YXJA.

136. URBEN, *supra* note 21, at 77–78.

137. *See, e.g.*, Steve Corbett & Michael J. Davidson, *The Role of the Military in Presidential Politics*, 39 PARAMETERS 58, 67–68 (2009) (referring to such selections as "disturbing").

officers – especially retired general and flag officers – should not opine publicly on significant national policy matters or campaign on behalf of a national candidate.[138] But why these should be considered "norms" is an assumption left unexplained in both the literature and popular press.[139]

On the other hand, non-norms are sometimes easy to identify intuitively as well. The responsibility to advise the president on "ongoing military operations"[140] or a prohibition on the chairman of the Joint Chiefs of Staff exercising military command over the Joint Chiefs or any of the armed forces[141] do not state or create norms – they are rules encoded in statutes in which Congress has defined this position. Likewise, a policy memorandum that assigns the chairman of the Joint Chiefs of Staff to a non-voting advisory position during National Security Council meetings states not a norm but, instead, merely a rule of procedure that can be modified by an appropriate authority at any time.[142] The historical practice of almost never appointing an active-duty military officer as the President's national security advisor also intuitively strikes one as a custom, not a norm.[143] But why these should be categorically excised from a catalogue of CMR norms remains unexplained.

Other than illustrations of what intuitively seem like "norms" in CMR, there is no formal definition. In fact, there is not even a *lexicographical* or dictionary definition of a CMR norm. But we ought not be concerned so much with dictionary definitions – what Brian Leiter pejoratively called "banal descriptive sociology"[144] – or what might be found in a military doctrine manual.[145] What we mean

138. Miller, *supra* note 125, at 1237; Heidi Urben, *Generals Shouldn't Be Welcome at These Parties: Stopping Retired Flag Officer Endorsements*, WAR ON THE ROCKS (July 27, 2020), https://perma.cc/7FJC-WQ6Q.

139. Leading classical and contemporary works (whether theoretical or empirical in their approach) on American civil-military relations – and the President's role as commander-in-chief particularly – regularly refer to and discuss norms and military professional "culture" with respect to how military elites engage with civilian authorities, even if only tacitly, but they do not define the concept before opining on the degree to which such norms are followed and why. *See, e.g.*, HUNTINGTON, *supra* note 62; S.E. FINER, THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS 24–28 (1962); JANOWITZ, *supra* note 97, at 5–16, 347–50, 361–69; DALE R. HERSPRING, THE PENTAGON AND THE PRESIDENCY: CIVIL-MILITARY RELATIONS FROM FDR TO GEORGE W. BUSH 13–21 (2005); FEAVER, *supra* note 24; PETER W. RODMAN, PRESIDENTIAL COMMAND: POWER, LEADERSHIP, AND THE MAKING OF FOREIGN POLICY FROM RICHARD NIXON TO GEORGE W. BUSH 185–86 (2009); FISHER, *supra* note 33; URBEN, *supra* note 21, at 202–03 (though Urben does briefly define "norms" as "informal mechanisms that govern behavior," she does not explore their properties in a generic civil-military relationship with more specificity).

140. 10 U.S.C. § 153(a)(3)(A).

141. 10 U.S.C. § 152(c).

142. National Security Presidential Memorandum on Organization of the National Security Council and Subcommittees, 2025 DAILY COMP. PRES. DOC. 1 (Jan. 20, 2025), https://perma.cc/N5PT-4RRH.

143. David Barno & Nora Bensahel, *An Active-Duty National Security Advisor: Myths and Concerns*, WAR ON THE ROCKS (Feb. 28, 2017), https://perma.cc/VZ82-946H (referring to the "anomaly" of then-Lieutenant General H.R. McMaster serving as a politically appointed national security advisor during President Trump's first term, only the third active-duty officer to do so).

144. Brian Leiter, *Beyond the Hart-Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 45 (2003).

145. U.S. DEP'T OF DEF., JOINT PUBLICATION 1, DOCTRINE FOR THE ARMED FORCES OF THE U.S. 1 (2017), https://perma.cc/5R23-CNUM ("The US Armed Forces function within the American system of

instead is that there is no deeper explanation of the characteristics or properties of a CMR norm, of what it presupposes and implies, of what makes an act or set of behaviors between the parties in a civil-military relationship a "norm" as opposed to a tradition, standard, rule, law, duty, habit, custom, convention, or rule of thumb, or whether a CMR norm is best understood as some or all of these concepts and categories some or all of the time.[146]

This article engages in a conceptual analysis – a philosophical methodology intended here to draw out implications from a vague but often-employed concept and draw distinctions about that concept to ensure it applies only to those conditions that warrant it and are consistent with our intuitions about it.

II. CONCEPTUAL ANALYSIS METHODOLOGY

The term "civil-military relations (CMR) norm" is a shorthand label universally applied to a concept that describes the interactions among certain actors in a defined professional relationship.[147] And while the "civil-military" qualifier is a relatively straightforward definition (see Part IV, *infra*), explaining how it applies to interactive behavior to constitute a norm is largely unexamined. The interpretations of CMR norms default to those held by the commentator at hand and publicly available precedent. The phrase "CMR norm" is both commonly used and vague. To generate useful insight into CMR norms and understand possible pathologies in navigating those norms, a concrete definition is required. The analytical method of conceptual analysis provides a framework for producing an accurate characterization of a CMR norm.

Conceptual analysis "is a means of clarifying or explicating and giving definition, dimension, and meaning to ordinary and obscure expressions."[148] This method involves isolating the factual conditions that are separately *necessary* and collectively *sufficient* to apply the concept *meaningfully* in *relevant* contexts. One legal philosopher described this process as identifying and examining the irreducible and necessary "entities that fall under the concept [under review],"[149] while others have explained the process as one that "aims to elucidate complex notions by breaking them up into their simpler component parts,"[150] and one that offers "philosophically rigorous explications of various concepts that figure prominently in discourse about the law . . . [such that] the nature of [an] important legal practice" is made clearer.[151] At its core, the function of conceptual analysis is twofold: first, to clarify (not necessarily to simplify) the manner by which the

civil-military relations and serve under the civilian control of the President, the Commander in Chief." (the only reference to "civil-military relations" in the publication)); *see also* U.S. DEP'T OF DEF., DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2021), https://perma.cc/3PWJ-V4D7 (no definition of "civil-military relations" contained therein).

146. SHAPIRO, *supra* note 21, at 409 n.8.

147. Johan Olsthoorn, *Conceptual Analysis*, *in* METHODS IN ANALYTICAL POL. THEORY 155, 171 (Adrian Blau ed., 2017).

148. STEPHEN PETRINA, METHODS OF ANALYSIS 1 (2016), https://perma.cc/22U4-JNDK.

149. SHAPIRO, *supra* note 21, at 405 n.9.

150. Olsthoorn, *supra* note 147, at 153.

151. Kenneth Einar Himma, *Conceptual Jurisprudence: An Introduction to Conceptual Analysis and Methodology in Legal Theory*, 26 REVUS 65 (2015), https://perma.cc/Y3A5-2WA8.

picture of something in our heads and the words we use to describe it match reality and, second, to enable more refined scrutiny and – possibly – practical usage of that now clarified concept.[152]

Conceptual analysis is neither universally heralded nor devoid of controversy (especially among philosophers who, as a profession, arguably invented it),[153] nor is there a single acclaimed process for engaging in it.[154] Critics can argue that it may rely too much on one's intuition, ending up with a result that is readily disproven by a scientifically-motivated empirical study or lacks a true accounting of cause-and-effect within the concept itself.[155] But these limitations notwithstanding, it seems to offer the best shot at moving the project of understanding what a CMR norm is or could be beyond where we sit now, which is with nothing in our heads *except* intuition and presumptive examples. "The elucidation of the language of political science," argued Felix Oppenheim, "is by no means an idle exercise in semantics, but in many instances a most effective way to solve substantive problems of political research."[156]

One method for doing conceptual analysis, endorsed by Professor Shapiro, broadly includes four activities or strategies to follow in any order. Proceeding "on the basis of our intuitions," these strategies include (1) comparing "institutions and practices that are similar, but not identical"; (2) "puzzle-solving" or spotting possible contradictions and paradoxes in how we employ or understand certain terms and the concepts they purport to label; (3) the use of hypotheticals to explore how provisional definitions of concepts might work or fail when applied to reasonably foreseeable circumstances and borderline cases (which permits us to see with greater clarity what conditions are necessary or merely contingent features);[157] and "the examination of . . . historical evidence" related to

152. Alexander S. Harper, *An Oblique Epistemic Defense of Conceptual Analysis*, 43 METAPHILOSOPHY 235, 237 (2012) ("Conceptual analysis attempts to explicate what it is that we mean when we use a concept like *knowledge* so that we can investigate the properties and instantiations of something we care about." (emphasis in original).

153. *See, e.g.,* SHAPIRO, *supra* note 21, at 13; Andrew Melnyk, *Conceptual and Linguistic Analysis: A Two-Step Program*, 42 NOÛS 267 (2008); Michael Beaney & Thomas Raysmith, *Analysis*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., 2024), https://perma.cc/8LMG-6Z5.

154. SHAPIRO, *supra* note 21, at 18 ("[C]onceptual analysis is a tricky enterprise . . . [because] it lacks established procedures for guaranteeing that one has discovered an entity's identity.").

