

**MILITARY STRATEGISTS ARE FROM MARS, RULE OF LAW
THEORISTS ARE FROM VENUS:¹ WHY IMPOSITION OF THE
RULE OF LAW REQUIRES A GOLDWATER-NICHOLS
MODELED INTERAGENCY REFORM**

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I. Introduction

Military victory in Iraq and Afghanistan proved relatively easy for the United States and its coalition partners.² This overwhelming success was due, in large part, to the top-down reorganization of the Department of Defense (DOD) put into practice by the 1986 Goldwater-Nichols Act.³

¹ See JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS: THE CLASSIC GUIDE TO UNDERSTANDING THE OPPOSITE SEX* (1992) (applying the same metaphor to explain differences between men and women); Colonel Rickey L. Rife, *Defense Is from Mars, State Is from Venus: Improving Communications and Promoting National Security* (June 1, 1998) (unpublished Senior Service College Fellow Research Project, available at <http://stinet.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA351032>) (using the same metaphor to contrast the Departments of Defense and State).

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² Joseph J. Collins, *Planning Lessons from Iraq and Afghanistan*, JOINT FORCES Q., 2d Quarter 2006, at 10, 11.

U.S. conventional military power is unparalleled. No country or nonstate actor in its right mind seeks conventional battle with the United States. Operation *Iraqi Freedom* demonstrated that the Armed Forces, with minimal allied help, can attack a significant opponent at a 1:6 force ratio disadvantage, destroy its forces, and topple a mature, entrenched regime, all in a few weeks.

Id.

³ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in various sections of 10 U.S.C.). General Peter

A work in progress for more than forty years, at times hotly resisted by the stakeholders even in the face of significant military debacles resulting from the disjointedness of the services,⁴ the Act has resulted in a meaner, leaner, much more agile and capable DOD.⁵ The success of the Goldwater-Nichols Act demonstrates that no matter how good an agency's intentions and subject matter expertise, sometimes it takes an act of Congress to mandate the coordination, cooperation, and leadership necessary to spur success in a changing world.⁶

Pace, while Vice Chairman of the Joint Chiefs of Staff, attributed the military success in Iraq to the realization of the Goldwater-Nichols promise:

[General Peter Pace] said that during operations Desert Shield and Desert Storm the battlefields were “deconflicted”—meaning the various services carved out exclusive niches and did not have to work together. In Iraq, ‘I believe the capabilities and capacities of the U.S. military on that battlefield were finally the realization of the dream that was the Goldwater-Nichols Act,’ he said.

Jim Garamone, *Pace Proposes Interagency Goldwater-Nichols Act*, ARMED FORCES PRESS SERV., Sept. 7, 2005 (quoting General Peter Pace); *see also* Peter M. Murphy & William M. Koenig, *Whither Goldwater-Nichols?*, 43 NAVAL L. REV. 183, 194–95 (1986); Christopher L. Naler, *Are We Ready for an Interagency Combatant Command?*, JOINT FORCES Q., 2d Quarter 2006, at 26, 27.

⁴ *See generally* JAMES R. LOCHNER III, VICTORY ON THE POTOMAC: THE GOLDWATER-NICHOLS ACT UNIFIES THE PENTAGON (2002) (discussing how significant shortcomings of the military organizational structure pre-Goldwater-Nichols led to military debacles as well as the numerous challenges to the Act's passage); Murphy & Koenig, *supra* note 3 (providing overview of background and implementation of the Goldwater-Nichols Act).

⁵ Naler, *supra* note 3, at 27.

The success of the Goldwater-Nichols Department of Defense Reorganization Act of 1986 is evident when an empowered unified combatant command leads a coalition of over 40 countries in multiple regions executing the war on terror. The intent of the act has come to fruition in less than 20 years. In Iraq, for instance, “the capabilities and capacities of the U.S. military on the battlefield were finally the realization of the dream that was the Goldwater-Nichols Act.”

Id. (quoting Garamone, *supra* note 3). *But see* Peter W. Chiarelli, *Beyond Goldwater-Nichols*, JOINT FORCES Q., Autumn 1993, at 71 (“Goldwater-Nichols is like the Articles of Confederation—each is better than what went before; however, each failed to endow the new order it created with the authority needed to unify its parts.”).

⁶ *See, e.g.*, Lorelei Kelly, *Unbalanced Security: The Divide Between State and Defense*, FOREIGN POL’Y FOCUS (Inst. for Policy Studies, Silver City, N.M. & Wash. D.C.), Mar. 28, 2007 (“The backstory of today’s interagency impasse provides important context. Our policymaking dilemma is not an accident. It is an outcome. And Congress has been frustratingly absent where leadership is concerned.”).

In stark contrast to the initial overwhelming military success, post-conflict stabilization and reconstruction challenges in Iraq and Afghanistan have proven that winning the “peace” is a more elusive, ill-defined, costly, difficult, and long-term campaign.⁷ History dictates that the United States must win this campaign if we are to avoid repeating the past.⁸ If the United States is unsuccessful, failed and fragile states will endure as fertile breeding grounds for terrorist networks.⁹ Also,

⁷ See Collins, *supra* note 2, at 11 (“[T]he insurgents decided after a few months that they had to defeat reconstruction in order to force the evacuation of coalition forces and discredit the people who had worked with the coalition. In both conflicts, counterinsurgency, stabilization, and reconstruction have become threads in the same cloth.”); Jeffrey Record, *Why the Strong Lose*, PARAMETERS, Winter 2005–2006, at 16, 26 (“Operation Iraqi Freedom achieved a quick victory over Iraqi conventional military resistance, such as it was, but did not secure decisive political success. An especially vicious and seemingly ineradicable insurgency arose in part because Coalition forces did not seize full control of the country and impose the security necessary for Iraq’s peaceful, economic, and political reconstruction.”); Lieutenant Commander Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW., July 2007, at 45, 50 (describing changes for the worse in Afghanistan, to include an increase in insurgent attacks, crime, and opium production, a deficit in basic services such as water and electricity, and the de facto control of portions of the country by warlords); see also General William S. Wallace, *Foreword* to U.S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (27 Feb. 2008) [hereinafter FM 3-0] (“Battlefield success is no longer enough; final victory requires concurrent stability operations to lay the foundation for lasting peace.”); cf. Address to the Nation on Iraq from the U.S.S. Abraham Lincoln, 1 PUB. PAPERS 410, 412 (May 1, 2003) (declaring an end to major hostilities in Iraq less than forty-five days after the initiation of major military action). See generally U.S. DEP’T OF STATE & BROAD. BD. OF GOVERNORS OFFICE OF INSPECTOR GEN., REPORT OF INSPECTION NO. ISP-IQO-06-01, INSPECTION OF RULE-OF-LAW PROGRAMS, EMBASSY BAGHDAD (Oct. 2005) [hereinafter DOS IG INSPECTION] (describing the rule of law efforts in Iraq through September 2005 and various barriers to success).

⁸ See JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 7 (2006) (“Unless the rule of law can be created in post-intervention societies, military interventions will not fully eradicate the dysfunctional conditions that necessitated intervention in the first place . . . perhaps necessitating another intervention a few years down the road.”).

⁹ OFFICE OF THE PRESIDENT OF THE UNITED STATES OF AMERICA, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA v (2002) (“[W]eak states, like Afghanistan, can pose as great a danger to our national interests as strong states. Poverty does not make poor people into terrorists and murders. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels.”); FM 3-0, *supra* note 7, para. 1-9 (“The problem of failed or failing states can result in the formation of safe havens in which adversaries can thrive.”); STROMSETH ET AL., *supra* note 8, at 3 (“Repression, poverty, and injustice can fuel terrorism, instability, civil war, and organized crime, and these in turn can lead to still more repression, poverty, and injustice. In the future, many military interventions are likely to arise jointly out of humanitarian concerns and security concerns.”); Andrew S. Natsios, *The Nine Principles*

regardless of whether a state fails or is led by a repressive regime, “human rights abuses and violence will recur and continue unchecked, posing ongoing threats not only to the residents of post-conflict societies but also to global peace and security.”¹⁰ Either way, if we fail at reconstruction now, in the future we may need to re-intervene in a country with an even less receptive population.¹¹ Finding a formula to get it right now is imperative, for the future likely holds only more of the same.¹² Given this necessity¹³ for success in Afghanistan, Iraq, and

of Reconstruction and Development, PARAMETERS, Autumn 2005, at 4, 18–19 (“This new paradigm means that an increasing number of complex emergencies and fragile states have heightened consequences for US national security interests. It is no longer acceptable or appropriate for us to avoid engaging with failed states. There is a contemporaneous correlation between failed states and terrorist-induced instability.”).

¹⁰ STROMSETH ET AL., *supra* note 8, at 7. Stromseth continued: “The logic is straightforward: although the roots of terrorism are complex, misery and repression create fertile ground for terrorist recruiters.” *Id.*

¹¹ *Id.* One need only consider the present situation in Somalia to appreciate how difficult a subsequent intervention in a failed state would be following an initial unsuccessful effort. When a state’s attempt to fix a fragile or failed state is unsuccessful, conditions deteriorate, so that any later effort will be that much more difficult. Moreover, any goodwill the United States may have initially enjoyed, for example, in Somalia, may be near nonexistent in the second intervention. Colonel James M. Coyne, Back to the Future: The Role of the Military in Enforcing the Rule of Law 9 (Apr. 10, 2001) (unpublished U.S. Army War College Strategy Research Project, available at <http://stinet.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA390621>) (discussing Somalia and noting that “[t]he conflicting UN purposes, the lack of Somali government consent because a government did not exist, the existence of a collapsed state, and the promise of the UN and US to ‘rebuild the state’ were part of the recipe for disaster”). Coyne further elaborated on how the initial U.S. failure in Haiti ultimately led to its re-intervention: “The departure of the US military in 1934 was hailed as Haiti’s second emancipation. Subsequent history, however, showed the failure to stabilize the political system by improving public administration resulted in the US military returning 60 years later.” *Id.* at 6.

¹² Secretary of Defense Robert M. Gates, *Beyond Guns and Steel: Reviving the Nonmilitary Instruments of American Power*, MIL. REV., Jan.–Feb. 2008, at 2, 3 (“The end of the Cold War, and the attacks of September 11, marked the dawn of another new era in international relations—an era whose challenges may be unprecedented in complexity and scope.”); Lieutenant General Peter W. Chiarelli & Major Stephen M. Smith, *Learning from Our Modern Wars: The Imperatives of Preparing for a Dangerous Future*, MIL. REV., Sept.–Oct. 2007, at 2, 3 (“We must also broaden our scope to include imperatives across our government—imperatives that will help us prepare for a future in which we will almost certainly encounter situations of equal or greater complexity than those we face today.”). These thoughts echo the 2006 National Security Strategy:

The goal of our statecraft is to help create a world of democratic, well-governed states that can meet the needs of their citizens and conduct themselves responsibly in the international system. This is the best way to provide enduring security for the American people.

beyond,¹⁴ the question becomes: how has the United States fared in its nation-building¹⁵ efforts to date in post-conflict societies?

Achieving this goal is the work of generations. The United States is in the early years of a long struggle, similar to what our country faced in the early years of the Cold War. The 20th century witnessed the triumph of freedom over the threats of fascism and communism. Yet a new totalitarian ideology now threatens, an ideology grounded not in secular philosophy but in the perversion of a proud religion. Its content may be different from the ideologies of the last century, but its means are similar: intolerance, murder, terror, enslavement, and repression.

OFFICE OF THE PRESIDENT OF THE UNITED STATES OF AMERICA, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2006) [hereinafter 2006 NSS]; *see also* FM 3-0, *supra* note 7, at viii (“America is at war and should expect to remain fully engaged for the next several decades in a persistent conflict against an enemy dedicated to U.S. defeat as a nation and eradication as a society.”). Field Manual 3-0 continues that the “conflict cannot be won by military forces alone; it requires close cooperation and coordination of diplomatic, informational, military, and economic efforts.” *Id.* It lists eight “trends that will affect ground force operations,” to include “globalization,” “technology,” “demographic changes,” “urbanization,” “resource demand,” “climate change and natural disasters,” “proliferation of weapons of mass destruction and effects,” and “failed or failing states.” *Id.*

¹³ Not all agree that the United States must succeed or intervene in the large majority of failed or failing states, only those that may potentially harbor terrorists and thereby present a threat to the United States.

History is awash in failed states, but only a handful have posed a serious problem for American security. A few civil wars have given impetus to jihadism, but it does not follow that the United States should join these conflicts, even in the Middle East. The principal interest the United States has in lawless states is to prevent a government from taking power that will give refuge to terrorists aiming to attack our country.

Benjamin H. Friedman et al., *Learning the Right Lessons from Iraq*, POL’Y ANALYSIS NO. 610 (CATO Inst., Wash. D.C.), Feb. 13, 2008, at 13. While Friedman’s argument has a certain allure, it neglects the complexities of globalization in which terrorists networks can export their beliefs, or for that matter their entire organization, from a region of the world that has become impermissive to one that has become permissive due to the tolerance of the host-government or alternatively the government’s inability to control its own territory. Therefore, while a failed state may seem momentarily innocuous, over time it will likely become a breeding ground for terrorists unless conditions are improved.

¹⁴ JAMES DOBBINS ET AL., THE BEGINNERS GUIDE TO NATION-BUILDING vi (2007) (“Western governments thus increasingly accept that nation-building has become an inescapable responsibility.”); *see also* Martin J. Gorman & Alexander Krongard, *A Goldwater-Nichols Act for the U.S. Government: Institutionalizing the Interagency Process*, JOINT FORCES Q., 4th Quarter 2005, at 51, 52.

Unfortunately, the United States' stability and reconstruction track record in Afghanistan and Iraq has proven that the congressional framework established for the executive branch by the National Security Act of 1947,¹⁶ its amendments in 1949,¹⁷ and the Goldwater-Nichols Act of 1986¹⁸ are insufficient to achieve our strategic objectives.¹⁹ Moreover,

Globalization, technological advances, and even American international preeminence have caused problems to meld and fuse together—sometimes purposefully, other times by chance. While past problems were complex, today, due to globalization, the communications revolution, and the ease of travel, there is an element of time compression that allows for this complexity and conflation to increase much faster. In addition, beyond the speed at which conflation occurs, the consequences of failing to address these problems both quickly and comprehensively are more severe. In today's international environment, the proliferation of weapons of mass destruction (WMD), the potential for economic disruption, the possibility of massive migration, and the rise of cyber threats raise the stakes

Id.; Chiarelli & Smith, *supra* note 12, at 3 (quoting General Charles C. Krulak) (“The rapid diffusion of technology, the growth of a multitude of transnational factors, and the consequences of increasing globalization and economic interdependence have coalesced to create national security challenges remarkable for their complexity”).

¹⁵ Coyne describes nation-building as follows:

Peace building, also known as “nation-building,” involves dealing with failed states after resistance is overcome. Occurring in the post conflict stage of a failed state, it seeks to rebuild basic civil infrastructure, governmental institutions, and procedures different from those that existed prior to the conflict/strife. It is during this type of operation that additional duties are generated and thrust upon the military. These include disarming the former combatants, training security personnel, monitoring elections and reforming or strengthening governmental institutions.

Coyne, *supra* note 11, at 2.

¹⁶ Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C.).

¹⁷ National Security Act Amendments of 1949, Pub. L. No. 81-216, 63 Stat. 578.

¹⁸ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in various sections of 10 U.S.C.).

¹⁹ See Lieutenant Colonel Floyd A. McKinney, *Interagency Coordination: Picking-Up Where Goldwater-Nichols Ended 1* (Mar. 15, 2006) (unpublished U.S. Army War College Strategy Research Project, available at www.strategicstudiesinstitute.army.mil/pdffiles/Ksil422.pdf) (“This suggests that in present form, the U.S. Government, and specifically the [National Security Council], may be ill-equipped to effectively deal with the 21st century challenges confronting the United States.”); Gabriel Marcella, *National Security and the Interagency Process: Forward into the 21st Century*, in ORGANIZING FOR NATIONAL SECURITY 163, 189 (Douglas T. Stuart ed., 2000) (“It is time to move away from a system

an analysis of nation-building efforts prior to these two conflicts reveals an inconsistent track record where lessons learned are shortly thereafter forgotten within the executive branch until world events once again cause the cycle to repeat itself.²⁰ Driven primarily by the recent lackluster results of U.S. operations in Iraq and Afghanistan,²¹ and in part by variable U.S. stabilization and reconstruction efforts over time,²² two distinct schools of thought have emerged as to how best to ensure future successes in these complex nation-building enterprises. Notably, neither model is concerned with whether the beneficiary is viewed as the United States or the host nation.

Rule of law theorists or scholars comprise the first of these schools of thought. An examination of the theorists reveals the necessity for a uniform definition and application of the rule of law across the U.S. government if the United States is actually to achieve the rule of law in failed or fragile states. The second school of thought, consisting of

designed for the problems of 1947 toward one that is appropriate to the challenges of the next century.”); William A. Navas, Jr., *The National Security Act of 2002*, in ORGANIZING FOR NATIONAL SECURITY 231 (Douglas T. Stuart ed., 2000) (arguing for a major reform of the national security system pre-US intervention in Iraq); *see also* Kelly, *supra* note 6 (arguing for the creation of a “deployable international civil service” to offset the significant operational burden placed on the military); Garamone, *supra* note 3 (discussing General Peter Pace’s suggestion for a Goldwater-Nichols-like reform of U.S. agencies).

²⁰ *See* DOBBINS ET AL., *supra* note 14, at iii–vii (providing an overview of the ebbs and flow in U.S. dedication to and relative performance in nation-building missions from the Cold War through the present). In the context of military downsizing following victory in war, Secretary Gates characterized the situation as follows:

One of my favorite lines is that experience is the ability to recognize a mistake when you make it again. Four times in the last century the United States has come to the end of a war, concluded that the nature of man and the world had changed for the better, and turned inward, unilaterally disarming and dismantling institutions important to our national security—in the process, giving ourselves a so-called “peace” dividend. Four times we chose to forget history.

Gates, *supra* note 12, at 3.

²¹ Conditions in Iraq have significantly improved since I wrote this article, while those in Afghanistan have conversely deteriorated. However, the dilemma of how the U.S. government should organize its instruments of national power to bring about a society marked by the “rule of law” remains elusive and problematic. Iraq has made it clear that security legitimated through the use of host-nation forces is essential to building the rule of law.

²² *See generally* Coyne, *supra* note 11 (discussing U.S. military role in peacekeeping operations from the Civil War forward).

military strategists, highlights the failures of the national security apparatus in achieving highly integrated, coordinated, and successful interagency effort in today's complex contingency operations leading to the conclusion that the instruments of national power must be overhauled. I propose that the United States' successful implementation of the rule of law in failed or fragile states requires the merger of these two schools of thought. To accomplish this merger, I first draw on the rule of law theorists to propose that the United States universally adopt the United Nations' (U.N.) definition of the rule of law in all its operations. Second, to create an organizational entity capable of adopting and "synergistically"²³ applying this definition in an operational setting, I draw on the military strategists' suggested overhaul of the national security apparatus and propose a revision of that apparatus tailored to accomplish the rule of law objective.

Part II of this article analyzes the various definitions and descriptions of the rule of law, including those espoused by U.S. government agencies, to conclude that the rule of law must be seen as a process. The formal and substantive components of the rule of law must be co-equally pursued from the inception of the intervention onward, with the ultimate goal of a host nation population "buy in" that results in the accomplishment of pre-defined ends.²⁴ Further, to solve the "problem of knowledge"²⁵ with the definition and implementation of rule of law, there must be a single, harmonious definition of the means and goals of any U.S. sponsored rule of law program.

²³ See *infra* notes 125–53 and accompanying text (defining and discussing a "synergistic" approach to the establishment of the rule of law).

²⁴ See *infra* notes 19–196 and accompanying text.

²⁵ Thomas Carothers, *The Problem of Knowledge* (2003), reprinted in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 15 (Thomas Carothers ed., 2006). Carothers broadly describes the problem of knowledge as follows:

The problem of knowledge in rule of law promotion can be considered as a series of deficits at various analytical levels, descending in generality. To start with, there is a surprising amount of uncertainty about the basic rationale for the rule of law promotion. Rule of law practitioners know what the rule of law is supposed to look like but in practice they are uncertain as to what the essence of the rule of law is.

Id. at 16–17; see *infra* notes 76–80 (generally discussing the "problem of knowledge").

As part of this analysis, Part II introduces the first of the two schools of thought—rule of law theorists. I label the first school of thought as theorists because they tend to focus on how to describe or define the rule of law, how those definitions or descriptions can be realized within a society, and the potential impact particular descriptions or definitions have on the sustainability of the rule of law in a given society.²⁶ Unfortunately, none of the theorists translate their respective definitions and descriptions into concrete courses of action that actually achieve rule of law on the ground.²⁷ At best, subscribers suggest that greater U.S. and international interagency coordination is needed to achieve a society “culturally committed”²⁸ to the rule of law.²⁹

Part II concludes by attempting to solve the “problem of knowledge” for U.S. government agencies. I propose in this section that the United States adopt the U.N. definition of the rule of law across all government agencies as a baseline that is synergistically tailored and applied to

²⁶ See, e.g., DOBBINS ET AL., *supra* note 14, at iii–vii; STROMSETH ET AL., *supra* note 8; Rosa Brooks, *From Autocracy to Democracy: The Effort to Establish Market Democracies in Iraq and Afghanistan: Panel 1: Establishing the Rule of Law*, 33 GA. J. INT’L & COMP. L. 119 (2004); Carothers, *supra* note 25; Rachel Kleinfeld, *Competing Definitions of the Rule of Law* (2005), reprinted in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31 (Thomas Carothers ed., 2006); Richard H. Fallon, Jr., *The “Rule of Law” as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); Thom Ringer, *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the “Rule of Law” and Its Place in Development Theory and Practice*, 10 YALE H.R. & DEV. L.J. 178 (2007); Captain Dan E. Stigall, *The Rule of Law: A Primer and a Proposal*, 189 MIL. L. REV. 92 (2006); Kevin H. Govern, “Rechtstaat” Aspirations Versus Accomplishments: Rethinking Recent Rule of Law Efforts in Iraq (2007) (unpublished presentation at the 2007 Barnes Symposium at the University of South Carolina Law School, Columbia South Carolina) (on file with author).

²⁷ See *infra* notes 49–84, 136–37 and accompanying text. *But see* Tasikas, *supra* note 7, at 55–58 (examining rule of law implementation in Afghanistan and proposing a rule of law “joint command”). While Tasikas’s proposal is a step in the right direction it fails to go far enough, and akin to the other rule of law theorists, he fails to take into account the wide-ranging calls for reformation by the military theorists.

²⁸ STROMSETH ET AL., *supra* note 8, at 75–76 (“Without a widely shared cultural commitment to the idea of the rule of law, courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper.”); see also DOBBINS ET AL., *supra* note 14, at 88 (echoing Stromseth very closely); cf. FM 3-0, *supra* note 7, para. 1-33 (“People base their actions on the perceptions, assumptions, customs, and values. Cultural awareness helps identify points of friction within populations, helps build rapport, and reduces misunderstandings. It can improve a force’s ability to accomplish its mission and provide insight into individual and group intentions.”).

