

# AT THE ELBOW AND UNDER PRESSURE: LEGAL, MILITARY, AND INTELLIGENCE PROFESSIONALS

*Dakota S. Rudesill\**

## I. INTRODUCTION

From morning staff meetings at federal agencies, to National Security Council meetings at the White House, to late-night videoconferences with American personnel in the field on the other side of the globe, deliberations across the United States government's national security apparatus involve multiple professional communities. Individuals in legal, military, and intelligence positions each have the opportunity to provide insight particular to their respective disciplines, while also shouldering special obligations as members of professional tribes. Normally, interactions among these tribes and relationships with decision-makers are collaborative and constructive. But too often, work across professional lines and relationships with powerful principals are beset by tension and dysfunction. Distrust among the professions and pressure by decision-makers to shade their work can become serious problems for professionals in each tribe, reducing the effectiveness of the government as a whole and driving up risk to national security. Meanwhile, professionals in each field can lose their credentials due to loss of professional independence, compromise of confidential information, or other ethical lapses. In short, lawyers, military personnel,

---

\* Associate Professor, Moritz College of Law, and Co-Leader of Security and Governance Research, Mershon Center for International Security Studies, The Ohio State University. This Article is based on the author's remarks upon receiving the Sidney D. Drell Academic Achievement Award from the Intelligence and National Security Alliance. I thank the Staff and Editors of the *Hofstra Law Review* for their patience and good work, particularly during the COVID-19 pandemic and its many disruptions. For reading drafts and helpful comments, I thank Alex Joel, Daniel Maurer, Mark Nevitt, and Corin Stone. For research assistance, I thank Brian Babb, Elly Bennett, Helen Fite, Shelby Leighton, and Bailey Sanders. I am responsible for all content and any errors. The views expressed here are mine and do not imply endorsement by the Office of the Director of National Intelligence nor any other United States government agency.

and intelligence officers are similarly situated in important respects.<sup>1</sup> They can also find common ethical cause in the face of decision-maker pressure that became severe in the Trump era.

Too little attention has been accorded to these professions in comparative perspective. This Article identifies foundational commonalities and notable distinctions among the roles of these professions in the context of government, and particularly, the American national security apparatus. This Article's aims are both academic and practical: spurring further comparative analysis, while also enriching awareness of the intense pressure these professionals presently face—to their professional peril and to the peril of good governance in our republic.

This Article first considers the *who* of these three professions. It argues that lawyers, soldiers, and intelligence officers all belong to distinct but fundamentally similar ethical professions.<sup>2</sup> These guilds have in common key attributes and core ethical commitments. All three professions are characterized by special expertise, training, licensing, and ethical obligations, the foremost of which is professional independence.

Part III concerns the *why*, explaining that all three professions are enormously important to the republic for similar reasons.<sup>3</sup> Most notably, their expertise and special skills manage the complexity of challenges facing the country, and their independence works as a check on error and bad faith by public officials.

Part IV focuses on the *what* and the *how* of legal, military, and intelligence work.<sup>4</sup> Members of the professions collaborate within their guilds; collaborate with other guilds; often work adversarially and at considerable peril; and manage themselves individually, particularly their human susceptibility for corruption (by others and the self). They often serve demanding principals who may not share their professional outlook or heightened ethical standards—and sometimes seek to

---

1. Other professions represented in government have similarities in their professional attributes, as well, and also have come in for tremendous pressure in recent years. They include journalists, budgeteers, climate scientists and weather forecasters, physicians, and other experts on public health and disease. This Article focuses on lawyers, soldiers, and intelligence officers because of their special centrality to national security.

2. See *infra* Part II. The three professions overlap. The military and intelligence professions include lawyers. And the vast majority of U.S. intelligence professionals serve in the military or work at agencies, such as the National Security Agency and Defense Intelligence Agency, that are part of the Department of Defense. Military intelligence lawyers stand at the intersection of all three communities.

3. See *infra* Part III.

4. See *infra* Part IV.

intimidate or manipulate them. Wedged between their principles and principals, the core, challenging, and continual task of lawyers, servicemembers, and intelligence officers is to balance their obligations of professional independence and service to a principal. There are special challenges to the independence-versus-service balancing when they are asked to become agents or advocates for their principals.

In Part V, this Article turns to the singularly stressful *now* for these professional guardians of law, force, and fact.<sup>5</sup> Legal, military, and intelligence personnel in the public arena and in government in recent years have faced severe and perilous pressures. This Article identifies a slate of independence-buttressing steps these professions and their allies should take.<sup>6</sup> These begin with looking beyond professional parochialism to recognize their common challenges, especially when working behind the veil of secrecy and classification. Similarly situated in their opportunities, obligations, and importance to good governance in our republic, these professionals need to come to their common defense—and be better protected in their independence by the law, by their institutions, and by the public they ultimately serve.

## II. THE *WHO*: ETHICAL PROFESSIONS WITH COMMON COMMITMENTS

Everyone who has served in or studied government has seen the dark side of *esprit de corps*: a combination of arrogance about the importance of one's own institution or agency and distrust of others.<sup>7</sup> There is professional parochialism, too, and it often manifests as condescension and paranoia. "They"—the lawyers, "the uniforms," "the spooks," depending on who is talking—cannot be allowed (variously) to control operations, to control the paper flow, to chair the meetings, to slow decision-making, or even to know what one's organization or team knows. That is because "they" do not understand the issues, cannot sufficiently protect sensitive information, do not appreciate the peril to personnel or other vital equities, or cannot move quickly. That there is sometimes a kernel of truth to these concerns keeps them well-fed and resilient. Yet too often this parochialism exacerbates classic national security process maladies: secrecy to the exclusion of key stakeholders with vital insight or information, excessive speed that results in

---

5. See *infra* Part V.

6. See *infra* Part V.B.

7. See *Overview: Esprit de corps*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095758104> (last visited Nov. 7, 2020) (defining *esprit de corps* as "a feeling of pride, fellowship, and common loyalty shared by the members of a particular group").

under-informed decisions, personalization and ego, and claims of consequence (“people could die”) that cover instead for bureaucratic self-interest or ignorance of the value-added of other actors.<sup>8</sup> The ultimate adversary may be a foreign power or terrorist organization, but the near enemy too often is other American public servants with different backgrounds and roles.

In reality, lawyers, military servicemembers, and intelligence officers have much in common. They are members of similar ethical professions, ones with similar attributes and a common core of ethical commitments.

The first common professional attribute is *special expertise*. Legal doctrine, war, and espionage are not matters of daily experience for most of society. That they sound complex, mysterious, and perilous translates to prestige for those with deep knowledge and experience in these fields. From the outside, professionals within these guilds may appear to have sorcerer-like capabilities: to use legal argument and filings to change the fate of lives and livelihoods, to employ lethal force in defense of the community, and to collect and assess classified information and conduct sabotage and counter-spy operations.<sup>9</sup> As guild members, lawyers, soldiers, and intelligence personnel are elite and speak with special authority.

The special expertise of the three professions flows from their *elite training*. Even in an advanced, highly-educated society, relatively small fractions of the population have attended law school or clerked for a judge, graduated from a military academy or have been taught the use of combat arms, much less been schooled in espionage at the Central Intelligence Agency (“CIA”) “farm” or attended the Sherman Kent School for Intelligence Analysis at “the Agency.”<sup>10</sup>

Special knowledge and training are prerequisites for *special licensing*. For the lawyer, the law license is awarded for successful completion of a law degree, bar examination, and (in most states) professional responsibility examination passage and passage of a

---

8. See JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 123-24 (2007).

9. The knowledge and skills of intelligence officers are often so specialized that former intelligence agency personnel sometimes have a difficult time securing rewarding, post-government employment. They cannot discuss much or any of what they know or what they did.

10. Ted Gup, *Down on ‘The Farm’: Learning How to Spy for the CIA*, WASH. POST (Feb. 19, 1980), <https://www.washingtonpost.com/archive/local/1980/02/19/down-on-the-farm-learning-how-to-spy-for-the-cia/fbe2f23c-ab8d-4fba-aab2-1c1da55f1c53>; *Offices of CIA: Training Resources*, CIA, <https://www.cia.gov/offices-of-cia/intelligence-analysis/training-resources.html> (last visited Nov. 7, 2020).

character and fitness investigation.<sup>11</sup> A servicemember's or intelligence officer's commission is somewhat similar, but the best analogy to the law license for these professionals is the security clearance. The Standard Form for National Security Positions, the SF-86, gathers largely the same information from applicants as do bar character and fitness forms.<sup>12</sup> Both filings—and the interviews and investigations that follow—can be highly intrusive and often uncomfortable. These reviews focus on employment record, history of compliance with the law, and personal failings and circumstances (especially reputation for honesty, substance abuse, and unmanageable debts) that bear on one's character and therefore suitability to be entrusted with extremely sensitive information and weighty responsibilities.<sup>13</sup> The courts have made clear that receiving bar admission and security clearances are privileges and not rights.<sup>14</sup>

Expertise, training, and licensing requirements screen and prepare candidates for the special and fundamentally similar *ethical commitments* of the legal, military, and intelligence professions. Each profession is bound by an ethical code, articulated in documents that carry that term and also in training materials, adjudicative opinions related to alleged violations, and the writings of leaders, practitioners, and scholars. Lawyers, soldiers, and intelligence officers are defined by the role assumption and ego subordination inherent in these ethics regimes. Individuals in these professions all have special occupational identities and have fiduciary duties of loyalty, acting in the interest of others—most often principals, superiors, clients, and colleagues.<sup>15</sup> For

---

11. California allows one to become a lawyer through self-study or bar passage. Almost all states require bar passage. *Comprehensive Guide to Bar Admission Requirements: 2020*, NAT'L CONF. BAR EXAM'RS, [https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020\\_021820\\_Online\\_Final.pdf](https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf) (last visited Nov. 7, 2020).