155. *See generally* Stephen Laurence & Eric Margolis, *Concepts and Conceptual Analysis*, 67 PHIL. & PHENOMENOLOGICAL RSCH. 253 (2003) (reviewing the revival of conceptual analysis within analytical philosophy but noting that the methodology still suffers from these objections).

156. Felix E. Oppenheim, *The Language of Political Inquiry: Problems of Clarification*, *in* HANDBOOK OF POLITICAL SCIENCE 284 (Fred I. Greenstein & Nelson W. Polsby eds., 1975).

157. *See also* David J. Chalmers & Frank Jackson, *Conceptual Analysis and Reductive Explanation*, 110 PHIL. REV. 315, 322 (2001) ("When given sufficient information about a hypothetical scenario, subjects are frequently in a position to identify the extension of a given concept, on reflection, under the hypothesis that the scenario in question obtains. Analysis of a concept proceeds at least in part through consideration of a concept's extension within hypothetical scenarios and noting regularities that emerge. This sort of analysis can reveal that certain features of the world are highly relevant to determining the extension of a concept, and that other features are irrelevant. What emerges as a result of this process may or may not be an explicit definition, but it will at least give useful information about the features in virtue of which a concept applies to the world.").

supposed norms – what Shapiro calls the "Anecdotal Strategy."[158]

Because CMR necessarily lies at the intersection of politics and law, an approach intended for a conceptual analysis in political theory, not just legal theory, may also be appropriate. David Baldwin, for example, begins his conceptual analysis of "dependence" and "interdependence" in international relations by articulating what falls under the umbrella of "conventional usage" including both common and scholarly practice across various academic fields.[159] Baldwin then continues his conceptual analysis by distinguishing between traditional and contemporary uses,[160] accounting for various particularized versions of the concept,[161] examining possible distinctions between similar terms or labels for the concept,[162] and finally proposing various potential explanations in light of counterfactuals while assessing implications for component elements or sub-concepts.[163]

This article will pursue a blend of these two approaches – one used by legal theorists and one by political theorists. Whether the outcome is something capable of yielding the benefits suggested in Part V may be answered, as Baldwin does, by applying Oppenheim's evaluative criteria.[164] To paraphrase that criteria: (1) concepts should be operational; (2) concepts should establish connections with other relevant and related terms; (3) concepts should spot and highlight theoretically important but overlooked aspects of the subject in question; (4) concepts should not prevent empirical investigation that could confirm or falsify the definitions one has derived; (5) concepts should remain reasonably close to ordinary language meanings; and (6) concepts should be humble.[165] These criteria are modifiable as Oppenheim does not bar further analysis as appropriate.[166]

The first step this article takes in analyzing the concept of the CMR norm is to zoom outward from the specific to the general and explain what a "norm" is, as if it were a genus. With that broader concept settled, at least for the purpose of advancing the argument, the article will then address the field of practice and scholarly interest called "civil-military relations" to qualify a very specific species of norm.

III. DEFINING NORMS, GENERALLY

In the mid-1960s, Professor Jack Gibbs observed that "[a]though the concept is central to the social sciences, norms have not been treated in a truly systematic manner."[167] That gap has led to some confusion about the meaning of a "norm." Is it the same thing as an unpublished but well-adhered-to *standard*? Is it more

158. SHAPIRO, *supra* note 21, at 19–22.
159. David A. Baldwin, *Interdependence and Power: A Conceptual Analysis*, 34 INT'L ORG. 471, 475–86 (1980).
160. *Id*. at 486–89.
161. *Id*. at 489–92.
162. *Id*. at 492–95.
163. *Id*. at 495–504.
164. *Id*. at 504–06.
165. Oppenheim, *supra* note 159, at 297–309.
166. *Id*.
167. Gibbs, *supra* note 26, at 594.

like a *rule* but enforced through some unofficial social censure? Is it, in some contexts, akin to a *law*, promulgated by an official body of professionals or experts, complete with definitions and enforced through other rules that punish breaches? Or is it something like a *duty*, perhaps self-regulated obedience but shared by many like-minded members of a particular community? Is it merely a *custom*, the expected way of conducting oneself under certain contexts and circumstances, approved by much of the relevant community through repetition and with the risk of social ostracism accompanying its violation?[168] Or could it be a widely shared *habit*, a precedent followed for no reason other than that it is easier to continue the practice than to change, despite no necessarily rational basis for why it began?

Many of these norm-adjacent concepts arguably have a plainer meaning than "norm," are well-accepted, and do not need further elaboration in common conversation.[169] In other words, whether a corporate entity satisfies a regulation's *standards* of technical compliance, or whether a school's *rules* for cell phone usage are realistic and fair, or whether a legislative bill signed by the governor constitutes a *law* generally do not get distracted or delayed by confusion over intricate lexical or philosophical nit-picking distinctions. But the concept of *custom* can also have a technical, legal meaning, one that makes it seem far more formal, widespread, and at risk for reprisal for noncompliance compared to a mere norm. *Black's Law Dictionary*, for example, defines custom as a "practice that by its common adoption and long, unvarying habit has come to have the force of law" – its essential elements being its "commonness" (as in widely-held), its durability, and its legally binding effect. [170] In other words, no discretion exists about whether to follow this long, unvarying practice. The U.S. military's criminal justice system also elevates *custom* into a legal obligation under some circumstances, and failure to follow it can have the same legal ramifications as disobeying a lawful order.[171] Since the legal profession can elevate customs to law but does not extend that same import to norms, a norm is conceptually distinct from a custom.

Like custom, the other conceptual candidates for defining a norm may also carry some normative value or weight by instantiating a community's sense of "right" or "wrong" or providing waypoints along a spectrum of "better" to "worse" conduct. It is not yet clear whether a norm necessarily carries such weight and reflects certain values. Concepts like *standard*, *rule*, and *law* are usually enforced through punishment imposed by independent or neutral arbiters – juries, judges, executive branch oversight agencies, supervisors, teachers, school administrators.

168. An alternative definition of "custom" is "a pattern of behavior such that individuals (unconditionally) prefer to conform to it because it meets their needs." CRISTINA BICCHIERI, NORMS IN THE WILD: HOW TO DIAGNOSE, MEASURE, AND CHANGE SOCIAL NORMS 15 (2017).

169. This is not to say that specialized academics do not perform what amounts to conceptual analysis of these terms too. *See, e.g.*, IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS (1785); H.LA. HART, THE CONCEPT OF LAW (1961). A more recent example is PAULINE SHANKS KAURIN, ON OBEDIENCE: CONTRASTING PHILOSOPHIES FOR THE MILITARY, CITIZENRY, AND COMMUNITY (2020).

170. *Custom*, BLACK'S LAW DICTIONARY (8th ed. 2004).

171. 10 U.S.C. § 934 (discussing punishment of custom violations).

Violators of these can expect adverse consequences because the community seeks to express its approbation or condemnation of that conduct in a public manner, or to deter it, or to punish it for the sake of just deserts.

So too with the concept of *duty*. In common legal meaning, the generic concept of *duty* is defined as a "legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right."[172] Thus, this concept is characterized by its legally enforceable nature and its one-sidedness. For instance, while one actor may have an obligation to perform or behave in a certain way, the duty itself does not impose a reciprocal duty on another person. Instead, it creates an asymmetric right that the other actor can enforce against the duty-bound actor.

The military's criminal code treats *duty* in a similar fashion but conflates it with another similar concept: "[a] duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or *custom* of the Service," and its violation is punishable as a federal crime.[173] It is not yet clear whether violating a *norm* carries the risk of punishment too. Perhaps each of these concepts can, under certain conditions, qualify as a norm itself. But what conditions? If a "norm" is characterized by its frequency, how frequent is enough? How many actors must participate in it? Must it be practiced for some threshold minimum period of time, akin to a custom or habit, but carry some sort of reciprocity unlike a duty, before it can be reasonably called a *norm*? If it is defined in terms of expectations, we must confront the question of perspective: whose expectations count and why theirs?

Several academic disciplines have adopted or suggested definitions of *norm*, but which are usually implied to be relevant definitions only in the context of that idiosyncratic discipline. In the law, a norm has been taken to be:

> any standard – general, individualized, or particularized – that is supposed to guide conduct and serve as a basis for evaluation or criticism . . . [s]trict rules, rules of thumb, presumptions, principles, standards, guidelines, plans, recipes, or orders, maxims, and recommendations can all be norms . . . [f]urthermore, moral, legal, religious, institutional, rational, logical, familial, and social standards are norms as well . . . [and] they purport to tell [their subjects] what, in some sense, they are entitled to, ought to, or may do.[174]

Legal theorist Hans Kelsen referred to law as a hierarchy of norms, each of which is an "ought to" rather than a "must do" or "must not do," validated by a higher level norm, rule, regulation, law, or mandate.[175] Daphna Renan, referencing American presidents and the influence of norms on their behavior, defined norms

172. *Duty*, BLACK'S LAW DICTIONARY (8th ed. 2004).