²⁹ See generally authorities cited *supra* note 24.

various failed and fragile states.³⁰ Substantively robust, this definition is capable of producing a “cultural commitment”³¹ by the host-nation if properly pursued from the planning stages of an intervention onward. As importantly, the substantive elements of this definition are critical to any U.S. definition of the rule of law because without them, there can be rules and institutions that create the illusion of the rule of law, but that nonetheless produce regimes inconsistent with U.S. national policy objectives.³² Additionally, because this definition has much in common with the various descriptions and definitions offered by a number of U.S. agencies, a shift to its uniform application should not be institutionally overwhelming.³³

Part III discusses in detail the inadequacies of the current national security framework to achieve a robust and substantive definition of the rule of law that is uniformly defined and synergistically applied across agencies. By comparison to the deficiencies within the U.S. Government and the DOD that necessitated the National Security Act of 1947, its amendments in 1949, and the Goldwater-Nichols National Defense Reorganization Act of 1986, I argue that National Security Presidential Directive (NSPD) 44³⁴ and the establishment of the Office of the Coordinator for Reconstruction and Stabilization³⁵ are inadequate to

³⁰ See *infra* notes 165–96 and accompanying text (discussing “a synergistically applied U.N. definition”). In this regard, my approach is similar to that advocated by Jane Stromseth, David Wippman, and Rosa Brooks, leading theorists on the rule of law. See generally STROMSETH ET AL., *supra* note 8.

³¹ STROMSETH ET AL., *supra* note 8, at 75–76.

³² For example, Vali Nasr describes how elections in Iraq that resulted in a Shia Islam rise to power sparked similar electoral movements by Hezbollah in Palestine as well as Lebanon. VALI NASR, *THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE* 231–40 (2007). Even in Iraq itself, there exists the possibility that an elected government, if it and the population have not bought into a robust, substantive definition of the rule of law, could migrate toward a much closer relationship with Iran, a country with a history of human rights abuses that has been regionally empowered by the U.S. invasion of Iraq. See *id.* at 211–26 (discussing Iran’s post-U.S. invasion rise to power and the country’s ability to influence events in Iraq).

³³ See *infra* notes 187–94 and accompanying text.

³⁴ NATIONAL SECURITY PRESIDENTIAL DECISION DIRECTIVE/NSPD 44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTION AND STABILIZATION (Dec. 7, 2005) [hereinafter NSPD 44].

³⁵ *Id.*; see also CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. AND SCH., U.S. ARMY, *RULE OF LAW HANDBOOK* 22–23 (July 2007) [hereinafter ROL HANDBOOK] (providing brief overview of NSPD-44 and the Office of the Coordinator for Reconstruction and Stabilization).

produce lasting changes.³⁶ The only viable means of achieving the successful implementation of the rule of law in failed or fragile states is a robust coordinated interagency planning and implementation process. It is a full spectrum process that brings the weight of each agency's critical expertise at critical stages of the intervention and the establishment of the rule of law process. Part III concludes that because the existing national security apparatus is incapable of producing this highly coordinated robust effort, the national security apparatus must be fundamentally overhauled if the United States is to successfully meet the challenges of today and tomorrow.

To support my argument, I rely on and indirectly introduce the second of the two schools of thought, which I label military strategists. The military strategists acknowledge the national security objective, the complexities of the situation in Iraq, Afghanistan, and the broader global community, and the inadequacy of organization of the U.S. national security apparatus to address the problems associated with post-conflict stabilization and reconstruction operations due to a lack of unified interagency planning and action.³⁷ After providing some examples of how a lack of interagency coordination adversely impacts operations on the ground, these strategists tend immediately to delve into a proposed reorganization of the national security apparatus.³⁸ At best, military strategists dissect the problem while only assuming input from a non-DOD agency would favorably impact a situation. They fail to delve extensively into the breadth, type, or depth of expertise possessed by these other agencies and how a coordinated application and synchronization of efforts might shape future outcomes. For example, within the broader context of stability and reconstruction operations, these strategists do not consider in detail how input from rule of law theorists can and should influence the shape of the new organizations they propose.³⁹

Part IV formally introduces the military strategists. Drawing on the discussion of the problems with the existing national security apparatus

³⁶ I also conclude that the yet to be fully developed and implemented Department of State Interagency Management System is similarly insufficient to achieve enduring success. See *infra* notes 265–82 and accompanying text.

³⁷ See, e.g., Collins, *supra* note 2, at 11; Gorman & Krongard, *supra* note 14, at 52; Naler, *supra* note 3, at 27; Mitchell J. Thompson, *Breaking the Proconsulate: A New Design for National Power*, PARAMETERS, Winter 2005, at 62; McKinney, *supra* note 19.

³⁸ See generally authorities cited *supra* note 37.

³⁹ See *infra* notes 292–342 and accompanying text.

as described in Part III, Part IV sets forth the various military strategist proposed revisions to the national security apparatus. Modeled after the National Security Act of 1947⁴⁰ and the Goldwater-Nichols Act of 1986,⁴¹ the proposed revisions call for major changes at the strategic and high-operational or combatant command level that are accompanied by significant changes to government personnel policies and education systems.⁴²

Finally, Part V joins the military strategists with the rule of law theorists to propose a congressional revision of the national security apparatus. The proposed apparatus is tailored to the level of interagency effort necessary to synergistically apply the robust and substantive U.N. definition of the rule of law to accomplish U.S. national security objectives in failed or fragile states. Both the strategists and the theorists share a common ground—an acknowledgement that the military alone is not the ideal government agency to accomplish post-conflict reconstruction and stabilization operations.⁴³ The dilemma: military strategists are from Mars, and rule of law theorists are from Venus.⁴⁴ The military strategists see the problem and immediately spring into action to find the solution. The rule of law theorists see the problem, talk about the problem, talk about the problem some more, and then ask that everyone work together to fix the problem, but never seem to get around to actually proposing a concrete solution to the problem. Ironically,

⁴⁰ Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C.).

⁴¹ Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of 10 U.S.C.).

⁴² See *infra* 292–342 and accompanying text.

⁴³ See, e.g., DAVID GALULA, COUNTERINSURGENCY AND WARFARE: THEORY AND PRACTICE 88 (Hailer Publishing 2005) (1964); STROMSETH ET AL., *supra* note 8, at 143–45; Brooks, *supra* note 26, at 128; Coyne, *supra* note 11, at 13–15; Friedman et al., *supra* note 13, at 1, 9; Gorman & Krongard, *supra* note 14, at 51; Michael J. Totten, *The Final Mission, Part I* (Jan. 27, 2008), <http://www.michael-totten.com/archives/2008/01/>. But see John A. Nagl & Paul L. Yingling, *New Rules for New Enemies*, ARMED FORCES J., Oct. 2006 (arguing that nation-building is a proper task for Soldiers).

⁴⁴ I originally based my reference to Mars and Venus on GRAY, *supra* note 1. Gray characterizes men as more solution oriented, woman as more discussion and feeling oriented. By analogy, the strategists are solution oriented, hence from Mars, while the theorists are discussion oriented, hence from Venus. Subsequently, I learned that Colonel Rickey L. Rife applied the same metaphor to describe differences between the Departments of Defense and State. His metaphor is even more apt to my comparison between rule of law theorists and military strategists in that in many ways, rule of law theorists operate in similar fashion to his descriptions of the Department of State. See Rife, *supra* note 1.

neither appears to know that the other exists. Not one military strategist directly references or cites a rule of law theorist; in turn, not one rule of law theorist directly cites or references a military strategist. The same barrier-inducing stovepipe structure between the military and civilian agencies in the field has reproduced itself in academia. This article seeks to introduce the two as the opening salvo in a dialogue that ultimately leads to necessary organizational reform, reform which all appear to agree upon, at least in theory.

The synthesis of a substantive description of the rule of law with a Goldwater-Nichols type overhaul of the national security apparatus is the best means of accomplishing the national security objective of building enduring democracies or stable law-abiding countries from failed or fragile states. Without one, the other will fail, as reflected even in the debate between the rule of law theorists and military strategists as to how best to achieve success in Iraq, Afghanistan, and beyond. Without the underpinning of the rule of law theorists, the dramatic changes called for by the strategists may lack sufficient weight to warrant action and, more importantly, risk creating a U.S. institutional framework inadequate to move from a failed or fragile state to a state marked by a “robust,” “substantive,”⁴⁵ adherence to the rule of law. Without the theorists, any U.S. institutional changes may only be geared to achieve pyrrhic victories, such as the establishment of a “thin,” institutionally focused, “formal” rule of law.⁴⁶ Like the seed that lands on the rock, these fledgling states will initially appear to be successes only to wither in the months and years to follow.⁴⁷ Similarly, without the support of the military strategists, rule of law theorists will remain just that—*theorists*—failing to explain how even a “synergistic approach”⁴⁸ to the rule of law can be practically put into action. Mars must therefore align with Venus. The U.S. instruments of national power must be fundamentally overhauled.

⁴⁵ STROMSETH ET AL., *supra* note 8, at 70–76.

⁴⁶ *Id.* at 56–84.

⁴⁷ *Luke* 8:1-15 (“Those on the rock are the ones who receive the word with joy when they hear it, but they have no root. They believe for awhile, but in the time of testing they fall away.”).

⁴⁸ STROMSETH ET AL., *supra* note 8, at 56–84.

II. The Rule of Law: If We Might “Know It When [We] See It,”⁴⁹
Shouldn’t We All Be Looking at the Same Thing?

Rule of law is here, rule of law is there, rule of law is everywhere. The rule of law has become ubiquitous to the point of becoming slippery.⁵⁰ Akin to eyewitness testimony at a trial, while most persons can generally agree on what they witnessed as being the rule of law, their accounts of what it looks like and how it came to be are as varied in number as there are eyewitnesses. Through an examination of the numerous eyewitness accounts of the rule of law,⁵¹ to include those of U.S. government agencies,⁵² it becomes evident that for rule of law to achieve its promise of stabilized societies, even democracy in the eyes of some, there must be a centralized authority capable of coordinating the extraordinarily diverse agencies and actors involved in accomplishing this mammoth undertaking. For while everyone talks the rule of law, attempts to define the rule of law, argues the rule of law is the answer, and criticizes the rule of law, no one translates all of these concepts and ideas into a concrete, comprehensive, and actionable plan that actually results in the rule of law.⁵³

The need for a centralized authority first presents itself upon consideration of the diverse definitions and descriptions of the rule of law among theorists themselves. For example, some theorists advocate a

⁴⁹ *Id.* at 56.

⁵⁰ *See infra* notes 66–85 and accompanying text (discussing that despite universal agreement on the benefits of the rule of law, no one can really agree on what it is or how to achieve it).

⁵¹ *See infra* notes 85–153 and accompanying text (discussing the various definitions and descriptions of rule of law theorists).

⁵² *See infra* notes 154–64 and accompanying text (discussing the implementation of rule of law among U.S. government agencies, to include their definition, if any, of what the rule of law is and how to achieve it).

⁵³ As one scholar observed:

It would not be very difficult to show that the phrase “the Rule of Law” has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.

Kleinfeld, *supra* note 26, at 31 (quoting Judith N. Shklar, *Political Theory in the Rule of Law*, in *IDEAL OR IDEOLOGY?* 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987)). *See generally, e.g.*, STROMSETH ET AL., *supra* note 8; Carothers, *supra* note 25; Kleinfeld, *supra* note 26.

“formal,” “minimalist” or “thin” approach to the rule of law.⁵⁴ These theorists emphasize the rule of law’s “formal and structural components, rather than the substantive content of the laws.”⁵⁵ In contrast, substantive rule of law theorists acknowledge the importance of the laws’ structure and components, but “insist[] that the true rule of law also requires particular substantive commitments: to human rights, for instance.”⁵⁶ Some of these theorists, sensing the great divergence of opinion on what the rule of law is and how to measure it, have recently categorized the various descriptions and definitions of the rule of law and attempted to synthesize them into a more comprehensive or synergistic approach that emphasizes means and ends.⁵⁷

Unfortunately, this disparity of how to define or describe the rule of law transcends these scholarly articles and manifests itself within various U.S. agency approaches to the rule of law, for example, the U.S. Agency for International Development’s (USAID) approach compared to that of the DOD.⁵⁸ As one of these theorists notes, “[a]lthough some practitioners harbor no doubts and promote the rule of law abroad with a great sense of confidence, most persons working in the field openly recognize and lament the fact that very little really has been learned about rule-of-law assistance relative to the extensive amount of on-the-ground activity.”⁵⁹ A “problem of knowledge”⁶⁰ as to what rule of law is—beyond “I know it when I see it”⁶¹ and it is a good thing—and how to practically achieve it hinders the rule of law’s successful development in countries where it is lacking or nonexistent.

From a national policy perspective, there must be a centralized authority for the rule of law to be realized in a post-conflict or fragile state. This centralized authority must, in coordination with subordinate

⁵⁴ See, e.g., Ringer, *supra* note 26; see also *infra* notes 96–105 and accompanying text.

⁵⁵ STROMSETH ET AL., *supra* note 8, at 76.

⁵⁶ *Id.* at 71; see *infra* notes 106–14 and accompanying text (discussing the substantive approach).

⁵⁷ See STROMSETH ET AL., *supra* note 8, at 80 (advocating a synergistic approach); see also Kleinfeld, *supra* note 26, at 31 (advocating that rule of law be defined and its success measured by pre-articulated ends); Ringer, *supra* note 26, at 207 (emphasizing that rule of law should be seen as a “dynamic” “means of development” rather than a “fully fledged end” because the “ends of development shift over time, as developing societies begin to define their own goals for themselves”).

⁵⁸ See *infra* notes 154–64 and accompanying text.

⁵⁹ Carothers, *supra* note 25, at 15.

⁶⁰ *Id.*

⁶¹ STROMSETH ET AL., *supra* note 8, at 56.

actors and agencies, arrive at a generally applicable universal definition of the rule of law that incorporates stated goals and the particular means to achieve those goals. This central authority must define the mission or goal of rule of law operations. Moreover, this centralized authority and the supporting organizational infrastructure must also be flexible enough to vary the definition, goals, and methods to accommodate the panoply of cultures and societies in which it will operate.⁶² Beyond these logistical concerns, in defining the mission or goal, this centralized authority must adopt a substantively infused definition of the rule of law that results in a host-nation society “culturally committed”⁶³ to its continued development. Only then may U.S. policy goals, such as a stable society that abides by the rule of law, be achieved. Toward this end, in Part II.E, I argue that the United States should adopt and synergistically⁶⁴ apply the U.N. definition of the rule of law as a baseline for all U.S. government agencies when planning for and actually intervening in failed or fragile states.⁶⁵

A. The Obvious—No One Can Really Agree on What It Is

In any scholarly discussion on the rule of law, it is amazing how common it is to hear the following refrain—no one knows what the rule of law really is, except that “we *do* know it when we see it, and we most certainly know it when we *don’t* see it.”⁶⁶ In chameleon fashion, its definition has been considered sufficiently vague and elusive so as to spark comparisons to the “proverbial blind man’s elephant.”⁶⁷ The rule of law may be everything and anything depending on who is defining it and for what purpose—“a trunk to one person, a tail to another.”⁶⁸ This malleability results in groups as disparate as economic-oriented entities,⁶⁹

⁶² See *infra* notes 154–64 and accompanying text (discussing the necessity for a centralized authority).

⁶³ STROMSETH ET AL., *supra* note 8, at 310–46 (discussing the creation of “rule of law cultures”).

⁶⁴ See *infra* notes 125–53 and accompanying text (discussing the synergistic approach).

⁶⁵ See *infra* notes 165–96 and accompanying text.

⁶⁶ STROMSETH ET AL., *supra* note 8, at 57.

⁶⁷ Kleinfeld, *supra* note 26, at 32.

⁶⁸ *Id.*

⁶⁹ STROMSETH ET AL., *supra* note 8, at 58–59. Stromseth explains the embracement of the rule of law by these economic interests, such as the World Bank and multinational corporations, as follows:

international and national security experts,⁷⁰ military personnel,⁷¹ and human rights advocates⁷² embracing the rule of law as central in attaining their respective goals, however divergent their interests may otherwise be.⁷³ All “share the basic assumption that the rule of law is central to [a]

Most in the economic development and corporate communities assume that the rule of law entails or produces sensible, intelligible regulations, effective dispute resolution mechanisms, and a predictable, fair legal framework in which property interests can be effectively protected. Thus, for those concerned with the creation of a stable, favorable business climate and with new investment and market opportunities, the rule of law is often conceptualized as a necessary prerequisite.

Id.

⁷⁰ *Id.* at 60 (“[A]lthough the roots of terrorism are complex, misery and repression create fertile breeding grounds for terrorist recruiters. If the rule of law is necessary to economic growth and to eliminating egregious human rights abuses, then by extension the rule of law plays a key role in eliminating the conditions that give rise to violence and terror.”). Stromseth’s line of reasoning echoes that in the 2002 and 2006 National Security Strategies. See, e.g., 2006 NSS, *supra* note 12, at 1 (“The goal of our statecraft is to help create a world of democratic, well-governed states that can meet the needs of their citizens and conduct themselves responsibly in the international system. This is the best way to provide enduring security for the American people.”).

⁷¹ See Gates, *supra* note 12, at 4 (stating that military success alone in Iraq and Afghanistan is “not sufficient to win”); ROL HANDBOOK, *supra* note 35, at 3–4 (outlining the importance of rule of law efforts to the conduct of stability operations).

⁷² STROMSETH ET AL., *supra* note 8, at 59 (“To human rights advocates, where the rule of law is absent, human rights violations flourish Promoting the rule of law thus seems to most human rights advocates like a critical component of protecting fundamental human rights.”).

⁷³ *Id.* at 58–60. Another rule of law theorist has similarly characterized the susceptibility to perceive the rule of law as an elixir to multiple ailments:

“One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world’s troubles. How can U.S. policy on China cut through the conundrum of balancing human rights against economic interests? Promoting the rule of law, some observers argue, advances both principles and profits. What will it take for Russia to move beyond the Wild West capitalism to more orderly market economics? Developing the rule of law, many insist, is the key. How can Mexico negotiate its treacherous economic, political, and social transitions? Inside and outside Mexico, many answer: establish once and for all the rule of law. Indeed, whether it’s Bosnia, Rwanda, Haiti, or elsewhere, the cure is the rule of law, of course.”

Ringer, *supra* note 26, at 179 (quoting Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.–Apr. 1998, at 95).

stable and modern democratic society.”⁷⁴ As a result, “the rule of law stands in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement on precisely what it means.”⁷⁵

The vagueness associated with the definition and implementation of rule of law projects has best been described as a “problem of knowledge.”⁷⁶ All agree it is a good thing, no different than “apple pie and ice cream,”⁷⁷ yet its elusiveness thwarts efforts to define and implement it. From theorists to military practitioners, all have encountered the same dilemma—a “problem of knowledge.”⁷⁸ The dilemma lies in that the rule of law appears to be an interdisciplinary mixture that encompasses philosophy, law, behavioral sciences, economics, and politics,⁷⁹ which when blended with a fair amount of art and luck in the implementation, produces a law-abiding, stable society

⁷⁴ STROMSETH ET AL., *supra* note 8, at 60.

⁷⁵ Stigall, *supra* note 26, at 93 (citing BRIAN Z. TAMANAHA, ON THE RULE OF LAW 5 (2004)); *see also* STROMSETH ET AL., *supra* note 8, at 56–57 (“In the foreign policy world, most policymakers and practitioners take it for granted that the rule of law is something everyone needs in post-conflict and post-intervention societies, something that is clearly worth pursuing . . . even in the absence of a precise and agreed-on definition.”).

⁷⁶ Carothers, *supra* note 25, at 5. Carothers described the problem as follows:

When rule-of-law aid practitioners gather among themselves to reflect on their work, they often express contradictory thoughts. On the one hand they talk with enthusiasm and interest about what they do, believing that the field of rule-of-law assistance is extremely important. Many feel it is at the cutting edge of international efforts to promote both development and democracy abroad. On the other hand, when pressed, they admit that the base of knowledge from which they are operating is startlingly thin. As a colleague who has been closely involved in rule-of-law work in Latin America for many years said to me recently, “we know how to do a lot of things, but deep down we don’t really know what we are doing.”

Id.

⁷⁷ STROMSETH ET AL., *supra* note 8, at 58.

⁷⁸ Carothers, *supra* note 25, at 5; *see, e.g.*, ROL HANDBOOK, *supra* note 35, at 4 (“From an operational standpoint, any approach to actually *implementing* the rule of law as part of stability operations must take into account so many variables—cultural, economic, institutional, and operational—that it may seem futile to seek a single definition for the rule of law or how it is to be achieved.”).

⁷⁹ *See* ROL HANDBOOK, *supra* note 35, at 4 (describing rule of law as based as much in philosophy as law); *see also* STROMSETH ET AL., *supra* note 8, at 75 (“‘[P]romoting the rule of law’ is an issue of norm creation and cultural change as much as an issue of creating new institutions and legal codes.”).

from a failed or fragile state. At its core, rule of law theorists and practitioners are striving to find the solution to that indefinable gel that somehow binds societies together under a stable government and congeals it into an intelligible formula. Put another way, they are attempting to understand the foundational elements that generate a meeting of the minds in the “social contract” between a government and its people.⁸⁰

Ironically, despite being unable collectively to overcome the “problem of knowledge,” rule of law theorists insist that the rule of law is essential to the success of any intervention in a failed or fragile state.⁸¹ Rule of law theorists also agree that the current U.S. and international organizational framework is inadequate to nurture the rule of law in a failed or fragile state. By proposing an ideal rule of law definition from the various competing ones held by the United States and international agencies as well as scholars, the theorists highlight the need for a cohesive approach as the current piecemeal framework is dysfunctional.⁸² Whether or not directly stated, for rule of law theorists, the United States must change how it approaches post-conflict reconstruction and stabilization operations to ensure greater interagency coordination from the intervention’s inception to its completion. In particular, this approach must emphasize the primacy of civilian agencies during the reconstruction phase once security has been established.⁸³

Admittedly, overcoming this “problem of knowledge” to arrive at a working and effective definition of the rule of law has been an incredibly complex and difficult undertaking.⁸⁴ Nonetheless, I advocate that it is an undertaking the United States must pursue through the full coordinated

⁸⁰ See generally JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., Penguin Books 1968) (1762).

⁸¹ See, e.g., STROMSETH ET AL., *supra* note 8, at 7 (“[M]ilitary interventions that do not ultimately rebuild the rule of law in post-conflict societies are doomed to undermine their own goals.”).

⁸² Some authors, such as Stromseth, Brooks, and Wippman, explicitly cite the need for greater interagency coordination and cooperation. See *id.* at 364–67. Other authors tacitly acknowledge this fact by highlighting the need for a more universal definition as opposed to the various competing definitions articulated by government agencies, scholars, international organizations, and states. See, e.g., Stigall, *supra* note 26, at 99–110 (comparing the various U.S. institutional definitions of the rule of law to demonstrate the need for a cohesive approach that adopts a uniform operational formalist definition).

⁸³ Compare STROMSETH ET AL., *supra* note 8, at 351, 364–67, with Stigall, *supra* note 26, at 99–110.

⁸⁴ See generally Carothers, *supra* note 25.

use of all instruments of national power to achieve as much as possible a well-rounded, practical, substantive, and uniform approach to the establishment of rule of law in failed or fragile states.

B. Categorizing Efforts to Define or Describe It

A cursory review of the various scholarly efforts to categorize, describe, or define the rule of law quickly reveals it to be a monumental undertaking, one that could easily fill multiple books, much less a scholarly article. Recognizing this challenge, in this section I introduce the reader to these various efforts to highlight the necessity for the U.S. government to undertake a multiagency study of rule of law theory and thereby arrive at a common, substantive definition of the rule of law that furthers U.S. national policy objectives.