12. See *Questionnaire for National Security Positions: SF86*, U.S. OFF. PERS. MGMT. (Nov. 2016), <https://www.gsa.gov/Forms/TrackForm/33130>.

13. See *id.*; David Jaffe & Janet Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, AM. BAR ASS'N (Jan. 22, 2020), [https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/26/2/conduct-yourselves-accordingly-amending-bar-character-and-fitness-questions-promote-lawyer-wellbeing](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/26/2/conduct-yourselves-accordingly-amending-bar-character-and-fitness-questions-promote-lawyer-wellbeing).

14. See *Dep't of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“[N]o one has a ‘right’ to a security clearance.”). Denials in both instances are frequently appealed administratively, sometimes to federal courts, and only sometimes successfully. Compare *Sestric v. Clark*, 765 F.2d 655, 656, 660-61, 663-64 (7th Cir. 1985) (denying appellant's privileges and immunities and equal protection clause claims against Illinois state bar officials), with *Dorfmont v. Brown*, 913 F.2d 1399, 1400-01, 1403-04 (9th Cir. 1990) (denying appellant's request for an injunction against revocation of her security clearance).

15. A further analogue is the fiduciary duties of the soldier, juror, and voter to act in the general public interest. See Edward B. Foley, *Voters as Fiduciaries*, 2015 U. CHI. LEGAL F. 153,

the government lawyer, the duties attach regarding their immediate organizational client and the ultimate clients: the interests of justice, the public, and the Constitution.<sup>16</sup> Similarly, soldiers and intelligence officers swear oaths to the Constitution and to the protection of the nation.<sup>17</sup>

Integral to role assumption and fiduciary duty are the heightened ethical commitments to professional independence, integrity, and protection of confidences (attorney-client confidences for the lawyer and classified information). They are heightened duties in the sense that they ask more than general societal norms and often more than the law. For lawyers, the Model Rules of Professional Conduct (“MRPC”) prohibit the lawyer from allowing a client to direct or interfere with the lawyer’s “independence of professional judgment”; require candor to clients, tribunals, and third parties; bar “conduct involving dishonesty, fraud, deceit, or misrepresentation”; and extensively regulate the protection of client confidences.<sup>18</sup> Similar state bar rules impose these obligations at pain of loss of license or other discipline.<sup>19</sup> While the military is subject to the authority, direction, and control of civilians who hold office as the result of partisan elections and appointments, the ethos of the profession of arms in the United States is staunchly apolitical.<sup>20</sup> That is, the armed forces stay out of partisan and electoral politics. The military is part of the executive branch of the federal government but the military services—the Army, Navy, Air Force, Marines, Coast Guard, and Space Force—remain organizationally distinct and professionally independent.

---

157-58, 190-91 (2015).

16. See BAKER, *supra* note 8, at 124-25 (illustrating that the clients for the national security lawyer include the lawyer’s agency and the Constitution).

17. See 10 U.S.C. § 502(a); 5 U.S.C. § 3331. Ego subordination, and loyalty to the nation and fellow personnel, inhere throughout the order President Dwight Eisenhower issued, since amended, to govern U.S. servicemembers who become prisoners. See Exec. Order No. 10631, 3 C.F.R. § 266 (1954-1958).

18. See MODEL RULES OF PRO. CONDUCT pmb. § 11; r. 1.8(f)(2) (Current Clients: Specific Rules), 5.4(c) (Professional Independence of a Lawyer), 2.1 (Advisor), 3.3(a) (Candor Toward the Tribunal), 4.1 (Truthfulness in Statements to Others), 8.4(c) (Misconduct), 1.6 (Confidentiality of Information) (AM. BAR ASS’N 2020).

19. See, e.g., *Rule X. Rules of Professional Conduct*, D.C. BAR, <https://www.dcbbar.org/about/who-we-are/rules-and-bylaws/rules-governing-the-district-of-columbia-bar> (last visited Nov. 7, 2020); *Rule XI. Disciplinary Proceedings*, D.C. BAR, <https://www.dcbbar.org/about/who-we-are/rules-and-bylaws/rules-governing-the-district-of-columbia-bar/rule-xi-disciplinary-proceedings> (last visited Nov. 7, 2020).

20. See, e.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 2.1 § 2.7 (2019) [hereinafter MCM] (“[i]nappropriate [c]onsiderations” in court-martial proceedings include “the accused’s . . . lawful political association, activities, or beliefs,” and “[p]olitical pressure to take or not to take specific actions in the case”); MCM, *supra*, MIL. R. EVID. 508 (“A person has a privilege to refuse to disclose the tenor of the person’s vote at a political election conducted by secret ballot unless the vote was cast illegally.”).

This independence is reflected in norms and regulations keeping the military out of politics, and traditions and statutory protections for the independent views of senior military officers and lawyers.<sup>21</sup> The ethical codes of the military services centrally emphasize professional identity and ego subordination, service to the nation and the Constitution, and integrity and truth-telling.<sup>22</sup> So, too, does the Intelligence Community's ("IC") principles of professional ethics.<sup>23</sup> The intelligence principles and the statute creating the position of Director of National Intelligence stipulate that intelligence shall be objective and free of political considerations.<sup>24</sup> And, all three varieties of professionals face loss of

---

21. See U.S. DEP'T OF DEF., DIRECTIVE NO. 1344.10 §§ 2, 4 (Feb. 19, 2008); Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, § 201, 100 Stat. 1005 (1986), codified as amended at 10 U.S.C. § 151 (highlighting that with notice to the Secretary of Defense, the Joint Chiefs of Staff may provide their own views to Congress on any matter concerning the Department of Defense), § 153(b)(2) (showing that the Chairman of the Joint Chiefs of Staff shall provide risk assessment to Congress regarding national military strategy, transmitted through the Secretary of Defense, who may add comments), § 153(c) (showing that the Chairman shall submit directly to Congress a report on the needs of the combatant commands, including the Chairman's views on whether the President's budget request is deficient); DANIEL MAURER, CRISIS, AGENCY, AND LAW IN U.S. CIVIL-MILITARY RELATIONS 43-45 (2017) (explaining the independence of the Chairman under the Goldwater-Nichols Act of 1986); James Stavridis, *I Spent My Career in the U.S. Navy. The U.S. Military Must Stand Up for Its Soul in This Moment*, TIME (June 3, 2020, 1:28 PM), <https://time.com/5847343/military-stand-up-for-its-soul> (writing that the military "must remain above the fray of domestic politics"). Regarding military lawyers, see, for example, 10 U.S.C. § 8088(e) (banning interference with the ability of Navy lawyers to "give independent legal advice"). The apolitical professional military idea in America owes much to the classic theoretical work of political scientist Samuel Huntington. See generally SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS (1957). Critiques include claims that his formulations are too simplistic and that the idea that the military should operate in a realm different from civilian policy-making is unrealistic and may even have perverse consequences. See, e.g., Risa Brooks, *Paradoxes of Professionalism: Rethinking Civil-Military Relations in the United States*, INT'L SECURITY, Spring 2020, at 7. See generally MAURER, *supra* (explaining that the relationship among civilian leaders and the military is understood as one involving principals and agents).

22. See, e.g., *The Air Force Core Values*, CURTIS E. LEMAY CTR., [https://www.doctrine.af.mil/Portals/61/documents/Volume\\_2/V2-D05-Core-Values.pdf](https://www.doctrine.af.mil/Portals/61/documents/Volume_2/V2-D05-Core-Values.pdf) (Aug. 8, 2015) (explaining that Air Force values are "integrity first, service before self, and excellence in all we do"); *Honor Concept*, U.S. NAVAL ACAD., <https://www.usna.edu/About/honorconcept.php> (last visited Nov. 7, 2020) (highlighting that "[m]idshipmen are persons of integrity" and do not lie, cheat, or steal). These pieces of guidance emerge from the administrative side of the military, while other ethics guidance can be provided by operational commands. For the distinction, see generally Mark P. Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905 (2019).

23. See *Principles of Professional Ethics for the Intelligence Community*, OFF. DIR. NAT'L INTEL., <https://www.dni.gov/index.php/how-we-work/ethics> (last visited Nov. 7, 2020); see also OFF. DIR. NAT'L INTEL., INTEL. CMTY. STANDARD NO. 610-3, at 3-4 (Oct. 4, 2010).

