

Paved with Good Intentions?: Civil-Military Norms, Breaches, and Why Mindset Matters

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INTRODUCTION

In a remarkably blunt open letter to President Trump, forty retired flag officers criticized his decision to withdraw U.S. military forces, then fighting alongside Kurdish fighters against ISIS, from Syria and called on the commander-in-chief to adopt and follow the “core values” of the men and women serving in the Armed Forces.¹ It is this “collective” of values (including loyalty, respect, commitment, integrity, and selfless service),² they argue, that works like a compass to steer government action and decision-making straight ahead in murky seas. “Abandoning” our allies and partners, they wrote, especially the weaker partners who become targets of more powerful neighbors if American forces step out of the way, is “not consistent with who we are as a military force.”³

It is not the first time that a cohort of retired senior military officers, or a well-known and highly accomplished retiree, has gone public with substantive disagreements about current national security policy decisions. We can refer to the 2006 “Revolt of the Generals”⁴ of course, but less than a week before this open letter was published, retired Admiral William McRaven, famous for his leadership of special operations forces in Afghanistan and the raid that killed Osama bin Laden, wrote in a New York Times op-ed, “it is easy to destroy an organization if you have no appreciation for what makes that organization great,” sharing stories of an “underlying current of frustration, humiliation, anger and fear” for the health of the Republic among his fellow retirees.⁵ While not novel in their approach, the forty retirees did go a step farther than previous retired protestors by acknowledging their intent. They wrote:

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¹ The American Coll. of Nat’l Sec. Leaders, *Retired Generals and Admirals: We Call on Trump to Start Living up to the Values of the U.S. Armed Forces*, NEWSWEEK (Oct. 23, 2019, 12:02 PM), <https://perma.cc/4RC4-BTUW>.

² *Id.*

³ *Id.*

⁴ See Don M. Snider, Opinion, *The Army’s Ethic Suffers Under Its Retired Generals*, STRATEGIC STUDIES INST. (Jan. 2009), <https://perma.cc/9ATP-3XC2> (calling retired flag officer public opinions an “unsolved and haunting problem”); see also Mackubin Thomas Owens, *Rumsfeld the Generals, and the State of U.S. Civil-Military Relations*, 59 NAV. WAR COLL. REV. 68, 68-80 (2006).

⁵ William H. McRaven, Opinion, *Our Republic is Under Attack From the President*, N.Y. TIMES (Oct. 17, 2019), <https://perma.cc/YGE5-HXCQ>.

We *knowingly break* the culture of public silence expected of retired Generals and Admirals to urge you exert national and global leadership . . . For years, the most senior Generals and Admirals have told military veterans that comments about current policy should be left to others. We *understand and respect* that view. We also believe that compliance that leads us to silence makes us complicit with actions inconsistent with who we are and what we stand for.⁶

In other words, they have identified a rule-of-thumb, a cultural expectation, about proper civil-military relations that imparts guidance to military leaders to accept policy decisions of their civilian principals as part of healthy and Constitutionally-demanded civilian control. And they “knowingly break” it.⁷ Whether their cause is justified, or whether their belief in the moral authority of martial values is something we want all citizens to share, is for the purpose of this essay of little relevance.

At the very least, these retired officers (still legally part of the Armed Services under the Uniform Code of Military Justice⁸), chose to place more weight on revered martial values (that have accrued or been indoctrinated over ages to make war-fighting more successful) than on the values associated with healthy civil-military relations. This is a deliberate, conscious, and calculated rejection of civil-military relationship norms. That alone ought to give pause to the large community of scholars and practitioners (in and out of uniform) who grow concerned when fractures appear in what was thought to be a solid edifice of customary standards of conduct defining what it means to be a “professional” in the profession of arms. It is one thing for a norm to exist. It is another to know that it exists. It is still another to knowingly deviate from that norm. When knowing deviations occur, it signals that the norm itself may no longer be so normal or so widely-accepted.

I. QUESTIONS WORTH ASKING WHEN NORMS SLIP AWAY

The norm of private (at best) dissent coming from senior retired flag officers is not the only norm seemingly undermined in recent controversies. Retired Marine colonel Andrew Milburn, author of a still-controversial essay on disobeying lawful orders,⁹ recently suggested that the “exercise [of] some degree of moral autonomy in the gap between receipt of order and execution” is an accepted norm of civil-military relations.¹⁰ He added, “[t]he higher an officer climbs in rank, the closer he comes to the nexus between policy and military strategy, and the weightier that

⁶ The American Coll. of Nat’l Sec. Leaders, *supra* note 1 (emphasis added).

⁷ The American Coll. of Nat’l Sec. Leaders, *supra* note 1.

⁸ Uniform Code of Military Justice art. 2, 10 U.S.C. § 802(a)(4) (2006).

⁹ Andrew R. Milburn, *Breaking Ranks: Dissent and the Military Professional*, 59 JOINT FORCES Q., 101, 101-07 (2010).

¹⁰ Andrew Milburn, Commentary, *When Not to Obey Orders*, WAR ON THE ROCKS (July 8, 2019), <https://perma.cc/BA2B-8HNW>.

obligation becomes.”¹¹ Under this view, Milburn repeated recent criticism¹² of an apparent directive from the White House to remove the USS John S. McCain from presidential line-of-sight during President Trump’s visit to Japan.¹³ That event has been characterized¹⁴ as yet another¹⁵ breakdown of American political norms—this time, the norm of military non-partisanship.¹⁶ Milburn suggested, in keeping with his stance on the role of dissent, that if the military agreed to move the ship or hide the name from view, that decision would have been an abdication of that moral autonomy expected of senior military leaders, and at the same time a deviation from the norm.¹⁷

Let us consider that expectation for moral autonomy, though, from the point of view of a civilian principal:

Any organization of men in the military service bent on inflaming the public mind for the purpose of forcing government action through the pressure of public opinion is an exceedingly dangerous undertaking and precedent . . . It is for the civil authority to determine what appropriations shall be granted, what appointments shall be made, and what rules shall be adopted for the conduct of its armed forces. ...[W]henever the military power starts dictating to the civil authority by whatever means adopted, the liberties of the country are beginning to end.¹⁸

When political or military actors appear to erode norms in civil-military relationships, a hot subject¹⁹ during a presidential administration that appears to many observers as rejecting many such conventions as a matter of course,²⁰ we should ask ourselves three questions. First, what evidence do we have that a civil-military norm *actually* has degenerated—that it now has a weaker binding or precedential value on behavior than it did in the past? If it is weaker, such that it holds little meaningful influence over what an actor chooses to do or say, we ought to question whether that actor or similarly-positioned actors believe it deserves “norm” status at all. Second, what determines the blameworthiness or culpability of the actor when he or she apparently acts contrary

¹¹ *Id.*

¹² See David Barno & Nora Bensahel, *The Increasingly Dangerous Politicization of the U.S. Military*, WAR ON THE ROCKS (June 18, 2019), <https://perma.cc/LS3B-6PJE>.

¹³ Rebecca Ballhaus & Gordon Lubold, *White House Wanted USS John McCain ‘Out of Sight’ During Trump Japan Visit*, WALL ST. J. (May 30, 2019, 2:41 AM), <https://perma.cc/P4WN-YWAW>.

¹⁴ *Emails Shed Light On Efforts To Put USS John McCain ‘Out Of Sight’* (MSNBC Morning Joe television broadcast May 30, 2019), <https://perma.cc/B9MP-FVF4>.

¹⁵ See John Fritze, *Trump Defends Signing MAGA Hats for Service Members During Visit to Iraq, Germany, USA TODAY* (Dec. 27, 2018, 7:04 PM), <https://perma.cc/R6HN-L4BJ>.

¹⁶ See Heidi Urben, *Why the Military’s Nonpartisan Ethic has Eroded, and What to Do About it*, MODERN WAR INST. (June 27, 2017), <https://perma.cc/PSG9-T2E6>.

¹⁷ MILBURN, *supra* note 10.

¹⁸ President Calvin Coolidge, Speech before the American Legion Convention: Toleration and Liberalism (Oct. 6, 1925), <https://perma.cc/276S-XNZJ>.

