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## Revisiting Goldwater-Nichols: Why Making the Joint Staff A General Staff will Improve Civilian Control of the Military and Refine the Constitutional Balance of War Powers

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## REVISITING GOLDWATER-NICHOLS: WHY MAKING THE JOINT STAFF A GENERAL STAFF WILL IMPROVE CIVILIAN CONTROL OF THE MILITARY AND REFINE THE CONSTITUTIONAL BALANCE OF WAR POWERS

MAJOR MICHAEL D. MINERVA\*

*As the United States has progressively become more involved globally since World War II, the U.S. military is being stretched beyond the professional military competency straining civilian control of the military. To remedy this, it is again time to revisit our national security structure, and adopt a General Staff in place of the Joint Staff. Following World War II and the destruction of the German General Staff by the Nazi Party, the General Staff as an institution has been emotionally rejected in the United States without a careful historical and legal examination of how that institution operates under varying forms of government and without an understanding of how it would operate under the United States' peculiar constitutional form of government. Exploring the historical and legal roots of the General Staff demonstrates that replacing the Joint Staff with a General Staff subordinated into the chain of command will act as a check on the ever-expanding influence of the military, while at the same time strengthening the military's ability to decisively defend U.S. national interests. Further, a General Staff will clarify the constitutional separation of military powers in a way that mitigates the politicizing effects of the separation of powers doctrine restoring balance to the constitutional division of military powers.*

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*Upon the soldiers, the defenders of order, rests a heavy responsibility. The greatest service they can render is to remain true to themselves, to serve with silence and courage in the military way. If they abjure the military spirit, they destroy themselves first and their nation ultimately. If the civilians permit the soldiers to adhere to the military standard, the nations themselves may eventually find redemption and security in making that standard their own.<sup>1</sup>*

## I. INTRODUCTION: POLITICAL TENSION IMPOSED ON THE APOLITICAL

Since World War II (WWII) there has been a massive expansion of the role the U.S. military plays in determining foreign policy generally and national security policy specifically.<sup>2</sup> In many respects, the professional military establishment is being stretched beyond its professional competency.<sup>3</sup> While this reliance on military advice and solutions exists on a sliding scale that varies from President to President and depends on the personalities of various senior officials involved,<sup>4</sup> the overarching trend has been for more reliance on the military for foreign policy issues.<sup>5</sup>

With the advent of globalization, the “perpetual” Global War on Terror, and now the resurgence of great power competition, the likelihood of lessening American global involvement—

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<sup>1</sup> SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 466 (1957).

<sup>2</sup> *Civilian Control of the Armed Forces: Hearing before the S. Comm. on Armed Servs.*, 115th Cong. 21–22 (2018) (statement of Eliot A. Cohen, Robert E. Osgood Professor of Strategic Stud., Johns Hopkins Sch. of Adv. Int’l Stud.); NATIONAL DEFENSE STRATEGY COMMISSION, *PROVIDING FOR THE COMMON DEFENSE: THE ASSESSMENT & RECOMMENDATIONS OF THE NATIONAL DEFENSE STRATEGY COMMISSION* xi (2018) (noting that “civilian voices have been relatively muted on issues at the center of U.S. defense and national security policy, undermining the concept of civilian control.”); Charles J. Dunlap, *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 *WAKE FOREST L. REV.* 341, 342 (1994) (“Americans turn to the armed forces ever more frequently to provide answers when conventional political methodologies fail.”).

<sup>3</sup> HUNTINGTON, *supra* note 1, at 11 (“Yet a distinct sphere of military competence does exist . . . . The duties of the military officer include: (1) the organizing, equipping, and training of this force; (2) the planning of its activities; and (3) the direction of its operation in and out of combat. The direction, operation, and control of a human organization whose primary function is the application of violence is the peculiar skill of the officer.”).

<sup>4</sup> JAMES E. BAKER, *IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES* 106 (2007). This practice is by design and is codified at 50 U.S.C. § 3021(c), which provides that “The [National Security] Council consists of the President, the Vice President, the Secretar[ies] of State, Defense, Energy, Treasury, and such other officers of the United States Government as the President may designate.” It further authorizes the President to “designate such other officers of the United States Government as the President considers appropriate, including the Director of National Intelligence, the Director of National Drug Control Policy, and the Chairman of the Joint Chiefs of Staff, to attend and participate in the meetings of the Council.”

<sup>5</sup> STEPHEN L. REARDEN, *THE ROLE AND INFLUENCE OF THE CHAIRMAN: A SHORT HISTORY* 2 (2011).

military and otherwise—is low.<sup>6</sup> Even during one of the most inward-looking administrations since the American isolation period, American involvement around the globe continued unabated.<sup>7</sup> These factors all drive towards a greater need for better military synchronization and comprehensive national security strategies that address the entire globe—that is, a General Staff.<sup>8</sup>

This degree of reliance on the military with a broader scope of application has placed tensions on the American civil-military balance that has strained the relationship in unhealthy ways. This strain was exemplified in 2020 by the public outrage over the Secretary of Defense (SecDef) and the Chairman of the Joint Chiefs of Staff (CJCS) (in fatigues) accompanying President Trump on a walk across Lafayette Square for a picture in front of St. John’s Church after protestors were forcibly cleared from the square during a period of widespread national civil unrest.<sup>9</sup> Further exacerbating the tension between civilian and military leaders, an unprecedented host of retired general and flag officers publicly criticized all involved<sup>10</sup> resulting in the CJCS apologizing and

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<sup>6</sup> Barack Obama, President of the United States, Remarks by the President at the Nat’l Def. Univ. (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

<sup>7</sup> See, e.g., WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Dec. 2017) [hereinafter NSS]; Council on Foreign Relations, *Timeline: Trump’s Foreign Policy Moments, 2017–2020*, <https://www.cfr.org/timeline/trumps-foreign-policy-moments>; Tom McTague & Peter Nicholas, Opinion, *How ‘America First’ Became America Alone*, THE ATLANTIC (October 29, 2020), <https://www.theatlantic.com/international/archive/2020/10/donald-trump-foreign-policy-america-first/616872/>.

<sup>8</sup> *Increasing Effectiveness of Military Operations: Hearing before the S. Comm. on Armed Servs.*, 114th Cong. *passim* (2017) (statements of Admiral James G. Stavridis, U.S. Navy, retired, Dean of the Fletcher Sch. of Law & Dipl., Tufts Univ. and Former Commander of U.S. European Command and U.S. Southern Command; Dr. Christopher J. Lamb, Deputy Director of the Inst. for Nat’l Strategic Studies, Nat’l Def. Univ.); *30 Years of Goldwater-Nichols Reform: Hearing before S. Comm. on Armed Servs.*, 114th Cong. (2016).

<sup>9</sup> A mix of military police from the District of Columbia National Guard and United States Park Police were present when Lafayette Square was cleared. See Philip Bump, *Timeline: The Clearing of Lafayette Square*, THE WASHINGTON POST (June 5, 2020), <https://www.washingtonpost.com/politics/2020/06/02/timeline-clearing-lafayette-square/>. *But cf.*, Mark T. Esper, SecDef., Statement for the Rec. to the HASC Hearing on DOD Auths. and Roles Related to Civilian Law EnFt (As Prepared) (July 9, 2020), <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2269970/secretary-of-defense-mark-t-esper-statement-for-the-record-as-prepared-to-the-h/>; Mark T. Esper, SecDef. Addresses Reporters Regarding Civil Unrest (June 2, 2020), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2206685/secretary-of-defense-esper-addresses-reporters-regarding-civil-unrest/> (affirming that no military personnel—national guard or active duty—were engaged in clearing protesters from Lafayette Square).

<sup>10</sup> A former SecDef and Combatant Commander (General James N. Mattis, U.S. Central Command), two former CJCSs (Admiral Mike Mullen and General Martin Dempsey), a former Vice Chairman of the Joint Chiefs of Staff (Admiral Sandy Winnefeld), a former Combatant Commander (General Tony Thomas, U.S. Special Operations Command), a former Commander of U.S. Forces Afghanistan (General John Allen). See Max Boot, Opinion, *The Retired Generals Are Defending America from Our Greatest Threat: The President*, THE WASHINGTON POST (June 4, 2020),

acknowledging that he “should not have been there” because it created the perception of the military being involved in domestic politics, followed by congressional hearings into military domestic law enforcement activities.<sup>11</sup> Whether it was right or wrong for the CJCS to accompany the President in Lafayette Park, this incident demonstrates the military’s growing ubiquity in the national decision-making process beyond giving its “best military advice.”<sup>12</sup>

At various times in its short history, the United States has reevaluated whether its current national security apparatus is structured to meet anticipated threats, *i.e.*, whether the military and its civilian overseers are organized in a way that ensures survival as a Republic with liberties guaranteed for its citizens. The first, and perhaps most momentous occasion was earlier than most might think. Indeed, national security was one of the main factors driving the 1787 convention in Philadelphia. While still in our national infancy, we threw off the entire construct of government formed by the Articles of Confederation: “We the People of the United States, in Order to . . . *provide for the common defence . . . and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*”<sup>13</sup>

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<https://www.washingtonpost.com/opinions/2020/06/04/retired-generals-are-defending-america-our-greatest-threat-president/>. But at least one civil-military relations expert argues that criticism by retired officers actually undermines the public trust in the military. Largely because it seems to compromise the military professional ethic and damages the trust between the military at large and civilian leaders. *See, e.g.,* Mackubin Thomas Owens, *How Military Leaders’ Trump Criticism Can Damage Civil-Military Relations*, NAT’L REV. (June 12, 2020), <https://www.nationalreview.com/2020/06/military-leaders-criticism-president-trump-can-damage-civil-military-relations/>.

<sup>11</sup> Mark Milley, General, United States Army, CJCS, Keynote Address to Nat’l Def. Univ. Class of 2020 Graduates (June 11, 2020), <https://www.youtube.com/watch?v=7AKmmApwi0M>; *Hearing on the Defense Department’s Role in Civilian Law Enforcement: Hearing before the H. Comm. on Armed Servs.*, 116th Cong (Jul. 9, 2020).

<sup>12</sup> While the term “Best Military Advice” has become ubiquitous across the national security apparatus, it bears mentioning that it is neither defined in statute nor doctrine, and some believe it is a detrimental standard because it tends to create a sense, or at least an insinuation, of superiority over coordinate civilian advice. *See* James Golby & Mara Karlin, *Why “Best Military Advice” is Bad for the Military—and Worse for Civilians*, 62 ORBIS: FPRI’S J. OF WORLD AFFS. 137, 138–41 (2018). The statutory requirement at 10 U.S.C. § 151 is simply “advice with respect to any matter . . . as [the CJCS] considers appropriate . . . of the range of military advice and opinion with respect to that matter.” “Judgment of the military member” is also invoked but without qualifiers such as “military judgment” or “professional judgment.” 10 U.S.C. § 153 further outlines the CJCS’s responsibilities and functions and outlines areas where he is responsible for advising the President, all of which relate to the military or national security strategy.

<sup>13</sup> U.S. CONST., preamble (emphasis added). *See* RICHARD H. KOHN, *The Constitution and National Security: The Intent of the Framers*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989*, at 63–64 (Richard H. Kohn ed., 1991).

The structure initially created by the Constitution reigned until the 20th Century with very few structural changes to the national security apparatus—largely because of a predominant internal, isolationist mindset. But then in the early 1900s, Secretary of War Elihu Root pursued major defense reforms, which stayed in place through two global conflicts.<sup>14</sup> Following WWII, however, the United States was the sole global superpower, and again revisited the national security construct, completely overhauling the existing framework. The National Security Act of 1947 created the Department of Defense (DoD), the U.S. Air Force, the Central Intelligence Agency, and the Joint Chiefs of Staff (JCS), and drastically altered the roles and influence of the service chiefs and secretaries.<sup>15</sup> This formed the general basis of the modern national security apparatus that exists today. After the convulsions of Vietnam, the 1960s and 1970s, and several smaller military debacles, Congress again looked inward and passed the Goldwater-Nichols Act of 1986, vesting more authority in the CJCS.<sup>16</sup>

In light of our growing need to synchronize global military operations<sup>17</sup> and rectify growing civil-military strains stemming from the military being stretched beyond its professional competency, it is time to revisit Goldwater-Nichols. Beginning with the National Security Act of 1947, the United States, as a nation, has been loath to adopt a General Staff model of national military hierarchy—largely out of fear that doing so would undermine civilian control of the military and somehow usher

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<sup>14</sup> GORDON NATHANIEL LEDERMAN, REORGANIZING THE JOINT CHIEFS OF STAFF: THE GOLDWATER-NICHOLS ACT OF 1986, at 8 (1999) (“Secretary of War Elihu Root pushed the General Staff Act of 1903 through Congress and unified the various Army bureaus under one chief of staff supported by a general staff. The notion of a ‘general staff’ involves unifying a multifaceted organization under a strong central staff possessing executive powers and reports to a single decisionmaker.”).

<sup>15</sup> *Id.* at 16.

<sup>16</sup> *Id.* at 86; STEVEN L. REARDEN, COUNCIL OF WAR: A HISTORY OF THE JOINT CHIEFS OF STAFF, 1942–1991, at 454 (2012) (“The most striking features of the law were those affecting the Chairman who now became ‘principal military advisor’ to the President, the National Security Council, and the SecDef, superseding the JCS in that role. Functions and duties previously conferred collectively on the Joint Chiefs of Staff now passed to the Chairman, thus ending the days of corporate decisionmaking and consensus recommendations.”).

<sup>17</sup> NSS, *supra* note 7, at 26 (“Protecting American interests requires that we compete continuously within and across these contests, which are being played out in regions around the world . . . . To prevail, we must integrate all elements of America’s national power—political, economic, and military . . . . The United States will seek areas of cooperation with competitors from a position of strength, foremost by ensuring our military power is second to none and fully integrated without allies and all of our instruments of power.”); *Increasing Effectiveness of Military Operations*, *supra* note 8, at 21 (statement of Dr. Christopher Lamb, Deputy Dir., The Inst. for Nat’l Strategic Stud., Nat’l Def. Univ.).

in the proverbial “man on horseback.”<sup>18</sup> Yet, in the history of American military reform, there has been a natural progression towards a General Staff—never smooth, always stammering, and halting just short of creating an actual General Staff. These movements, however, have typically resulted in compromises based on congressional home-district interests that tie in with service turf-wars. It is again time to revisit our national security structure and take the next logical step by establishing a true General Staff, with executive authority, in the chain of command.<sup>19</sup> Doing so will enable a more effective military, while strengthening civilian control of the military and righting the balance of constitutional military powers. Doing so effectively, however, requires a critical look at the historical and theoretical explanations of the General Staff and the American construct of civilian control of the military—especially in light of the traditional, healthy level of skepticism of American military power.<sup>20</sup>

To that end, Part II will explain the history, development, and presumed downfall of the General Staff: born out of enlightened professionalism and a “victim of Nazism and its destruction .

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<sup>18</sup> See JOINT HISTORY OFFICE, ORGANIZATIONAL DEVELOPMENT OF THE JOINT CHIEFS OF STAFF, 1942–2013, at 32 (April 2013). This aversion to a General Staff was not present prior to the rise of Nazi Germany and WWII. *National Security Act of 1947: Hearings before the H. Comm. on Expenditures in the Exec. Dept.*, 80th Cong. (1947) (statements of witnesses throughout discussing concerns with the German General Staff—for both strategic reasons as well as for civilian control reasons). Indeed, prior to WWII, the Army largely operated off of a general staff model subordinated to the War Department. In fact, the Secretary Root reform bill was called the “General Staff Act of 1903.” LEDERMAN, *supra* note 14, at 8. With the creation of the DoD, the Secretary of War was replaced by the modern Secretary of the Army and the SecDef. While the American public has always been suspicious of standing armies, that same suspicion did not necessarily extend to the General Staff until after WWII. Additionally, Huntington notes that the idea of the General Staff as a military organization was an institutional victim of Nazi power. HUNTINGTON, *supra* note 1, at 122–23. From the time the U.S. military began professionalizing and throughout the first half of the 20th Century the United States used a General Staff to direct and coordinate global military operations—including in both world wars.

<sup>19</sup> *Increasing Effectiveness of Military Operations*, *supra* note 8, at 7, 9 (statements of Admiral James G. Stavridis, U.S. Navy, retired, Dean of the Fletcher Sch. of Law & Dipl., Tufts Univ. and former Commander of U.S. European Command and U.S. Southern Command and General Norton A. Schwartz, U.S. Air Force, retired, President & CEO, Bus. Execs. for Nat’l Sec., and former Chief of Staff of the Air Force) (discussing putting the CJCS in the chain of supervision).

<sup>20</sup> From the outset, cognizance of historical causes—general and specific—is critical. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 470 (Harvey C. Mansfield & Debra Winthrop, eds., trans., Univ. of Chicago Press 2000) (1850–59) (“As for me, I think that there is no period in which it is not necessary to attribute one part of the events of this world to very general facts and another to very particular influences. These two causes are always met with; only their relationship differs. General facts explain more things in democratic centuries than in aristocratic centuries, and particular influences fewer. In aristocratic times, it is the contrary: particular influences are stronger and general causes are weaker, unless one considers as a general cause the very fact of inequality of conditions that permits some individuals to oppose the natural tendencies of all the others.”).



. . . one of the calamities of the war.”<sup>21</sup> Part III will briefly survey the history and development of the Joint Staff: born out of a need for unity,<sup>22</sup> but settling for mere “jointness.” Part IV will explore the constitutional structure of civilian control of the military and the tensions that separation of powers imposes on civil-military relations. Part V will then explain how a General Staff within our constitutional structure would operate and how it will improve civilian control of the military and ease the constitutionally imposed civil-military tensions through design.<sup>23</sup>

## II. THE GENERAL STAFF: ENLIGHTENED PROFESSIONALISM

A General Staff—as the name implies—is a military staff that handles general military matters, as opposed to a special staff that addresses specific military matters. The General Staff has traditionally been marked by sharing executive-command authority over a country’s armed forces. The General Staff is led by a Chief of Staff who is subordinate to a Commander in Chief.<sup>24</sup> Traditional functions of a General Staff are the planning and integration of military operations—including logistics and intelligence—through the thorough and systematic study of war, past, present, and future. While many countries use the General Staff model to command and organize

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<sup>21</sup> HUNTINGTON, *supra* note 1, at 122–23.

<sup>22</sup> At times in military reform debates, unification has been used to mean a unification of the military departments and Military Services into one national armed force. The debate over this kind of Service unification has occurred repeatedly through American history—typically centering on absorption of the Marine Corps, but has largely been settled (for the time being at least). Having different Services provides a complete range of capabilities that would otherwise have holes in it, much the way the United States is a union of the various states, the U.S. military operates as a union of Services with the singular goal of national security as their aim. For purposes of this article, union and unity do not refer to Service unification, unless so specified. Rather, they refer to the time-honored military principle of unity of command. Much the way the United States currently brings various capabilities from the Military Services together at the *Unified Combatant Command* level under one commander with one set mission.

<sup>23</sup> While tempting, for reasons of space and scope, this article will not address in detail several questions that routinely arise with defense reform: whether combatant commands should be reorganized along something other than a geographical model, whether the Services should be unified, and what the roles of the Services should be. Narrowly, this article explores what effects on civilian control of the military adopting a General Staff might have.