Within the scholarly world, the rule of law can be broken down into three core components: purposes, definitions or descriptions, and approaches and measurement techniques. Purposes speak to the underlying importance or “values” of rule of law to a society.⁸⁵ How does the rule of law “serve” or benefit a society?⁸⁶ Definitions and descriptions of the rule of law, in turn, flesh out “different ways of conceptualizing”⁸⁷ the rule of law to achieve these often unstated purposes or assumed beneficial purposes.⁸⁸ For example, definitions seek to identify or characterize core building blocks that a society must possess to achieve the rule of law, to include its purposes. Generally, two competing definitions of the rule of law have evolved: “formal,” “minimalist,” or “thin,” compared with “substantive,” “maximalist,” or “thick.”⁸⁹ Lastly, approaches and measurement techniques refer to those means used to accomplish the defined state of a rule of law and assess a given society’s establishment of the rule of law. For example, do we establish the rule of law through building courthouses and “legal codes,” or do we attempt to bring about an internalization of the rule of law by citizens of the host-nation? Similarly, do we measure the rule of law by

⁸⁵ Fallon, *supra* note 26, at 7.

⁸⁶ *Id.*

⁸⁷ STROMSETH ET AL., *supra* note 8, at 70 (emphasis removed).

⁸⁸ *Id.*

⁸⁹ *Id.* Compare *infra* notes 96–105 and accompanying text (discussing and defining “formal,” “minimalist,” or “thin” definitions of the rule of law), with *infra* notes 106–14 and accompanying text (discussing and defining “substantive,” “maximalist,” and “thick” definitions of the rule of law).

counting the number of courthouses and trials, or do we measure it by the society's commitment to the rule of law?⁹⁰ These two differing approaches and measurement techniques have come to be referred to as "institutional" or "reformist," and "ends based," respectively.⁹¹

1. Purposes

The underlying purposes of the rule of law are the least controversial of its three components. Relatively widespread agreement⁹² exists that Professor Richard Fallon correctly stated the three bedrock purposes of the rule of law:

Efforts to specify the meaning of the Rule of Law commonly appeal to values and purposes that the Rule of Law is thought to serve. Three such purposes—against which competing definitions or conceptions can be tested—appear central. First, the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.⁹³

Broken down more "simply," the three core purposes of the rule of law to a society are to provide "security, predictability, and reason."⁹⁴ From the perspective of any member of a given society, these three core objectives are difficult to dispute. From the perspective of another society, however, there is a noticeable absence. These purposes are content-neutral and could be achieved in societies many in the West

⁹⁰ STROMSETH ET AL., *supra* note 8, at 75.

⁹¹ Kleinfeld, *supra* note 26, at 32–33, 47; *see also* STROMSETH ET AL., *supra* note 8, at 74–75; *infra* notes 115–24 and accompanying text (discussing the "institutional/reformist" and "ends based" approaches and measurement techniques).

⁹² *See, e.g.*, STROMSETH ET AL., *supra* note 8, at 69–70 ("Scholars, philosophers, and lawyers have debated this for centuries, and although there is no one definition everyone agrees upon, it is probably fair to say that most scholarly conceptions of the rule of law at least share a similar sense of the *goals* of the rule of law."); ROL HANDBOOK, *supra* note 35, at 4–5.

⁹³ Fallon, *supra* note 26, at 7–8.

⁹⁴ ROL HANDBOOK, *supra* note 35, at 5.

would consider totalitarian or despotic.⁹⁵ Hence, much debate has ensued over how to best define or describe a society that can be said to have achieved these purposes and established the rule of law. At its core, this is a debate about whether something ideal should be added, such as human rights, democracy, or compliance with international law, to include the law of armed conflict. How one resolves this debate will fundamentally influence how he or she defines and describes the rule of law.

2. *Definitions and Descriptions*

The formalist or “minimalist”⁹⁶ conception of rule of law “echoes the Aristotelian precept that there should be ‘a government of laws, not men.’”⁹⁷ The formalist conception of the rule of law emphasizes the form and sources of laws and the government’s compliance with those laws rather than the substantive content of the laws.⁹⁸ Professor Fallon adopts a formal conception of the rule of law. For example, he asserted that the following five elements must exist for a state to be characterized as having a rule of law:

- (1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.
- (2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the

⁹⁵ STROMSETH ET AL., *supra* note 8, at 71–72. Stromseth raises these concerns in the context of discussing the “minimalist” approach without directly applying them to the “purposes.” See *infra* notes 96–105 and accompanying text (discussing the dangers of content-neutral formalist definitions of the rule of law). However, these concerns appear to apply as equally to “purposes” as they do the “definitions.”

⁹⁶ STROMSETH ET AL., *supra* note 8, at 71.

⁹⁷ *Id.* at 70 (quoting Aristotle).

⁹⁸ Stigall, *supra* note 26, at 94. Stigall elaborates on the formalist definition as follows:

The formalist definition is procedural in nature, viewing the rule of law as a situation in which a government acts in accordance with predetermined rules or laws. The focus of the formalist conception of the rule of law is on the form and source of the laws and the state’s conformance therewith. The substance of these laws is of secondary (if any) concern.

Id.

most part. In Joseph Raz's phrase, "people should be ruled by the law and obey it."

(3) The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.

(4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.

(5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.⁹⁹

Formal conceptions of the rule of law are favored for being clear and objective without the taint of subjective values or morals,¹⁰⁰ to include such seemingly basic values as the fairness and justness of the law's content.¹⁰¹ Provided there are "specific, observable criteria of the law or legal system" and the government conforms to these criteria, the rule of law may be said to exist under a formalist definition.¹⁰² Due to a formalist conception of the rule of law's content neutrality, it has been viewed as a more easily exported, one size fits all approach.¹⁰³ However, for this same reason, the formal conception has often been criticized for being "devoid of moral and ethical content," allowing it to "coexist comfortably with appalling human rights abuses and injustices."¹⁰⁴ "As

⁹⁹ Fallon, *supra* note 26, at 9.

¹⁰⁰ Matthew Stephenson, *Rule of Law as a Goal of Development Policy*, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last visited Aug. 26, 2008).

¹⁰¹ *Id.* ("Formal definitions thus avoid more subjective judgements [sic], for example, about whether laws are 'fair' or 'just.'").

¹⁰² *Id.*

¹⁰³ ROL HANDBOOK, *supra* note 35, at 14 (citing Robert Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1709-10 (1991) for the proposition that "formalist goals . . . are less likely to result in controversy and confusion among both international and host-nation participants than projects with substantive goals simply because there is less disagreement on the formal criteria for the rule of law than there is regarding the substantive criteria").

¹⁰⁴ STROMSETH ET AL., *supra* note 8, at 72. Stromseth provided the following scenario to highlight the content neutrality of a formalist definition relative to a substantive definition:

Imagine, for instance, a state in which a minority group is considered inferior by the majority; duly and democratically passed laws mandate discriminatory treatment for the minority; elected officials obediently enforce the laws. . . . Or, alternatively, consider a state

long as the system is predictable, it is acceptable, even if brutal, for example, ‘Yield to merging traffic or you will be tortured.’”¹⁰⁵ Marked by a content neutrality that leads to ease of exportability, the formalist definition of the rule of law remains subject to potential criticism for being morally indifferent.

In contrast to the formal or minimalist conception of the rule of law is the substantive or thick conception of the rule of law. It is labeled thick or substantive because it adds content to a formalist conception of the rule of law, thus leaving behind the potential moral vacuum which characterizes the formalist approach. “A substantive account of the rule of law does not necessarily reject the notion that the rule of law has important structural and formal elements—predictability, universality, nonarbitrariness, and so on—but insists that true rule of law also requires particular substantive commitments: to human rights, for instance.”¹⁰⁶ Stromseth, Wippman, and Brooks present an example of a substantive definition of the rule of law:

The “rule of law” describes a state of affairs in which the state successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral, and universally applicable rules, and in a manner that respects fundamental human rights norms (such as prohibitions on racial, ethnic, religious and gender discrimination, torture, slavery, prolonged arbitrary detentions, and extrajudicial

that favors gruesome and harsh punishments for minor crimes: shoplifters are flogged to death; adulterers are publicly stoned.

In either of these hypothetical states (and readers will readily think of real-life examples), the formal elements of most minimalist definitions of the rule of law might well be satisfied. The laws might not be arbitrary; they might be enforced in a consistent fashion; people could plan around them; they might even have been adopted through some fair and democratic voting process. Nevertheless, most of us would consider these states unjust in some fundamental ways, and those who favor more substantive accounts of the rule of law insist that injustice is incompatible with true rule of law.

Id. at 71.

¹⁰⁵ Ringer, *supra* note 26, at 194.

¹⁰⁶ STROMSETH ET AL., *supra* note 8, at 71. Other substantive ideals could include justness, fairness, equality, freedom, and minority rights. *Id.*

killings). In the context of today's globally interconnected world, this requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes.¹⁰⁷

Self-described as “unabashedly substantive,” it is difficult to miss the substantive element of this definition: “human rights norms (such as prohibitions on racial, ethnic, [etc.] . . .).”¹⁰⁸ Therefore, Stromseth's definition of the rule of law is similar to those labeled thick or substantive because they add content to the minimalist or thin definition, usually in the form of stated or unstated moral values.

The relative pros and cons of a substantive conception of the rule of law present a mirror image of the formalist conception pros and cons. Whereas formalist definitions are viewed as “cookie cutter”¹⁰⁹ due to their content neutrality and ease of exportation, the insertion of values into a substantive definition arguably makes it more difficult to “generate support from across the political spectrum.”¹¹⁰ It is therefore considered less exportable. Similarly, while formalist conceptions can be criticized as morally void, substantive conceptions of the rule of law offer the advantage of being generally equated with “something normatively good and desirable.”¹¹¹ Substantive conceptions have also been criticized in two additional ways. First, they have been criticized as being too viewpoint discriminatory—that is, he or she that holds the power gets to impose the substance.¹¹² In other words, who decides which ideals or

¹⁰⁷ *Id.* at 78.

¹⁰⁸ *Id.* at 78–79.

¹⁰⁹ *Id.* at 74.

¹¹⁰ *Id.* at 72.

¹¹¹ See Stephenson, *supra* note 100 (“This is appealing, first because the subjective judgement [sic] is made explicit rather than hidden in formal criteria, and, second, because the phrase ‘rule of law’ has acquired such a strong positive connotation. Many people cannot accept any definition that would allow, even in theory, a repressive or unjust regime to possess the rule of law.”).

¹¹² STROMSETH ET AL., *supra* note 8, at 71–72. Stromseth characterizes the “vulnerabilities” of a substantive definition of the rule of law as follows:

Who should decide, for instance, *which* substantive values must be embodied in law for the rule of law to be satisfied? What neutral principle can be invoked to resolve disputes over competing conceptions of justice and rights? Thus, although everyone might agree that Nazi Germany's Jewish laws were horrifically unjust, what about the laws that remain on the books in many countries of the

values should be pursued, and at what point the ideal is achieved?¹¹³ Second, not only does the rule of law “vest the law with responsibility for social justice and distributive equality,” but it also “vests lawyers and judges with great power over those same societal objectives.”¹¹⁴ Thus, while a substantive definition solves the potential moral void of the formalist definition by injecting content, it thereby diminishes exportability and potentially creates the appearance of imperialism.

3. *Approaches and Measurement Techniques*

The final core component or building block of the rule of law concerns how to approach its implementation and measure its achievement. Under the institutional or reformist approach, the rule of law is measured by the number and type of institutions a society possesses,¹¹⁵ such as courthouses, trials, prisons, and legal codes.¹¹⁶ As an approach to the rule of law, it seeks to reform the institution without defining a broader end.¹¹⁷ Typically, reformists or institutionalists focus on the reform or establishment of three primary institutions: laws, judiciary, and “police, bailiffs, and other law enforcement bodies.”¹¹⁸ The danger of the institutional approach to which practitioners are particularly susceptible is that the institutions and reforms to institutions become the end themselves, to the exclusion of any defined goal of the rule of law.¹¹⁹

world that grants women greatly reduced political and social rights? Would it be possible for a state such as Saudi Arabia to continue its policies that discriminate against women but still satisfy the main substantive requirements of the rule of law?

Id.

¹¹³ *Id.*

¹¹⁴ Ringer, *supra* note 26, at 194.

¹¹⁵ Kleinfeld, *supra* note 26, at 32–33, 47–54; *see also* STROMSETH ET AL., *supra* note 8, at 74–75.

¹¹⁶ Kleinfeld, *supra* note 26, at 47–48; *see also* STROMSETH ET AL., *supra* note 8, at 74–75.

¹¹⁷ Kleinfeld, *supra* note 26, at 32–33, 47–48.

¹¹⁸ *Id.* at 47–48.

¹¹⁹ *Id.* at 48–54; *see also* STROMSETH ET AL., *supra* note 8, at 74–75. A Judge Advocate who formerly served in Afghanistan observed a similar phenomenon:

[B]y focusing only on objective criteria, there is an underlying failure to address whether or not the subjective analysis supports the particular course of action. For example, the objective fact that the

When the rule of law is implicitly defined by its institutions, rather than its end, the latter tend to be assumed. Rather than considering the desired goals we are trying to achieve through the rule of law, and then determining what institutional, political, and cultural changes best achieve these ends, practitioners are tempted to move directly toward building institutions that look like those reformers know. Practitioners engaged in such institution modeling tend to compare institutions in the country that need to be reformed with their counterparts in developed countries and then provide the resources, skills, and professional socialization to help each local institution approach Western models.¹²⁰

For example, if a substantive end goal is justice, merely building a courthouse does not necessarily result in the ultimate end goal of justice actually being achieved across a society. Institutionalists tend to become so focused on the architectural blueprint for and furnishing of the courthouse that they misconstrue the interim production of the courthouse as being an end in itself, rather than a means to the end of achieving justice.¹²¹

In contrast to the institutional and reformist approach to the rule of law, which are most often unknowingly embraced by rule of law

Iraqi or Afghani Judge has been provided a computer is worthless if the subjective analysis demonstrates that nobody bothered to train him/her on how to use it or that the Courthouse lacks electricity.

E-mail from Major Steven Garipey, 56th Judge Advocate Officer Advanced Course, The Judge Advocate General's Legal Ctr. and Sch., to Major Tonya Jankunis (Mar. 21, 2008, 12:33 EST) (on file with author).

¹²⁰ Kleinfeld, *supra* note 26, at 50–51.

¹²¹ STROMSETH, ET AL., *supra* note 8, at 77. Stromseth provides:

Many Americans take the value of the rule of law for granted and assume that “if you build it, they will come” applies to courts as much as to baseball fields. But courts and constitutions do not occupy the same place in every culture that they occupy in American (or European) culture, and as a result, efforts to build the rule of law in post-intervention societies can appear irrelevant to the concerns of ordinary people—or, at worst, incoherent, arrogant, and hypocritical.

Id.

practitioners,¹²² is the ends-based approach. Under the ends-based approach, the intended ends or goals of the rule of law are first defined, and then the means to achieve them is developed.¹²³ It is an approach to the rule of law that is more than just establishing institutions. It also seeks to create in the host-nation population a “normative commitment to the project of law itself, a commitment to the orderly and nonviolent resolution of disputes and a willingness to be bound by the outcome of legal rules and processes.”¹²⁴ With this normative commitment paramount among predefined ends, adherents to this approach view the means—to include institutions—as clay to be kneaded, shaped, molded, and if necessary, reshaped, to ultimately achieve the predefined end, which is a normative commitment. Under the ends-based approach, the ends define the means, not the means the end.

¹²² Kleinfeld, *supra* note 26, at 48. Kleinfeld described the process as follows:

Yet when practitioners turned these ideas into practice, they inevitably had to simplify such nuanced theoretical concepts. Because programs to build the rule of law are most easily oriented around reforming concrete problems within material things, such as laws or organizations, it was all too easy for means to become conflated with ends and eventually made into ends in themselves.

Id.

¹²³ *Id.* at 34–36. Kleinfeld defines five of these “rule of law ends” or goals: “government bound by law,” “equality before the law,” “law and order,” “predictable, efficient justice,” and “lack of state violation of human rights.” *Id.* In contrast, at least one theorist advocates an emphasis on means over ends. “[M]y conviction that the rule of law is part of developments means rather than one of its fully-fledged ends. . . . The ends of development shift over time, as developing societies begin to define their own goals for themselves.” Ringer, *supra* note 26, at 206–07.

¹²⁴ STROMSETH ET AL., *supra* note 8, at 75 (emphasis removed).

C. A New Wave—The Synergistic¹²⁵ Approach

Recognizing the extraordinary confusion in the field concerning the definition and successful implementation of the rule of law, Stromseth, Wippman, and Brooks developed the synergistic approach to building the rule of law through a pragmatic, substantive, ends-based definition.¹²⁶ Using their “descriptive and pragmatic”¹²⁷ definition provided above,¹²⁸ the synergistic approach includes three core elements: First, “it is ends-based and strategic,”¹²⁹ meaning that the rule of law “starts with a clear articulation of strategic objectives.”¹³⁰ Second, it is “adaptive and dynamic,”¹³¹ meaning that it “recognizes the need to build on what is

¹²⁵ Stromseth uses the biological and theological definitions of “synergism” to highlight that building the rule of law is a difficult process with the ultimate goal of affecting individuals, not just institutions. “Synergism, in biological terms, refers to ‘the action of two or more substances, organs, or organisms to achieve an effect of which each is individually incapable.’ . . . Borrowing a term from biology is a useful way to remind ourselves that building the rule of law is a profoundly human endeavor.” *Id.* at 80–81 (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1233 (2d College ed. 1982)). “Theologically, synergism is a theory that both human effort and divine grace are needed to achieve regeneration. . . . Regardless of one’s theological views, this meaning of synergism helps serve as reminder of the need for *humility* in efforts to build the rule of law.” *Id.* at 81.

¹²⁶ *Id.* at 77–84.

¹²⁷ *Id.* at 78.

¹²⁸ See *supra* note 107 and accompanying text. The authors recognize the limitations inherent in any definition of the rule of law, to include their own.

It is not intended to stand up to rigorous philosophical critiques or subtle arguments about first-order and second-order rule-making or resolve questions relating to the universality of rights. Instead, this working definition seeks simply to identify *what it is that most policymakers are looking for* when they talk about the rule of law in post-intervention societies.

STROMSETH ET AL., *supra* note 8, at 78.

¹²⁹ STROMSETH ET AL., *supra* note 8, at 81.

¹³⁰ *Id.* Stromseth elaborated on this strategic goal as follows:

Improved institutions can help to achieve certain aims of the rule of law—such as securing law and order, or protecting human rights—but the institutions are not the ends in themselves. At the very least, this insight means that reformers should focus clearly on the ultimate goals of building the rule of law and resist an overly narrow concentration on institutions alone.

Id.

¹³¹ *Id.* at 82.

there¹³² and move it in constructive directions—and we also recognize that the rule of law is never permanently ‘achieved.’ It must be continuously and creatively sustained.”¹³³ And third, it is “systemic” and “holistic.”¹³⁴ In discussing the systemic nature of the synergistic approach, these authors provide the following guidance:

Appreciating how institutions intersect and operate *as a system* is vital to designing effective and balanced programs for reform. Interveners need to appreciate failures and challenges in the legal system as a whole. They need to understand the interrelationships between the various components and how they impact each other. They need to take a holistic approach to reform, working toward a balanced development of the component parts of a functioning legal system. The priorities in any given situation will depend on the areas of greatest need, with the overall aim of balanced and mutually reinforcing improvements.¹³⁵

¹³² Stromseth continued: “The rule of law cannot be imported wholesale; it needs to be built on preexisting cultural commitments.” *Id.* Failing to build on “preexisting cultural commitments” may alienate critical host-nation personnel. As one Iraqi judge stated:

“Are you familiar with the Code of Hammurabi?” We replied that we knew of the Code of Hammurabi, and he said, “Well, most Americans have never even heard of it. Iraq has an ancient legal culture. We don’t need you to come here and tell us about what law is. We invented law. This is the cradle of Western civilization. We are the people who figured law out, thousands of years ago. But now your soldiers are coming in and telling us what to do, and you’re not respecting our legal traditions or legal process. The first thing the Americans did after the war was to announce that they were immune from Iraqi legal process. So, if an American commits a crime, they’re completely immune, there’s nothing that we can do about it. The Americans are unaccountable. How can this be the rule of law?”

Brooks, *supra* note 26, at 130 (quoting an Iraqi Judge).

¹³³ STROMSETH ET AL., *supra* note 8, at 82. “The emphasis on adaptive intervention encourages a focus on the perceptions and needs of ordinary people, on the consumers of the law.” *Id.* “By noting that the synergistic approach is also dynamic, we mean that the rule of law is always a work in progress. New achievements create new challenges, and efforts to build the rule of law must continually evolve as circumstances change.” *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

Of all the rule of law definitions and approaches, this approach appears to be the most flexible, practical, and reality—as opposed to theory—oriented. While these theorists do not propose a concrete solution, their solution has the potential to dovetail neatly with an overhauled national security apparatus to produce a synergistic¹³⁶ realization of the rule of law.¹³⁷

Central to the synergistic approach is recognition that for the rule of law to be achieved, the means and ends must result in the “cultural commitment” of the host nation to its sustained development.¹³⁸ “Institutions and codes are important, but without the cultural and political commitment to back them up, they are rarely more than window dressing.”¹³⁹ Looking beyond the institutions to the people themselves, the tremendous span of “cultural commitment” required appears truly daunting:

¹³⁶ The biological and theological definition of synergism appears an appropriate remedy to the interagency failures of the U.S. Government in its stability and reconstruction efforts. See *supra* note 125 providing biological and theological definitions of the word synergism.

¹³⁷ In fairness to Stromseth, Wippman, and Brooks, their goal was not to propose a concrete solution. Rather, their “definition describes the strategic goals of the rule of law but does not tell practitioners how to achieve these goals. A framework for combining these two must be developed—a framework that can help practitioners link ends and means more efficiently.” STROMSETH ET AL., *supra* note 8, at 80; see *infra* notes 292–342 and accompanying text (discussing military strategists proposed overhauls of the national security apparatus); *infra* notes 343–88 and accompanying text (discussing my proposal for an overhaul of the national security apparatus).

¹³⁸ For some scholars, the rule of law, to include a cultural commitment, is unachievable in Iraq.

The functioning of a modern state requires the participation of millions of people who show up for work, pay taxes, and so on. People do these things because they believe in a national idea that organizes the state or because they are coerced. In attempting to build foreign nations, the United States is unable to impose a national idea and our liberalism, thankfully, limits our willingness to run foreign states through sheer terror.

Friedman et al., *supra* note 13, at 9; see also Totten, *supra* note 43 (providing the following on-the-ground perspective: “But a gloomy Army soldier I met last summer in Baghdad said something so simple, depressing, and obviously correct that I doubt I will ever forget it. ‘Iraq will always be Iraq.’”). While establishing the rule of law may be difficult, and the work of decades rather than months or years, it is a mission the United States has committed itself to undertaking. See STROMSETH ET AL., *supra* note 8, at 392 (“In the world we inhabit, there is no other choice.”).

¹³⁹ STROMSETH ET AL., *supra* note 8, at 310.

The “building blocks” for the rule of law might be said to be courts, police, prisons, legislatures, schools, the press, bar associations and the like. Of course, unlike the bricks and timber that go into physical structures, the institutional building blocks on which the rule of law depends are themselves made up of human beings, with their own hopes, fears, and attitudes, and this makes creating the institutional aspects of the rule of law as complex as any other venture that relies on mobilizing multiple individuals in a common enterprise.¹⁴⁰

The challenge of “norm creation”¹⁴¹ within a failed or fragile state applies with equal weight regardless of whether one is pursuing a formalist or substantive definition of the rule of law.¹⁴² Without “norm creation” and a resulting “cultural commitment,” any perceived gains will be temporal and fade as quickly as the intervener’s departure.¹⁴³

¹⁴⁰ *Id.* at 57. As an example of one of the human challenges that must be overcome, the President of the Iraqi High Tribunal observed: “The rule of law has to be seen as more powerful than the rule of fear.” Patrick O’Donnell, *Iraqi High Tribunal Judges Visit Case Western Reserve University in Cleveland*, PLAIN DEALER, Jan. 30, 2008, <http://www.cleveland.com/news/plaindealer/index.ssf?/base/cuyahoga/1201685572303840.xml&coll=2>; see also Totten, *supra* note 43 (“Iraqis are not lumps of clay or blank slates that can be hand-molded or written on. They are human beings with their own complex history and culture. Most recently they were the most brutally micromanaged subjects and enforcers of the regime of Saddam Hussein.”).