¹⁹ See Mark Nevitt, *Civilian Control of the Military During an Age of Trump and ‘Administrative Coups’*, JUST SECURITY (Sept. 27, 2018), <https://perma.cc/6F6Y-FC5N>.

²⁰ See, e.g., Max Boot, *Trump’s ‘Emergency’ Is his Latest Assault on the Norms of American Democracy*, WASH. POST (Feb. 15, 2019, 12:38 PM), <https://perma.cc/QL5L-7N6S>; Jonathan Lemire, *How Trump has Rewritten the Rules of the Presidency*, PBS (Dec. 27, 2018, 11:56 AM), <https://perma.cc/SA2U-7QYU>.

to that norm, especially if that actor *consciously discards* the norm? It is one thing—and itself a voluminous area of critical commentary—for a military officer to dissent or disagree with her superior civilian principal. But it is something different, and an area regrettably bereft of critical commentary, to dissent or disagree with the underlying norm itself. Third, if the breach or erosion of the norm by the military agent in the relationship deserves a retributive (“you’re fired”) or rehabilitative (“you’re reassigned”) response from the civilian principal, on what *grounds* should that response be based? The options are many: precedent, partisanship, pressure from fellow principals, the advice of fellow principals, a gut feeling, or a mix-bag of all of these. But the justifying rationale for that response is often a challenge to articulate.

These three seemingly independent questions are raised anytime the public becomes aware of a rift, disagreement, surprise, or concern among the military leadership and civilian political authority, as with the USS McCain, and when now-retired General Joseph Votel spoke with Congress and with CNN about his views on U.S. forces in Syria. Whether the issue is when or how to deploy or sustain armed force abroad, what citizens should be qualified or disqualified from voluntary service, or the appropriateness of politicization of an apolitical profession (and many other subjects of demographics, budget share, basing, voting, and campaigning), civil-military “crises”²¹ come from many sources. Their relationships range from precarious²² to pugnacious;²³ and though the subject matter often repeats itself, the method by which the crisis unfolds changes with the times. This variety challenges our ability to objectively judge whether such a norm is threatened, by whom, why, and what responses are appropriate.

Scholarship on the interactions among the senior civilian and military “decision-making elite”²⁴ has largely glided past these three questions.²⁵ It tends to focus on public *acts* of dissent

²¹ Richard H. Kohn, *Out of Control: The Crisis in Civil-Military Relations*, NAT’L INT. (Mar. 1, 1994), <https://perma.cc/Y9L7-67H8>.

²² Lindsey P. Cohen, *The Precarious State of Civil-Military Relations in the Age of Trump*, WAR ON THE ROCKS (Mar. 18, 2018), <https://perma.cc/X8KL-GRV9>.

²³ Peter Feaver, *National Security Advisor McMaster’s Three Civil-Military Relations Challenges*, FOREIGN POL’Y (Feb. 21, 2017, 3:26 PM), <https://perma.cc/J8B4-BWXH>.

²⁴ Rosa Brooks, *Civil-Military Paradoxes*, in WARRIORS & CITIZENS: AMERICAN VIEWS OF OUR MILITARY 22, 39 (Kori Schake & Jim Mattis eds., 2016).

²⁵ See, e.g., Richard H. Kohn, *First Priorities in Military Professionalism*, 57 ORBIS 380, 380-89 (2013) (identifying four norms and values that all officers should follow, and urging the institution and its educational venues to re-invigorate their study, but not discussing illustrations of officers deliberately, carelessly, or negligently discarding those norms and what degree of response might be consistent with the actor’s degree of culpability); Jon Rahbek-Clemmensen et al., *Conceptualizing the Civil–Military Gap: A Research Note*, 38 ARMED FORCES & SOC’Y 669, 669-78 (2012) (suggesting that all research and commentary about the so-called civil-military “gap” actually reveal four “variants” of the gap: cultural, demographic, policy preference, and institutional; but makes no mention of the underlying mindset of those participants and whether episodes over time might reveal what might be termed a “norm adherence gap” as well); Don M. Snider, *Dissent and Strategic Leadership of the Military Professions*, 52 ORBIS 256, 256-77 (2008) (focusing on senior military officer dissent, this work is largely a case study of the 2006 “Revolt of the Generals” in response to the Iraq war, “accepts that all of the dissenters are forthright men without ulterior motives and that their main issue was substantive with respect to war policy,” and asks whether civil-military norms ought to accept and accommodate this type of dissent); Donald S. Travis, *Discovering the Fault-Lines in Civil-Military Relations*, 44 ARMED FORCES & SOC’Y 731, 731-47 (2018) (though addressing “ethical lapses,” the author—responding to earlier work by Thomas Crosbie and Meredith Kleykamp—addresses no crisis in

and advocacy, and their consequent *effects* on public policy or public opinion. Scholars often conclude that norms are degenerating but do not first ask whether the actors themselves demonstrate knowledge or acceptance of those norms, nor whether (or to what extent) those acts reveal a mark of moral culpability or blameworthiness that justifies some punitive or administrative response (public or private) to those actions.²⁶ However, recent civil-military literature may be instructive. Risa Brooks points to some evidence suggesting senior military leaders have grown concerned about growing partisanship and politicization in the ranks—that speaking publicly about it at service academy graduations, for instance, is a signal that something is awry (“Were those norms so deeply ingrained as to be unquestioned and compliance automatic, such comments would have little traction and seem oddly out of place in the American civil-military discourse”).²⁷ Of course, this may reveal that those speaking on the subject *publicly* revere or have adopted the norms they seek to protect, but may not allow us to infer generalizations about whether certain norms are understood or accepted by senior strategic-level military or civilian leaders.

Jeffrey Donnithorne, on the other hand, studied how and why the four armed services’ independent cultures and “patterns of thinking” often intentionally yield results that can appear to civilian leadership as confused, dissenting, or frustrating counteractions (or what Peter Feaver would call “shirking”²⁸).²⁹ “A military service’s response,” according to Donnithorne, “to civilian direction may be a culturally conditioned interpretation of what a task requires [but] senior civilian and military leaders often fail to understand each other’s incentives, equities, and culture [and] as each side struggles to appreciate the concerns of the other, the result is friction, distrust, and less effective policies.”³⁰ These senior commanders and strategic organizers have systematically used and benefited from extremely-detailed planning methods and processes over the course of their

civil-military norms, but rather deviant personal behavior and incompetence undermining the relationship and eroding the military’s sense of “professionalism”).

²⁶ See, e.g., Russell F. Weigley, *The American Military and the Principle of Civilian Control from McClellan to Powell*, 57 J. MIL. HIST. 27, 27-58 (1993). Weigley referred to the development, post-American Civil War, of a professional “code of conduct [that] included unprotesting obedience to the civil authorities,” *id.*, at 37, and which he described as a “ready, uncarping military acceptance of civilian supremacy.” *Id.*, at 39. Weigley elaborated on General Colin Powell’s controversial, public, opposition to using force in Bosnia—while he was still on active duty as Chairman of the Joint Chiefs of Staff—and suggested that his “statements especially raised questions about his conformity to the code.” *Id.*, at 28. Weigley did not, however continue on to examine whether evidence suggested Powell had an evolving sense of that norm (part of this “code”)—that senior military leaders do not seek to influence policy, especially when it is contrary to known civilian political authority’s preferences—or accepted it conditionally. See Deborah Avant, *Conflicting Indicators of ‘Crisis’ in American Civil-Military Relations*, 24 ARMED FORCES & SOC’Y 375, 376 (1998).

²⁷ Risa Brooks, *The Perils of Politics: Why Staying Apolitical Is Good for Both the U.S. Military & the Country*, 57 ORBIS 369, 370 (2013).

²⁸ PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 59-60 (2003).

²⁹ Jeffrey W. Donnithorne, *Principled Agents: The Role of Service Culture in American Civil-Military Relations*, 61 ORBIS 506, 506-26 (2017); see also DALE R. HERSPRING, THE PENTAGON AND THE PRESIDENCY: CIVIL-MILITARY RELATIONS FROM FDR TO GEORGE W. BUSH 2 (2005) (“the greater the degree to which presidential leadership style coincides with and respects prevailing service/military culture, the less will be the degree of conflict”).

