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INTRODUCTION

Every generation of national security leaders faces challenge. Some challenges are serial in nature crossing from administration to administration and falling within existing rubrics of response, like containment during the Cold War. Other challenges are new or evolving, like those presented by terrorism, climate degradation, public health, and cybersecurity. Still other challenges are sudden and existential, potentially threatening the physical existence of the state, or its fundamental nature, like the Civil War and the War of 1812.

Perspective is helpful, as there is a tendency for each new generation of specialists, and each new administration, to feel as if they are facing challenges like no others before. The words of the Doolittle Committee in 1954 come to mind: “It is now clear that we are facing an implacable enemy whose avowed objective is world domination by whatever means at whatever cost. There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply.” The classic and calm retort by George Marshall when confronted with a new crisis in a different context comes to mind: “I have seen worse.”

At the same time it is hard to take issue with the thought that the War of 1812, the Civil War, and World War II presented national security challenges unlike others.

With this perspective in mind, there is no question the new administration, like those before, will face a seemingly daunting list of foreseeable and ongoing challenges, including: the Civil War in Syria; rivalry with Russia and China, involving every domain from the South China Sea to cyber space; the proliferation of WMD weapons and corresponding risks with Iran and North Korea; the impact of failed or failing states, like Yemen, Venezuela, Nigeria, and Mali; and, international terrorism, domestic terrorism, and something in-between involving home-grown terrorism, actualized or inspired from overseas. The new administration will also face less well understood, but nevertheless foreseeable challenges, like those presented by potentially pandemic diseases like Ebola, Zika, and the H1N1 flu; the growing impact of climate change; increasingly serious cyber-attacks and network intrusions, to say nothing of the economic changes, challenges, and opportunities ahead.

One can debate whether this breadth of national security concerns is unprecedented. One thing that does seem new is the environment in which the U.S. Government now operates. Whether manifest in the approval ratings of presidential candidates, or in the public’s response to the Snowden leaks, or as ironically summarized in the news photograph of the man thanking firefighters for rescuing him from a forest fire in a t-shirt emblazoned with the phrase, “Less Government = More Freedom,” government
today operates in an environment of skepticism, mistrust, doubt, and even anger. The mission and role of government may well be misunderstood and underappreciated by many Americans, perhaps a majority of Americans. It may also be true that the focus and nature of government will continue to evolve in the face of new public and security priorities.

The Standing Committee on Law and National Security is committed to educating the Bar and the public on the importance of the rule of law in protecting U.S. national security, reflected in our freedoms and liberty and in our physical security. The Committee was founded in 1962 by, among others, then ABA President and later Supreme Court Justice Lewis Powell. Since that time, the Committee and its companion Advisory Committee, have conducted studies, written reports, and held conferences and working groups on the most pressing issues of the day at the intersection of law, policy, and national security. It is the tradition and practice of the Committee to address not just the substance of the law, but also the process by which decisions are made and the manner in which the government is structured to address national security. The Committee’s work is also focused on the values embodied in U.S. constitutional law and process. That is because the goal of the Committee is not just to educate the public and the Bar, but to help prepare and inform policymakers and lawyers as they undertake to meet the national security challenges of the day.

In light of the present and prospective challenges, the Standing Committee asked and considered two questions.

Is the government properly organized to meet these challenges?

And, are there ways the Government might better structure its operations or process to better meet these challenges?

We call this project: Governance, Process, and Structure, or GPS in short, because its intent is to offer a better bureaucratic compass. The project is not addressed to the substance of the U.S. response, but to the USG’s capacity to respond. It is also raising two recurring questions, or complaints about the process of government.

Is it too centralized in the White House and at the NSC, undercutting departmental expertise and capacity and delaying decision?

Is it effective and timely in providing a “whole-of-government” approach to security?

In response, we invited the members of our Committees to consider these questions in the context of their specialized fields of practice, study, and knowledge. We further invited our members to do so in the form of brief papers that might quickly orient a transition team, NSC staff, or legislator, to the core
organizational and structural issues, appreciate the necessary background, and identify possible solutions and answers.

As is our tradition, we have sought to frame the issues and options, without ultimately making a recommendation. This approach reflects our Committee’s longstanding bipartisan composition and non-partisan approach, allowing members to fully participate without being tied to or associated with particular views or outcomes. Toward this end, Committee members were invited to comment on the attached paper, along with the others, without attribution, or if they felt compelled, with a written addendum. Likewise, a Steering Committee of the willing, volunteered to edit and review each paper for consistency in tone, format, and style. (However, the views are those alone of the identified author.) Our goal, and the Committee’s goal is to have the new administration make informed and purposeful decisions, not necessarily reach a particular result.

The first of these papers is addressed to the National Security Council (NSC), NSC process, and the NSC staff. It is our intention that as other papers are prepared we will release them as well. We start with the NSC because the NSC system has been and is likely to remain the principal mechanism by which the President makes national security decisions and addresses national security crises. In addition, the composition and organization of the NSC system should be among the first set of national security decisions the President-elect and President elect’s team should make during the transition. This process will inform the substantive decisions to come. Moreover, we can expect our adversaries and enemies to test the NSC, the NSC process, and the NSC staff at the outset of the new administration. The President and the President’s staff must be ready for these tests, just as they must be ready to implement the next President’s policy initiatives.