24. See *Principles of Professional Ethics for the Intelligence Community*, *supra* note 23; Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108-458, § 102A, 118 Stat. 3644 (2004), codified as amended at 50 U.S.C. § 3024(a)(2) (explaining that the Director of National Intelligence as head of the intelligence community ("IC") shall ensure that intelligence provided to executive and legislative branches is "objective [and] independent of political considerations").

security clearance for mishandling national security's confidences—classified information.<sup>25</sup>

### III. THE *WHY*—THE PROFESSIONS MATTER FOR SIMILAR REASONS

Similarity in the professional attributes and core ethical commitments of the legal, military, and intelligence guilds reflects their common functions. The *who* of the professions which have just been considered flows from their *raison d'être*, their *why*.<sup>26</sup>

Professions represent a distributed institutional approach to managing the complexity, scale, and other daunting demands of specific social problems. Advising and arguing about the law in a modern state, protecting against the high-intensity organized violence threatened by a Russian armored division or 9/11-scale terrorist attack, and stealing secrets from foreign states and countering foreign espionage—much less doing all of these things well—are tasks too large and elaborate for non-specialists. The expertise, training, licensure requirements, and high ethical standards—plus the size of the professions—make profoundly difficult and ramified societal tasks manageable. The professions improve the quality of decision-making by sorting, delegating, and analyzing the issues in a sophisticated way. They enable decision-makers without subject matter expertise to make and implement high quality decisions.

In a republic with frequent elections and the popular sovereignty they reflect, the professions enable and channel governance by elected officials attentive to public and partisan opinion. The professions serve the State and its people regardless of which officials or parties hold office, enabling the preferences of voters and politicians to be pursued and implemented in a competent way. Traditionally, the professions also subtly but importantly manage politics by providing agreed, common frames of reference for expert, decision-maker, and public conversation regarding law and fact.

In this way, the professions also serve as a check on error and bad faith by political actors. Deep knowledge, training, licensure, and ethical commitments to integrity and professional independence give legal, military, and intelligence personnel credibility to contest uninformed

---

25. Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009) (prescribing a “uniform system for classifying, safeguarding, and declassifying national security information”); Exec. Order No. 13467, 73 Fed. Reg. 38103 (June 30, 2008) (promoting alignment of policies and processes related to access to classified information).

26. See *Raison D'être*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/raison%20d%27%C3%AAtre> (last visited Nov. 7, 2020) (defining the phrase as “reason or justification for existence”).



opinions. Professionalism provides firm footing to refuse to participate in fraud, lies, self-dealing, and other malfeasance and abuse of authority by politicians. In this way, these professionals embody “good government” and public integrity values that are in the public interest regardless of the vagaries of elected official, partisan, or public sentiment about personalities, parties, or policy.

This work of the professions of law, arms, and intelligence is especially vital in the national security space. Here, the safety and liberty of the country intersect. Much national security process also happens in classified settings. It is insulated by secrecy and dispatch from public knowledge, judicial review, and often from oversight by Congress. In classification’s darkest corners, the common attributes and commitments of the professions facilitate quality decisions, stand against malfeasance, and buttress the rule of law.<sup>27</sup>

#### IV. THE *WHAT* AND THE *HOW*—WHAT THE PROFESSIONS DO AND HOW THEY FAIL

Stories involving conflict are archetypically about humans versus humans, humans versus the elements, and humans versus themselves. Legal, military, and intelligence work involve similar relational struggles. The extent to which, in the course of these interactions, professionals uphold their ethical commitments reflects how well they and their guilds are serving their purposes in the interest of their principals and the public.

##### A. *Working Relationally*

To begin, legal, military, and intelligence practitioners all collaborate *within their profession*. The MRPC anticipate that lawyers practice cooperatively.<sup>28</sup> They are expected to consult one another and are assumed to share client confidences.<sup>29</sup> The military distinguishes itself from vigilantes and armed gangs by serving the State as a trained corporal unit, fixated from the first day of bootcamp to the last moments of a war on synergistically operating as a combined-arms team with unity of command and collaborative effort. Intelligence work is the work of teams, involving collectors, analysts, information brokers, gadget builders (physical and digital), case officers and other operators in the

---

27. See BAKER, *supra* note 8, at 53.

28. MODEL RULES OF PRO. CONDUCT r. 1.0(c) (AM. BAR ASS’N 2020).

29. See *id.* at r. 1.6 & cmts. 1, 2, 5, 9, 13-14 (explaining the exceptions to revealing client confidences between lawyers); see also *id.* at r. 1.0(c) cmt. 2, r. 1.0(k) & cmts. 8-10 (defining “law firm” and “screening”).

field, administrators, security officers, lawyers, and briefers. Breakdowns in a profession's ethical culture can be especially damaging when they involve recruits undergoing indoctrination—navigating their initial training and apprenticeship years, when collaboration within one's professional silo is most intense; when values, skills, and culture are inculcated; and when *esprit de corps* is forged. All three of these professions therefore emphasize, and continually review and improve, initial training, entry on duty, and apprenticeship.<sup>30</sup>

Legal, military, and intelligence practice progressively involves greater collaboration *among professions* as careers unfold and professionals move up. Complex national security issues often have multiple and interrelated legal, military, and intelligence aspects. Therefore, cross-disciplinary interactions are imperative for quality decisions. But these interdisciplinary interactions can be fraught due to parochial arrogance and distrust, cultural differences, terminology variations, and the persistence of monodisciplinary training for new entrants within legal, military, and intelligence organizations and in higher education.<sup>31</sup>

Collaboration is one part of the preparation for another common feature of legal, military, and intelligence practice: *working*

---

30. Initial training and apprenticeship are matters of continual focus for the three professions. See, for example, the legal community's conversations about law schools and clerkships, the military's extensive investment of time and effort in basic and other initial training for younger personnel, and the IC's traditions and emphasis on values at the start of an intelligence officer's career. See generally A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949 (2012) (discussing critiques of the ability of legal education to adequately train law students for law practice); see also Military Life, MYFUTURE, <https://www.myfuture.com/military/military-life> (last visited Nov. 7, 2020) (discussing experiences that servicemembers have in common); Michael J. Morell, *Declassified: Martin Petersen on the Tiananmen Crisis and Training CIA Analysts*, INTEL. MATTERS (July 15, 2020), <https://podcasts.apple.com/us/podcast/declassified-martin-petersen-on-tiananmen-crisis-training/id1286906615?i=1000484983789> (featuring former CIA Training Director Martin Petersen relating the remarks he gave to all new CIA employees about the ethos and responsibilities of intelligence work).

31. Of course, these are significant problems within the legal, military, and intelligence communities as well. Prosecutors and defense lawyers are often adversarial to an unprofessional degree, the United States military has undertaken a generational effort to enhance interoperability and drive down inter-service rivalry, and with a nearly two-decade lag behind the military, the IC, since the mid-2000s, has been working to break down barriers and distrust among its seventeen components. See Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1426-28, 1454-58 (2018); Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, § 201, 100 Stat. 1005 (1986), codified as amended at 10 U.S.C. §§ 151(f), 153(b)(2), 153(c) (restructuring the Department of Defense to promote multi-service jointness); WILLIAM A. OWENS & EDWARD OFFLEY, *LIFTING THE FOG OF WAR 202-04* (2000) (advocating for the United States military force to deploy "as a single entity," organized for "the most efficient and effective use of resources"); 50 U.S.C. § 3024 (key provision of statute restructuring the intelligence establishment to promote interoperability, information sharing, and unity of effort).

*adversarially*, often at professional and personal peril. Unlike its civil law counterparts around the world, the American legal system is generally adversarial where courts are involved and often in other settings as well.<sup>32</sup> The profession of arms structures itself to prevail in humanity's most dangerous contest, war. Servicemembers work in concert with intelligence officers who often share their exposure to armed attack in the field.<sup>33</sup> At foreign postings far from hot warzones, and even stateside at work and at home, intelligence professionals face surveillance, potential recruitment efforts, and sometimes harassment by foreign intelligence services.<sup>34</sup> They have faced violent attack by terrorists.<sup>35</sup> Professionals in all three fields share with their families the burdens of lives lived adversarially.

Intra- and inter-professional work, and especially practice in adversarial settings, provide opportunities for lawyers, servicemembers, and spies to fail at their most intimate relationship, their *relationship with themselves*. Amid the friction, fear, fog, and uncertainty that characterize war and other perilous national security activities,<sup>36</sup> servicemembers or intelligence professionals in the field can be tempted to violate the rules—for example, the international law of armed conflict or domestic laws on detainee treatment. Captives face physical duress to give up secrets or otherwise betray their values and their country. But compromise less commonly stems from combat, torture, and other

---

32. However, legal practice is becoming more collaborative and incorporating alternative dispute resolution methods. See Paola Cecchi-Dimeglio & Peter Kamminga, *The Changes in Legal Infrastructure: Empirical Analysis of the Status and Dynamics Influencing the Development of Collaborative Law Around the World*, 38 J. LEGAL PRO. 191, 205-08, 213 (2014) (analyzing the perception of collaborative law in the legal field).