³⁰ JEFFREY W. DONNITHORNE, FOUR GUARDIANS: A PRINCIPLED AGENT VIEW OF AMERICAN CIVIL-MILITARY RELATIONS 2-3 (2018).

careers to generate viable military options. But those options are predicated on receiving civilian guidance and the identification of desired end-states as part of the input.

When that civilian input is lacking, obscure, or tentative, military leaders will feel under-prepared and frustrated with civilian politics, adding to a sense of friction or outright anxiety.³¹ If the institutions writ large reveal tensions and upend norms in the broader civil-military relations, it stands to reason that the individual actors constituting the senior strategic leadership of those institutions could be responsible at the interactive relationship level. Donnithorne rightly observes:

senior military leaders with 30-40 years of national service naturally harbor strong views about the best ways to defend the nation . . . military leaders with strong preferences [will] exhibit varying degrees of cooperation with a resistance to their civilian bosses. Civilian Control is indeed unquestioned, but how far down does this control go?³²

Civilian Control may be “unquestioned,” as he notes,³³ but is it *understood* in all of its applications and nuances by those (both military and civilian) who must work within its confines? And to the extent the right actors understand such control, do they accept and make good faith efforts to abide by the various norms derived from civilian control? Donnithorne assumes that their degree of “cooperation with or resistance to” civilian authority is a function of those actors’ service cultures, which provide some sort of mental scaffolding to support their “strong views about the best ways to defend the nation.”³⁴ But merely having strong views about a subject does not imply having *informed* or *knowledgeable* views about a subject.

In reality, those senior leaders – by the time they have reached the geopolitical, grand strategic, civilian-military nexus where policy decisions with national or global impact are debated and made – have spent relatively little time in, or exposure to, this level of planning and decision-making.³⁵ Most of their career timeline has been spent at tactical and operational level staffs, commands, and agencies, working for the “guy who works for the guy who works for the guy that makes the actual (political) decisions.”³⁶ Of course, there are exceptions, like General (retired) David Petraeus, who

³¹ Janine Davidson, *Civil-Military Friction and Presidential Decision-Making: Explaining the Broken Dialogue*, 43 PRES. STUD. Q. 129, 135 (2013) (quoting Rosa Brooks, *Thought Cloud: The Real Problem with The Civilian-Military Gap.*, FOREIGN POLICY (Aug. 2, 2012), <https://perma.cc/96T2-CW9P>).

³² DONNITHORNE, *supra* note 30, at 21.

³³ *Id.*

³⁴ *Id.*

³⁵ The routine placement of senior generals and admirals in assignments involving “international politico-military affairs,” alongside civilians, as part of the organizational reality of the modern U.S. military was noted by Janowitz in his classic *The Professional Soldier*. He wrote: “some officers have tasks which involve direct political planning and political negotiation [and] every field commander stationed aboard is, by virtue of his very position, a political agent.” MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* 70 (1971).

³⁶ SARAH SEWALL & JOHN P. WHITE, *PARAMETERS OF PARTNERSHIP: U.S. CIVIL-MILITARY RELATIONS IN THE 21ST CENTURY* 5 (2009) (relating senior civilian and military practitioners’ concerns that military leaders are largely unprepared or underprepared to manage and address strategic problems like disagreement and dissent).

spent an unusual number of years and assignments working as a close aide to senior-ranking military officers who directly worked for civilian and political officials.³⁷

But such officers – should they even ascend to positions like a multinational or joint force commander, Combatant Commander, Service Chief of Staff, or Chairman – remain out-of-step with and outnumbered by the “muddy boots” operations-focused commanders whose career trajectories that seem to eschew all-things inside-the-beltway, but who have historically been most likely to hold those positions at culminating point of their career.³⁸ Most senior military leaders, though credentialed with master’s degrees in “national security studies” at senior service colleges or year-long fellowships at think tanks,³⁹ remain arguably no more than experienced amateurs in *national* defense policy-making. They have dutifully, even expertly if promotion is an indicator of skill, executed the plans made by those who believe they know “the best ways to defend the nation.” But it is not at all obvious or certain that their resistance to, or acceptance of, civilian decisions could be indicia of other idiosyncratic factors, besides Service culture viewpoints and reductionist planning methodologies. Civilian Control is a wonderfully normative prescription and description; however, it includes hosts of *conduct norms* that vary in strength, definition, and

³⁷ For example, he served as the Aide to the Army Chief of Staff as a Major and later as Executive Assistant to the Chairman of the Joint Chiefs of Staff as a Colonel. (Official resume on file with the author).

³⁸ Consider the shallow pool of senior Army officers who might engage personally with senior civilians routinely at the apex of national defense decision-making. These officers would work directly for or with a civilian political appointee in the Department of Defense or in Congress, or in some other Executive Branch agency or department, as a Colonel or higher—those considered to be the Army’s future “strategic leaders.” Such positions include Senior Military Assistant to the Secretary of Defense, or the Deputy Chief of Staff of the Army for Personnel (G-1), working for the civilian Assistant Secretary of the Army (ASA) for Manpower and Reserve Affairs, or as the Chief, Legislative Liaison reporting to the Secretary of the Army, or detailed to the National Security Council Staff. As of October 2019, there are thirteen four-star Generals in the U.S. Army, the highest military grade and rank by law. Seven of these Generals serve in Joint duty positions, either on the Joint Staff or as a Combatant Commander—the senior uniformed military officer in the operational chain-of-command immediately below the Secretary of Defense and the President (e.g., Chairman of the Joint Chiefs of Staff; Commander of US Forces, Korea; Commanding General of U.S. Special Operations Command; Commander of U.S. Africa Command). Six currently serve in the institutional Army (e.g., Chief of Staff of the Army, Vice Chief of Staff, Commanding General of Army Materiel Command). If we screen these officers’ official resumes to identify those with relevant assignments in practical, day-to-day relationships with civilian political appointees or members of Congress at the national policy-making level from the time they were promoted to colonel, the pool is even shallower. Of those thirteen full Generals, only four had—prior to their current assignment—a position working directly for or alongside of a senior civilian political appointee or member of Congress. Of the thirteen, the average time in service from their promotion to Colonel (O-6) to that of General (O-10) was just over thirteen years. Of the forty-six Lieutenant Generals (three-star rank) in the Army, only nine had such experience. See U.S. Army General Officer Management Office (GOMO), <https://www.gomo.army.mil/Ext/Portal/Positions/Positions.aspx?View=3> (last visited Nov. 4, 2019) (official biographies on hand with the author). Of course, there are numerous duty positions inside and outside of D.C. that necessarily place these senior 3- and 4-star general officers – and many in even lower rank – in close working relationships with senior civilians, but from which they might glean much about civil-military norms. But if we want to focus on the those responsible for participating in formal civil-military relationships at the policy-military planning nexus, we can clearly see a gap in relevant backgrounds: of the those possessing the relevant interaction with civilians prior to their current assignment, the vast majority had but one, and nobody with more than two, such duty positions. Regardless of percentages, the key take-away is that assignments that force senior officers to engage with and work directly for senior civilian political appointees prior to assuming such roles at the four-star level is not a personnel requirement imposed by law or by policy within the Department of Defense.

³⁹ Jim Tice, *Senior service college, fellowship assignments released*, ARMY TIMES (Apr. 1, 2016), <https://perma.cc/359R-Z3QS>.

applicability. Does their experience, up to that point, reflect an *acceptance* of those norms? Does their rank and position imply *understanding* of those norms?

Building on Rosa Brooks’s observation that the contemporary relationship among the strategic elite wearing suits and uniforms is beset by “mistrust” and “almost willful ignorance,”⁴⁰ despite working side-by-side daily in the national security establishment,⁴¹ this essay proposes that the parties and the public might understand the peculiar character of and culpability for that ignorance. Exploring the willfulness and mindset of the individual parties that seem to breach norms or fail to establish a baseline of workable mutual expectations is a step in that direction. This essay further proposes that we borrow the scalable legal concept of “intent” – described below as “the degree of informed intentionality” of a civil-military relationship actor – that singularly helps answer each of these three questions. Informing this proposal is a look at some recent norm-busting events, throwing an additional layer of questions against what we think we already know.