<sup>24</sup> There are two types of general staffs. There is the General Staff at the national headquarters level, and there is the general staff at the field headquarters level used by commanders to conduct their operations. The same was true in Prussia and Germany: the *grosser generalstab* and the *truppengeneralstab*, respectively. Eugene O. Porter, *The Evolution of the General Staff*, 8 *The Historian* 26, 28 (1945). This construct parallels what the United States currently uses with the Joint Staff at the Pentagon and joint staffs at the various combatant commands. JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES xvi, xix–xx (12 Jul. 2017) [hereinafter JP 1].

their armed forces, the United States currently does not.<sup>25</sup> The General Staff is a distinctly Prussian innovation and has become the hallmark of professional militaries the world over.<sup>26</sup> Understanding its fountainhead will help explain why a General Staff is desirable as well as where the possible pitfalls lie.

#### *A. Born Out of Enlightened Professionalism*

In the late 18th Century, Enlightenment philosophy spread like a wildfire across Europe, affecting the basis of civil government, the study of natural sciences, the practice of religion, the education of children, and culminated in revolutions in both the new and old worlds.<sup>27</sup> The German Enlightenment, *Die Aufklärung*, focused on “the human element in history and the dominance of reason,” with a strong emphasis on evaluation of objective evidence.<sup>28</sup> While the Enlightenment in other countries focused more on societal institutions, in Germany, the focus was the individual mind, and the “perfectibility of man.”<sup>29</sup> “To Kant, enlightenment was ‘man’s emergence from self-imposed nonage,’” which was only possible through an understanding of the concept of “*Bildung*”—culture, coupled with a “well balanced relationship between character and intellect” rooted in a genuine historical sense and objective criticism.<sup>30</sup> *Bildung* was pursued through constant “evaluation, examination, and practice.”<sup>31</sup> While the Enlightenment took root societally several decades earlier, by

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<sup>25</sup> 10 U.S.C. § 155(e); JP 1, *supra* note 24, at III–6. This has not always been the case. During the 20th Century prior to the adoption of the National Security Act of 1947, the United States did use the General Staff model. *See* LEDERMAN, *supra* note 14, at 8.

<sup>26</sup> WALTER GOERLITZ, *HISTORY OF THE GERMAN GENERAL STAFF 1657–1945*, at 49 (Brian Battershaw trans., Westview Press 1985) (1953). This is not to say, however, that other militaries did not use military staffs organized along conventional sections prior to the development of the General Staff.

<sup>27</sup> GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION 191–92* (1991); CHARLES EDWARD WHITE, *THE ENLIGHTENED SOLDIER: SCHARNHORST AND THE MILITÄRISCHE GESELLSCHAFT IN BERLIN, 1801–1805*, *passim* (1989).

<sup>28</sup> WHITE, *supra* note 27, at 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1–2. White explains, “There is no exact equivalent of *Bildung* in English, but education, culture, and self-cultivation are all part of it.” *Id.* at 21 n.5. Further, Scharnhorst “understood that *Bildung* was a life-long process, not the social polish needed to enter court life.” *Id.* at 31.

<sup>31</sup> *Id.* at 10 (quoting Scharnhorst).

the late 1700s and early 1800s its influence turned to the science and art of war at an institutional level, and it did so in the person of Gerhard Johann David von Scharnhorst.

i. Enlightenment Influence on Military Thinking

While many officers and civilians were involved in reforming the Prussian military, Scharnhorst was primarily responsible for reshaping Prussian military thinking in the image of Enlightenment thought.<sup>32</sup> Born in Hanover, Scharnhorst sought and obtained an appointment in the Prussian Army after his reform attempts were rejected by the Hanoverian Army.<sup>33</sup> Upon his arrival in Prussia, Scharnhorst immediately began laying the intellectual groundwork for a reformation of the Prussian Army based on Enlightenment principles.<sup>34</sup> He did so as the director of the *Militärische Gesellschaft* in Berlin—a volunteer military society dedicated to the rational, scientific, historical, and philosophic study of war which was no mere social club for nobles and military elites.<sup>35</sup> Through scholarly “papers, lectures, discussions, and essay competitions” on military affairs and historical battles, famous and obscure, and public presentations and oral defenses of those studies, the *Militärische Gesellschaft* forged a class of intellectual officers who would ultimately lead the Prussian Army in the coming wars with France.<sup>36</sup> Though only lasting from 1801 to 1805, this society shaped the minds of officers of all ranks and educated them for the coming war, subsequent reformation, and ultimate victory over Napoleon.<sup>37</sup> The impact of the society, however, was not immediate.<sup>38</sup>

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<sup>32</sup> *Id.* at 40.

<sup>33</sup> *Id.* at xi–xii.

<sup>34</sup> *Id.* at 28–29, 40.

<sup>35</sup> *Id.* at xii–xiv, 191 (“The purpose of the Society is to instruct its members through the exchange of ideas in all areas of the art of war, in a manner that would encourage them to seek out truth, that would avoid the difficulties of private study with its tendency to one-sidedness, and that would seem best suited to place theory and practice in proper relationship.” (quoting the Society statutes)).

<sup>36</sup> *Id.* at xii–xiv, 32. For a description of the format of the weekly meetings, a breakdown of the nearly 200 topics presented, and the general operations of the society, see *id.* at 39–49.

<sup>37</sup> *Id.* at 49, 185–87.

<sup>38</sup> While not immediate, it was long lasting: 60 percent of the officer members went on to become generals, through 1870, five of eight chiefs of the Prussian General Staff were members and seven of the ten field marshals appointed

First, the Prussians had to experience the defeat and destruction of the army of Frederick the Great—an event Napoleon made look so easy at Jena-Auerstadt that it shocked the world.<sup>39</sup>

## ii. Prussian Reforms after Defeat

Following the Prussian defeat at Jena-Auerstadt in 1806, Napoleon occupied Prussia.<sup>40</sup> While the Prussian Army operated under a General Staff before Jena-Auerstadt, to Scharnhorst's frustration, it was a General Staff in name only, lacking real authority to influence operations in the field or even a clear chain of command.<sup>41</sup> The result was that "a war accepted under the worst possible conditions was fought in the worst possible way."<sup>42</sup> Nonetheless, because of Scharnhorst's "ceaseless activity, firm determination, and intelligent counsel" throughout the battle, retreat, and subsequent French occupation, the king promoted him to general and appointed him chairman of the Military Reorganization Commission—giving him authority to begin implementing his ideas.<sup>43</sup>

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during that period were members. Further, several key government and military posts were filled by members of the *Militärische Gesellschaft*. *Id.* at 49.

<sup>39</sup> PETER PARET, *CLAUSEWITZ AND THE STATE* 217 (1976) ("it was the lost war of 1806 that alone had opened the door to basic change in Prussia."); DAVID G. CHANDLER, *THE CAMPAIGNS OF NAPOLEON* 509 (1966) ("Napoleon had blown with his breath, and Prussian military might was no more. The news of the sudden French victory at Jena-Auerstadt left the governments of Europe gasping and amazed. It was difficult enough to credit the news that the army of Frederick the Great had been virtually annihilated in the maelstrom and subsequent exploitation of a single day's fighting.").

<sup>40</sup> See CHANDLER, *supra* note 39, at 505–11.

<sup>41</sup> WHITE, *supra* note 27, at 127, 143 n.42. On the eve of the campaign, Scharnhorst—as a colonel on the General Staff—commented that "What ought to be done I know only too well. What is going to be done, only the gods know." *Id.* (quoting a letter from Scharnhorst to his daughter of October 7, 1806). This comment does not reveal hubris or pride, rather it demonstrates his frustration with ill-prepared leadership and how little power the General Staff had to influence operations going into Jena-Auerstadt, which was a complete French victory. Scharnhorst's frustration was palpable, causing Clausewitz to comment, "if one realizes that *three* commanders-in-chief and *two* chiefs of staff serve with the army, though only *one* commander and *one* chief of staff ought to be there. . . . How much must the effectiveness of a gifted man [Scharnhorst] be reduced when he is constantly confronted by obstacles of convenience and tradition, when he is paralyzed by constant friction with the opinions of others." See PARET, *supra* note 39, at 124 (quoting a letter from Clausewitz to his fiancée Marie v. Bruhl of September 29, 1806). See also GOERLITZ, *supra* note 26, at 25–26 for a description of how the General Staff was dispersed among the various armies "so the greater part of their usefulness was completely destroyed."

<sup>42</sup> GOERLITZ, *supra* note 26, at 25. For example, the reorganization recommendations that had long been made were hurriedly and half-heartedly carried out on the eve of battle. *Id.* Further, the General Staff charged with coordinating the battle "Was crippled from the start, its highest officers being simply distributed among the various armies . . . creating a lack of unity and confusion of counsel in the Command." *Id.* at 25–26. Consequently, the Prussian efforts throughout were completely uncoordinated enabling Napoleon to completely dismantle the army. *Id.*

<sup>43</sup> WHITE, *supra* note 27, at 129 (quoting Gebhard Lebrecht von Blücher, for whom Scharnhorst acted as Chief of Staff during the retreat).

Naturally, the Reorganization Commission was further composed of members of the *Militärische Gesellschaft* and Scharnhorst's former students from the Berlin Institute for Young Officers.<sup>44</sup>

During the French occupation, Scharnhorst, with the assistance of his acolytes from the *Militärische Gesellschaft*, began the five year reformation process with secret earnest.<sup>45</sup> Scharnhorst's work with the military society paved the way for reform of the army's education system, training, organization, recruiting, manpower, and command structures in ways that have been emulated throughout modern professional militaries.<sup>46</sup> In rebuilding the military, the Reform Commission established a War Ministry, instituted universal service, and created new articles of war abolishing most corporal punishments and instituting protections for the rights of individual soldiers.<sup>47</sup> Further, the officer ranks were opened to all classes—rather than just the nobility—based on character, intellect, and written examinations, with “educational qualifications [being] the decisive factor in leadership selection.”<sup>48</sup>

Central to *leading* a competent force was a professional military education scheme that formalized schooling for officers and injected a degree of rigor and objective study based on *Aufklärung* principles.<sup>49</sup> Central to controlling this new “nation-in-arms” was the quickening of the General Staff and subordinating it to the newly establishing War Ministry.<sup>50</sup> Scharnhorst's reforms

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<sup>44</sup> *Id.* at 131. While the *Militärische Gesellschaft* was a voluntary organization that Scharnhorst led, upon receiving an appointment in the Prussian Army his official duties included serving as the Director of the Berlin Institute for Young Officers—one of several formal schools throughout the country that young officers attended during the winter months to study military art and science. The king had assigned him to the Institute in order to reform it. *Id.* at 39, 87; GOERLITZ, *supra* note 26, at 17.

<sup>45</sup> WHITE, *supra* note 27, at xii–xiv, 49; WINSTON S. CHURCHILL, *THE GATHERING STORM* 42 (1948) (comparing Seeckt's rebuilding during the Weimar Republic to that of Scharnhorst during French Occupation).

<sup>46</sup> HUNTINGTON, *supra* note 1, at 31.

<sup>47</sup> WHITE, *supra* note 27, at 133.

<sup>48</sup> *Id.* at 134–35.

<sup>49</sup> *Id.* at 137. Most modern Professional Military Education (PME) programs pale compared to the rigor the *Kriegsakademie* required. In addition to four years of pre-commissioning education, the *Kriegsakademie* was another three years—representing what Huntington called the second phase of professional education: “the first imparting a broad, liberal, cultural background, and the second imparting the specialized skills and knowledge of the profession. . . . given at special institutions operated by or affiliated with the profession itself,” much the way in the United States a lawyer attends law school or a doctor, medical school after their general education. *Id.*; HUNTINGTON, *supra* note 1, at 9.

<sup>50</sup> WHITE, *supra* note 27, at 138.

sparked the beginning of the professional military age, and, like a previous Reformation beginning in Germany, had wide-ranging societal impacts.<sup>51</sup> During a five-year period, Scharnhorst completely rebuilt the army Napoleon had destroyed,<sup>52</sup> and ultimately produced two famous progeny: the General Staff and Carl von Clausewitz.<sup>53</sup> While Scharnhorst's enlightened method of the study of war is explained by his protégé throughout his famous work, *On War*, the practical manifestation of his method is the General Staff.<sup>54</sup>

### iii. The Military as a Profession: Scharnhorst's Progeny

The General Staff, as envisioned by Scharnhorst and as it ultimately came to fruition, was the institutional embodiment of *Bildung* as applied to the art of war. According to Scharnhorst, "An Army without a well-organized General Staff is like a country without a government."<sup>55</sup> "The task of the Great General Staff was not to produce geniuses, but to concentrate on the training of ordinary men who could display efficiency and common sense."<sup>56</sup> Because the General Staff was the pinnacle of the Prussian military, its practices were institutionalized throughout, and thus, the Prussian General Staff created the profession of arms.<sup>57</sup>

Having discussed the influences of Enlightenment thinking on the creation of the General Staff and hence, the profession of arms, it is also helpful to define what a professional military

<sup>51</sup> VI WILL DURANT, *THE REFORMATION: A HISTORY OF EUROPEAN CIVILIZATION FROM WYCLIF TO CALVIN: 1300–1564*, at 777, 935–40; WHITE, *supra* note 27, at 123–35.

<sup>52</sup> ANDREW ROBERTS, *NAPOLEON: A LIFE* 642–43 (2014).

<sup>53</sup> Scharnhorst's relationship with Clausewitz began while the latter was a student at the Berlin Institute discussed *supra* note 44. Clausewitz, who found the course of study more rigorous than expected, nearly quit the institute after his father's death, but Scharnhorst took special notice and helped him through the trial. See PARET, *supra* note 39, at 74–75. From there, the relationship grew between the teacher and student to such a degree that Scharnhorst became a second father to him. *Id.* Ultimately, "the flowering of Clausewitz's gifts could itself be regarded as a product of Scharnhorst's policies." *Id.* at 166.

<sup>54</sup> Indeed, alluding to John 1:27, Clausewitz claimed to be Scharnhorst's John the Baptist. GOERLITZ, *supra* note 26, at 40.

<sup>55</sup> *Id.*

<sup>56</sup> GOERLITZ, *supra* note 26, at 127 (quoting General von Seeckt); HUNTINGTON, *supra* note 1, at 114 ("Genius is work.") (quoting Helmuth von Moltke (the elder)).

<sup>57</sup> HUNTINGTON, *supra* note 1, at 30–37.

actually is. Professor Samuel Huntington's seminal work, *The Soldier and the State*, provides the accepted definition of a professional soldier. He begins by defining a profession as "a special type of vocation" requiring "expertise, responsibility, and corporateness."<sup>58</sup> Expertise is acquired in two phases: "the first imparting a broad, liberal, cultural background, and the second imparting specialized skills and knowledge;" and can be successfully applied only with appropriate understanding of the "broader tradition" of which the professional is a part.<sup>59</sup> The professional's responsibility is to society, individually or collectively, and absent accepting this professional responsibility, the professional cannot continue to practice.<sup>60</sup> As with the other professions, the military profession has an included code of ethical standards closely tied to corporateness.<sup>61</sup> Corporateness is that "sense of unity" that results in self-regulation based on standards of competence and established methods of enforcement.<sup>62</sup> The area of expertise of the professional

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<sup>58</sup> *Id.* at 8.

<sup>59</sup> *Id.* at 8–9.

<sup>60</sup> *Id.* at 9. This responsibility for the military professional naturally includes ensuring the military security of society, but it also includes an element of restraint, with the profession only acting on "socially approved purposes." *Id.* at 14–15. That is, civilian control.

<sup>61</sup> Generally, this includes the Law of War applicable to all militaries regardless of nationality. More specifically, it includes national constraints like the Uniform Code of Military Justice (UCMJ) in the United States, and then even more narrowly those customs and regulations of a particular Service.

<sup>62</sup> *Id.* at 10. This idea is not foreign to the legal profession, which is largely a self-regulating profession. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r.8.5; Carla C. Ward, *The Law of Choice: Implementation of ABA Model Rule 8.5*, 30 J. LEGAL PRO. 173, 186 (2006) ("Regulation of the bar historically has been, and remains, a function of the judiciary of each state, because every state has an extremely important interest in maintaining and assuring the professional conduct of the attorney it licenses." (internal quotations omitted)). Likewise, in the American military the self-regulatory aspect of corporateness is in the method by which officers are disciplined, and, to use a civilian term, "fired," when an officer fails to uphold the standards of professional conduct. A Board of Inquiry composed of more experienced officers is convened to evaluate whether the officer's conduct amounts to substandard performance—whether the officer failed to live up to the accepted professional standard of competence. *See* 10 U.S.C. § 1181 *et seq.* *See, e.g.*, U.S. DEPT OF NAVY, SEC'Y OF NAVY INSTR. 1920.6D, ADMINISTRATIVE SEPARATION OF OFFICERS Encl. (6) (24 July 2019) [hereinafter, SECNAVINST 1920.6D] (outlining several bases for which an officer may be separated from the Naval Service for failing to meet various professional standards and the procedures by which a Board of Inquiry, composed of senior officers will make such a determination). Uniquely, perhaps when compared to other professions, advancement within the military profession is also quasi-self-regulatory: using the same mechanism of a board composed of senior officers to evaluate the professional qualifications of those eligible for promotion. 10 U.S.C. § 164 (requiring that officers be "mentally, morally, physically, and professionally qualified" for the responsibilities of the next grade and incorporating the requirements of exemplary conduct found at 10 U.S.C. §§ 7233 (Army), 8167 (Navy and Marine Corps), and 9233 (Air Force)). Further, not only do officer promotion boards have the authority to evaluate and recommend officers for advancement, they also have the additional self-regulatory authority to determine whether an officer should show cause for retention. 10 U.S.C. § 617 ("A [promotion] selection board . . . shall include in its report to the Secretary concerned the name of any . . . officer before it for consideration for promotion whose record, in the opinion of a majority of the members of the board, indicates that the officer should be required . . . to show cause for his retention on active duty.").

officer then, is “the direction, operation, and control of a human organization whose primary function is the application of violence,”<sup>63</sup> distinguished from the act of actually committing the violence, which is generally a “mechanical craft.”<sup>64</sup> While some may criticize Huntington’s theory of “objective civilian control” because it does not always bear out in reality in the American system, his definition of the profession has largely been accepted.<sup>65</sup> Furthermore, Huntington is posing “objective civilian control” as an ideal, theoretical form of civilian control—not necessarily one that should bear out in every country, system, or time in history—to explain the many factors and institutions that effect civilian control.<sup>66</sup>

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The U.S. Supreme Court has repeatedly endorsed the self-regulatory nature of this concept specifically for the military, calling it a “specialized society separate from civilian society” whose justice system serves a different purpose with its own laws and traditions. *See* *Parker v. Levy*, 417 U.S. 733, 743 (1974) (also noting that based on the President’s commission, military officers bear “particular position[s] of responsibility in society”). *See also*, *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) (explaining that the difference between military and civilian societies is the warfighting purpose of military society); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (noting that the military society has a “separate discipline from that of the civilian” and that “orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.”); *In re Grimley*, 137 U.S. 147, 152 (1890) (noting that by becoming a soldier, the citizen’s “relations to the state and public are changed. He acquires a new status, with correlative rights and duties.”).

<sup>63</sup> HUNTINGTON, *supra* note 1, at 11.