33. Collaboration is increasingly common between the United States military and United States IC, both stateside and in the field. They are more functionally inter-operable, and their legal authorities have converged, as well. See generally Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539 (2012) (discussing legal aspects of the convergence of military and intelligence activities).

34. Some reports indicate that advances in technology are making traditional, physical monitoring less necessary for foreign intelligence services because digital methods are more effective at tracking United States intelligence officers. See Emily Crane, *Will the Digital Age Kill Off Spying? CIA in Crisis as Facial Recognition, Biometrics and AI Make It Increasingly Difficult for Agents to Maintain Their Cover Abroad*, DAILY MAIL (Dec. 30, 2019, 3:09 PM), <https://www.dailymail.co.uk/news/article-7837767/CIA-faces-crisis-intelligence-gathering-digital-footprints.html>.

35. See, e.g., Michael Morell, *Declassified: Former FBI Agent Bradley Garrett on the Global Manhunt for Mir Aimal Kansi*, INTEL. MATTERS (Aug. 5, 2020), <https://podcasts.apple.com/us/podcast/declassified-former-fbi-agent-bradley-garrett-on-global/id1286906615?i=1000487146289> (portraying an account of the hunt for a terrorist who murdered two CIA officers outside CIA headquarters in 1993).

36. See CARL VON CLAUSEWITZ, ON WAR 119-22, 138, 140 (Michael Howard & Peter Paret trans. & eds., 1976) (contending that war is characterized by these conditions).

physical coercion than it does from self-corruption: participation by individuals in their own compromise. Thankfully, relatively few people are deliberately unethical. More often, professionals rationalize deviation from their obligations as *de minimus*, necessary to expedite matters (a white lie or rule violation they think nobody will notice, for example), or in some way deserved compensation for some other harm, unfairness, or inconvenience. Analyses of whether a security clearance candidate or holder can be trusted focus on susceptibilities organized under the heading of “SMICE”—sex, money, ideology, contraband (including substance abuse), and ego (or excitement).<sup>37</sup> In addition to problematic foreign contacts or history of serious mental illness, investigators examine whether someone has shown poor judgment; recklessness or tendency to rationalize doing the wrong thing; and errors in their lives, presently or in the past, that could be embarrassing to them or otherwise give a foreign intelligence service or other bad actor basis for a recruitment pitch or blackmail. Archetypical examples are illicit sexual infidelity, large debts or expensive tastes, loyalties to extremist causes or foreign powers, crimes or substance abuse problems, and resentments or other psychological vulnerabilities.<sup>38</sup> CIA officer Aldrich Ames’s recruitment by the Soviet KGB through payments and ego-stroking—which led to the identification and murder of nearly a dozen Soviets who were clandestinely helping the United States—is a canonical case from the intelligence world.<sup>39</sup> It also reflects a cross-professional phenomenon. Military personnel most often lose their clearances and sell secrets for financial reasons, while lawyer discipline cases commonly involve violations of bar rules that protect the funds of clients and colleagues.<sup>40</sup> On these and other bases, professionals of law,

---

37. “SMICE” factors—or “MICE” if “S/sex” is dropped into the “E” category under ego or excitement—were classically considered as recruitment motives, both by U.S. case officers considering potential foreign recruits and by U.S. counterintelligence and security clearance investigators reviewing American clearance holders and candidates. There are other variants of these rubrics. See generally, e.g., Randy Burkett, *An Alternative Framework for Agent Recruitment: From MICE to RASCLS*, 57 *STUD. INTEL.* 7 (2013) (urging attention on reciprocity, authority, scarcity, commitment, liking, and social proof (“RASCLS”) factors).

38. *Id.* at 11. Marital infidelity is a crime under military law. See Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (containing a general article criminalizing “disorders and neglects to the prejudice of good order and discipline” and “conduct of a nature to bring discredit upon the armed forces”); MCM, *supra* note 20, pt. IV, ¶¶ 144-46. Therefore, a servicemember who has an extramarital affair provides material for blackmail on multiple bases: potential disclosure to the spouse and other family members, professional embarrassment “of a nature to bring discredit upon the armed forces” and those involved, and violation of the law. § 934.

39. Burkett, *supra* note 37, at 9, 12, 17.

40. See Lindy Kyzer, *Top Reasons for Security Clearance Denial in 2017*, CLEARANCEJOBS (Jan. 31, 2018), <https://news.clearancejobs.com/2018/01/31/top-reasons-security-clearance-denial-2017>. On the other hand, there is evidence that student loan defaults and other common financial

arms, and espionage face professional discipline, expulsion, or criminal sanction for rationalized compromise of their professional obligations.<sup>41</sup>

*B. The Special Relationship: Principals and Principles*

A final relational commonality of the legal, military, and intelligence professions is the centrality of the *relationship with their principal*. The relationship with the client, commander, or intelligence customer (or their subordinates) can be one's most intimate and ramified professional relationship, after the relationship with themselves. It is often hazardous for people in each profession in ways recognizable to the other two when acting as advisor or agent.

Serving principals without compromise of principles can be a challenge even in the best of times. Senior principals in government (the President, top political appointees, members of Congress, and others) are often demanding and forceful personalities; gentle souls rarely make it to the top.<sup>42</sup> They typically have limited time, incomplete information, less subject matter expertise and experience than their advisors and agents, and worries of embarrassment or other political vulnerability. For these reasons, senior principals may feel intimidated by lawyers, career military professionals, or members of the spy services. Principals may defensively respond with intimidating conduct or other power moves. Senior principals always have agendas—a lattice of ideas and instincts about law and fact; ideological commitments; or political, policy, bureaucratic, or personal projects. Principals may seek to enlist and coopt lawyers, soldiers, and intelligence officers. Or they may maneuver to dissuade these professionals from standing in their way. Professionals also can expect to encounter senior officials who do not share their professional background or high ethical standards. That can frustrate effective communication and even imperil trust and respect. President Clinton's extramarital affair and related deceptions and President Trump's penchants for false statements and prioritizing selfish personal interests, for example, spurred tension in relationships with the military and IC for both Commanders-in-Chief because, in both cases, the President's behavior was so at odds with heightened military and IC duties of integrity and ego subordination.<sup>43</sup> Also, it bears emphasis that

---

problems are not good predictors of compromise or other misconduct. *See, e.g.*, Arthur F. Greenbaum, *Administrative and Interim Suspensions in the Lawyer Regulatory Process—A Preliminary Inquiry*, 47 AKRON L. REV. 65, 84-85 (2014).

41. *See, e.g.*, Greenbaum, *supra* note 40, at 86-88; LEONARD WONG & STEPHEN J. GERRAS, LYING TO OURSELVES: DISHONESTY IN THE ARMY PROFESSION 19-20, 22 (2015).

42. *See* BAKER, *supra* note 8, at 123-24.

43. *See supra* note 38 and accompanying text (illustrating the crime of "extramarital sexual

senior principals are superiors, wielding line authority or other influence over the careers of subordinates.

In navigating relationships with principals, the central and common task of legal, military, and intelligence professionals is to serve both their professional ethical obligations and their obligation of service. What lawyers call “client-itis” represents per se failure: full merger with the principal to the abandonment of independent judgment. Ethical practice in the face of intimidation and powerful principals requires courage. Being a professional of independence and integrity, and not becoming a “yes-man” or “yes-woman”, is not simply an objective but intrinsic to the jobs of lawyer, soldier, and intelligence officer.

Professionals in each field work to serve both their independence and their service obligations in two main contexts: as advisor and as agent.

If they are doing their jobs competently, legal, military, and intelligence professionals provide frank and candid advice despite intimidation or other pressures. When pressed to agree with an unsupported assertion or a false statement, they must refuse. When pushed for black-and-white answers or misleading metrics, they must stick up for grey, for nuance, for deeper understanding, and, as necessary, for more inquiry.<sup>44</sup> They must not only acknowledge gaps and uncertainties in law or fact, and in their own personal knowledge, but indeed seek them out, flag them for principals as necessary when they cannot be resolved before briefing him or her, and work to resolve them fully and quickly and report back.<sup>45</sup> Covering for omissions,

---

conduct” under military law); Bradley Graham, *Military Leaders Worry Privately About Impact; Some Troops Offended by Double Standard*, WASH. POST, Sept. 15, 1998, at A10 (expressing discomfort within the military with the Commander-in-Chief not facing the same penalties as servicemembers); Daniel Barkhuff & William Burke, *Trump Has Little Advice to Offer Naval Academy Graduates*, BALT. SUN (May 22, 2018, 10:50 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0523-trump-usna-20180522-story.html> (critiquing that President Trump is “guided by self-interest, ego, impulse and immediate self-gratification” and prone to lying); Justin Wise, *Defense Expert Lists 6 Trump Errors in 2 Minutes of His Navy Speech*, THE HILL (May 25, 2018, 4:38 PM), <https://thehill.com/policy/defense/389435-defense-expert-lists-six-trump-errors-in-two-minutes-of-his-navy-speech-inbox>.