173. M.C.M., *supra* note 18, at IV-28, para. 18(c)(3)(a) (emphasis added).

174. SHAPIRO, *supra* note 21, at 41.

175. HANS KELSEN, PURE THEORY OF LAW 4 (Max Knight trans., 1967); *see also* RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 111–18 (2021).

as a "thick network of rules or standards" that are "unwritten or informal" that "make concrete, and mediate among, competing values"[176] which "govern political behavior"[177] because they are "expected behavioral patterns . . . [that] generate moral reasons for compliance."[178] Like custom and duty, a norm has a lexicographical meaning: "a model or standard accepted (voluntarily or involuntarily) by society or other large group, against which society judges someone or something."[179]

In philosophy, a norm has been described as a "prescribed guide for conduct or action which is generally complied with by the members of a society" and, more specifically, "a significant social pressure for conforming to them and against deviation – actual or potential – from them."[180] In studying norms related to the commission of mass atrocities, Paul Morrow defined norms generically as "practical prescriptions, permissions, or prohibitions, accepted by individuals belonging to particular groups, organizations, or societies, and capable of guiding the actions of those individuals."[181] But for how long, and by how many individuals in that particular group, must this acceptance continue for it to be considered a norm and therefore pragmatic guidance to follow? What happens to the individual who does not follow that guidance?

Sociologist Jon Elster regarded norms as "[i]nformal institutions."[182] Sociologist Bruce Doherenwend more specifically described a social norm as a species of *rule,* stating:

> a rule which, over a period of time, proves binding on the overt behavior of each individual in an aggregate of two or more individuals. It is marked by the following characteristics: (1) Being a rule, it has content known to at least one member of the social aggregate. (2) Being a binding rule, it regulates the behavior of any given individual in the social aggregate by virtue of (a) his having internalized the rule; (b) external sanction in support of the rule applied to him by one or more of the other individuals in the social aggregate; (c) external sanctions in support of the rule applied to him by an authority outside the social aggregate; or any combination of these circumstances.[183]

Doherenwend properly accounts for time as playing some definitional role, for it seems clear enough that a norm is likely not imposed spontaneously, does not last only briefly, and is not *sua sponte* enforceable, as that would risk appearing to be

176. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2189–91 (2018).

177. *Id*. at 2196.

178. *Id*. at 2197.

179. *Norm*, BLACK'S LAW DICTIONARY (8th ed. 2004).

180. EDNA ULLMANN-MARGALIT, THE EMERGENCE OF NORMS 12–13 (1977).

181. PAUL C. MORROW, UNCONSCIONABLE CRIMES: HOW NORMS EXPLAIN AND CONSTRAIN MASS ATROCITIES 2 (2020).

182. Jon Elster, *Norms*, *in* THE OXFORD HANDBOOK OF ANALYTICAL SOCIOLOGY (Peter Hedstrom & Peter Bearman eds., 2009); *see also* Jon Elster, *Political Norms*, 63 JERUSALEM PHIL. Q. 47–59 (2014).

183. Bruce P. Doherenwend, *Egoism, Altruism, Anomie, and Fatalism: A Conceptual Analysis of Durkheim's Types*, 24 AM. SOCIO. REV. 470, 470 (1959).

an arbitrary and capricious attempt at coercion. But it is not clear why a rule known only to a single member of a "social aggregate" (which might be as small as two people, according to his definition) can be "regulated" and enforced by "one or more of the other individuals in the social aggregate" or even by an external authority outside of that community.[184] If one independent way in which the supposed norm is binding is through a person's self-regulation, Doherenwend's definition does not clarify what it means to have "internalized" that rule. Does that mean adherence without understanding its nature, source, or full implications, or does internalization presuppose these elements?

Gibbs took a more holistic approach:

> A norm in the generic sense (i.e., encompassing all the various types of norms) involves: (1) a collective evaluation of behavior in terms of what it *ought* to be; (2) a collective expectation as to what behavior *will be*; and/or (3) particular *reactions* to behavior, including attempts to apply sanctions or otherwise induce a particular kind of conduct. Virtually all conceptions of norms can be subsumed under this generic definition."[185]

Gibbs summarized a norm as a "shared belief that persons ought or ought not to act in a certain way"[186] which permits a member of that community or an observer to make "predictions as to what persons will do."[187] And while Gibbs would suggest that laws are a kind of norm whose violation triggers a very specific type of "reaction," he asserted that, for norms *generally*, "the reaction does not necessarily involve the application of penalties – any kind of an attempt (even the friendly admonition) to secure conformity is sufficient as long as it is made by persons in particular status."[188] Importantly, in contrast to the Kelsen, Renan, and Doherenwend definitions above, Gibbs's definition eschews identifying *norms* – as a category – with specific behavioral elements. He wrote, "if we identify norms in terms of behavior, it is tautological to speak of the former as influencing or controlling the latter. The position is taken here that the degree of conformity to norms is a contingent but not a definitional attribute."[189]

Aside from legal scholars, philosophers, and sociologists, political scientists offer their own surfeit of similarly constructed, but far from uniform, definitions of a norm. For Jim Golby and Hugh Liebert, norms are simply the "unwritten rules of the game" played by certain actors in a given professional relationship.[190]

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184. *Id.*

185. Gibbs, *supra* note 26, at 589 (emphasis in the original); *cf.*, Bicchieri, *supra* note 168, at 35 (defining "social norm" as "a rule of behavior such that individuals prefer to conform to it on condition that they believe (a) most people in their reference network conform to it . . . and (b) that most people in their reference network believe they ought to conform to it").

186. Gibbs, *supra* note 26, at 589.

187. *Id.*

188. *Id.* at 590.

189. *Id.* at 588.

190. Golby & Liebert, *supra* note 122, at 79.

For Julia Azari and Jennifer Smith, norms are "unwritten or informal rules that structure collective expectations about how disputes will be resolved."[191] But why only expectations about resolving disputes? Surely, dispute resolution is relevant, but is more proactive dispute *prevention* not also something we might intuit about a relationship norm, whether between executive branch agencies, inside the White House, or between key influencers or decision-makers in Congress? In their book, *How Democracies Die*, Steven Levitsky and Daniel Ziblatt define norms as something like "shared codes of conduct" that "become common knowledge within a particular community . . . accepted, respected, and enforced by its members."[192] Earlier work by Levitsky and Gretchen Helmke refers to norms as "socially shared rules, usually unwritten, that are created, communicated and enforced outside officially sanctioned channels."[193] More recently, Nicolas Davis and his co-authors characterize norms as "behavioral rules prescribing boundaries of acceptable behavior within a specific community and context contingent on . . . the belief that others will follow a given rule [and] violating a rule will bring sanctions from others."[194]

Like Gibbs's sociological position,[195] this view takes belief about the norm's supposed establishment of an expectation of conformity to be a bedrock necessary element, with whatever happens to serve as "boundaries of acceptable behavior" to be the contingent variable, dependent on the character of the relationship or community in which the norm is said to reside. Finally, in broader terms but intended expressly for the context of CMR, Marybeth Ulrich holds norms to be "shared codes of conduct in a society applicable to the relationship between the military, the political leadership, and civilian society."[196] Obviously, this definition says nothing about when those "codes" became operative, how many people constitute a "society," or whether belief in and conformity with those codes are punishable in some private or public manner.

From a conceptual analysis stance, none of these definitions specify the individually necessary and collectively sufficient components of a CMR norm in general. Perhaps that is too much to ask without first embracing a particular context, like norms for [choose a specified profession, relationship, organization, culture, or community]. Nevertheless, at this point, it does not seem irresponsible to propose a tentative catalogue of core characteristics of norms in general, drawn from the various definitions offered by the fields of law, philosophy, sociology, and political science.[197]

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191. Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSPS. ON POL. 37, 38 (2012).

192. LEVITSKY & ZIBLATT, *supra* note 111, at 101.

193. Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSPS. ON POL. 725–40 (2004) (emphasis added).

194. NICOLAS T. DAVIS, KEITH GADDIE & KIRBY GOIDEL, DEMOCRACY'S MEANINGS: HOW THE PUBLIC UNDERSTANDS DEMOCRACY AND WHY IT MATTERS 135 (2022).

195. *See* Gibbs, *supra* note 26, at 589

196. Ulrich, *supra* note 121, at 46.

197. No doubt this article misses useful and thoughtful conceptualizations of "norm" from other academic disciplines, perhaps outside of the humanities and social sciences. Because this article attempts a first approach to the concept of a "CMR norm," drawing from only these four fields may be insufficient but doing so is not unreasonable given their respective concerns with CMR, generally. For examples of books in which each field tackles that subject, see, e.g., MAURER, CRISIS, *supra* note 28

Assuming Gibbs is correct that his three-part description accurately subsumes all types of norms and is context-independent, we will begin with the assertion that a norm is:

(1) a collective evaluation of behavior in terms of what it *ought* to be;

(2) a collective expectation as to what behavior *will be*; and/or

(3) particular *reactions* to behavior, including attempts to apply sanctions or otherwise induce a particular kind of conduct.[198]

This article takes (1) to mean that a norm includes an implicit judgment shared within a specific community about what behavior is *preferable* (and by implication, not preferable) when members of that community interact with each other. To prefer one behavior over another is to say that it satisfies certain values – perhaps values of efficiency, justice, fairness, equity, or consistency with accepted principles like equality or hierarchy. This article takes (2) to mean an expectation shared within a specific community about what behavior is *probable* (and by implication, improbable) when members of that community interact with each other, given what they have judged to be preferable in light of certain accepted values. And this article takes (3) to mean a non-arbitrary, established set of *punishments* (broadly inclusive) and actions preliminary to punishment imposable upon members of that community when they fail to act in accordance with that preferable, probable behavior.

