

RESEARCH REPORT

Civil Elements in National Security Decision-Making

Efraim Chalamish

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Part I

Context, Opportunities, and Challenges

Introduction – Who, What, and Why Now

Defense strategy is the cornerstone of any nation's foreign and national security policy. Policymakers comprise a myriad of types of leaders including presidents, prime ministers, heads of key governmental departments, generals and other high-ranking military officials. Defense strategy discussions that were traditionally held in exclusive forums and were cloaked in secrecy are increasingly being held in transparent and more inclusive forums today. As such, these discussions address broader concerns with a greater variety of players.

This phenomenon of the expanding security forums and apparatus is neither accidental nor coincidental. Instead, it is a derivative of responses to the changing threats in the national security world. Many countries have recently reformed, or at least reconsidered, their defense policies, motivated by the impact of globalization, the prevalence of non-state actors in conflicts both abroad and at home, the Internet revolution, the threat of cyber attacks, the globalization of financial markets, and increased exchange of goods, services, and people, as well as the overall strain of the recent global economic crisis.¹

Not only are the threats ever-increasing, but groups seeking to influence defense policy are increasing. A proliferation of think tanks and NGOs worldwide has led to an increase of those who are extremely vocal about defense policy concerns. They are constantly seeking ways and places to share their knowledge and networks, in order to influence decision-makers. Although there is evidence suggesting that think tanks and experts are influential when it comes to foreign policy,² their influence

* I would like to thank Courtney Creedon, a research assistant, for her dedication and thorough research.

1 Concern over some of these threats are apparent in the Foreword to the United Kingdom's most recent Strategic Defense and Security Review; former president Nicolas Sarkozy's Foreword to France's White Paper on Defense and National Security; the Executive Summary of Germany's White Paper on German Security Policy and the Future of the Bundeswehr; and the Overview of United States' National Security Strategy. See HM Government, Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review, 2010, Cm 7948, 3–6, available [here](#); Nicolas Sarkozy, Foreword to The French White Paper on Defense and National Security 9–11 (ALTO trans., Odile Jacob 2008), available [here](#); Federal Ministry of Defense, White Paper 2006 on German Security Policy and the Future of the Bundeswehr, 2006, at 4–11; available [here](#); The White House, National Security Strategy 1–7 (2010), available [here](#).

2 Lawrence R. Jacobs & Benjamin I. Page, *Who Influences U.S. Foreign Policy?*, 99 AM. POL. SCI. REV. 107–23 (2005), available [here](#). According to their research, U.S. foreign policy is most heavily and consistently influenced by internationally-oriented business leaders, followed by experts.

on defense decisions is poorly regulated and ill-understood.³

Instead of incorporating these outside influences into the official decision-making processes, they frequently have been involved with the work of a national security council-type institution in order to ensure a more inclusive defense strategy debate.⁴ These councils, which are a relatively new phenomenon, bring top military officials into conversation with various arms of the executive branch on matters of national security. While all of these councils continue to rely on the political and military elite and are only advisory in nature, their experience provides an impetus for considering the issues of defense and security in a more interdisciplinary manner. Finding it insufficient to deal separately with external and internal state security, and finding it necessary to address the simultaneous promise and threat of globalization, many states have made adjustments. Some have streamlined their security apparatus, encouraged inter-departmental cooperation and coordination,⁵ and have included commercial and other civil elements in their decision-making process.

Hence, as presented in this paper, both the integration of external groups that bring these non-military factors into the national security decision-making process and building institutional mechanisms that empower non-military factors within existing institutions can democratize national security policymaking and thereby make it more effective. Any reference, then, to civil elements in national security decision-making includes both civil groups or entities, such as academia or media, and institutional bodies, such as a parliament.

As I show in a separate part of this study, these adjustments have been implemented in several democratic countries, along with authorizing a parliamentary role in the defense decision-making process. While in most countries, national security strategy and implementation are driven by the executive branch or the presidency, our studies show that some countries are currently adopting reforms that will empower their parliaments and authorize the legislators to participate in, or approve, certain defense decisions. Parliamentary participation improves transparency and accountability,

- 3 See Richard N. Haas, *Think Tanks and U.S. Foreign Policy: A Policy-Maker's Perspective*, 7 U.S. FOREIGN POL'Y AGENDA 5-8 (2002), available [here](#) (discussing the role of think tanks in foreign and defense policy).
- 4 The United States National Security Council, for example, was established in 1947 and has long been a part of formulating U.S. defense policy; however the national security councils of France and the United Kingdom were formed much more recently (in 2009 and 2010 respectively).
- 5 The formation of national security councils that incorporate various military, intelligence, and governmental officials, staff, and resources is evidence of this streamlining.

increases diversity of opinions and facilitates weighing other considerations such as foreign policy and economics, affording them much needed attention.

Despite these and other recent and widespread reforms in the area of defense policy and national security, non-governmental and non-military figures and factors are still noticeably absent from the institutionalized decision-making process.⁶ In a separate part of this study discussing four key democratic and military powers (France, Germany, the United Kingdom and the United States) we will demonstrate the overwhelming influence that the executive branch and the military often wield in defense policy and decisions, and will discuss a recent initiative undertaken by these countries to change it, as appropriate under the circumstances. Israel and many other democracies share similar characteristics as well as new impetuses for adjustments or reforms.

It is important to understand the potential ramifications of a narrow approach to defense strategy. While supporters of an interdisciplinary approach to defense strategy initially view strong leadership and basic inter-governmental cooperation as necessary, an historical survey of military mishaps undertaken recently reveals gaping holes in the current decision-making process and a potential for disastrous consequences. Decisions made by overworked and sometimes ill-informed government executives, under extremely tight time constraints, can lead to policies that are, although well intentioned, shortsighted and narrow in scope. Neglecting to develop and carry out a strategy to address not only the immediate situation, but also possible long-term consequences of a military operation, can lead to unnecessary deaths, increased difficulty in future military endeavors, damage to international business interests, and irreparable harm to foreign relations. By incorporating the knowledge, opinions and advice of members of the diplomatic community, experts/academics, business representatives, NGOs, and media representatives into the decision-making process in a *systematic* and *consistent* way, states can hope to avoid serious pitfalls. Clearly, it must be done in a sensitive way to avoid imposing unreasonable constraints on the military and its effective management.

Making the process more inclusive is crucial in order to allay many of the practical concerns associated with defense policy. More importantly, it is imperative for the establishment of a democratically responsible defense policy. Thus, any constitutional ‘checks and balances’ approach will be more effective if other branches

6 The historical lack of consideration of such figures is evident in France’s White Paper, when it describes the “unprecedented” way the commission took advantage of a varied group of sources in drafting the strategy. The French White Paper on Defense and National Security 14–15 (ALTO trans., Odile Jacob 2008), available [here](#).

of government are able to fully carry out their functions by working with the various constituents and integrating their critical view into the policy-making process.

Normative Reasons

The normative reasons to include civil elements in defense decision-making, i.e., enhanced inclusiveness, information breadth, cost reduction, defense policy effectiveness, increased accountability, and improved transparency are described below. A better understanding of these factors can improve their implementation.

Enhanced Inclusiveness

Due to the secretive nature of the defense establishment, it is difficult for various stakeholders to get access to and impact defense policies. Since some of these stakeholders have a great influence on other aspects of national security apparatus, such as foreign policy and economics, inclusion of non-military considerations will create a culture of inclusiveness and allow other participants to influence defense policies.

For example, studies of the influence of various forces on foreign policy in the United States⁷ show that business executives have the highest level of influence on foreign policymaking. They are followed by professional experts (e.g., think tanks), labor union leaders, and finally, public opinion with very limited influence. Thus, integrating foreign policy into a military decision-making process helps to involve various civilian sectors—including business, academic and other experts—labor union and civic leaders in the decision-making process.

Information Breadth

The above-mentioned key groups can offer knowledge and expertise that government officials simply might not possess but that are necessary to achieve a more comprehensive national security policy. Business representatives, for example, would be able to shed light on the possible effects that military operations could have on international trade and commerce; NGOs are involved in on-the-ground work and could offer expertise on local situations and the impact of defense decisions on

⁷ See Lawrence R. Jacobs & Benjamin I. Page, *supra* note 2.

civilian life; media can serve to gauge public opinion both at home and abroad, indicating how military action might affect popular sentiment domestically as well as the welfare of foreign peoples and the perception of the state by foreign populations and leaders. Diplomats, ambassadors, and their staffs are involved daily in foreign relations and could offer advice on how military operations might affect relationships between countries; finally, academic experts could provide nuanced information on niche subjects that the government does not have the time or capacity to pursue.

Incorporation of such knowledge is important not only for the breadth it represents, but, more importantly, for what it can prevent. Mishaps can and do occur during military operations, whether due to incomplete information, misinformation, rapidly changing conditions, or simple negligence. Preventable mistakes often result in disastrous consequences. Getting things right the first time, by utilizing a wide array of resources, could save lives, cut costs, and actually render operations more successful at meeting immediate and long-term goals and plans for growth. This is particularly correct in view of the changing nature of military conflicts towards more asymmetric warfare.

Cost Reduction

It is sometimes believed that government alone can balance the various forces; that through cooperation between various governmental agencies a country can maintain a defense policy that is both effective and in line with democratic ideals.

In order to achieve these goals, the government needs to develop the complete array of knowledge and information required for a comprehensive defense strategy. However, it is much more expensive and complicated to develop this knowledge in-house by governmental agencies than to rely on outside experts. The same factors that have recently led to an increasing use of external contractors by military and defense establishments worldwide with respect to military operations can justify such use in the context of outsourcing defense-related information gathering for decision-making purposes.

Defense Policy Effectiveness

Defense policy protocol is guided not only by what is enshrined in nations' constitutions and laws, but is also driven to a great degree by concerns of effectiveness. The argument for effectiveness is often misinterpreted as an argument

for expediency. Commanders-in-chief are often authorized to act expediently, and sometimes unilaterally.⁸ As military actions, both defensive and offensive, are derived from immediate and secretive action, it is impractical for a military leader (be it a president, prime minister, or secretary of defense) to be called upon to navigate often unwieldy parliamentary or congressional approval systems before coming to a decision.

Yet, such an emphasis on expediency does not necessarily mean that the resultant military operations will be *effective* or adequate in accomplishing their goal. An effective military is “one that derives maximum combat power from the resources physically and politically available,” where combat power is defined as “the ability to inflict damage upon the enemy while limiting the damage that he can inflict in return.”⁹ Clausewitz’s theory on the relationship between senior military and political leadership supports this view and calls for inclusion of political considerations in military decision-making in order to achieve successful military results. The political power over military actions is exercised, according to his view, based on strategic effectiveness.¹⁰

Defense policy effectiveness is, therefore, not solely derived from the effectiveness of the use of the military, but also can be extended to other non-military factors. Specifically, the term “combat power” could be read as “the ability to produce a desired outcome.”¹¹ Such an approach looks at effectiveness not as merely a measure of expediency, but also as a measurement of the use of resources to accomplish a goal. In addition, such effectiveness must not be considered only in the short term; the nature of the defense reality is that the very same decision that quickly neutralizes a conflict can create unfortunate consequences down the road. Inclusion of non-military elements in defense decision-making processes increases “combat power” and helps decision-makers access new resources, thus resulting in more informed decisions. It

- 8 In the U.K., for example, the prime minister is afforded the right to initiate military operations under the Royal Prerogative. While in the U.S., and more recently in France, the commander-in-chief is required to receive approval from Congress and parliament, respectively, this approval must come within hours after the engagement of troops. In none of these countries is the commander-in-chief required to receive approval prior to undertaking military operations. These processes will be discussed in more depth in the country case studies that follow.
- 9 Allan R. Millet, Williamson Murray & Kenneth H. Watman, *The Effectiveness of Military Organizations*, 11 INT'L SEC. 37–71 (1986), available [here](#).
- 10 CARL VON CLAUSEWITZ, ON WAR (Michael Howard and Peter Paret, trans. and eds., 1976).
- 11 In some cases, the desired outcome may be physical damage to an enemy using military power, but in many more cases the desired outcome is more nuanced and includes avoiding violence.

will give leaders the best opportunity to take full advantage of all the resources available to them, as effectiveness requires.¹² Consequently, it improves defense effectiveness in both the short and long terms.