44. See Michael Morell, *Former CIA Officer Kristin Wood on the Production, Delivery and Value of Analysis*, INTEL. MATTERS (Sept. 3, 2019), <https://podcasts.apple.com/us/podcast/former-cia-officer-kristin-wood-on-production-delivery/id1286906615?i=100044849708> (featuring Kristin Wood, former CIA briefer to the Vice President and other top officials, and recounting pressure from senior government officials to have intelligence align with their viewpoints and the importance of officers standing firm on the facts and their best judgments); JOSHUA ROVNER, *FIXING THE FACTS: NATIONAL SECURITY AND THE POLITICS OF INTELLIGENCE* 5 (2011) (describing typology of intelligence-policy relations, including neglect, excessive harmony, and politicization).

45. See, e.g., Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, FOREIGN AFFS.,

uncertainties, or inevitable mistakes in the work produced by one's institution or by one's self is professional misconduct, no matter how irritated or disappointed their principal might become when informed. All three varieties of professionals must be prepared to adapt their communication modalities to suit the learning style, available time, and other circumstances in which their principals operate, but must be resolute in not shading the content of their candid assessments.<sup>46</sup> Additionally, all three kinds of advisors must remember that they often have multiple principals or customers—for example, the Congress, in addition to their executive branch superiors. General Eric Shinseki, then-Chief of Staff of the Army, did the right thing when, prior to the 2003 Iraq War, he fulfilled his duty to provide candid professional military advice to Congress about force needs, even though that appraisal led to criticism and marginalization by his disagreeing and most proximate principal, then-Secretary of Defense Donald Rumsfeld.<sup>47</sup>

In short, the duty of all three advisors is, in the words of the IC's Ethical Principles, to “speak truth to power”—no matter who or how much the truth hurts.<sup>48</sup>

---

Mar.-Apr. 2006, at 15, 16-19.

46. David Priess has provided a valuable analysis of the different learning styles of Presidents when receiving the President's Daily Brief (“PDB”) on intelligence, and how intelligence briefers have adapted the written and oral PDBs in terms of length and format. See DAVID PRIESS, *THE PRESIDENT'S BOOK OF SECRETS: THE UNTOLD STORY OF INTELLIGENCE BRIEFINGS TO AMERICA'S PRESIDENTS FROM KENNEDY TO OBAMA 206-11* (2016). President Trump has been criticized for not reading more than a page, and the IC has been criticized for going along with Trump's evident preference for seeing his name in every PDB “article” and understanding how the report matters to him personally. These are valid concerns about the President, along with reports that the President reads the PDB perhaps only once a week. See John Walcott, ‘Willful Ignorance.’ *Inside President Trump's Troubled Intelligence Briefings*, TIME (Feb. 5, 2019, 10:43 AM), <https://time.com/5518947/donald-trump-intelligence-briefings-national-security>; Carol D. Leonnig et al., *Breaking with Tradition, Trump Skips President's Written Intelligence Report and Relies on Oral Briefings*, WASH. POST (Feb. 9, 2018, 10:02 AM), [https://www.washingtonpost.com/politics/breaking-with-tradition-trump-skips-presidents-written-in-intelligence-report-for-oral-briefings/2018/02/09/b7ba569e-0c52-11e8-95a5-c396801049ef\\_story.html](https://www.washingtonpost.com/politics/breaking-with-tradition-trump-skips-presidents-written-in-intelligence-report-for-oral-briefings/2018/02/09/b7ba569e-0c52-11e8-95a5-c396801049ef_story.html). Reports that PDB briefers have not told the President about important intelligence that he finds politically inconvenient—namely about election interference on his behalf and other bad behavior by Russia—implicate the professional obligations of intelligence officers. Natasha Bertrand & Kyle Cheney, *Russia Bounty Flap Highlights Intel Breakdown Under Trump*, POLITICO (July 1, 2020, 4:50 PM), <https://www.politico.com/news/2020/07/01/russia-bounty-intel-breakdown-trump-347224>.

47. See Thom Shanker, *New Strategy Vindicates Ex-Army Chief Shinseki*, N.Y. TIMES, Jan. 12, 2007, at A13 (noting that the General's influence became dramatically diminished).

48. See *Principles of Professional Ethics for the Intelligence Community*, *supra* note 23 (intelligence professionals “speak truth to power”); Stavridis, *supra* note 21 (“Our senior active duty military leaders must [speak] forcefully and directly to national leadership, speaking truth to power in uncomfortable ways. They must do this at the risk of their career.”).

The foundational professional act of role assumption involves stepping not only into the role of advisor but often, too, that of agent.<sup>49</sup> For some professionals, agent is an occasional role, while for others it is a primary role. In any case, balancing obligations to principal and principle can be especially challenging when the professional interacts with third parties at the direction of the principal.

To be sure, answering information and analysis requests, or collecting additional intelligence or other information in lawful ways, may be challenging for a variety of practical reasons, but generally raises few professional concerns. Taking direct action in the field—be it representing a principal at a meeting, conducting military operations or engaging in liaison activity with friendly intelligence services, or conducting covert action—is also reasonably straightforward when everyone is following the law and professional norms in good faith. The professional must even be willing to undertake courses of action against which they advised but which the principal legally, reasonably, and in good faith selected. But professionals in government must also be careful not to allow their loyalty to the Constitution to be overtaken by personal or partisan loyalty to politico principals exercising constitutional authority.<sup>50</sup> They must also be on guard for their pretextual use as agents—orders for which a legitimate reason is given, but which plainly have a politically partisan or personal actual motive.

Ethical challenges may also arise in the course of advocacy: speaking on behalf of the principal or in support of the principal's policies. Representative and advocate are core lawyer roles, ones governed by the MRPC, state bar authorities, and other laws and norms. The lawyer's ability to make any non-frivolous argument on behalf of their client operates in concert with duties of candor and honesty toward third parties.<sup>51</sup> Heightened duties of independence and integrity weigh still more heavily on military and intelligence professionals. The “non-frivolous” lawyer's standard for arguments to third parties is far

---

49. See MAURER, *supra* note 21, at 95-96 (discussing this idea in the military context).

50. The Hatch Act, 5 U.S.C. §§ 7321–7326, generally bans political activity by government employees while on duty and use of government resources for political purposes. Lawyers working for law enforcement agencies and non-military employees in national security positions (including intelligence personnel) have heightened restrictions (a ban on any active role in political activity, even while not on duty) as “further restricted employees.” See 5 U.S.C. § 7323(b)(2)(B); see also *Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., <https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup31> (last visited Nov. 7, 2020). Partisan activity by the military is banned under Department of Defense Directive 1344.10. See *supra* note 21.

51. See MODEL RULES OF PRO. CONDUCT r. 2.1, 3.1, 3.3(a), 4.1, 8.4(c) (AM. BAR ASS'N 2020) (relating to non-frivolous arguments, candor, and dishonesty).



lower than the lawyer's obligation to provide, in private, their best advice to clients and the intelligence professional's obligation to offer assessments—whether private or public—that represent their best judgment and speak truth to power without political slant. As noted above, statutes protect the right of top officers to provide their own independent, best assessments to Congress and senior executive branch officials, and the freedom of military lawyers to offer independent advice. Military and intelligence officers may provide information and analysis to the public and other actors in support of lawful principal decisions, but must guard against becoming lawyer-like advocates for their politically-chosen principal. This is, for example, why serving military officers who have taken senior White House roles normally reserved to politicians are sometimes branded “political” by and distrusted within their military service communities.<sup>52</sup> A related risk is that the pressures of advocacy in an intensely contentious political arena will have blow-back effects, creating incentives for information, analysis, and advice that are unwelcome to their principal to be skewed or suppressed. Indeed, the CIA's analytical work and reputation suffered as a result of then-CIA Director George Tenet participating in presentations to the Congress and the United Nations of the George W. Bush Administration's case regarding Iraq and weapons of mass destruction—a case later exposed as flawed.<sup>53</sup>

---

52. Examples of such appointments of actively-serving officers include General Alexander Haig as White House Chief of Staff by President Nixon, Lieutenant General Colin Powell as Assistant to the President for National Security Affairs (“APNSA” or “National Security Advisor”) by President Reagan, and Lieutenant General H.R. McMaster as APNSA by President Trump. In the case of McMaster, for example, the Army was reportedly reluctant to promote McMaster after his service as Trump's APNSA, a role in which McMaster wrote op-eds and did other advocacy work for the President's policies. See Greg Jaffe & Josh Dawsey, *Trump and McMaster Have Seemed Anxious to Part but So Far Remain Together*, WASH. POST (Mar. 1, 2018, 7:37 PM), [https://www.washingtonpost.com/world/national-security/trump-and-mcmaster-have-seemed-anxious-to-part-but-so-far-remain-together/2018/03/01/ad12a19a-1d98-11e8-9de1-147dd2df3829\\_story.html](https://www.washingtonpost.com/world/national-security/trump-and-mcmaster-have-seemed-anxious-to-part-but-so-far-remain-together/2018/03/01/ad12a19a-1d98-11e8-9de1-147dd2df3829_story.html) (showing the military's reluctance to promote McMaster); H.R. McMaster & Gary D. Cohn, *America First Doesn't Mean America Alone*, WALL ST. J. (May 30, 2017, 7:37 PM), <https://www.wsj.com/articles/america-first-doesnt-mean-america-alone-1496187426> (providing an example of McMaster arguing for presidential policy).