<sup>64</sup> *Id.* at 13. Note that Huntington excludes several categories from the class of soldiers he defines as military professionals. This might cause some pause today because the common understanding of the professional American military is that every person who is a member of the military is a professional—regardless of rank, component, or duration of service. But this conflates a standing, volunteer military with a professional army. Huntington excludes enlisted personnel from his definition, as they generally possess the mechanical skills of conducting violence, but not directing it, *id.* at 18; reservists as amateurs in the technical sense, *id.* at 13, 17; and some subsets of officers that in modern times would generally be defined as restricted or limited duty officers, sometimes colloquially referred to as staff officers. *Id.* at 12 (Huntington uses the term “auxiliary specialists” to describe those officers necessary to the achievement of military objectives, but not capable of or responsible for the management of violence.). Such staff officers should be distinguished from General Staff Officers (whose expertise is in directing organizations the purpose of which is to commit violence). Rather, restricted staff officers are more appropriately described as Special Staff Officers—for example, members of the Medical Corps, Chaplain Corps, or Judge Advocate General’s Corps in those Services that have them. In modern times, a hall mark of these subsets of officers is that there is a separate “competitive category” within which they are considered for promotion (invoking the element of corporateness). These officers also frequently possess a separate professional or technical area of expertise: medicine, law, or holy orders, for example. An exception to this general rule in modern times is the Marine Corps, which does not have any special staff corps. With very few exceptions, Marine officers are unrestricted line officers, regardless of military specialty.

<sup>65</sup> *See, e.g.*, ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMAN, AND LEADERSHIP IN WARTIME* 242–45, 264 (2002). But even where Cohen takes a skeptical view of Huntington’s theory, he accepts his definition of the military profession. *Id.* at 242. *See also*, MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* 6 (1960) (adopting Huntington’s definition of the military profession).

<sup>66</sup> He certainly does not advocate modifying the Constitution in order to obtain objective control, which as he points out is nearly impossible under our current constitutional structure. HUNTINGTON, *supra* note 1, at 191–92 (quoted *infra* note 201).



Once the officer accepts the professional responsibilities of their respective profession, it raises the question of the limits of their professional competence. A critical element of the corporate responsibility that a professional military is liable for is the subordination of the military to the civilian. Simply put, the institutional limits of military authority must be the military goals of the state—individually, it is limiting one’s professional opinion to those areas that fall within the professional competency.<sup>67</sup>

*B. The Failure of Professionals: Immolation, Götterdämmerung*

Following both world wars, the world blamed the German General Staff and, in America at least, concluded that civilian control of the military could not effectively coexist with a General Staff. Indeed, the Treaty of Versailles explicitly attempted to outlaw the German General Staff,<sup>68</sup> and the National Security Act of 1947 structurally prohibited the newly created Joint Staff from acting as a General Staff.<sup>69</sup> Not only did Congress refuse to create an Armed Forces General Staff in 1947, despite previous American use<sup>70</sup> and while other countries continued using the General Staff model, but the allied prosecutors at Nuremburg were also divided, with the American prosecutors arguing for charging the German General Staff as a criminal organization while the other allies were more

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<sup>67</sup> See *supra* note 3 and accompanying discussion. A framework analogous to that found in MODEL RULES OF PROFESSIONAL CONDUCT r.1.1 for attorneys may be beneficial for the military profession.

<sup>68</sup> Treaty of Peace with Germany (Treaty of Versailles) art. 160, January 10, 1920, 2 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776–1949 42, 116 (“The Great Germany General Staff and all similar organisations shall be dissolved and may not be reconstituted in any form.”).

<sup>69</sup> LEDERMAN, *supra* note 14, at 19–22; *National Security Act of 1947*, *supra* note 8, (statements of witnesses throughout discussing concerns with the German General Staff—for both strategic reasons as well as for civilian control reasons). The Nat’l Sec. Act of 1947 created the JCS and the Joint Staff, but the JCS was collectively the senior military advisors to the President with no CJCS, despite then-General Eisenhower’s testimony that a single armed forces chief of staff was needed. LEDERMAN, *supra* note 14, at 16–17. When the JCS structure was solidified with the DoD Reorganization Act of 1958 and the CJCS given a vote, the explicit prohibition of the Joint Staff acting as a General Staff was included. *Id.* at 22. See also 10 U.S.C. § 155(e).

<sup>70</sup> See, e.g., War Dep’t, A Handbook for the War Dep’t Gen. Staff, War Dep’t. Doc. No. 1119 (1923); William Harding Carter, Creation of the Am. Gen. Staff: Pers. Narrative of the Gen. Staff Sys. in the Am. Army, S. Doc. No. 119, at 1–3 (1924). See also 10 U.S.C. § 155(e) for the prohibition of the Joint Staff acting as a General Staff. Lederman, *supra* note 14, at 22.

skeptical.<sup>71</sup> Ultimately, at American insistence, the German General Staff was prosecuted, albeit unsuccessfully, as a criminal organization at Nuremburg.<sup>72</sup>

Accordingly, while there has been a natural, logical progression towards adopting a General Staff; Congress has been reluctant to do so largely because of the concern that the German General Staff thwarted civilian control and caused the two bloodiest conflicts in world history.<sup>73</sup> A close examination of the historical and legal context and traditions that lead to the degradation of the German professional military, however, demonstrates that these concerns are ill-placed and the same risks do not exist in the American system.

i. The Military as the Foundation of the German State

The cautionary examples of German civil-military relations during the World Wars cannot be evaluated without first understanding the societal role of the German military. This background helps clarify that while the General Staff is a sound, effective model for military leadership and organization, its greater societal role varies depending on the context in which it is employed. As much as the American system is skeptical of standing armies and strong militaries vis-à-vis society, the Prussian Army formed the very foundation of the German State.<sup>74</sup> That is, without the Prussian Army—and its way of viewing the world—neither Prussia, nor later the German Empire, would exist as a state.<sup>75</sup> While nobility amounted to societal status in feudal Prussia; so, too, did being a

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<sup>71</sup> TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBURG TRIALS: A PERSONAL MEMOIR* 236–40 (1992).

<sup>72</sup> *Id.* at 236–61, 501–33.

<sup>73</sup> 30 Years of Goldwater-Nichols Reform: Hearing before the S. Comm. on Armed Servs., 114th Cong. (2016) (discussing the history and development of the Joint Staff); Increasing the Effectiveness of Military Operations, *supra* note 8, at 11 (discussing that while the CJCS is not currently in the chain of command, in practice the position might as well be).

<sup>74</sup> GOERLITZ, *supra* note 26, at 1 (“[T]he Prussian monarchy was not a country that had an army, but an Army that had a country which it used as a billeting area . . . . [T]he history of Prussia is essentially the history of the Prussian Army. . . . It was the Army that formed the iron ring that held them together; one may even go so far as to say that in the strict sense there has never been a Prussian nation at all, though there has most certainly been a Prussian Army and a Prussian State.”), 78 (“[it], the expanded franchise and its effect on the legislature,] must never be allowed to touch the very foundation of the State, which was the Army.”).

<sup>75</sup> PARET, *supra* note 39, at 54.

military officer in Germany.<sup>76</sup>

That does not mean, however, that the German military controlled the entire government regardless of its relation to military affairs—it was not a military dictatorship.

The scope of military authority was strictly limited to military affairs. The military played no role in determining domestic economic policies. Foreign policy was the concern of the Chancellor and Foreign Minister. . . . As was natural and proper, the Chief of Staff and War Minister presented the military view on foreign policy.<sup>77</sup>

Indeed, quite in line with Professor Cohen’s “unequal dialogue” between civilian and military leaders, “[i]t was accepted gospel in the officer corps that war was an instrument of politics and that therefore the soldier was the junior partner of the statesman;” that is, officers advised and civilians decided.<sup>78</sup>

At first blush the notion that the military was both the foundation of the state and the “junior partner” seems contradictory, or at least rife with intellectual tension. To make sense of this paradox, it helps to note that political is not synonymous with civilian.<sup>79</sup> Because the military formed the foundation of the German State, the concept of a division between civil and military aspects of the state itself simply did not exist the same way it does in the United States. There was still a distinction of roles, but not always necessarily a clear division of institutions. Consequently, politics controlled; not necessarily civilians. The Prussian King was not just the Supreme War Lord (comparable to a Commander in Chief), he was part of the military.<sup>80</sup> Later, active military officers

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<sup>76</sup> WHITE, *supra* note 27, at 35–36, 123; TELFORD TAYLOR, *SWORD AND SWASTIKA: GENERALS AND NAZIS IN THE THIRD REICH* 9 (1952).

<sup>77</sup> HUNTINGTON, *supra* note 1, at 101.

<sup>78</sup> HUNTINGTON, *supra* note 1, at 100; COHEN, *supra* note 65, at 208–224 (“What occurred between president or prime minister and general was an unequal dialogue—a dialogue, in that both sides expressed their views bluntly, indeed, sometimes offensively, and not once but repeatedly—and unequal, in that the final authority of the civilian leader was unambiguous and unquestioned—indeed in all cases stronger at the end of a war than it had been at the beginning.” *Id.* at 209.).

<sup>79</sup> Indeed, the military either achieves or fails to achieve political objectives. That is its reason for existing. That political objective may be the security of the state, but that does not change its political nature. Further, simply because the objective is political, does not make it appropriate for a civilian to achieve it—indeed in many cases doing so would forfeit the protections of the law of war that the military regularly claims.

<sup>80</sup> PARET, *supra* note 39, at 140.

could and did serve in the German legislature.<sup>81</sup> Further, and perhaps more importantly, the position of War Minister was regularly filled by a military officer.<sup>82</sup> Frequently this occurred without ill-effect, but on at least one occasion, when the same officer was both the Chief of the General Staff and War Minister, there was a shift in power favoring the General Staff.<sup>83</sup> Having a military officer fill the role of War Minister—something prohibited in the American system—is a distinction fundamental to understanding the concept of civilian control when applied to the German military and it makes all the difference when considering whether a General Staff could function in the American constitutional framework.<sup>84</sup> The only possible conclusion that comes from it is that civilian control was not preeminent or even necessary in the German system. All that was historically required in the German system was that political objectives (vice civilian authorities) directed military operations.<sup>85</sup>

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<sup>81</sup> See, e.g., GOERLITZ, *supra* note 26, at 89. Here Goerlitz notes how Moltke entered the Federal Assembly as a member for Memel-Heydekrug; though, that “politics was something which Moltke almost nervously avoided” may indicate the appointment was obligatory. *Id.* at 108. At a minimum it highlights both the paradoxical nature and the degree of nuance in German civil-military relations.

<sup>82</sup> *Id.* at 77.

<sup>83</sup> In 1913, Falkenhayn, while serving as the Minister of War was also appointed as the Chief of Staff. *Id.* at 163. Falkenhayn, however, was not the first to fill both roles. When the position was created during the reform years, Frederick William was initially reluctant to appoint a Minister of War because he was “jealous of his role of supreme commander, [and so he] refused to for the time being to appoint a minister of war.” PARET, *supra* note 39, at 140. Ultimately, Scharnhorst himself was appointed as the Minister of War and the Chief of the General Staff, a fact that further underscores the lack of division between civilian and military in the German system of civil-military relations. *Id.* at 234. Note, also, that the German Chief of Staff traditionally had a right of direct access to the Executive. By the 1880s this right had become so untouchable that Waldersee, the Chief of Staff at the time, could “approach the Emperor without informing the War Ministry at all.” GOERLITZ, *supra* note 26, at 108. This, however, was largely a circumstance of personality. Waldersee was repudiated by most German officers as being too political. *Id.* at 123.

<sup>84</sup> See 10 U.S.C. § 113 (requiring a seven-year period for officers between active military service and appointment as the SecDef). See also, *Civilian Control of the Armed Forces*, *supra* note 2, at 12 (“Furthermore, countries that have routinely installed generals as Ministers of War or Defense have often had deeply problematic patterns of civil-military relations and suffered military failure, as well. France and Germany in the late 19th and early 20th centuries, Japan during the 1930s and WWII are two examples of this. . . . Even democracies that have gone down this route have suffered from the politicization of the senior officer corps by the routine appointment of retired military figures to this top civilian position.”). This concern is exactly why the National Security Act required a ten year cooling off period after a general officer retired before she could be appointed SecDef. That requirement has since been modified to seven years. See *infra* at note 127. Exceptions to this rule have only been granted three times, in the cases of George C. Marshall in 1950, James N. Mattis in 2017, and Lloyd Austin in 2021. See *infra* Section II.B.3 and notes 128 and 129.

<sup>85</sup> These theoretical underpinnings became even more nuanced in American thought during the first half of the 20th Century when two schools of thought developed, what Morris Janowitz calls the “absolute” and the “pragmatic.” JANOWITZ, *supra* note 65, at 264. The absolute ascribing to the belief that war “is the most fundamental basis of international relations. . . . In short, there is no substitute for “total victory.” *Id.* An example of this is MacArthur in Korea, discussed *infra* note 248. While the pragmatic view ascribes to the belief that war “is but one instrument of international relations . . . . The political objectives of warfare are gained by adapting the use of the threat of violence to the objectives to be achieved. To use too much or too little is self-defeating.” *Id.* These theories are subsets of

Because it is Clausewitz's maxim that war is "a continuation of political activity by other means"<sup>86</sup> there is a tendency to superimpose a division of civil and military aspects of government onto the German system, when in actuality it did not work that way. Clausewitz's famous maxim is a notion generally viewed in the United States as part of the philosophy of civilian control of the military: that the political actors direct the military actors.<sup>87</sup> But the idea that war is an extension of politics does not necessarily presume that there must be a division between the political and the military actors.<sup>88</sup> Indeed, Clausewitz did not conclude so.<sup>89</sup> That division is something American theorists tend to read into the idea, presumably because of how preeminent civilian control is in the American system. Because the military was preeminent in the German political system, the military and the political or civilian aspects of government tended to look much more like a mirror. In addition to the mirror-like effect of the executive structure of the German system, there was a complete lack of oversight on the part of the German legislature—whether the Diet or the Reichstag. "The control of the Diet over the Army was limited. Indeed, it had little more than the doubtful honour of voting it funds."<sup>90</sup>

With this context in mind, it becomes clear why, from a cursory American point of view, the

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Clausewitz's broader theory that war is an extension of politics. While neither theory necessarily predominated when Janowitz wrote *The Professional Soldier*, the terminology he used to describe the pragmatic school was near prophetic. See, e.g., *id.* at 273, Table 30. The tension between these theories and their varying degrees of acceptance by different military and political leaders is evident throughout civil-military relations during the wars in Korea and Vietnam.

<sup>86</sup> CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret eds., trans., Princeton Univ. Press 1976) (1832).

<sup>87</sup> See, e.g., John Binkley, *Clausewitz & Subjective Civilian Control: An Analysis of Clausewitz's Views on the Role of the Military Advisor in the Development of National Policy*, 42 *ARMED FORCES & SOC'Y* 251, 252–253, 259 (2016) (analyzing Clausewitz's various writings, including *On War*, to assess his views on the relationships between political and military considerations and noting that *On War* is a theoretical work focusing on the nature of war universally, not a work on civil-military relations with a specific type of government). Further, "[Clausewitz] rejected the notion of a politically neutral military," like we expect in the United States. *Id.* at 259. See also, PARET, *supra* note 39, at 286–307 (analyzing and explaining Clausewitz's various political and polemical writings). Book Eight of *On War* addresses the role of the military in developing war plans and policy, but because he is not writing a treatise on civilian control of the military, his discussion focuses on the subordination of military operations to policy objectives, not who makes the policy. See CLAUSEWITZ, *supra* note 86, at 577–617. Notably, he does not rule out or dismiss the notion that the "statesman and soldier [can be] combined in one person" since in his time, and indeed in Prussia, that was normal. *Id.* at 608.

<sup>88</sup> CLAUSEWITZ, *supra* note 86, at 86–88; Binkley, *supra* note 87, at 253; COHEN, *supra* note 65, at 7–8.

<sup>89</sup> COHEN, *supra* note 65, at 7–8; CLAUSEWITZ, *supra* note 86, at 86–88; Binkley, *supra* note 87, at 253.

<sup>90</sup> GOERLITZ, *supra* note 26, at 77.

German General Staff appears prone to political entanglement and why a Congress, predisposed to being skeptical of military establishments, casts a leery eye. More presciently, it helps explain the German General Staff's role during the world wars and dispels some of the myth that the General Staff is ill-suited for a system where civilian control is preeminent.

ii. German Civil-Military Relations: The World Wars

Even with the military forming the foundation of the state and the general lack of divide between the military and civilian in the German system, the overarching sentiment among professional soldiers—those who did not abjure the military spirit—was that politics was to be avoided.<sup>91</sup> Hindsight being what it is, it is easy to judge and malign the intentions of the Schlieffen Plan,<sup>92</sup> the existence of which is commonly blamed for World War I (WWI).<sup>93</sup> This is particularly true from an American point of view where, as a matter of national psyche, the United States, as an insular nation, cannot geographically fathom complete encirclement—the chief threat to German

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<sup>91</sup> GOERLITZ, *supra* note 26, at 123 (“Political intrigue was alien to the average officer. Soldiers did their duty and obeyed orders. [Chief of Staff] Waldersee had largely lost the affection of the Army through his restless political ambition . . .”).

<sup>92</sup> Named for Count Alfred von Schlieffen, Chief of the General Staff 1891–1906, the plan was initially developed in the 1890s, and then subjected to the tinkering of his successors. GOERLITZ, *supra* note 26, at 132, 135; BARBARA W. TUCHMAN, *THE GUNS OF AUGUST 20* (1962). In the event of war, the plan called for using the bulk of German forces on a western front against France, with a small contingent on an eastern front to hold Russian forces at bay. TUCHMAN, *supra*, at 19. To do so, Germany would hook through neutral Belgium to attack France. *Id.* That both France and Russia would be engaged against Germany was a given due to the treaties in effect amongst the European powers. *Id.* at 18; *infra* note 95. With the myth that “mobilization meant war” being universally accepted in European capitals in both civilian and military circles, speed became a critical strategic factor for Germany. *See id.* at 19; S.L.A. MARSHALL, *WORLD WAR I* 21 (1971); HENRY KISSINGER, *DIPLOMACY* 202–04 (1994).

<sup>93</sup> GOERLITZ, *supra* note 26, at 49. The peace-time function of the General Staff was to prepare for the next war. To that end, the General Staff focused on “education and scientific training of future higher officers, mapped the entire realm, . . . and studied the armies of its neighbours. For this also, irrespective of the international situation prevailing at the time, it prepared plans both for attack and defence for use in any conceivable military eventuality.” *Id.* Further, Goerlitz points out that [s]uch activities . . . became the function of every general staff everywhere in the world. There seemed nothing sinister in this at the time. It was only when a certain tension between the great nation states which the age of revolution produced that this work of the General Staff appeared to become charged with a peculiar significance and a peculiar danger. *Id.* In essence, contingency planning—which nearly all agree is a wise course of conduct—was the norm prior to WWI, but in hindsight, because of the political situation and actors at that point in history, it proved fatal and serves as a scapegoat for the general diplomatic failure prior to WWI. Indeed, this type of planning is one of the primary statutory responsibilities of combatant commanders. *See* 10 U.S.C. § 164.

national security.<sup>94</sup> From a German point of view, however, the Schlieffen Plan was a matter of national viability and based in a national psychological concern about encirclement:

For 200 years, Germany had been the victim, not the instigator, of the wars of Europe. In the Thirty Years' War, the Germans had suffered casualties estimated as high as 30 percent of their entire population, and all the decisive battles of the dynastic wars of the eighteenth century and of the Napoleonic Wars were fought on German soil.<sup>95</sup>

Consequently, for Germany, the Schlieffen Plan was the result of intense study and intended to protect against a two-front war in the event of being invaded by both France and Russia—Germany's traditional antagonists.<sup>96</sup> While not endorsing this inflexible, determinist view of the inevitability of WWI, the German point of view and the context in which the Schlieffen Plan was developed and executed clarifies the role of the German General Staff within German civil-military relations.<sup>97</sup>

By the time German victory was out of reach in WWI, the government had all but ceased to function with power shifting mostly to the Army, and consequently, the General Staff.<sup>98</sup> As the war

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<sup>94</sup> ALFRED THAYER MAHAN, *THE INTEREST OF AMERICA IN SEA POWER, PRESENT & FUTURE* 90 (1897) (explaining that the United States' security situation is more comparable to Great Britain—insular in nature).