Increased Accountability

Creating an effective defense policy is a challenging task for any state, but democracies also face the challenge of accountability. While effectiveness focuses on accomplishing a goal, accountability focuses on justifying that goal, and the processes required to accomplish it, to the public. In a democratic system, those in power are granted their authority by the public and they are therefore obligated to justify their actions.¹³ Scholars have varying viewpoints regarding accountability: Robert Dahl argues that defense policy should reflect public opinion,¹⁴ while more realistic scholars of international relations might argue that an incompetent public would negatively affect policy outcomes and that their right and power to vote should be sufficient to satisfy accountability.¹⁵ While it is infeasible, and perhaps unwise, to offer every citizen the opportunity to directly influence policy, leaders are still responsible vis-à-vis the electorate.

A commander-in-chief or a policymaker can increase her ability to respond to the public by providing for greater participation in the policymaking process and incorporating more civil elements into it. Such participation could enhance

- 12 Rarely is an argument lodged against the idea of granting the commander-in-chief powers to make decisions of immediate importance. It is not practical or feasible that a panel of experts be entertained in regards to extremely time-sensitive operations (as military operations, by nature, tend to be), rather what is being argued here is a robust transformation of the decision-making apparatus. Changing the culture of defense policy would mean incorporating non-governmental actors into the day-to-day operations of the decision-making apparatus so that when it came time for the president, prime minister, or secretary of defense to make a time-sensitive decision he/she will have already considered various interests and arguments concerning a particular operation. It is not enough that outside resources be consulted on an ad hoc basis whenever crisis strikes—this is the status quo and is precisely what is being argued against. Until diversified thinking is seen as a valuable and *necessary* component of the decision-making process it is unlikely that its benefits will be realized. For a more in-depth discussion of organizational culture, see Edgar H. Schein, *Organizational Culture*, 45 AM. PSYCHOL. 109–119 (1990), available [here](#).
- 13 Robert O. Keohane, *Global Governance and Democratic Accountability* (May 17, 2002), available [here](#).
- 14 ROBERT DAHL, PREFACE TO DEMOCRATIC THEORY 131 (1956).
- 15 Lawrence R. Jacobs & Benjamin I. Page, *Who Influences U.S. Foreign Policy?*, 99 AM. POL. SCI. REV. (2005), available [here](#).

accountability by giving players with a major interest in the outcome of military operations the ability to participate in the policymaking authorizing such operations.

Improved Transparency, Trust, and Legitimacy

In addition to helping the national security establishment reduce unnecessary risk by improving its decision-making process, integrating other factors and players that are outside of the military realm will also improve the system's transparency, which is a necessary component for creating trust. While reducing risk may have a real advantage in the short-to-mid-term period, improving transparency is indispensable to building the trust and public support required to establish the system's legitimacy and to sustain the national military in the long term.

General Challenges and Barriers to Success

Democracies have applied various approaches to the question of the role of civil elements in national security with varying results, but all have initially failed to recognize the enormous potential of including non-military elements in defense decision-making processes. They eventually recognized that cooperation among various governmental agencies is insufficient in order for a country to maintain a defense policy that is both effective and adheres to democratic goals. In addition to the specific challenges and contributions of each country, I would like to share some of the more general barriers to success that have been identified in this study and some brief initial thoughts and examples with respect to overcoming them.

1. Institutional Resistance to Inclusiveness

In order to improve integration of non-military factors in national security decision-making, we have to foster an inclusionary mindset within the defense establishment. Such a mindset and culture can bring together all the necessary components for needed integration, including reciprocal understanding, mutual enabling, trust, and integrity.

Yet, inclusiveness can be perceived as burdensome, time-consuming, and costly. Thus, the defense establishment should foster this “culture of inclusion” by joint training with other parts of the government and non-governmental groups, along with

making it part of the defense institutions' "code of conduct" and policy documents. The U.S. institutional approach to this problem, as mentioned above, can serve as a case in point.

In order to involve civil forces we have to provide decision-makers with rewards and encourage a culture of institutional risk-taking. Compensation could be, for example, in the form of promotion and credit for effective relationships with other parts of government and non-governmental groups.

2. Non-Binding Nature of Non-Military Advisory

The various attempts to add inclusive representation and reform advisory mechanisms for defense decision-making around the world do not change the non-binding nature of this newly inclusive advisory. Thus, for example, in the United Kingdom, the power to make legally binding decisions continues to rest in the hands of the prime minister. The non-binding, non-military considerations may not get appropriate attention, and there is a need to find ways to integrate them into the formal legislative process.

3. Inclusion as "Lack of Effectiveness"

Incorporating more players into defense decision-making is often seen as a hindrance to effectiveness, but including business interests, NGOs, media representatives, members of the foreign policy community, and academics/experts could go a long way towards transforming the culture of the defense policy apparatus and could actually increase effectiveness. As we saw with several governments and their white papers dealing with this concern, you can authorize the parliament's involvement in defense decision-making while maintaining the executive branch's authority and flexibility in times of crisis or where there is need for an immediate response in order to maintain effectiveness. Here we can differentiate between a policy-making process that should be open to such inclusion, and concrete and immediate decisions, often driven by a tight schedule, that call for a quick response and executive flexibility. Moreover, all stakeholders are responsible for sharing success stories of inclusiveness and its effectiveness with each other, and for demonstrating the significant potential of inclusiveness and its effectiveness to future decision-makers.

4. Information Overload

People have difficulty understanding an issue and making decisions when they are surrounded by more information than can be handled.¹⁶ Working closely with many stakeholders and receiving masses of information may, in fact, decrease the ability to make critical decisions. Therefore, ensuring that this mass of information is screened and organized by appropriate bodies is a critical mission for the success of the inclusive approach. Using technological tools, such as the U.S. web-based application, or centralized bodies, such as the extended national security councils, are just some of the ways to deal with this critical issue. The French and American efforts discussed above to streamline their security apparatus and consolidate some of their military, homeland security, and intelligence units and operations limit the information overload effect.

5. Increasing Costs

Working with external experts can be perceived as an expensive proposition. Yet, we have already discussed how it is more costly to produce this knowledge and expertise in-house. National security systems should be transparent about the real costs of such collaboration. The civil society's increasing pressure on governments to disclose the defense budget and its components, together with the developing role of parliaments in this process, can factor in the cost reduction associated with the integration of civilian factors into the national security analysis.

6. Transparency as National Security Risk

Sharing sensitive information with non-governmental agencies can expose all of us to non-military risk. On the other hand, we cannot fully integrate these civil entities without providing them with the complete information necessary for a comprehensive analysis. Striking the right balance here is crucial in order to have a meaningful impact on national security matters. The line between policymaking and executive decisions should be applied here as well. The need for secrecy increases when concrete military actions need to be executed swiftly.

16 See ALVIN TOFFLER, FUTURE SHOCK (1970).

To conclude, integrating civil elements into national security policy decisions might enhance inclusiveness by involving various actors in shaping defense policy. It can also increase breadth of information, thereby improving decisions and rendering them more effective in reaching the desired goals. It can also contribute to cost reduction by using the expertise of external sources. From a democratic point of view, involving civil elements ensures accountability, transparency, public trust and legitimacy. Yet, integration of civil elements into defense-policy decision processes faces serious challenges. Transparency might create a national security risk, inclusiveness can be time-consuming and costly, information overload might lead to a less effective decision-making process. Thus, integrating civil elements into the national security decision-making process should be done gradually and in a balanced way.

Part II

Global Comparative Analysis, Trends, and Future Directions

Introduction: Inclusion of Non-Military Factors and Institutional Mechanisms

In the first part of this study we discussed the importance of and reasons behind the inclusion of non-military factors in national security decision making. We also discussed the global challenges and barriers to success, which make the inclusion process more challenging. Nonetheless, such inclusion can be successfully achieved by integrating external groups that bring these non-military entities into the national security decision-making process, as we saw in that article, and by building institutional mechanisms that empower non-military entities within existing institutions that are traditionally driven by military views.

Institutional mechanisms that empower non-military entities can address several concerns associated with the inclusion of external non-military groups. These concerns include doubts about the real intention of external groups and their potential biased and negative influence, sharing sensitive information with external groups, and the lack of familiarity with formal institutions and their modus operandi.

This section, which provides a global comparative analysis, will examine the challenge of inclusion of non-military factors within existing institutions in the context of four case studies. We will not focus on the Israeli constitutional and military structure, as this has been discussed extensively in many other studies. We will cover France, the United States, Germany, and the U.K., and their approach with respect to this challenge. These analyses will focus on the relationships between various centers of power, their checks and balances, and their will and ability to integrate non-military players and considerations into the mainstream of national security decision-making. Monitoring the defense budget, improving national security advisories, and authorizing a limited role of parliaments in defense strategies and implementation are recent major developments, which will help us contextualize the new institutional mechanisms in this growing field of national security. Based on these cases, we will then identify emerging trends and potential applications for the Israeli reality.

The United States

In order to properly understand the changing role of non-military factors in defense strategy, it is necessary to review the constitutional framework of national security in the United States. The United States Constitution divides war powers among at least two of the three branches of government. Article II of the Constitution provides that the president, who serves as head of both the government and the state, is the commander-in-chief of the armed forces.¹ While the president has the power to direct the military and formulate strategy and policy, Article I of the Constitution gives Congress the power to declare war.² Though the president does not have the authority to declare war, this does not prohibit him from engaging troops in military operations. Many U.S. presidents have involved the military in operations without a formal declaration of war, skirting the need for Congressional approval. Although the U.S. Constitution formally separates powers with regards to war-making, “the distribution of authority between the branches remains contested and uncertain.”³ This uncertainty is reflected in the media, policy debates, and legal procedures.

Historically, the balance of power has been skewed in favor of the president, a situation that triggered the drafting and passing of the War Powers Resolution during the Vietnam era. The War Powers Resolution, enacted into law in 1973, over President Nixon’s veto, was meant to restrict the largely unhindered power of the executive. The Resolution stated as its intent “that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.”⁴ The Resolution also defines and limits the president’s power, declaring that he can only exercise his power as commander-in-chief in cases where war has been declared against the United States, when he has “specific statutory authorization,” or in cases of national emergency when the United States or its possessions and armed forces are immediately threatened (situations of national

1 U.S. Const. art. II, § 2.

2 U.S. Const. art. I, § 8.

3 Lori Damrosch, *The Clinton Administration and War Powers*, 63 LAW & CONTEMP. POL’Y. 125 (2000), available [here](#).

4 From the War Powers Resolution: “It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by circumstances, and to the continued use of such forces in hostilities or in such situations.” 50 U.S.C. § 1541a.

emergency will be discussed later in more detail).⁵ Further to this end, the Resolution explicitly provides that the president must consult with Congress “in every possible instance” before introducing armed forces into hostilities, and throughout the duration of any such situations.⁶ It imposes specific time constraints and checks on presidential powers in accordance with Congress’ interpretation of the United States Constitution. The War Powers Resolution requires that the president establish regular consultations with Congress before initiating actions and throughout the duration of such actions, and report to the leaders of Congress within 48 hours of initiation of military actions. In addition, absent a declaration of war, the president must remove troops from any hostile situation if Congress so stipulates.⁷

Though the U.S. War Powers Resolution has been law since 1973, the controversies surrounding the power to introduce U.S. armed forces into hostilities continue; beginning with President Nixon’s veto of the Resolution, all administrations since 1973 have “maintained that Congress cannot constitutionally restrict the President’s commander-in-chief powers.”⁸ Though most, if not all, administrations have asserted their power and independence with regard to war powers pursuant to the Constitution, evidence exists that the War Powers Resolution has had some effect; there is a long record of presidential reports submitted to Congress in compliance with the Resolution, but most of these consist of presidents consulting Congress *after* actions have already been initiated.⁹

While controversial for many reasons, the U.S. operations in both Afghanistan and Iraq are good examples of compliance with the War Powers Resolution. Congress approved the war in Iraq in 2002,¹⁰ and both President Bush and President Obama have submitted multiple reports¹¹ to Congress in compliance with the War Powers Resolution.¹² However, recent operations in Libya have proved far more

5 50 U.S.C. § 1541c.