Signed:

James E. Baker

Harvey Rishikof
THE NSC IN TRANSITION:

ORGANIZING THE NATIONAL SECURITY COUNCIL, PROCESS, AND STAFF

IN THE NEW ADMINISTRATION

JAMES E. BAKER*

Executive Summary

Presidents generally make national security decisions using one of four processes: the National Security Council (NSC) system; the military chain of command; ad hoc process established for particular circumstances, like the Deepwater Horizon oil spill; and informal process. The NSC, or NSC system, is “the principal forum for consideration of national security policy issues requiring Presidential determination.” It comprises the National Security Council, the Homeland Security Council (HSC), the NSC process, and the NSC staff.

There are three key questions the new Administration should address with respect to the NSC, the NSC process, and the NSC staff.

Who will attend NSC meetings? Which officials will serve as regular members of the NSC/HSC, and which officials will participate on an as needed basis?

What committees will exist below the Principals and Deputies? What subjects and functions will they cover, and who will chair these committees?

How large will the NSC staff be, where will they come from, and what functions will they perform?

In addition there are at least four core structural questions that should be asked regarding the manner in which the President and NSC receive and address the intelligence functions, law enforcement matters, legal advice, and provide for whole-of-government policy-making and response.

* Judge Baker retired from the United States Court of Appeals for the Armed Forces in 2015 after fifteen years of service, the last four as Chief Judge. He is currently the Chair of the ABA Standing Committee on Law and National Security. He served as Special Assistant to the President and Legal Adviser to the National Security Council (NSC) (1997-2000) as well as Deputy Legal Adviser to the NSC (1994-1997). The author wishes to acknowledge the support of Georgetown University Law School, which facilitated the production of this paper during the summer 2016.
How should legal advice be provided to the NSC?

How should the NSC communicate and coordinate with the Department of Justice and FBI on law enforcement matters of national security importance?

What role should the President and the NSC play regarding intelligence activities, policy, and oversight? Are these roles deliberate, purposeful, and understood?

Is the NSC the correct mechanism to ensure whole-of-government policymaking and national security response?

This report identifies and addresses these central structural and governance questions and others. It then sets out the options along with the advantages and disadvantages of each option. The report also provides background placing these options in the context of historical practice. The Report’s goal is not to advance a particular outcome, but to assist the President-elect’s team in making informed, timely, and purposeful decisions regarding the organization of the NSC.

That being said, the report does take the view that seven principles are paramount in designing and using the President’s national security process, regardless of options selected. Whether and how the next NSC adheres to these principles will have disproportionate influence on the success or failure of U.S. national security policy and response.

1. The President should make purposeful and intentional choices. Purposeful, for example, means the size of the NSC staff should be dictated by function and need, not arbitrary numbers and percentages.

2. The President’s decision-making process should be timely, contextual, and meaningful. One process does not fit all challenges or crises. Intelligence activities are and should be addressed in a different manner, for example, than overt policy proposals; a response to a pandemic disease may call for an ad hoc tailored process, while military operational command merits use of the established chain of command.

3. Once process is purposefully established, the President should insist upon its use. The NSC process works and is effective, because it is routinized, normative, and understood. This is true of the military chain of command as well.

4. Necessity will, on occasion, dictate deviation from process; however, deviation must be identified and accountable. An operation with the sensitivity of the Bin Laden raid, for example, cannot and should not be handled using normal process. However, where the necessity of speed, secrecy, or context warrant deviation from regular process: (1) The
President should be informed of any material deviation; (2) where the President has directed use of a process he must be told as a matter of law when a different process has been used; and, (3) the President, the NSC, and the NSC staff who are aware of such deviation should consciously ask why such deviation is being made and do so in accountable fashion.

5. The NSC process is the NSC’s process. If the President or the members of the NSC do not like the process, they should change it.

6. The President has the process the President tolerates, demands, or accepts.

7. Good process leads to better results. Good process addresses the timely synthesis of information, unity of command, and identifies dissent so that it can be addressed or mitigated. Good process also addresses the pathologies of national security and crisis decision-making, like speed, excessive secrecy, a focus on the immediate, and cognitive bias.

Background

As a matter of law and practice, the President is the central and often essential national security actor. Article II establishes the President’s power. The President is the Commander-in-Chief, Chief Executive, and retains broad Article II authority over the conduct of foreign relations. The President is essential because the President alone has the legal and bureaucratic wherewithal to direct a whole-of-government response to policy challenges and emergencies.

The President is also one of two elected officials within the Executive branch, and thus an essential source of democratic legitimacy. And, on issues of national security, the President ultimately speaks for the Nation. Moreover, many of the legislative tools of national security require presidential assent, such as those addressed to covert action and the imposition of economic sanctions.

To perform their national security functions Presidents need a staff and a system for making decisions. Arguably since 1947, and certainly since the Eisenhower administration, Presidents have relied on the NSC staff and NSC process, as the staff and process within the Executive Office of the President (EOP) to advise and assist them perform their national security responsibilities. However, the operation of the NSC system and staff is not without complaint, and sometimes controversy.

Four issues, or depending on perspective complaints, recur with regularity.

The NSC staff is too large, and thus adds bureaucracy and delay to the decision-making process, rather than facilitating it. In short, there are too many people, too many meetings, too many papers, and too few decisions.
The NSC staff and process is not subject to ordinary mechanisms of oversight, including legislative oversight, IG review, and media scrutiny.

The NSC system and staff is secretive, or too secretive and insular, and therefore is subject to hearing its own echo within the insular feedback loop of the White House bubble.

The NSC staff encroaches on departmental and agency functions and operates outside normative operational and policy chains of command.