<sup>95</sup> KISSINGER, *supra* note 92, at 169. By way of diplomatic background: in 1839 England, France, Russia, Prussia, and Austria signed a treaty guaranteeing Belgium's neutrality and independence as a state. TUCHMAN, *supra* note 92, at 18. In 1870, England "secured a treaty from both [France and Prussia] providing that if either violated Belgian neutrality, England would cooperate with the other to the extent of defending Belgium." *Id.* at 19. In 1892, France and Russia joined a military alliance, agreeing to fight together against Germany. *Id.* at 18. And so, "Europe was a heap of swords piled as delicately as jackstraws; one could not be pulled out without moving the others." *Id.* This was due in no small part to Kaiser Wilhelm's "saber rattling and martial strutting . . . at once comic and frightening[, which] did more to spread alarm than the total of German armament programs." MARSHALL, *supra* note at 92, at 21. *See also* KISSINGER, *supra* note 92, at 168–201.

<sup>96</sup> GOERLITZ, *supra* note 26, at 130–32. It was also the result of the realist conservatism that predominates the military mind. HUNTINGTON, *supra* note 1, at 59–80.

<sup>97</sup> Much has been written, by much more eminent scholars, about whether WWI was inevitable as well as the tinderbox that was Europe leading up to the Great War. Perhaps Kissinger sums it up best: "For decades historians have been debating who must bear responsibility for the outbreak of the First World War. Yet no one country can be singled out for that mad dash to disaster. Each of the major powers contributed its quota of shortsightedness and irresponsibility . . ." KISSINGER, *supra* note 92, at 168. Such discussion is beyond the scope of this article. Accordingly, the briefest of overviews is given in order to focus more closely on the role that the German General Staff played: prudent contingency planning like that statutorily tasked to combatant commanders.

<sup>98</sup> GOERLITZ, *supra* note 26, at 167 ("Thanks to the fact that War Ministry and General Staff were now united in Falkenhayn's person, the Supreme Command . . . enjoyed enormous power. The Emperor was now confining himself to the part of a crowned observer, while the Chancellor in Berlin withdrew increasingly into the background. The Supreme

dragged on the institutionally slight civil-military distinctions that did exist eroded. This erosion, casting political responsibilities onto the General Staff, compelled the “military leaders to abandon their adherence to military ideals.”<sup>99</sup> Reflecting the military foundation of the state, “war and power became ends in themselves and the man of power consequently was viewed not as the servant of the state but rather the embodiment of the state.”<sup>100</sup> Simply put, as the government crumbled, those remaining institutions reverted to their foundation: power. “Oddly enough,” even with the military largely running the German government near the end of the war, Ludendorff, the Chief of the General Staff, “rejected the idea of an *actual* military dictatorship”—in the face of great societal pressure, predominantly from civilian governmental officials.<sup>101</sup> Indeed, despite governmental power devolving onto him, Ludendorff’s resistance to an actual military dictatorship became a bulwark for civil government and reached “the younger generation of Staff officers, [who] took it to heart, . . . accept[ing] the principle that a soldier’s training did not qualify him for politics and the assumption of political responsibility by the military was a mistake; in particular they came to distrust a military

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Command had not consciously sought this eminence; it had been thrust upon it because all other traditional sources of authority had proved themselves too weak for the occasion.”)

<sup>99</sup> HUNTINGTON, *supra* note 1, at 106. Whenever political responsibilities are deferred to the military (that is, when the military is stretched beyond its competency), the military’s apolitical and professional nature is undermined. This proved particularly harmful in Germany during WWI in the area domestic economic regulation. *Id.* at 107. Space does not permit, but the contrast is stark compared to U.S. domestic mobilization during WWII. *Compare id.* at 106–08 *with* 337–42.

<sup>100</sup> *Id.* at 105.

<sup>101</sup> GOERLITZ, *supra* note 26, at 183–84 (“Despite the fact that circumstances were almost tossing the thing[, a military dictatorship,] in his lap, Ludendorff persisted in treating the idea as a counsel of despair, and continued wistfully looking for his strong man, his “German Lloyd George” *in the ranks of the politicians and parliamentarians*. He could not find him. Meanwhile, by the strangest of paradoxes, parliamentarians . . . were becoming increasingly convinced that military dictatorship was the only hope of salvation, and were toasting Ludendorff as the German Cromwell.” (emphasis added)). The degradation and collapse of the German government near the end of the war—and its greater societal impacts—cannot be overstated. Wilhelm II abdicated and the monarchy ceased, ushering in the Weimar Republic—this critical context must not be overlooked since it represents significant and far-reaching societal changes in the midst of global war. Kissinger notes that after WWI, “the Astro-Hungarian Empire had disappeared; [and,] three of the four dynasties that entered the war—the German, the Austrian, and the Russian—were overthrown. Only the British royal house remained standing.” KISSINGER, *supra* note 92, at 217. Further, highlighting the transition in epoch and illustrating the impending global changes, upon abdicating, Wilhelm travelled to Holland and sought obligatory refuge of a fellow ‘Brother Knight’ of the Knights of the Order of Saint John, who, under the vows of the order, was required to provide “sanctuary.” MARSHALL, *supra* note 92, at 445.



dictatorship.”<sup>102</sup>

WWII, conversely, provides opposite examples. While grave concerns were raised during congressional testimony for the National Security Act of 1947 and at Nuremberg about the General Staff’s role and conduct during the war, the truth is that WWII really provides a cautionary example of what happens when civilian authorities force the military to be political: a partisan military and, perhaps even more dangerously, a militarized political party.<sup>103</sup>

It is a well-established historical fact that Hitler despised the General Staff and its “accursed objectivity.”<sup>104</sup> Tellingly, between 1934 and 1938 Hitler had only one brief conversation with the Chief of the General Staff.<sup>105</sup> The trend continued as Hitler created additional staffs mirroring the General Staff’s structure and functions with competing and overlapping responsibilities. Eventually the Luftwaffe, led by Hermann Göring, the S.A., and the S.S.—all highly partisan entities—each had their own staffs all competing for manpower and missions.<sup>106</sup> The effect of these various staffs was that “independent lines of command persisted out into the field” with the only overlap being “Hitler himself.”<sup>107</sup> Each of these additional institutions also attempted to subsume the army and the General Staff in order to better effectuate National Socialism.<sup>108</sup> Going even further, Hitler decided he must direct every aspect of the war—personally deciding issues of politics, strategy, and tactics.<sup>109</sup> Without disbanding the General Staff he created the *Oberkommando der Wehrmacht* (OKW) (Supreme Command of the Armed Forces), relegating the General Staff to transmitting orders to the regional

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<sup>102</sup> GOERLITZ, *supra* note 26, at 184.

<sup>103</sup> HUNTINGTON, *supra* note 1, at 113–22.

<sup>104</sup> *Id.* at 114; GOERLITZ, *supra* note 26, at 294, 321–22 (“Hitler had no use for a General Staff as Moltke had conceived it, for in such an organization he was bound to meet men whose judgment was not influenced by his reverberating monologues.”).

<sup>105</sup> GOERLITZ, *supra* note 26, at 294.

<sup>106</sup> *Id.* at 300, 304, and 323; HUNTINGTON, *supra* note 1, at 117–18.

<sup>107</sup> HUNTINGTON, *supra* note 1, at 118.

<sup>108</sup> *See, e.g.*, GOERLITZ, *supra* note 26, at 300, 317.

<sup>109</sup> IAN KERSHAW, HITLER, 1936–45: NEMESIS 452–53 (2000); HUNTINGTON, *supra* note 1, at 118–19 (“Even the transfer of a single regiment from one front to the other had to be approved by Hitler. . . . Hitler extended his range of decision down to the most detailed tactical level.”); GOERLITZ, *supra* note 26, at 423.

operational commanders.<sup>110</sup> Essentially a party organization, the OKW had the form, but never the enlightened substance of the General Staff and ultimately devolved the national command to a pre-Scharnhorst structure.<sup>111</sup>

While Hitler did not purge the army in the same sense that Stalin did in order to achieve ideological uniformity, he denuded it of its ability to effect military policy, made irrelevant key actors who opposed his plans of expansion before WWII became a global conflict, and took deliberate, intentional steps to politicize the army.<sup>112</sup> Indeed, throughout the war, “Hitler continued his efforts to rob the Army of its traditional character, which has always been essentially unpolitical, so that he could turn it into a political instrument of National Socialism.”<sup>113</sup> The effect of this onslaught of politicization inevitably isolated the General Staff, in no small part because of its refusal to take on partisan airs, and caused General Staff officers to drift towards the resistance.<sup>114</sup> Ultimately, it was officers of the apolitical General Staff that made up the majority of the resistance movement and those involved in the July 20, 1944 assassination attempt.<sup>115</sup> The attempted assassination obviously

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<sup>110</sup> GOERLITZ, *supra* note 26, at 317; HUNTINGTON, *supra* note 1, 118–19.

<sup>111</sup> GOERLITZ, *supra* note 26, at 320–22 (“Hitler turned it into an office that supplied him with information and circulated and supervised his orders. This created a most unhealthy atmosphere, half military, half political, which had no kind of relation to real General Staff work.”). Hitler’s hatred and treatment of the General Staff and its “accursed objectivity” is all the more ironic when, on the eve of D-Day, Goebbels lambasted the army leadership and lamented the lack of a Scharnhorst and a Gneisenau to reform the army. KERSHAW, *supra* note 109, at 644.

<sup>112</sup> See, e.g., KERSHAW, *supra* note 109, at 59–60, 94 (describing the now famous Blomberg-Fritsch affair); GOERLITZ, *supra* note 26, at 304. Hitler could not afford to purge the army the way Stalin did. Throughout the 1930s Hitler was trying expand the army; thus, increasing the number officers with partisans, in a sense drowning the professional military voice, had a similar effect as purging the professional officers would have had. By way of example, in the early 1930s there were only 42 general officers. By the time the war broke out, that number had risen to 400. GOERLITZ, *supra* note 26, at 299. Consequently, the “lack of trained General Staff officers was proving nothing short of disastrous, nor could the General Staff hope to maintain the high standard of requirements. . . .” *Id.* See also, HUNTINGTON, *supra* note 1, at 119–22.

<sup>113</sup> GOERLITZ, *supra* note 26, at 420; See HUNTINGTON, *supra* note 1, at 119–22.

<sup>114</sup> GOERLITZ, *supra* note 26, at 300, 304; KERSHAW, *supra* note 109, at 86.

<sup>115</sup> See, KERSHAW, *supra* note 109, at 86, 652–84; GOERLITZ, *supra* note 26, at 330–31, 427–40, 461–77. That there is some dissonance in highlighting General Staff officers’ coordination of a coup and assassination attempt while arguing that adopting a General Staff will improve, or at least not harm, American civil-military relations is not lost on the author. The point, however, is that these officers were in no small part rebelling against several years of politicization that had occurred due to the deliberate creation of partisan military and police forces in society. In essence, their goal was to save Germany from a partisan military that was destroying it and to reinstitute constitutional government. In many respects they belonged to a segment of society that found Hitler and the Nazi Party’s conduct to be morally reprehensible. GOERLITZ, *supra* note 26, at 432–33. Following the failed attempt, Hitler purged all tangentially involved in the plot, most being garroted. *Id.* at 477.

cemented Hitler's dislike for the General Staff and marked the end of that institution's already diminished functioning as part of the government.<sup>116</sup>

While the colloquial concern about a General Staff because of its role in WWI is its eagerness to go to war, the General Staff during WWII was the only German institution trying to avoid war.<sup>117</sup> Although the General Staff during WWI was central to the decision making process and near the end of the war actually running the government, the General Staff during WWII was continually isolated and ultimately made irrelevant.<sup>118</sup> The story of the end of the German General Staff is one in which the General Staff opposed Hitler to save the country; and with each opportunity Hitler disregarded and weakened the General Staff until it completely ceased to function.<sup>119</sup> While WWI does provide a cautionary lesson for civil military relations, WWII provides a cautionary lesson about single party domestic politics. While the German Army officers opposed being politicized, the civilian authority refused to allow them to be apolitical, yea, even requiring them to be partisan.

The German General Staff throughout WWII in many ways is like the final installment of Wagner's *Ring of the Nibelung*: everyone knew it would end in self-immolation, but the General Staff was powerless to prevent it—despite historically being viewed as gods. And so, the wake of Nazi destruction included not only catastrophic, incomprehensible human loss, but also at least one good institution. Understanding the cultural and historical environment of the General Staff's downfall and how that environment differs from the American system of civilian control clarifies that when the institution is used in a different context, the risks of abuse are altogether mitigated.

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<sup>116</sup> GOERLITZ, *supra* note 26, at 477.

<sup>117</sup> *Id.* at 310.

<sup>118</sup> *See, e.g.*, KERSHAW, *supra* note 109, at 102.

<sup>119</sup> HUNTINGTON, *supra* note 1, at 118–19.

### iii. The American System Contrasted

At the heart of the United States' constitutional form of government is the ideal of the republican form of government because it protects individual liberties by limiting governmental authority.<sup>120</sup> In Germany, the foundation of the state was power,<sup>121</sup> most obviously manifested in that group which "in Germany [is] most honored of all—generals."<sup>122</sup> It is illustrative that when we consider the American founding fathers, we think of individuals like Washington, Jefferson, and Adams: individuals whose life work focused on freedom and restraint. Whereas when we consider the founding of the German Empire and the consolidation of the German states, we think of Bismarck, whose name is forever associated with *Realpolitik* and the consolidation of power.<sup>123</sup>

These separate state foundations also lead to separate histories for their respective militaries. The history of the United States military is very distinct from the history of the United States—certainly the military played pivotal roles at various critical times in the country's history, but the military did not create the country.<sup>124</sup> This historical distinction creates a character distinction. The character of the American military is not given to *coups d'état*. Indeed, aside from the Civil War, the closest thing to a *coup d'état* in American history came from outside of the military and the response of the JCS when it was over was to decry the entire affair and reaffirm the political neutrality of the American military—despite political requests to the contrary.<sup>125</sup>

Another critical distinction is that there is an additional layer of civilian leadership between

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<sup>120</sup> U.S. Const. pmb., art. IV, § 4; HUNTINGTON, *supra* note 1, at 143.

<sup>121</sup> HENRY KISSINGER, *DIPLOMACY* 169 (1994) ("The reason German statesman were obsessed with naked power was that, in contrast to other nation-states, Germany did not possess any integrating philosophical framework. None of the ideals which had shaped the modern nation state in the rest of Europe was present in Bismarck's construction . . . . Bismarck's Reich was an artifice, being foremost a greater Prussia whose principal purpose was to increase its own power.").

<sup>122</sup> TAYLOR, *supra* note 76, at 9.

<sup>123</sup> KISSINGER, *supra* note 92, at 137.

<sup>124</sup> *See generally*, HUNTINGTON, *supra* note 1, at 143–63, 193–230.

<sup>125</sup> *See* Memorandum from the Joint Chiefs of Staff to the Joint Force, subject: Message to the Joint Force (12 Jan. 2021) [hereinafter Jan. 6 Memo], <https://www.jcs.mil/Portals/36/Documents/JCS%20Message%20to%20the%20Joint%20Force%20JAN%2012%202021.pdf>. *See also infra* note 130 and accompanying discussion.

the head of state and the senior military officer—the SecDef. As discussed, while the creation of the Minister of War was critical to controlling the military in the German system, the position was not necessarily filled by a civilian. In the American system, the SecDef, by statute, must be a civilian.<sup>126</sup> Now, there have been exceptions to this rule: General George C. Marshall was the third SecDef and received a congressional waiver to the requirement to be off active duty for ten years<sup>127</sup> prior to being appointed.<sup>128</sup> More recently, both the current and previous Administrations have requested (and received) waivers for Generals James N. Mattis and Lloyd J. Austin, respectively.<sup>129</sup> Whether

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<sup>126</sup> 10 U.S.C. § 113 requires the SecDef be “appointed from civilian life,” and further requires that “A person may not be appointed as SecDef within seven years after relief from active duty as a commissioned officer of a regular component of an armed force.” While today the seven-year prohibition is interpreted as an insurance of civilian control of the military, the historical record as to the reason for its inclusion points more towards compromise over Service parochialism. See Paula Thornhill, Commentary, *The Mysterious Origins of the Secretary of Defense ‘Exclusion’ Clause: Truman, Hoffman, & the Chowder Marines*, WAR ON THE ROCKS (Feb. 24, 2021), <https://warontherocks.com/2021/02/the-mysterious-origins-of-the-secretary-of-defense-exclusion-clause-truman-hoffman-and-the-chowder-marines/>. Regardless of the original reason for its inclusion, today it stands for civilian control and indeed the waiting period is prudent for that purpose. *Civilian Control of the Armed Forces*, supra note 2, at 12.

<sup>127</sup> While the National Security Act required a ten-year period, the National Defense Authorization Act for Fiscal Year 2008 lessened this requirement to seven years. See 10 U.S.C. § 113 supra note 84.

<sup>128</sup> Marshall had been “out of uniform” for three years and during that time had served as a special envoy, the Secretary of State, and in civilian employment with the American Red Cross. The Marshall appointment adds an additional layer of complexity in that he was a five-star General of the Army, which meant he was to remain on active duty for life, and so was never truly “out of uniform.” Consequently, Marshall was technically on active duty when he was nominated as SecDef. See ED CRAY, *GENERAL OF THE ARMY: GEORGE C. MARSHALL, SOLDIER AND STATESMAN* 685 (1990). To avoid any improprieties, Marshall had previously voluntarily retired and was removed from the active list when he was appointed as Secretary of State in 1947. *Id.* at 669. After he retired as Secretary of State, the Army restored him to the active list—a move that was not purely ceremonial and the reason why he was on active duty when nominated as SecDef. *Id.* It should also be noted, that despite the emergency of the Korean War when Marshall was appointed, his appointment was pre-Goldwater-Nichols, which significantly strengthened the role of the JCS generally and the CJCS in particular, meaning, the uniformed military’s role in advising the President at the time was less than under the current system. In essence, the appointment of a recently-“retired” general was less risky. In addition to the Korean War, there was the ancillary crises of General MacArthur’s recalcitrant antics reaching a fever pitch—a situation in which the sitting SecDef was complicit. *Id.* at 685. Most of the opposition to Marshall’s nomination was not based civil-military relations concerns, but rather was wrapped up in anti-communist McCarthyism since Marshall was blamed for “losing China” when he was the Secretary of State. *Id.* at 685–86. The waiver vote in the House of Representatives was 220 to 105 and 47 to 21 in the Senate. He was subsequently confirmed in the Senate by a vote of 57 to 11. *Id.* at 686.