6 50 U.S.C. § 1542.

7 50 U.S.C. §§ 1542, 1543, 1544b,c.

8 See Lori Damrosch, *supra* (Part II) note 3, p. 127.

9 *Ibid.*

10 H.J. Res. 114, 107th Cong. (2002).

11 RICHARD F. GRIMMETT, THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS 18 (Congressional Research Service 2010), available [here](#).

12 Another possible contributing factor to the seeming lack of controversy surrounding the U.S. operations is the passing of Senate Joint Resolution 23, which, in light of the September 11, 2001, attacks, authorized the president “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks

controversial. Many¹³ in Congress have claimed that President Obama violated the law by participating in actions in Libya.

In addition to the executive and legislative branches there is, of course, a third branch of the U.S. government, the judiciary, and one wonders what the general role of the U.S. Supreme Court is in national security-related decisions. In general, the U.S. Supreme Court does not play a significant role in these decisions and the justices do not express their view. Even in the case of the War Powers Resolution, the U.S. Supreme Court has been remarkably quiet and has not ruled on the constitutionality of the Resolution. The U.S. Supreme Court's role with respect to military operations is mostly restricted to hearing lawsuits brought against the executive branch. Professor Rick Pildes, a leading American scholar, describes the lack of involvement of the judiciary in this process as follows:

Considerable uncertainty still remains about the proper scope of the Authorization for the Use of Military Force. No court has addressed the circumstances under which targeted killings are lawful. Many issues about the proper procedures to be used for trials before military commissions, and what charges can validly be brought there, remain

that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." This resolution was to taken to serve as the "specific statutory authorization" noted as necessary in the War Powers Act. This resolution, as well as public opinion following the attacks, undoubtedly gave the president freer rein than he would have otherwise been allowed. S.J. Res. 23, 107th Cong. (2001–2002).

- 13 These include, most notably, Speaker of the House John Boehner and Rep. Dennis Kucinich (who recently filed a lawsuit against President Obama; see [here](#)), who were publicly questioning the constitutionality of the operations in Libya. As noted in U.S. Const. art. I, § 8, cl. 11, the president cannot go to war absent a declaration of Congress. Even if military operations are not to be considered a war, pursuant to the War Powers Resolution, the president is still obliged to notify Congress within 48 hours of initiation and must terminate the operation within 60 days unless otherwise authorized by Congress. Operation Odyssey Dawn, the activities of U.S. forces regarding Libya, began on March 19, 2011, and the U.S. continued its involvement long past the 60-day deadline without explicit authorization from Congress. The operation was so controversial because it was part of a larger NATO operation initiated in order to enforce a U.N. Security Council Resolution. President Obama asserted that the U.S. was merely playing a supporting role, though many were nonetheless calling for his administration to adhere to the deadlines set forth in the War Powers Act. See George F. Will, *Is Obama Above the Law?*, WASH. POST, May 27, 2011, available [here](#); Rogene Fisher Jacquette, *Libya Campaign Reveals the Doves—on the Left and Right*, N.Y. TIMES, Jun. 16, 2011, available [here](#).

unanswered. And as Clapper illustrates, courts have had nothing to say about the scope of various surveillance programs.¹⁴

To sum up the situation, the executive branch acts in these areas virtually unrestrained by judicial review.

When looking at situations of national emergency—situations that are becoming more and more likely with the rising global threat of terrorism—it is important to consider the National Emergencies Act (50 U.S.C. §§ 1601-1651), enacted in 1976. The Act sets forth the executive’s expanded powers in times of national emergency. Prior to the National Emergencies Act, presidents employed emergency authority seemingly at will, with little more than the post–World War I requirement of a proclamation of a state of national emergency to limit their powers. The passing of the Act ushered in a new era of regulations conferring emergency powers. Pursuant to the National Emergencies Act, the president is authorized to declare a state of national emergency;¹⁵ in doing so, the president must specify the provisions of law under which he proposes that he, and other officers, will act.¹⁶ The president’s authority and actions during the national emergency are subject to judicial and legislative review,¹⁷ and Congress can rescind a declaration by passing a joint resolution.¹⁸ Absent a Congressional repeal or presidential termination, the declaration expires one year from the date of its issuance unless extended by the president. The checks and balances set forth by the National Emergencies Act ensure that the president does not impose martial law unless it is absolutely necessary. The United States entered into a state of emergency immediately following the terrorist attacks of September 11, 2001. It has been extended every year since then throughout the Bush and Obama administrations, most recently in September 2013 by President Obama in light of the ongoing national security threats.¹⁹

Nuclear weapons policy is another key area of concern. The National Command Authority, composed of the president and the secretary of defense, exercises exclusive control over the deployment of nuclear weapons. The president, as commander-in-chief of the U.S. Armed Forces, is the ultimate authority. Nuclear Command and

14 Rick Pildes, *Does Judicial Review of National-Security Policies Constrain or Enable the Government?*, LAWFARE, Aug. 5, 2013, available [here](#).

15 50 U.S.C. § 1621a.

16 50 U.S.C. § 1631.

17 RICHARD F. GRIMMETT, *supra* (Part II) note 11.

18 *Ibid.*

19 The White House, Office of Press Secretary, Letter to Congress, September 10, 2013, available [here](#).

Control (NC2), as defined by the Department of Defense (DoD),²⁰ further establishes this authority and serves as the support structure for the president to carry out such operations. The secretary of defense acts as the president's executive agent in managing the Nuclear Command and Control System.²¹ While the ability to engage nuclear weapons is exclusively a presidential prerogative, "the Nuclear Command and Control System (NCCS) has evolved to serve the president's requirements for advice and decision making for the strategic nuclear forces."²²

Though the president seems to wield extraordinary executive power, it is important to note that the president does not act alone in considering involvement in hostilities—the executive branch includes a host of bodies and officials responsible for advising the president on such matters. Since its establishment in 1947, the National Security Council (NSC) has been "the president's principal forum for considering national security and foreign policy matters with his senior national security advisors and cabinet officials."²³ The reference to foreign policy considerations as part of national security comprehensive analysis is not formally included in other democracies, which makes the U.S. an important case study for our discussion of integration of foreign policy elements into Israel's national security analysis.²⁴ Chaired by the president, the NSC includes the vice president, the secretary of state, the secretary of the treasury, the secretary of defense and the assistant to the president for national security affairs as its regular members. The chairman of the Joint Chiefs of Staff acts as military advisor, and the director of National Intelligence serves as an intelligence advisor. The president's chief of staff, counsel to the president, and the assistant to the president for economic policy all have standing invitations to the Council. Various other individuals are invited to attend the Council when deemed appropriate.²⁵ The NSC also encompasses the

20 The department of defense defines Nuclear Command and Control (NC2) as "The exercise of authority and direction by the President, as Commander in Chief, through established command lines, over nuclear weapon operations of military forces; as Chief Executive over all Government activities that support those operations; and, as Head of State over required multinational actions that support those operations. The NC2 structure supports the exercise of authority and direction by the President." Department of Defense Directive, Number 3150.06 (May 24, 2013), available [here](#).

21 *Ibid.*, pp. 2–3.

22 Robert D. Critchlow, Nuclear Command and Control: Current Programs and Issues 5 (Congressional Research Service, 2006), available [here](#).

23 See [The White House website](#).

24 To be discussed later in this study in the sections on the United Kingdom, France, and Germany.

25 National Security Council, The White House, available [here](#) (last visited Sept. 9, 2012).

Homeland Security Council, established under President George W. Bush following the World Trade Center attacks on September 11, 2001. In 2009, President Barack Obama merged the staff of the two councils into one National Security Staff, but the councils themselves continue to exist as independent agencies with direct access to the president.²⁶

The structure of governance is critical for any non-military influence in the U.S. system. We have learned that the United States Constitution explicitly divides military powers between the executive and legislative branches. Yet, since the enactment of the War Powers Resolution in 1973, U.S. presidents have continually circumvented the requirement to receive congressional approval. Unlike under the French system, in which, as discussed below, until recently the executive was authorized by law to act unilaterally in many sorts of military operations, there is a great deal of controversy as to the powers of the executive in the United States. The unifying theme among most administrations in the last 50 years or more is the ongoing power struggle between Congress and the president. As it currently stands, the U.S. system is characterized by the executive's begrudging compliance with the authority asserted by Congress under the War Powers Resolution. Since this power balance is often skewed in favor of the president, with limited Congressional authority, it is unclear how much power non-governmental agents can wield. Their influence is mostly limited to lobbying an often powerless Congress. Yet, several historical examples, such as the collaboration between the U.S. military and the U.S. political opposition during the Korean War and President Kennedy's disagreement with the U.S. military during the Cuban Missile Crisis, show that despite the formal division of powers, in practice power struggles are real. In light of the limited role of Congress in this process, there is a greater need to include other non-military considerations in defense-related decisions in order to mitigate risks that the military establishment tends to downplay. There are several forces at play with respect to the significant influence of the military on defense-related decisions.

The national debate on defense strategies tends to be shaped by the profile of the people engaged in such debate, the institutional “culture,” and the sources of funding for various defense operations. More specifically, U.S. military and Pentagon personnel have a great deal of influence in this debate. There has been much discussion in recent years about the “culture” of the department of defense and the

26 Justin Rubin, Georgetown Security and Law Commentary: Merging the NSC and the HSC: A Legal Footnote (2009), available [here](#).

need to include more diverse backgrounds, profiles, and voices to adapt to the changing defense fronts and challenges, as the Institute for Defense Analyses has demonstrated, as discussed below.

The shift of the U.S. military away from the operations of war to post-conflict management is one example. While the military remains largely unquestioned in its role in war, no societal consensus exists regarding its role in post-conflict situations and peacekeeping. The Institute for Defense Analyses has held a workshop on the “implications of transforming the culture of the DoD” and in its report on that workshop, it stresses the need to accelerate the DoD’s transformation from the “industrial age” to the “information age.”²⁷ Additionally, the report highlights the U.S. military’s rare success in post-war operations in cases of seized territory and states that “[a]lthough post-conflict activities have been an integral part of military campaigns in which U.S. forces are required to seize territory, they have never been incorporated into mainstream military thinking in any major, systematic way.”²⁸ This and other studies describe the military leadership as a “decisive factor” in implementing any organizational cultural change that would improve the ability of the defense establishment to deal with the above-mentioned challenges.²⁹

Another example is the shift of the U.S. military from waging war against conventional enemies to an asymmetric war against terrorism. The shift to asymmetric war requires a military leadership and an organizational culture that support a more interdisciplinary analysis, bringing together non-traditional views on national security threats and potential solutions. In order to effect such change, it is necessary to bring in people from a greater diversity of disciplines and backgrounds. For example, the increasing involvement of civilians and guerilla groups in an asymmetric war calls for a better understanding of the civilian society by military specialists. Therefore, sociologists and psychologists, among others, should and do take a greater role in defense decision-making.

27 Edgar M. Johnson, *Workshop Introducing Innovation and Risk: Implications of Transforming the Culture of DoD*, IDA, Mar., 2004, available [here](#).

28 Dr. James Jay Carafano of The Heritage Foundation made this comment as part of the Institute for Defense Analyses workshop (see previous footnote). Such analysis can also be found in one of his lectures at The Heritage Foundation. J.J. Carafano, *Post-Conflict and Culture: Changing America’s Military for 21st Century Missions*, Heritage Lecture No. 810 (The Heritage Foundation, 2003), available [here](#).