Because the NSC, NSC process, and NSC staff are located within the EOP, and because NSC decisions are necessarily presidential decisions, some external bureaucratic tension is natural and should be expected. Otherwise, the Executive branch would not be engaged in policy debate, coordination, and execution. Just as agencies engage in bureaucratic battle and dispute, they will engage in bureaucratic battle and dispute with the NSC staff. The functioning of the separation of powers will, and should, do the same. Where the President, and the President’s staff are involved, political and policy differences may generate disputes with the Congress. Therefore, one should take care to distinguish between what is expected bureaucratic tension and behavior, and fundamental structural flaws. One should also take care to distinguish between problems that are generated by personality and those that are generated by flawed process or law.

The question is not whether the President should meet with senior national security advisers (let’s call them the NSC and HSC), or have a system for making decisions (let’s call it the NSC process), or whether there should be a staff to assist the President (let’s call it the NSC staff). The question is what shape should the NSC system take and what functions should it perform given today’s needs and the President’s own preferences?

While seemingly bureaucratic, this should by necessity be one of the first questions the President-elect addresses in transition. Why? Because the President’s process will inform all the substantive national security questions that follow. It will also influence the capacity of the Executive to address crises. One can imagine, for example, that the Nation’s enemies and rivals will seek to test a new president at the outset of an administration. In any event, the President will be hard-pressed to implement a policy agenda without an effective process and staff. How the President shapes the NSC will depend on personality, style, and need, along with the willingness of the President’s immediate staff to consider and address the questions presented below.
The NSC system has been praised by former National Security Advisers for its flexible “protean” nature. That is because the National Security Act of 1947, as amended, combined with the President’s Article II authorities provides the President broad latitude in organizing and using the NSC – council, process, and staff. The Act authorizes a Council and a staff and authorizes the Council “to perform such functions as the President may direct.” This means that in the end, the President gets the process the President demands, expects, or tolerates. If the President does not like the process, the President can change it. If a President wants to add members to the NSC, the President can do so. And, if the President wants to ignore the NSC altogether, the President can do so too. The legal obstacles to the President organizing and running the NSC, NSC process, and NSC staff as the President sees fit are almost exclusively budgetary. The question, therefore, is not whether additional law is needed, but how the President should best wield existing law.

The Council: In the wake of World War II and with the advent of the Cold War, the National Security Council was established in 1947 “for the purpose of more effectively coordinating the policies and functions of the departments and agencies of the Government relating to national security.” Presidents at least since George H. W. Bush have designated the NSC as “the principal forum for consideration of national security policy issues requiring Presidential determination,” as stated in Presidential Policy Directive-1 (President Obama, February 13, 2009). In addition, pursuant to E.O. 12333 and 13470, the NSC “shall act as the highest Executive Branch entity that provides review of, guidance for and direction to the conduct of all national foreign intelligence, counterintelligence, and special activities, and attendant policies and programs.”

The National Security Act of 1947 originally designated the following officials as members of the NSC: the President, Vice President, Secretary of State, Secretary of Defense, the Director of Mutual Security, the Chairman of the National Security Resources Board, and “the Secretaries and Under Secretaries of other executive departments and the military departments, the Chairman of the Munitions Board, and the Chairman of the Research and Development Board, when appointed by the President by and with the advice and consent of the Senate, to serve at his pleasure.” Today the statutory members are: the President, Vice President, Secretary of State, Secretary of Defense, and the Secretary of Energy. The Director of National Intelligence and the Chairman of the Joint Chiefs of Staff are statutory advisers to the NSC. The law states “the Chairman (or in his absence the Vice Chairman) of the Joint Chiefs of Staff may, in his role as principal military adviser to the National Security Council and subject to the direction of the President, attend and participate in meetings of the National Security Council.” Similar language addresses the DNI.
The National Security Act notwithstanding, as a matter of practice, the members of the NSC are whomever the President designates and in fact includes at meetings.

Presidents generally are over-inclusive in designating members of the NSC by directive at the outset of administrations. For example, Presidential Policy Directive-1, “Organization of the National Security Council System,” February 13, 2009, provides that no fewer than sixteen officials “shall” be members of the NSC or invited to NSC meetings. Previous documents were similarly expansive. In practice, the officials who regularly, meaning routinely, attend NSC meetings, are: The President, Vice President, the Secretary of State, the Secretary of Defense, the DNI, the Director of CIA, the Chairman of the Joint Chiefs of Staff, and the Assistant to the President for National Security Affairs. The longer directive list thus serves as a checklist against which to consciously decide which officials should attend particular meetings.

Congress has on occasion sought to dictate which officials serve on the NSC, most recently in 2007 when the Secretary of Energy was added as a statutory member. In addition, the Congress has periodically passed legislation purporting to establish particular NSC committees or to require the NSC to address certain subjects. However, executive branch lawyers have long taken the view that as a matter of constitutional law, (derived from Article II, in particular the Chief Executive, Commander-in-Chief, and Opinions Clauses) while Congress can statutorily designate members of the NSC, as it has, or a Committee of the NSC, as it has, the President is free to determine who should attend particular meeting(s), whom to meet with, and whether that meeting is designated an NSC meeting or not.