II. THE REINCARNATION OF CIV-MIL NORM BREAKING

A. *MacArthur, Votel, and Fallon*

Two days before President Harry S. Truman relieved Gen. Douglas MacArthur of his command in Korea, former First Lady Eleanor Roosevelt had this to say in her syndicated newspaper column:

I cannot feel, however, that a commanding general in the field, particularly when he commands for a group of nations, should take it upon himself to announce the policy that in his opinion should be followed in the area of the world where he commands troops.⁴²

Nearly seventy years later, Gen. Joseph Votel’s final days as commander of U.S. Central Command recalls Mrs. Roosevelt’s grasp of norms in proper American civil-military relationships. Gen. Votel candidly answered questions from a CNN journalist about the future of the U.S. campaign against the self-proclaimed Islamic State, suggesting he disagreed with the president’s characterization of the group’s defeat.⁴³ Moreover, he explicitly stated he would not have given advice to pull U.S. forces out of the fight. This was a post-script to public testimony less than two weeks earlier when Gen. Votel disclosed to the Senate Armed Services Committee that the

⁴⁰ Brooks, *supra* note 24, at 39.

⁴¹ *Id.*

⁴² Eleanor Roosevelt, *My Day: April 9, 1951*, THE ELEANOR ROOSEVELT PAPERS DIGITAL EDITION (2017), <https://perma.cc/7CBT-Z4A3>.

⁴³ Barbara Starr, *Top US General Disagrees with Trump Over Syria Troop Pullout*, CNN (Feb. 17, 2019, 5:37 PM), <https://perma.cc/RYZ6-4NNK>.

president did not consult him before the official Twitter announcement⁴⁴ of “victory” over ISIS.⁴⁵ This too recalled an earlier episode: Adm. William Fallon’s candid, on-the-record interviews back in 2007, during which he – also as commander of Central Command – took issue with the Bush administration’s increasingly hawkish rhetoric about Iran and its nuclear ambitions. That September, traveling in the Middle East, Adm. Fallon told an *Al Jazeera* television interviewer “this constant drum beat of conflict is what strikes me, which is not helpful and not useful.”⁴⁶ About three months later, during an interview with the *Financial Times*, he returned to this theme: “the bellicose comments are not particularly helpful.”⁴⁷

For MacArthur, it was an argument to expand armed conflict in Korea. For Gen. Votel, it was an argument to continue supporting armed conflict in Syria. For Fallon, it was argument to avert armed conflict with Iran. Their statements repudiated the customary expectation that once the civilian political superior decides, the time for dissent has passed; to do otherwise would be to risk implying, publicly, that they have a personal and value-based disagreement with the political superior that lies outside their zone of professional responsibility and carries what Don Snider calls “shades” of political advocacy.⁴⁸ In all three cases, these leaders signaled their rejection of a norm of civilian-military relationships. Votel’s reveal that the president did not discuss his decision to withdraw forces from Syria with the commanding general before announcing it yields another concern that yet more norms of civil-military relations are eroding.⁴⁹

B. Norm-Sampling

Norms, as Harvard law professor Daphna Renan has described, are of critical concern because they govern, moderate, and modulate the practice of presidents and their senior (and largely unelected) advisors.⁵⁰ Norms of behavior in civil-military relationships (“unwritten rules of legitimate or respectable behavior”⁵¹) come in all shapes and sizes. Consider the following generalizations and direct quotes from former Secretary of Defense Robert Gates, Admiral Mullen, and others, as common exemplars.

⁴⁴ President Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 19, 2018, 3:10 PM), <https://perma.cc/D24C-8QYH>.

⁴⁵ *Hearing to Receive Testimony on the United States Central Command in Review of the Defense Authorization Request for Fiscal Year 2020 and the Future Years Defense Program Before S. Comm. on Armed Serv.*, 116th Cong. 59 (Feb. 5, 2019) (statement of General Joseph Votel, Commander, United States Central Command), <https://perma.cc/TKT8-H3H7>.

⁴⁶ Brian Murphy, *Nervous Gulf Hears Calmer Tones on Iran*, USA TODAY (Sept. 29, 2007, 2:47 PM), <https://perma.cc/5NVH-87J3>.

⁴⁷ Blake Hounshell, *Morning Brief*, FOREIGN POL’Y (Nov. 12, 2007, 12:49 PM), <https://perma.cc/D5WH-UDA3>. See also Seymour M. Hersh, *Preparing the Battlefield*, NEW YORKER (June 29, 2008), <https://perma.cc/588H-MY3F>.

⁴⁸ DON M. SNIDER, *DISSENT AND STRATEGIC LEADERSHIP OF THE MILITARY PROFESSIONS* 21-26 (2008).

⁴⁹ See, e.g., Phillip Carter, *Uncivil Military Relations*, LAWFARE (Feb. 22, 2018, 7:00 AM) <https://perma.cc/9JZU-6PL4>; James Kitfield, *When the Commander in Chief Is ‘Unfit,’ What’s a General to Do? Jim Mattis’ Resignation Was Just a Beginning*, DAILY BEAST (Mar. 9, 2019, 9:40 AM), <https://perma.cc/N3MD-YDX5>.

⁵⁰ See Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2190 (2018).

⁵¹ *Id.* at 2189.

- “. . . While I look to the Chiefs to represent the military factor without reserve or hesitation, I regard them to be more than military men and expect their help in fitting military requirements into the over-all context of any situation . . .”⁵²
- Give “best military advice”: Senior officers must give their “best and most candid advice”⁵³
- Military has no veto power: senior officers “obey loyally, especially when they are overruled”⁵⁴
- Do not box-in the civilian decision-maker with pre-emptive statements to Congress or the media: Senior officers should not make public statements to media or Congress that “box in” deliberations and policy choices available to the president; don’t reduce, or appear to reduce, the “decision-space” available to policy-makers⁵⁵
- Stay in your (military lane): Senior officers should not speak or act on areas outside their areas of expertise (i.e., “respect the lanes”)⁵⁶
- Confidentiality: “what is said between the president and I in the Oval Office really needs to be between us”⁵⁷
- . . . The Chairman “should be a true believer in the foreign policy and military strategy of the administration which he serves”⁵⁸
- Senior military officers do not resign in protest to manifest dissent and disagreement with a civilian principal’s policy or decision⁵⁹
- Senior military officers do not talk openly about their political party affiliations or partisan policy preferences with subordinates or with the media⁶⁰

Though they could have, neither statutes nor the Constitution effectively define what Renan calls a “sufficiently thick network of rules or standards,” but only traditions and norms that create and reinforce expectations.⁶¹ There are no laws, for example, that prohibit a president from taking

⁵² National Security Action Memorandum 55 from President John F. Kennedy to the Chairman, Joint Chiefs of Staff, subject: Relations of the Joint Chiefs of Staff to the President in Cold War Operations (June 28, 1961), <https://perma.cc/VK35-MQKT>. According to historian Matthew Moten, General Maxwell Taylor was the memorandum’s author, following his investigation into the failures of planning and recommendations during the Bay of Pigs operation. MATHEW MOTEN, *PRESIDENTS & THEIR GENERALS: AN AMERICAN HISTORY OF COMMAND IN WAR 279-80* (2014).

⁵³ ROBERT M. GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR 574-75* (2014).

⁵⁴ *Id.*

⁵⁵ Julian Barnes & Adam Entous, *Interview Excerpts: Adm. Mike Mullen*, WALL ST. J. (Sept. 28, 2011), <https://perma.cc/SB4H-X83M> (quoting Admiral Michael Mullen).

⁵⁶ GATES, *supra* note 53.

⁵⁷ Eun Kyung Kim, *McChrystal on Resignation: ‘I Wanted to Stay in the Job,’* TODAY (Jan. 7, 2013, 2:32 PM), <https://perma.cc/R9ME-U3YF> (quoting General Stanley McChrystal).