29 See also J. Thomas Hennessey, Jr., “Reinventing” Government: Does Leadership Make the Difference?, 58 PUB. ADMIN. REV. 522–32 (1998).

As the legislative branch (Congress) is changing its traditional limited influence on defense matters relative to the executive branch, lobbying rules that govern stakeholders' access to the legislative process can help them bring fresh perspectives to Congress and shape defense strategy. Moreover, it gives the various stakeholders access to the many government agencies dealing with national security. The United States has one of the world's most extensive lobbying industries, with strict disclosure requirements.³⁰ Yet, leading scholars and commentators call for lobbying reforms in light of the existing and potential abuse of the system,³¹ and it remains to be seen if reforms are eventually adopted and what their impact will be on the ability of non-military groups to influence the national security decision-making process.

Another way for legislative bodies to play a more significant role in any defense decision-making process is either by having the authority to control defense spending or by debating the defense budget on an annual basis. Such an approach would give Congress the opportunity to set its national security priorities, taking into account non-military factors as well. An open debate about the defense budget and its components would provide an incentive for the administration to reassess its national security strategy without exposing specific strategic options or confidential plans. Can Congress adjust its role more specifically by its involvement in discussions of defense matters and approval of defense spending?

While the Constitution allows Congress to refuse any proposed budgets, it has exercised this power rarely. This is particularly the case with respect to defense spending. Even where polls have indicated that public sentiment favored defense cuts, Congress was reluctant to curb spending. Les Aspin, a former U.S. secretary of defense, credits this to pressure on Capitol Hill from the armed services and limited defense knowledge among Congressmen. Although military personnel are barred from lobbying on Capitol Hill, they are allowed to "disseminate information," thereby applying a certain amount of pressure on members of Congress, and their military glory is often enough to gain an advantage. With limited knowledge of defense matters, Congressmen often defer to "experts" and these experts are often part of the defense establishment, making them more likely to argue in favor of spending. Because of these obstacles, both practical and political, Congress's right to refuse defense spending is rarely realized in practice. In fact, it was only recently, for the first time in history, that the House Armed Services Committee rejected the

30 The lead legislation in this area is the Lobbying and Disclosure Act of 1995, 2 U.S.C. 1601.

31 For examples of these reforms and analysis, see Thomas B. Edsall, *Putting Political Reform Right Into the Pockets of the Nation's Voters*, N.Y. TIMES, Dec. 14, 2011, available [here](#).

department of defense's Quadrennial Review, the main public document describing the United States' military doctrine and potential threats, due to the report's potential negative impact on the president's various proposals for defense budget cuts.³²

With respect to civilian participation in defense-related matters, the state department's online "Opinion Space" project can serve as a case study. This state department platform has invited users to read a series of discussion questions and possible responses and rate how much they agree with the response and how insightful they find it. After rating a given response to the question "[w]hat are one or two specific new technologies or interfaces that could help governments around the world enhance open public dialogue?" users were encouraged to give their opinions on an array of issues including nuclear weapons, climate change, and women's empowerment. Then they were asked to "join the discussion." After registering, users joined the discussion by rating other users' responses to questions and/or issues and by offering responses of their own. This allows the government to integrate the public's views on defense-related matters into its decision-making process.

The key issues of the U.S. analysis: (i) the inclusion of certain elements (such as foreign policy) in the NSC regulatory framework provides the required institutionalization and legitimacy; (ii) lobbying rules could provide stakeholders access to Senators, Congressmen, and Department of Defense officials, in systems, like the American one, where the legislative branch (Congress) is changing its traditional limited influence on these matters relative to the executive branch; (iii) changing the institutional culture of "over-militarization" by diversifying the profiles and backgrounds of defense establishment leaders would help avoid any institutional bias towards military factors in national security analysis; (iv) creating mechanisms to better control defense spending or debate the defense budget in order to set priorities, especially when the various stakeholders have limited access to the national security decisions themselves; and (v) since national security systems are, by their nature, centralized, using crowd-sourcing and other web-based tools would allow additional players to provide the government with new information and participate in any national-security related decisions.

³² For media coverage of the House Armed Services Committee's rejection of the Quadrennial Review, see [here](#).

The United States

President

- Head of state and head of government
- Commander-in-chief of armed forces

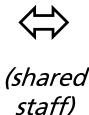
*Forms defense policy
in consultation with*

National Security Council

- Chaired by the president
- Includes statutory members: VP, secretaries of state and defense
- Advised on military matters by chairman of the Joint Chiefs of Staff (DoD)
- Invites president's chief of staff, counsel to the president, assistant to the president for economic policy to all meetings

Homeland Security Council

- Advises the president on matters of homeland security (similar to NSC, but domestic)
- Makes policy for Dept. of Homeland Security
- NSC is merely an advisory board and does not have the authority to make decisions. Defense Department advises the president through the NSC. Secretary of defense may have differing opinions than other members of the council but all decisions are ultimately up to the president



Authorized by

US Congress

- Responsible for declaration of war
- Votes on defense budget
- Holds the president accountable pursuant to the War Powers Resolution

France

The French case presents us with a different balance between the legislature, the presidential institution, and the executive branch. In contrast to the other democracies under examination, the role of the French parliament in defense decision-making has been extraordinarily minimal, while the government takes a leadership role. In order to understand the ability of French civilian society to influence defense strategy and add other non-military elements to it, it is critical to fully grasp the central role of the French presidency.

The French Constitution, in a number of articles, accords most of the responsibility for defense matters to the president of the Republic. Article 15 designates the president as commander-in-chief of the armies and also stipulates that he or she presides over high councils and committees relating to national defense.³³ For those who are familiar with the role of the president in French society, this is no surprise. The president is responsible for national independence, the integrity of the territory, and respecting treaties; in cases of emergency or imminent threat, the Constitution confers upon him the power to take whatever means necessary to fulfill these duties.³⁴ In practice, the French president also heads classified cabinet meetings in a manner consistent with the spirit of the Constitution.

The Constitution also mandates that the prime minister is “responsible” for national defense.³⁵ How are the relations between the president and the prime minister with respect to national defense to be understood?

While this stipulation seemingly contravenes the president’s role as commander-in-chief and his responsibility as chairman of various councils, the responsibility accorded to the prime minister by Article 21 of the French Constitution is largely interpreted to be purely administrative in nature. In other words, the prime minister is responsible for ensuring the implementation of policy decided upon in the National Security and Defense Council, which will be discussed later in this section, under the leadership of the president.³⁶ The prime minister is also responsible for appointing

33 1958 CONST. art. 15.

34 It is Article 5 that stipulates the duties and article 16 that grants him the power to fulfill said duties. 1958 CONST. arts. 5 & 16.

35 1958 CONST. art. 21.

36 From the *Code de la défense*, Article D*1131-1: “*Le Premier ministre assure la mise en œuvre par le Gouvernement des décisions prises en application des dispositions des articles L.1111-3, L. 1121-1 et L. 1121-2 et dispose, à cette fin, du secrétariat général de la défense et de la sécurité nationale.*” (“The prime minister assures the implementation by the government of the decisions made in the

military officials.³⁷ As the prime minister does not have to consult with the president, this authority to appoint senior civil and military officers can have an indirect impact on national security policymaking. Practically, an important feature of the prime minister's work is leading an inter-ministerial defense process, including signing decrees and attending ministerial meetings. The prime minister's limited executive role strengthens the status of the president in this defense process.

In France there is traditionally broad public consensus surrounding foreign and defense policy, in contrast to social issues. Nevertheless, the prime minister plays a more significant role when there is a coalition and he or she does not belong to the same political party as the president, referred to by the French as "cohabitation." The most recent example of cohabitation is the Chirac-Jospin period from 1997 to 2002, when President Jacques Chirac of the right-wing Rally for the Republic Party (now center-right UMP) appointed Lionel Jospin, a member of the Socialist Party (PS), as his prime minister.³⁸ Chirac's power was severely limited by this development and Jospin played a greater role in defense and military policy. Former president Chirac even referred to this era as a time of "paralysis."³⁹

While Article 35 of the French Constitution does accord some authority to parliament in the declaration of war, this role is limited and therefore, the French

application of Articles L.1111-3, L.1121-1 and L.1121-2 and positions the Secretary General of Defense and National Security to act to this end.") L.1111-3 and L.1121 (1-2) stipulate that defense policy is decided upon by the *Conseil de défense et de sécurité nationale*, and that the president acts as chairman of said council—with the prime minister taking over the president's duties if necessary. For further clarification, according to the website of the French government, while the constitution seems to split duties between the president and the prime minister, "*[e]n pratique, le Premier ministre assure plus particulièrement la direction générale et la direction militaire de la Défense, gère certaines missions administratives (organisation et gestion des personnels et des armements) et assume la responsabilité de la politique de défense devant le Parlement.*" [In practice, the prime minister assures more specifically the general military direction of defense, handles certain administrative matters (organization and management of personnel and arms) and assumes the responsibility of defense politics in parliament."], *La fonction de Premier ministre—Portail du Gouvernement* (updated May 15, 2012), available [here](#).

37 *Ibid.*

38 Jacques Chirac was elected president of the Republic in 1995, and in the beginning of his presidency he enjoyed the support of the majority right-wing National Assembly. Choosing to exercise his executive authority, Chirac dissolved parliament and called for new elections—this time, however, elections delivered a leftist majority to the National Assembly. Though the president is responsible for appointing the prime minister, the prime minister must also have the support of the National Assembly, forcing Chirac to appoint socialist Lionel Jospin as prime minister.

39 ALAN ALLPORT, JACQUES CHIRAC, 49 (Chelsea House, 2007).

parliament has not been a central player in matters of national defense.⁴⁰ Moreover, since France has not officially declared war since the current constitution was established in 1958, this parliamentary authority pursuant to Article 35 has until now proven irrelevant.

However, recent and continued augmentation of participation in exterior operations⁴¹ has triggered a debate in recent years, led by former French president Nicolas Sarkozy, surrounding the proper role of the parliament in national security affairs and the defense decision-making process.⁴² Consequently, France found it imperative to reform and amend its constitution in this regard. Under *la réforme constitutionnelle de 23 juillet 2008*, Article 35 of the French Constitution was revised to grant parliament a greater role. Article 35 now stipulates that the government is obligated to inform parliament of its decision to engage armed forces abroad within three days after the start of any intervention. The government must also specify the objectives of said military intervention. Following the introduction of this information, the floor of parliament is open for debate, but the debate does not lead to a vote.⁴³ This reflects the French view that French institutions should hold public debates on military involvement as part of the greater global role of the French military, without conducting a detailed operational and budgetary⁴⁴ discussion or approval, as in the German model. In France, the military budget is approved by the

40 1958 CONST. art. 35.

41 “Depuis plusieurs années, les propositions et rapports s’étaient succédé pour accroître la place du Parlement, d’autant que le nombre et le coût des opérations extérieures (OPEX) ont beaucoup augmenté – quelque 10 000 à 12 000 militaires concernés chaque année, pour près de 852 millions d’euros en 2008.” (“For many years, propositions to expand the role of parliament abounded as much as the number and cost of external operations augmented—impacting some 10,000 to 12,000 military personnel each year and costing nearly 852 million euros in 2008.”) *La déclaration de guerre et les interventions armées à l’étranger*—fiche no. 47, Assemblée Nationale (Apr., 2014), available [here](#).

42 The constitutional reform of July 2008 has even been called “Sarkozy’s Constitutional Reform.” The reforms have been touted by Sarkozy as a victory for democracy, in their supposed expansion of parliamentary power. Opponents on the left have argued, however, that the reforms have turned France into a “monocracy.” *France Backs Constitution Reform*, BBC NEWS, Jul. 21, 2008, available [here](#); Estelle Shirbon, *France’s Sarkozy Secures Constitutional Reform*, REUTERS, Jul. 21, 2008, available [here](#); and *Narrow Victory for Sarkozy’s Constitutional Reform*, AUSTRALIAN BROADCASTING CORP., Jul. 22, 2008, available [here](#).