¹⁴¹ STROMSETH ET AL., *supra* note 8; *supra* note 139 and accompanying text (relating a normative commitment of the host nation population to the cultural commitment of the host nation to building the rule of law).

¹⁴² STROMSETH ET AL., *supra* note 8, at 75 (“For even in its formal sense, the rule of law requires a particular set of cultural commitments. Most fundamentally, even the most formal, minimalist conception of the rule of law requires a normative commitment to the project of rule of law itself . . .”).

¹⁴³ *Id.* Several other scholars have arrived at a similar conclusion. For example, as one scholar noted:

The first principal of development and perhaps the most important is ownership. . . . When ownership exists and community invests itself in a project, the citizens will defend, maintain, and expand the project well after the donors have departed. If what is left behind makes no sense to them, does not meet their needs, or does not belong to them, they will abandon it as soon as aid agencies leave.

Natsios, *supra* note 9, at 7; see also Brooks, *supra* note 26, at 131 (“[T]he bottom line is that if one wants to achieve that magical thing—the rule of law—one not only has to create fair, appropriate, and reasonable laws and institutions, one also has to create a widely shared societal commitment to using those laws and institutions.”); Ringer, *supra*

While it is apparent that an institutional approach focused on courts, cops, and corrections will fail to result in a “cultural commitment,”¹⁴⁴ even an intervener with the goal of establishing a “cultural commitment” will confront three significant barriers to its attainment. First, and as referenced above, is the history of the host-nation people.¹⁴⁵ For example, the Iraqis’ past experience with a brutal regime’s reign of terror by government institutions likely impacts their willingness to trust any future government.¹⁴⁶ Second, interveners must tread the fine line between being, or creating the appearance of being, imperialists as opposed to humanitarians or helpful neighbors; that is, they must be

note 26, at 5 (“For law to be effective and actually change behavior, it must be fully understood and embraced not only by law enforcers but also by those using the law, i.e., its customers.”).

¹⁴⁴ See *supra* notes 115–21, 138–43 and accompanying text.

¹⁴⁵ See *supra* notes 131–33, 140 and accompanying text.

¹⁴⁶ See Brooks, *supra* note 26, at 132 (“[I]f U.S efforts to reform the Iraqi legal system appear arbitrary, many Iraqis may find it hard to tell the difference between Saddam’s rule of law and American rule of law.”); Michael J. Totten, *A Plan to Kill Everyone* (Jan. 2, 2008) [hereinafter *Totten Plan*], <http://www.michaeltotten.com/archives/2008/01/>. Totten’s description of the numbing of the Iraqi population is remarkable:

It was only then that I noticed that none of the Iraqis on the street reacted in any noticeable way to what had just happened. They didn’t take cover when we did. We were *all* briefly certain that war had returned to Fallujah. But the Iraqi kids still played in the streets. They did not run and hide. Their parents did not yank them inside. Try to imagine that in an American city.

One of the Marines later told me that military dogs, while they’re being trained, are put into rooms with loud speakers. The first half hour of Stephen Spielberg’s *Saving Private Ryan*—that terrifying scene where hundreds of soldiers are shot and blown to pieces while storming the beach at Normandy—are played over and over again until the dogs no longer fear the sounds of war.

Iraqis who live in Fallujah have heard more shots fired in anger than I ever will. Machine gun fire has been the soundtrack in that city for a long time. War is just a shot away, but even the children of Fallujah will not budge if breaks out again.

Id.; see also Michael J. Totten, *The Dungeon of Fallujah* (Feb. 18, 2008) [hereinafter *Totten Dungeon*], <http://www.michaeltotten.com/archives/2008/02/> (describing in detail the “Red Building” in Suleimaniya: “Before it was liberated . . . resistance fighters and their family members were arrested, interrogated, and sadistically tortured inside its walls. A free standing rape-room with large windows was built just outside.”).

cautious not to substitute wholesale their values for those of the host-nation.¹⁴⁷

Lastly, as will always be the case in post-intervention attempts to establish the rule of law, interveners will have to overcome the creation of a coerced rule of law from the “barrel of a gun”¹⁴⁸ versus the real thing. The rule of law and provision of security presents a “chicken-and-the-egg problem.”¹⁴⁹ Though one can debate whether the rule of law leads to security or security to the rule of law, the reality is likely that both are mutually supporting, and that without the other, neither can exist.¹⁵⁰ Unfortunately, the necessity for both creates a security dilemma. Security must exist, but in the process of creating a secure environment, an intervener may inadvertently create a coerced, fleeting adherence to the rule of law.¹⁵¹ While there may not be a universal solution to this

¹⁴⁷ Kleinfeld, *supra* note 26, at 52 (“Practitioners are often following an idealized blueprint of their home system that ignores its own difficulties and flaws . . .”); Ringer, *supra* note 26, at 185 (“[T]he citizens of nations experiencing foreign-funded rule of law reforms may become resistant and perhaps even hostile to development initiatives if they feel the rule of law is being used to smuggle in foreign moral, political, and cultural values under the guise of neutrality.”); *see also* STROMSETH ET AL., *supra* note 8, at 322–23 (describing the lack of familiarity of U.S. personnel in Iraq with the Iraqi legal system and concluding that “[f]rom the perspective of the [Iraqi] judges, this is sheer arbitrariness and disrespectful of Iraqi legal process. From the perspective of coalition officials, many of whom are U.S. officers with the Judge Advocate General’s Corps (JAG), this represents an effort to correct substantive defects in the Iraqi judicial process.”).

¹⁴⁸ Brooks, *supra* note 26, at 130 (“How can the U.S.-led coalition in Iraq claim to care about the rule of law when it maintains control—tenuous control—only through overwhelming force and when its actions strike many Iraqis as inconsistent and arbitrary? To put it a little differently, how can you pull the rule of law from the barrel of a gun?”).

¹⁴⁹ STROMSETH ET AL., *supra* note 8, at 312 (using this metaphor in a different context).

¹⁵⁰ Brooks, *supra* note 26, at 128 (“[O]ne of the biggest challenges is that the institutions of the rule of law have to be rebuilt at the very same time that security has to be reestablished. Reestablishing security in turn involves both protecting people from physical violence and also ensuring human security in the very broadest sense . . .”); Natsios, *supra* note 9, at 6 (“Development cannot effectively take place without the security that armed forces provide. And security cannot ultimately occur until local populations view the promise of development as an alternative to violence.”).

¹⁵¹ Brooks, *supra* note 26, at 134–35. Brooks states:

This paradox that I have talked about—how to bring the rule of law from the barrel of a gun—partly stems from the fact that in Iraq, the face of the guy with the gun and the face of the guy urging the rule of law are one and the same. With almost all the troops and civilians on the ground operating under the auspices of the American military, most Iraqis unsurprisingly find it difficult to distinguish between our claims about legitimate authority and rights and our sheer power.

dilemma, “[w]hen fighting ends or least moderates to the point that security becomes a priority, a critical window of opportunity opens.”¹⁵² “This phase of the intervention should not be squandered because military presence in significant numbers and the initial positive impact on public opinion are of limited duration. The longer an external military force remains deployed on the ground, the more it is apt to be perceived as an occupation army.”¹⁵³ Therefore, the actual orchestration of the intervention must be carefully planned in advance rather than created piece by piece as the campaign unfolds.

D. Reality Reflects the Debate

Unfortunately, rule of law efforts within U.S. agencies so far reflect disparate efforts in need of a centralized authority to dictate the pursuit of a uniform, synergistic approach that results in a normative commitment by the host-nation population to the rule of law. As discussed in various scholarly articles, no agreed upon approach to the rule of law exists across or even within U.S. government agencies.¹⁵⁴ Moreover, civilian agencies charged with the lead in rule of law operations,¹⁵⁵ in particular the DOS, lack the essential resources to complete their mission.¹⁵⁶ As a result of these civilian agency resource deficits, the DOD has assumed the de facto lead in rule of law operations.¹⁵⁷ Without centralized

Id.

¹⁵² STROMSETH ET AL., *supra* note 8, at 145. “Lord [Paddy] Ashdown, who served in Kenya, Kuwait, Borneo and Northern Ireland, has set out his conviction that an invading force has to establish authority over its captured territory in the ‘golden hour’ immediately after intervention.” Nick Meo & Richard Beeston, *Lord Ashdown Called in to Overhaul Reconstruction of Afghanistan*, TIMESONLINE, Jan. 17, 2008, <http://www.timesonline.co.uk/tol/news/world/asia/article3200995.ece>.

¹⁵³ STROMSETH ET AL., *supra* note 8, at 145 (quoting Robert B. Oakley & Michael J. Dziedzic, *Conclusions*, in POLICING THE NEW WORLD DISORDER: PEACE OPERATIONS AND PUBLIC SECURITY 509, 535 (Robert Oakley et al. eds., 1998)).

¹⁵⁴ See, e.g., Christopher M. Ford, *The Rule of Law for Commanders*, MIL. REV., Jan.-Feb. 2008, at 50, 51–52.

¹⁵⁵ See NSPD 44, *supra* note 34; see *infra* notes 265–82 and accompanying text (discussing the DOS’s lead coordinating agency role under NSPD 44).

¹⁵⁶ Chiarelli & Smith, *supra* note 12, at 5; Kelly, *supra* note 6.

¹⁵⁷ Chiarelli & Smith, *supra* note 12, at 5–7 (stating that “like it or not, until further notice the U.S. Government has decided that the military largely owns the job of nation-building”); Gates, *supra* note 12, at 6; Kelly, *supra* note 6. Chiarelli and Smith further observed: “Unless and until there is a significant reorganization of U.S. Government interagency capabilities, the military is going to be the Nation’s instrument of choice in nation-building.” Chiarelli & Smith, *supra* note 12, at 5–7. In recent publications, the DOD has tacitly acknowledged its prominent role in nation-building. See U.S. DEP’T OF

authority definitively refereeing and coordinating interagency actions, the result has been at times piecemeal and/or conflicting rule of law efforts.¹⁵⁸ Additionally, in assuming the lead, the DOD has run head-first into the security dilemma.¹⁵⁹ Looking at Iraqi operations as a whole, it becomes apparent that only a centralized authority which includes augmentation of civilian agency resources can create a rule of law definition and program capable of potentially achieving its realization in Iraq.

Considering that the United States has been engaged in two major nation-building enterprises involving numerous U.S. government agencies since 2001 and 2003, it is inconceivable that it still has not established a common interagency operating definition and approach to

DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS para. 4.1 (28 Nov. 2005) [hereinafter DODD 3000.05] (establishing stability and reconstruction operations as a core military mission); FM 3-0, *supra* note 7 (making similar recognition).

¹⁵⁸ For example, it has been observed:

In the United States, for example, “dozens” of agencies participate in post-conflict security, reconstruction, and rule of law efforts. Duplication of effort, confusion, competition for resources, gaps in assistance, mixed messages, and lost time commonly follow. Worse, division among the international actors creates opportunities for spoilers to play different international actors against each other, and even derail assistance efforts.

STROMSETH ET AL., *supra* note 8, at 351. For a discussion of the difficulties created by unclear interagency roles, responsibilities, and authority in the relationship between Combined Joint Task Force-Seven and the Coalition Provisional Authority, see Christopher M. Schnaubelt, *After the Fight: Interagency Operations*, PARAMETERS, Winter 2005–2006, at 47.

¹⁵⁹ The narrative of an embedded reporter accompanying Marines in Fallujah highlights the conflicting nature of military efforts to simultaneously establish security and implement the rule of law:

I had a hard time imagining that the Marines I walked with had a quiet and secretive plan to kill this guy if all of sudden he raised up an AK-47 from behind the bushes. He was not going to do that. I just knew it. It is very nearly impossible to tell what most Iraqis are thinking when you briefly pass them on the street. Theoretically any one of them could be an insurgent. But there are some I felt safe writing off as potential threats. You can just tell with some people. At least I have the luxury of thinking so when it isn't my job to return hostile fire.

Totten *Plan*, *supra* note 146.

the rule of law.¹⁶⁰ Rather, in the absence of an overarching approach, agencies have been left to fend for themselves.¹⁶¹ For example, the military has not even articulated a definition of the rule of law applicable across the Defense Department despite publishing a directive and joint publication directly stating that stability and reconstruction operations are one of the military's core missions.¹⁶² Successful stability and reconstruction operations necessarily entail rule of law operations. Therefore, the silence of this directive and publication is disturbing as it leaves the complex goals and definitions of the rule of law¹⁶³ to be determined on an ad hoc basis by various elements of command within the DOD.¹⁶⁴ And because this dilemma is not limited to the DOD, the same could be said across all government agencies.

E. A Synergistically Applied U.N. Definition

The successful establishment of a society culturally committed to the rule of law in a failed or fragile state requires the United States to adopt a

¹⁶⁰ Ford, *supra* note 154, at 51–52; Stigall, *supra* note 26, at 3 (“[T]he United States has yet to adopt a definition of the rule of law. However, there are numerous government entities that focus on the work of the rule of law and rule of law reform. Each entity defines the rule of law differently, depending on the entity’s focus.”).

¹⁶¹ STROMSETH ET AL., *supra* note 8, at 69 (“This ‘I know it when I see it’ quality has some virtues, to be sure: it enables consensus, because it leaves everyone free to interpret the rule of law in his or her own way, with little need to confront or resolve areas of disagreement. But it also permits superficiality and obtuseness that has badly limited the efficacy of many rule of law promotion efforts.”).

¹⁶² See Ford, *supra* note 154, at 51–52; see also DODD 3000.05, *supra* note 157, para 4.1; JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTERAGENCY, INTERGOVERNMENTAL ORGANIZATION, AND NONGOVERNMENTAL ORGANIZATION COORDINATION DURING JOINT OPERATIONS i (17 Mar. 2006) [hereinafter JOINT PUB. 3-08].

¹⁶³ The complex and seemingly hopeless endeavor of defining the goals, definitions, and approaches to the rule of law requires a more centralized response as individual practitioners in the field may be overwhelmed by the task and revert to an institutionalist approach. See *supra* notes 96–105 and accompanying text (describing how practitioners tend to rely on institutional approaches to implementing the rule of law); see also ROL HANDBOOK, *supra* note 35, at 4 (“From an operational standpoint, any approach to actually *implementing* the rule of law as part of stability operations must take into account so many variables—cultural, economic, institutional—that it may seem futile to seek a single definition for the rule of law or how it is to be achieved.”).

¹⁶⁴ The U.S. Army Judge Advocate General’s Corps has recognized the absence of a doctrinal definition of the rule of law and the necessity for policymakers to provide that definition by optimistically stating: “The deployed captain or major who is this *Handbook*’s audience will hopefully be part of an operation that already has a definition of the rule of law—one that has been adopted by policymakers.” ROL HANDBOOK, *supra* note 35, at 6.

uniform definition and synergistic approach to the rule of law. I propose that the United States adopt the rule of law definition provided by the former U.N. Secretary General:

The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.¹⁶⁵

The greatest strength of this definition is that it is sufficiently substantive to satisfy U.S. policy objectives and simultaneously broad enough to be exportable and tailored to fit the needs of different societies and cultures.

The definition is clearly substantive as it characterizes the rule of law as embracing “human rights,”¹⁶⁶ “equality before the law,” “participation in decision-making,” and “fairness.” As noted above, a strictly formalistic approach to the rule of law could exist in the absence of these substantive values and result in regimes most would consider brutal or totalitarian.¹⁶⁷ However, by incorporating these values, the definition is

¹⁶⁵ *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616, at 4 (2004).

¹⁶⁶ STROMSETH ET AL., *supra* note 8, at 59. In defining human rights within the context of rule of law, Stromseth provided:

The human rights-oriented conception of the rule of law involves, at a minimum, due process, equality before law, and judicial checks on executive power, for most human rights advocates regard these as essential prerequisites to the protection of substantive human rights. To human rights advocates, where the rule of law is absent, human rights violations flourish: without the rule of law, arrests and detentions are arbitrary, there is no effective mechanism for preventing torture or extrajudicial execution; individuals or groups may be free to take the law into their own hands in abusive and violent ways, and abuses go unpunished in a climate of impunity.

Id.

¹⁶⁷ *See supra* notes 96–105 and accompanying text.

largely in accord with the U.S. policy objective of establishing viable democracies.¹⁶⁸ For example, although the definition does not explicitly contemplate democracies, its requirement for “participation in decision-making” cannot exist in a totalitarian or dictatorial society. Similarly, although the definition does not explicitly reference gender, race, or religious relations, its incorporation of “equality before the law,” if given its natural meaning, includes all of these rights. While admittedly this definition is still subject to the criticism that it is viewpoint-discriminatory and may result in the imposition of the values of the intervener, this critique is in many ways contemplated by the U.S. national security policy.¹⁶⁹ It should not, therefore, be a barrier to the adoption of this definition. Rather, from a U.S. policy perspective, the fact that this definition is so substantively robust argues in favor of embracing it.

By adopting a definition proposed by the former U.N. Secretary General, the United States will mitigate imperialist appearances. “Defining the rule of law in terms of widely accepted international norms therefore allows for the emergence of the concept of the rule of law at an international level without the taint of undue Western influence.”¹⁷⁰ In mitigating imperialist tendencies, this definition has three benefits. First, as it is not expressly and solely American in origin and character, coalition partners as well as non-governmental organizations, to include foreign organizations, can more readily share in its adoption as a goal. To the extent pursuit of this definition leads in turn to wider international and nongovernmental support, appearances of imperialism as a barrier to the rule of law further diminish. Second, for this same reason, this definition enables host-nation persons, some who may have values and beliefs highly divergent from those of the United States, to also agree to this definition as a goal. Importantly, while substantive, the definition is broad enough to enable the particulars of its application to be tailored to meet the needs of individual societies, building on the roots of their history, culture, and experience.¹⁷¹ Lastly, by enabling interveners on the

¹⁶⁸ See *supra* note 12. Note, however, that this does not mean that these newly established governments will necessarily reflect western political positions even if they appear to be democracies. See *supra* note 32.

¹⁶⁹ See *supra* note 12 (discussing the 2006 National Security Strategy).

¹⁷⁰ David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 33 (2006).

¹⁷¹ See *supra* notes 122–53 and accompanying text (discussing “cultural commitment”); see also STROMSETH ET AL., *supra* note 8, at 11 (“[T]he minimally necessary historical and theoretical background consists of a basic understanding of the legal and historical

ground to assert an internationally accepted definition of the rule of law in their daily interactions with host-nation personnel, it reduces the appearance of imperialism at the individual level as well.¹⁷² Reduced appearances of imperialism thus make this definition highly exportable.

A valid criticism of the U.N. definition is that it does not adequately incorporate security.¹⁷³ However, as discussed above, security and the rule of law must be seen as two sides of the same coin. Without one, the other will fail.¹⁷⁴ Therefore, it is likely that the definition assumes security has been or will be established. This assumption probably stems from the rule of law ideal that persons responsible for imposing the rule of law should be distinct from the individuals providing security.¹⁷⁵ Regardless, it is clear that security must be established. Additionally, security should not be viewed in a narrow sense. Rather, as with all other aspects of rule of law implementation, it should be synergistically pursued:

context in which military interventions occur and an awareness that the rule of law is a complex and culturally situated idea’); FM 3-0, *supra* note 7, paras. 1-25, 1-31–1-33 (recognizing that “societies are not monolithic” and discussing the need to take into account the individual society’s political, economic, military, religious, and cultural circumstances). Depending on the society an intervener finds itself in, some important elements of the definition, such as “equality” before the law, could be initially curtailed until introduction of the right will not undermine the broader rule of law project. For example, in an Islamic country, “equality” before the law could not likely immediately translate into gender equality. Or, for example, while near universal agreement exists that fundamental human rights are minimally necessary, other “secondary” human rights could be trimmed or emphasized to address the cultural, historical, and religious heritage in a failed or fragile state.

¹⁷² Michael J. Totten, *The Final Mission, Part III* (Feb. 12, 2008), <http://www.michaeltotten.com/archives/2008/02/>. Totten stated:

The Marines are not imposing American values per se on the Iraqis. They’re grounded in international law, and they’re deadly serious about it. Lieutenant Montgomery didn’t give a lecture on the Declaration of Independence, the Bill of Rights, or anything else that is particular of or exclusive to the United States. Instead, he taught the U.N. Code of Conduct for Law Enforcement Officials.

Id.

¹⁷³ See, e.g., ROL HANDBOOK, *supra* note 35, at 5–6 n.15 (stating that the definition “does not emphasize the role of security”).

¹⁷⁴ See *supra* notes 148–53 and accompanying text.

¹⁷⁵ See *supra* notes 148, 151 and accompanying text (discussing the security dilemma).

The legitimacy of an intervention in local eyes will also depend on the goals that interveners pursue and their effectiveness in meeting local needs. Are interveners able to establish basic security quickly and deal credibly and robustly with violent obstructionists? Can interveners address concrete needs for food, water, electricity, health care, and so forth?¹⁷⁶

Efforts to establish the rule of law without similar progress in these basic areas will result in the frustration of both efforts.¹⁷⁷ As one author stated, “[w]hen a man’s life is at stake, it takes more than propaganda to budge him.”¹⁷⁸ Absent tangible progress toward or the realization of broadly defined security, any definition of the rule of law, however well articulated, must fail. Therefore, adoption of the UN definition of the rule of law must necessarily anticipate the establishment of security.

A second potentially valid criticism of this definition as well as any other worth pursuing from a national policy perspective is that it is too lofty a goal. For example, one author characterized the U.N. approach to the rule of law as a “highly aspirational ‘laundry list.’”¹⁷⁹ However, it is a “laundry list” in sync with U.S. policy objectives and therefore worth setting as an end goal even if it may never ultimately be achieved. “In truth the rule of law is a complex, fragile, and to some extent inherently unrealizable goal. Nonetheless, projects that are self-conscious about the nuances and paradoxes of the rule of law are much more likely to be successful.”¹⁸⁰ One need only consider our own experience in the United States to appreciate how long it has taken to realize the promises of our

¹⁷⁶ STROMSETH ET AL., *supra* note 8, at 59.

¹⁷⁷ As observed by the U.N. Undersecretary for Legal Affairs:

The rule of law is not sufficient to deal effectively with all the challenges we are facing. There are millions of people in the world today who suffer from hunger, poverty, disease, and other difficulties. Lofty words about the rule of law give little comfort to someone who is struggling to survive the day.

Hans Corell, United Nations Under-Secretary General for Legal Affairs, Lecture at the Vienna International Centre: Prospects for the Rule of Law Among Nations 10 (Feb. 24, 2004), available at http://untreaty.un.org/OLA/media/info_from_lc/Vienna_24_2_04_final.doc.

¹⁷⁸ GALULA, *supra* note 43, at 78.

¹⁷⁹ Ringer, *supra* note 26, at 193.

¹⁸⁰ STROMSETH ET AL., *supra* note 8, at 57.

Constitution.¹⁸¹ In other words, simply because it is aspirational or may take a long time does not mean it is not worth pursuing. It must be understood by all involved that building the rule of law is a “step-by-step” process.¹⁸² There is no rule of law fairy godmother who will wave her magic wand and make rule of law in Iraq look like rule of law in the United States—rule of law and democracy may not happen for decades or more.¹⁸³ Building the rule of law begins with the planting of seeds, which when properly nurtured will root and grow into tomorrow’s oaks.¹⁸⁴ As each seedling matures, it may not resemble its neighbor, but it will be distinctly recognizable as a stable representative society rooted in the rule of law. Creating the environment necessary to nurture and achieve this end state must begin with aspirational goals and a devoted pursuit of the means necessary to achieve it.