But where Gibbs views these three elements as alternative descriptions of a generic norm, this article views them all as individually necessary and collectively sufficient conditions. Integrated, they are the three legs of a stool. For Gibbs, one type of behavior is a "norm" because it reflects shared values, but another type of behavior may not, such as prison rules regulating the behavior of convicts, unpopular laws, or the custom of drinking coffee in the morning before work.[199] And unlike Gibbs, this article distinguishes laws, rules, and customs from norms as separate concepts. Moreover, the author does not see how a series of repeated "reactions" to behavior (whether criminal prosecutions or verbal admonishments) would alone constitute a norm if that behavior was not also believed by a community to have some positive or negative value and thus a judgment about whether members ought to behave that way. Likewise, the author does not see how collective predictions about what members in a community will do are rationally possible unless there already exists shared understanding of what motivates those members to do or not do certain things and what sanctions exist to induce or deter that behavior.

(a legal approach); JANOWITZ, *supra* note 97 (a sociological approach); KAURIN, *supra* note 172 (a philosophical approach); HUNTINGTON, *supra* note 62; FEAVER, *supra* note 24; URBEN, *supra* note 21 (political science approaches).

198. Gibbs, *supra* note 26, at 589.

199. *Id.*

From these core elements, a tentative, derivative, and applied definition of "*civil-military relations* norm" will be posed in Part V, *infra*. While the generic norm above might include – as Gibbs says – a standard encoded and enforced by criminal law, or the norm is simply a pattern of obedience to that particular law, the more specific CMR norm concept may exclude laws altogether.

IV. EXAMPLES OF SUPPOSED CMR NORMS AND THEIR FEATURES

Before deriving what a CMR norm is, the qualifier of "CMR" should be pinned down. Surveying the vast interdisciplinary scholarship on CMR, Professor Risa Brooks described the field as:

> encompass[ing] several different civilian and military relationships, which are variously studied by sociologists, historians, and political scientists. Those relationships include that between the military institution and broader society, between the military and other government bureaucracies, and between leaders and their organizations within the military. The primary emphasis within the discipline of political science, however, is on relations between political elites and the senior military leadership at the state's apex.[200]

The target subject of this article is the set of norms associated with Brooks's last "apex" category. Giving a bit more detail to that class, this article takes CMR to consist of three aspects: relational, identity, and contextual:

- *Relational*: the interpersonal and intergroup associations and interactions, formal and informal, among . . .
- *Identity*: . . . members of Congress, senior politically appointed members of the national security establishment,[201] the president and senior members of the civilian White House staff;[202] the chairman and vice chairman of the Joint Chiefs of Staff and uniformed chiefs of the Armed Services in their individual capacity and as the Joint Chiefs of Staff;[203] combatant commanders,[204] and senior flag officer-level operational commanders of joint forces abroad . . .
- *Contextual*: . . . in the context of their deliberations, decisions, actions, and intentions related to advancing national security goals according to their respective official duties and positions.

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200. Risa A. Brooks, *Integrating the Civil-Military Relations Subfield*, 22 ANN. REV. POL. SCI. 379, 380 (2019).

201. *E.g.*, the Secretaries of the Department of Defense and Homeland Security, the Intelligence Community, the civilian deputies, and undersecretaries.

202. 50 U.S.C. § 3021(e) (*e.g.*, the Special Assistant to the President for National Security and the National Security Council Staff).

203. 10 U.S.C. § 151 (*e.g.*, the Chief of Naval Operations, the Chief of Staff of the Army, the Chief of the National Guard Bureau).

204. 10 U.S.C. § 164.

From various journalistic, scholarly, and autobiographical sources, examples of what have been described as CMR norms in light of those three components include:

- Civilian executive branch officials – most notably the president and secretary of defense ("SECDEF") – have the "right to be wrong;" they cannot be formally vetoed or overruled by the military even in highly technical matters idiosyncratic to the military profession.[205]
- Senior military leaders do not resign when they disagree with, or dissent from, a president's or SECDEF's directive, order, or policy (we might call this the "duty to salute and execute" norm).[206]
- Senior military leaders keep junior servicemembers from being used as "props" in political rallies or campaign events (non-partisanship norm)[207]
- Presidents do not pardon U.S. military accused, suspected of, or convicted of war crimes.[208]
- Presidents do not purge senior officers from nominative positions based on the officers' political preferences or lack of "loyalty" to the president[209] (apolitical norm).
- Civilian executive branch officials grant significant discretion to military commanders and other uniformed officials to make tactical and operational decisions in the midst of conflict and combat; *i.e.*, most traditional military missions and operations will not be micromanaged by civilian authorities (a trusting non-interference norm).[210]

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205. *See, e.g.*, Peter D. Feaver, *Right or Wrong?: The Civil-Military Problematique and* Armed Forces & Society*'s 50th*, 51 ARMED FORCES & SOC'Y 507, 507–09 (2025); Peter D. Feaver & Richard H. Kohn, *Civil-Military Relations in the United States: What Senior Leaders Need to Know (and Usually Don't)*, STRATEGIC STUD. Q., Summer 2021, at 12.

206. *See* Richard H. Kohn, *Always Salute, Never Resign: How Resignation Threatens Professionalism and National Security*, FOREIGN AFFS. (Nov. 10, 2009), https://perma.cc/UU6B-L5RP; PETER BAKER & SUSAN GLASSER, THE DIVIDER: TRUMP IN THE WHITE HOUSE 2017–2021 476 (2022) (quoting Peter Feaver's advice to General Mark Milley in June 2020: "We have no tradition of resignation in protest amongst the military," and that doing so, in the face of a lawful-but-awful order, is "very, very subversive of civilian control.").

207. *See* Stephen Saideman, *Opinion: Trump's Fort Bragg Speech Was a Serious Step Toward Ending Democracy*, MSNBC (June 11, 2025), https://perma.cc/A6EA-JYJD.

208. *See* Ulrich, *supra* note 121, at 55 (noting that Trump's pardons of military personnel "convicted of war crimes" against the advice of advisors in the Pentagon "fray[ed] the 'civil-military bargain,' eroding trust in the civil-military relationship."); *see also* Dan Maurer, *War Crime Clemency: The President's Self- (Defeating) Pardon*, 82 MD. L. REV. 581 (2023).

209. *See* Nevitt, *supra* note 11.

210. This is generally consistent with Huntington's "objective control" theory of civil-military relations. HUNTINGTON, *supra* note 62. Though certainly complex and historically varied, the degree of discretion usually lies between two extremes: "overmeddling" by civilians on one end and "over

- Presidents do not refer martial offenses by senior military leaders (*i.e.*, conduct that is solely military in nature that has no analogue in civilian criminal codes,[211] like disobeying an order, or conduct prejudicial to good order and discipline) to the military's criminal justice process; such conduct will be punished through administrative measures, like relief-for-cause or forced resignation, in lieu of criminal sanctions[212] (an "administrative censure-only" norm).
- The president and SECDEF seek, and are entitled to, the "best military advice" from the Joint Chiefs of Staff and combatant commanders before finalizing a decision involving the employment of armed force.[213]

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delegation" to the military on the other. FEAVER, *supra* note 24, at 76. The reader may get a sense of this variation by perusing historical accounts of wartime strategic and tactical decision-making, including civilian decisions to relieve inept commanding officers. *See, e.g.*, THOMAS RICKS, THE GENERALS: AMERICAN MILITARY COMMAND FROM WORLD WAR II TO TODAY 13 (2012) (noting that the degree of civilian trust for military leaders and the "quality of civil-military discourse is often a sign of whether a war is being conducted effectively, one of the few available leading indicators."); T. HARRY WILLIAMS, LINCOLN AND HIS GENERALS viii (1952) (tracing President Lincoln's evolution from a micromanaging "general-in-chief" at the outset of the Civil War toward a more conventional, though still very engaged, commander-in-chief overseeing U.S. General Grant's final campaigns in Virginia); JAMES M. MCPHERSON, TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF 2–4 (2008) (surveying the lengths to which an inexperienced Lincoln went to teach himself military strategy at the beginning of the war, to finding the right – competent and aggressive – commanding generals and learning how to trust their operational decisions in the field, provided he gave them sufficient strategic guidance); *see also* MATTHEW MOTEN, PRESIDENTS & THEIR GENERALS: AN AMERICAN HISTORY OF COMMAND IN WAR 2–20 (2014) (analyzing the civil-military relationships in wartime from George Washington to George W. Bush). However, some scholars are concerned that civilian deference to military leaders – in policymaking (*e.g.*, whether to invoke the Insurrection Act to quell domestic civil unrest) – erodes the ultimate meta norm of civilian control of the armed forces. *See* Polina Beliakova, *Erosion by Deference: Civilian Control and the Military in Policymaking*, 4 TEX. NAT'L SEC. REV. 55, 56–72 (2021), https://perma.cc/UK6L-7ED9.

211. The author discusses the historical difference between "martial" crimes and civilian crimes that servicemembers commit in Dan Maurer, *Martial Misconduct and Weak Defenses: A History Repeating Itself (Except When It Doesn't)*, 54 UIC L. REV. 867, 873–91 (2021), and identify seven categories of conduct that become criminalized in martial codes like the UCMJ that would not – and could not – be criminalized in American civilian criminal law in Dan Maurer, *Larrabee at the District Court: Misunderstanding Military Criminal Law by the Article III Judiciary Is Far from Retired*, 2021 U. ILL. L. REV. ONLINE 23, 43–44 (2021), https://perma.cc/CT3N-9L9J.