43 1958 CONST. art. 35 (as amended).

44 Interestingly enough, the military budget is not playing a dominant role in the media during the annual parliamentary budget discussion.

French Senate under the “*Projet de loi de programmation militaire*.⁴⁵

If the duration of the intervention were to exceed four months, the government would have to obtain authorization from parliament. Since in recent years the French military has been involved in several long-term military operations abroad, in January 2009, the parliament simultaneously approved all such interventions ongoing at the time. More specifically, since this reform was enacted, the parliament has already been called upon to authorize interventions in Afghanistan, Chad, Central African Republic, Ivory Coast, Lebanon, and Kosovo, among others.⁴⁶ It is important to clarify that these new parliamentary responsibilities are in addition to the traditional “declaration of war” powers.

This process has mainly been driven by the president’s view that other parts of the French government and society should have a greater impact on defense policy. This has triggered an extensive political debate, especially among the Socialists, the president’s political rivals, some of whom rejected his constitutional reforms.⁴⁷ This regulatory reform was part of a broader national security reform, outlined by the *Livre blanc* [White Paper], an important form of strategic document that can be found in many Western democratic societies.⁴⁸ This broader reform reorganizes France’s public authorities in order to implement a new national security strategy, including the establishment of the new Defense and National Security Council with its National Intelligence Council, affirming a comprehensive and consolidated approach to defense, national security, and intelligence. As demonstrated below, the new Defense and National Security Council also includes non-military thinking in its analysis, and the “various political, financial, operational and international dimensions shall be the

45 *Dossiers législatifs - LOI n° 2013-1168 du 18 décembre 2013 relative à la programmation militaire pour les années 2014 à 2019*, available [here](#).

46 *La déclaration de guerre et les interventions armées à l’étranger*—fiche no. 47, Assemblée Nationale (Apr., 2014), available [here](#).

47 See, e.g., Henry Samuel, *French President Nicolas Sarkozy Wins Constitution Battle by Single Vote*, THE TELEGRAPH, Jul. 21, 2008, available [here](#).

48 “White Papers are used as a means of presenting government policy preferences prior to the introduction of legislation...the publication of a White Paper serves to test the climate of public opinion regarding a controversial policy issue and enables the government to gauge its probable impact.” HENRY CHAPIN & DENIS DENEAU, CITIZEN INVOLVEMENT IN PUBLIC POLICY-MAKING: ACCESS AND THE POLICY-MAKING PROCESS 33 (Canadian Council on Social Development 1978). Up-to-date WHITE PAPERS ON DEFENSE from nearly half of the world’s countries are available through the Military Education Research Library Network (MERLN) of the National Defense University. White Papers on Defense—MERLN, NDU, Apr. 15, 2011, available [here](#).

subject of contradictory debate and the options will be presented for final decision,” also using its newly created Advisory Council.⁴⁹

It is not surprising that the new French president, the socialist Francois Hollande, seems to follow this line, which reflects his inclusive viewpoint regarding the place of the French parliament and government in French national security affairs. In fact, President Hollande also initiated the drafting of a new White Paper on Defense and National Security in 2012, published in 2013.⁵⁰

Like the United States and Israel, France also has a national security council—the *Conseil de défense et de sécurité nationale* (CDSN). The Council is chaired by the president and its other members, in descending order of authority, include the prime minister, defense minister, minister of the interior, minister of finance, minister of the budget, and the minister of foreign affairs. Other ministers and officials may be called upon to participate in the council at the discretion of the president. The formation of the CDSN was decreed in October 2008 and formally established a year later, in December 2009. A security council has long existed as part of the French government, but the formation of the CDSN marks the replacement of the Conseil de défense, an informal group, and officially recognizes the concept of national security.⁵¹ So far, the change seems marginal and it is yet to be seen whether the new national security entity, with its formal structure and a broader approach to national security, will empower new voices in the traditional and conservative defense decision-making process.

The CDSN is also part of an overhaul of French defense and security strategy outlined in the *Livre blanc sur la défense et la sécurité nationale*, which was mentioned before and published in 2008 (an updated version of the *Livre blanc* was initiated by President Hollande and was published in April, 2013).⁵² The *Livre blanc* itself was commissioned in part with the aid of a panel of non-military, non-governmental experts,⁵³ and suggests that such a *conseil consultatif* (advisory council)

49 The French White Paper on Defense and National Security, p. 15, also available [here](#).

50 *Livre Blanc, Défense et Sécurité Nationale*, 2013, Portail du Gouvernement (April 29, 2013), available [here](#).

51 The *Conseil de défense*, or Defense Council, has existed since the beginning of the Fifth Republic. Dossiers législatifs — LOI n° 2009-928 du 29 juillet 2009 relative à la programmation militaire pour les années 2009 à 2014 et portant diverses dispositions concernant la défense, available [here](#).

52 Conseil des ministres, *Défense et sécurité nationale: le Livre blanc* (Odile Jacob, La Documentation Française 2008). *Le Livre blanc* is also available [here](#).

53 *Ibid.*

might play a role as part of the CDSN in the future. These experts would be appointed by the president and submit independent analyses to the president or the prime minister in order to support political, financial, and other defense-related decisions.⁵⁴ It is unclear what exactly the profile of these members will be other than that they will be “independent figures,” and their contributions will be intended to trigger debates that will inform final decisions.⁵⁵ The *conseil consultatif* has yet to be created as part of the national security apparatus, though the idea remained prominent in policymaking circles in the years after the publication of Sarkozy’s *Livre blanc*.⁵⁶ Support for such a council has surged recently, with the idea that it would guarantee neutrality and transparency of analyses and information exchanged at the highest levels of the government.⁵⁷ The French media contribute to the debate surrounding some of these topics, thereby integrating additional voices into the defense decision-making process.

Finally, France does not have a rigid review process of nuclear operations, but the president regularly provides his view on nuclear capacity and operations in his speeches. The relatively soft approach to nuclear weapons can be explained by the general supportive view of the French people. However, the current debate on nuclear energy in France following the Fukushima disaster may change this trend and impact nuclear weapon policy as well.⁵⁸

⁵⁴ *La fonction “anticipation stratégique”: quel renforcement depuis le Livre blanc?* SÉNAT, available [here](#).

⁵⁵ *Le Conseil de défense et de sécurité nationale—fiche no. 1.6*, available [here](#).

⁵⁶ A discussion of the implications of the *Livre blanc* was recently published by the French Senate. In the discussion, Senator Robert del Picchia examines the manifestations of the proposed defense policy of “strategic anticipation” set forth in the *Livre blanc* since its release. He cites the *conseil consultatif* as a means to reinforce France’s capacity for strategic anticipation but also notes that “this idea was adopted at the highest level before being abandoned, notably for reasons of confidentiality.” (“*Cette idée a été adoptée au plus haut niveau avant d’être abandonnée, notamment en raison des problèmes de confidentialité des débats.*”) In review of del Picchia’s analysis, Senator Jean-Louis Carrère encourages working towards better developing a functioning *conseil consultatif*. Sénat, *Commission des affaires étrangères, de la défense et des forces armées: compte rendu de la semaine du 8 juin 2011* (Jun. 8, 2011), available [here](#).

⁵⁷ *La fonction “anticipation stratégique”: quel renforcement depuis le Livre blanc?* SÉNAT, available [here](#).

⁵⁸ Fifty-seven percent of the French are in favor of abandoning nuclear energy. See M. V. Ramana, *Nuclear Power and the Public*, BULLETIN OF ATOMIC SCIENTISTS (Aug. 3, 2011), available [here](#).

Though the executive branch has long played the role of relatively uncontested decision-maker with respect to military operations outside of war, the constitutional reform of 2008 and the publication of the *Livre blanc* seem to suggest that France is moving in a different direction. Understanding the need to adapt to a changing, globalized world, and underlining the necessity of responding to evolving and continued threats,⁵⁹ the recent changes in French law have limited the executive power, consolidated the issues of defense and broader national security (including intelligence), and seemed to welcome varying and external opinions. Yet, the story of the new reform is still unfolding and we should all closely follow its implementation in the near future. On another note, it is clear that in the case of France, defense strategy has been influenced more by external military operations than by internal terrorist and other threats, given the French reluctance to use the French military for internal purposes. The French institutional approach to terrorism is mainly driven by police power and internal control.

The key issues of the French analysis: (i) in light of the highly centralized legal and practical power of the presidency in the French constitutional system, there was a need to amplify the voice of the French parliament in national security affairs by including reporting requirements and debating mechanisms; (ii) the integration of non-traditional defense factors in national security affairs is part of wider efforts of the French government to streamline the defense apparatus and consolidate defense and broader national security operations and agencies; and (iii) an independent group of non-military and non-governmental experts, which was influential in France's national security periodic strategic review, could provide a neutral, transparent, and interdisciplinary advisory to the country's leadership that includes both information and analyses.

⁵⁹ Nicolas Sarkozy, Foreword to The French White Paper on Defense and National Security 9-11 (ALTO trans., Odile Jacob 2008), available [here](#).

France (Post-2008 Reforms)

President

- Head of state
- Commander-in-chief of armed forces

Forms defense policy in consultation with

Conseil de défense et de sécurité nationale (CDSN)

(National Security and Defense Council)

- Chaired by the president
 - Includes the prime minister, defense minister, minister of the interior, minister of finance, minister for the budget, and minister of foreign affairs (other ministers may be called upon at the discretion of the president on an ad hoc basis)
- Responsible for the formation of national defense and security policy
- Encompasses *Le conseil nationale de renseignement* (Intelligence Council)

Policy implemented by

Prime Minister

- Head of government
- Responsible for ensuring governmental implementation of policy formulated by the CDSN

Authorized by
(only in times of war or long-term engagement)

Parliament

- Holds the power to declare war
- Must be informed within 3 days of a launch of military operation by the government (but has no power of authorization), pursuant to Article 35 of the Constitution
- Must approve of any military operation if it is to last longer than 4 months, pursuant to Article 35

Germany

The example of Germany has special significance, considering its recent history and its close strategic relationship with the Israeli government and military. Yet, it is important to remember that all current German military operations are part of a system of mutual self-defense such as the North Atlantic Treaty Alliance (NATO) and operations authorized by the UN Security Council,⁶⁰ and it has not experienced any major terrorist attack on its soil over the past decade.

The German case is also unique among these democracies in that its constitution outlaws war of aggression. Article 26 of the Basic Law for the Federal Republic of Germany (“Basic Law”) *declares unconstitutional* any acts intended to disturb the peace relations between nations, especially any preparations for “a war of aggression.”⁶¹ These acts are a criminal offense.⁶² The principle of peacefulness plays a major role in any judicial review of German military operations abroad. This is not to say, however, that Germany abstains from engaging in military action—as of October 25, 2012, there are nearly 6,600 *Bundeswehr* forces deployed abroad, mainly in peacekeeping operations.⁶³ Though the *Bundeswehr* cannot initiate offensive actions constitutionally, since 1994 it has had a marked presence in European Union (EU), NATO, and UN endeavors. This change is often credited to the administration of current chancellor Angela Merkel.⁶⁴ These organizations have been said to make up the “international framework of [Germany’s] security and defense policy.”⁶⁵ As outlined in the *Defense Policy Guidelines* of 2011, German defense policy is primarily concerned with conflict control. The defense minister uses phrases such as “peacekeeping and peace enforcement” and “crisis response” to describe the role of the military. Participation in these organizations and their respective military operations is paramount to Germany’s foreign and defense policy but, as stated,

60 As of October 25, 2012, Germany had around 6,600 soldiers deployed abroad. The vast majority of these forces were historically serving under the International Security Assistance Force (ISAF). In addition to ISAF, German armed forces are involved in seven other international operations—all under the auspices of NATO, the European Union, or the United Nations. Bundeswehr.de: *Einsatzzahlen—Die Stärke der deutschen Einsatzkontingente* (Oct. 25, 2012), available [here](#).