A third and final potential criticism of this or any other rule of law program in a failed or fragile state is that it involves an intangible which the United States cannot impose. “[S]uccess requires the cooperation of the subject population or a goodly portion of it. That is not something that we can create through planning.”¹⁸⁵ While this may be true, by

¹⁸¹ *Id.* at 76 (noting that the “American rule of law culture . . . evolved over centuries and has been facilitated by a relatively high degree of prosperity”).

¹⁸² Interview with Lieutenant Colonel Gregory Gillette, Office of Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, in Wash. D.C. (Feb. 14, 2008); *see also* STROMSETH ET AL., *supra* note 8, at 82 (noting that the rule of law is “always a work in progress”); Coyne, *supra* note 12, at 1 (“It is a dangerous hubris to believe we can build other nations. But where our own interests are engaged, we can help nations build themselves—and give them time to make a start of it.”) (quoting Anthony Lake, Mar. 6, 1996).

¹⁸³ In fact, it may never “look like” the rule of law in the United States if one considers cultural differences, but hopefully “we will still know it when we see it.” STROMSETH ET AL., *supra* note 8, at 56; *see also* E-mail from Major John Porter Harlow, Professor, International & Operational Law Dep’t, The Judge Advocate General’s Legal Ctr. & Sch., to Major Tonya L. Jankunis (Feb. 20, 2008, 14:28 EST) (on file with author) (“[W]e will never make [rule of law] in Fallujah look like [rule of law] in Charlottesville in our lifetimes.”).

¹⁸⁴ Even the tiniest sprout demonstrates fertile ground for further cultivation:

The Iraqi Police call it a jail, but it’s nothing like a jail you’ve ever seen, at least not in a civilized country. It was built to house 120 prisoners. Recently it held 900. . . . It seems somehow inadequate, tone-deaf, and perhaps even wrong to say Fallujah’s disgraceful warehouse for humans is progress. But it is.

Totten *Dungeon*, *supra* note 146.

¹⁸⁵ Friedman et al., *supra* note 13, at 9.

synergistically pursuing the U.N. definition with the goal of gradually cultivating a “cultural commitment,” the United States maximizes the likelihood of success. Moreover, this critique ignores a more critical fact: often, the United States may not have a choice but to intervene to protect its national security interests.¹⁸⁶ Therefore, unless the United States reverts to a fundamentally more isolationist foreign policy position, interventions and the establishment of the rule of law are here for the foreseeable future.

Amidst this criticism, and in addition to the strengths discussed above, lies perhaps the greatest benefit of adopting the former U.N. Secretary General’s definition: it or variations of it are currently in use on the ground in Iraq. Notwithstanding the silence of Department of Defense Directive 3000.05¹⁸⁷ and Joint Publication 3-08¹⁸⁸ on a rule of law definition,¹⁸⁹ Multi-National Force–Iraq¹⁹⁰ and Multi-National Corps–Iraq¹⁹¹ have adopted the first sentence of the former Secretary General’s definition as their own. Similarly, among three definitions of the rule of law espoused by the DOS, one of them mirrors the former Secretary General’s.¹⁹² An examination of the rule of law definition in the USAID and other government agencies reveals similar threads of the U.N. definition.¹⁹³ Thus, with the United States engaged in two major contingency operations, a key benefit of universally shifting to the U.N. definition is that it should result in very little agency antagonism. It is “not tailored to a single agency’s programs or identity.”¹⁹⁴ This conclusion raises an obvious question—if most agencies are already

¹⁸⁶ See *supra* notes 7–15 and accompanying text (discussing how failed and fragile states can jeopardize U.S. national security); STROMSETH ET AL., *supra* note 8, at 392 (recognizing that interventions are dictated by necessity).

¹⁸⁷ DODD 3000.05, *supra* note 157.

¹⁸⁸ JOINT PUB. 3-08, *supra* note 162.

¹⁸⁹ See *supra* notes 150–60 and accompanying text (discussing this directive and publication).

¹⁹⁰ E-mail from Major Olga M. Anderson, Professor, International & Operational Law Dep’t, The Judge Advocate General’s Legal Ctr. & Sch., to Major Tonya L. Jankunis (Feb. 14, 2008, 10:56 EST) (on file with author) (stating that based on her review of unclassified portions of current operations orders, Multi-National Force–Iraq has adopted the first sentence of the former U.N. Secretary General’s definition as its own).

¹⁹¹ *Id.* (stating the same thing with regard to Multi-National Corps–Iraq).

¹⁹² See Ford, *supra* note 154, at 51 (listing the three DOS definitions, to include the U.N. definition).

¹⁹³ *Id.* (stating that USAID “has concocted a similar definition”).

¹⁹⁴ E-mail from Lieutenant Colonel Gregory Gillette, Office of Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, to Major Tonya L. Jankunis (Feb. 15, 2008, 15:18 EST) (on file with author).

using variants of the same U.N.-based definition, how does the authoritative imposition of this definition foster enhanced rule of law efforts?

The unfortunate answer is that conflicting interagency efforts on the ground coupled with an overly institutional focus on courts, cops, and corrections, in particular by DOD, has frustrated rule of law efforts. As observed by the President of the Iraqi Bar in a letter to President Bush:

America's Rule of Law effort in Iraq has focused almost entirely on training police, building prisons, and supporting prosecutions. This is understandable. These areas are important to security but they represent a policeman's and prosecutor's definition of what Rule of Law means. This definition is limited to law enforcement. . . . [O]ur legal culture is in need of assistance and America's millions of dollars have done little to assist our institutions. . . . If you think that "implanting" the Rule of Law in Iraq is limited to your current Rule of Law efforts, then you are receiving poor advice.¹⁹⁵

As a preliminary matter, to overcome this narrow implementation of the rule of law, all federal agencies need not only to have the same definition of the rule of law but also actually know that they have the same definition. Second, all federal agencies must understand the implications of the definition—that is, that while courts, cops, and corrections are an important element of any rule of law program, a more comprehensive approach that results in a host-nation cultural commitment to the rule of law project itself is needed. To achieve this more comprehensive approach, the United States must synergistically apply the U.N. definition of the rule of law. Unless you also win the "hearts and minds"¹⁹⁶ by building a normative commitment to living under the rule of law, the mission may fail. For while all the institution building may give the impression you have the entire elephant, trunk and tail included,

¹⁹⁵ Memorandum from Manuel Miranda, Office of Legislative Statecraft, to Ambassador Crocker, U.S. Embassy, Baghdad, Iraq, subject: Departure Assessment of Embassy Baghdad (5 Feb. 2008) (quoting letter from Aswad Al-Minshidi, President of the Iraqi Bar, to President George W. Bush (n.d.)).

¹⁹⁶ Brooks, *supra* note 26, at 132–33 ("To use a wildly overused phrase, creating the rule of law is a matter of winning hearts and minds as much as a matter of creating institutions.").

the end result may be much less spectacular—in fact, the intended elephant may just turn out to be a mouse. With this understanding in mind, the remainder of this article is largely dedicated to discussing whether the U.S. national security apparatus is capable of achieving this synergistic approach.

III. The National Security Act of 1947 and Goldwater-Nichols Example: Why We Must Build a Dynamic Bridge from Mars to Venus

Today's Departments of Defense, State, Treasury, and so forth are yesterday's Departments of War and Navy. Today's myriad complex threats to national security are yesterday's developing Cold War. Today's National Security Presidential Directive 44 (NSPD 44),¹⁹⁷ unfortunately, is not yesterday's National Security Act of 1947 or Goldwater-Nichols Department of Defense Reorganization Act of 1986.¹⁹⁸ Notwithstanding NSPD 44's directive to increase interagency coordination and the DOS's creation of the Office of the Coordinator for Reconstruction and Stabilization (S/CRS),¹⁹⁹ today's national security apparatus remains virtually unchanged from that created by the National Security Act of 1947. Akin to 1945, the result has been "a fundamental mismatch between the international threat environment and the national security apparatus."²⁰⁰ The United States must successfully confront the "myriad challenges around the world in the coming decades,"²⁰¹ to

¹⁹⁷ NSPD 44, *supra* note 34.

¹⁹⁸ National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C.); Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in various sections of 10 U.S.C.).

¹⁹⁹ NSPD 44, *supra* note 34; *see also* ROL HANDBOOK, *supra* note 35, at 22–23 (providing brief overview of NSPD-44 and S/CRS); *see infra* notes 265–82 and accompanying text (providing brief overview of NSPD-44 and S/CRS).

²⁰⁰ McKinney, *supra* note 19, at 2.

²⁰¹ Gates, *supra* note 12, at 4. Secretary Gates elaborated on these "myriad challenges":

Unfortunately, the dangers and challenges of old have been joined by new forces of instability and conflict, among them—

- A new and more malignant form of global terrorism rooted in extremist and violent jihadism;
- New manifestations of ethnic, tribal, and sectarian conflict all over the world;
- The proliferation of weapons of mass destruction;
- Failed and failing states;

include the establishment of stable societies through the cultivation of the rule of law, by restructuring our national security framework to meet the challenges of today and tomorrow—not yesterday.²⁰²

Many military strategists and practitioners analogize today’s national security apparatus’s ineffective and inefficient handling of security challenges to the situation in the late 1940s as the end of World War II quickly transitioned into the developing Cold War.²⁰³ One author synopsized these similarities as follows:

While the problems facing the United States were varied, the most important challenges were shaped by a quickly changing strategic environment;²⁰⁴ rapid advances in

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- States enriched with oil profits and discontented with the current international order; and
 - Centrifugal forces in other countries that threaten national unity, stability, and internal peace—but also with implications for regional and global security.

Id. at 3.

²⁰² Numerous others have suggested a similar necessity. *See, e.g.*, CTR. FOR STRATEGIC & INTERNATIONAL STUDIES, BEYOND GOLDWATER-NICHOLS: U.S. GOVERNMENT AND DEFENSE REFORM FOR A NEW STRATEGIC ERA, PHASE 2 REPORT 4–87 (2005) [hereinafter CSIS] (discussing various potential modifications to the national security structure to meet the post-Cold War threat); Chiarelli & Smith, *supra* note 12, at 5 (advocating a “top down review of the roles and missions of all its elements of national power”); Gates, *supra* note 12, at 4; McKinney, *supra* note 19, at 1.

²⁰³ *See, e.g.* Colonel Mark D. Needham, The Triad of National Security Legislation for the 21st Century 1 (Mar. 18, 2005) (unpublished U.S. Army War College Strategy Research Project, available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil192.pdf>) (noting that the United States faces challenges today similar to the challenges faced at the end of World War II and advocating for the United States to “revise its national security apparatus for the environment of the 21st century.”).

²⁰⁴ As a result of this changing strategic environment, there developed a pronounced need for effective intelligence and counter-intelligence capabilities.

[M]any people in the United States developed a form of paranoia that saw fifth column enemies everywhere. Even paranoiacs can have real enemies; the Soviet Union started to expand its efforts to subvert the United States at home. Unlike the Red Scare of 1919, however, this fear was seriously grounded. . . . This fed fears of a foreign-inspired internal revolution in the United States.

Mark R. Shulman, *The Progressive Era Origins of the National Security Act*, 104 DICK. L. REV. 289, 326 (2000).

technology;²⁰⁵ growing concern with organizational effectiveness and efficiency; a growing chorus of pundits and Congressional leaders advocating organizational changes to the foreign policy establishment;²⁰⁶ and efforts to unify the U.S. government and military services in an effort to improve organizational performance.²⁰⁷ These principal causal factors formed

²⁰⁵ *Id.* at 326. Shulman vividly makes apparent how rapidly advancing technology greatly reduced the Atlantic and Pacific Oceans' capability of serving as a protective barrier:

[T]he emergence of post-war technology meant that for the first time an enemy could strike the continental United States catastrophically. The sea-launched surprise attack on Pearl Harbor had been sufficient to cause the War and Justice departments to imprison thousands of American citizens based merely on their ethnic origins. . . . The fire-storm bombings of Dresden and Tokyo, and even the nuclear explosions at Hiroshima and Nagasaki, barely foreshadowed the destructiveness of intercontinental missiles to come.

Id.

²⁰⁶ Included in this growing chorus are two former Presidents. Franklin Roosevelt, in discussing the difficulty in getting the Navy to change, likened the Navy to a featherbed: "You punch it with your right and you punch it with your left until you are finally exhausted . . . and then you find the damn bed just as it was before." Gates, *supra* note 12, at 5 (quoting President Franklin Roosevelt). Harry Truman made a similar observation, noting "that if the Army and Navy had fought as hard against the Germans as they had fought against each other, the war would have been over much sooner." *Id.* (paraphrasing President Franklin Roosevelt).

²⁰⁷ The impetus for these efforts to reform the military has been described as follows:

[M]ilitary roles and missions were rethought in light of the gargantuan World War II campaigns. The scope and scale of war had expanded dramatically, as had the ability to strike across wide expanses of ocean. The German Blitzkrieg and above all the Japanese attack on Pearl Harbor had shattered many Americans' faith in their nation's invulnerability. The conduct of the war and lessons learned from other armed forces brought home the critical importance of cooperation among land, sea, and air forces. This was as true at the tactical level as at the level of grand strategy. Frequently in the Pacific, tactical success depended on soldiers fighting alongside marines, with air support and naval bombardment. Likewise, grand strategy required that General Douglas MacArthur and Admiral Chester Nimitz not only to divide the Pacific theater of operations but also share forces.

Shulman, *supra* note 204, at 325–26.

the foremost impetus for the National Security Act. . . .²⁰⁸

As a result of these perceived and real deficits, Congress enacted the National Security Act of 1947.²⁰⁹ The overarching congressional intent was “to provide a comprehensive program for the future security of the United States.”²¹⁰ To accomplish this objective, it created the National Security Council (NSC),²¹¹ a National Military Establishment²¹² to include the Navy,²¹³ the former War Department which was re-designated the Army,²¹⁴ and a newly created Air Force,²¹⁵ all in theory headed by the newly created Secretary of Defense,²¹⁶ and the Central Intelligence Agency and position of Director of Central Intelligence.²¹⁷

The NSC served as the fulcrum under this new framework for the development of integrated and comprehensive policy. Headed by the President, it was originally comprised of the Secretaries of State and Defense, the three military service secretaries, and the Chairman of the

²⁰⁸ McKinney, *supra* note 19, at 2; *see also* Needham, *supra* note 203, at 1–2 (discussing similar factors contributing to the passage of the National Security Act of 1947).

²⁰⁹ Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C.).

²¹⁰ *Id.* § 2, 61 Stat. at 496 (codified as amended 50 U.S.C § 401 (2000)). To achieve this objective, the Act sought:

[T]o provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to national security; to provide three military departments for the operation and administration of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force, with their assigned combat and service components; to provide for their authoritative coordination and unified direction under civilian control but not to merge them; to provide for the effective strategic coordination of the armed forces and for their operation under unified control and for their integration into an efficient team of land, naval, and air forces.

Id.

²¹¹ *Id.* § 101(a), 61 Stat. at 496.

²¹² *Id.* § 201, 61 Stat. at 499–500.

²¹³ *Id.* § 206, 61 Stat. at 501.

²¹⁴ *Id.* § 205, 61 Stat. at 501.

²¹⁵ *Id.* § 207, 61 Stat. at 502.

²¹⁶ § 202, 61 Stat. at 500.

²¹⁷ *Id.* § 102(a), 61 Stat. at 497; *see also* Needham, *supra* note 203, at 2 (providing an overview of the National Security Act).

National Security Resources Board.²¹⁸ The President could designate heads of other executive departments to the Council subject to the advice and consent of the Senate.²¹⁹ Its mission was extraordinary in scope and importance: “to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving national security.”²²⁰

Within two years it became apparent that the National Military Establishment was dysfunctional. “[I]t was meant to promote unity among the military services. It didn’t. A mere two years later the Congress had to pass another law because the Joint Chiefs of Staff were anything but joint. And there was no chairman to referee the constant disputes.”²²¹ The National Security Act Amendments of 1949²²² were thus geared toward the overhaul of the recently created DOD. Among other matters, the Amendments elevated the DOD to an executive or cabinet level department while simultaneously demoting the services to military departments.²²³ The Amendments also created the position of the Chairman of the Joint Chiefs of Staff (CJCS), who along with the service chiefs, was to serve as the “principal military adviser to the President, the NSC, and the Secretary of Defense.”²²⁴

With the exception of changes resulting from the Goldwater-Nichols Department of Defense Reorganization Act of 1986,²²⁵ “the current national security apparatus is [structurally] unchanged since its creation following World War II.”²²⁶ The Goldwater-Nichols Act was a

²¹⁸ *Id.* § 101(a), 61 Stat. at 496.

²¹⁹ *Id.*

²²⁰ *Id.*

²²⁰ *Id.*

²²¹ Gates, *supra* note 12, at 5.

²²² Pub. L. No. 81-216, 63 Stat. 578 (1949).

²²³ *Id.* § 201, 63 Stat. at 579.

²²⁴ *Id.* § 211, 63 Stat. at 582; *see also* Murphy & Koenig, *supra* note 3, at 186–87.

²²⁵ Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of 10 U.S.C.).

²²⁶ McKinney, *supra* note 19, at 1. This statement was made after and remains valid despite the passage of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638. Among other matters, the Act created the position of the Director of National Intelligence. Pub. L. No. 108-458 § 102, 118 Stat. 3638, 3644. It also established the National Counterterrorism Center, National Counter-Proliferation Center, and National Intelligence Centers. *Id.* §§ 1021–1023, 118 Stat. 3638, 3672–77.

congressional response to reorganize the military following a series of less than optimal contingency operations from the Korean and Vietnam conflicts through Desert One²²⁷—a failed rescue attempt of fifty-three American hostages in Iran²²⁸—and the failure in basic force protection measures that led to the suicide bomber attack on the Marine Corps barracks in Lebanon.²²⁹ Specifically, in passing the Act, Congress intended:

To reorganize the Department of Defense and strengthen civilian authority in the Department of Defense, to improve the military advice provided to the President, the National Security Council, and the Secretary of Defense, to place clear responsibility on the commanders of the unified and specified combatant commands for the accomplishment of missions assigned to those commands and ensure that the authority of those commanders is fully commensurate with that responsibility, to increase attention to the formulation of strategy and to contingency planning, to provide for more efficient use of defense resources, to improve joint officer management policies, otherwise to enhance the effectiveness of military operations and improve the

²²⁷ Chiarelli, *supra* note 5, at 71.

²²⁸ LOCHNER, *supra* note 4, at 45. Lochner provided a sobering description of the botched rescue attempt:

On April 25, 1980, a military raid to rescue fifty-three Americans held captive in Iran failed. Code-named Operation Eagle Claw, the mission was aborted when only six of eight helicopters arrived at the rendezvous point in Iran, labeled “Desert One,” and one of those was broken. In departing, a helicopter collided with a C-130 transport plane. Five airmen and three marines died in the explosion, which destroyed both aircraft. The other five helicopters were abandoned with valuable secret documents, weapons, and communications gear on board.

Id. Lochner attributed the failed mission to “institutional deficiencies” and “Pentagon unpreparedness . . . so immense that [not] even six months of organizing, planning, and training could . . . overcome” them. *Id.* at 46.

²²⁹ *Id.* at 142–63. “[A] lone terrorist drove a yellow Mercedes-Benz truck laden with explosives into the lobby of the BLT headquarters building where he triggered one of the biggest nonnuclear detonations ever.” *Id.* at 150. As a result, 241 service members, predominantly Marines, died. “Another 112 Americans were wounded.” *Id.*

management and administration of the Department of Defense, and for other purposes.²³⁰

To accomplish these objectives, the Goldwater-Nichols Act first significantly strengthened the role of the CJCS by making him the principal advisor to the President, NSC, and Secretary of Defense and providing him greater authority over the service chiefs.²³¹ Second, it “mandate[d] that the Joint Staff function as the chairman’s staff, responding to the direction and guidance of the CJCS.”²³² Third, the Act enhanced joint assignments by codifying “joint duty positions,” requiring joint schooling prior to assignment to a joint position, requiring joint service for promotion to flag officer, and mandating the same promotion rates for officers assigned to joint assignments “as those for officers serving on their own service’s staff.”²³³ Finally, the Act “clearly defined the chain of command as running from the President to the Secretary of Defense to the [combatant commanders].”²³⁴ The service chiefs were thus removed from the operational chain of command and relegated to a “train, man, and equip” function. The overall effect of the Act, as previously discussed, has been an extraordinarily more capable DOD.²³⁵

Based on the structure of the national security apparatus, it is easy to understand why so many commentators have characterized the structure as “stovepiped.”²³⁶ Each agency is statutorily required to meet together in only one forum—the NSC. At this high level ideas are finally brought together, shared, and developed into national policy.²³⁷ The vast streams

²³⁰ Pub. L. No. 99-433, 100 Stat. 992 (1986).

²³¹ Murphy & Koenig, *supra* note 3, at 189–91.

²³² *Id.* at 191–92.

²³³ *Id.*

²³⁴ *Id.* at 192–93.

²³⁵ See *supra* notes 2–6 and accompanying text (discussing the impact of the Goldwater-Nichols Act on operations).

²³⁶ Gorman & Krongard, *supra* note 14, at 53. A stovepipe is defined as “a pipe, as of sheet metal, serving as a stove chimney or to connect a stove with a chimney flue.” RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 1319 (1991). Smoke is generated from the fireplace and thereafter contained within the stovepipe until it exits the house from the chimney. Similarly, ideas and concepts are developed within an agency and contained within that agency until they are finally released at the chimney, which in this case is the National Security Council.

²³⁷ Needham, *supra* note 203, at 3 (“What is most critical about the NSC is the strategic thought process that leads to the coordinated strategy. Strategy created in each of the various departments and brought to the NSC for coordination will not work. It must be a holistic and synergistic product of the different perspectives of the NSC members, their staffs, and the NSC staff.”).

of information collected and developed within each of these agencies—each with its own organization, language, doctrine, budget, goals, expertise, and culture²³⁸—must funnel through their respective leadership before arriving at the NSC. Only at the NSC are all of these streams of information finally pooled together to receive interagency perspectives, information, and synchronization to develop U.S. policy.²³⁹ From the Cold War perspective, this approach made sense. While overly simplistic, we were either at war (a military function) or we were not (a civilian agency function).²⁴⁰ As a result, relative to today, there was a negligible requirement for interagency coordination and unity of action below the NSC level.

Unfortunately, since the collapse of the former Soviet Union, the nature of the threats and missions has evolved beyond the capacity of our current national security apparatus to anticipate and counter effectively. It is 1947 all over again.²⁴¹

For well over a decade, the United States has faced a security environment far more complex than that of the Cold War. Today's challenges—such as winning the global war on terror and slowing the proliferation of weapons of mass destruction—require multifaceted security strategies that take advantage of the capabilities from across the full spectrum of national security agencies.

Yet, while today's challenges are vastly different from those of the Cold War, the structures and mechanisms the United States uses to develop and implement national security policy remain largely unchanged. Cabinet agencies continue to be the principal organizational element of the national security policy, and each agency has its own strategies, capabilities, budget, culture, and institutional prerogatives to emphasize and protect.²⁴²

²³⁸ See, e.g., CSIS, *supra* note 202, at 26; Kelly, *supra* note 6 (describing differences between Defense and State); Rife, *supra* note 1 (same).

²³⁹ Gorman & Krongard, *supra* note 14, at 53–54.

²⁴⁰ See Kelly, *supra* note 6.

²⁴¹ See *supra* notes 7–15, 200–01 and accompanying text (describing the contemporary threat).

²⁴² CSIS, *supra* note 202, at 26.