⁵⁸ MAXWELL TAYLOR, *SWORDS AND PLOWSHARES: A MEMOIR 252* (1972).

⁵⁹ Don M. Snider, *Dissent, Resignation, and the Moral Agency of Senior Military Professionals*, 32 *ARMED FORCES & SOC’Y* 6, 6-7 (2016).

⁶⁰ General (retired) Martin E. Dempsey, Letter to the Editor, *Military leaders do not belong at political conventions*, WASH. POST (July 30, 2016), <https://perma.cc/7ZYV-3VZY>.

⁶¹ Renan, *supra* note 50, at 2190; *see also* Dan Maurer, *Fiduciary Duty, Honor, Country: Legislating a Theory of Agency into Strategic Civil-Military Relations*, 10 *HARV. NAT’L SEC. J.* 276, 299-303 (2019).

strategic military advice from outside the military,⁶² or from allegedly allowing his visit to a combat zone to take on the appearance of a partisan political rally,⁶³ or from criticizing the military commanders responsible for executing the previous Administration’s wartime strategies.⁶⁴ Likewise, neither military doctrines nor Defense Department regulations or policies provide these codified customs for a commander-in-chief’s most senior military officers.⁶⁵ Norms, therefore, are the unwritten — but often misunderstood or misapplied — customized rules that these parties seem to follow, providing form and expectations to their relationship. When we cite evidence that marks a deviation from those norms, we mark a possible pathology in the civil-military relationship. Much has already been written,⁶⁶ for example, about the effect of James Mattis’ legacy on those relationships,⁶⁷ as well as President Trump’s seemingly spontaneous or unconsidered acts that arguably violate long-standing customs between the commander-in-chief and his subordinate commanders.⁶⁸

C. Appreciating the Actor’s Mindset Enriches, not Displaces, the Rest of the Story

1. Public Actors Are Not Necessarily Rational Actors

If all we are concerned with, in the aftermath of an apparent breach or violation of a civil-military relationship norm, is whether the trust between the parties, or one’s confidence in the other, was shaken, or whether a negative outcome resulted that otherwise would not have, then we are accepting that the study and importance of civil-military relations is purely consequentialist. All that matters (to the parties anyway) is the effect or value of its output according to this view.⁶⁹

⁶² See, e.g., Carol E. Lee et al., *Officials Worry Trump May Back Erik Prince Plan to Privatize War in Afghanistan*, NBC NEWS (Aug. 17, 2018, 5:12 PM), <https://perma.cc/9WFX-LMDG> (discussing concern over the relevance and influence of Erik Prince, founder of Blackwater, on the Trump’s national security planning in Afghanistan).

⁶³ Morgan G. Stalter, *Ex-Obama National Security Official: Trump Confused ‘Troop Visit with a Campaign Rally’*, THE HILL (Dec. 26, 2018), <https://perma.cc/EC6D-U69F>.

⁶⁴ Aaron Blake, *3 Takeaways from Trump’s Testy Fox News Interview*, WASH. POST (Nov. 19, 2018, 9:43 AM), <https://perma.cc/B9SK-MZYD>.

⁶⁵ DANIEL MAURER, *CRISIS, AGENCY, AND LAW IN US CIVIL-MILITARY RELATIONS* 53-60 (2017) (“executive branch directives that implement ethics policy focus largely on personal financial responsibilities and prohibiting conflicts of interest that affect the public’s perception of, or actual impact on, an impartial government workforce. These sources are silent . . . on the unique fiduciary responsibilities that are created and managed by the parties to civil-military relationships” and the armed services’ doctrine “aims down and in, to manage their service members’ generic relationships and duties with each other, promoting values like integrity and selfless service, with vague expression of general respect for the chain-of-command, and reminders that civilians control the military”).

⁶⁶ Peter Feaver, *Mattis Was the Best Secretary of Defense Trump Could Have Had*, FOREIGN POL’Y (Feb. 12, 2019, 5:17 PM), <https://perma.cc/XTG2-KFC5>.

⁶⁷ Jim Golby, *Commentary, In the Wake of Chaos: Civil-Military Relations Under Secretary Jim Mattis*, WAR ON THE ROCKS (Feb. 4, 2019), <https://perma.cc/UDP9-UUSE>.

⁶⁸ David A. Graham, *The Military Has Become Trump’s Favorite Prop*, ATLANTIC (Nov. 21, 2018), <https://perma.cc/CG7V-3MHA>.

⁶⁹ See, e.g., Linda Robinson et al., *Improving Strategic Competence: Lessons from 13 Years of War* (2014). However, Eliot Cohen’s argument implicitly adopts this view when it asserts that “prudence, not principle” determines the conditions under which a civilian leader ought to intervene in military affairs directly. ELIOT COHEN,

But not only are they not always rational actors with imputable intentions, these are *public representative* actors. The civilian side is accountable to the electorate. The military side is not only accountable to the civilian but also, as stewards of the profession,⁷⁰ accountable to the expectations of peers and subordinates: an expectation that institutionalized norms and values will neither be ignored nor deliberately abandoned, but rather self-consciously followed and continued.

These public actors necessarily invite a third party in as observers of what Eliot Cohen calls the “unequal dialogue”⁷¹ – the public itself. The public at large has a vested interest in a well-functioning civil-military relationship for the same reasons it has an interest in a well-functioning judicial branch. Effective, rule of law-based, representative government within the meaning and motives of the Constitution implicitly require it. A well-functioning civil-military relationship ought to (at the very least) demonstrate a certain respect for favored traditions, customs, and constitutional and legislated divisions of responsibility to which both parties tacitly or explicitly agree to follow.⁷² And if a well-functioning civil-military relationship is one that respects and comports to certain norms, then the public, not just the parties, ought to know if those norms (including a respect for them, and an understanding of them) are endangered. Is there, for instance, evidence of a “norm adherence gap” that aggravates other civil-military “gaps” like those posed by Jim Golby?⁷³ If the public is to have a chance at engaging in meaningful debate about these supposed breaches and norm-busting behaviors, about whether there are norms at all or whether traditional norms have morphed into something undesirable, we need to look beyond simply the conduct of parties and the conduct’s consequences. In other words, it is reasonable to claim that an unintentional breach, or a breach born from lack of appropriate grounding in and appreciation for certain civil-military norms, is *categorically different* than a purposeful decision to act or speak in a way that signals a breach while fully aware of but unconcerned with its consequences. But to diagnose the deviation as a symptom of a pathological, dysfunctional relationship, or to decide what preventive measures might be useful to prevent an outbreak, we have to ask contextually-relevant follow-up questions.

2. Ask All the Relevant Questions

When knowledgeable observers, the media, and historians comment on an action (like a civilian leader deciding to fire a general, or senior military officers speaking to the press, or those officers resigning in protest) that appears to reveal a fracture in the civil-military relationship, there

SUPREME COMMAND: SOLDIERS, STATEMEN, AND LEADERSHIP IN WARTIME 12 (2002). James Dubik seems to echo the sentiment in his support for the inevitably necessary blurring of lines (“coresponsibilities”). JAMES M. DUBIK, JUST WAR RECONSIDERED: STRATEGY, ETHICS, AND THEORY 91 (2016).

⁷⁰ Snider, *supra* note 48, at 14.

⁷¹ ELIOT A. COHEN, SOLDIERS AND CIVILIANS: THE CIVIL—MILITARY GAP AND AMERICAN NATIONAL SECURITY 429 (2001).

⁷² Dan Maurer, *Meeting of the Minds: How Presidents and Generals Stake out Their Territory*, LAWFARE BLOG (May 18, 2017, 3:00 PM), <https://perma.cc/74QZ-CFN6>.

⁷³ Jim Golby (@jimgolby), TWITTER (Mar. 10, 2019, 9:24 AM), <https://perma.cc/MBE7-PRXN>.

are usually two big questions: the “so what?,” or *impact*, question, and the “was he warranted in doing that?,” or *justification*, question.