212. FEAVER, *supra* note 24, at 93 (referring to the UCMJ as a part of the "civilian monitoring and punishment edifice" of civilian control); *but see* Burke & Matisek, *supra* note 44 (articulating concern that lack of enforcement of Article 88 of the UCMJ in cases of clear contempt toward civilian leadership makes the UCMJ "dead letter law" that is ineffective as a tool for ensuring civilian control of the armed forces); Dan Maurer, *Governing Military Norm-Defiance in a Norm-Defying Presidency*, LAWFARE (Aug. 8, 2024), https://perma.cc/P2KL-ZVQF (describing challenges in relying upon the UCMJ to effectively deter and punish disobedience of lawful orders issued by the President or Secretary of Defense directly to senior military officials, leaving norms as the only viable source of guidance and consequence).

213. *See generally* James Golby & Mara Karlin, *Why "Best Military Advice" Is Bad for the Military—and Worse for Civilians*, 62 ORBIS 137 (2018) (arguing that the expectation that senior military officials provide civilians their "best military advice" is now a norm in civil-military relationships, divorced from any legal requirement, and possibly deleterious). Former Secretary of Defense Robert Gates reflected on his expectation: "A major task of the secretary of defense is to . . . ensure that the president listens to professional military advice that he may not want to hear, and that the senior officers offer their best and

- Senior officers – like members of the Joint Chiefs of Staff or the combatant commanders – do not make statements in the press or in public speeches about controversial national security plans or decision-making that contradict or criticize decisions made by civilian leadership, nor present views that would narrow the field of viable future political options.[214]
- Retired officers – especially retired general and flag officers – do not opine publicly on significant national policy matters[215] or campaign on behalf of a national candidate.[216]

Each of these supposed norms are cast in descriptive terms: the parties do or do not engage in such behaviors, a claim that can be studied empirically. But, following Gibbs, they might also be equally well stated in prescriptive terms: the parties should or should not engage in such behaviors because of some articulable reason based on moral, pragmatic, or professional values. Regardless of their descriptive or prescriptive character, however, a readily identifiable characteristic common among these presumptive paradigmatic norms is that none are contingent on the identity, political party, or idiosyncratic personality of the actors in the respective principal and agent roles. Another common characteristic is the lack of a regulatory or statutory *rule* that prescribes or proscribes that conduct – that is, there is no *law* to shape its evolution over time, to regulate its applicability, or to protect it from abuse or misunderstanding.[217]

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most candid advice and obey loyally, especially when overruled . . . [and] I felt that service chiefs and other senior generals and admirals were candid with me, willing to disagree and argue their case forcefully, and yet quite disciplined in falling in line once I made a decision." ROBERT M. GATES, DUTY: MEMOIRS OF A SECRETARY AT WAR 574–76 (2014).

214. GATES, *supra* note 215, at 574–75 (discussing his tenure as Secretary of Defense under both the George W. Bush and Barack Obama Administrations, Gates criticized the "all too frequent public statements that were seen by the two presidents as unnecessary and inappropriate, creating unwanted (and sometimes unnecessary) political problems at home, limiting options abroad, and narrowing the commander in chief's freedom of decision.").

215. *See* Urben, *supra* note 139.

216. URBEN, *supra* note 21, at 139–56.

217. However, some rules or regulations indirectly support a norm. For example, U.S. Department of Defense regulations prescribe certain bars on political conduct by servicemembers to reinforce "the traditional concept that members on active duty should not engage in partisan political activity, and that members not on active duty should avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement." DoD Directive No. 1344.10, *supra* note 72, at 2. This regulation provides cover for military officials to reject civilian plans to use servicemembers as "props" in a political campaigns or other rallies. As the June 2025 Fort Hood rally revealed, however, even DoD regulations may not prevent norm-breaking. Heidi A. Urben, *The Military Must Remain Nonpartisan. America Depends on It*, DEF. ONE (June 11, 2025), https://perma.cc/AA4Y-29L8.

Nevertheless, the principle of civilian supremacy[218] and the inherently coercive nature of the military's criminal justice system[219] mean that any attempt to enforce CMR norms appears formally unilateral. This does not mean that a more senior military member cannot hold a subordinate accountable for breaching a CMR norm; it means that the military member – not the civilian member – in the CMR is usually the only one *capable* of being held accountable for breaching a norm with an adverse employment decision (firing, relief from duty, forced retirement, admonishment or reprimand), informal sanction (ostracism, denial of access to important decision-makers or policy discussions), or criminal penalties. This remains true, in the form of life-long UCMJ jurisdiction for retired officers.[220] To the extent that elite civilian officials are held accountable for CMR norm-breaking, it can only be through political consequences (*e.g.*, elections, impeachment) for which the military member has no direct authority to initiate or adjudicate. The extent to which, if at all, such a member uses his or her informal influence and network with other civilian officials (perhaps in the president's inner circle or with key members of Congress) to challenge or question the civilian superior's norm-breaking might itself be potential norm – but without question there is no direct mechanism for the military member to discipline, chastise, admonish, or re-train elected or presidentially-appointed civilian officials.

Also common to these norms is the feature of expectations. They reflect the expectations each party (the position, not the person occupying it) has of the other. When those parties meet those expectations consistently, the behavior forms a pattern or precedent and therefore serves as a predictive guide to future conduct. This precedent-like phenomenon is not arbitrary: the expectations are derived from the role or functions, expertise, and authorities of the parties, which themselves are established by, and thus validated by either (1) a higher level of rule, law, or regulation, or (2) a belief that the behavior or abstention from certain behavior has pragmatic value sufficient to guide conduct consistently. In sum, there appear to be six characteristics shared by the phenomena commonly considered to be a CMR norm:

- Phenomenon is based on the expectations of the parties
- Phenomenon forms patterns and precedents
- Phenomenon is based on formal rules, responsibilities, expertise, and authority
- Enforcement is formally unilateral and asymmetric

218. *See supra* Part I.

219. *See* FEAVER, *supra* note 24, at 93; Dan Maurer, *Sovereign, Employer, Community: A Theory of Military Justice Beyond Discipline, Obedience, and Efficiency Beyond Discipline, Obedience, and Efficiency*, 107 MARQ. L. REV. 399, 451 (2023).

220. 10 U.S.C. § 802(a)(4) (military criminal jurisdiction extends to retired servicemembers from the "regular component of the armed forces").

- Phenomenon is not contingent upon the identity, political party, or idiosyncratic personality of the principal or agent
- No law shapes the phenomenon's evolution, regulation, applicability, or protects it from abuse or misunderstanding by the parties

V. NECESSARY AND SUFFICIENT CONDITIONS FOR GENERIC CMR NORM

A. CMR Norm's Conditions

Gibbs's three-part definition of the concept of "norm"[221] included an unnecessarily complex "typology" of nineteen classes of norms,[222] in which he includes "rules," "laws," "customs," "conventions," and "mores" distinguished by various "definitional attributes": the degree to which such types involve sanctions for violations (further distinguished by the kind of sanction and the status of the entity imposing it) and distinguished by the extent to which "collective evaluation" of the behavior is associated with "collective expectations."[223] But for reasons discussed in Part II, *supra*, a "norm" is better viewed as something distinguishable from a law, custom, or rule. The *act of conforming to* a law, custom, or rule (or not) might be a norm in Gibbs's more generic tri-partite definition because it *could* reflect a "collective evaluation of behavior in terms of what ought to be . . . what behavior will be . . . [and] reactions to behavior, including attempts to apply sanctions or otherwise induce a particular kind of conduct."[224] That, however, is not the same as the *existence* of a law, custom, or rule standing in isolation. Viewing the common characteristics of the paradigmatic CMR norms in Part IV, *supra*, in light of Gibb's three-part generic definition of the concept of norm above, but *not* the additional typology, may be the basis for a tentative description of CMR norm.

But this definition must do three things. First, it must be relegated to the singular context of a professional relationship between two classes of parties – the military agent and the civilian principal. Second, it must account for the fact that failure to comply with a CMR norm sometimes looks like violating a custom, tradition, or rule (which yields – at worst – complaints and admonishment). But it may sometimes look like failure to follow a law (which yields a possible prosecution for the military agent or the basis for a political impeachment or other adverse political outcome for the civilian principal). In the latter case, compliance failure elicits a kind of strong reaction that neither law-breaking nor custom-breaking seem to evoke: a harkening to higher principles of professionalism or

221. Gibbs, *supra* note 26, at 589 ("A norm in the generic sense (i.e., encompassing all the various types of norms) involves: (1) a collective evaluation of behavior in terms of what it ought to be; (2) a collective expectation as to what behavior will be; and/or (3) particular reactions to behavior, including attempts to apply sanctions or otherwise induce a particular kind of conduct. Virtually all conceptions of norms can be subsumed under this generic definition.").

222. *Id*. at 591–92.

223. *Id*.

224. *Id*. at 589.

constitutional subordination. Third, it must account for the role that the parties' motives – based on the parties' professional roles and authorities – play in complying with behavioral expectations, an element that usually plays no major part in typical discussions of customs, traditions, laws, and policies.