The Secretary of State,²⁴³ Secretary of Defense,²⁴⁴ various general officers,²⁴⁵ pundits, and think tanks²⁴⁶ have also widely acknowledged the inadequacy of the current security apparatus to meet this evolving threat. In general, there have been two major critiques of the national security apparatus relative to the current threat: first, a noticeable and consistent failure of interagency coordination,²⁴⁷ and second, a remarkable interagency imbalance resulting from a resource-dictated overreliance on the mammoth personnel, logistical, and planning capacities of the DOD compared with the minimal capacities of U.S. government civilian agencies.²⁴⁸

General Peter Pace stated that “the interagency process now in effect does a good job with presenting the president with options. ‘But once the president decides to do something, our government goes back into its stovepipes for execution—Department of State does what they do, [DOD] does what we do, the Department of Treasury, etc.’”²⁴⁹ Lieutenant General Peter W. Chiarelli is even more critical: “In every overseas intervention the U.S. has undertaken since the end of the cold war, an integrated approach and an understanding of each organization’s missions and capabilities have been woefully lacking.”²⁵⁰ Simply put:

²⁴³ Chiarelli & Smith, *supra* note 12, at 5 (“*I don’t think the U.S. government had what it needed for reconstructing a country. We did it ad hoc in the Balkans, and then in Afghanistan, and then in Iraq.*”) (quoting Secretary of State Condoleezza Rice).

²⁴⁴ Gates, *supra* note 12, at 4. Secretary Gates stated:

One of the most important lessons of the wars in Iraq and Afghanistan is that military success is not sufficient to win: economic development, institution-building and the rule of law, promoting internal reconciliation, good governance, providing basic services to people, training and equipping indigenous military and police forces, strategic communications, and more—these, along with security are essential ingredients for long-term success. Accomplishing all of these tasks will be necessary to meet the diverse challenges I have described.

So, we must urgently devote time, energy, and thought to how we better organize ourselves to meet the international challenges of the present and the future

Id.

²⁴⁵ See, e.g., Chiarelli & Smith, *supra* note 12.

²⁴⁶ See, e.g., CSIS, *supra* note 202.

²⁴⁷ See *infra* notes 249–52, 259–64 and accompanying text.

²⁴⁸ See *infra* notes 253–64 and accompanying text.

²⁴⁹ Garamone, *supra* note 3 (quoting General Pace).

²⁵⁰ Chiarelli & Smith, *supra* note 12, at 5.

The principal problem of interagency decision making is lack of decisive authority; there is no one in charge. As long as personalities are involved who work well together and have leadership support in the NSC, interagency efforts will prosper, but such congruence is not predictable. The world situation does not wait for the proper alignment of the planets in Washington. There is too much diffusion of policy control.²⁵¹

And yet today's missions, whether conducting rule of law operations in failed or fragile states or conducting an offensive contingency operation in support of the global war on terrorism, demand interagency direction and coordination at the strategic, operational and tactical levels to increase the likelihood of success.²⁵²

Beyond this failure of interagency coordination, the national security apparatus suffers from a dramatic institutional imbalance that has resulted in a de facto reliance on the DOD to carry the vast weight in all stability operations,²⁵³ to include nation-building and rule of law operations. "It is a simple fact that today, U.S. operational capability rests almost entirely in the Department of Defense. Enhanced coordination, planning, and outreach among non-DOD agencies are of little use until they can be translated into operations—yet that capability exists in very few agencies today, and even then in little quantity."²⁵⁴ For example, the DOS "has only 11,000 employees in the foreign service, a miniscule number compared to the more than 2,000,000 uniformed personnel in the U.S. military."²⁵⁵ The USAID is even more miniscule, a mere 3,000 employees, making it "little more than a contracting agency."²⁵⁶ This institutional imbalance is problematic for

²⁵¹ Marcella, *supra* note 19, at 184.

²⁵² CSIS, *supra* note 202, at 26 ("The national security agencies can bring a wealth of experience, vision, and tools to bear on security challenges, but more often than not, the mechanisms to integrate the various dimensions of U.S. national security policy and to translate that policy into integrated programs and actions are extremely weak, if they exist at all.").

²⁵³ *Id.* at 56.

²⁵⁴ *Id.* at 8.

²⁵⁵ Chiarelli & Smith, *supra* note 12, at 5. It goes almost without saying that many of the two million members of the armed services have not historically been trained to conduct rule of law operations. Even recognizing this, however, the stark contrast in number of personnel alone allocated to the DOS and its sister agencies relative to the DOD to conduct their respective missions is mind-numbing.

²⁵⁶ *Id.*

two primary reasons. First, in the context of rule of law and nation-building efforts, civilian expertise is needed not only to enhance the operation, but more practically, to positively affect the host-nation's receptiveness by having civilian personnel administer programs vice military personnel.²⁵⁷ Second, to the extent civilian agencies are tasked with lead responsibility for stabilization and reconstruction operations, but DOD personnel must take the de facto on the ground lead, a "tremendous amount of uncertainty regarding who is in charge"²⁵⁸ can result.

As might be imagined, systemic problems with the national security apparatus have migrated and manifested themselves on the ground. For example, the Provincial Reconstruction Team (PRT) is often viewed as the vehicle of interagency action at the ground level.²⁵⁹ The PRT is composed of a mix of military and civilian personnel normally under the leadership of a DOS civilian employee.²⁶⁰ Unfortunately, the reality has not lived up to the hype. For example, regarding PRT operations in Afghanistan, it has been observed that "[d]espite their potential record of success . . . PRTs always have been a bit of a muddle. Inconsistent mission statements, unclear roles and responsibilities, ad hoc preparation, and, most important, limited resources have confused potential partners

²⁵⁷ See *supra* notes 148–53 and accompanying text.

²⁵⁸ CSIS, *supra* note 202, at 57; see Schnaubelt, *supra* note 158, at 50. For example, in discussing the relationship between the Coalition Provisional Authority and Combined Joint Task Force-7, Schnaubelt highlights how this ambiguity as to who is in charge detracted from the mission.

The official relationship between the CPA Administrator and the CJTF-7 Commander was probably clear to those two individuals, but not completely understood by others inside the former Republican Palace in which CPA and CJTF-7 were collocated. "Who is Bremer's boss?" was a common question. Many military officers appeared to believe that the Commander of CJTF-7 was the senior person in the building, or at least an equal to Ambassador Bremer—responsible for all military-related decisions, while Ambassador Bremer handled only civilian matters. Meanwhile, CPA staff believed the opposite to be true—that the CPA Administrator was the senior official in the country, setting Iraq-wide policy.

Schnaubelt, *supra* note 158, at 50.

²⁵⁹ See generally, e.g., Michael J. McNerney, *Stabilization and Reconstruction in Afghanistan: Are PRTs a Model or a Muddle?*, PARAMETERS, Winter 2005–2006, at 32.

²⁶⁰ *Id.* ("First established in 2003, PRTs consisted of 60–100 soldiers plus, eventually, Afghan advisors and representatives from civilian agencies like the US State Department, the US Agency for International Development, and the US Department of Agriculture.").

and prevented PRTs from having a greater effect on Afghanistan's future."²⁶¹

Outside the context of PRTs, the same holds true. An officer who served in Afghanistan noted that "[t]he biggest frustration in dealing with other agencies was a complete lack of synchronization of effort, and at times, different opinions as to how a particular problem should be addressed."²⁶² Among numerous examples of the interagency discord at the ground level that this officer experienced, two stand out. First, due to a "lack of organic resources, these (non-Department of Defense) agencies would continually place a drain on the limited assets that Combined Joint Task Force 76 had in Afghanistan."²⁶³ And second, in the context of counter-narcotic operations:

USAID would meet with local leaders . . . and promise them alternative resources if they would willingly reduce the level of opium production within their respective areas. The problem with this plan was that USAID did not have the resources to physically deliver these items (i.e., grain, farm equipment, etc.). USAID would then try and blame us for either not delivering the items and/or not providing a secure enough environment for them to contract out the delivery. The bottom line was that every broken promise, whether intentional or not, was a setback to the efforts that our Commanders were making at the tactical level.²⁶⁴

Thus, the interagency situation at the micro level mirrors the situation at the macro level: a lack of a decisive authority and absence of coordinated action and planning combined with a mission impacting resource imbalance.

In late 2004, Congress responded in limited fashion to at least the lack of civilian interagency planning in section 408 of the Consolidated

²⁶¹ *Id.* at 33.

²⁶² E-mail from Major Steven Garipey, Student, 56th Judge Advocate Advanced Course, The Judge Advocate General's Legal Center and School, to Major Tonya L. Jankunis (Nov. 30, 2007, 15:15 EST) (on file with author).

²⁶³ *Id.*

²⁶⁴ *Id.*

Appropriations Act of 2005.²⁶⁵ Section 408 established the Department of State's Office of the Coordinator for Reconstruction and Stabilization.²⁶⁶ This office "has the authority to *catalog* and *monitor non-military* resources and capabilities and to *coordinate* the development of contingency plans and training of civilian personnel for effective reconstruction and stabilization . . . activities."²⁶⁷ National

²⁶⁵ Pub. L. No. 108-447, 118 Stat. 2809 (2004); see PRESIDENTIAL REPORT TO CONGRESS, 109TH CONG., REPORT ON IMPROVING INTERAGENCY SUPPORT FOR THE UNITED STATES 21ST CENTURY NATIONAL SECURITY MISSIONS AND INTERAGENCY OPERATIONS IN SUPPORT OF STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION OPERATIONS 8 (June 2007) [hereinafter INTERAGENCY REPORT] (noting that the DOS established the Office for the Coordination of Reconstruction and Stabilization prior to the passage of section 408).

²⁶⁶ Pub. L. No. 108-447, § 408, 118 Stat. 2809, 2904. Section 408 provides in relevant part:

That the functions of the Office of the Coordinator for Reconstruction and Stabilization shall include--

(1) *cataloguing and monitoring* the non-military resources and capabilities of Executive agencies (as that term is defined in section 105 of title 5, United States Code), State and local governments, and entities in the private and non-profit sectors that are available to address crises in countries or regions that are in, or are in transition from, conflict or civil strife;

(2) *monitoring* political and economic instability worldwide to anticipate the need for mobilizing United States and international assistance for countries or regions described in paragraph (1);

(3) *assessing* crises in countries or regions described in paragraph (1) and determining the appropriate non-military United States, including but not limited to demobilization, policing, human rights monitoring, and public information efforts;

(4) *planning* for response efforts under paragraph (3);

(5) *coordinating* with relevant Executive agencies the development of interagency contingency plans for such response efforts; and

(6) *coordinating* the training of civilian personnel to perform stabilization and reconstruction activities in response to crises in such countries or regions described in paragraph (1).

Id. (emphasis added).

²⁶⁷ INTERAGENCY REPORT, *supra* note 265, at 8 (emphasis added).

Security Presidential Directive 44 (NSPD 44)²⁶⁸ broadens the scope of DOS “coordination” responsibilities by authorizing the “Secretary of State to *coordinate* whole-of-government [reconstruction and stabilization] planning and operations and to choose to appoint a Coordinator to manage those efforts.”²⁶⁹ In the words of NSPD 44, the DOS has the responsibility to “*harmonize* [reconstruction and stabilization] efforts with U.S. military plans and operations.”²⁷⁰ Finally, pursuant to NSPD 44, an Interagency Management System (IMS) is being developed to “provide a framework for interagency *cooperation* in a [reconstruction and stabilization] crisis.”²⁷¹ When a crisis “triggers” the IMS, the Office of the Coordination for Reconstruction and Stabilization’s “planning and operations staff have the responsibility to provide core teams, as required, in Washington, at the military operational command level, and in the affected country.”²⁷² In other words, the IMS is a special “coordinating” team that arises only upon the occurrence of a crisis.

Undoubtedly, these are extremely important first steps in recognizing the necessity for a coordinated government effort to respond to reconstruction and stabilization operations.²⁷³ But these initial steps are problematic for several reasons. First, none of these authorities do more than require “coordination,” “harmonization,” “monitoring,” and “cataloguing.”²⁷⁴ The word “direct” is therefore painfully absent. Absent “direct” or a similarly authoritative verb, much of the promise of these coordinating organizations will remain aspirational, personality dependent, and ultimately unfulfilled without a decisive referee below the strategic level to decide disputes.²⁷⁵ Second, these measures do not

²⁶⁸ NSPD 44, *supra* note 34.

²⁶⁹ INTERAGENCY REPORT, *supra* note 265, at 8 (emphasis added). NSPD 44 provides that the Secretary of State shall “coordinate and strengthen efforts . . . to prepare, plan for, and conduct reconstruction and stabilization assistance and related activities that require the response capabilities of multiple United States Government agencies.” NSPD 44, *supra* note 34.

²⁷⁰ NSPD 44, *supra* note 34 (emphasis added).

²⁷¹ INTERAGENCY REPORT, *supra* note 265, at 9 (emphasis added).

²⁷² *Id.*

²⁷³ CSIS, *supra* note 202, at 8.

²⁷⁴ See *supra* notes 266–71 and accompanying text (placing emphasis on the use of these and similar words).

²⁷⁵ Marcella, *supra* note 19, at 184 (noting that a lack of “decisive authority” leads to personality-based relationships in the interagency). For example, FM 3-0 provides:

Most civilian organizations are not under military control. Nor does the U.S. ambassador or United Nations Commissioner control them.

address the resources problem.²⁷⁶ Third, with regard to the DOD, this “harmonizing” is not even statutory. As such, it is a first step that has repeatedly been taken before.²⁷⁷ For example, one need only compare the promise of NSPD 44 with that of Presidential Decision Directive 56 (PDD 56),²⁷⁸ enacted during the Clinton administration to manage

Civilian organizations have different organizational cultures and norms. Some may be willing to work with Army forces; others may not. Thus, personal contact and trust building are essential. Command emphasis on immediate and continuous coordination encourages effective cooperation. Commanders should establish liaison with civilian organizations to integrate their efforts as much as possible with Army and joint operations. Civil affairs units typically establish this liaison.

FM 3-0, *supra* note 7, para. 1-54.

²⁷⁶ See, e.g., Marcella, *supra* note 19, at 184. According to Marcella:

The Department of State, which has the responsibility to conduct foreign affairs, is a veritable pauper. Indeed, the military has more money to conduct diplomacy. The State Department’s diplomats may have the best words in town, in terms of speaking and writing skills, and superb knowledge of foreign countries and foreign affairs, but it is a very small organization that has been getting smaller budget allocations from Congress in recent years.

Id.

²⁷⁷ The Center for Strategic and International Studies described the frustratingly repetitive cycle as follows:

U.S. responses to complex emergencies to date have been largely *ad hoc* and plagued by poor planning, slow response time, insufficient resources, and little unity of effort among agencies. This continuous cycle—in which the U.S. government cobbles together plans, people, and resources for stabilization and reconstruction efforts before, during or after major combat operations—puts unnecessary strains on the U.S. military, undermines success, and must be broken.

CSIS, *supra* note 202, at 55. Recognizing similar deficiencies in the national security apparatus, Secretary Gates suggested that among other measures, funding for DOS must be increased. See Gates, *supra* note 12, at 8.

²⁷⁸ See White Paper: The Clinton Administration’s Policy on Managing Complex Contingency Operations: Presidential Decision Directive 56: Managing Complex Contingency Operations (May 1997) [hereinafter PDD 56 White Paper]. Presidential Decision Directive 56 is a classified document. However, the PDD 56 White Paper is a redacted and unclassified version of PDD 56. The PDD 56 White Paper explains, “the key elements of the Clinton Administration’s policy on managing complex contingency operations.” *Id.* at 1. It was “promulgated for use by government officials as a handy reference for interagency planning of future complex contingency operations.” *Id.* While the White Paper “explains the PDD, it does not override the official PDD.” *Id.*

“complex contingency operations.”²⁷⁹ As one contemporary observer noted, PDD 56 “mandates reform in the joint/interagency coordination process. It recognizes that the United States will continue to conduct complex contingency operations (CCOs). Greater coordination is required to appropriately bring all instruments of national power to bear on all such operations.”²⁸⁰ Unfortunately, with the change in administration, the lessons of PDD 56 were forgotten until the United States was forced to relearn them the hard way—on the ground in Iraq and Afghanistan.²⁸¹ As a result, while NSPD 44 is a positive first step, it is a step that may quickly be forgotten unless embraced in a broader statute amending the national security apparatus.²⁸²

²⁷⁹ *Id.* The similarities between NSPD 44 and PDD 56 in characterizing the threat and need for a coordinated response are remarkable. The PDD 56 White Paper provides:

In the wake of the Cold War, attention has focused on a rising number of territorial disputes, armed ethnic conflicts, and civil wars that pose threats to regional and international peace and may be accompanied by natural or manmade disasters which precipitate massive human suffering. We have learned that effective responses to these situations may require multiple dimensional operations composed of such components as political/diplomatic, humanitarian, intelligence, economic development, and security; hence the term complex contingency operations.

Id.

²⁸⁰ William P. Hamblet & Jerry G. Kline, *Interagency Cooperation: PDD 56 and Complex Contingency Operations*, JOINT FORCES Q., Spring 2000, at 92.

²⁸¹ McKinney, *supra* note 19, at 10 (stating, in the context of the forgotten lessons of PDD 56, “the changeover in intellectual thought and experience that occurs with changes in administrations, results in missed opportunities and a relearning of lessons across the organizations”).

²⁸² In describing the inherently fickle nature of presidential decision directives (PDDs), Marcella’s discussion highlights the likely future for NSPD 44 upon completion of operations in Iraq and Afghanistan absent further congressional involvement:

The reality is however, that a PDD is not a permanent guide to the actions of agencies. Rarely is it fully implemented. It can be overtaken by new priorities, new administrations, and by the departure of senior officials who have the stakes, the personal relationships, the know-how, and the institutional memory to make it work. A senior NSC staffer, Navy Captain Joseph Bouchard, Director of Defense Policy and Arms Control, remarked in 1999 that one cannot be sure about whether a PDD from a previous administration is still in force because for security reasons no consolidated list of these documents is maintained. Moreover, PDDs and other presidential documents are removed to presidential libraries and archives when a new president takes over. A senior Defense

In a similar vein, the publication of Department of Defense Directive 3000.05,²⁸³ *Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations*, may be seen as recognizing that significant interagency challenges, from poor coordination to inadequate resources, have made the military the de facto lead in reconstruction and stabilization operations.²⁸⁴ The Directive provides:

Stability operations are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support. They shall be given priority comparable to combat operations and be explicitly addressed and integrated across all [DOD] activities including doctrine, organizations, training, education, exercises, materiel, leadership, personnel, facilities, and planning.²⁸⁵

Published in 2006, Joint Publication 3-08, *Interagency, Intergovernmental Organization, and Nongovernmental Organization During Joint Operations* provides the “doctrinal basis for interagency coordination and for U.S. military involvement in multinational operations.”²⁸⁶ Clearly, as related by the senior military assistant to the Secretary of Defense, the military has accepted this de facto responsibility which has been evolving since the end of the Cold War:²⁸⁷

Department official states that PDDs are rarely referred to after they are final, are usually overtaken by events soon after publication, and are rarely updated. In this respect the interagency evaluation of PDD 56’s effectiveness, published in May 1997, is instructive: “PDD 56 no longer has senior level ownership. The Assistant Secretaries, Deputy Assistant Secretaries, and the NSC officials who initiated the document have moved on to new positions.”

Marcella, *supra* note 19, at 179. While NSPD 44 is currently enjoying greater longevity than PDD 56, PDD 56’s history may unfortunately be predictive of NSPD 44’s future.

²⁸³ DODD 3000.05, *supra* note 157.

²⁸⁴ Kelly, *supra* note 6 (“It is difficult to overstate the significance of this document, which makes civil society support as important as combat operations. It’s probably safe to say that the military has rarely, if ever, advocated so strenuously on behalf of the State Department and other agencies within one of its own planning documents.”).

²⁸⁵ DODD 3000.05, *supra* note 157, para 4.1.

²⁸⁶ JOINT PUB. 3-08, *supra* note 162, at i.

²⁸⁷ One author vividly described the military’s assumption of this de facto status since the end of the Cold War as follows:

“[L]ike it or not, until further notice the U.S. Government has decided that the military largely owns the job of nation-building.”²⁸⁸ Unfortunately, as tremendously advantageous as this directive and joint publication will be to planning, training for, and conducting nation-building operations, they are not without their shortcomings. First, these publications are as susceptible to change as NSPD 44.²⁸⁹ Second, by affirmatively taking on a nation-building responsibility, they exacerbate the interagency imbalance. Why bother bolstering State’s resources when you can fall back on Defense?²⁹⁰ Third, although these publications can direct the DOD to coordinate with other government agencies, they are only aspirational as applied to members of other government agencies. Again, there is no practical mechanism or higher authority to require integration below NSC level. More fundamentally, absent the provision of additional personnel and resources to these other government agencies, there will be a limited number of persons with whom to coordinate. Finally, it is difficult to achieve the rule of law from what appears to be the barrel of a gun to the host-nation.²⁹¹ Regardless of how well the military conducts itself during nation-

With little guidance from the elective officials who control the purse strings, the military adapted to the ad-hoc nature of its post-Cold War missions largely on its own. For the past 15 years, the DoD has lived in a policy space somewhere between war and peace. The military even evolved its own lingo to describe the complicated, ground-level and very human terrain where it worked. Post-Cold War activities had many titles besides MOOTW: complex contingency, irregular war, conflict termination, low-intensity conflict, counter-insurgency. Like Spanglish, international partnerships added to the mix. Peacekeeping, Peace building, and Peace Enforcement come from the United Nations Charter. Stability and support each has its own subdivision of labor. Stability may still require use of force while Support addresses humanitarian needs. Meanwhile, more and more responsibility for civilian tasks accrued to the Defense Department.

Kelly, *supra* note 6.

²⁸⁸ Chiarelli & Smith, *supra* note 12, at 6.

²⁸⁹ See *supra* notes 265–82 and accompanying text (discussing how presidential decision directives are generally susceptible to change). In the context of a military publication, if the authority on which it is premised changes, it too must change. Similarly, if there is a change in the civilian leadership of the DOD, it is possible the publication will also change. For example, even if NSPD 44 remained static, it does not follow that stability and reconstruction operations must remain a “core” military mission.

²⁹⁰ Kelly, *supra* note 6.

²⁹¹ See *supra* notes 148–53 and accompanying text.

building missions, this perception will adversely affect at least how some of the population responds.

Review of the lessons of Goldwater-Nichols and the National Security Act of 1947 relative to the current operational challenges and the capacity of the national security apparatus to meet those challenges highlights the necessity for a congressional level reform. Recent efforts at greater interagency coordination are steps in the right direction; however, they risk being fleeting in nature. More fundamentally, these efforts have failed to go beyond “coordination” to “direction,” a key component in successfully conducting complex rule of law operations in failed or fragile states. To provide a more permanent structure that has the capacity to truly “direct” rule of law operations, Mars must align with Venus.

IV. Choosing the Perfect Bridge: Military Strategist-Suggested Juxtapositions of Mars and Venus

The current stove-piped and inadequately resourced U.S. national security apparatus is fundamentally mismatched to counter today’s complex, multifaceted threats, to include the conduct of stability and reconstruction operations, and its subpart, rule of law operations.²⁹² “What is required is the transformation and integration of the entire national security interagency apparatus. Any tangible success in a war against the common noun of ‘terrorism’ absolutely requires that we tear down our inherently stove-piped Cold War institutions and recreate them for the 21st century.”²⁹³ In other words, only a major overhaul of this apparatus combined with resource augmentation of civilian agencies will produce a sufficiently dynamic framework to establish the rule of law and thereby create stable societies.