53. The CIA participated in the preparation of presidential speeches, an incorrect national intelligence assessment regarding Iraq, and—with CIA Director Tenet seated behind Secretary of State Colin Powell—in the Bush Administration's presentation to the United Nations Security Council. See ROBERT DRAPER, *TO START A WAR: HOW THE BUSH ADMINISTRATION TOOK AMERICA INTO IRAQ 275-76* (2020) (containing an intelligence expert's discussion of the effects of CIA assistance in advocacy).

## V. THE NOW—PROFESSIONALS UNDER PRESSURE AND WHAT IS TO BE DONE

To be clear, the vast majority of professionals in government do their jobs with honor and integrity. Pressure to compromise their principles is rare, as is rationalization of serious ethics or legal violations. Even so, the legal, military, and intelligence professional communities are large, and every year cases come to light of professionals who have lowered their standards and face discipline. And every presidential administration at some point sees an overbearing official push policies, assumptions, or preferences too hard when working with their advisors or agents. The good news is that these problems, although certainly worrisome whenever they occur, normally happen at a relatively low rate of incidence and certainly do not reflect a coordinated effort.

This Article goes to press in times that are not normal.

President Donald Trump took office surfing a wave of populist disdain for elites with expertise.<sup>54</sup> From his administration's first days in office, it embraced a conspiracy theory that alleged that professionals in government—including legal, military, and intelligence officers—were a “deep State” set against the President for partisan reasons.<sup>55</sup> In reality, lawyers, soldiers, and the spy services were overwhelmingly doing their jobs in accordance with the law, norms, and their ethical commitments. They were practicing their loyalty to their ultimate principals, the Constitution and the public, and upholding high professional standards even if it meant saying and doing things that the President and his partisans found inconvenient.

Fully capturing the enormous pressure put on professionals during the Trump Administration would require a book-length treatment, but a quick overview will demonstrate the effort's intensity regarding public servants in the professions of law, arms, and intelligence. This Part of the Article also recommends steps that these professionals and their allies can take to protect their ability to honor their ethical commitments, most notably their independence and integrity.<sup>56</sup>

---

54. See, e.g., TOM NICHOLS, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS* 210-13, 215 (2017).

55. Charles S. Clark, *Deconstructing the Deep State: Donald Trump Isn't the First President to Be Deeply Skeptical of the Institutions and People He Now Leads*, GOV'T. EXEC., <https://www.govexec.com/feature/gov-exec-deconstructing-deep-state> (last visited Nov. 7, 2020). While new administrations are often in tension with non-political public servants, the severity of such tension during the Trump years remains remarkable. See *id.*

56. See *supra* Part V.B.

### A. *The President's Anti-Professional Pressure Campaign*

President Trump and his team have put pressure on the independence of lawyers, law enforcement, and the rule of law without precedent since President Richard Nixon sequentially fired top Justice Department officials for investigating his role in the Watergate scandal.<sup>57</sup> Although prohibited by Justice Department policy from pursuing indictment of a sitting President, Special Counsel Robert Mueller, former Federal Bureau of Investigation (“FBI”) Director, presented considerable evidence that President Trump and his team obstructed law enforcement personnel in their investigation into ties between the Trump campaign and Russian espionage to aid Trump during the 2016 election and related matters.<sup>58</sup> Among other things, the President asked for the personal loyalty of, and then fired, FBI Director James Comey, for overseeing the independent law enforcement investigation prior to Mueller’s appointment.<sup>59</sup> The President fired Acting Attorney General Sally Yates in part for reporting profound concerns that the President’s National Security Advisor, retired Lieutenant General Michael Flynn, lied to federal investigators and contacts of Russian agents.<sup>60</sup> Later, most of the Justice Department career prosecutors handling the Flynn case resigned, likely in protest, when the Attorney General abandoned prosecution of Flynn, who had pled guilty to lying to the FBI—a move by the Attorney General that is part of a larger effort to undo the work of career Justice Department and FBI professionals during the Russia investigation.<sup>61</sup> Additionally, the

---

57. Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC, Oct. 2017, <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921>.

58. See 2 ROBERT S. MUELLER, III, U.S. DEP’T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1-2 (2019) [hereinafter MUELLER REPORT].

59. *Id.* at 3-4, 12, 24, 62-63, 71.

60. *Id.* at 24, 31; Riley Beggin & Veronica Stracqualursi, *A Timeline of Sally Yates’s Warnings to the White House About Mike Flynn*, ABC NEWS (May 8, 2017, 9:44 PM), <https://abcnews.go.com/Politics/timeline-sally-yates-warnings-white-house-mike-flynn/story?id=47272979>.

61. See C. Ryan Barber, *Thousands of Ex-Prosecutors Urge Flynn Judges to Question Barr’s Move to Drop Case*, LAW.COM (May 11, 2020, 1:51 PM), <https://www.law.com/nationallawjournal/2020/05/11/thousands-of-ex-prosecutors-urge-flynn-judge-to-question-barrs-move-to-drop-case>; Erik Larson, *Flynn Prosecutor Steps Down as Case Is Reportedly Being Dropped*, BLOOMBERG (May 7, 2020, 2:41 PM), <https://www.bloomberg.com/news/articles/2020-05-07/flynn-prosecutor-van-grack-steps-down-from-criminal-case>; Sarah N. Lynch, *U.S. Moves to Drop Case Against Trump Ex-Adviser Flynn, Who Admitted Lying to FBI*, U.S. NEWS (May 7, 2020), <https://www.usnews.com/news/top-news/articles/2020-05-07/prosecutor-abruptly-quits-handling-case-against-ex-trump-adviser-michael-flynn>; Mark Mazzetti, *In Flynn Case, Barr Again Takes Aim at Mueller Inquiry*, N.Y. TIMES (May

President repeatedly berated his first Attorney General, Jeff Sessions, for rightly recusing himself and appointing Mueller, criticized the Deputy Attorney General for overseeing Mueller's investigation, and attempted to remove Mueller for conducting his independent investigation in accordance with the law and his ethical obligations.<sup>62</sup> Trump pardoned Flynn and other loyalists who had been prosecuted for serious offenses and further undermined respect for the rule of law by denigrating judges who issued rulings that displeased him—attacks on the judiciary that drew a rare rebuke of a President from the Supreme Court's Chief Justice.<sup>63</sup>

The President has taken a variety of extraordinary steps that raise profound concern about politicization of the armed forces. Credible reports indicate that the President has harshly criticized military leaders for providing advice regarding alliances and other global security matters with which the President does not agree.<sup>64</sup> Secretary of Defense James Mattis, a retired Marine general, resigned because he found his independent advice on these matters unwelcome.<sup>65</sup> The President has given speeches to military audiences that are highly partisan both in their content and campaign-style staging.<sup>66</sup> Trump unsuccessfully pushed for a Red Square-style domestic display of force.<sup>67</sup> The President excoriated,

---

18, 2020), <https://www.nytimes.com/2020/05/08/us/politics/barr-mueller-investigation-flynn.html>.

62. See MUELLER REPORT, *supra* note 58, at 48, 78, 80, 86.

63. See Kevin Johnson & Kristine Phillips, *President Trump Pardons Ex-National Security Advisor Michael Flynn; Ends Three-Year Legal Odyssey*, USA TODAY (Nov. 26, 2020, 12:32 PM), <https://www.usatoday.com/story/news/politics/2020/11/25/michael-flynn-trump-announces-pardon-former-national-security-advisor/6419985002>; Kevin Liptak et al., *Trump Pardons Former Sheriff Joe Arpaio*, CNN (Aug. 27, 2017, 2:32 AM), <https://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-donald-trump-pardon/index.html> (reporting Trump's pardon of one of his supporters who was convicted of criminal contempt of court); Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, AP (Nov. 21, 2018), <https://apnews.com/article/c4b34f9639e141069c08cf1e3deb6b84>.

64. See Leo Shane, III, *Trump Blasted Top Military Generals as 'A Bunch of Dopes and Babies' According to New Book*, MILITARYTIMES (Jan. 17, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/01/17/trump-blasted-top-military-generals-as-a-bunch-of-dopes-and-babies-according-to-new-book>; Joshua Geltzer, *Trump Loved "His Generals"—Until He Got to Know Them*, JUST SEC. (Jan. 2, 2020), <https://www.justsecurity.org/67884/trump-loved-his-generals-until-he-got-to-know-them>; Ryan Pickrell, *Trump Called the Generals Under His Command a 'Bunch of P---ies,' New Book Says*, BUS. INSIDER (Sept. 9, 2020, 1:20 PM), <https://www.businessinsider.com/trump-called-generals-under-his-command-bunch-of-pssies-book-2020-9>.