Regardless of any particular and specified norm's importance, popularity, or degree of adherence (however they might be measured), we can propose the following individually necessary and collectively sufficient conditions for the species of CMR norms:

1. A phenomenon in the form of a behavior or abstention from behavior of one party (e.g., the military agent) in the CMR (a) toward or in reference to the other party (e.g., the civilian principal), or (b) with respect to how that party executes its responsibilities, expertise, functions, and authorities within the range of its unencumbered discretion; and
2. The prompt that activates the behavior or abstention from behavior is a mutual expectation of the parties; and
3. The general parameters of that expectation are known, or reasonably should be known, by both parties in the CMR, and are (a) defined by, or (b) are the product of each party's respective inventory of formal responsibilities, expertise, functions, authorities, and restrictions, or (c) in opposition to those formal responsibilities, expertise, functions, authorities, and restrictions; and
4. The behavior or abstention is common or routine in generally similar situations; and
5. Each party in the CMR has reason to anticipate that the other will not deviate in future situations of foreseeable similarity; and
6. The behavior or abstention is common or routine, and thus foreseeably recurring in future similar circumstances, because the parties self-monitor and each hold compliance to be in their self-interest (broadly defined) as either a principal or agent, in that compliance either (a) supports civilian control over the military or (b) supports effective military planning and execution (and it could be both); and
7. Part of this self-interest, enforced by self-monitoring, is a preference not to lose the respect or confidence of the other party and not to cause negative reputational effects on subordinates who may serve in similar positions later; and
8. As a result, the phenomenon will serve as a party's default or presumptive behavior or abstention in the absence of *explicit direction, order, custom, tradition, rule, or law*; in this way, the

phenomenon is a guide to action in novel but foreseeable futures; and

9. An irregularity (by itself or in concert with others) in this behavior or abstention is either an intentional or unintentional signal between one CMR party to the other that the general parameters of the mutual expectation are (1) unknown; (2) purposefully ignored or violated (regardless of motive); or (3) misunderstood and misapplied by at least one party; and
10. As a result of that signaling, irregularities may be considered as a proxy for the health of the CMR; and
11. One party may consider the other party's adhering to the phenomenon to be within the oeuvre of professional duties for which it may expect the other to comply; as a result, irregularities may be seen as a proxy for the distribution of informal authorities within that CMR; and
12. Only the military party in the CMR has a professional mechanism, imposed by civilian authority, for self-regulating and self-monitoring compliance with CMR norms [*i.e.*, the UCMJ and DoD administrative regulations]; and
13. The remedy for an elected or appointed civilian's breach of this CMR expectation is determined and imposed by the public or another civilian authority, not the military party, and is usually outside the scope of legal sanction,[225] but for military violators the remedy for a breach of this CMR expectation is determined by the civilian principal or military superior and may include punitive criminal sanction under the UCMJ.

Defining the CMR norm by more than a dozen individually necessary and collectively sufficient conditions, both descriptive and prescriptive, certainly adds density and complexity to a discussion of CMR; but it also provides criteria by which to describe with more precision a specific instance of a supposed norm breach, norm creation, norm cataloguing, and norm atrophy. Besides, we may streamline discussions by placing these thirteen conditions roughly within the three parts of Gibbs' definition of a generic norm, described above.[226]

225. LEVITSKY & ZIBLATT, *supra* note 111, at 102.
226. *See supra* Part III.

Gibbs's Generic Norm Requirement	CMR Norm Necessary and Sufficient Condition Number
"a collective evaluation of behavior in terms of what it *ought* to be"	3, 6, 7, 9, 11
an implicit judgment shared within a specific community about what behavior is *preferable* (and by implication, not preferable) when members of that community interact with each other; to prefer one behavior over another is to say that satisfies certain values – perhaps values of efficiency, justice, fairness, equity, or consistency with accepted principles like equality or hierarchy[227]	
"a collective expectation as to what behavior *will* be"	1, 2, 3, 4, 5, 6, 8, 10
an expectation shared within a specific community about what behavior is *probable* (and by implication, improbable) when members of that community interact with each other, given what they have judged to be preferable in light of certain accepted values	
"particular *reactions* to behavior, including attempts to apply sanctions or otherwise induce a particular kind of conduct"	12, 13
a non-arbitrary, established set of *punishments* (broadly inclusive) and actions preliminary to punishment imposable upon members of that community when they fail to act in accordance with that preferable, probable behavior	

Four of these individually necessary and collectively sufficient conditions, however, mark as distinctive this definition of a CMR norm and push it farther from adjacent concepts like custom, tradition, rules, and conventions. Conditions 6 and 7 speak to the parties' motives for partaking in or abstaining from certain behavioral patterns and these conditions make those motives essential to norm-creation. If the parties' motivations are not either to support civilian control over the military or to support effective military planning and execution, and these motives are not at least partly inspired by a preference not to lose the respect or confidence of the other party and not to cause negative reputational effects on subordinates who may serve in similar positions later, then that phenomena is not

227. Gibbs, *supra* note 26, at 589.

a CMR norm. Conditions 9 and 10 focus on "irregularities" – instances of a party to the CMR behaving in ways relative to the phenomenon counter to the expectations of the other party. These conditions establish that such irregularities have communicative value: they signal that one party misunderstands, misapplies, ignores, or does not know of the parameters of the CMR expectation. This in turn communicates a message about the health – the normal, expected functioning – of that CMR.

B. Testing the CMR Norm Definition

As part of this article's conceptual analysis, we can test the logic and appropriateness of this definition (its thirteen individually necessary and collectively sufficient conditions) in two ways. First, we may juxtapose the definition against the common characteristics shared by the phenomena of behavior (or abstentions in behavior) that are regularly assumed to be examples of CMR norms. Consistency does not mean the definition must be right, but if any of the listed conditions are inharmonious with those characteristics of behavior we intuitively believe to be a CMR norm, we might be reasonable to question the condition's relevance and necessity. If they are generally consistent, we can suppose that the more detailed and meticulously expressed conditions are reasonably fair, exhaustive implications or descriptions of the six common characteristics. On the other hand, a supposed norm is just that: we assume it to be one, but we might be wrong and our new test might prove our error. Therefore, the second test is to select some conduct that is intuitively and commonly described as a CMR norm and determine the extent to which it fits or would be excluded by this definition. A finding of fit does not guarantee the definition is correct, but it would strongly support the inference that it is, especially if the first test reveals general consistency too.[228]

1. Are the Common Characteristics of Supposed CMR Norms Consistent with the Thirteen Conditions in the Definition?

The following table presents the six common characteristics identified at the end of Part IV above in comparison with the individually necessary and collectively sufficient conditions of the proposed definition of a generic CMR norm. The second column identifies the conditions that best reflect that adjacent characteristic in greater detail.

228. A third way to evaluate the logic and appropriateness of the thirteen conditions might be to identify some conduct that is *not* commonly described as a CMR norm and which would *fail* to be one under this new definition. But this negative fit cuts too easily in both directions: it may support an inference that the thirteen conditions in the definition match the world realistically, but it may also simply support a conclusion that one or more of the thirteen conditions is wrongly formulated or unnecessary. This third "test" is therefore not a particularly illuminating or sufficient evaluative approach.

Common Characteristic of Supposed CMR Norm	CMR Norm Necessary and Sufficient Condition Number
Phenomenon is based on the expectations of the parties	1, 2, 3, 9, 11
Phenomenon forms patterns and precedents	4, 5, 8
Phenomenon is based on formal rules, responsibilities, expertise, and authority	3
Enforcement is formally unilateral and asymmetric	12, 13
Phenomenon is not contingent upon the identity, political party, or idiosyncratic personality of the principal or agent	3
No law shapes the phenomenon's evolution, regulation, applicability, or protects it from abuse or misunderstanding by the parties	8

This short exercise reveals that three of the proposed necessary and sufficient conditions (numbers 6, 7, and 10) described earlier are not directly represented in the common characteristics we found in those behaviors assumed to be CMR norms. Conditions 6 and 7, for example, say that the routineness and foreseeability of the phenomena are attributable to the parties' motives: specifically, a self-interested motive attributable to either party to reinforce civilian control over the military or to support effective military operations. Moreover, each party could be driven by both motives, and those in turn are influenced by normal human preferences to sustain the respect and confidence of one's associates and to avoid negative reputational consequences. In any case, this question of what motivates compliance with a phenomenal behavior or abstention from behavior is not facially a function of any of the six common characteristics we found among the conduct typically categorized as a CMR norm.

If it is fair to label this a discrepancy, there are four possible explanations. First, the author has simply failed to correctly match up the elements of the two categories and these three missing conditions do actually correspond to one or more of the common characteristics; second, the new definition is complete but the common characteristics menu is incomplete; third, the menu of common characteristics is complete but the additional necessary condition is not actually necessary; or, fourth, the menu of common characteristics is complete *and* the additional conditions are necessary (or at least reasonably inferred) implications of those characteristics. The fourth explanation is the best one in support of the

conceptual analysis argument made above; the first and second explanations are less helpful. But if all of those are incorrect and the third explanation for the discrepancy holds, there may be sound reason to reject some (or all) of the thirteen conditions as truly necessary and collectively sufficient elements of what makes a CMR norm a "norm." Nevertheless, rejecting the results of the conceptual analysis on that ground (failing the first test) would be hasty if the second test supports those results. To that test, this section turns next.