The justification question is almost always answered by focusing on motivations. If the actor is a senior military officer, the focus is on the motive or reasons driving the officer to act in a way that seems to violate core values of respecting legitimate civilian control.⁷⁴ If the actor is a senior civilian official, focus could be on several fronts: whether the act demonstrates the official is attempting either to assert control over, or alternatively to politicize, the military,⁷⁵ or whether the act suggests the official is failing to provide real opportunity⁷⁶ for responsible, reasoned dissent or advice.⁷⁷ Of course, if the civilian happens to be the President, a fair conclusion is that the modern presidency is so permissive that the office – both and its current and former occupants – are free to define, redefine, or ignore so-called norms altogether.⁷⁸

The “so what?” or *impact* question is almost always answered by focusing on the consequences of that action (or speculating what they could be). Will it lead to a relief from command or forced retirement, as it did for Gen. Stanley McChrystal after the now-infamous *Rolling Stones* article?⁷⁹ A public repudiation as it did after Gen. Eric Shinseki’s testimony about the number of troops needed to stabilize a post-war Iraq?⁸⁰ Actual partisanship in military decision-making? Will it lead to a policy shift? A drop in approval ratings? These examples are possible quantitative outcomes that could be measured, but some non-measurable results are equally predictable. It may ultimately end with the erosion of (or failure to develop) mutual trust among senior civilian and military

⁷⁴ See, e.g., H.W. BRANDS, *THE GENERAL VS. THE PRESIDENT: MACARTHUR AND TRUMAN AT THE BRINK OF NUCLEAR WAR* (2016).

⁷⁵ Bradley P. Moss, *Politicizing the Military Is Uniformly Wrong*, ATLANTIC (Dec. 27, 2018), <https://perma.cc/N9U6-XUMK>.

⁷⁶ COHEN, *SUPREME COMMAND*, *supra* note 69.

⁷⁷ Peter D. Feaver, *The Right to Be Right: Civil-Military Relations and the Iraq Surge Decision*, 35 INT’L SEC. 87, 87-125 (2011).

⁷⁸ See Marc A. Thiessen, *Look Who’s Shattering Presidential Norms Now*, WASH. POST (Sept. 11, 2018, 6:32 PM), <https://perma.cc/N3MJ-TX65>. Consider also President Donald Trump’s assertions of seemingly limitless Executive authority—at least within the Executive branch—during an eventful summer of 2019, involving the withdrawal of U.S. military forces from northern Syria to make way for a Turkish invasion intended to push back Kurdish fighters (ostensible U.S. allies in countering a militant ISIS), and military aid to Ukraine and the “favor” he asked of the Ukraine’s president to investigate corruption and intrigue involving the 2016 U.S. election and his chief presidential rival for 2020. In speaking with George Stephanopoulos of ABC News, President Trump said, referring to an ability to fire a Special Counsel, that “Article two allows me to do whatever I want.” *Transcript: ABC News’ George Stephanopoulos’ exclusive interview with President Trump*, ABC NEWS (June 16, 2019, 7:58 PM), <https://perma.cc/72T8-36UT>. Five weeks later, speaking in front of Turning Point USA’s Teen Student Action Summit, he repeated his lesson in civics, almost word for word: “then I have an Article two, where I *have the right to do whatever I want as president*, but I don’t even talk about that.” President Donald Trump, Remarks at Turning Point USA’s Teen Student Action Summit 2019 (July 23, 2019, 11:34 AM) in *THE WHITE HOUSE REMARKS*, <https://perma.cc/DUJ5-U7VB>.

⁷⁹ Michael Hastings, *The Runaway General*, ROLLING STONE (June 22, 2010, 10:00 AM), <https://perma.cc/4BSD-LKA6>.

⁸⁰ Eric Schmitt, *Threats and Responses: Military Spending; Pentagon Contradicts General on Iraq Occupation Force’s Size*, N.Y. TIMES (Feb. 28, 2003), <https://perma.cc/V9H6-DTM8>. For televised testimony, see *Fiscal Year 2004 Defense Budget, Hearing Before the S. Armed Servs. Comm.*, 108th Cong. (2003) (statement of General Eric Shinseki, Chief of Staff, U.S. Army) (C-Span television broadcast Feb. 28, 2003), <https://perma.cc/3NP7-AMKC>.

leaders, the destabilization of decision-making, a reorientation of the parties toward bad policy, and may undercut the sense of legitimate civilian authority over matters of national defense.

It is not a coincidence that the justification and impact questions are also how the victimized parties frame the debate⁸¹ and rationalize their conduct⁸² in the court of public opinion⁸³ and in the halls of the bureaucratic hierarchy among their superiors, peers, and subordinates. Because these apparent civil-military norm violations almost never involve objectively correct or incorrect, legal or illegal, behaviors, these motive- and effects-based considerations are clearly relevant, but they do not fully answer what ought to be the rest of the debate: How *blameworthy* was it? How do we hold the culpable party accountable? What should we do to prevent similar breaches? Statistically, should we still consider the civil-military norm in question to really be a norm? Should we still consider it to be a civil-military norm worth sustaining?

3. *Motive and Effect, Plus Mindset*

The two considerations of motive and effect discussed above are not the only factors that ought to be weighed. The forgotten consideration is the actor's understanding of what he or she was doing – knowing, or at least reasonably sensing, what public message about the civil-military relationship the act would send and other reasonably foreseeable consequences. By looking at the actor's *mindset*, which is described below as “informed intentionality,” there are three significant gains shared by the public, the parties, and students of civil-military relations. First, the actor's motive gets probed to an additional depth. Not only would we identify the driving purpose behind the decision to act, but also how sober or thoughtful it was. Second, understanding the actor's mindset suggests we might better “fit the punishment to the crime,” or rationally choosing among a variety of professional consequences for the act. Third, and maybe the most valuable gain, the civilian or military actor's understanding provides at least some evidence of how strongly that person both appreciates and values a particular civil-military norm under the circumstances. This is not just a consideration of this issue in the Huntingtonian abstract,⁸⁴ but also a valuation of the norm as applied under the circumstances in which he or she acted. For that military leader, a norm of respectful private dissent might apply if the subject is transgender service-members,⁸⁵ but it might be deemed irrelevant and discarded by that same person if the subject matter is war and

⁸¹ Tim Hains, *Trump: I 'Essentially' Fired Mattis Over Lack of 'Results' in Afghanistan*, REAL CLEAR POL. (Jan. 2, 2019), <https://perma.cc/T2RB-62FT>.

⁸² Letter from Sec'y of Def. James Mattis to President Donald J. Trump (Dec. 20, 2018), <https://perma.cc/552M-92DF> [hereinafter *Resignation Letter*].

⁸³ Martin L. Cook, *Revolt of the Generals: A Case Study in Professional Ethics*, 38 PARAMETERS 4, 4-15 (2008).

⁸⁴ SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF U.S. CIVIL-MILITARY RELATIONS* (1957). In other words, individual actors with real-world interests and conflicts behave in ways, and for reasons, for which an abstract political theory (like Huntington's, about the proper relationship between two institutional actors: civilian authority and the military writ large) provides no meaningful explanation for contradictory, inconsistent, or irrational decisions by individuals within those institutions; the actor's adherence and understanding of such abstract principles in practice, day-to-day, and in light of those interests and conflicts, are the very questions we want to answer more concretely.

⁸⁵ Leo Shane III, *Top Military General Says He Didn't Back Ban on Transgender Troops*, MILITARY TIMES (Sept. 26, 2017), <https://perma.cc/S5JK-TUJ7>.

peace.⁸⁶ Mindset, contextually, sheds light on how strongly the actor has internalized the norm in question.

This gain may also unearth insights about broader communities lower in the chain-of-command. Loren DeJonge Schulman is continuing a recent thoughtful analysis of Jim Mattis' legacy, and reflected on its effect on the field of civil-military relations after "two decades of combat, topped by a hurricane of civil-military norm upending."⁸⁷ She concluded that it is time for critical attention to a larger background of civ-mil controversies and crises — to do our "homework."⁸⁸ With that extra bit of attention, we might start to see larger trends or unexpected patterns emerging, not just among civil-military elites, but across the force and among civilian officials appointed by those senior elected officials. Maybe, as Schulman says, these norms are "constantly being re-written," with consequences felt and adopted by their subordinates on large scales.⁸⁹ It is at this point where we might begin to see links between the mindset of an individual actor and macro issues like the robustness of civilian control overall, including the effectiveness of national security policymaking.