In the case of the Homeland Security Council, the Congress has statutorily designated five Council members. However, the law also states that the members shall include “such other persons as are designated by the President.” At least with respect to the 108th Congress in 2004, which passed this section of law, the Congress and the Executive were in constitutional agreement that the President can designate members of the HSC, which principle, as noted, presumably extends to the NSC. More importantly, as a matter of practice across administrations, the President exercises ultimate authority over who the members of the NSC and HSC are as well as who attends meetings. The Secretary of Energy is not, in practice, a regular attendee at NSC meetings. The Secretary’s presence in statute, however, as with the President’s directive, should prompt the President and senior aides to affirmatively ask whether the Secretary should attend a particular meeting.

It should be noted as well that different administrations record presidential meetings in different ways. A meeting with the President and the Secretaries of State and Defense in the Situation Room, for example, may be recorded as an NSC meeting, whereas the same meeting in the Oval Office or at Camp
David may be listed as a meeting with the two Department heads on the President’s calendar. Therefore, analysts and historians should take care in assessing how often the NSC meets and on what subjects to ensure they are comparing similar meetings and events.

If the NSC is the senior national security deliberative and decision-making body in the United States Government, the membership question is: Who should regularly attend such meetings, and who should attend as needed. The same question is presented with respect to domestic security and the Homeland Security Council, which includes some but not all of the members of the NSC. Two specific membership questions emerge, to which there are no correct answers, provided the choices made reflect purposeful and informed decisions:

Should the Secretary of Treasury, Secretary of Energy, and/or Director of OMB regularly attend NSC and NSC Principals Meetings? On the one hand, many of today’s national security issues cut across traditional security boundaries and bear economic implications, like cyber-attacks and intrusions. In addition, cost can serve as a policy constraint just as law can. On the other hand, these officials have significant domestic responsibilities, independent of national security, and might more efficiently use their time to attend on an as needed basis. Moreover, if the NSC or Principals becomes too large, it may lose part of its conversational dynamic.

When should EOP staff other than NSC affiliated staff attend NSC and Principals Meetings? On the one hand, EOP officials, like the Chief of Staff, bring an essential capacity to harness a whole-of-government response to national security. On the other hand, in context, such officials may be perceived as bringing a domestic policy or partisan political perspective to national security decision-making.

(Where the President acts as Commander-in-Chief, the President will use the operational and administrative military chains of command. The chain of command may interface with the President as part of the NSC process, for example, with the Joint Staff working alongside the NSC staff, or this may occur exclusively within the chain of command, for example, President to Secretary of Defense to Combatant Commander, through the Chairman of the Joint Chiefs of Staff. Operation of the military chains of command, however, is outside the scope of this paper.)

The NSC Process: The “NSC” has also come to refer to a process and a staff. The NSC process, or system, describes the normative, but not exclusive, manner by which the President, receives information, considers policy options, and makes national security decisions. The process thus describes both the formulation of policy through the NSC’s subordinate committees, as well as the daily paper flow
and staffing of the President. It also refers to the process of policy promulgation, most visibly in the form of presidential directives, known in the past two presidencies as Presidential Policy Directives (PPDs), and National Security Policy Directives and Homeland Security Policy Directives (NSPDs and HSPDs).

The Principals Committee (PC) is the “senior interagency forum for consideration of policy issues affecting national security.” The PC is essentially the National Security Council, absent the President and Vice President. It is chaired by the Assistant to the President for National Security Affairs (APNSA), known more colloquially as the National Security Advisor.

The PC invariably includes the Secretary of State, the Secretary of Defense, the DNI, the CIA Director, the Chairman of the Joint Chiefs of Staff, the Principal Deputy National Security Adviser, and the National Security Adviser to the Vice President. As an essential functional element of the Principals Committee, there is a working requirement that absent extraordinary circumstances, the specific designated official alone may attend as a Principal, in other words, no substitutes. This makes it harder to schedule Principals Meetings, but also ensures that the persons in the room can in fact and law speak for “the Secretary” and their agencies, as well as make immediate decisions.

Not surprisingly, the Deputies Committee is comprised of the Deputy Secretaries and Deputy Directors of the NSC Principals’ departments and agencies. The Deputies are charged with four functions: (1) reviewing and monitoring of the interagency process; (2) vetting and reviewing issues being brought before the Principals; (3) reviewing major policy initiatives and policy implementation; and, (4) day-to-day crisis management. The DC is chaired by the, or a, Deputy Assistant to the President for National Security Affairs (DAPNSA). In practice, this generally means the Principal Deputy National Security Advisor. However, for a variety of reasons, including the breadth of post-9/11 national security challenges, there have been as many as six Deputy Assistants to the President for National Security Affairs at one time, each of whom may call and chair DCs. (Administrations have both designated a Deputy as the Principal Deputy or functioned with a de facto principal Deputy, i.e., the Deputy sitting in the National Security Adviser’s suite. Likewise, an NSC Deputy may be designated an Assistant to the President for National Security Affairs or a Deputy Assistant to the President for National Security Affairs. These are EOP designations corresponding to EOP pay grades and status, not necessarily NSC function and role. Likewise, the Assistant to the President for Homeland Security also currently serves as a DAPNSA and therefore may chair both PCs and DCs.) Further, in contrast to the PC, in recognition of both the frequency, roles, and subject matter range of the DC, greater latitude is permitted in who may serve as a Deputy. The Under Secretaries of Policy from State and Defense, for example, frequently serve as “Deputies.”
As a matter of process PCs and DCs are called by the Chair(s). As a matter of practice, however, meetings may be requested by a member of the PC or DC, with the concurrence of the APNSA or DAPNSA. NSC staff may also recommend the convening of a PC or DC or for that matter an NSC meeting. Generally, PCs and DCs are conducted with staff present, but not always. The notice might, for example, state PC/DC “plus one,” or a PC/DC “plus two,” or, “Principals Only.” As a matter of practice, the National Security Advisor or Deputy National Security Advisor(s) serve as gatekeepers and may well ask NSC staff to attend “Principals only” meetings as subject matter experts, note-takers, and memo-writers.