<sup>129</sup> Mattis had been out of uniform for four years and during that time had entered academia. Worth noting, prior to Mattis’s appointment as SecDef, the Senate held hearings and brought in experts from both sides of the aisle to address the civil-military relations implications of his appointment, with both supporting his appointment. See *Civilian Control of the Armed Forces*, supra note 2. Comparisons were drawn to the national security emergency ongoing when Marshall was granted a waiver (the Korean War which China had just entered) and a forecasted impending national security “crisis.” *Id.* at 12. But cf. Eliot Cohen, Opinion, *This is No Job for a General*, THE ATLANTIC (December 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/12/no-job-general/617326/> (arguing that no such crisis currently exists justifying the nomination of Lloyd Austin). During the hearing the fact that Mattis had edited a book on civil-military relations was raised as indicative that he was a safe selection despite his recent uniformed service. Austin had likewise been out of uniform for four years and during that time he worked in private industry for a defense contractor. Likewise, for his confirmation, experts on civil-military relations testified regarding the impact it may have on civilian

the growing frequency of these waivers means an undermining of civilian control of the military remains to be seen, but the lessening degree of scrutiny does indicate there is less concern about the requirement that the SecDef come “from civilian life.”

Lastly, not unlike American political culture and its basis in Enlightenment thinking, “the culture in the military is so strongly one of subservience to civilian leadership” that the risk of a coup is insignificant “when weighed against the efficiencies that could be derived from” a General Staff.<sup>130</sup> This culture was strongly reaffirmed after both Lafayette Park last year and the events of January 6, 2021, when the JCS issued a strong statement condemning the event and by insinuation the sitting President’s support for the rioters.<sup>131</sup> The previously discussed notion of imputing the theory of civilian control onto Clausewitz’s idea that the political must direct the military provides strong intellectual support for this culture. In American thinking, political and civilian are synonymous, even if it was not for Clausewitz. This forms a strong safeguard in the American military mind that is predisposed to civilian control.

### *C. The Virtue of Professionalism: Parsing The Baby From The Bathwater*

One of the virtues of professionalism is subservience to civilian leadership. But even more so, it is a free, but disciplined, intellect in the officer corps, and the meritocracy that that builds—not blind obedience to orders. It is a professionally curated judgment.<sup>132</sup> Any militia can submit to

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control of the military. He was confirmed with only two contrary votes. There is certainly a lessening degree of concern regarding the requirement. Somewhat surprisingly, the chairman of the Senate Armed Services Committee opened the hearing saying he had “never been a real believer in the seven-year thing to start with.” See *Civilian Control of the Armed Forces: Hearing before the S. Comm. on Armed Servs.*, 117th Cong. (2021) (statement of James M. Inhofe, Senator, Chairman of the S. Comm. on Armed Servs.). But see Thornhill, *supra* note 126 (explaining that the original 10 year cooling off period was, like much of the National Security Act, a result of compromise around Service parochialism, and not the principle of civilian control of the military that it has come to represent).

<sup>130</sup> *Increasing Effectiveness of Military Operations: Hearing before the S. Comm. on Armed Servs.*, 114th Cong. 33 (2017) (statement of Admiral James G. Stavridis, U.S. Navy, retired, Dean of the Fletcher Sch. of Law and Diplomacy, Tufts Univ. and Former Commander of U.S. European Command and U.S. Southern Command).

<sup>131</sup> See Jan. 6 Memo *supra* note 125.

<sup>132</sup> WHITE, *supra* note 27, at xii.

civilian control, but that does not make it a professional fighting force.<sup>133</sup> Professionalism, much like Enlightenment, is to emerge from “self-imposed nonage,” and to recognize the requirements of maturity.<sup>134</sup> What is evident from a short review of the General Staff’s Enlightenment fountainhead is that the same forces that brought it into being are those that animated the American Founding Fathers just a few decades prior. While there have been instances of officers abjuring the military spirit and involving themselves in politics in a way that undermines civilian control; they are outlying instances and not the overarching theme of the history of the General Staff.<sup>135</sup> This is because professionalism generally prevails. Furthermore, those instances largely represent individual personalities abjuring professionalism—something that could happen in any system or structure, the Joint Staff included.

In sum, professionalism is a necessary prerequisite for an apolitical and non-partisan military. Generally speaking, prior to the age of the professional military, armies served individual or partisan interests rather than the nation-state. Whereas professionalism engenders an apolitical and non-partisan military, the objectivity and meritocracy that a General Staff imposes on military institutions breeds professionalism. That professionalism results in an apolitical and non-partisan military. A professional military is more than just a standing military. Prussia had standing armies long before they became professional, as did the United States. They became professional only when the General Staff required the specialized level of education and expertise, responsibility to society, and corporateness. Rejecting the enlightened root of military professionalism risks losing the apolitical

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<sup>133</sup> Take for example the Freikorps that developed around Hitler and ultimately became the Nazi Party’s paramilitary organizations. KERSHAW, *supra* note 109, at 258, 790. They began as reserve-military organizations and were totally subservient to the civilian leadership of Adolf Hitler. GOERLITZ, *supra* note 26, at 211–12, 219–21. It bears noting here that while the object of the military profession is the direction and control of organizations the purpose of which is to commit state-sanctioned violence, the reverse is not true: efficiency in combat or the ability to manage violence effectively does not inherently denote professionalism.

<sup>134</sup> WHITE, *supra* note 2745, at xii (quoting Kant).

<sup>135</sup> See, e.g., the discussion *supra* notes 83 and 91 (Waldersee), or *infra* note 248 (MacArthur).

and nonpartisan military that results.

### III. THE JOINT STAFF: DESIRING UNITY, SETTling FOR “JOINTNESS”

The Joint Staff is not a General Staff—explicitly so: “The Joint Staff shall not operate or be organized as an overall Armed Forces General Staff and shall have no executive authority.”<sup>136</sup> And the CJCS is not in the chain of command.<sup>137</sup> This may come as a surprise since in the U.S. national security structure, the Joint Staff largely fills the role one would expect a General Staff to fill, and yet it is statutorily without authority.<sup>138</sup> The JCS was informally created during WWII to parallel the British General Staff and make combined decisions regarding allied strategy and execution of the war effort.<sup>139</sup> During the war, the JCS acted as a high command.<sup>140</sup> The JCS structure was formalized in the National Security Act, but its role and function changed from that of de facto high command to strategic planning and military advice.<sup>141</sup> This structure worked sufficiently for most of the Cold War, but after United States focus shifted from the Soviet Union, the lack of executive authority in the Joint Staff became more problematic operationally.

#### *A. The National Security Act of 1947: Unity in National Security Execution*

Following WWII, Congress formalized the ad hoc mechanisms developed during the war and created several new organizations in the National Security Act of 1947.<sup>142</sup> In 1949 the Act was amended to create the CJCS, and then in 1958 the DoD Reorganization Act refined some of the National Security Act’s innovations and provided the national security structure that existed until

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<sup>136</sup> See 10 U.S.C. §§ 155(e), 163.

<sup>137</sup> 10 U.S.C. § 152(c) (“The Chairman . . . outranks all other officers of the armed forces. However, he may not exercise military command over the Joint Chiefs of Staff or any of the armed forces.”)

<sup>138</sup> 10 U.S.C. § 155(e).

<sup>139</sup> REARDEN, COUNCIL OF WAR, *supra* note 15, at 1–2.

<sup>140</sup> *Id.* at 68.

<sup>141</sup> *Id.*

<sup>142</sup> LEDERMAN, *supra* note 14, at 16–17.



1986.<sup>143</sup> Together, they created the JCS, the CJCS, and the Joint Staff to support them.<sup>144</sup> The JCS was an advisory body to provide consensus military advice.<sup>145</sup> This proved problematic for several reasons. The CJCS had no real authority: he ran the meetings and presented the consensus views of the JCS to the President in the form of military advice.<sup>146</sup> While the Unified Combatant Commands were created, there was certainly not unity in the national security establishment and the military advice to the President was subpar at best.<sup>147</sup> In many respects, despite the statutory prohibition and the weak authority of the Joint Staff, this was a logical step in the development and acceptance of a National General Staff.<sup>148</sup> Furthermore, while it was the right solution at the time, U.S. national security interests soon outgrew the construct making reform a necessity.

Highlighting some of the fault lines of this structure, just two administrations later, the role of the JCS was completely undermined.<sup>149</sup> After Kennedy was elected in 1960, and despite the creation of the CJCS and the statutory role of the JCS, President Kennedy still appointed a “Military Representative to the President” with whom he agreed politically.<sup>150</sup> In doing so, he recalled the

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<sup>143</sup> *Id.* at 18–21. While the changes in the DoD Reorganization Act were important, it was not a paradigm shift.

<sup>144</sup> REARDEN, COUNCIL OF WAR, *supra* note 16, at 68; LEDERMAN, *supra* note 14, at 18–21.

<sup>145</sup> REARDEN, THE ROLE AND INFLUENCE OF THE CHAIRMAN, *supra* note 5, at 7.

<sup>146</sup> LEDERMAN, *supra* note 14, at 19. Indeed, the CJCS did not vote at JCS meetings until the DoD Reorganization Act of 1958. *Id.* at 22.

<sup>147</sup> LEDERMAN, *supra* note 14, at 24–31 (chronicling the JCS’s paralysis due to Service role obligations, dominance by Service headquarter staffs, and marginalization); H.R. MCMASTER, DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM 6–7, 27–28, 261 (1998); THOMAS E. RICKS, THE GENERALS: AMERICAN MILITARY COMMAND FROM WORLD WAR II TO TODAY 253–59 (2012); REARDEN, THE ROLE AND INFLUENCE OF THE CHAIRMAN, *supra* note 5, at 25–26.

<sup>148</sup> There is, admittedly, some dissonance between the prohibition of acting as a General Staff and the National Security Act representing a step in the direction of a General Staff. This dissonance is resolved by the fact that the JCS represents the first time in American history that a centralized military planning organization encompassed all of the Military Services, vice prior to WWII when only the Army used a General Staff model.

<sup>149</sup> Truly, if one considers the fact that this structure was not solidified until the DoD Reorganization Act of 1958, then the fault lines in the structure were revealed immediately when Kennedy was elected in 1960.

<sup>150</sup> MCMASTER, *supra* note 147, at 10–11. Kennedy created this position, in part, because he was dissatisfied with the advice he received from the JCS during the Bay of Pigs Operation. Further, Kennedy wanted the opposite of what Marshall was when he was Chief of Staff, and Taylor was exactly that. He wanted a general of his generation with whom he could have a friendly relationship, not a formal one. *Id.* at 15; RICKS, *supra* note 147, at 219. For a description of Marshall’s formal, professional relationship with FDR, see, DAVID L. ROLL, GEORGE MARSHALL: DEFENDER OF THE REPUBLIC 121, 130, 207 (2019) (“Marshall was always all-business, avoiding small talk and social intimacy.”). It should also be noted that this was not entirely unprecedented. During WWII, FDR recalled Admiral Leahy from retirement to act as his “Chief of Staff to the Commander in Chief.” REARDEN, COUNCIL OF WAR, *supra* note 16, at 213, 538. While

then-retired General Maxwell Taylor to fill the position because he agreed with Taylor's criticisms of the Eisenhower Administration's policies.<sup>151</sup> On paper, the Military Representative was "not interposed between the President and any of his statutory advisors or advisory bodies such as the SecDef, JCS or the NSC," and was to be merely a liaison officer.<sup>152</sup> But in reality, the arrangement was completely dysfunctional and all military advice had to go through Taylor's filter.<sup>153</sup> Further, in October 1962, ignoring the traditional rotation of the chairmanship between the services, Kennedy replaced the CJCS with Taylor, in essence imposing an overtly political choice into what was supposed to be "an organization designed by law to give impartial military advice to the commander in chief."<sup>154</sup>

Not only was the legally charged advisory body thus undermined by the President's appointment of a separate military advisor, but it was structurally flawed within. The JCS, as initially created, was intended to advise based on consensus with the idea that the crucible of each Service's chief providing diverse points of view and building sound military advice.<sup>155</sup> In practice, the advice rendered was stillborn—subjected to the both the defects that all counsels of war fall prey to and plagued by the same inter-service rivalries that the National Security Act debates had focused on.<sup>156</sup>

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not unprecedented, the precedent preceded the statutory creation of the JCS, so the practice undermined the congressionally mandated system.

<sup>151</sup> MCMASTER, *supra* note 147, at 12. Taylor had retired as the Chief of Staff of the Army over disagreements with Eisenhower's defense policies and subsequently wrote a memoir, *The Uncertain Trumpet*. See RICKS, *supra* note 144, at 219.

<sup>152</sup> MCMASTER, *supra* note 147, at 14.

<sup>153</sup> *Id.* at 16–17, 22–23. *But cf.*, REARDEN, COUNCIL OF WAR, *supra* note 16, at 213 (describing Taylor as more of a difficulty to the SecDef than the JCS and capturing some of the differing views on Taylor's role).

<sup>154</sup> MCMASTER, *supra* note 147, at 22. Worth noting, "General Taylor was the only military officer included in the deliberations of President Kennedy's advisers during the Cuban Missile Crisis of October 1962, and President Kennedy did not consult with the chiefs regarding the proposed naval quarantine until after he had decided to institute the quarantine." LEDERMAN, *supra* note 14, at 25–26. That is, one of the greatest nuclear crises the United States had faced and the statutory military advisers (the JCS) were not in the room or even consulted. Shortly thereafter, Kennedy completed his overhaul of the JCS, appointing "officers more to his liking." *Id.* at 26; MCMASTER, *supra* note 147, at 22. Upon retiring a second time, Taylor, returning to an overtly political role, was immediately appointed as the ambassador to South Vietnam. REARDEN, THE ROLE AND INFLUENCE OF THE CHAIRMAN, *supra* note 5, at 24.

<sup>155</sup> LEDERMAN, *supra* note 14, at 17. The National Security Act of 1947 charged the JCS collectively as the "principal military advisors to the President and the Secretary of Defense." *Id.*

<sup>156</sup> *See, e.g.*, REARDAN, COUNCIL OF WAR, *supra* note 16, at 80, 173–74 ("Quarreling over Service functions and the allocation of resources continued to hobble their ability to address problems of a cross-Service nature and to present consensus recommendations. Rarely did the JCS speak with a single voice on key issues of national strategy and military

As the war progressed, McNamara and Johnson continued the Kennedy approach of marginalizing the JCS, consulting them only after decisions were made.<sup>157</sup> Furthermore, the fact that the Service Chiefs fulfilled two roles in the national defense structure (leading their respective services and members of the JCS), created a conflict of interest whereby military advice and consensus was leveraged by civilians against unrelated budgetary concessions.<sup>158</sup>

Despite these abuses, much good came from the National Security Act of 1947. The creation of the CIA, the Air Force, the JCS, and Joint Staff were all sound and needed developments at the time. While the point of this article is to demonstrate that the Joint Staff should be matured into a General Staff, its birth in 1947 was not the time to do that. Indeed, creating a General Staff at the same time as the new civilian SecDef may have actually undermined civilian control due to the weakness of the secretariat.<sup>159</sup> The prevailing view at the time was that the civilian secretary's role was administrative—not strategic or operational.<sup>160</sup> Further, WWII wrought an extreme growth of military control of traditionally civilian functions in society.<sup>161</sup> While FDR was an involved Executive, “so far as the major decisions in policy and strategy were concerned, the military ran the

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policy. Despite extensive organizational and administrative reforms introduced in 1958, the JCS system was slow to embrace more efficient and effective ways. While there was some progress toward improving operational planning, clashes and disagreements among the chiefs persisted. Frustrated, the President looked elsewhere for advice in addressing key politico-military problems.”); MCMASTER, *supra* note 147, at 137–54.

<sup>157</sup> LEDERMAN, *supra* note 14, at 26.

<sup>158</sup> *Id.* This conflict of interest was exploited by McNamara, who played the various Chiefs off against each other, the effect of which was to “suppress their individual misgivings about U.S. policy” in Vietnam. *Id.* at 26–27. While the Service Chiefs still fill both roles today, the conflict of interest has not been leveraged in the same way since largely because Goldwater-Nichols made the CJCS individually the senior military advisor.

<sup>159</sup> LEDERMAN, *supra* note 14, at 17 (“[G]iven [the SecDef’s,] lack of statutory powers, required him to foster compromises among the services and service secretaries. In summary, he merely had the ‘power to persuade’ rather than the power to order compliance.”). The tensions described *infra* note 226 created by the Service Chiefs’ dual-hatted nature were particularly poignant during the early years of the SecDef. *Id.* at 17–19. Initially, the SecDef was only authorized “a support staff limited to three special assistants;” the robust staff that is the modern Office of the Secretary of Defense (OSD) would come later. REARDAN, COUNCIL OF WAR, *supra* note 16, at 68; LEDERMAN, *supra* note 14, at 19. Further, underscoring the weakness of civilian influence on military policy in the years immediately following WWII, “the Chiefs made it clear that they wanted to perpetuate” their wartime power boon. HUNTINGTON, *supra* note 1, at 336. See also *infra* note 162 describing the JCS’s increased policy-making role and civilian abdication.

<sup>160</sup> HUNTINGTON, *supra* note 1, at 336.

<sup>161</sup> *Id.* at 328, 332.

war.”<sup>162</sup> In light of that post-WWII context, creating a General Staff in 1947 would have been ill-timed and, because of the weakness of the SecDef position, may have undermined civilian control. The U.S. national security institutions were simply not mature enough at that point in history. The CJCS and Joint Staff were appropriate for the time as created, but as Vietnam and subsequent events would demonstrate, the country’s security needs had outgrown the structure.

*B. The Goldwater-Nichols Act of 1986: Settling for “Jointness”*

After the JCS’s sidelined performance during Vietnam and a series of debacles and fiascoes in Grenada, Lebanon, and Operation Eagle Claw, Congress again revisited the national security structure in the 1980s.<sup>163</sup> Congress doubled-down on “jointness” in the Goldwater-Nichols Act by minimizing the influence of the services but still requiring them to work jointly.<sup>164</sup>

The Act further clarified the chain of command by clearly articulating the command authority of combatant commanders as distinguished from what remained of the operational role of the service chiefs.<sup>165</sup> Significantly, the Goldwater-Nichols Act eliminated the requirement for consensus among the JCS and elevated the CJCS as the sole “principal military adviser.”<sup>166</sup>

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<sup>162</sup> HUNTINGTON, *supra* note 1, at 315. This disposition of deference was not just from FDR either. “A not unrepresentative Representative expressed congressional acquiescence when he said: ‘I am taking the word of the General Staff of the War Department, the people who are running this show.’” *Id.* at 317. What Huntington described as “civilian abdication” on the part of the American civilian leadership contrasts starkly with their British counterparts. *Id.* at 317, 328–29. While the British Chiefs supported Churchill’s policies because it was their duty, “the American chiefs, on the other hand, supported their government’s policies, because as political directors of the war, they played a major role in formulating them.” *Id.* at 328–29. See also, COHEN, *supra* note 65, at 95–133, for a description of Churchill’s nuanced involvement with and direction of the British military. It is also worth noting, though space does not permit further exploration, that while the military had significant influence in the economic and domestic wartime planning during WWII, it resembled more of a balanced approach between military and civilian influences. See HUNTINGTON, *supra* note 1, at 337–44.