2. Does the Supposed-CMR Norm Fit the Thirteen Conditions?

a. The Right to be Wrong

The first supposed CMR norm we might evaluate under the proposed definition is, in Professor Feaver's words, the civilian principal's "right to be wrong" – what he refers to as the "principal norm for democracies."[229] This right is taken as a foundational axiom in American CMR, one essential for preserving the constitutional supremacy of one and subordination of the other, ultimately tuned to the concern that the threat of a military veto undermines legitimate democratic elections (at least) and increases the risk of an outright junta (at worst). Even demonstrably poor judgment based on incomplete facts leaves a final decision by the president on matters of military operations and strategy, and even on internal DoD personnel management policy, immune from being overruled by the military.

Though only tacitly implied by the text of the Constitution itself, the axiom seems to meet Gibbs's original three-part definition of a generic norm as a "a collective evaluation of behavior in terms of what it ought to be . . . [or] a collective expectation as to what behavior will be . . . [or a set of] particular reactions to behavior, including attempts to apply sanctions or otherwise induce a particular kind of conduct."[230] If the president determines to nominate a person to be the next SECDEF, and that nominee's qualifications and judgment are criticized by the public and some members of Congress after the Senate's confirmation vote,[231] we may critique the president's vetting and judgment but in no way would we say it was an unlawful choice, and nobody seriously questions that the president may nominate whomever he or she chooses provided the statutory qualifications[232] are met or waived, and that "ought" to be the case. In other words, the president had a "right to be wrong" about his nominee's character and fitness for office. Likewise, history provides sufficient proof that presidents have and will continue to decide military matters incorrectly, perhaps even dangerously and against the counsel of his or her senior military commanders and the Joint

229. *See* Feaver, *supra* note 204, at 507; Feaver & Kohn, *supra* note 209, at 16–18.

230. Gibbs, *supra* note 26, at 589. As stated in Part III, *supra*, this article interprets a generic norm to require all three of these conditions.

231. Anni Karni, *Tillis Suggests He Regrets Vote to Confirm Hegseth, Calling Him "Out of His Depth"*, N.Y. TIMES (July 9, 2025), https://perma.cc/Z8AF-XCEF.

232. 10 U.S.C. § 113(a).

Chiefs of Staff. In other words, the president's "right to be wrong" is empirically validated and reasonably foreseeable in all future administrations.

However, Gibbs's third prong – about external and internal reactions to behavior including those meant to induce future conduct – is less clearly raised by the "right to be wrong." As presidents are now criminally immune when taking official actions,[233] even if it would violate a criminal law let alone be an error in judgment or assessment, presidents are not deterred from decisions or induced to take actions by the threat of criminal prosecution.[234] That threat simply does not operate as a meaningful motive to engage in or abstain from some pattern of behavior with respect to his or her military agents. Indeed, the Supreme Court's rationale justifying immunity relies on the idea that even the possibility of such a threat would unreasonably inhibit presidents from making decisions that may be legally risky but necessary and within the ambit of his or her constitutional duties.[235]

Moreover, presidents have no internal professional mechanism for curbing or checking their compliance – no code of ethics or professional responsibility that imposes specific duties and imposes specific sanctions for breaching those duties outside of the Impeachment Clause of the Constitution. Having one would prompt presidents to self-regulate or for some other actor in the executive branch to monitor and enforce compliance with those expected patterns of behavior with the president's military subordinate agents.

Viewing this "right" through the lens of the thirteen individually necessary and collectively sufficient conditions supports disassociating it from the concept of a CMR norm. It may be fair to conclude that the right is a "phenomenon in the form of a behavior or abstention from behavior" (condition 1) because it implies that dissenting military officials will not formally intervene to overrule a president's policy or decision. Moreover, we might grant that a breach of this right by the military agent would signal a serious pathology in the health of that CMR (condition 10). Further, a president or SECDEF would be reasonable to expect no such intervention (condition 4). Additionally, a military official contemplating some sort of intervention might second-guess himself upon considering his self-interest and reputation (conditions 6 and 7) and the risk of being court-martialed (condition 13).

Notwithstanding these positive indicators of a CMR norm, the "right to be wrong" is actually maintained by the military official because doing otherwise would be contrary to explicit military criminal law and the subordination of the military under the elected civilian Commander in Chief in the Constitution, a precept to which military officers swear an oath to support.[236] In other words, the military's compliance with what it views as a "wrong" civilian decision does not

233. Trump v. United States, 603 U.S. 593, 613–15, 619 (2024).

234. Aziz Huq, *Presidential Criminal Immunity: A Rule-of-Law Threat Beyond the Oval Office*, LAWFARE (June 12, 2025), https://perma.cc/RXX9-3D2S.

235. Trump, 603 U.S. at 618–19.

236. 5 U.S.C. § 3331.

originate as a default presumption in the absence of an explicit direction, order, or law (failing condition 8).

When it is said that presidents have a "right to be wrong," it is as much because there is no legal sanction for being wrong as it is a matter of constitutional supremacy over the military agent who might prove that the presidential decision was wrong. This leaves Feaver's catchphrase a powerful description of the asymmetric imbalance between the civilian principal and the military agent – a statement of a CMR principle, but not a CMR norm.

b. Resignation on Principle

As a second illustration, consider the supposed "duty to salute and execute" norm that rejects resignation as a senior military professional's means for registering dissent or disagreement with the civilian's political or policy directive.[237] In the wake of the highly unusual and very controversial "Friday Night Massacre" of senior generals and admirals in the first two months of the second Trump Administration,[238] no wave of principled public resignations from among the remaining senior cohort of the armed forces flooded the DoD. Not even one. Nor did General Milley resign as Chairman of the Joint Chiefs of Staff when it was clear he worried greatly about the legality, morality, and danger of President Trump's desire to use military force to quell civil unrest in 2020.[239]

Choosing not to resign from a senior position reporting directly to the president or the SECDEF, privately or publicly, is certainly a phenomenon in the form of a behavior or abstention from behavior of one party in the CMR (a) toward or in reference to the other party, or (b) with respect to how that party executes its responsibilities, expertise, functions, and authorities within the range of its unencumbered discretion. For many senior military officials, the idea of resignation in the face of disagreement over policy is anathema, regarded within professional doctrine as quintessential unprofessionalism in the face of an overarching duty of subordination.[240] Civilian political officials almost certainly understand this, given the dearth of historical examples of military protest resignations, so this abstention can be said to be based in a mutual expectation that resignation is both unwarranted and undesirable. That expectation easily leads both parties to believe that resignation in protest is highly unlikely (though not impossible) in similar future circumstances, given that the military professional likely believes that sticking it out, despite one's internal reticence, disagreement, or disapproval, is essential for two desirable ends.

237. *See generally* Richard B. Myers & Richard H. Kohn, *The Military's Place*, 86 FOREIGN AFFS. 147 (2007); Dave Barno & Nora Bensahel, *Rough Seas Ahead: Steering the Military Profession*, WAR ON THE ROCKS (Mar. 4, 2025), https://perma.cc/PNC5-3E53.

238. *See, e.g.*, Cohen, *supra* note 2; Wexler & Ghiotto, *supra* note 2; Davis et al., *supra* note 3; Jaffe, *supra* note 3. *See also supra* text accompanying notes 2 and 3.

239. BAKER & GLASSER, *supra* note 205, at 467–78.

240. *Id.*

First, to maintain the public appearance of military subordination to democratically elected civilian authority, consistent with an oath of office that articulates that principle.[241] Second, that working "from the inside" to mitigate the worst impulses or effects of the civilian's policy is the best stratagem for securing an effective military institution, and its reputation (as well as the individual officer's reputation), in the near or long term.[242] General Milley's rationale for not tendering his resignation in 2020 was in accord with that end; he kept his drafted resignation letter secret and unsent "to fend off the continuous and growing threats from within, including fears that [President] Trump might start a war with Iran, withdraw troops without warning from Afghanistan, and invoke the Insurrection Act if street demonstrations broke out around the time of the election."[243] If reasonably accurate, this tally means that this "salute and execute" phenomenon meets at least the first seven of the individually necessary and collectively sufficient conditions outlined in the new CMR norm definition above.

What about the remaining six conditions? There is no explicit direction, order, rule, or law regulating the principled resignation of a senior military officer when the alternatives she possesses are disobeying a lawful order or obeying an order she finds morally repugnant or professionally derelict. What remains is an informal precedent, established by her peers and others who formerly occupied her position or something close to it, of not resigning under similar constraints and alternatives. If that officer were to confront the possibility of such alternatives in some foreseeable situation, this informal precedent would serve as a guide in making her decision.

Imagine if our hypothetical senior officer were to resign on principle, a tactic that General Milley legally could have but did not employ when he felt professionally and morally obliged to remain in office despite his concerns about President Trump's actions in 2020. Given the historical rarity of such a move, resignation would necessarily signal to the civilian administration (and the public if paying attention) one of three possibilities: (1) the general did not know of the expectations related to dissent and disagreement between the military agent and civilian principal; (2) the general ignored the expectation purposefully; or (3) the general misunderstood the expectation that resignation was not a professionally acceptable recourse. Given that professional education of senior military officers usually includes civil-military norms,[244] only the second possibility is likely. Nevertheless, any of the three

241. 5 U.S.C. § 3331 ("I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.").

242. BAKER & GLASSER, *supra* note 210, at 468 (quoting General Milley: "If they want to court-martial me, or put me in prison, have at it . . . [b]ut I will fight from the inside.").

243. Joel H. Rosenthal, *General Milley's Ethical Dilemma: The Letter That Was Never Sent*, CARNEGIE COUNCIL FOR ETHICS IN INT'L AFFS. (Aug. 30, 2022), https://perma.cc/WRM8-BJVN.