Below the level of the DC there is generally an interagency working group (IWG) (a.k.a., Interagency Policy Committee (IPC)) addressed to the geographic, functional, or issue area presented. Some IWGs, such as the Counterterrorism Coordinating SubGroup (CCSG), may perform a hybrid role as both an IWG and quasi-DC. IWGs may be standing, e.g., addressing an ongoing policy area like Iraq or Iran, or ad hoc, e.g., addressing a natural disaster.

As a general matter, the procedural presumption is that in the absence of crisis or other urgency, an IWG will be asked to develop factual background and options for the DC. The DC will then consider the matter and either dispose of it, or formulate key options and decisions for the PC. The PC will do the same for the NSC, or in writing for the President. While this structure results in an expectation as to how issues will move up the chain of command, the process will vary depending on urgency, the nature of the issue presented, the level at which a meeting is requested, and of course, the President’s preferences. Regardless, at each level of the process, the chair of the relevant committee (and corresponding staff) must ask: What is the purpose of the meeting and what are the projected as well as desired outcomes?

At or after the meeting, the Chair should consider the following questions:

What is the next step?

Should the matter go to the DC, PC, or NSC? Should it return to the IWG for more options?

Should the PC proceed with the decisions taken pursuant to existing delegated authority and departmental statutory authority?

Must the President be informed, or decide?

And, what are the deliverables, in the form of memos, briefing papers, talking points, Hill briefings, press guidance, etc.?
For all these actions, both before and after presidential decision, the NSC needs a staff.

The NSC Staff: The National Security Act of 1947, provides that “The Council shall have a staff.” The Act, further contemplates that the staff “be headed by a civilian executive secretary.” In practice across administrations, however, the NSC staff is hired, fired, and directed by the National Security Advisor, with the Executive Secretary acting more as a Chief of Staff or military Staff Secretary, with responsibility for paper flow. Indeed, the National Security Advisor is himself or herself a presidential staff member, usually assigned to the White House Office within the EOP rather than to the NSC. The APNSA has no independent authority other than the persuasive authority that comes from proximity to the President. The APNSA’s legal authority derives from the President exercising presidential authority through the National Security Advisor.

The NSC staff has steadily, and more recently exponentially, grown since President Truman first somewhat reluctantly acceded to the creation of the Council in 1947. However, the numbers are hard to track and compare, as the “NSC staff” includes not only policy aides, but also communicators, intelligence analysts, IT specialists, and administrative assistants to support both the staff, the Executive Secretariat, and the Situation Room.

According to the 1997 History of the National Security Council, prepared by the Office of the Historian, Bureau of Public Affairs, Department of State, during the Kennedy administration the NSC policy staff consisted of twelve persons, a decrease in number from the Eisenhower administration. The overall number of staff was also reduced from 74 to 49. During the Nixon administration, and Henry Kissinger’s tenure as National Security Advisor, the policy staff increased to 34. According to statements by former national security advisors, the NSC policy staff during the Carter, Reagan, H.W. Bush, and Clinton years ranged in the vicinity of 60-80. During the W. Bush and Obama years the policy staff has operated at, above, or around 100 persons. However, at least some media counts indicate “the NSC staff” doubled in size from 200 to around 400 during the W. Bush and Obama years. If so, it is not clear whether this growth has occurred exclusively in the policy area, or across the staff functions, and/or whether it reflects more than the absorption of the HSC staff, which existed independent of the NSC staff during the W. Bush administration, into a single NSC staff in the Obama administration.

NSC staff growth reflects, among other things, the advent of the homeland security discipline and the incorporation of a homeland security staff on the NSC staff. It also reflects the necessity of having NSC staff cover the wars in Afghanistan and in Iraq as well as the terrorist threat emanating from ISIS, AQAP and other offshoots of Al-Qaeda as well as an array of new threats to critical infrastructures. Some
also argue it reflects the gravitation, or magnetic pull, of national security decision-making away from the cabinet departments to the White House.

Judgments about the net positive or negative impact of such trends is a matter of debate, and often partisan political perspective.

There are arguments that NSC-centric policy development and direction is a matter of necessity driven by four factors: a compelling sense of presidential responsibility; the necessity for whole-of-government response; the pace of world events; and, the 24/7 news cycle, among other factors. There are also arguments that it reflects the natural tendency of bureaucracies and officials to gather power and to micro-manage, and that too centralized a process overwhelms the NSC’s capacity to cope, and results in a smaller feedback loop with fewer views and less expertise. The answer, of course, depends both on perspective and on the policy and outcome at issue. Two points warrant mention. First, whatever the result, it is not dictated by law, but by choice, either purposeful or default. Second, aware of the factors at play, the President and the NSC are not bound to a single model or degree of centralized or diffuse control.

Comparative and accurate NSC staff numbers are hard to find. This reflects a lack of transparency on the part of the NSC as an institution as well as a pattern across administrations to count staff using methods which, by intent or result, mask the true number of policy staff. For example, personnel paid for by a separate EOP entity, who are fellows, or who are on “temporary” assignment, may not be “counted” as NSC staff, even if performing NSC staff functions. The reality remains that the NSC policy staff has essentially doubled in size during the past three presidencies.