<sup>163</sup> REARDEN, COUNCIL OF WAR, *supra* note 16, at 414; LEDERMAN, *supra* note 14, at 65–68. Significant changes in the DoD Reorganization Act of 1958 included adding the Commandant of the Marine Corps to the JCS (though not as a voting member until 1978) and most importantly giving the CJCS a vote on the advice. LEDERMAN, *supra* note 14, at 20–24. Also worth noting, the DoD Reorganization Act is when the General Staff prohibition was explicitly included. *Id.* at 22.

<sup>164</sup> LEDERMAN, *supra* note 14, at 81–84.

<sup>165</sup> *Id.* at 76–80.

<sup>166</sup> *Id.* at 86. Elevating the CJCS above the other JCS members not only in rank, but now also as the sole principal military adviser is yet another step towards a General Staff.

Nonetheless, the act does not prevent the problems that arose in Vietnam. Indeed, the “extent to which the Act gives the President and SecDef discretion to opt out of the Act’s provisions” imputes an inherent vagueness that creates the potential for sidelining the statutorily outlined processes and subjecting the CJCS to more partisan pressure.<sup>167</sup> An additional layer of ambiguity in the CJCS’s role as adviser centers on whether he must advocate for the combatant commands or “make dispassionate recommendations to civilian decisionmakers regarding the choice between the CINCs’ and the services’ perspectives.”<sup>168</sup> As has happened previously, this provides an opportunity to cut the services out of the advisory role entirely,<sup>169</sup> and it also leaves the combatant commanders to convey their needs via the vicar of the CJCS, who may have different interests since he is not in the chain of command and may not have the same operational understanding since he is geographically distant. Further complicating the CJCS’s role, their term ends in October of odd numbered years, creating a situation where newly elected Presidents select new chairmen increasing the likelihood of partisan loyalty triumphing over military professionalism, making the ambiguity of the role all the more dangerous.<sup>170</sup>

In sum, the major defense reforms form logical steps towards a General Staff by creating a centralized planning advisory body for the armed forces and increasingly narrowing the role of the CJCS towards that of a Chief of Staff. These half-measures, though right at the times, have cumulatively injected a degree of ambiguity that actually poses risks to civilian control; as Eisenhower acknowledged, “when military responsibility is unclear, civilian control is uncertain.”<sup>171</sup>

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<sup>167</sup> *Id.* at 88. Indeed, “Congress’s vacillation between mandating certain organizational structures for DOD policymaking can be traced to the conflict between the desire for a governmental separation of powers . . . and the fact that the activities of the branches frequently overlap.” *Id.* at 89. “In summary, the Act represents a delicate balance between Congress mandating organizational structures yet providing discretion to the president and secretary of defense to employ the chairman and designate his responsibilities.” *Id.* at 90. See Section IV, *infra*, for further discussion of this tension.

<sup>168</sup> *Id.* at 90. CINC, commander in chief, is a term formerly used for combatant commanders.

<sup>169</sup> *See, e.g., id.* at 91. See also the discussion *infra* note 231.

<sup>170</sup> *Id.* at 92.

<sup>171</sup> *Id.* at 21.

At a minimum, tying the CJCS's role, responsibilities, and terms to partisan interests piles risk on the inherent ambiguity of the position that unnecessarily puts civilian control in a perpetually perilous balance. Thus, the paradox of the National Security and Goldwater-Nichols Acts is that out of an “emotional” fear of creating a General Staff, something far more nebulous and influential was erected in its place.<sup>172</sup>

#### IV. THE PREMINENCE OF CIVILIAN CONTROL: IN OUR BLOOD

Civilian control of the military is preeminently fundamental to the American republic, predating the Constitution of 1789. Indeed, one need not look far to find it written in our blood. The Declaration of Independence includes six charges against King George III relating to military dominance of colonial civilian authorities.<sup>173</sup> The most explicit of which for “affect[ing] to render the Military independent of and superior to the Civil Power.”<sup>174</sup> The Articles of Confederation, following the Greco-Roman tradition, as the Founders were wont to do, vested the military powers of the United States “in Congress assembled.”<sup>175</sup> Indeed, even what may be considered “purely military” decisions such as where the Army may march were vested “in Congress assembled.”<sup>176</sup> When George Washington was subsequently commissioned by the Continental Congress he was

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<sup>172</sup> *Id.* at 60.

<sup>173</sup> “He has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures.” DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776). “He has affected to render the Military independent of and superior to the Civil Power.” *Id.* at para. 14. “For quartering large Bodies of Armed Troops among us[.]” *Id.* at para. 15. “For protecting them[, the quartered troops], by mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States[.]” *Id.* “He is, at this Time, transporting large Armies of foreign Mercenaries to compleat the Works of Death, Desolation, and Tyranny, already begun with circumstances of Cruelty and Perfidy, scarcely paralleled in the most barbarous Ages, and totally unworthy the Head of a civilized nation.” *Id.* at para. 18. “He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the Executioners of their Friends and Brethren, or to fall themselves by their Hands.” *Id.* at para. 19.

<sup>174</sup> *Id.* at para. 14.

<sup>175</sup> *See generally*, ARTICLES OF CONFEDERATION of 1781. Truly, the Articles of Confederation vested all executive power “in Congress Assembled,” such that the legislature was the Executive; fatally so. For a Greek example of determining strategy by representative vote, *see*, HERODOTUS, THE HISTORY OF HERODOTUS 206–07 (Robert Maynard Hutchins et al. eds., George Rawlinson trans., Encyc. Britannica 1952) (c. 425 B.C.E.).

<sup>176</sup> ARTICLES OF CONFEDERATION of 1781, at art. IX, para. 5.

directed, “punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United Colonies, or committee of Congress.”<sup>177</sup>

Likewise following the Greco-Roman tradition, it was to the Continental Congress that General Washington famously resigned his commission.<sup>178</sup>

#### *A. Constitutional Structure: The Balance Between Civilians*

When the Articles of Confederation proved ineffectual and a new constitution was considered, that civilians would control was never a question—particularly in light of how Washington entrenched deference to civilian control into American military culture. Rather, the debate was which civilians would have what controls, and so, the powers were divided. So much so that when it comes to control of the military, the separation of powers doctrine is at its zenith. For most constitutional divisions of power, the subject power is placed wholly with one branch of government or another. Take the power to levy taxes, for example: it is solely and explicitly a legislative power.<sup>179</sup> The military powers, on the other hand, are not wholly within one branch of government. Instead, the separation of powers doctrine has subdivided further the notion of civilian control. It is this application of the separation of powers that has created the most frequent tensions

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<sup>177</sup> JOURNALS OF THE CONTINENTAL CONGRESS 1774–1779, vol. II at 96–97, [https://avalon.law.yale.edu/18th\\_century/contcong\\_06-17-75.asp](https://avalon.law.yale.edu/18th_century/contcong_06-17-75.asp).

<sup>178</sup> JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 297–98 (Robert Faulkner & Paul Carrese, eds., Liberty Fund, 2000) (1838). In a speech evoking Cincinnatus before the Continental Congress on December 23, 1783, Washington cemented the concept of civilian control of the military in the American national psyche with the words, “Having now finished the work assigned me, I retire from the great theatre of Action; and bidding an Affectionate farewell to this August body under whose orders I have so long acted, I here offer my Commission, and take my leave of all the employments of public life.” *Id.* at 480.

<sup>179</sup> U.S. CONST. art. I, §§ 7–8. While the President has the veto, and ostensibly could veto any tax bills, the veto is a procedural power that can be applied to any of the various legislative powers. It is not a substantive power. This is implicit in *Clinton v. City of New York*, 524 U.S. 417, 439 (1997) (finding the line-item veto unconstitutional and explaining that the President may return an entire bill, but not alter the substance of it). Thus, the veto power is a matter of checks and balances against the Legislature, not a matter of separation of powers. *See*, THE FEDERALIST NO. 73 (Alexander Hamilton) (discussing the veto as a counter to the legislative propensity to intrude upon the rights of other departments).

in civil-military relations.<sup>180</sup> While the new Constitution placed the military authority of the United States unquestioningly in civilian hands, the debate has focused almost exclusively on what the proper balance of authority is between different civilian entities, and not on the balance between military and civilians. Consequently, the military, uniquely, is not by nature a purely executive department as other federal agencies are—despite statutory language structuring the DoD as an “executive department”—it is by character a national department.<sup>181</sup>

### i. Congressional Civilian Control

Congressional civilian control of the military comes in several very specific constitutional grants that, taken together, have far reaching strategic consequences. “The Congress shall have Power To lay and collect taxes . . . to pay the Debts and provide for the common Defence;” “To declare War, grant Letters of Marque and Reprisal, and make rules concerning Captures on Land and Water;” “To raise and support Armies;” “To provide and maintain a Navy;” “To make Rules for the Government and Regulation of the land and naval Forces;” “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;” and “To provide for organizing, arming, and disciplining the Militia.”<sup>182</sup> The Senate has the additional power

<sup>180</sup> HUNTINGTON, *supra* note 1, at 177 (“The separation of powers is a perpetual invitation, if not an irresistible force, drawing military leaders into political conflict.”). *See generally, id.* at 163–92.

<sup>181</sup> *See* 10 U.S.C. § 111 (“The Department of Defense is an executive department of the United States.”). *But cf.* Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 Hous. L. Rev. 553, 560 (2007) (arguing that while the military is an executive department conceptualizing it as a strictly executive agency diminishes the constitutional balance of power between the Congress and Executive). Indeed, classifying the military as a purely executive department and congressional treatment of it as such, “disregards the textual and structural checks and balances created by the Framers of the Constitution to ensure that no branch of government gained too much control over the nation’s armed forces.” *Id.* at 560. The somewhat uncomfortable corollary to this conclusion is that when the military acts as a purely executive agency, it violates its oath to the Constitution. Thus, the statutory language, when read in light of the constitutional framework, is a pragmatic choice to provide efficacy to the Commander in Chief clause. That alone, however, does not change the conceptual nature of the military as a national agency subject to both the Legislative and Executive branches of government. Justice Jackson noted the tension between theory and practicality in *Youngstown Sheet & Tube Co.*: “a century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of the equation. They largely cancel each other out.” *Youngstown Sheet and Tube Co. et al. v. Sawyer*, 343 U.S. 579, 634–45 (1952) (Jackson, J., concurring).

<sup>182</sup> U.S. CONST. art. I, § 8.



of giving (or withholding) advice and consent to Presidential appointments of military officers.<sup>183</sup>

Lastly, there is the power of the purse, which Congress uses to direct and limit Executive Branch action.<sup>184</sup> Together, these powers confer the power of oversight—by which Congress supervises the military.

As is plain, the congressional military powers are clear and explicit. There is little debate regarding most of them. The congressional power garnering the most attention is the power to declare war, as it chafes against the President’s authority as Commander in Chief. While the congressional civilian controls are frequently described with the catch-phrase, “the power of the purse,” in reality, they are strategic authorities forming the long-arm of American military power by reaching beyond the four-year election cycle—all of which require military advice.<sup>185</sup>

## ii. Executive Civilian Control

While congressional civilian control is clearly enumerated and fairly limited, executive civilian control is vague and nebulous. The Constitution provides that “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .”<sup>186</sup> “[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States . . . .”<sup>187</sup> “[H]e shall take Care that the Laws be faithfully executed, and shall Commission all Officers of the United States.”<sup>188</sup>

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<sup>183</sup> U.S. CONST. art. II, § 2.

<sup>184</sup> U.S. CONST. art. II, § 9 (“No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”).

<sup>185</sup> Whether Congress actually receives the necessary military advice is another question altogether. See Corn & Jensen, *supra* note 181 (arguing that not only is it necessary, but also that there is no current institutional structure to provide military advice to Congress sufficient to enable effective exercise of its military powers).

<sup>186</sup> U.S. CONST. art. II, § 2.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* There are two other constitutional provisions pertaining to national security, but they impose restrictions on the government and consequently are not powers of the government. Namely, Amendments II and III prohibiting the

It is the Commander in Chief clause that has raised the most debate between the civilian entities that exercise control over the military. As mentioned, there is political and legal chaffing between the Commander in Chief clause and the power to declare war. This friction is by design.<sup>189</sup> The conflict between these two clauses demonstrates how the American military by its constitutional nature has been structurally politicized because of the separation of military powers. In what has become a “primer on constitutional interpretation and a reservoir of quotation,”<sup>190</sup> Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube* provides a framework for analyzing this friction.<sup>191</sup>

*Youngstown Sheet & Tube* analyzes uses of Presidential power based on the level of congressional consent. On one end of the spectrum, the President’s authority is at its maximum when the President acts pursuant to a congressional authorization.<sup>192</sup> When the President acts in the absence of a congressional authorization, the President can only rely on independent executive powers.<sup>193</sup> Actions taken pursuant to concurrent powers fall into a “zone of twilight” subject to interpretations of “congressional inertia, indifference or quiescence”—something of a middle category.<sup>194</sup> On the other end of the spectrum, the President’s authority is at its “lowest ebb” when the President acts contrary to the “express or implied will of Congress,” and in so doing, risks the “equilibrium established by our constitutional system.”<sup>195</sup>

It is in Jackson’s middle category, the “zone of twilight,” that the military finds itself time and again because of the shared military powers under the Constitution. What the *Youngstown Sheet &*

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infringement of the right to keep and bear arms and prohibiting the quartering of soldiers except in certain circumstances. U.S. CONST. amends. II–III.

<sup>189</sup> See, e.g., James P. Terry, *The President as Commander in Chief*, 7 AVE MARIA L. REV. 391 (2009); BAKER, *supra* note 4, at 33–46; THE FEDERALIST NOS. 26, 28 (Alexander Hamilton); *Youngstown Sheet and Tube*, *supra* note 181.

<sup>190</sup> BAKER, *supra* note 4, at 41.

<sup>191</sup> *Youngstown Sheet & Tube*, *supra* note 181, at 635–37 (Jackson, J., concurring); *Hamdan v. Rumsfeld et al.*, 548 U.S. 557, 593 n.23 (2006) (adopting the framework from Jackson’s concurrence).

<sup>192</sup> *Youngstown Sheet & Tube*, *supra* note 181, at 635.

<sup>193</sup> *Id.* at 637.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 637–38.

*Tube* opinions demonstrate is that in order for the military powers to be faithfully and soundly executed, it takes both the Executive and Legislative Branches of government. “Stalemates may occur when emergencies mount and the Nation suffers for lack of *harmonious, reciprocal action between the White House and Capitol Hill*. That is a risk inherent in our system of separation of powers.”<sup>196</sup> It is precisely because it takes both branches of government that the military frequently finds itself institutionally caught in the middle of political disagreements about whether to use force or how much defense spending is appropriate—it is built into the structure of our government.

### iii. Separation of Military Powers Creates Structural Politicization

The notion that the separation of powers doctrine creates military responsibilities to both the Legislative and Executive Branches is not new. “This shared authority paradigm imposes upon military leaders both a right and duty to provide candid and complete information to the Executive and Legislative Branches on matters within their spheres of constitutional competence.”<sup>197</sup> But it is plain to see how this type of system can inject tension into civil-military relations, for truly, “no man can serve two masters: for either he will hate the one and love the other; or else he will hold to the one, and despise the other.”<sup>198</sup> This tension, however, is largely due to the commonplace view that the military is an executive agency, an assumption that relies on a false premise<sup>199</sup> that, in turn, creates a false dichotomy (Congress versus President).

The inherency of this tension in our civil-military system is the reason the military swears fidelity to the Constitution, and not a specific branch of government.<sup>200</sup> Thus, the military serves but

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<sup>196</sup> *Id.* at 633 (Douglas, J., concurring) (emphasis added).

<sup>197</sup> Corn & Jensen, *supra* note 181, at 557.

<sup>198</sup> *Matthew* 6:24 (King James).

<sup>199</sup> That is, that because the President is Commander in Chief, the military is a purely executive agency.

<sup>200</sup> U.S. Const., art VI (“all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”); 5 U.S.C. § 3331 (“An individual . . . appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: ‘I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and

one master: the Constitution. This tension, and its true source, is not necessarily unhealthy; despite the inefficiencies it creates.<sup>201</sup> While not new, since the military resides squarely in Jackson's "zone of twilight, both the military and the civilians exercising control must be mindful of it. The real danger is a collateral consequence of having a two-party system. For in a system with inherent tension derived from its structure, narrow is the way that leads to constitutional service and professionalism, but broad is the gate that leads to partisanship. The real danger in the inherent political-ness of our system is not that the military is involved in the political process—our system assumes that.<sup>202</sup> The real danger to civilian control is a partisan military—loyalty to, or even mere preference for, a political party—because, as history shows, that leads to *coups d'état* to bring a different political party to power or, as is more frequently the case, to change the form of government to a military dictatorship. As discussed previously, the assumption that a General Staff tends to create a partisan military is not supported by the historical record.<sup>203</sup> Rather, as seen during WWII, partisanship was imposed on the military—with the General Staff standing resolutely against party.<sup>204</sup>

To illustrate the tension unique to the military simplistically: orders given by the Commander

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domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”); *Civilian Control of the Armed Forces*, *supra* note 2, at 2, 21, (statement of Senator John McCain, Chairman, S. Comm. on Armed Servs.). Note, also, that while all constitutional officers that are required to swear fidelity to the Constitution rather than the President, it is the military that finds itself in a constitutional zone of twilight due to the separation of military powers. Civilian executive officers in non-military agencies that swear an oath to the Constitution are rarely placed in a position of conflict between the branches of government because only one branch exercises substantive authority over their actions. *See also*, HUNTINGTON, *supra* note 1, at 35 (“In practice, [the professional officer] must be loyal to some single institution generally accepted as embodying the authority of the nation. Where there are competing authorities, or competing ideas as to what ought to be the authority, professionalism becomes difficult if not impossible to achieve. The conflict of constitutional ideologies and governmental loyalties divides the officer corps and superimposes political considerations and values upon military considerations and values. The nature of an officer’s political loyalties become more important to the government than the level of his professional competence.”).

<sup>201</sup> HUNTINGTON, *supra* note 1, at 191. “Indeed, it is highly questionable whether, even if such change [to the separation of powers] were possible, it would be worth the price. *There are values other than civilian control and military professionalism, and these were the values the Framers had in mind when they wrote the Constitution.*” These inefficiencies are the “continuing prices the American people will have to pay for the other benefits of their constitutional system.” *Id.* at 191–92 (emphasis added).

<sup>202</sup> HUNTINGTON, *supra* note 1, at 177.

<sup>203</sup> *See Part III supra.*

<sup>204</sup> *See supra* note 115, and accompanying discussion.

in Chief, must be obeyed, for he is the Commander in Chief. Disobedience is contrary to professional military discipline, the basic premise of civilian control, and, indeed, is criminalized in various provisions of the Uniform Code of Military Justice (UCMJ).<sup>205</sup> To obey, however, when the military action is contrary to the wishes of Congress, albeit not facially illegal, or when Congress declines to declare war or authorize military action, equally flaunts civilian control by undermining the oath sworn to our constitutional framework.<sup>206</sup> Simply because the former example, disobeying the President, appears more scandalous and has more immediate repercussions,<sup>207</sup> does not make the latter example, obeying the President contrary to congressional will, any less egregious a violation of civilian control—even if it happens far more frequently.<sup>208</sup>

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<sup>205</sup> See, e.g., 10 U.S.C. §§ 888 (criminalizing contemptuous words against the President, Vice President, Congress, Secretaries of Defense and Homeland Security, the Service Secretaries, and, in certain circumstances, state governors and legislatures, the maximum punishment being a dismissal and one year imprisonment), 892 (criminalizing the failure to obey lawful orders, the maximum punishment being a dishonorable discharge and 2 years' imprisonment), and 894 (criminalizing overriding military authority by refusing to obey orders, overthrowing or destroying lawful civil authorities, and the failure to do everything possible to prevent such conduct, the maximum punishment being death).