244. *See* HUNTINGTON, *supra* note 62, at 237–39; Rapp, *supra* note 81; U.S. ARMY WAR COLLEGE, *supra* note 81; Owens, *supra* note 81. *See also supra* text accompanying note 81.

explanations would serve as proxy symptoms for the health – the regular expected functioning – of that relationship. The resignation would be statistically irregular and therefore unexpected, and, in severing that relationship at least until a replacement can be selected, the functionality of the relationship is undercut: tasks, advice, participation, and events for which that individual was directly responsible are delayed, halted, or overtaken by successors who almost certainly would not immediately perform at the same level of competence as the resigning officer. For that reason, the civilian principal could justly argue that the resigning officer, simply by the act of resignation, failed to comply with the professional duties expected of her office. This would indicate the distribution of informal authorities between the civilian principal and military agent – specifically, that the civilian's "right to be wrong" (though not itself a CMR norm) implies that the military agent's resignation is unjustified.

This leaves only the final two conditions in the CMR norm definition to consider. Both are highly generic – they are relevant regardless of the specific pattern of behavior or abstention from behavior that might constitute a CMR norm. First, under the expanded definition, the military party alone in the CMR can self-regulate and monitor his compliance with this or other norms and the standards against which his compliance is judged are imposed by the civilian authority. In this case, those *standards* are found in the Uniform Code of Military Justice. While Article 88 of the UCMJ prohibits "contemptuous words" used against certain civilian officials,[245] two other punitive articles are relevant to enforcing compliance with CMR *norms*: Article 133's prohibition of "conduct unbecoming an officer"[246] and Article 134's prohibition on "conduct of a nature to bring discredit upon the armed forces."[247] Both punitive articles are vaguely and broadly defined, ostensibly covering a range of acts or omissions that might otherwise be constitutionally protected behavior or speech, leaving them as legitimate tools for deterring and punishing certain behaviors that the civilian official may object to. Second, civilian officials – even though some do play a role in administering military justice[248] – are not themselves subject to criminal sanction under the UCMJ, nor any other law, for breaching a norm. Military officials, however, remain subject to the prosecutorial discretion of these civilians acting as "general court-martial convening authorities" when those civilians equate the norm breach to one of these two martial offenses.[249]

245. 10 U.S.C. § 888 (Article 88, UCMJ); *see also* M.C.M., *supra* note 18, at IV-21, para. 14(c) (explaining and discussing the statutory elements of this offense).

246. 10 U.S.C. § 933; *see also* M.C.M., *supra* note 18, at IV-139, para. 90(c) (discussing and explaining the statutory elements of this offense).

247. 10 U.S.C. § 934; *see also* M.C.M., *supra* note 18, at IV-141, para. 91(c)(3) (discussing and explaining the statutory elements of this offense).

248. 10 U.S.C. § 822(a)(1) (assigning the role of "general court-martial convening authority" to the President, SECDEF, and the individual service secretaries).

249. The author is not aware of any historical case in which a senior military commander or service chief-of-staff has been charged with a violation of UCMJ Article 133 or 134 under a theory that his or her conduct breached a norm of CMRs. That does not, of course, mean the law is silent on the matter; in

Unlike the case of the "right to be wrong," which is nothing more than a restatement of a constitutional division of authority and military subordination, this analysis suggests that the "salute and execute" supposed norm (that implies resignation on principle for senior military leaders is inappropriate) is rightly considered a CMR norm. It may be considered a norm that enforces that constitutional requirement of military subordination.

CONCLUSION

A conceptual analysis of what constitutes a CMR norm – distinguishing it from a rule, tradition, custom, or law – is not an aimless exercise in semantic distinctions. Professor Marybeth Ulrich has written that "the greatest challenge to civil-military relations norms . . . is that they are poorly understood . . . [and] [n]orms cannot be sustained in the absence of their stakeholders' commitment to them."[250] This article hastens to add that stakeholders are less likely to commit to them if they do not understand why the norm is considered a *norm* at all. This undertaking, therefore, promises certain diagnostic benefits helpful to the parties in the civil-military relationship, to the public passively observing it, and for those seeking to better describe it and anticipate future developments.[251] The conceptual analysis that constructed a new, admittedly more complicated, definition of CMR norm endeavored to meet Oppenheim's criteria for evaluating the utility of any analytical concepts: (1) concepts should be operational; (2) concepts should establish connections with other relevant and related terms; (3) concepts should spot and highlight theoretically important but overlooked aspects of the subject in question; (4) concepts should not prevent empirical investigation that could confirm or falsify the definitions one has derived; (5) concepts should remain reasonably close to ordinary language meanings; and (6) concepts should be humble – modifiable because further analysis is not barred.[252] The ultimate utility of this new definition may be assessed on the extent to which it satisfies these criteria.

At its most basic, this article articulates a new definition and stipulates that part of its definition is keyed to a particularized relational context of certain actors, their motives for compliance, and the consequences of non-compliance (including what signals are communicated by that non-compliance). Focusing on the idiosyncratic characteristics among norms and other similar, but not identical, concepts like traditions, customs, and rules, permits a clearer distinction between what is unlawful (like certain rule-breaking), unusual in its frequency of appearance (noncustomary), counter to a tradition, and what is a breach of a CMR norm. This may aid the parties in the CMR in better understanding the scope of their official responsibilities considering these informal, implicit assumptions and expectations on their behavior. It may also aid the public in objectively

theory, either of these punitive articles could be the basis for a court-martial prosecution and thus remain warnings that deter military actors from choosing certain courses of action.

250. Ulrich, *supra* note 122, at 47.

251. BICCHIERI, *supra* note 168, at 1.

252. Oppenheim, *supra* note 159, at 297–309.

diagnosing pathologically diseased CMR based, in part, on the parties' adherence to or rejection of norms, and to more fairly judge violations of CMR duties considering what the norms may be. It may likewise aid in the scholarly empirical study of norms across historical periods and internationally, and distinguish between existing norms, along several dimensions. Quoting Gibbs, these CMR norms may be distinguished on "(1) the extent to which they are known or recognized, (2) the extent to which they are accepted as being just, (3) the degree to which they are uniformly applied to all groups or categories, (4) whether they are severely or lightly sanctioned, (5) the mode and consistency of enforcement, (6) source of authority, (7) the degree to which they are internalized, (8) the mode of their transmission, and (9) the amount and kind of conformity to them."[253]

This new definition may also contribute as a resource in evaluating the relative qualitative strength or importance of one CMR norm compared to others. This more nuanced definition also permits a deeper consideration of what consequences do, or ought to, follow from the breach of a norm – and identify what purposes those consequences serve (retributive, deterrent, expressive, etc.). Further, it permits Congress with its oversight and legislative responsibility over parts of the CMR to, with greater precision, identify and promote a *meta*-norm: that all CMR norms do and should reflect and uphold certain democratic and constitutional values. First, unelected military officials do not dictate policy and are subordinate to elected officials, even when a civilian official's decision or judgment is poor. Second, the question of how to employ military capabilities in a given conflict, shaping of military culture, design of military tactics, and promoting military professionalism and professional standards of competence remains the near-exclusive (not exclusive) province of uniformed military officials. Third, that both the civilian principals and military agents must be responsive to and obey the rule of law, with final fidelity owed to the Constitution, including legal decisions from the courts that encroach upon the party's presupposed responsibilities, expertise, functions, and authorities. One obvious illustration of how Congress may identify and promote that meta-norm is in the Senate's responsibility to adequately consider before consenting to the president's nominees for strategic civil-military appointments, like the SECDEF, chairman of the Joint Chiefs of Staff, and the leaders of the various combatant commands. The scope and depth of their interrogatory into the how a nominee may interact with his or her colleagues on the other side of the CMR ought to be wider and deeper than what historical confirmation hearings reveal.

Finally, a new comprehensive conceptual delineation of what makes a phenomenon of behavior or abstention from behavior a CMR norm should provide an opportunity for Congress to explore new statutory obligations or to relax or clarify existing duties. This opportunity is especially critical in an era of routine norm-breaking and concomitant warnings that such norm-breaking is a harbinger of democratic backsliding – a concern raised by more than a mere breach of

253. Gibbs, *supra* note 26, at 588.

tradition or custom. That is to say, understanding what constitutes a CMR norm, and what does not, provides lawmakers with an opportunity to erect more formal legal constraints on action that reinforces democratic values and institutions.

Oppenheim's final criterion of "openness to meaning" was interpreted by Baldwin to mean that "concepts must be allowed to evolve and should never be fixed for all time, but this does not relieve scholars of the need to justify new definitions . . . . However, there is not much to be said in favor of simply 'drifting' into new definitions[.] Instead, let us choose our concepts in accordance with clearly specified criteria."[254] If errors have been made in formulating the individually necessary and collectively sufficient conditions for a CMR norm above, new evaluative criteria ought to be explored and new renditions attempted; the amount of heavy lifting the concept of *norm* has done in our discussions of CMR in just the last few years alone justifies the effort to be clear (even if it cannot be neatly concise). It is therefore fitting to conclude where this article began – with the admonition by CMR scholars Feaver and Seeler that "our ideas, predictions, and prescriptions in any field of inquiry are shaped by the methodological lens through which we study: if this lens changes, then our thinking changes."[255]

254. Baldwin, *supra* note 162, at 506.
255. Feaver & Seeler, *supra* note 1.