In contrast to the theorists who live on Venus, the strategists who call Mars home acknowledge the problem but do not talk about it all that much. Instead they immediately spring into action with proposed reorganizations and supplementations of the national security apparatus to facilitate, coordinate, and direct interagency action as well as correct

²⁹² See *supra* notes 7–15, 197–291 and accompanying text.

²⁹³ Thompson, *supra* note 37, at 74.

the imbalance of interagency resources.²⁹⁴ Almost uniformly, each strategist invokes the name of the National Security Act of 1947²⁹⁵ and the Goldwater-Nichols Department of Defense Reorganization Act of 1986²⁹⁶ to justify the necessity for change as well as serve as a model of change.²⁹⁷

Generally, these strategists can be divided into arguing for one of three major levels of reform: strategic or NSC-level reform,²⁹⁸ high operational or combatant commander level of reform,²⁹⁹ or significant tweaking of the current national security apparatus to enhance interagency capabilities without dramatic reorganization.³⁰⁰ Many strategists additionally maintain, in keeping with the Goldwater-Nichols model, that personnel systems must be modified to require interagency experience and that training must similarly reflect the new interagency reality.³⁰¹ Given that intimate interagency coordination is a *sine qua non*

²⁹⁴ See, e.g., Collins, *supra* note 2; Garamone, *supra* note 3 (discussing General Peter Pace's suggestion for a Goldwater-Nichols-like reform of U.S. agencies); Gorman & Krongard, *supra* note 14, at 52; Kelly, *supra* note 6 (arguing for the creation of a "deployable international civil service" to offset the significant operational burden placed on the military); Marcella, *supra* note 19, at 189 ("It is time to move away from a system designed for the problems of 1947 toward one that is appropriate to the challenges of the next century."); McKinney, *supra* note 19, at 5; Naler, *supra* note 3, at 27; Navas, *supra* note 19, at 231 (arguing for a major reform of the national security system pre-US intervention in Iraq); Needham, *supra* note 203, at 1 (noting that the United States faces challenges today similar to the challenges faced at the end of World War II and advocating for the United States to "revise its national security apparatus for the environment of the 21st century"); Thompson, *supra* note 37, at 62. *But see* CSIS, *supra* note 202, at 4–87, 17 (rejecting the argument that "we need a Goldwater-Nichols for the interagency" reform because there is "no integrated USG chain of command" and the President lacks "authority, direction, and control" over non-Defense agencies, and instead proposing significant tweaks of the current national security apparatus).

²⁹⁵ Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C.).

²⁹⁶ Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of 10 U.S.C.).

²⁹⁷ See, e.g., Gorman & Krongard, *supra* note 14, at 52; McKinney, *supra* note 19, at 5; Naler, *supra* note 3, at 27; Navas, *supra* note 19, at 231; Needham, *supra* note 203, at 1; Thompson, *supra* note 37, at 62.

²⁹⁸ See Gorman & Krongard, *supra* note 14, at 54–56; McKinney, *supra* note 19, at 12–14; Needham, *supra* note 203, at 6–8.

²⁹⁹ See Naler, *supra* note 3, at 27–31; Thompson, *supra* note 37, at 71–74.

³⁰⁰ See CSIS, *supra* note 202, at 4–87; Collins, *supra* note 2, at 12–14; Kelly, *supra* note 6 (arguing for the creation of a "deployable international civil service" to offset the significant operational burden placed on the military).

³⁰¹ See Collins, *supra* note 2, at 12 (highlighting the need for interagency experience); Gorman & Krongard, *supra* note 14, at 57 (recognizing the valuable contributions of

of successful rule of law operations, the following is a summary of several military strategists' proposed overhauls at the strategic/NSC level and high operational/combatant commander level.

Strategists focusing on an overhaul of the national security apparatus at the strategic level generally view the current national security apparatus as incapable of effectively anticipating, “plan[ning] and execut[ing] long-term strategic policy.”³⁰² In part, this incapacity is the result of information overload at the NSC level naturally resulting from the stove-piped decision-making process established under the National Security Act of 1947³⁰³ and the National Security Act Amendments of 1949.³⁰⁴

After surviving the intradepartmental process, these separate solutions enter the interagency process and eventually make their way to the highest levels of government. Called “policy hill” by Robert Cutler, President Dwight D. Eisenhower’s National Security Adviser, this process means that only at the highest levels do actual integration, coordination, and synchronization occur. In testimony before the 9/11 Commission, Secretary Powell, Secretary of Defense Donald Rumsfeld, and Condoleezza Rice testified that it took over 7 months to formulate a coherent, regionally based counterterrorism strategy that was originally scheduled to be briefed to the Principals Committee the week of September 11. This delay occurred despite the realization of the urgency for a coordinated, multifaceted strategy to confront the imminent threat posed by Al Qaeda.³⁰⁵

interagency professionals); McKinney, *supra* note 19, at 13–14 (highlighting the need for interagency training and experience); Needham, *supra* note 203, at 12–15 (highlighting the need for interagency training and experience).

³⁰² McKinney, *supra* note 19, at 10.

³⁰³ Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of 10 U.S.C.).

³⁰⁴ Pub. L. No. 81-216, 63 Stat. 578 (1949).

³⁰⁵ Gorman & Krongard, *supra* note 14, at 53–54; *see also* McKinney, *supra* note 19, at 10.

Given the challenges facing the nation in the 21st century, the small structure of the NSC staff limits its ability to plan and execute long-term strategic policy. Likely because of this inability, the Brookings

Beyond this core problem, strategists proposing strategic level reform point to several other deficits in the current national security apparatus. For example, that the structure “rewards parochialism through promotion and opportunity, stovepipes divergent expertise, and wastes resources by producing unnecessary redundancies.”³⁰⁶ Further, that the current organization is ineffective due to the ever “Changing Role of the NSC Based on Chief Executive’s Inclinations,”³⁰⁷ “Ineffective Organizational Learning and Missed Opportunities,”³⁰⁸ “Ineffective Control of Interagency Rivalries,”³⁰⁹ and an “Inability to Influence Appropriations and Spending Priorities.”³¹⁰

To remedy these deficiencies, the strategists propose a dramatic overhaul of the national security apparatus at the strategic level to achieve a coordinated and “synergistic”³¹¹ interagency effort. The goal of their effort is to efficiently transmit integrated policy options and recommendations to the President. To achieve this result, the strategists mix together the combined lessons of the National Security Act of 1947,³¹² National Security Act Amendments of 1949,³¹³ and the

institution found that the NSC is immersed in policy detail and focuses predominantly on the short-term.

Id.; Needham, *supra* note 203, at 3.

What is most critical about the NSC is the strategic thought process that leads to a coordinated strategy. Strategy created in each of the various departments and brought to the NSC for coordination will not work. It must be holistic and synergistic product of the different perspectives of the NSC members, their staffs, and the NSC staffs.

Id.

³⁰⁶ Gorman & Krongard, *supra* note 14, at 54.

³⁰⁷ McKinney, *supra* note 19, at 9.

³⁰⁸ *Id.* at 10.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 11.

³¹¹ Needham, *supra* note 203, at 3.

³¹² Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in various sections of 10 U.S.C.) (creating the National Security Council, Central Intelligence Agency, Department of Defense, and Air Force); *see supra* notes 199–216 and accompanying text.

³¹³ Pub. L. No. 81-216, 63 Stat. 578 (1949) (creating the position of the Chairman of the Joint Chiefs of Staff, elevating Department of Defense to cabinet level position, and demoting the services to military departments); *see supra* notes 221–24 and accompanying text.

Goldwater-Nichols Department of Defense Reorganization Act of 1986.³¹⁴

As a preliminary step, the strategists would create a new executive agency or department with control over the combined activities of its subordinate elements. For example, one would create a “permanent executive or governing board comprised of the senior leadership . . . from the departments and agencies . . . that would be similar to how the service chiefs sit on JCS while retaining their service roles.”³¹⁵ Another would create a “Secretary of National Security,” who with regard to the underlying agencies would serve in a capacity similar to that of “the military service chiefs to the CJCS.”³¹⁶ And yet another strategist would create a “Department of National Security and Strategy” encompassing a multitude of agencies while at the same time correcting the President’s current lack of “statutory responsibility to direct the activities of the different interagency actors” beyond the DOD.³¹⁷

Second, the strategists would demote wholesale or partial elements of existing executive agencies, such as Defense, State, Intelligence, Commerce, and Immigration and Customs Enforcement from their current cabinet level status and bring them under the fold of this new executive authority.³¹⁸ In other words, it would be very similar to the elevation of the DOD to a cabinet level status and the demotion of the services to military departments by the National Security Act

³¹⁴ Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of 10 U.S.C.) (empowering the combatant commanders, relegating the services to a train, man, and equip function, mandating “jointness” through military personnel and professional education systems, and empowering the Chairman of the Joint Chiefs of Staff); *see supra* notes 225–35 and accompanying text.

³¹⁵ Gorman & Krongard, *supra* note 14, at 55.

³¹⁶ Needham, *supra* note 203, at 6.

³¹⁷ McKinney, *supra* note 19, at 12–13 (“This would resolve the current inability of the NSC to control and direct activities across the interagency community to ensure unity of effort across the competing departments.”); *see* CSIS, *supra* note 202, at 17 (“While Title 10 of the U.S. Code gives the Secretary of Defense ‘authority, direction and control’ over the Department subject to the direction of the President, Congress has not given the President the same authority over the USG agencies, except when he invokes his temporary emergency powers.”).

³¹⁸ Gorman & Krongard, *supra* note 14, at 54; *see also* McKinney, *supra* note 19, at 12–13; Needham, *supra* note 203, at 6 (creating a structure that encompasses “Defense, Foreign Policy and Regional Affairs, Finance, and Homeland Security” and at least has a close working relationship with if not direct control over the intelligence community).

Amendments of 1949,³¹⁹ or alternatively, the elevation of the Chairman's role relative to that of the service chiefs by the Goldwater-Nichols Act.³²⁰

Third, through suggested changes in funding, personnel policies, interagency education and training, and the creation of "interagency service officers,"³²¹ the strategists seek to foster an interagency attitude that ultimately results in an effective, dynamic, interagency approach to the identification and resolution of threats to the national security of the United States. In other words, these strategists echo the Goldwater-Nichols reform of the military personnel and education systems.³²²

Strategists focused on the high operational level of reform in turn concentrate on an overhaul of the combatant command structure to take account of the extraordinary interagency nature of current military operations.³²³ To support their claims for an overhaul of the combatant command structure, one strategist relied on the observations of two former combatant commanders as to "where problems exist and potential remedies might be found."³²⁴ The other strategist adopted a more studied

³¹⁹ See *supra* notes 221–24 and accompanying text.

³²⁰ See *supra* notes 225–35 and accompanying text.

³²¹ McKinney, *supra* note 19, at 13–14; see also Gorman & Krongard, *supra* note 14, at 54–55.

These organizations would assume a role similar to the military services and become responsible for training and equipping the personnel seconded to the interagency bodies. Their personnel would rotate between their home organizations and the new organizations just as military officers serve within their own services and also in joint organizations.

Id.

³²² See *supra* notes 225–35 and accompanying text.

³²³ See Naler, *supra* note 3; Thompson, *supra* note 37.

³²⁴ Naler, *supra* note 3, at 27. Naler's focus on a combatant command level reform makes sense because he relies on General Peter Pace's observations on the deficiencies of the current interagency construct. While not quoted specifically in Naler's work, in a media interview General Pace stated that the "interagency process now in effect does a good job with presenting the president with options. 'But once the president decides to do something, our government goes back into its stovepipes for execution—Department of State does what they do, DoD does what we do, the Department of Treasury, etc.'" Garamone, *supra* note 3 (quoting General Pace). Naler does cite General Pace for asking whether we "need a Goldwater-Nichols-like event for the interagency?" Naler, *supra* note 3, at 27 (quoting Garamone, *supra* note 3 (quoting General Pace)). Naler also relied on the observations of the former commander of U.S. Central Command, General Anthony Zinni, who stated: "In Washington there is no one place, agency, or force that directs interagency cooperation. The only such cooperation is on an ad hoc, person-to-person or group-to-group basis. So if you have a problem like putting Iraq back together

approach. He initially highlighted the current “absurdities” resulting from a lack of an interagency unified effort.³²⁵ Second, he acknowledged that the “Combatant Commands are by far the most structured tools with which the United States can wield all the elements of its national power.”³²⁶ Third, he recognized the shortcomings of the combatant commands to achieve a coordinated interagency approach. Despite the development of the Joint Interagency Coordination Groups³²⁷ and Civil

after Saddam . . . there’s nowhere to start.” *Id.* (quoting General Anthony Zinni in Chris Stronhm, *Former Military Commander Calls for New Military-Civilian Planning Organization* (Dec. 7, 2004), www.govexec.com/dailyfed/1204/120704cl.htm).

³²⁵ Thompson, *supra* note 37, at 62. Thompson described the “absurdities” as follows:

Examples of obvious absurdities abound—the fact that DOD’s division of the world’s nations in its Unified Command Plan bears no relation whatsoever to the State Department’s regional bureaus, which, in turn, are different from the Central Intelligence Agency’s regional groupings. DOD dutifully prepares its “National Military Strategy” (and now a “National Defense Strategy”) but there is no corresponding National Economic Strategy or National Information Strategy for two other key elements of power. “Unified Action” is a fine idea with a prominent place in DOD doctrinal publications; unfortunately, no one else in the government pays much attention to DOD’s doctrine.

Id.

³²⁶ *Id.*

³²⁷ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 290 (12 Apr. 2001, *as amended through* 17 Oct. 2007) [hereinafter JOINT PUB. 1-02], defines a Joint Interagency Coordination Group, or JIACG, as follows:

An interagency staff group that establishes regular, timely, and collaborative working relationships between civilian and military operational planners. Composed of US Government civilian and military experts accredited to the combatant commander and tailored to meet the requirements of a supported joint force commander, the joint interagency coordination group provides the joint force commander with the capability to coordinate with other US Government civilian agencies and departments. Also called JIACG.

Id. A problem with the JIACG is that “[a]lthough they are intended to ‘[p]rovide regular, timely, and collaborative day-to-day working relationships between civilian and military operational planners,’ the representatives in the JIACG typically do not possess tasking authority with their parent agency. Planning and operations by non-DOD agencies still remain largely disconnected from military planning and operations.” Schnaubelt, *supra* note 154, at 57. JIACGs have at least three additional “crippling deficiencies.” Thompson, *supra* note 37, at 67. First, “it is not possible, absent legislation, to mandate non-DOD participation.” *Id.* “Second, there are strict limitations on the roles and

Military Operations Centers,³²⁸ evidence from operations in Iraq and Afghanistan “demonstrates that the true unified action among the interagency construct remains a distant, elusive goal.”³²⁹ To cement his argument, he concluded that “the reality is that there is no single entity responsible for managing interagency coordination at the all-important nexus between the strategic and operational levels. In a striking passage for a doctrinal publication, Joint Publication 0-2 laments the utter absence of any government-wide doctrine or controlling authority.”³³⁰ From this analysis of the problem, these strategists proposed an overhaul of the combatant commands to achieve an integrated interagency approach to threats and missions.

responsibilities of the JIACGs. They cannot task civilian agency elements or personnel, reorganize civilian agency elements, prioritize the efforts of civilian elements, or unilaterally commit agency resources.” *Id.* “Third, and most fundamentally, the vastly differing organizational cultures of the civilian and military agencies that constitute the JIACG really hinder its smooth functioning.” *Id.*

³²⁸ JOINT PUB. 1-02 defines a Civil Military Operations Center, or CMOC, as follows:

An ad hoc organization, normally established by the geographic combatant commander or subordinate joint force commander, to assist in the coordination of activities of engaged military forces, and other United States Government agencies, nongovernmental organizations, and regional and intergovernmental organizations. There is no established structure, and its size and composition are situation dependent.

JOINT PUB. 1-02, *supra* note 327, at 89.

³²⁹ Thompson, *supra* note 37, at 72 (“The overall poor performance of the interagency coordinating process in Afghanistan and Iraq demonstrates that the Combatant Commands are, by their single element of power nature and orientation, not up to the task of planning and conducting effects-based operations.”) Thompson cites the Joint Forces Command definition of effects-based operations: “operations that are planned, executed, assessed, and adapted based on a holistic understanding of the operational environment in order to influence or change system behavior or capabilities using the integrated application of selected instruments of power to achieve directed policy aims.” *Id.*

³³⁰ *Id.* at 64. Thompson quotes Joint Publication 0-2 as follows: “There is no overarching interagency doctrine that delineates or dictates the relationships and procedures governing all agencies, departments, and organizations in interagency operations. . . . [T]here is no oversight organization to ensure that the myriad of agencies, departments, and organizations have the capabilities to work together.” *Id.* (quoting JOINT PUB. 0-2, *infra* note 392, at I-11).

One of these strategists turns the Civil Operations and Revolutionary Development Support (CORDS) model from Vietnam “on its head.”³³¹ He describes this new framework as follows:

Turning the CORDS model on its head, the commanders of geographic combatant commands could be senior civilians with the experience of long and distinguished careers, representing key governmental agencies in the National Security Council. The President would nominate them to their new role with full ambassadorial rank, and they would report to the National Security Advisor. Interagency synergy would be achieved through deputy director positions based on the elements of power—[Diplomatic, Information, Military, Economic (DIME)]. Reversing the command relationships in CORDS, the military director would be the current four-star Combatant Commander. This officer would retain command authority over military

³³¹ *Id.* at 72. Under the CORDS model, a civilian, Robert Komer, was appointed the “civilian operational deputy” to the commander of the Military Assistance Command, Vietnam (MACV). *Id.* at 70. Vested with full ambassadorial rank, this civilian ranked third in line of command at MACV, “after Westmoreland’s deputy, General Creighton Abrams.” *Id.*

Komer did not have command authority over military forces, but he was now the sole authority over the entire U.S. pacification effort, “for the first time bringing together its civilian and military aspects under unified management and a single chain of command.” Komer appointed new deputy commanders for pacification in each of the four corps regions, giving them the same command relationship to their respective corps commanders that he had to Westmoreland. These four individuals . . . “were, in effect, his corps commanders.” Serving under these “Corps Dep CORDS” were Province Senior Advisors (PSAs) in each of South Vietnam’s 44 provinces. The PSAs were roughly half-military and half-civilian, though those in less secure provinces were usually military. They were in charge of fully integrated military and civilian agency province teams; under them were small, usually four-person, district teams in each of the 250 districts. The district teams were, again, a mixture of military and civilian agency personnel.

Id. at 70–71 (quoting GUENTER LEWY, *AMERICA IN VIETNAM* 124 (1978); NEIL SHEEHAN, *A BRIGHT SHINING LIE—JOHN PAUL VANN AND AMERICA IN VIETNAM* 657 (1988)). The CORDS model went so far as to permit military and civilians to conduct one another’s “performance reports.” *Id.* For a discussion on the contributing factors to the failure of the CORDS model, see *id.*

forces, and responsibility for planning efforts, albeit with augmentation from the diplomatic, informational, and economic directorates. Military billets might be staffed by officers from an “Interagency Officer” career field, proposed by Colonel Harry Tomlin, with the same underlying philosophy as the Army’s Foreign Area Officer field. Diplomatic, informational, and economic directors, each with ministerial rank, would come from appropriate Cabinet departments and be responsible for integrating planning with the military within their spheres of expertise, and for coordination and interface with embassy country teams. Interagency intelligence centers, staffed by regional and topical specialists from the Defense Intelligence Agency, the CIA, and the State Department’s Bureau of Intelligence and Research (INR), would replace the current Joint Intelligence centers at the commands.³³²

In contrast, the other strategist proposing an overhaul of the combatant commands leaves the ultimate commander a general officer but creates two deputy commanders, one civilian and the other military.³³³ Below these levels, the combatant commands would incorporate at the headquarters and staff level a more “inclusive list of instruments of national power [to] include diplomatic, informational, military, economic, law enforcement, financial, and health and environmental.”³³⁴ Through this “transformational integration” of the elements of national power at the “juncture of the strategic and operational levels,” the U.S. will have created “truly interagency organizations capable of harnessing and projecting America’s ‘soft’ power.”³³⁵

Clearly other changes must be contemplated to fully realize the potential of the U.S. instruments of national power. Perhaps the most obvious among these deficiencies is the glaring institutional imbalance between our military and civilian agencies. As discussed earlier, the resources available to the DOD dwarf those of other government agencies.³³⁶ As a result, the military has come to be relied upon as our

³³² *Id.* at 72–73.

³³³ Naler, *supra* note 3, at 28.

³³⁴ *Id.* at 27.

³³⁵ Thompson, *supra* note 37, at 74.

³³⁶ *See supra* notes 248, 253–58 and accompanying text.

preeminent instrument of national power, even in such areas as stability and reconstruction operations and rule of law implementation, where civilian agencies should be in the lead.³³⁷ As one commentator remarked upon the publication of Department of Defense Directive 3000.05,³³⁸ “[i]t’s probably safe to say that the military has rarely, if ever, advocated so strenuously on behalf of the State Department and other agencies within one of its own planning documents.”³³⁹ To remedy this defect, she argued for the creation of a “deployable international civil service.”³⁴⁰ Secretary of Defense Robert M. Gates echoed this sentiment, stating we need “to build a civilian response corps” that incorporates “a permanent, sizeable cadre of immediately deployable experts with disparate skills.”³⁴¹ As a result, even if we build it, unless Congress creates additional resources and billets in these civilian agencies, they will not come.³⁴² Our structure at the critical tactical and operational levels will remain as hollow as it is today with the notable exception of the DOD.

Deciding how to reform the national security apparatus is no easy task. It will require numerous congressionally directed studies, and as history has shown, it will also require perfect timing to coalesce the political will of all the necessary powerbrokers across government agencies and within the halls of the Congress and the White House. However, having seen some of the possibilities, are any of them suited to achieve the rule of law and the broader stability and reconstruction mission in a post-intervention or failed state?

V. The Alignment of Mars and Venus to Achieve the Rule of Law in Failed and Fragile States

Having completed a tour of Venus and Mars, illumination from the rays of the sun has made one thing abundantly clear: Mars and Venus must collide and in the process become one. The current national security apparatus cannot adequately respond to the complex

³³⁷ See *supra* notes 248–5 and accompanying text.

³³⁸ DODD 3000.05, *supra* note 157.

³³⁹ Kelly, *supra* note 6.

³⁴⁰ *Id.*

³⁴¹ Gates, *supra* note 12, at 7.

³⁴² See STROMSETH ET AL., *supra* note 8, at 77 (“Many Americans take the value of the rule of law for granted and assume that ‘if you built it, they will come,’ applies to courts and constitutions as much as to baseball fields.”).

multidisciplinary challenges presented in building the rule of law in a failed or fragile state.³⁴³ A review of Mars's proposals taking into account Venus's dynamic requirements for the establishment of the rule of law shows that the best course of action is a combination of the three approaches outlined in Part IV: reform the strategic level, reform the high operational level, thereby integrating the tactical level, and augment our civilian agencies. That is the real lesson of the National Security Act of 1947, its amendments in 1949, and the Goldwater-Nichols Act of 1986, when viewed through the lens of reforms to the DOD.

The National Security Act of 1947 created a DOD but left the Secretary's position relatively powerless, as the service chiefs still retained their cabinet level authority.³⁴⁴ The 1949 amendments corrected this problem by demoting the service secretaries to military departments and elevating the DOD to a cabinet level position.³⁴⁵ In turn, the Goldwater-Nichols Act empowered combatant commanders by relegating the services to a train, man, and equip function, thereby giving combatant commanders the authority to make operational decisions subject to the direction of the DOD, NSC, and the President. It also empowered the CJCS. To effectuate this apparatus, the Act mandated "jointness" through training, doctrine, and importantly, personnel.³⁴⁶

Recognizing the relatively widespread agreement that our national security apparatus is not poised to meet the dynamic challenges of the twenty-first century,³⁴⁷ a holistic and synergistic reform rather than a piecemeal one is in order. Otherwise, we may simply repeat once again the nearly fifty years it took the DOD to become fully integrated, only this time in the context of the national security apparatus. Adopting only one aspect of the proposal, or a variant thereof, equates to taking baby steps. In fact, it takes "one giant leap." One giant leap will effectively bridge the gap between the goal of creating stable societies and the reality of actually achieving them.