The policy staff is currently organized into approximately 35 geographic and functional bureaus. Whether this is an effective and manageable number of directorates, covering the right areas and functions, is of course a critical threshold question for the incoming security team. NSC staff are drawn from the career bureaucracy on detail to the NSC, as well as from private life, including academia, think tanks, law firms, and campaign staff. At any moment in time the balance between career and non-career staff will be in the range of 60-40%, 70-30%, or even 80-20%. This reflects a desire to have career expertise on the staff as well as the budgetary reality that detailees from agencies are paid for by their parent agencies, while direct hires from private life must be paid for with EOP funds. Assignments to the NSC staff are coveted, albeit exhausting. They usually last one-two years, but can extend much longer. They also can lead to fast-track promotion and advancement, just as they can result in more visible setback. While NSC policy staff serve at the pleasure of the President (and National Security Advisor),
career employees on detail retain those employment protections that come with their home agency employment.

Congressional leverage over the size of the NSC staff is derived from the limits placed on EOP appropriations as well as from statutory limits placed on the number of persons authorized to be detailed from any one agency to the NSC at one time. In all cases, NSC staff are subject to the Hatch Act restrictions on the conduct of partisan political activities by federal employees based on the rules applicable to their home agency or status. Military officers, Foreign Service officers, and intelligence personnel, for example, are subject to the most restrictive rules applied in government, whether they are serving at their home agencies or at the NSC. National Security Advisors are generally assigned to the White House Office payroll (as is the President), and not the NSC’s, and thus do not operate under the same Hatch Act limitations. However, when a National Security Advisor is detailed from another agency, for example, a military officer, the parent agency’s partisan-political limitations follow. In addition, as a matter of policy discretion, most National Security Advisors have consciously abstained from visible partisan political activities, like attending fundraising events or giving speeches in battleground states before elections, even if permitted to do so by law.

The NSC staff exists to advise and assist the President perform the President’s national security functions. The staff has no inherent operational or policy authority independent from the President. That is not to say NSC staff do not wield power. They wield the power that comes with proximity and in some cases access to the President. And, they wield whatever delegated power the President may wish to authorize. In this regard, and as noted at the outset, the President has broad authority as Chief Executive and Commander in Chief as well as from the National Security Act to determine what exactly “advise and assist” means in practice.

Generally, it does not mean implementation, but again, this is not dictated by law, but rather presidential preference. Bureaucratic tension may arise when agencies are not sure whether a staff member speaks for the President (a lawful directive) or purports to speak for the President (an exercise in persuasive authority in the form of direction). When used as bureaucratic shorthand, for example, a reference to “the NSC” may be a reference to the staff, the process, or the Council, as in “send the briefing paper to the NSC.” There are reasons why a staff member or a partisan commentator might embrace ambiguity on whether they are referring to the President or to the staff, but there are also sound reasons why clarity and precision on this point is essential.
For example, a reference to the NSC without qualification is a reference to the Council. That means the President, Vice President, Secretary of State, etc., and thus all the authority the President and the Department Secretaries bring to bear.

As a matter of longstanding, but contested practice, the President’s immediate staff do not testify before Congress. These positions do not require confirmation. This includes the National Security Advisor and NSC staff. In a sentence, the constitutional theory behind this position is that because the Congress, as a co-equal branch of government, cannot compel the President to personally testify or subject the President to confirmation, it cannot in effect accomplish the same result by requiring the President’s immediate staff to testify “in the President’s place” or with reference to their advice to the President.

The functional theory behind this legal policy is the concern that if the President or the President’s immediate staff testified before Congress as a matter of comity or law, the President’s advisers would do little but testify before Congress, undermining the President’s capacity to function as Chief Executive and Commander in Chief. To the extent the NSC staff do, and are perceived as doing, no more than advising and assisting the President, there is less room for debate. However, where the APNSA and NSC staff direct the manner in which policy is implemented or programmatic funding is spent, independent of the President, legislative interest in the overseeing how appropriated funds are spent increases, as does the pressure to subject presidential staff to confirmation and congressional testimony. This was the case, for example, when Governor Tom Ridge served as the first Homeland Security Advisor.

Some members of the Executive branch, including the departmental members of the NSC, of course, are subject to both confirmation and to a requirement of testifying before Congress. This includes those members of the President’s immediate staff who exercise independent legislative and departmental authority, such as the Director of OMB and the United States Trade Representative. In addition, the National Security Advisor and NSC staff do frequently brief and confer with Members of Congress and their staff as a matter of comity rather than compulsion.

Further, National Security Advisors and other members of the President’s immediate staff have testified before Congress pursuant to vaguely phrased exceptions of comity involving credible allegations of wrongdoing, or where the testimony is addressed to matters of grave national importance (and the political pressure to do so is strong or overwhelming), or some combination of all three, like Iran-Contra.

With this background in mind, there are a number of core questions about how the President-elect should structure the NSC, NSC process and NSC staff.
Questions:

I. **Is there an optimum or “right” size for the NSC staff? What criteria should be used in defining “optimum” size?**

There is a tension in the NSC process and on the NSC staff between being large enough to effectively and efficiently process information and present issues to the President, Principals, and Deputies, on the one hand, and being so large that the staff becomes an unnecessary layer(s) of additional bureaucracy, on the other hand. However, as noted in the introduction, the National Security Act of 1947 is a flexible authority; it expressly provides for a staff, but does not dictate the size of the staff or define its functions beyond the designation of an Executive Secretary. Moreover, the President has broad constitutional authority, in any event, to direct his immediate staff as well as to conduct foreign policy. In this legal context, there are at least three facets to the question of how large the NSC staff should be.