<sup>206</sup> This is not to insinuate that each individual service member ought to make their own constitutionality determination in order to comply with their oath—a feat even many courts decline to do in this area on grounds of justiciability. Rather, it is offered, admittedly simplistically, to show how easily the separation of powers doctrine may undermine civilian control and politicize the military. The simplicity of it, however, should not minimize its theoretical effects; after all, Justice Jackson's three categories were but "somewhat over-simplified grouping[s] of practical situations," and yet, they represent the theoretical paradigm used to answer nearly all questions in this area. *Youngtown Sheet & Tube, supra* note 181, at 635. That the officer's oath does not require individual officers to determine the constitutionality of every conflict is well established in the law. See, e.g., WILLIAM WINTHROP, *MILITARY LAW & PRECEDENTS* 296–97 (1920) ("But for the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline. Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness. Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it can scarcely fail to be held justified by a military court . . ."); *United States v. Huet-Vaughn*, 43 M.J. 105, 114–15 (C.A.A.F. 1995) ("To the extent that CPT Huet-Vaughn's acts were a refusal to obey an order that she perceived to be unlawful, the proffered evidence was irrelevant. The so-called 'Nuremberg defense' applies only to individual acts committed in wartime; it does not apply to the Government's decision to wage war. . . . Finally, to the extent that CPT Huet-Vaughn intended to contest the legality of the decision to employ military forces in the Persian Gulf, the evidence was irrelevant, because it pertained to a non-justiciable political question.").

<sup>207</sup> See, e.g., WILLIAM MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR 1880–1964*, at 629–77 (1978) for a detailed account of the events leading up to President Truman relieving General MacArthur, perhaps the most poignant and serious civil-military crises in American History and a good example of these repercussions. See also H.W. BRANDS, *THE GENERAL VS. THE PRESIDENT: MACARTHUR AND TRUMAN AT THE BRINK OF NUCLEAR WAR* (2016). Note also, how MacArthur's folly involved his relations with the legislature.

<sup>208</sup> "Congress has declared war eleven times in the context of five conflicts: the War of 1812, the Mexican War, the Spanish-American War, WWI, and WWII. In other instances, the President has authorized the use of force . . . without

The structural tension created by the separation of military powers manifests itself today because the United States has a professional, standing military—something the Framers explicitly sought to avoid.<sup>209</sup> In part, this is because the Framers of the Constitution did not provide for or consider the implications of civilian control over a standing, professional military.<sup>210</sup> They deliberately provided for the citizen-soldier model that was prevalent throughout the overall American experience until the Cold War brought about the prospect of perpetual conflict requiring a standing military. This raises the question then: under modern national security requirements, is the goal of civilian control that the military is apolitical, as commonly invoked, or is it that it is merely nonpartisan?

*B. Apolitical, or Merely Nonpartisan?*

Both a politicized and a partisan military are detrimental to civilian control. But as previously established, our constitutional structure inherently politicizes the military to some degree. The more harmful of the two, is a partisan military—that is what strangled the professionalism of the German military after Hitler came to power and is the chief lesson of the General Staff during WWII.

When the military chooses one branch of government over the other to ascribe loyalty to (especially in political controversies), it may surrender its apolitical and, depending on the

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congressional authorization, and in some cases in the face of implied congressional opposition.” BAKER, *supra* note 4, at 182. For an overview of Presidentially authorized uses of force and congressional responses, see Terry, *supra* note 189. Certainly, Congress could refuse to fund an operation it disapproved of or impose limitations on types or amounts of military support, but in historical practice Congress is not likely to do so, or in the very few cases when it does, it does so narrowly. Terry, *supra* note 189, at 412–18.

<sup>209</sup> Dunlap, *supra* note 2, at 348–49.

<sup>210</sup> See HUNTINGTON, *supra* note 1, at 164–65 (“In terms of providing for civilian control, the Constitution was drafted at just the wrong time in history. It was a product of the last years of preprofessional officership. If it had been framed twenty-five years later, its clauses with respect to military power might well have been significantly different. But as it was, for all their political wisdom and insight, the Framers did not, with a few noted exceptions, foresee the emergence of military professionalism and objective civilian control.”). Or if not for their lack of foresight regarding the emergence of military professionalism, at a minimum, the express desire to not have a standing military and hence no need for explicit constitutional framework. See also Dunlap, *supra* note 2, at 348 (“the Founding Fathers considered foreign invasion and attacks by Native Americans along the frontier as the principal threats to American security. A modest navy and a small standing army backed by a citizen militia was deemed sufficient to counter these threats.”).

circumstances, its nonpartisan nature.<sup>211</sup> When the military is forced by one of the branches of government to ascribe loyalty to one branch or the other, that civilian entity politicizes the military.

Huntington strikes the heart of this tension:

The greatest service [soldiers] can render is to remain true to themselves, to serve with silence and courage in the military way. If they abjure the military spirit, they destroy themselves first and their nation ultimately. If the civilians permit the soldiers to adhere to the military standard, the nations themselves may eventually find redemption and security . . . .<sup>212</sup>

He is not implying that the civilian entities should become militaristic, and he is not arguing that the military should sit silently by as the JCS did during Vietnam.<sup>213</sup> Huntington is arguing that the military should have the courage to, and the civilians should create an environment in which, the military can give objective military advice to all constitutional entities. And, to make that possible, the civilian actors that fill constitutional roles should not embroil the military in domestic political (or partisan) discourse. And finally, civilians should give the military a free hand to give candid advice to all branches of government without fear of retribution.<sup>214</sup>

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<sup>211</sup> Frequently, this has a partisan manifestation or is depicted as following partisan lines, especially when the Executive and Legislative branches are controlled by opposing parties. Partisan motivation is not a given, however. When the Executive and legislature are controlled by the same party it may be mere politicization, but could still be partisan depending on the issue and people involved.

<sup>212</sup> HUNTINGTON, *supra* note 1, at 466. Note that Huntington is not saying once a war begins, the entire effort should be turned over to the military, since war is their domain. He is saying if civilian leaders permit the military to be apolitical and nonpartisan, the nation will prosper.

<sup>213</sup> *See, e.g.*, MCMASTER, *supra* note 147, at 300–22 (characterizing the JCS as “Five Silent Men”); Corn & Jensen, *supra* note 181, at 602.

<sup>214</sup> Military officers should be free from fear of retribution from both Executive and Legislative branches of government. While there are some safeguards from Executive retribution (for example, the President may relieve an officer from a specific billet, but Congress has imposed due process protections limiting the President’s ability to separate an officer from the military. *See* 10 U.S.C. § 1181 *et seq.*, *supra* note 62 and accompanying discussion.). There are, however, few safeguards against Legislative retribution. Congress may refuse to give consent to the appointment or promotion of any officer with whom they have political or even partisan disagreements (even within the military competency). This may seem far-fetched today, but during the Civil War (and largely pre-WWII) it was commonplace. *See generally*, DONALD B. CONNELLY, JOHN M. SCHOFIELD AND THE POLITICS OF GENERALSHIP *passim* (2006). If it does seem far-fetched for today, consider for example, a circumstance where Congress refused to consent to Lieutenant Colonel Vindman’s promotion had he declined to testify in impeachment proceedings (as the Executive branch advised him). That would not have been an extreme possibility had the party roles been reversed. *See also*, David Welna, *Senator Puts Rare Hold on Military Promotions Over Ousted Army Officer*, NATIONAL PUBLIC RADIO (July 2, 2020), <https://www.npr.org/2020/07/02/886896695/senator-puts-rare-hold-on-military-promotions-over-ousted-army-officer>. While Welna depicts such an action by a legislator to be rare and unprecedented, a cursory review of history shows it is not unprecedented. Further, it has only become rare since the advent of a professional military. Something of

While separation of military powers inherently creates civil-military tensions with its tendency to politicize, it does not make it impossible for the military to fulfill its constitutional role. General George C. Marshall, operating with a General Staff, is the perfect counter example to a MacArthur or a McClellan.<sup>215</sup> He best typifies the professional officer who served with silence in the military way and yet is known for his candor in speaking truth to power, regardless of its unpleasantness.<sup>216</sup> Upon appointing him Chief of Staff to the Army, FDR said of disagreements with him, that “I don’t have to look over my shoulder to see whether he is going to the Capitol to lobby against me. I know he is going to the War Department to give me the most loyal support as Chief of Staff that any President could wish.”<sup>217</sup> Simply put, rather than take advantage of the structural politicization caused by the separation of powers, he wisely avoided it.<sup>218</sup> Marshall towed the line “that a responsible officer had the right to question a policy he considered wrong or mistaken and to discuss thoroughly a proposal.” But he believed, unlike MacArthur, that “there was no right to challenge publicly the wishes of the Commander-in-Chief. Refusal to accept that rule on the part of an officer meant the *destruction* of his own power to command.”<sup>219</sup>

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the reverse, in this example, in order to protect the promotion of a single officer (that is, to force the President to nominate a specific person) a single Senator was blocking action on all officer nominations (affecting over 1,200 officers) until she received assurances from SecDef that Lieutenant Colonel Alexander Vindman’s promotion had not been withheld for testifying during overtly partisan impeachment hearings. While not a retributive example, it certainly highlights the potential political abuse of officer nominations. Such a political use of the officer appointment process to coerce political actions by the Executive branch is only possible because of the separation of powers doctrine. The politicizing effect? While only time will tell, military officers may think twice before fulfilling their obligation to candidly advise either branch of government, particularly during periods of political disharmony.

<sup>215</sup> While the JCS had been informally created for liaison with Allied powers, the U.S. Army operated under a General Staff with the Service Chief, Marshall, in the chain of command.

<sup>216</sup> ROLL, *supra* note 150, at 121.

<sup>217</sup> *Id.* at 122. FDR presciently captures the inherent politicizing tension of separation of powers, even if unintentionally. The concern was not that if the general disagreed, he would lead a coup; it was that if he disagreed he would go to Congress, as MacArthur ultimately did.

<sup>218</sup> Excellent examples are how Marshall handled the pressure to reinstate the draft and how he handled the appointment of Eisenhower as the Supreme Allied Commander for the invasion of Normandy. *Id.* at 157–62, 291–96. The latter example caused Secretary of War Stimson to describe him using Proverbs 16:32, “He that ruleth his spirit is better than he that taketh city.” *Id.* at 296. Quite the opposite of those who abjure the military spirit in favor of taking the city.

<sup>219</sup> FORREST C. POUGE, *Marshall on Civil-Military Relationships in the United States*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989, at 194 (Richard H. Kohn ed., 1991) (emphasis added). See *infra* notes 248 and 251.



The goal then, under our constitutional system, must be nonpartisan. Certainly, the military should not be advising on any political questions that do not relate to national security, but the chief goal is a military without partisan loyalties. By staying within the military's professional competency, being permitted to serve with silence as it relates to all other societal issues, the military can avoid the dangerous kind of politicization, i.e., partisanship, and function effectively within our constitutional framework.<sup>220</sup>

## V. AN AMERICAN GENERAL STAFF: SUBORDINATED PROFESSIONALISM

Now that the historical and constitutional context has been discussed together with the general causes and particular influences that, combined, form the complicated rationale behind varying events and their effects on civil-military relations, we can consider what an American General Staff would look like and take care to avoid some of the historical concerns that have proven problematic.<sup>221</sup> To begin, we will address, practically how a General Staff fits into the chain of command and what its role would be compared to the current Joint Staff. Then, looking at each facet in turn, we will assess the impact of a General Staff on civilian control. First, a General Staff addresses Eisenhower's concern about clarity. By clarifying the advisory role of the Chief of the General Staff as subordinated into the chain of command, it makes civilian control certain. Next, a General Staff helps avoid civil-military crises by increasing professional military accountability within the military—a long-neglected feature inherent in the corporate nature of a profession. Lastly, a General Staff's structure lessens the politicization that occurs due to the separation of powers while

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<sup>220</sup> HUNTINGTON, *supra* note 1, at 35 (addressing the politicizing effects of divided loyalties in constitutional authority (quoted *supra* note 200)). See also the discussion *supra* note 3 and Part II.A.3.

<sup>221</sup> TOCQUEVILLE, *supra* note 20, at 470 (“As for me, I think that there is no period in which it is not necessary to attribute one part of the events of this world to very general facts and another to very particular influences. These two causes are always met with; only their relationship differs. General facts explain more things in democratic centuries than in aristocratic centuries, and particular influences fewer. In aristocratic times, it is the contrary: particular influences are stronger and general causes are weaker, unless one considers as a general cause the very fact of inequality of conditions that permits some individuals to oppose the natural tendencies of all the others.”).

improving the balance of constitutional military powers.

*A. American General Staff Structure*

What would an American General Staff look like? Currently, the Joint Staff and the CJCS are not in the chain of command. The CJCS is an independent adviser supported by the Joint Staff and acts as a “channel of communication” between the combatant commanders and the SecDef. The chain of command flows from the President through the SecDef to the Combatant Commanders.<sup>222</sup> With an American General Staff, however, the chain of command will flow from the President as Commander in Chief, through the SecDef as the “principal assistant to the President,” to the Chief of the General Staff.<sup>223</sup> The Chief of the General Staff would exercise “command authority” similar to, but superior to that of the combatant commanders.<sup>224</sup> The Chief of the General Staff would continue to act as the senior military advisor to the President, but from a subordinated position within the chain of command.<sup>225</sup> Such a position would necessarily have direct access to both the President and the SecDef. Notably, under this structure, the services would maintain their current statutory missions and purposes.<sup>226</sup>

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<sup>222</sup> See JP 1, *supra* note 24, at II-10.

<sup>223</sup> 10 U.S.C. § 113.

<sup>224</sup> See 10 U.S.C. § 164. The SecDef’s authority includes the “authority, direction, and control over the [DoD]”, but does not include command authority as described in 10 U.S.C. § 164, which, in the current construct, flows from the Commander in Chief through the SecDef to the Combatant Commanders. See 10 U.S.C. §113; JP 1, *supra* note 24, at II-9. Thus, the SecDef is the “principle assistant to the President in all matters relating to the Department of Defense.” *Id.* While the Chief of the General Staff would be subordinate to the SecDef, this would not alter the secretary’s current authority. Truly, it would not alter the authority paradigm at all, except to place a military connecting file in the chain of command at the seat of government. Note, however, that the chain of command for non-operational matters runs from the President to the SecDef to the Service Secretaries. JP 1, *supra* note 24, at II-9.

<sup>225</sup> 10 U.S.C. §§ 151–53.

<sup>226</sup> This is not a proposal for Service unification. As alluded to *supra* note 22, a General Staff does not require unification of the Services. The role of Services will be addressed tangentially in Part V.D, *infra*. In short, the Services will maintain their current statutory missions and purposes focused on force generation and readiness. See, e.g., 10 U.S.C. §§ 7013, 7033, 8013, 8033, 8043, 9013, 9033 (providing for the general duties of the Service Secretaries and Chiefs). Further, as it relates to the Service Chiefs’ JCS role, the Chief of the General Staff could still convene regular meetings of the JCS in order to provide a variety of strategic voices in forming his or her advice, but the Service Chiefs’ primary focus should be on their roles as Service Chiefs. See 10 U.S.C. § 151. To fully address whether the JCS should continue serving as an advisory body, however, is beyond the scope of this study and one which must be subjected to further research. There has been some debate about whether the “dual-hatted” nature of serving as both a Service Chief and on the JCS is

*B. Subordination of Military Roles Increases Civilian Control Over Policy*

Subordinating<sup>227</sup> a General Staff into the chain of command would both clarify the advisory role as well as increase civilian influence throughout the policy making process. There is still a “fundamental ambiguity” about the role of the Joint Staff and CJCS (even after Goldwater-Nichols) that both undermines civilian control and is a poignant cause of the shift in balance of influence from Office of the Secretary of Defense (OSD) to the Joint Staff.<sup>228</sup> This “fundamental ambiguity” stems from the fact that despite statutory delineation, as an advisor, the CJCS and Joint Staff have poorly defined roles because they exist outside the chain of command. The role of an advisor is inherently subject to personality preferences—judge advocates experience this reality daily in operational settings—and the CJCS is not immune to this inherent trait of the role.<sup>229</sup> The concern being, “[w]hen military responsibility is unclear, civilian control is uncertain.”<sup>230</sup>

As an advisor, the CJCS can have an outsized role, like a General Colin Powell or General Joseph Dunford had, or they can be sidelined entirely as during Vietnam.<sup>231</sup> Neither situation is

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effective and feasible. *See, e.g.*, LEDERMAN, *supra* note 14, at 21–23 (JCS responsibilities are supposed to take precedence). See also the discussion *supra* note 158 (addressing the conflict of interest exploited for political gain). Certainly, the creation of a General Staff need not eliminate the inter-Service cooperation and integration that has been a great virtue of Goldwater-Nichols. Perhaps a more limited role for the Service Chiefs of working with the Chief of the General Staff to develop documents like the National Military Strategy would better enable them to conduct their Service-specific work. Notably, the elimination of the JCS as an advisory body would make it more important to create a statutory rotation through the Services to fill the post of Chief of the General Staff, though the nominee need not have been a Service Chief, any flag officer should be eligible. Ultimately, the role of the Service Chiefs is a question that must be researched and addressed analytically and dispassionately, not “emotional[ly]” dismissed as that of a General Staff was during the National Security Act debates. *Id.* at 60.

<sup>227</sup> While the CJCS serves subject to the authority, direction, and control of the President and SecDef, see 10 U.S.C. §153, the CJCS and the Joint Staff are not subordinated *into* the chain of command. They operate outside of the chain of command creating a situation not dissimilar in degree of influence to the German General Staff during WWI when the War Minister and Chief of Staff were the same person.

<sup>228</sup> There certainly is no shortage of role defining in 10 U.S.C. §§ 151–53 and 164. The ambiguity in the role exists in the nature of being an advisor, while at the same time being responsible for more than advising.

<sup>229</sup> LEDERMAN, *supra* note 14, at 39 (“to the extent that the JCS’s military advice was problematic, such inadequacy may have resulted from the incompetence or weak character of the individuals involved rather than from organizational deficiency.”). Goldwater-Nichols’s “prescription for a strong chairman, acting as the ‘principal military adviser’ to the civilian authorities, contains a fundamental ambiguity . . .” *Id.* at 86.

<sup>230</sup> *Id.* at 21 (quoting Eisenhower on the ambiguity of the JCS’s advisory role in the chain of command).

<sup>231</sup> For an example of Powell’s role, see LEDERMAN, *supra* note 14, at 92–93 (describing the CJCS as “too independent”). For an example of Dunford’s role, see Paul D. Shinkman, *The Joint Chiefs’ Power Surge*, U.S. NEWS (Sep. 30, 2019), <https://www.usnews.com/news/national-news/articles/2019-09-30/how-joe-dunford-quietly-changed-the-joint-chiefs->

optimal. In essence, at the Presidential level, an advisor becomes one among many vying for the Presidential influence.<sup>232</sup> While an advisor's role inherently waxes and wanes with the winds of personalities,<sup>233</sup> an officer with limited, clearly articulated authority subordinated into the chain of command will not because it forms the vital linchpin between civilian and military with a clearly defined role and area of professional competency.