65. Jeffrey Goldberg, *The Man Who Couldn't Take It Anymore*, ATLANTIC, Oct. 2019, <https://www.theatlantic.com/magazine/archive/2019/10/james-mattis-trump/596665>.

66. See Michael R. Gordon, *Trump's Mix of Politics and Military Is Faulted*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/politics/trump-macdill-air-base.html>. (“[O]vert partisanship before an audience of armed forces personnel runs against a decades-long legacy.”).

67. See Dakota S. Rudesill, *Trump's Military Parade: Pennsylvania Avenue is Not Red*

and the White House reassigned a National Security Council official, an Army officer, who complied with a congressional subpoena regarding Trump's attempt to pressure the Ukrainian President into investigating Trump's domestic political opponent (presidential conduct so abusive of the office that it led to Trump becoming only the third President ever impeached).<sup>68</sup> The White House also retaliated against the officer's brother, a military lawyer.<sup>69</sup> In June 2020, the President was roundly criticized by General Mattis and other retired senior military officers (among many others) for using the National Guard and other militarized federal forces to clear Lafayette Square of non-violent demonstrators in order to stage a presidential photo opportunity and shoot a campaign-style video including the Attorney General, Defense Secretary, and Chairman of the Joint Chiefs of Staff.<sup>70</sup> The Chairman, General Mark Milley, subsequently felt compelled to issue guidance to the entire United States military as to the non-political nature of the armed forces, and to apologize in public for his, and thereby the military's, involvement in the Lafayette Square incident.<sup>71</sup>

The President's pressure campaign has remarkably been even more intense regarding intelligence professionals. President Trump and his team have repeatedly sought to dissuade and intimidate the IC from doing its job to "speak truth to power."<sup>72</sup> Trump has criticized the IC and

---

*Square*, LAWFARE (Feb. 21, 2018, 9:00 AM), <https://www.lawfareblog.com/trumps-military-parade-pennsylvania-avenue-not-red-square> (urging Congress to generally prohibit such parades except in case of a war victory); see also Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 U. CIN. L. REV. 391, 410, 412 n.79 (2018) (providing that, in addition to its appropriations power, Art. I, § 8, cl. 14 of the Constitution provides Congress with the constitutional authority to make such "Rules for the Government and Regulation of the land and naval Forces").

68. Devlin Barrett et al., *Whistleblower Claimed that Trump Abused His Office and that White House Officials Tried to Cover It up*, WASH. POST (Sept. 26, 2019, 6:11 PM), [https://www.washingtonpost.com/national-security/house-intelligence-committee-releases-whistleblowers-complaint-citing-trumps-call-with-ukraines-president/2019/09/26/402052ee-e056-11e9-be96-6adb81821e90\\_story.html](https://www.washingtonpost.com/national-security/house-intelligence-committee-releases-whistleblowers-complaint-citing-trumps-call-with-ukraines-president/2019/09/26/402052ee-e056-11e9-be96-6adb81821e90_story.html).

69. Leo Shane, III, *Brother of Army Officer Who Testified Against Trump Alleges Widespread Abuse, Retaliation at National Security Council*, MILITARYTIMES (Aug. 26, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/08/26/brother-of-army-officer-who-testified-against-trump-alleges-widespread-abuse-retaliation-at-national-security-agency>.

70. Veronica Stracqualursi, *The Prominent Former Military Leaders Who Have Criticized Trump's Actions over Protests*, CNN (June 5, 2020, 6:17 PM), <https://www.cnn.com/2020/06/05/politics/military-leaders-trump-floyd-protests/index.html>.

71. Robert Burns, *Milley Says He Was Wrong to Accompany Trump on Church Walk During George Floyd Protests*, MILITARYTIMES (June 11, 2020), <https://www.militarytimes.com/news/your-military/2020/06/11/milley-says-he-was-wrong-to-accompany-trump-on-church-walk-during-george-floyd-protests>.

72. See Robert Draper, *Unwanted Truths: Inside Trump's Battles with U.S. Intelligence Agencies*, N.Y. TIMES MAG. (Aug. 25, 2020), <https://www.nytimes.com/2020/08/08/magazine/us-russia-intelligence.html>; *supra* note 48 and accompanying text.

its leaders (both civilian and military) for their independent assessments that Russian intelligence intervened in the 2016 election in ways to discredit U.S. democracy and help Trump, and for their testimony to Congress about Russia, North Korea, and Iran that diverged from the President's preferences.<sup>73</sup> The President has ousted a shockingly large slate of senior intelligence officials, including the Director of National Intelligence ("DNI"), Acting DNI, Principal Deputy DNI, Director of the National Counter-Terrorism Center, the DNI's Chief of Election security, the IC Inspector General, and the Secretary of Homeland Security, for following the law and their ethical obligations in providing assessments regarding Russia's ongoing election interference and other matters, or taking actions that were politically inconvenient for the President.<sup>74</sup> The President sent a stunning message of "no confidence" to the IC when he stated at his 2018 summit with Russian President Vladimir Putin, overseer of the world's most hostile and capable adversary intelligence services, that he believed Putin instead of U.S. intelligence professionals, in reference to Russian election interference.<sup>75</sup>

The President and his team have also signaled that Trump does not want to receive information or analytical assessments at odds with his beliefs and perceived personal political interests regarding Russia and other matters. Reportedly, the President's Daily Brief ("PDB") on intelligence and other estimates have reflected this skewing guidance.<sup>76</sup> In abuses of power that telegraphed obvious threats and incentives to intelligence and military personnel regarding expressing themselves, the

---

73. Eileen Sullivan, *Trump Calls Intelligence Officers 'Naive' After They Contradict Him*, N.Y. TIMES (Jan. 30, 2019), <https://www.nytimes.com/2019/01/30/us/politics/trump-intelligence.html>.

74. See generally John Walcott, *Trump's Latest Intelligence Meltdown Isn't About the Facts. It's About the Truth*, TIME (Feb. 20, 2020, 10:53 PM), <https://time.com/5788479/trump-fires-maguire>; David Welna, *Exclusive: After Quitting Last Year, Senior U.S. Intelligence Official Now Talks*, NPR (Aug. 13, 2020, 8:12 PM), <https://www.npr.org/2020/08/13/902345240/exclusive-after-quitting-last-year-senior-u-s-intelligence-official-now-talks> ("While Gordon recalls all five presidents she briefed periodically finding certain intelligence inconvenient, she says Russian interference in the 2016 election and ensuing investigations into that activity were 'a particularly contentious topic' for Trump."); Eric Schmitt et al., *In Push for 2020 Election Security, Top Official Was Warned: Don't Tell Trump*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/us/politics/russia-2020-election-trump.html> ("In the months before Kirstjen Nielsen was forced to resign, she tried to focus the White House on one of her highest priorities as homeland security secretary: preparing for new and different forms of Russian interference in the 2020 election. President Trump's chief of staff told her not to bring it up in front of the president.")

75. Ron Elving, *Trump's Helsinki Bow to Putin Leaves World Wondering: Why?*, NPR (July 17, 2018, 5:00 AM), <https://www.npr.org/2018/07/17/629601233/trumps-helsinki-bow-to-putin-leaves-world-wondering-whats-up>.

76. See Draper, *supra* note 72.

President unprecedentedly directed the revocation of the security clearance of former CIA Director John Brennan (a career intelligence officer) due to Brennan's First Amendment-protected criticism of the President and arranged for clearances for family members and other White House personnel over serious objections from career professionals regarding their foreign national contacts and vulnerability to blackmail by foreign powers.<sup>77</sup> For these and other reasons, multiple former senior career intelligence officials have warned that intelligence during the Trump Administration has become politicized.<sup>78</sup> Trump's first DNI, former Republican Senator Dan Coats, like other national security officials, reportedly had well-grounded concern that Trump's unusual behavior regarding Russia was driven by Russia's possession of compromising information about the President.<sup>79</sup> In the months before the 2020 election, Trump's second Senate-confirmed DNI informed Congress that briefings on Russian and other foreign espionage against the U.S. elections would only be provided in written form—an extraordinary and disturbing development that gave politically-appointed leadership more control over what Congress is informed of and prevented oversight committees from verbally questioning career professionals to better understand the reports and surface any independent assessments at odds with the preferences of the President.<sup>80</sup> After the election, the President, in an unprecedented cleaning-of-house, replaced the Secretary of Defense and other top Pentagon civilian intelligence officials, installing political loyalists in several jobs.<sup>81</sup>

---

77. Michael Poznansky, *Trump Revoked John Brennan's Security Clearance. The Long-Term Consequences May Be Dire*, WASH. POST (Aug. 20, 2018, 6:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/20/trump-revoked-john-brennans-security-clearance-heres-why-that-matters>; Maggie Haberman et al., *Trump Ordered Officials to Give Jared Kushner a Security Clearance*, N.Y. TIMES (Feb. 28, 2019), <https://www.nytimes.com/2019/02/28/us/politics/jared-kushner-security-clearance.html>.