What is its function?

Should size be defined by a number or by function?

And, should the NSC staff organization and membership be public?

1. **Should the NSC policy staff perform functions beyond its core functions including: (1) directing how policy is implemented; (2) implementing policy; and, (3) serve as a more public face of national security policy?**

Most commentators would agree that the NSC staff performs, and should perform, a number of core functions. These include chairing IWGs, serving as information and policy conduits up and down the policy chain of command, and performing staff functions for the President and NSC, like taking notes, drafting memoranda, briefing papers, and press guidance. Where commentators might disagree, is where exactly the line falls between a staff member informing an agency of the President’s decisions or positions and that same staff member purporting to direct an agency, absent instruction from the President to do so. So too, the difference between implementing policy, directing how policy is implemented, and ensuring policy is implemented may depend on where one sits. In the same instance, for example, and in good faith, departmental personnel may perceive that they are being “directed” and “micromanaged” by NSC staff, where the NSC staff “direct” certain actions. NSC staff perceive that they are ensuring the President’s intent is followed, when they “urge” certain actions. Likewise, department personnel and NSC staff may generally agree that NSC staff should staff the President and not act as independent policymakers. However, they may well disagree on whether an NSC staff member who insists on development of additional policy options for the President’s consideration is engaged in policymaking or
rigorous staff work. The problem may be compounded when Type-A personalities are involved, and a close examination of facts or options is perceived as, or perhaps intended as, pressure on agency personnel to come out a certain way. Commentators will also disagree on whether and when the NSC staff should perform direct policy roles to include directing the implementation of policy, implementing policy, or serving as the public face and spokespersons for policy.

Advantages of a More Direct Staff Role:

- **Stealth.** The APNSA, and NSC staff, usually travel with a smaller footprint and visibility than parallel senior officials and therefore can be better situated to engage in silent diplomacy than their agency counterparts.
- **Presidential Connection.** The APNSA and the NSC staff will often be perceived as directly speaking on behalf of the President. The clarity of message may also increase when not channeled through an agency. Presidents may also prefer to use their closest confidants to carry out sensitive tasks.
- **The use of the NSC staff as public spokespersons and as the face of public policy can help to amplify the President’s message and policy.**
- **NSC staff generally operate with fewer layers of bureaucratic control and review and therefore can generally respond with greater speed, sometimes perceived as energy, than agency counterparts.**

Disadvantages:

- The APNSA and NSC staff generally operate with less oversight than departmental personnel. They are not subject to an IG or to a requirement to appear before Congress and testify, although the APNSA and NSC staff do voluntarily brief members of Congress.
- Functions that are rightly perceived as extending beyond advising and assisting the President may undercut the constitutional basis for declining to permit NSC staff from testifying before Congress.
- Additional functions, including those requiring travel, will distract the NSC staff from their primary function of staffing the President and the NSC process and either require an increase in the size of the staff or a diminishment in its coordination function.
- The benefits of rapidity may be offset by a diminution of input as well as by a failure to build and institutionalize long term support.

2. **Should the President purposefully cap the size of the NSC staff or alternatively allow functional needs or budget constraints to determine size?**
Advantages:

• A defined, and limited, number of staff will help ensure that NSC staff focus on their primary mission of advising and assisting the president and facilitating the NSC process, rather than more discretionary functions like policy implementation and public affairs.

• A defined, and limited, number of staff by design or necessity will leave to agencies the core function of implementing policy and deciding how to implement policy.

• Bureaucracy has a natural tendency to grow, especially when populated with talented type-A persons whose ability to influence policy is largely capped by the number of hours in the day and not their imagination.

Disadvantages:

• Staff size should follow function. Therefore, advocates of a staff cap should first identify which NSC staff functions and offices should be eliminated or reduced, then determine the appropriate number of staff, rather than select an arbitrary number and then cut personnel to meet it.

• A staff cap does not account for unexpected contingencies or needs. By example, a staff cap at the outset of the Bush or Obama administrations, if embedded in law or budget, would not have allowed the addition of staff to cover the homeland security functions or wars in Iraq and Afghanistan without first cutting other functions.

• The NSC staff serve as an engine of government. The staff are a source of energy and ideas; cut the staff too deeply and one may find the bureaucracy is slower, less nimble, and less responsive to presidential needs and direction.

3. Should the names and functions of NSC policy staff be public?

A purposeful decision to set the size of the NSC staff based on function rather than arbitrary numbers depends on policymakers and appropriators knowing what the NSC staff does and what functions it performs. This in turn requires transparency. However, at present, there is no publicly available or accessible White House list or diagram of the NSC staff structure. This raises the question, should the President direct such publication or should Congress require it.

Advantages:

• Allows debate about the size and role of the NSC staff to respond to fact and function rather than conjecture and spin.
Knowledge about the President’s immediate staff is consistent with the democratic values of accountability, responsibility, and openness.

More specifically, it also allows Congress and commentators greater insight into how the President has structured the Homeland Security-National Security staff balance and whether the USG is equipped for whole-of-government coordination at the NSC.