61 Grundgesetz für die Bundesrepublik Deutschland (GG) §26.

62 *Ibid.*

63 See *supra* note 60.

64 Anna Gawel, *Germany Increases Military, Political Clout around World*, WASHINGTON DIPLOMAT, Nov. 18, 2010, available [here](#).

65 German Ministry of Defense, *Defense Policy Guidelines 5* (May 18, 2011), available [here](#).

involvement does not disregard constitutional and other legal directives:

The involvement of the German *Bundestag* with regard to the employment of the armed forces as stipulated in the constitution will continue to be an indispensable basis of German security policy. Military operations have far-reaching political consequences. In each individual case, there must be a clear answer to the question of whether German interests require and justify an operation and what the consequences of non-action would be.⁶⁶

Though Germany seems to be expanding its military clout, the Basic Law strictly limits the scope of the *Bundeswehr*.

While in the other democracies discussed herein the head of the executive branch serves as the commander-in-chief of the armed forces, the German Constitution makes a distinction between wartime and peacetime in terms of the figure in command. The federal minister of defense commands the armed forces in times of peace,⁶⁷ while such command is transferred to the chancellor of the federal republic in the “state of tension or defense.”⁶⁸ The federal minister of defense, as the default commander-in-chief, is advised by the *Generalinspekteur*, a senior military advisor who provides institutional “know-how.” This control structure reflects Germany’s painful history of employing the military to advance political interests in the lead-up to World War II and the constitutional stipulation that the use of the military by the chancellor is reserved for extreme cases of a state of tension.⁶⁹ Clearly, this differentiation between the military and the government helps realize the limited role afforded to the armed forces in the Basic Law.

The legislative branch of the German government (*Bundestag* and *Bundesrat*) possesses extraordinary authority in respect to war powers, so much so that Germany’s army is considered a “parliamentary army.”⁷⁰ Pursuant to Article 115a of the Basic

66 *Ibid.*, 4.

67 Grundgesetz für die Bundesrepublik Deutschland (GG), art. 65a.

68 *Ibid.*, art. 115b.

69 Article 87a of the Basic Law not only establishes the Armed Forces, but also stipulates that “the armed forces may be employed only to the extent expressly permitted by this Basic Law.” The article establishes that the armed forces may be employed internally and/or to support police operations only in a state of defense or a state of tension. Grundgesetz für die Bundesrepublik Deutschland (GG), art. 87a.

70 Dieter Wiefelspütz, *German Forces Deployments and the German Bundestag*, 4 VIENNA J. ON INT’L CONST. L. 235 (2010).

Law, parliament is authorized to declare a “state of tension or defense.”⁷¹ The German constitution permits the armed forces to supplement police or border protection forces in cases where German territory or citizens are threatened, but even such a situation is subject to the approval of the *Bundestag* or *Bundesrat*.⁷²

Regardless of whether or not parliament has declared a “state of tension,” Germany’s Federal Constitutional Court (FCC), in its landmark decision in 1994, clarified that according to Germany’s constitutional structure, all involvement of German forces in external situations where “imminent involvement in hostilities is likely,” *requires* the approval of the parliament. The approval mechanism can be more flexible (a regular majority) in times of emergency where the usual approval process, with its supermajority, is not practical due to the need to respond quickly. Parliamentary approval is required even in cases involving deployment of armed forces pursuant to an already existing treaty.⁷³

Several important court decisions have examined this requirement in the context of specific military operations in the Middle East. The FCC ruled in 2008⁷⁴ on the constitutionality of deployment of German soldiers in NATO AWACS aircraft involved in an aerial surveillance mission above Turkey, for which the federal government did not obtain consent from the *Bundestag*. The court ultimately decided that the federal government should have sought approval from parliament before deploying troops, relying on the July 12, 1994, ruling. Underlying this decision was the determination that involving *Bundeswehr* forces in the AWACS operation involved them in a situation where hostilities were likely.⁷⁵

Just one year prior to the AWACS/Turkey decision, however, the FCC seemed to rule in favor of executive authority in its decision in the *Tornado Case*.⁷⁶ In that case,

71 “Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defense) shall be made by the *Bundestag* with the consent of the *Bundesrat*. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the *Bundestag*.” Grundgesetz für die Bundesrepublik Deutschland (GG), art. 115a.

72 Grundgesetz für die Bundesrepublik Deutschland (GG), art. 87a.

73 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) [Rulings of the Federal Constitutional Court], July 12, 1994, vol. 90, p. 286; *see also International Law Reports*, vol. 106 (1997), pp. 320–52 (discussing the ruling in English).

74 BVerfGE, 2 BvE 1/03 of May 7, 2008, paragraphs No. (1–92), available [here](#).

75 Press Release no. 52/2008, *Federal Constitutional Court, Deployment of German Soldiers in AWACS Aircraft over Turkey Required the Approval of the Bundestag* (May 7, 2008), available [here](#).

76 BVerfG, 2 BvE 2/07 of 07/03/2007, paragraphs No. (1–90), available [here](#).

the court ruled that the federal government was not required to seek renewal of approval from parliament of Germany’s military support of Turkish defense based on a NATO treaty. The change of scope from the original treaty was the shift from emergency crisis operations (regional self-defense) against Iraq to a mission in Afghanistan with no immediate connection to the Euro-Atlantic area. This decision was subject to two important stipulations—renewal of approval was not required provided that the amendments to the treaty did not contradict the originally stated structural limits of the treaty and that they did not include any new involvement of armed forces.⁷⁷

The *Bundestag*’s scrutiny of the federal government and approval of military actions underway are conducted by its Defense Committee and Foreign Affairs Committee.⁷⁸ While the Foreign Affairs Committee is the lead committee in preparing the recommendation for a decision on a mission abroad, the vote of the Defense Committee has a critical role. The Defense Committee also exercises oversight of the defense budget, military procurement, and internal structural military affairs.⁷⁹ It can also constitute itself as a committee of inquiry, and it conducts an interdisciplinary parliamentary analysis, which includes non-military factors that are presented by experts and witnesses who regularly attend the Committee’s meetings.⁸⁰ The *Bundestag*, however, does not have the authority to dictate much more than a simple approval to initial or expanded involvement—parliament is not to decide “the modalities, the dimension and the duration of the operations, nor the necessary coordination within and with the organs of international organizations.”⁸¹

Hence, parliament cannot request the initiation of any military operations,⁸² nor does it formulate foreign policy—these tasks are accorded to the federal government, in particular the executive branch.⁸³ There is no consensus regarding the

77 Helmut Philipp Aust & Mindia Vashakmadze, *Parliamentary Consent to the Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the AWACS/Turkey Case*, 9 GER. LAW J. 2223, 2229–30 (2008) (discussing the *Tornado Case* and the contradictions with the AWACS/Turkey decision), available [here](#).

78 German *Bundestag: The Influence of the Defence Committee on International Missions of the Bundeswehr outside National and Alliance Defence* ([online](#); last visited Sep. 9, 2012).

79 *Bundestag* information on the Defense Committee ([online](#)).

80 *Ibid.*

81 BVerfGE 90, pp. 286, 389.

82 See Dieter Wiefelspütz, *supra* note 70 (discussing the limited role of the German parliament in German forces deployment).

83 Article 59 of the Basic Law stipulates that the federal president acts as representative of Germany for the purposes of international law. This is to include the conclusion of treaties and the exchange of

executive branch's authority to initiate military operations pursuant to an already-existing treaty that has been approved by the German parliament, such as in the case of many NATO operations.⁸⁴

One of the most important developments in security policy in recent years in many Western governments has been the establishment of a national security council to formulate and execute a more comprehensive and objective defense policy. Germany does not currently have a national security council based on the American model, as France, the United Kingdom, and Israel have all recently adopted. Germany's current equivalent, the *Bundessicherheitsrat* (BSR), does not function in the same way as the national security councils of these other democracies, and unlike all the other national security councils, the military is not even adequately represented within it.⁸⁵

Generally, the problem with launching a comparative analysis of Germany's formation of defense policy and the role of civilian society in its defense policy is its historical development. German defense is a minimally developed arena of foreign policy. The German military operates exclusively as a peacekeeping force, or in conjunction with mutual self-defense organizations/treaties (e.g., NATO), so its defense policy largely does not exist outside of preparations to defend the nation from outright attack.

Germany's BSR, translated as the Federal Security Council, is comparable to the national councils of the other countries under examination *in name only*. The BSR exists as part of the Cabinet (*Bundeskabinett*) with a small administrative office in the Chancellery, counting the chancellor and the ministers of the foreign affairs, economy, finance, justice, development, and interior ministries among its members. BSR's observer is the chief of staff of the federal president. The BSR, however, deals

envoys. Treaties that precipitate legislation require the consent and participation of the “bodies responsible”—in other words, the executive branch may sign treaties, but if the treaties require any change in legislation the participation of parliament is necessary. GG, art. 59.

- 84 As discussed earlier, the rulings of the FCC are not consistent on this matter. Aust and Vashakmadze cite BVerfGE pp. 90, 286, and 387 to support the fact that the FCC does not consider legislative approval of involvement in mutual self-defense organizations to be sufficient authorization of all future concrete deployments of armed forces, even pursuant to the treaty's original mandate. The FCC, however, has also ruled in favor of Executive leeway such as in the case of the 1999 NATO Strategic Concept, when it ruled that missions proposed under it did not require parliamentary approval. Helmut Philipp Aust & Mindia Vashakmadze, *Parliamentary Consent to the Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the AWACS/Turkey Case*, 9 GER. LAW J. 2223, 2224 (2008) available [here](#).
- 85 Maxim Worcester, *Does Germany Need a National Security Council?* Institut für Strategie-Politik-Sicherheits- und Wirtschaftsberatung 1 (2010), available [here](#).

exclusively with arms exports and is notoriously secretive about its dealings. Thus, it has been criticized for lack of parliamentary control and a very narrow agenda, instead of being used as an instrument for coherent foreign and security policy.⁸⁶

Though there are calls to create a council that takes on an advisory role,⁸⁷ no such attempt has yet been successful. Dr. Henning Riecke of the German Council on Foreign Relations cites both German constitutional structures, designed by Germany's Basic Law, and the political culture as contributing factors to the hesitance to establish a national security council.⁸⁸ It is, however, important to note that although decisions regarding defense policy are made within the Cabinet, another body, the *Militärische Führungsrat* (Federal Armed Forces Defense Council) may debate issues prior to the cabinet's decision. This council, equivalent to the U.S. joint chiefs of staff, is chaired by the *Generalinspekteur* but exercises no command authority.

Though Germany has maintained a noticeable military presence since 1994, it is currently in the process of reducing its armed forces. The decrease in absolute personnel figures, along with an increase in budgetary constraints, and the general post-war culture of restraint—all ensure that the *Bundeswehr* unequivocally remains a “parliamentary army.” German security policy under Merkel and Steinmeier has continued the geographic extension of German security, including the participation of German armed forces in various out-of-area missions. There have also been efforts to transform the *Bundeswehr* from a territorial defense force to a deployment army.⁸⁹ However, current policy and budgetary constraints make it unlikely that Germany will develop a military conducive to operating outside of its current scope.

86 E-mail from Henning Riecke, Head of Program, Transatlantic Relations Program, German Council on Foreign Relations (Jun. 17, 2013) (on file).

87 Many such suggestions have been credited to Chancellor Angela Merkel and her supposed desire to increase the executive's role in national security issues. Talk of a national security council on the American model was picked up in the press following the publication of a new concept for national security strategy published by the Christian Democratic Union in 2008. See *Merkel's CDU Calls for Missile Shield for Europe*, SPIEGEL ONLINE, May 5, 2008, available [here](#).

88 “The German political culture is usually averse against [sic] mixing internal and external aspects of security. Historically, a clear division between army and police has been an essential feature of the (West) German security forces. Using the Bundeswehr in internal affairs is against the constitution.” E-mail from Henning Riecke, Head of Program, Transatlantic Relations Program, German Council on Foreign Relations, to Courtney Creedon, Research Assistant (Aug. 24, 2011) (on file with research assistant).