78. See, e.g., Michael Morell et al., *Trump's Politicization of U.S. Intelligence Agencies Could End in Disaster*, FOREIGN POL'Y (Apr. 28, 2020, 1:42 AM), <https://foreignpolicy.com/2020/04/28/trump-cia-intimidation-politicization-us-intelligence-agencies-could-end-in-disaster>; Michael Morell, *Former CIA Deputy Directors on Life Inside the Agency*, INTEL. MATTERS (Jan. 22, 2019), <https://www.cbsnews.com/news/transcript-david-cohen-avril-haines-talk-with-michael-morell-on-intelligence-matters>.

79. *Former Intelligence Chief Dan Coats Had 'Deep Suspicions' Russia 'Had Something' on Trump*, WOODWARD BOOK SAYS, UPOLITICS (Sept. 12, 2020), <https://www.msn.com/en-us/news/politics/former-intelligence-chief-dan-coats-had-deep-suspicions-russia-had-something-on-trump-woodward-book-says/ar-BB18XTLQ>.

80. Emma Newburger, *Director of National Intelligence Will No Longer Brief Congress in Person on Foreign Election Interference*, CNBC (Aug 30, 2020, 2:03 PM), <https://www.cnbc.com/2020/08/29/national-intel-director-will-no-longer-give-congress-in-person-briefings-on-election-interference.html>.

81. See Barbara Starr et al., *Trump Administration Removes Senior Defense Officials and Installs Loyalists, Triggering Alarm at Pentagon*, CNN,

### B. *Protecting the Professions*

When President-Elect Joe Biden announced key members of his national security team in November 2020, he emphasized that they will “tell me what I need to know, not what I want to know.”<sup>82</sup> Even so, the anti-professional tide in American culture remains relatively high; a Trump-style pressure campaign could return depending on who wins the next presidential election; and, of course, the more quotidian but still worrisome guild parochialism, policy-maker pressure, foreign recruitment efforts, and rationalized self-corruption of which this Article warns should not be expected to cease. The professions of law, arms, and intelligence and their allies should therefore move to protect them—in the current moment and over the long run. What needs to be done can be arranged under the relational categories identified in Part IV of this Article.<sup>83</sup>

First, *within their professions*, lawyers, soldiers, and intelligence officers should meet anti-professional pressure with recommitment to their values and their colleagues. They must maintain or raise high standards for recruiting, training, licensure, and ongoing professional education. They should reinvigorate both ethics training and enforcement of professional standards. All three professions must, in particular, train themselves in spotting and counteracting the cognitive bias that can flow from pressure from principals.

The professions should also work with legislative and executive branch officials to reinforce and, as needed, enhance protections within government. Ethical principles should be given statutory force more extensively. For example, in addition to reaffirming and strengthening the Hatch Act’s ban on political use of government resources, Congress could legislate the IC’s Principles of Professional Ethics and ethics codes of the military services, along with the Defense Department’s administrative ban on political activities. The whistleblowing channel and congressional subpoenas that were conduits for professionals to speak truth to power in the Ukraine scandal must be protected. The professions should also study whether to make resignation or withdrawal

---

<https://www.cnn.com/2020/11/10/politics/pentagon-policy-official-resigns/index.html> (Nov. 13, 2020, 3:31 PM) (reporting the Trump administration’s installation of new officials in the positions of Secretary of Defense, Chief of Staff to the Secretary of Defense, Undersecretary of Defense for Intelligence, and General Counsel of the National Security Agency).

82. See Matt Viser, *After Long, Bitter Delay, Biden Transition Kicks into Gear*, WASH. POST (Nov. 24, 2020, 8:20 PM), [https://www.washingtonpost.com/politics/biden-transition-trump/2020/11/24/26b8e4ba-2e7a-11eb-bae0-50bb17126614\\_story.html](https://www.washingtonpost.com/politics/biden-transition-trump/2020/11/24/26b8e4ba-2e7a-11eb-bae0-50bb17126614_story.html).

83. See *supra* Part IV.



from matters easier for lawyers, soldiers, and intelligence officers faced with unethical or illegal pressures or orders.<sup>84</sup>

Second, lawyers, military servicemembers, and intelligence personnel should collaborate *across professional lines* in defending the independence and high ethical standards of all the professions. They should recognize what this Article most importantly seeks to communicate—just how much they have in common. Perhaps led by individuals with credentials in multiple fields, these three communities should seek to check parochial tendencies with fraternal and collaborative ones. They should foster regular dialogue as part of initial training through continuing professional education about their common commitments and challenges—and the common cause they can make against anti-professionalism. They can also rally around and urge Congress to stipulate only for-good-cause removal of Inspectors General, a vital accountability feature of American governance now under severe pressure (President Trump has relieved multiple Inspectors General for doing their jobs),<sup>85</sup> recognizing that the analysis of law, military, and intelligence done by Inspectors General involves professionals from each of their fields and serves their professional commitments to independence, integrity, and good process.

Third, in terms of *adversarial relationships*, the American public that is increasingly skeptical of the value of these and other professions needs to be helped to understand their importance to the country. Professionals with expertise need to be supported in confronting anti-professionalism and bad information. That includes confronting conspiracy theories and other low-quality ideas about the “deep State,” and defending the kind of elitism that is valuable—specialized knowledge and training and heightened ethical commitments.<sup>86</sup>

---

84. One idea is creating standing funds of “I quit” money for professionals who resign in the face of pressure to do unethical or illegal things—accounts analogous to the funds created for the dependents of intelligence personnel lost in the line of duty after 9/11. See Annalise Knudson, *18 Years Later: A Guide to Resources Available for Sept. 11 Victims, Families*, SILIVE.COM, <https://www.silive.com/news/2019/09/18-years-later-a-guide-to-resources-available-for-sept-11-victims-families.html> (Sept. 10, 2019). Charging an outside body with review of the merit of for-conscience resignation decisions could provide a check on opportunistic or unwarranted resignations.

85. William Roberts, *Amid the Coronavirus Pandemic, the Trump Administration Targets Government Watchdogs*, CTR. FOR AM. PROGRESS (June 1, 2020, 9:04 AM), <https://www.americanprogress.org/issues/democracy/reports/2020/06/01/485656/amid-coronavirus-pandemic-trump-administration-targets-government-watchdogs>.

86. The author underscores the term “valuable elitism.” Status and opportunities that are distributed on the basis of inherited or otherwise unearned socioeconomic power, in contrast, reflect very problematic elitism. The public is right to be concerned about this, and our nation has much work to do.

The other adversarial relationship that will have so much to do with the prospects of the professions of law, arms, and intelligence inside the U.S. government is that with *principals*. Leaders must set the right tone, emphasizing the highest ethical standards. Professionals also need to be better trained experientially—from the initial education in their fields through continuing professional education—both in cross-profession teamwork and in how to work with demanding and even hostile principals without compromising their principles.<sup>87</sup> This training ought to include how to set expectations with principals as to the ethical obligations of the professions and what the principal’s advisors and agents are willing and unwilling to do. A terrific example of such strategic communication was provided by General Milley, who in the context of the President’s efforts to politicize the military, stated publicly to Congress that the United States military would stay out of the 2020 presidential election.<sup>88</sup>

## VI. CONCLUSION

Legal, military, and intelligence work may appear, at first glance, to be very different. Each profession does require special training, and their practice settings can differ at times. But these three vital professions often work together, and each profession has a common core of professional commitments, particularly heightened duties of independence, and integrity. Being people of integrity is their individual, collective, and common job. They are similarly situated and can learn a great deal from one another. They can, and indeed should, make common cause in the face of powerful anti-professional pressure from the public and some of the principals that public sentiment elevates to high office. Ultimately, the ability of lawyers, military personnel, and intelligence officers to set aside tribal parochialism, and to inform and motivate allies, will be integral to their ability over the long run to uphold their high ethical standards and do their vital work for the country.

---

87. See *The Ohio State National Security Simulation*, THE OHIO STATE UNIV.: MORITZ COLL. OF L., <https://moritzlaw.osu.edu/national-security-simulation> (last visited Nov. 7, 2020) (featuring a simulation, designed by the author, that serves to train legal, military, and intelligence students in cross-profession collaboration and how to work with demanding senior leaders).

88. Ryan Browne, *Top US General Tells Congress the Military Won't Play a Role in the 2020 Election*, CNN (Aug. 28, 2020, 7:39 PM), <https://www.cnn.com/2020/08/28/politics/milley-2020-election/index.html>; see also Daniel Maurer, *Breaking Ranks in a Civil-Military Crisis: Strategic Communication to Register Dissent*, JUST SEC. (Aug. 26, 2020), <https://www.justsecurity.org/72164/breaking-ranks-in-a-civil-military-crisis-strategic-communication-to-register-dissent> (describing and urging such advisement by senior military officers).