D. *Mindfulness Matters: Incorporating Mens Rea Into Civil-Military Breach Analyses*

1. *Character on Intent: "Informed Intentionality"*

In criminal law, mindset is known as the actor's *intent*, or *mens rea* ("guilty mind"), and it matters for several reasons. The character of that intent helps define the character of the crime, what we call it, whether we prosecute the actor for it, and how we punish the actor if he is convicted.⁹⁰ When a President, Secretary of Defense, service secretary, national security advisor, general, admiral, or Member of Congress apparently deviates from civil-military norms, we should look for evidence of that actor's intentionality, and how informed it was by facts, history, and the actor's attention to the circumstances.

a. From Purposeful to Negligent

⁸⁶ *Resignation Letter*, *supra* note 82.

⁸⁷ See Loren DeJonge Schulman, *Post-CHAOS Homework on Civil-Military Relations*, WAR ON THE ROCKS (Feb. 22, 2019), <https://perma.cc/DEN3-9237>. See also Peter Feaver, *Mattis Was the Best Secretary of Defense Trump Could Have Had*, FOREIGN POL'Y (Feb. 12, 2019, 5:17 PM), <https://perma.cc/5MTS-KZL2>; Jim Golby, *In the Wake of Chaos: Civil-Military Relations Under Secretary Jim Mattis*, WAR ON THE ROCKS (Feb. 4, 2019), <https://perma.cc/89DY-GSQE>.

⁸⁸ Schulman, *supra* note 87.

⁸⁹ *Id.*

⁹⁰ For classic explanation of *mens rea* element by the U.S. Supreme Court, see *Morissette v. United States*, 342 U.S. 246, 250-51 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution").

The strength of the actor’s intent or mindset, and how informed or knowledgeable it was, is significant for those caring about civil-military relationships and the norms that guide them for the same reasons we consider any defendant’s intentionality important in court. Take, for example, how we criminalize the act of causing the death of another person. The most egregious form of this offense, where the facts show that the actor consciously sought to end the life of another and knowing death was the consequence of the act, is called “murder” and carries the possibility of the harshest punishments. We might draw an analogy to criminal law’s use of the term purposely to describe this grade of mindset.⁹¹ The Model Penal Code, on which a majority of states have based their modern criminal statutes, explains this mindset as conscious design to cause the death.⁹² Some jurisdictions, using the traditional common law vocabulary, would call this “first degree murder”⁹³—it is deliberate and premeditated, or what we could call *maximally mindful*, and provides for way to distinguish those offenses eligible for capital punishment. At the other end of the spectrum of informed intentionality, where the facts show the actor unintentionally, accidentally, caused a death because of a failure to reasonably understand the risk that the death would occur, we label as “negligent homicide,” if indeed the jurisdiction criminalizes such conduct at all. In those cases, a reasonable person would have been aware of a “substantial and unjustifiable risk” that this behavior was prohibited or would lead to the death, and in this case the actor was unreasonable because he was not so aware, but “should have been.” We call this negligence,⁹⁴ or being *unreasonably unmindful*.

Between the poles of purposefully and negligently, there are two other gradations of mindset recognized by criminal law that could also be useful analogues for the mindset of someone supposedly violating accepted norms of the civil-military relationship. To knowingly (but not necessarily purposefully) act, the actor is “practically certain” that a result will occur, but does the act anyway.⁹⁵ This could be a way to classify the informed intentionality of say, Gen. Votel or Adm. Fallon. In both cases, a respected senior field commander answered a journalist’s question on a major television network, or in a national print publication, possibly confident that the answer

⁹¹ MODEL PENAL CODE § 2.02 (AM. LAW INST. 1962).

⁹² “A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.” *Id.* § 2.02(2)(a).

⁹³ *See, e.g.*, MONT. CODE ANN. § 45-5-102 (2013) (“Deliberate homicide”); N.Y. PENAL LAW § 125.27 (Consol. 2008) (“With intent to cause the death of another person, he causes the death of such person or of a third person...”); 18 PA. CONS. STAT. § 2502 (2010) (defining first degree murder as an “intentional killing,” where “intentional killing” is defined as “killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing”).

⁹⁴ MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1962) (“Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”).

⁹⁵ *Id.* § 2.02(2)(b) (“Knowingly. A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.”).

would be interpreted by many as a subordinate’s refutation of an unpopular president’s stated strategy, but did so anyway — though perhaps without the specific purpose to cause a civil-military breach. In other words, they arguably exhibited *mindful indifference*.

Between “knowingly” and “negligently,” lies the mindset of recklessness.⁹⁶ It is a “gross deviation from the standard of conduct that a law-abiding citizen would observe under the circumstances.” Put another way, this is to *know* that there is a substantial and unjustifiable risk, consciously disregard that risk, and then act. Unlike acting “purposefully,” there is no premeditation, no conscious design to bring about a known consequence. Consider Colin Powell’s New York Times op-ed published toward the end of his military career, just before Bill Clinton’s election in 1992.⁹⁷ Some scholars, like Richard Kohn, argued his motive was to shape a public expectation for what the American way of war ought to look like (referred to as the Powell-Weinberger Doctrine⁹⁸), knowing that it might act like a veto and constrain politically-acceptable strategies for engaging in the Balkans or in other circumstances that might erupt into “military operations other than war.”⁹⁹

Regardless of his *motive*, and regardless of *effect*, Powell’s act was unexpected and departed from a norm of silent subservience to the civilian’s legitimate authority to decide when, where, and why military operations ought to occur. Looking beyond motive and effect, if we try to find the right way to classify his mindset — his informed intentionality — we would question whether, from his position as a celebrated Chairman of the Joint Chiefs of Staff (CJCS), Powell could foresee that his op-ed would disclose and publicly confirm a significant difference of opinion within the incoming administration. We would question whether historical evidence suggests that his decision to publish that op-ed deviated not only from what his peer four-star flag officers would have done, but also what previous chairmen of have done in similar circumstances.

Gen. Maxwell Taylor, the CJCS under President Kennedy, believed that the Chairman “should be a true believer in the foreign policy and military strategy of the administration he serves.”¹⁰⁰ If we classify Powell’s conduct, after asking those questions, as potentially “reckless,” the popular narrative about this period of American civil-military relations and Powell’s reputation might shift. His recklessness, or *mindful nonconformance*, would help us understand the extent to which Powell valued certain norms generally or only under certain conditions. The scholarly community

⁹⁶ *Id.* § 2.02(2)(c) (“Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”).

⁹⁷ Colin L. Powell, *Why Generals Get Nervous*, N.Y. TIMES (Oct. 28, 1992), <https://perma.cc/686N-2PTP>.

⁹⁸ Frank Hoffman, *A Second Look at the Powell-Weinberger Doctrine*, WAR ON THE ROCKS (Feb. 20, 2014), <https://perma.cc/MM4N-CVPS>.

⁹⁹ Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, 55 NAVAL WAR C. REV. 8, 19 (2002). In reply, Powell retorted “Presidents Bush and Clinton, and Secretaries Cheney and Aspin, exercised solid, unmistakable civilian control over the Armed Forces and especially me. That’s the way it should be and was. My activities as Chairman were always taken with the prior knowledge of my civilian leaders.” See Colin Powell, *An Exchange on Civil-Military Relations*, NAT’L INT. (June 1, 1994), <https://perma.cc/LQE8-R8J4>.