89 Christian Hacke, *Germany's Foreign Policy under Angela Merkel*, American Institute for Contemporary German Studies (2008), p. 2, available [here](#).

The German system seems to work for Germany—sensitive to its history, the *Bundeswehr* and its supporting legal structure are marred with relatively few controversies and operate in line with the prevailing socio-political culture of the nation.

The current European debate on managing fiscal deficit will probably continue the trend of reducing the size of Germany's armed forces and limiting expansion of their operations. Moreover, Germany has already done away with compulsory military service.⁹⁰ Questions of pan-European fiscal policies and strategic solidarity can also play a role in any future revision to current policies. Moreover, rising global terrorism may revitalise the discussion in Germany of how it should use its military for local deployment to deal with internal challenges and whether a new national security council can help this process.

It is crucial to consider the context. Germany is an economically sound country, entrenched in an alliance with some of the most powerful nations in the world, and surrounded by political allies that share strong cultural and religious ties. In other words, the German system is not highly adaptable, and it is challenging for Israel to draw lessons on the military-civil balance from the German case. Nevertheless, the rising role of parliament in Germany's defense policy and military activities, facilitated both by legislation and judicial interpretation of such legislation, is an important development in recent years, reflecting a broader trend in leading democracies and their militaries. The German model that calls for parliamentary approval and joint responsibility with the executive for peacekeeping operations and military intervention, while maintaining executive flexibility in times of emergency, should be studied carefully.

The key issues of the German analysis: (i) the significance of the German parliament in oversight of military operations allows the German parliament to conduct an interdisciplinary analysis of national security matters through one of its committees; this analysis can include non-military, civil factors, including foreign policy, civil society, and commercial interests; and (ii) non-military concerns need to be addressed by establishing a Western-style national security council, which is currently missing from the German system.

90 *Germany to Abolish Compulsory Military Service*, THE GUARDIAN, Nov. 22, 2010, available [here](#).

Germany

Parliament

- Empowered to declare a state of war (only body with such authority)
- Must approve of involvement in external situations where hostility is likely
- Oversees the federal government in regards to policy and command of operations already underway
- Cannot request the initiation of a military operation
- Cannot decide on the specifics of a military operation

Votes on decisions made by

Federal Minister of Defense

- Default commander-in-chief of *Bundeswehr* (in times of peace)

Federal Chancellor

- Commander-in-chief of *Bundeswehr* in times of war

Advised by

Generalinspekteur

- Senior military advisor to commander-in-chief of armed forces

Enacts policy formed by the

Cabinet

- Consists of federal chancellor and cabinet ministers
- Responsible for decisions regarding troop deployment and other, broader foreign and defense policy decisions

May write policy inspired by debates in the

Militärische Führungsrat

(Federal Armed Forces Defense Council)

- Consists of the deputy chief of staff of the Federal Armed Services and three service *Inspekteurs*

The United Kingdom

Observers of the U.K. system find themselves quite confused with respect to the balance of powers between the Parliament, the royal institutions, and the various organs of the British government. Yet, the British defense establishment plays a significant role in global defense strategy, and understanding the role of non-military factors in its decision-making processes is critical.

Military decision-making in the United Kingdom includes no formal and little practical role for Parliament, although this may be changing in light of the global trend towards a growing role for parliaments in defense matters. The government acts as the sole authority in this regard, operating under the ancient practice of royal prerogative. The concept of royal prerogative is an ambiguous one; various scholars and officials offer their definitions, though it is impossible to agree on definitive articulations of the duties and privileges enshrined therein despite the lively constitutional debate.⁹¹

The definition offered by the Treasury Solicitor's Department in 2004 aptly illustrates the difficulties in describing the prerogative:

There is no single accepted definition of the prerogative. It is sometimes defined to mean all the common law, i.e., non-statutory powers, of the Crown. An alternative definition is that the prerogative consists of those common law powers and immunities which are peculiar to the Crown and go beyond the powers of a private individual, e.g., the power to declare war as opposed to the normal common law power to enter a contract.⁹²

Though the royal prerogative technically ascribes power to the monarch, in practice it is the prime minister who acts on behalf of the monarch in regard to declarations of war and the deployment of British troops.⁹³

91 Claire Taylor & Richard Kelley, Parliamentary Approval for Deploying the Armed Forces: An Introduction to the Issues 7 (House of Commons Library Research Paper 08/88, 2008), available [here](#).

92 *Ibid.*

93 “Because the prerogative power constitutes legislative authority to act without parliament, the government of the day does not need the permission of parliament to send troops abroad into conflict situations.” Sebastian Payne, *Comment: Changing Britain’s War Powers Will Not Be Easy*, www.politics.co.uk, Apr. 11, 2011, available [here](#).

The absence of a legal role for Parliament does not prevent it from wielding influence over government decisions. Because the prime minister, although appointed by the monarch, is ultimately accountable to Parliament, he must be especially conscious and responsive to the wishes of Parliament. Though former prime minister Tony Blair maintained support for the current system, he conceded that practically it would be difficult for a government to engage in armed conflict or deploy troops without a parliamentary debate.⁹⁴

Although Parliament is not expected to vote on issues of military involvement, *debates are allowed.*⁹⁵ While there was controversy in the late 1990s over events in Kosovo and the perception that the British parliament did not debate these matters, recent years have seen a resurgence of parliamentary debates. On eighteen different occasions Parliament gave voice to its opinion in regard to the situation in Iraq, and formally voted in favor of military deployment there.⁹⁶ It is still unclear whether this vote should serve as a precedent for requiring parliamentary approval of deployment of armed forces in the future.

In respect to the war in Afghanistan, Parliament again saw the opportunity to present and discuss various viewpoints. Though the British parliament can express its view on military operations through statements to the House, questions, and debates, it is important to note that no such vote occurred on a motion introduced by the government on the deployment of British troops in Afghanistan.⁹⁷ One could argue that the failure to hold a vote implies a legitimacy and accountability crisis within the British system. More recently, the British parliament approved a motion introduced by the government seeking retrospective approval for deployment of forces in Libya

94 Evidence to the Liaison Committee, February 6, 2006, Q303.

95 There is considerable sentiment that debate in Parliament is a privilege, not only among those in the government but also among some in Parliament itself. Graham Allen, a member of Parliament (Labour Party), perhaps summed up the sentiment best, saying, “This House is not taking any decisions; the government have already taken a decision and have graciously allowed us a debate today.” Quote taken from the March 21, 2011, Libyan intervention debate in the House of Commons. See also Sebastian Payne, *Comment: Changing Britain’s War Powers Will Not Be Easy*, www.politics.co.uk, Apr. 11, 2011 (analyzing the Commons’ debate and the prospects for regulatory reform on parliamentary approval), available [here](#).

96 “Parliament was recalled on 24 September 2002 to debate the situation in Iraq and the possible recourse to military action. Prior to the commencement of military operations on 20 March 2003 there were three further debates on Iraq on substantive motions, and eleven statements, plus two debates on defence in the world, during which much mention was made of the ongoing situation.” See Claire Taylor & Richard Kelley, *supra* note 91.

97 *Ibid.*, 14.

in 2011. On the other hand, no government-led debate or parliamentary vote on the deployment of the armed forces to Mali was held in 2013 since it was clear that no British forces would be deployed in a combat role. As of today, no legislative proposals have been put forward by the government to allow the House of Commons a formal approval role in connection with deployment of armed forces.

Britain's lack of a written constitution or laws explicitly governing decision-making authority as to warfare precludes an extensive *legally-minded* debate.⁹⁸ However, growing concern over a perceived lack of democratic accountability under the current system has stimulated not only debate but also calls for reform. These appeals have not only come from the public and members of Parliament, but also from within the government itself. The drafting of a measure similar to the United States' War Powers Act has been entertained. The government, in its Green Paper of 2007, suggested the more general notion that "the Government should seek the approval of the House of Commons for significant non-routine deployments of the Armed Forces into armed conflict, to the greatest extent possible."⁹⁹ Five years later, the precise form such "approval" will take is yet to be determined.¹⁰⁰ The British government, though, is pushing for a "resolution-style" reform instead of formal legislation:

While not ruling out legislation in the future, the government believes that a detailed resolution is the best way forward. This will take the form of a House of Commons resolution which sets out in detail the processes Parliament should follow in order to approve any commitment of Armed Forces into armed conflict.¹⁰¹

98 For a more detailed reading of this issue, and the potential problems and benefits of comparing it to a U.S. system that has a tradition of constitutionally-based debate on the matter of war-making, see David Jenkins, *Efficiency and Accountability in War Powers Reform*, 14 J. CONFLICT & SECURITY L. 145-165 (2009), available [here](#).

99 Ministry of Justice, The Governance of Britain, Cm 7170, July 2007, paragraph 26, available [here](#).

100 There are conflicting accounts of the government's intentions. In some instances the government suggests that parliamentary reform is in the form of a resolution, while Mr. Hague, the British foreign minister, during the March 21, 2011, debate on Libya in the U.K. Parliament, implied that reforms would take a more concrete legal incarnation: "We will also enshrine in law for the future the necessity of consulting Parliament on military action."

101 The earlier Green Paper offered more varied and lenient options but the resolution route was eventually exerted as the unique option in the White Paper. HM Government, Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review, 2010, Cm 7948, 3-6, available [here](#).

This resolution, which would be drafted by the House of Commons, would be non-binding and would require the prime minister to initiate the approval process.¹⁰² Under such a resolution, the prime minister's war powers under the royal prerogative are maintained and any decisions set forth in the approval process would not be legally enforceable. The proposal makes no mention of any consequences that would result from a failure to approve military operations.¹⁰³ Thus, the real impact of this proposed reform is, indeed, uncertain.

When we look at the recent case of a potential British military intervention in Syria we conclude that while the British parliament eventually did not pre-approve military actions it did follow the practice of a non-legally binding discussion and approval or rejection of a military action led by the executive branch.

On the future of the British defense decision-making process and the role of Parliament, a protocol exists that British leaders follow in practice. As in all of the other democracies under study, the U.K. leader does not make his decision in a vacuum. The prime minister has long entertained a multitude of advisors, but 2010 saw the establishment of a formal National Security Council ("Council"), similar in structure to the United States National Security Council. The Council was established on May 12, 2010, and is chaired by the prime minister.¹⁰⁴ The deputy prime minister serves as the deputy chair and the Council includes the chancellor of the exchequer, the foreign secretary, the defense secretary, the home secretary, the secretary of state for the Department for International Development, the secretary of state for energy and climate change, the chief secretary to the treasury, and the minister for government policy as its members.¹⁰⁵ The U.K. Council has a narrow-base participation in comparison to the U.S. version. The position of national security advisor, who is responsible for "coordinat[ing] and deliver[ing] the Government's international security agenda," was created concurrently.¹⁰⁶

The list of members reads as a much more diverse version of the American and French bodies, but the Council's function is largely the same. The National Security Council considers itself the main forum for a discussion of the Government's national security objectives and it states its intention to deal with national security "in the

102 Ministry of Justice, The Governance of Britain—Draft Constitutional Renewal Bill, 2008, Cm 7342.

103 See David Jenkins, *supra* note 98, pp. 156–157.

104 Cameron Chairs First UK Security Council Meeting, BBC NEWS, May 12, 2010, available [here](#).

105 Prime Minister's Office. Establishment of a National Security Council , available [here](#).

106 Prime Minister's Office. Establishment of a National Security Council (May 12, 2010), available [here](#).

round and in a strategic way.”¹⁰⁷ While the Council provides the opportunity for cooperation among different agencies and individuals, no decisions made in the Council hold any legal clout. The power to make legally binding decisions continues to rest in the hands of the prime minister. Consequently, and as we have seen with other national security councils and in other countries examined here, non-military considerations may not receive appropriate attention despite the diverse representation in the Council.

The debate that is going on in the United Kingdom now follows the general trend toward more parliamentary control in military matters. Additionally, like other democracies discussed herein, it faces the issue of how to adapt to the growing threat of terrorism and how to balance efficacy and accountability.