³⁴³ Gates, *supra* note 12, at 6 ("But these new threats require our government to operate as a whole differently—to act with unity, agility, and creativity. And they will require considerably more resources devoted to America's nonmilitary instruments of power.").

³⁴⁴ See *supra* notes 203–20 and accompanying text.

³⁴⁵ See *supra* notes 221–24 and accompanying text.

³⁴⁶ See *supra* notes 225–35 and accompanying text.

³⁴⁷ See *supra* notes 197–291 and accompanying text.

To remedy this gap, I propose a “giant leap”³⁴⁸ at the Appendix. The Appendix sets forth a proposed reform of the national security apparatus at the strategic and high operational or combatant commander level capable of producing a single, directed, unified, and “synergistic” approach to implementing a substantively robust U.N. definition of the rule of law.

At the strategic level, an interagency perspective is necessary to make the fundamental decision of how to define and measure or administer the rule of law for the entire U.S. government. Should it be substantive or formal, and if substantive, what added values should we include?³⁴⁹ Beyond how to define the rule of law, the strategic level must decide how we measure or administer the rule of law. In other words, how do we go about establishing our definition of the rule of law? Is it the building of institutions or the intangible ends that we seek to achieve, such as a host-nation “cultural commitment” that results in a stable society capable of enduring when the United States departs?³⁵⁰

To produce an organization capable of answering these questions across the interagency spectrum, I propose the creation of a National Security Department headed by a Director of National Security. The Director of National Security³⁵¹ would be a cabinet or executive level department and a full time member of the NSC, replacing the Secretaries of Defense and State in this regard. The NSC would remain otherwise intact as would the position of National Security Advisor as an advisory position to the President.³⁵² The Department of National Security would have lead responsibility for all matters affecting the national security of the United States from external or foreign threats. To realize this responsibility, and ensure unity of effort between the two government agencies primarily responsible for U.S. national security today, both the DOD and DOS would be demoted from their cabinet level position and fall under the Department of National Security and report to the Director

³⁴⁸ See Schnaubelt, *supra* note 158, at 59 (calling for a “quantum leap to interagency operations”).

³⁴⁹ See *supra* notes 96–114 and accompanying text.

³⁵⁰ See *supra* notes 115–53 and accompanying text.

³⁵¹ See generally McKinney, *supra* note 19 (proposing the creation of a “Department of National Security and Strategy” and accompanying structure).

³⁵² See generally Goreman & Krongard, *supra* note 14 (making a similar recommendation with regard to the National Security Council and Advisor).

of National Security.³⁵³ A Unified Staff would be created. All staff functions, from budget through operations, plans, personnel, and training ultimately would fall under the authority of this newly established Department as opposed to either State or Defense. To synchronize this staff, the position of Chairman of the Unified Staff would be created.

The Director of National Security would report directly to the President.³⁵⁴ The chain of command would flow from the President through the Director of National Security to the newly created Geographic Control Center Commanders, which will be discussed below. Neither the Secretaries of State nor Defense would exercise operational command or control over their respective departments, which would retain their existing names. Rather, akin to the combined changes of the National Security Act of 1949 and Goldwater-Nichols Act of 1986,³⁵⁵ both of these departments would be demoted from cabinet level positions and relegated to a train, man, and equip function in support of the Geographic Control Center Commanders.

Other currently existing cabinet level positions would remain intact. However, these other agencies would be required to provide support to the Director of National Security beyond simple “coordination” and “cooperation.” Effective planning and functioning in today’s complex operating environment requires the Department of National Security to have actual authority over other agency assets during operations. Therefore, upon a presidential declaration that a contingency operation exists,³⁵⁶ the Director of National Security would receive tasking authority over these other government agencies to provide required personnel, training, equipment, and support to the Geographic Control Center Commanders.³⁵⁷ Adopting this approach ensures the President,

³⁵³ See generally *id.* at 54–55 (advocating “the primacy of the current departments and agencies involved in national security should be lowered. These organizations would assume a role similar to the military services and become responsible for training and equipping the personnel seconded to the interagency bodies.”).

³⁵⁴ See *id.* at 55.

³⁵⁵ See *supra* notes 203–35 and accompanying text (discussing these two acts).

³⁵⁶ Contingency operation would be broadly defined, to include anything from peacekeeping through humanitarian missions to actual military intervention.

³⁵⁷ See Needham, *supra* note 203, at 5. With regard to his vision of a “Deputy Director of the National Security Directorate” (DDNSD), Needham stated:

Although the President is still in a lead role, the DDNSD emerges as a significant player—much empowered. The DDNSD can coordinate the previous State Department diplomatic actions, some treasury

Director of National Security, and most importantly, the Geographic Control Center Commanders have the resources and operational command and control necessary to plan effectively for and conduct synergistic rule of law operations. Additionally, during times other than a presidentially declared contingency operation, these other agencies will be required to have a permanent staff presence within the Department of National Security, to include a presence at each Geographic Control Center Command. They will also be required to participate in and provide personnel and subject matter expertise to unified training and planning.

Successful implementation of the rule of law also requires a similar reorganization at the high operational level which will have a trickle-down effect to the tactical level. Reorganization at the high operational level would build regional expertise and enable long-term planning for contingency operations and hot spots across the region well in advance of a crisis, possibly even circumventing the crisis itself through preventative measures short of a full scale contingency operation. By centralizing area expertise across the spectrum of U.S. agencies, these plans could encompass cultural, linguistic, economic, health, environmental, religious, and regional nuances, even within a country, and use this information to arrive at a workable, synergistic plan.

As the rule of law theorists recognize, there is no “one size fits all” to implementing the rule of law.³⁵⁸ At the high operational level, we would find our tailors—that mix of interagency personnel who could tailor the broad rule of law directives from the strategic level into country and region specific wardrobes or courses of action. By possessing all the requisite personnel in-house, an interagency combatant command,³⁵⁹ or as I label them, Geographic Control Center Commands, would then have the operational authority similar to that of current combatant commanders to deploy appropriate resources and personnel as necessary to maximize the mission and ultimately achieve success at the tactical

powers, elements of what is currently the purview of the Department of Homeland Security, and the significant actions of the secretary of Defense for crisis management and in his Homeland Defense role. That is if the President grants him or her that authority.

Id. See generally Goreman & Krongard, *supra* note 14.

³⁵⁸ STROMSETH ET AL., *supra* note 8, at 9.

³⁵⁹ See Naler, *supra* note 3 (proposing an “interagency combatant command” that is similar to yet distinct from the Geographic Control Center I propose).

level. And, importantly, should a disagreement arise between the various interagency actors, these Geographic Control Center Commanders would be the centralized authority that serves as a referee and makes the call.

Filling the interagency void at the high operational level,³⁶⁰ these Geographic Control Center Commands will look largely similar to the current combatant commands but with a dramatic interagency twist.³⁶¹ There will be six Geographic Control Centers that mirror the geographic orientation of the current combatant commanders and the anticipated addition of Africa Command. However, borrowing from a strategist, the “commander” of the Geographic Control Center will be a civilian nominated by the President, approved by Congress, and vested with full ambassadorial rank.³⁶² The commander has direct responsibility over all military and DOS personnel and operations within the region, to include the chiefs of mission at embassies. He has similar control over all military affairs. However, this commander must be a civilian³⁶³ to preserve civilian control over the military, and perhaps more importantly, prevent military control over the traditional DOS mission. Also, under this framework, having a military member in charge of an entire region’s foreign policy might significantly tarnish diplomatic relations with foreign countries based on appearance alone.

Falling under the commander are two deputy commanders—the current military combatant commander and a DOS senior executive service (SES) civilian.³⁶⁴ Each deputy commander would serve as the principal advisor to the commander on their respective areas of expertise. The commander would also have a personal staff. Included on this personal staff would be a legal advisor. The principal legal advisor would be a military flag officer (O7) or DOS SES, while the deputy would be the principal’s interagency counterpart. Overall, the composition of this personal staff, like that of the primary staff, would reflect an interagency mix of personnel. Personnel from this legal staff,

³⁶⁰ On this concept of the Geographic Combatant Control Center, I borrow heavily from Thompson, *supra* note 37. Thompson stated: “Only civilian leadership, with significant interagency experience, can recreate these commands into truly interagency organizations capable of harnessing and projecting America’s ‘soft’ power, arguably the most potent weapon in its arsenal, along with its military force.”) *Id.* at 74.

³⁶¹ *See infra* app.

³⁶² *See generally* Thompson, *supra* note 37.

³⁶³ *See id.* (proposing a civilian commander).

³⁶⁴ *See generally id.*

in addition to forming a core legal office, would be seeded in each primary staff section.

The primary or Unified Staff would be composed of personnel representative of all the elements of national power—diplomatic, intelligence, military, and economic³⁶⁵—but concentrated on the diplomatic and military. Each staff section would be headed by a DOS SES or alternatively military flag officer based on their traditional areas of expertise. As was the case with the personal staff, the deputy would be the interagency counterpart of the staff principal. The staff sections depicted in the Appendix are, for the most part, self-explanatory with the exception of the environment, health, and legal staff section.³⁶⁶ The legal portion of this staff section is distinct from that of the legal advisor to the commander. The latter is charged with providing legal advice to the commander and his staff on all matters. The former is exclusively dedicated to studying the legal systems of countries within the Geographic Command Center to thereby enhance rule of law or any other contingency operations that may arise in the region. The same may be said of several other staff sections, such as “cultural affairs” and “financial and economic development” (as distinct from “requirements and acquisitions”).

Beyond these core elements, another central feature would be a standing Unified Headquarters Element.³⁶⁷ This element would contain core personnel necessary to stand-up a unified task force in the event of a contingency. The ultimate commander and composition of this task force could vary depending on whether the mission is predominantly military or civilian in nature. Either way, this element would contain the structure necessary to direct the personnel or equipment received from the DOS, DOD, and other government agencies during a contingency operation.

For this overhaul of the national security apparatus to be effective, the civilian agencies will need to be augmented in terms of personnel and equipment.³⁶⁸ While budgetary concerns may be eased by having appropriated funds flow to and through the Department of National

³⁶⁵ See *id.* (proposing deputy commanders based on DIME).

³⁶⁶ See Naler, *supra* note 3. I adopt Naler’s proposed staff for his “unified combatant command headquarters.” *Id.*

³⁶⁷ See *id.*

³⁶⁸ See generally, *e.g.*, Gates, *supra* note 12; Kelly, *supra* note 6.

Security, without authorizations for more civilian personnel, the organizations will remain DOD heavy and DOS and civilian agency light. Additionally, as learned from Goldwater-Nichols, there will need to be similar changes to personnel policies, such as the creation of interagency specialty tracks,³⁶⁹ the reward of interagency experience,³⁷⁰ and increased interagency education and training.³⁷¹

If the national security apparatus is overhauled as outlined above, one of the immediate results will be a “synergized,” uniform approach to all operations as a result of mandated integration and cooperation orchestrated by authoritative heads at the strategic and high operational level. However, another equally beneficial consequence will be the cross-pollination of interagency cultures. The premise of this article has been that Mars and Venus, or military strategists and rule of law

³⁶⁹ See McKinney, *supra* note 19, at 13 (calling for the growth of “interagency service officers”). McKinney described these officers as follows:

The Secretary of DNSS should also establish an interagency duty career specialty to provide an opportunity to develop a cadre of civilian and military professionals who are trained to work the interagency process. These new Interagency Service Officers (ISO) would be required to return to their parent organizations periodically to ensure they do not become isolated, and thereby maintain a certain degree of organizational specific proficiency.

Id.

³⁷⁰ See *id.* at 14 (stating that “the Secretary of DNSS should revise the current civilian and military personnel systems to reward interagency experience”). Thompson further noted that “the quality of advice produced by the interagency process is directly related to the quality of the civilian and military professionals working in the different agencies. It is critical that the United States has trained civilians and military professionals experienced with the interagency process.” *Id.* at 13. Others have echoed these same thoughts. See, e.g., Chiarelli & Smith, *supra* note 12, at 13 (“[W]e should consider expanding opportunities for interagency team members to work routinely with military organizations. These members would increase their understanding of what the military can and cannot contribute to our national security solutions.”); Needham, *supra* note 203, at 13–14 (“Imagine the synergy created when the upper-level staff in Defense has served in Homeland Security with the State Department. Barriers to interagency cooperation and coordination would crumble.”).

³⁷¹ See, e.g., McKinney, *supra* note 19, at 13 (suggesting that leadership “establish a professional interagency education system similar to the professional military education system in the Department of Defense. . . . Moreover, the Secretary of DNSS should ensure that interagency college graduates actually serve in interagency duty assignments.”); Needham, *supra* note 203, at 14 (“Schooling is a very significant aspect of the entire national security personnel system. To that end there have even been recommendations to transform the National Defense University into a more of a National Security University for educating not only military officers, but national security civilians as well.”).

theorists, must collide. As a result of this collision, the original Mars and Venus, that is, the State Department and Department of Defense cultures,³⁷² will also collide.³⁷³ A criticism of civilian agency efforts to date has been that they suffer from a lack of planning and coordination.³⁷⁴ On the other hand, a criticism of the DOD is that it is overly focused on the institutional aspects of the rule of law—courts, cops, and corrections.³⁷⁵ The reorganization I propose will necessarily result at least in part in some of the DOD's weighty planning and organizational skills³⁷⁶ rubbing off on civilian agency personnel. Similarly, some of the DOS's more interpersonal and holistic approach³⁷⁷ to operations will rub off on the DOD, such that courts, cops, and corrections will be seen more clearly as a component part of the broader rule of law mission. In this sense, there will be a second, more long-term and ongoing alignment of Mars with Venus.

In proposing an overhaul of the national security apparatus of this magnitude there are likely to be a wealth of objections ranging from comments that it is outright impossible to comments that it contradicts the intentions of the Founding Fathers.³⁷⁸ While it is not possible to anticipate all the objections, in this section I respond to some that have been made or are anticipated.

An immediate reaction to the proposed overhaul is that it is politically and practically impossible. First, it will be argued that it is politically impossible. An insufficient amount of political goodwill when matched against significant potential hostility within the presidency, Congress, and the agencies themselves may preclude its realization forever. To borrow from Machiavelli,

³⁷² See generally Rife, *supra* note 1 (discussing the unique and very different cultures of the Departments of Defense and State).

³⁷³ Major Steven Garipey suggested the idea of this second "collision" to me. Interview with Major Steven Garipey, 56th Judge Advocate Officer Graduate Course, TJAGLCS, in Charlottesville, Va. (Dec. 17, 2007).

³⁷⁴ See Needham, *supra* note 203, at 3 ("The State Department lacks military proficiency, the Defense Department lacks diplomatic skills, and therefore, neither can create an integrated strategy on their own, not to mention the strategic input from the economic and informational elements of our national policy-making institutions.").

³⁷⁵ See *supra* note 195 and accompanying text.

³⁷⁶ See generally Rife, *supra* note 1.

³⁷⁷ *Id.*

³⁷⁸ Friedman et al., *supra* note 13, at 6 (arguing that a major reorganization and integration of the national security apparatus would contravene the intentions of the Founding Fathers' preference for checks and balances).

“It must be realized that there is nothing more difficult to plan, more uncertain of success, or more dangerous to manage than the establishment of a new order of government; for he who introduces it makes enemies of all those who derived advantage from the old order and finds but lukewarm defenders among those who stand to gain from the new one.”³⁷⁹

The history of the Goldwater-Nichols Act and National Security Act of 1947 reveals this to be a valid criticism.³⁸⁰ However, this same history also shows that even though it may be hard, it can still be accomplished.³⁸¹ Just because it will be hard does not mean it not worth the effort.

Beyond being politically impossible, others will argue that it is practically impossible. For example, it has been observed that

[i]n 1986, no one questioned whether the U.S. military had the ability to conduct superior military operations, and Goldwater-Nichols’ enhancement of joint operations made it function even better. By contrast, many, if not most, of today’s non-Defense agencies lack the operational culture and capacities to conduct effective interagency operations. Bringing “jointness” to the interagency is therefore an even more daunting task that will also take decades.³⁸²

Clearly, integrating the cultures of Mars and Venus will take a significant period of time. But if one does nothing and maintains the status quo, then this same criticism will remain valid twenty-five years from now when there remains a need for integrated interagency action. Rather than taking baby steps toward this integration, a giant leap will achieve the end result sooner. Though this leap may stir up a lot of dust and cause short-term confusion, when the dust settles in ten or twenty years, the United States will have practically achieved an integrated interagency approach to operations.

³⁷⁹ Navas, *supra* note 19, at 231 (quoting NICCOLO MACHIAVELLI, *THE PRINCE* (1532)).

³⁸⁰ See generally LOCHNER, *supra* note 4.

³⁸¹ *Id.*

³⁸² CSIS, *supra* note 202, at 17.

Others have argued that the creation of an increasingly integrated national security apparatus, such as that proposed by the military strategists, runs counter to the system of checks and balances envisioned by the Founding Fathers. For example, Friedman, Sapolsky, and Preble have asserted:

A wish that agencies always march to the same strategy ignores the fact the agencies should and do have different goals, interests, and perspectives. . . . Unity, we should not forget, was anathema to the authors of the Constitution, who mistrusted concentrations of power—even in foreign affairs—and organized a government to bicker and muddle through.³⁸³

To make this argument, the authors first determine that the military strategist proposed overhauls of the national security apparatus “rely not only on faulty premises about Iraq, but also on undue faith in planning and coordination.”³⁸⁴ In their view, the national security apparatus does not need “better planning, [just] better leaders. That problem is solved by elections, not bureaucratic tinkering.”³⁸⁵

The argument of these authors advocating for less government integration is overly simplistic and flippant, ignoring the complex intricacies of coordinated interagency action across multiple theaters of operation. Future presidents, regardless of their innate abilities, will be confronted with the complexities of translating into action a stove-piped interagency decision-making process that only comes together on their doorstep at the NSC, for a coordinated decision.³⁸⁶ To enable better decision-making, an integrated approach is required. Objections based largely on the perceived size of the newly created agency should not hinder its adoption.

³⁸³ Friedman et al., *supra* note 13, at 9.

³⁸⁴ *Id.* at 6.

³⁸⁵ *Id.* The authors continued: “The President’s failure to referee his subordinates, however, is not a structural deficiency in the U.S. Government but a managerial deficiency in the Bush Administration. No amount of bureaucratic rejiggering can make the President listen to the right people.” *Id.* at 8.

³⁸⁶ Before NSPD 44, President Clinton recognized the complexities of interagency action and issued PDD 56. Unfortunately, the Bush administration initially neglected the lessons of the Clinton Administration allowing PDD 56 to lapse until world events caused the interagency learning cycle to repeat itself. *See supra* notes 277–82 and accompanying text (discussing the history of PDD 56).

Critics will challenge the idea of this “Super Department” for just that reason—it is a “Super Department.” But in a post-9/11 world the elements of national power that are essential to national security should not be coordinated and focused by chance. Bringing them together under one organization, at a minimum, will lead to quality discussions and interaction among all interagency actors and that in turn will provide well-thought out policy recommendations to the President in a timely manner.³⁸⁷

Additionally, the Founding Fathers contemplated an energetic executive branch. “In *Federalist Paper 70*, Alexander Hamilton wrote, ‘Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.’”³⁸⁸ For the executive to be energetic, as opposed to wallowing in the flood of information from the stovepipes of a multitude of government agencies, the national security apparatus must be overhauled.

VI. Conclusion

The lessons of Part II and Part III of this article are that Mars must align with Venus if the United States is to successfully counter the complex challenges to establishing the rule of law in failed or fragile states. As discussed in Part II, there is widespread agreement that the rule of law is a good thing.³⁸⁹ The trick, however, within both the

³⁸⁷ Needham, *supra* note 203, at 18 n.19.

³⁸⁸ Gorman & Krongard, *supra* note 14, at 57 (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

President John Adams stated, “The essence of a free government consists of an effectual control of rivalries.” If President Adams’ observation is correct, then the organization tasked with leading the interagency process must be an arbiter of disputes, coordinator of action, and a central body responsible for harmonizing the national elements of power.

McKinney, *supra* note 19, at 10–11 (quoting Marcella, *supra* note 19, at 9).

³⁸⁹ See *supra* notes 66–84 and accompanying text.

scholarly world and U.S. government agencies, has been a “problem of knowledge,”³⁹⁰ resources,³⁹¹ and “unity of effort.”³⁹²

At the most basic level, if the United States is to solve this “problem of knowledge,” it must achieve a common interagency working definition of what the rule of law is and the means that it will use to establish it and measure the results.³⁹³ To oversimplify and borrow a military phrase, all U.S. government agencies must agree on uniform tasks, conditions, and standards. Toward this end, I have argued that the United States should uniformly adopt across all government agencies the U.N. definition of the rule of law. It is substantively robust and incorporates national security objectives of the United States.³⁹⁴ Further, borrowing from Stromseth, I have argued that the United States must synergistically implement this rule of law definition to achieve a cultural commitment by the host nation through the combined resources of all its instruments of national power, to include resource and personnel enhanced civilian agencies.³⁹⁵ In a nutshell, an effective rule of law program requires a fully integrated interagency government effort under the operational control of a single centralized authority capable of making decisions binding on all the interagency actors in a theater of operations.³⁹⁶

Unfortunately, as outlined in Parts III and IV, the current national security apparatus cannot adequately respond to today’s complex challenges, such as the establishment of the rule of law, which requires extraordinary interagency coordination and unity of effort.³⁹⁷ As a result,

³⁹⁰ Carothers, *supra* note 25, at 5.

³⁹¹ See *supra* notes 248, 253–58 and accompanying text.

³⁹² See *supra* notes 247–52, 259–64 and accompanying text. Within the Department of Defense, “unity of effort” is defined as:

Unity of effort requires coordination among government departments and agencies within the executive branch, between the executive and legislative branches, with nongovernmental organizations (NGOs), international organizations (IOs), and among nations in any alliance or coalition.

JOINT CHIEFS OF STAFF, JOINT PUB. 0-2, UNIFIED ACTION ARMED FORCES (UNAAF) vii (10 July 2001) [hereinafter JOINT PUB. 0-2].

³⁹³ See *supra* notes 66–84 and accompanying text.

³⁹⁴ See *supra* notes 30–33, 165–96 and accompanying text.

³⁹⁵ See *supra* notes 53, 125, 165–96 and accompanying text.

³⁹⁶ See *supra* notes 49–196 and accompanying text.

³⁹⁷ See *supra* notes 197–342 and accompanying text.

various military strategists have proposed overhauls of the national security apparatus, although with relatively little discussion.³⁹⁸

Taken together, these differing viewpoints of the theorists and strategists highlight the necessity for and means of change. However, an examination of their writings reveals that the two have apparently never been formally introduced. This brings me to the humble objective of this article: “Mars meet Venus, Venus meet Mars.” My intent in writing on both of these two relatively disparate topics was to simply serve as a matchmaker of sorts, from which respective scholars in both areas could discern how the weight of their different fields complement one another and can lead to the formulation of a truly effective national security objective and accompanying apparatus. Having introduced the two, in Part V of this article I proposed a revision to the national security apparatus tailored to a synergistic implementation of the rule of law. Having set the table, I now leave it in the capable of hands of Mars and Venus to advance the argument. Who knows, maybe they will give birth to the National Security Act of the future.

³⁹⁸ See *supra* notes 292–342 and accompanying text.

Appendix