¹⁰⁰ TAYLOR, SWORDS AND PLOWSHARES, *supra* note 58, at 252.

already regards¹⁰¹ his conduct as a troublesome case study, but describing his intent or mindset in addition to motives and effects may further reinforce the academic consensus and challenge the more widely-held public view.¹⁰²

In civil-military relations	In legal terms		
Degree of Informed Intentionality	“Mens rea” analogy	Defined by	Implication
Maximally Mindful	Purposeful	Deliberate act with premediated expectation of an effect on a CMR norm	Actor knew of the norm and desired to break it or erode it
Mindful Indifference	Knowing	Deliberate act and “practically certain” of consequences on a CMR norm, but not acting specifically to cause that effect	Actor knew of the norm, and did not care one way or the other whether the norm broke or eroded
Mindful Non-Conformance	Reckless	Knows of a risk that the act could lead to certain effects on the CMR norm, consciously disregards that risk, but lacks No premeditation or design to bring about that effect	Actor knew of the norm and knew that his act could have an effect, but did not believe the act would have an effect in this case
Unreasonably Unmindful	Negligent	Should have been, but was not, aware that a risk of certain consequences on a CMR norm would follow from the act	Actor did not know or understand the link between the act and a possible, foreseeable effect, but should have because a reasonable, similar-

¹⁰¹ See, e.g., Weigley, *supra* note 26, and Kohn, *supra* note 21.

¹⁰² See, e.g., Steven Stark, *President Powell*, ATLANTIC (Oct. 1, 1993), <https://perma.cc/A8A3-LFSA>. See also Adam Mendler, *What Leaders Can Learn From Colin Powell*, FORBES (Aug. 13, 2018, 8:00 AM), <https://perma.cc/FB5V-7QSG>; David W. Moore, *Powell Remains Most Popular Political Figure in America*, GALLUP (Sept. 30, 2002), <https://perma.cc/MLJ5-KM5G> (summarizing Gallup Poll revealing that 88% of Americans held a favorable view of then Secretary of State Powell); *Public Figure: Colin Powell*, YOUNGOV, <https://perma.cc/9MHV-T5UQ>.

			situated actor would have
<p>*This table illustrates that motive or justification (“I want X to happen because Y”), and impact or effect, are distinct questions with distinct implications from that of <i>mindset</i>, and only part of the overall context of the apparent Civil-Military Relationship breach</p>			

This begs a question: how, exactly, do we collect “evidence” of something so subjective and internal as a person’s intentionality? The difficulty is obvious, and probably the leading candidate argument for not bothering with this element at all. But difficult does not mean impossible, nor does it justify relegating this factor to the pile of irrelevant details. In legal systems, the accused’s mindset – informed intentionality – is never written on their sleeves (or in best-selling memoirs) either, but it is nevertheless as important to the prosecution as is the fact that the accused did anything at all. Rather than physical evidence or direct observation by an eyewitness (or even a confession), often only artifacts of their intent remain, circumstantial evidence rather than direct proof.

The same can be true for a supposed civil-military breach. We could look to the actor’s previous public statements (be they in professional forums, or to Congress); previous warnings that the actor may have received (think of President Obama’s talk to Gen. McChrystal onboard Air Force One following the latter’s speech in London¹⁰³); the actor’s previous educational exposure to, or personal independent study of, military history and civil-military norms; or to the actor’s earlier professional exposure to civil-military norms,¹⁰⁴ like prior duty on the National Security Staff, as a Legislative Liaison, as a White House Fellow, or as military assistant to an appointed civilian official. How probative and relevant each piece might be depends on the totality of circumstances, including the nature of the norm in question. None of these are likely to be the smoking gun. This hunt for mindset may be daunting, but it could prove to be a valuable exercise.

From the lowest culpability level of negligence (i.e., unreasonably unmindful) to the highest culpability level of purposefulness (i.e., maximal mindfulness), these gradations of informed intentionality might serve as standards against which we judge the senior strategic civil-military actors’ relational behaviors, specific acts, and courses of conduct that appear to breach generally-known and accepted norms. At the lower end of the mindset spectrum, accountability by punishments and social condemnation are the weakest. Less culpability (a low or non-existent degree of informed intentionality) still triggers some accountability, but triggers the public’s

¹⁰³ Greg Jaffe, *The President’s Difficult Relationship with War and his Warriors*, WASH. POST (June 3, 2016), <https://perma.cc/4DLV-JEWB>.

¹⁰⁴ See, e.g., *Academic Programs, AY 2016*, U.S. ARMY WAR COLLEGE (2016). One of the many readings on the subject includes Marybeth P. Ulrich, *A Primer on Civil-Military Relations for Senior Leaders*, in U.S. ARMY WAR COLLEGE GUIDE TO NATIONAL SECURITY ISSUES, VOLUME II: NATIONAL SECURITY POLICY AND STRATEGY 306-16 (J. Boone Bartholomees, Jr., ed., 2012). For an exemplar of independent scholarship by a practitioner, consider H.R. McMaster’s dissertation on the topic, resulting in his well-received book, *DERELICTION OF DUTY: JOHNSON, McNAMARA, THE JOINT CHIEFS OF STAFF AND THE LIES THAT LED TO VIETNAM* (1997).

response and prevention efforts differently. We do not engage in public safety campaigns against the act of murder, and we generally treat those offenses as if rehabilitative effort is not the society's primary concern. Rather, the state-inflicted act of retribution is enough justice and thought to be a plausible deterrent. In contrast, we *do* engage in public safety campaigns against risky behaviors that could foreseeably cause death – “don't drink (or text) and drive,” “click it or ticket” - and society employs court-sponsored rehabilitation for some of those offenses. In other words, the degree of public accountability and public prevention efforts to deter, punish, or rehabilitate are functions of the actor's degree of informed intentionality — an attempt to fit not just the “crime,” but also the “criminal.” The same ought to hold for threats to civil-military relationships and the public servants (whether in uniform or a suit) that threaten them.

Returning to Gen. Votel's statements, we can and should ask how it can be, after more than thirty years in uniform — and no doubt learning to think about civilian control of the military through Huntington's *Soldier and the State*¹⁰⁵ — a leader of his experience, position, and presumed judgment would nevertheless publicly “break” with the commander-in-chief?

CONCLUSION

“Told you did I, reckless is he! Now, matters are worse.”
*-Yoda, to Obi-Wan Kenobi.*¹⁰⁶

Because Gen. Votel was third in the nation's military chain-of-command for the campaign against ISIS, whether subsequent memoirs, studies, or his statements reveal his pique over the claimed lack of consultation with the administration may illuminate the workings of a key civ-mil relationship during the first half of the Trump Administration. One possibility is that he again echoes MacArthur, who wrote in his autobiography that he was shocked by Truman's “callous disregard for the ordinary formalities.”¹⁰⁷ Or perhaps Votel will take as a model the now-famous “Revolt of the Retired Generals,”¹⁰⁸ which controversially condemned then-Secretary of Defense Donald Rumsfeld's approach in Iraq and his leadership within the Pentagon, hoping that public engagement by experts will spark political pressure to make a policy change. The public role of a retired flag officer is itself a controversial subject, and one for which Votel's future behavior might demonstrate whether a norm exists or is eroding, whether we should care if it is broken, and then what we might do if it is a norm worth enforcing.

In his memoirs, former Defense Secretary Robert Gates wrote about the self-discipline required of senior civilian and military officials as they tackle mutual problems with different styles, backgrounds, agendas, and competences.¹⁰⁹ For Gates, this self-discipline was key to building and

¹⁰⁵ HUNTINGTON, *supra* note 84.

¹⁰⁶ STAR WARS: EPISODE V – THE EMPIRE STRIKES BACK (Lucasfilm 1980).

¹⁰⁷ DOUGLAS MACARTHUR, REMINISCENCES 449 (1964).

¹⁰⁸ See Snider, *supra* note 4; see also Owens, *supra* note 4 at 68-80.

¹⁰⁹ GATES, DUTY, *supra* note 53.

sustaining healthy civil-military relationships. “Never miss a good chance to shut up,” he wrote.¹¹⁰ Informed intentionality is a signal about whether, and the extent to which, civ-mil actors accept, understand, and adopt norms like this. What the civilian or military actor knew, or should have known about patterns of civil-military relations, their respective duties, and what the reasonably foreseeable consequences could be, are relevant and discernable fact. This additional question gives the civil-military community of interest a new way to discuss the full context of circumstances like Powell’s, McChrystal’s or Votel’s. Was the act *negligent? Reckless? Knowing? Purposeful?*

¹¹⁰ *Id.*