Some might argue that a Chief of the General Staff would inherently behave in a partisan manner because the operational chain of command would be in closer proximity to the political aspects of government. Before addressing the concern, note that the same risk exists under the current construct.<sup>234</sup> Ultimately, simple safeguards can insulate operational decisions from partisan circumstances. The Chief of Staff term can be offset from Presidential terms to desynchronize operational leadership from what have become quadrennial partisan upheavals. Other procedural insulations would also protect the military establishment from politicization such as requiring a two-thirds senatorial confirmation (vice a simple majority), protections from removal from office except for cause, and mandatory service rotations.

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role-in-preparing-for-war. It is a well-documented fact that Kennedy did not trust the CJCS and so he circumvented the statutory process. *See* LEDERMAN, *supra* note 14, at 39; MCMASTER, *supra* note 147, at 10–15. By the time Johnson took office, McNamara had become the de facto senior military advisor. Conversely, during the Gulf War, the CJCS dominated the decision-making processes (Which may have been in part because he was the first CJCS under Goldwater-Nichols when consensus advice was no longer required. Such a change however, should not have changed the balance of sources of advice between the CJCS and SecDef). LEDERMAN, *supra* note 14, at 92–93. Indeed, the Goldwater-Nichols reforms did not insulate the balance of the unequal dialogue from personalities and similar concerns to those that arose under McNamara during Vietnam arose again under Rumsfeld in the early 2000s. *See* CHRISTOPHER P. GIBSON, *Enhancing National Security & Civilian Control of the Military: A Madisonian Approach*, in *AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA* 239 (Suzanne C. Nielsen & Don M. Snider, eds., 2009). For an insightful account of the personality influences after the Goldwater-Nichols newness had worn off, see MICHAEL R. GORDON & BERNARD E. TRAINOR, *COBRA II: THE INSIDE STORY OF THE INVASION & OCCUPATION OF IRAQ* (2007).

<sup>232</sup> Because the CJCS and the Joint Staff are not in the chain of command, their role is depicted on the same level as the SecDef highlighting the ambiguity of “channels of communication.”

<sup>233</sup> LEDERMAN, *supra* note 14, at 39–40.

<sup>234</sup> While some CJCS have disagreed very publicly with civilian policy decisions. The distinction is the disagreement was not based on partisan loyalty, despite how the opposing party may have attempted to capitalize on the disagreement. (For example, consider the CJCS's public disagreement with President Clinton over openly homosexual Service Members. *See* DIANE H. MAZUR, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* 195 (2010).)

Transforming the Joint Staff into a General Staff within the chain of command clarifies the “fundamental ambiguity” coming from the advisory role because it actually subordinates the role into the chain of command, providing clarity to the role of the Chief of the General Staff.<sup>235</sup> When a military officer is subordinated into the chain of command it becomes clear they can advise on subjects within their authority—i.e., military capabilities and efficacy. That alone, is a protection against the Chief of the General Staff becoming politicized. While subordinating a General Staff would make absolutely clear that OSD is responsible for policy advice to the President, and the Chief of the General Staff is responsible for military advice, it would also have the further effect of clarifying roles at the staff level throughout the interagency process.

A significant concern relating to the current state of civil-military relations is the balance of influence between the OSD and the Joint Staff.<sup>236</sup> That is, there is a perceived shift in influence from OSD to the Joint Staff with civilian appointments remaining unfilled in recent years and the Joint Staff picking up the proverbial slack.<sup>237</sup> These unfilled civilian roles have far reaching effects throughout the interagency process, giving the military voice disproportionate volume in policy making.<sup>238</sup> While nobody claims the Joint Staff is coequal with the SecDef in terms of authority, the fact that the CJCS is not in the chain of command yields outsized influence at the national level and the appearance of parity with the OSD in the interagency policy-making process.<sup>239</sup>

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<sup>235</sup> LEDERMAN, *supra* note 14, at 86, 92.

<sup>236</sup> *Civilian Control of the Armed Forces*, *supra* note 129 *passim* (statements of Lindsay P. Cohn, Associate Professor, U.S. Naval War College, & Kathleen J. McInnis, International Security Specialist, Congressional Research Service); NATIONAL DEFENSE STRATEGY COMMISSION, *supra* note 2, at xi, 47–48.

<sup>237</sup> See *Civilian Control of the Armed Forces*, *supra* note 129 *passim* (statements of Lindsay P. Cohn, Associate Professor, U.S. Naval War College, & Kathleen J. McInnis, International Security Specialist, Congressional Research Service); NATIONAL DEFENSE STRATEGY COMMISSION, *supra* note 2, at xi, 47–48. See also, Aaron Mehta, *As Trump Term Ends, 40 Percent of Top DoD Jobs Lack Confirmed Officials*, DEFENSE NEWS, (Nov. 20, 2020), <https://www.defense.news.com/pentagon/2020/11/20/as-trumps-term-ends-40-percent-of-top-dod-jobs-lack-confirmed-officials/>.

<sup>238</sup> NATIONAL DEFENSE STRATEGY COMMISSION, *supra* note 2, at xi, 47–48.

<sup>239</sup> This in part stems from the CJCS’s role of being an independent military advisor. Independent in the sense that the CJCS is not limited to only giving advice that the SecDef approves of or agrees with (part of the problem during Vietnam). This construct would eliminate the redundant DoD voices in the interagency and still guarantee independent military advice to the President.

The creation of a subordinated General Staff would have dramatic effects on the interagency process by explicitly subordinating the General Staff to OSD. For example, a General Staff in the chain of command raises the question of whether a representative from OSD or the General Staff would be participating in various interagency committees and working groups.<sup>240</sup> While there are certainly prudential reasons for the current construct, it may give the impression to other governmental agencies that there are two DoD voices on every working group across government—the result being that problems appear more and more like defense problems for which a military solution is appropriate.<sup>241</sup> Truly, though, a General Staff need participate only on those interagency working groups and committees where there are questions about military capabilities or whether military means could accomplish a particular political ends.<sup>242</sup> In sum, subordinating a General Staff into the chain of command clarifies the responsibilities between OSD and the General Staff throughout the interagency process, righting the balance between civilian and military influence on policy—which, after all is the object of civilian control.

### *C. Professional Military Accountability: Professional Corporality*

Adopting a General Staff will also increase military accountability *within the military* at the political level of government. Recent historical practice has civilians relieving (firing) generals, not higher-ranking generals.<sup>243</sup> In some respects this is a testament to the strength of American civil-military relations in that civilian leadership is comfortable relieving generals for operational failures.

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<sup>240</sup> Current practice is that both OSD and the Joint Staff attend interagency working groups. JP 3–08, INTERORGANIZATIONAL COOPERATION I–15 (18 Oct. 2017).

<sup>241</sup> This becomes particularly poignant given budget discrepancies.

<sup>242</sup> See HUNTINGTON, *supra* note 1, at 11 (explaining the limited area of professional military competency).

<sup>243</sup> RICKS, *supra* note 147, at 11–13 (studying American generalship and “[t]he vicissitudes of the relationship between generals and their civilian overseers.”). Generally, Ricks identifies a division between WWII and the decades that followed, both in caliber and efficacy of generalship. *Id.* at 7, 13. Notably, this transition coincides with the adoption of the National Security Act (institutionalizing the Joint Chiefs of Staff and eliminating the Army’s General Staff from the chain of command) shortly after WWII.

But when it occurs, it nearly always generates public discourse about the declining state of civil-military relations.<sup>244</sup> Further, it raises the question of why the general was not relieved by the next superior military officer.<sup>245</sup> Why does the President or SecDef have to reach down to the tactical level to relieve a commander? Perhaps some of it can be attributed to military bias, but this was not always the practice in the American military.<sup>246</sup>

Prior to the adoption of the Joint Staff model, generals were frequently relieved by other military officers. There are certainly a lot of factors affecting this practice, but the fact that there is no general in the chain of command at the seat of government is an oft-overlooked contributory factor.<sup>247</sup> Consequently, there is no officer in the chain of command sufficiently sensitized to the political object of the military operation, leaving “some civilian in Washington” as the only competent authority to relieve the general in the field who runs afoul of the civilian leadership’s political goals.

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<sup>244</sup> *Id.* at 462 (“When generals don’t fire generals, civilians will. Thus it is really not a question of *whether* to relieve generals but of *who* will relieve them. . . . Since the Army lost the tradition of relief in the Korean War, each conflict has instead been marked by the firing of top commanders by civilians: MacArthur in that war, Harkins and Westmoreland in Vietnam, Woerner before Panama, Dugan during the Gulf War, Wesley Clark after Kosovo, Casey in Iraq, McKiernan and McChrystal in Afghanistan. These ousters are necessarily clumsier and tardier than internal military moves would be, because they are less like routine maintenance and more like blowing the safety valve on a boiler.” (emphasis in original)).

<sup>245</sup> *Id.* at 13 (noting that “[w]hen the military does not relieve senior generals, civilian officials will.”).

<sup>246</sup> *Id.* at 31–39 (chronicling General Marshall’s firing or forcible retirement of an estimated 600 officers immediately preceding and in the early years of WWII). While it may be easy to dismiss these reliefs as based on modernization and eliminating the aged—and for some that is true—the fact remains that in 1939 the U.S. Army was “not even a third-rate military power” of only 197,000 men. *Id.* at 15. That is, it was in no position to be eliminating manpower on the eve of war. Further, the cited passage also addresses the firings of several general officers who were Marshall’s peers in terms of experience and duration of service, a practice Marshall maintained throughout the war.

<sup>247</sup> The DoD Reorganization Act marked the beginning of the statutory elimination of Service Chiefs from the chain of command, and consequently the JCS was entirely without authority to either relieve a failing commander or direct their removal. *See* LEDERMAN *supra* note 14, at 22–23. *See also* RICKS, *supra* note 144, at 11 (“The politics of relief are complex.”). Some of the lowest point in American civil-military relations have occurred between civilians in Washington and generals geographically distant. Throughout the Civil War, Lincoln’s various commanders were geographically located with the Army wherever it happened to be. While Grant most readily returned to Washington several times to conference with the President, he primarily communicated through telegraph. Further, some of the more recalcitrant simply stayed out of Washington to avoid Lincoln’s direction. MacArthur likewise was geographically separated maintaining his headquarters either in Japan or Korea. The modern geographic Combatant Commanders are spread across the globe, as were most of the officers listed *supra* note 244. These generals were with their forces in the field—where they were supposed to be. The point is simply that there was not an officer in the chain of command at the seat of government.

Take the MacArthur episode as an example.<sup>248</sup> Because the CJCS was not in the chain of command, he was powerless to relieve MacArthur, forcing the President to do it and precipitating a major civil-military relations debacle.<sup>249</sup> Had the CJCS been in the chain of command, however, relieving MacArthur, even if directed by Truman, would not have necessitated a civil-military low point—in essence it could have been a military act, rather than a political act; the military taking accountability for insubordination to civilian authorities or loss of trust and confidence.<sup>250</sup> It may have created some political tension because of MacArthur's popularity, but that occurred regardless.<sup>251</sup> Notably, this limit on the CJCS's authority remains in place today.<sup>252</sup>

Putting a military connecting file in the chain of command at the political seat of government transparently creates an opportunity for military accountability to political needs, increasing the corporate nature of professionalism. When that ability is removed, the profession can no longer regulate itself. The MacArthur case is easy because of the brazenness of his violations of

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<sup>248</sup> MacArthur had vehemently and openly disagreed with Truman over the conduct of the Korean War, viewing war fundamentally as a failure of politics rather than a continuation of it. MANCHESTER, *supra* note 207, at 627. The tension between the two culminated when MacArthur issued his own peace ultimatum after being informed by the JCS that Truman was attempting peace talks with the Communist Chinese government. In doing so, he usurped the President's stated foreign policy objectives. ROY K. FLINT, *The Truman-MacArthur Conflict: Dilemmas in Civil Military Relations in the Nuclear Age*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989*, at 258 (Richard H. Kohn ed., 1991). This was the final straw in a series of indiscretions on MacArthur's part that Truman had overlooked, including MacArthur's unilateral visit to Chiang Kai-shek to discuss mutual interests; a public letter to the Veterans of Foreign Wars critical of Truman's policy towards Chiang Kai-shek; disobeying an Executive Order to curtail public speeches regarding foreign and military policy; and sending a letter to a member of Congress explaining what he thought American foreign policy should be, a distinctly partisan act given the context. *Id.* at 248, 259.

<sup>249</sup> Further limiting General Omar Bradley, the CJCS at the time, was the requirement for consensus advice amongst the JCS. Before rendering advice, Bradley had to wait for the JCS to be assembled. BRANDS, *supra* note 207, at 295–300. Only then did he recommend relieving MacArthur. In essence, the lack of authority hampered his ability even to be an advisor, much less take action.

<sup>250</sup> Worth noting, such acts of relief by senior military officers is inherently an act of professionalism. See the discussion of corporate self-regulation *supra* at note 62. The effect of this self-regulation is that the profession is better trusted by civilians because insubordination is appropriately addressed, and indeed, the profession better trusts the civilian masters since they are not the only office relieving often-times revered generals.

<sup>251</sup> The inter-branch tension between Congress and the Executive was particularly poignant in this case because of MacArthur's popularity, but also because of the how the constitutional structure inherently politicizes the military in such a way that unless partisanship is vigilantly guarded against, civilian control is undermined. In short, MacArthur joined the partisan fray in a manner that undermined Executive civilian control by attempting to shift Executive issues to the Legislative branch and by both believing his own policies were superior to the civilian leader's and actively pursuing his own policy.

<sup>252</sup> This aspect of the CJCS is the same today. Goldwater-Nichols strengthened the advisory role of the CJCS, but maintained the prohibition of any kind of command authority.



civil-military norms, but placing a Chief of the General Staff in the chain of command also creates accountability for military incompetence or failure.<sup>253</sup> And while a General Staff would not entirely eliminate service loyalties, because of its Enlightened foundation it would create an overarching culture that binds the operating forces together in a unity of effort.<sup>254</sup>

*D. Rebalancing Control Between Congressional and Executive Civilians*

Finally, creating a General Staff within the operational chain of command helps clarify which civilian portions of government control which aspects of national security, without divorcing the design of the military force from operational needs. A General Staff, the role of which focuses solely on operational planning and direction, would be free from the manning, training, equipping, readiness, and budgetary requirements that are predominantly the responsibility of the Services.<sup>255</sup>

Because the Services are primarily tasked with manning, training, and equipping the force, they are ideally situated to report to Congress on readiness and budgetary requirements in line with Congress's authority to "raise and support" and "provide and maintain" the force.<sup>256</sup> Eliminating the current requirements of CJCS reporting to Congress regarding readiness and budgetary requirements

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<sup>253</sup> In the current joint system incompetence can be scapegoated based on Service cultures and parochialism, rather than relieved for ineptitude. The objectivism of a General Staff leaves no room for this.

<sup>254</sup> There have been varying proposals over the years that a General Staff would require a General Staff Corps, the officers of which would not return to their respective Services once they are selected as General Staff Officers. These proposals are frequently outgrowths of unification proposals. This is not required in order to reap the benefits for civilian control or of a General Staff. The Services would provide forces to the General Staff for operational purposes and continue their manning, training and equipping mission discussed *supra*, note 226. This aspect would certainly affect the way forces assigned to a combat command are supervised and held accountable within the General Staff operational chain, but would not affect the way the Services currently select and promote senior leaders.

<sup>255</sup> See 10 U.S.C. §§ 153, 166. One might ask who then is a voice at the seat of government to advocate for combatant command funding and prioritization. To the extent this is a policy decision, the SecDef should be that advocate; to the extent this is a military decision, it will be a decision for the Chief of the General Staff. Moreover, moving the Chief of the General Staff into the chain of command aligns the operational interests of the General Staff with the combatant command. Furthermore, this provides ample room to reinsert the civilian voices from the Department of State, whose regional bureaus are aligned with the combatant command AORs.

<sup>256</sup> Recognizing that the Services already do this, currently the CJCS is also required to report to Congress on these issues creating a level of redundancy that does not actually increase lethality. As proposed, a General Staff reporting back to Congress regarding operational matters (oversight of Congress's war-making power) and the Services reporting back to Congress regarding readiness and budgetary requirements (oversight of Congress's provide for powers) helps rebalance civilian control between the Executive and Legislative branches without politicizing the military in the process.

eliminates the operational chain of command from what is frequently a partisan process (and maintaining a nonpartisan military is the real goal) and insulates operational considerations from being wrapped into partisan struggles.

Funding is in many respects the ultimate policy decision. Further, there is no shortage of military voices requesting funding from Congress and advising Congress on how to spend on an annual basis: The SecDef, the three service secretaries, the CJCS, the Chief of Staff of the Army, the Chief of Naval Operations, the Commandant of the Marine Corps, the Chief of Staff of the Air Force, the Chief of Staff of the Space Force, the Commandant of the Coast Guard, and then each of the eleven combatant commanders typically addresses resourcing at some point during their tenure.<sup>257</sup> Freeing the proposed Chief of the General Staff from having to address budgetary concerns permits that position and accompanying staff to focus on actual strategy and on implementing policy decisions. Concomitantly, this would shift the function fully to OSD, further lessening the influence of the Joint Staff.

Each of these aspects of the national defense structure are overlapping and reinforcing. And it would be fictitious to claim that funding and policy can be completely separated from strategy and operational concerns. Under the current construct, however, they are also muddled and conflicted. A General Staff in the American system provides a degree of clarity to the limits of the military's professional competency that not only increases the ability of the military to ensure the national defense, but also improves civilian control of that military in both tangible and influential ways, resolving the paradox caused by the National Security Act and Goldwater-Nichols Act.

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<sup>257</sup> Having the combatant commanders testify as to resourcing gives Congress a focused perspective by AOR. Further, maintaining the testimonial practice of combatant commanders offers an opportunity for congressional oversight of the General Staff itself. Similarly, this acts as a sort of oversight of how well the Services are providing for operational requirements. Ultimately, this directs congressional testimony towards what helps accomplish the military mission, rather than what satisfies a particular Service's desires.

## VI. CONCLUSION

It may seem counterintuitive that a General Staff in the chain of command actually improves civilian control of the military. Several factors contribute to this perception, chief among them, the fact that when discussed the General Staff is rarely thought of in the context of differing types of governments, legal systems, and cultures. Critical in understanding the failures of the German General Staff is acknowledging the militaristic foundation of that society and remembering that, in spite of the that, it was the Enlightenment, not militarism, that was the foundation of the General Staff. Thus, we see that the General Staff, like the military itself, is but a tool of the state and so the system in which it operates matters.

Also contributing to this perception is the fact that when contemplating civilian control of the military, we tend to think of strong civilian authorities vis-à-vis weaker military authorities in terms of a zero-sum game. In reality we should think in terms of a strong military subordinated to strong civilian authorities. This is possible by subordinating a General Staff into the chain of command and thereby tangibly increasing civilian control and improving civil-military relations while also improving the national security of the United States—which, after all, is the goal. Further, it addresses the growing concern that the Joint Staff has become too powerful by limiting the military to its professional area of competence, while at the same time preserving Service identities and cultures. Ultimately a General Staff, as proposed, creates an environment in which the military may serve with “silence and courage in the military way,” without being structurally forced to abjure the military spirit, allowing both military and civilian control to be strengthened and improve.