The key issue of the U.K. analysis: The informal role of the British parliament in approval of defense operations should be supplemented by formal legislation or governmental policy; the proposed resolutions should solve this concern.

¹⁰⁷ Cabinet Office. National Security Council ([online](#), last accessed Sept. 10, 2012).

The United Kingdom

Monarch

- Head of state
- Legal commander-in-chief under the royal prerogative (though not in practice)

Prerogative powers exercised by

Prime Minister

- Head of government
- Commander-in-chief in practice

Consults in his decisions with

National Security Council

- Chaired by the prime minister
- Meets weekly to develop security strategy
- Includes permanent members: deputy prime minister, chancellor of the exchequer, secretary of state for foreign and Commonwealth affairs, home secretary, secretary of state for defense, secretary of state for International Development, secretary of state for energy and climate change, and the security minister
- Invites chief of defense staff and heads of intelligence agencies as required

No formal or legal link with

House of Commons

- Exercises no formal role or power in military decision-making
- Sometimes debates on forthcoming or already-initiated operations, though opinions are not formally recorded
- Makes decisions that, under the government's current proposition for reform, will continue to be non-legally-binding
- Offers approval that is extremely useful in legitimizing government decisions

Trends and Applications

The conceptual framework and the comparative analysis of several democracies help to identify nations and areas where non-military considerations are integrated into national security. Also, strategic implementation and decision-making through various institutional reforms and systematic mechanisms are relevant. While our comparative analysis covers a wide range of nations, it is still possible to identify significant trends for application to the Israeli case. I will now review the trends and potential implications.

The first trend, which has already started in Israel, is **authorizing a greater role for the parliament** in the defense decision-making process. The Israel Democracy Institute introduced in its proposal for an Israeli Constitution several mechanisms to grant the Israeli parliament (the Knesset) broader authority. These mechanisms include, for example, a general ministerial obligation to report to the Knesset without the need for a particular request from the Knesset. In most countries, national security strategy and defense implementation rest in the hands of the executive branch or the presidency. Yet, as we have seen in various case studies (e.g., the U.S., France, and the U.K.), some countries are currently adopting reforms that will empower their parliaments and allow them to participate in certain defense decisions, including expressing opinions and giving approval. Parliamentary participation increases the chances of improving transparency and accountability, increasing diversity of opinions and factors—such as foreign policy and economics—and affording them much needed attention. Governments can ask for parliamentary approvals on general or specific actions according to existing legislation or common practice, or certain legislative bodies can be created to share their know-how with other branches of government or in order to increase the legislature's participation in both closed and public debates.

Clearly, the ability of parliaments to play a bigger role depends on the constitutional limits and the political tradition of the respective country. Several changes that have been implemented recently in Europe would not necessarily fit Israel's legal structure and political tradition. However, since the Israeli parliament is not intimately involved in defense decisions, its ability to influence the military agenda and add non-military concerns to the traditional military agenda would potentially be enhanced by various reforms.

The Israeli parliament, for example, can follow other legislatures, such as the U.S. Congress,¹⁰⁸ and split its foreign affairs and defense committee into two separate committees: one dedicated exclusively to defense concerns and the other to foreign affairs. It would give the foreign affairs committee the opportunity to focus on foreign policy issues and work closely with its counterparts abroad. While ideally, the foreign affairs and defense committee should dedicate sufficient time to both defense and foreign policy agenda items, actual practice differs. In practice, only one out of its many sub-committees deals with foreign affairs and only a few meetings a year focus on foreign affairs. In fact, since foreign policy covers the whole globe, it is almost impossible to dedicate ample time to foreign policy discussions when foreign affairs and defense issues are being dealt with by the same parliamentary committee. However, it would be important, according to this proposal, for the two separate committees, foreign affairs and defense, to conduct several joint sessions during the year to ensure a complete integration and cross-analysis, and to make sure the defense committee continues to consider critical input from foreign affairs sources.¹⁰⁹ The relevant laws, such as the Basic Law: the Military, should reflect such parliamentary empowerment. Currently, this and other related laws do not refer to the role of the Knesset in this process.

Second, and in connection with the empowering of the parliament, the Knesset should follow other legislatures and increase and improve its participation in discussion of the defense budget and its implementation. Currently, this debate is limited mainly to the finance committee (in addition to financial aspects of the foreign affairs and defense committee). The debate should be widened and include additional forums and committees within the parliament. Moreover, one of the most frequent complaints about the work of the finance committee with respect to the defense budget is how they lead discussions and debates based on very limited information, due to concerns about confidentiality. The military, together with other branches of government, should sort out how to include more information in its briefings and increase transparency on budget discussions outside of the scope of the defense establishment. As discussed earlier, the U.S. House Armed Services Committee should be looked at in this context.

In the United States, as we have seen, Congress has the constitutional power to refuse approval of any proposed defense budgets. Yet, this power has been rarely exercised in practice. The U.S. Congress defers to “experts” from the defense

108 Both the U.S. House of Representatives and the U.S. Senate have a separate stand-alone committee on Foreign Relations/Affairs, available [here](#).

109 For a parliamentary discussion on this proposal in Israel see [here](#) (December 21, 2011) [in Hebrew].

establishment on defense spending affairs due to its limited knowledge of defense matters. This creates practical and political obstacles.

The need to follow other legislatures and **increase and improve parliamentary participation in defense budget debates** should be understood in the broader context of an ongoing tension between the ministry of defense and the budget division of the ministry of finance in Israel. Several commentators and studies, including a study conducted by the Israel Democracy Institute,¹¹⁰ point out that the decision-making process in planning the defense budget lacks proper preparation and inclusiveness. Only the ministry of finance takes into account the broader security perspective while each ministry ignores other national resilience components. Background discussions are quite limited. Moreover, it seems that the political establishment ignores its responsibility to assess national security resilience and investment allocation. The political leadership should not outsource its responsibility to set national priorities and should take into account all political, security, and other factors in a multi-factor national security environment. Increasing and improving parliamentary participation in defense budget debates can mobilize the various political forces and stakeholders to ensure that other parts of the government are actively engaged in setting national priorities and securing national security resilience in its broader meaning.

Another trend is the **increasing public participation in foreign policy and defense debates by using web-based applications** to share knowledge and views. Globalization should not be only a threat to traditional defense strategy, as discussed in my other study, but also an opportunity to use “crowdsourcing” methods in order to design a more comprehensive and inclusive national security paradigm. The innovative “Opinion Space” was a good example.¹¹¹ Since the Israeli government has already invested in e-government systems, any such tools can be integrated into the existing e-government platform to enhance national security decision-making. Some of the potential platforms can be developed and led by the private sector. An interesting

¹¹⁰ Baruch Nevo and Yael Shur-Shmueli, *The Israel Defense Forces and the National Economy of Israel* 39–53, Israel Democracy Institute, 2005.

¹¹¹ This State Department platform has invited users to read a series of discussion questions and possible responses and rate how much they agree with the response and how insightful they find the response. After rating a given response to the question “What are one of two specific new technologies or interfaces that could help governments around the world enhance open public dialogue?”, users were encouraged to express their opinions on an array of issues including nuclear weapons, climate change, and women’s empowerment. Then they were asked to “join the discussion.” After registering, users joined the discussion by rating other users’ responses to questions and/or issues and by offering responses of their own.

example is Wikistrat (www.wikistrat.com), a website that provides a crowdsourcing platform for geostrategic analysis, where experts from a wide range of industries and specialties are sharing information in the context of specific defense and other geostrategic challenges.

The fourth trend is **reforming national security councils** to reflect change of threats and the need to conduct a more inclusive national security analysis that brings foreign policy, economic, business, and other civil issues before the policy and decision-makers. Thus, for example, while the National Security Council Law—2008, which establishes the Israeli council, does provide for the council's participation in defense budget analysis and discussion, it marginalizes any reference to economic analysis of threats and potential strategic responses. In the U.S., on the other hand, the National Security Act of 1947 (as amended) refers specifically to such broader strategic analysis.¹¹² While some argue that the global financial crisis of 2008 and the dramatic economic growth in Asia have had a very significant impact on political and military instability in many parts of the world, the work of the Israeli National Security Council in these areas has reportedly been very limited. The unclear future of the U.S. dollar, the growth of the Chinese currency, and their effect on national security interests in our region are just some of the factors that must be carefully analyzed. A specific requirement by law or by institutional structure (e.g., hiring new, diverse teams, or even filling or expanding existing positions, as Israel's State Comptroller indicated in the report discussed below) may change this reality.

Moreover, the legislators may want to create exceptions to the general limited and optional advisory role of the Israeli National Security Council, and require that specific decisions that are considered more sensitive and controversial should require formal consultation with the National Security Council. The recent controversy in Israel about a potential military attack on Iran's nuclear facilities and the way to conduct this debate could trigger such a legislative reform.

In general, Israel's National Security Council suffers from an effectiveness deficit. As Israel's State Comptroller showed in his 2012 report on the implementation of Israel's National Security Council Law—2008, Israel's National Security Council staff does

¹¹² The president, for example, is also being advised on the “strategic relocation of industries, services, government and economic activities, the continuous operation of which is essential to the Nation’s security.” National Security Act of 1947 (as amended), section 107(b)(6).

not participate in many critical meetings of the Defense Cabinet, does not review potential national security projects, and does not adequately review any proposed military budget. In general, this report concluded that Israel's National Security Council does not fulfill its mission to provide a neutral and integrated, "second opinion" national security analysis.

The fifth trend, as I have already indicated, is the **personnel and institutional culture** shift in many defense institutions towards a more diverse and inclusive approach to defense analysis and national security process. Indeed, the current system, according to which significant overlap exists between senior Israeli military personnel, the Israeli National Security Council staff, and the Ministry of Defense (political representation), limits critical thinking within the defense establishment. For instance, the current head of the Israeli National Security Council is the former deputy head of the Mossad, Israel's foreign intelligence agency.¹¹³ Instead of promoting the general revolving-door approach within the system, the various institutions should invest the time and resources to consider a more diverse pool of candidates, including economists, diplomacy specialists, and business executives. As we have seen in many studies following the 2008 financial crisis, for example, women perceive risk differently from men, and this has a dramatic impact on the risks people are willing to take in the workplace.¹¹⁴ Clearly, the stakes are much higher in the national security context. But, in order to mitigate or reduce risks, building a more diverse group of decision-makers should be an additional consideration. Such personnel and institutional change should start from the national security leadership in Israel, which should play a meaningful role in making it happen.

The confluence of such trends could influence national security establishments to reduce unnecessary risks, improve the decision-making process by integrating other non-military factors into it, and thereby achieve better results. Finally, it will improve the system's transparency, accountability, and credibility.

To summarize, these conclusions would require both legislative changes and informal reforms. New or revised legislation may include, for example: amending the Knesset by-laws to allow two separate committees for foreign affairs and defense;

113 [Official website](#) of Israel's National Security Council; the names of other Council executives are undisclosed.

114 Julie A. Nelson, *Would Women Leaders Have Prevented the Global Financial Crisis? Implications for Teaching about Gender, Behavior, and Economics*. Global Development and Environment Institute Working Paper No. 11-03, Sept., 2012 (online), available [here](#).

amending the Basic Laws to establish a ministerial obligation to report to the Knesset regardless of a particular request from the Knesset, especially on the financial dimensions of defense decisions and operations; and revising the National Security Council Law—2008 to specifically include non-military considerations and operations, or non-military members of the Council. Informal measures may include, for example: allocating funds to support or build web-based applications that crowd-source information and data for foreign policy and defense deliberations; adoption of new hiring and training practices to make military and defense institutions more diverse; and better allocation of funds for civil elements in the National Security Council.

Israel has the potential to achieve a better day-to-day life for its citizens by improving its defense strategy and creating a positive impact through various reforms and adjustments given its size, the frequency of immediate threats, and the already understood concerns of educated and experienced citizens.