Disadvantages:

- The NSC staff is an extension of the President. They are his immediate staff. Therefore, questions about the NSC should be directed to the President and not the staff. Staff anonymity keeps the focus on the President.
- While knowledge of the specific staff and numbers may allow for a more informed debate about the size and function of the NSC staff, it may also stimulate that debate, a debate the NSC may not wish to have because it will invite line-item inspection about every aspect of the NSC staff of the sort that does not extend to agencies. This will distract the NSC staff from their primary function of advising and assisting the President, as opposed to justifying each position’s existence.
- The NSC staff turns over frequently, the EOP may resist the temptation to have to explain or respond to every staff transition. (This concern, however, could be addressed by a decision to post the staff listing on an annual basis or by function, without incumbent names.)
- The more public a role the NSC staff plays, and the more visible the staff is, the more likely there will be pressure for members of the staff to brief Congress and to brief the press, thus undermining the staff’s core internal roles.
- Publication and personalization of the NSC staff may increase the risk of politicizing the NSC staff as partisan actors seek to undercut the President by attacking NSC staff.

II. **Does the NSC staff and process incorporate an appropriate level of strategic thinking and perspective in its work? What is an appropriate level?**

There is a natural tendency on the NSC staff, which has worldwide responsibility and is small, to focus on immediate issues and tasks, in other words, to follow the inbox or crisis of the day, rather than forecast what the future might entail and craft long range policy to meet it. This is not just a reflection of size, but a reflection of what Justice Jackson observed in Youngstown Sheet and Tube v. Sawyer regarding his tenure as Attorney General, “The tendency [in the Executive branch] is strong to emphasize transient results upon policies … and lose sight of enduring consequences.” In national security, the
pressure to “solve the problem” can be relentless. In such context, there are at least three bureaucratic risks that emerge.

First, there is risk that the APNSA’s desk, and more broadly the NSC process itself, become chokepoints rather than conduits to timely presidential decision.

Second, there is risk that the President, or the NSC staff, will not have the time, space, and opportunity to think strategically about U.S. national security policy.

Third, there is risk that the President’s staff, and by extension, the President, will not have the time to monitor the implementation of policy and the impact of changing events on that policy.

In turn, this environment reinforces a crisis-driven decision-making cycle as issues may only receive NSC attention when they are critical or in crisis, rather than on an evolving or incremental timeline as circumstances in the field change. An administration must grapple with how to ensure that Presidential and NSC policy stays current, stays strategic, and remains timely.

The root question is how does the National Security Advisor and NSC staff find the time and space to think forward and strategically. Toward this end, the NSC staff has a Strategic Planning Directorate. One question is whether the directorate is currently “right-sized,” or should be more robust, approximating the strategic policy function of the policy planning staff at the State Department, but scaled to the NSC. The risk of having a small strategic function is that it becomes consumed (or overwhelmed) by day-to-day functions, serving as an auxiliary policy or speechwriting staff, and thus losing the capacity of monitoring policy implementation and impact, as well as forecasting policy trends and outcomes.

However, there are both advantages and disadvantages to expanding the strategic function within the NSC staff.

Advantages:

- A larger office would help to keep the President and NSC connected to the impact of policy, as well as keeping the NSC focused on long-term trends and strategy.
- Such an office would also help the NSC and President avoid leadership by crisis-hopping.

Disadvantages:

- A larger more robust office would duplicate the bureaucratic purposes already found on the National Intelligence Council and in the State Policy Planning office, which in fact served this function for the NSC during the Truman administration.
• There is commensurate risk of creating competitive pockets of analysis along with the real and perceived risk that any NSC staff driven strategic analysis will be influenced by its proximity to the President and his immediate staff.

• An expanded strategic function could also add to the real and perceived perception that national security policy and decision-making had further gravitated to the NSC and White House and away from the cabinet departments.

III. Is there a preferred, or optimum, architecture for providing legal advice at the NSC?

National security legal advice is provided to the President, NSC, and NSC staff by among others, the Office of White House Counsel, the Department of Justice (including, the Attorney General, Deputy Attorney General, Office of Legal Counsel, and National Security Division), and the Office of the Legal Adviser at the NSC. In addition, national security legal advice is provided directly to individual members of the NSC by department and agency counsel.

However, the principal mechanism and source of national security legal advice for the President, NSC (PC/DC/IWG) is from and through the Office of the Legal Adviser to the National Security Council. During the past three administrations the NSC/Legal Office has ranged in size from 2 to 6 lawyers. Roughly half of the Legal Advisers during this period were career government lawyers detailed to the Office, the other half designated from outside the career bureaucracy. Virtually all of the deputy legal advisers in the office have been detailees from national security agencies.

The Legal Adviser and NSC/Legal perform three functions. First, they provide legal advice to the President, the APNSA, and the NSC staff on all areas of national security law. This function is performed, inter alia, by reviewing all to most of the memoranda going to the President, attending NSC meetings, PCs, DCs, IWGs, and NSC staff meetings as well as a myriad of one-on-one contacts and email exchanges.

Second, the Office coordinates the provision of legal advice and the review of paperwork going to the NSC, the PC, and the DC and more often than not serves as the conduit of that advice either through written input to the NSC process, or by attending NSC, PC, DC and IWG meetings. Coordination of legal views is done informally through daily contacts and exchanges with interagency lawyers, as well as more formally through the Lawyers Group. The Lawyers Group is chaired by the NSC Legal Adviser and consists of senior representatives, usually the senior lawyer from DOJ/OLC, CIA/OGC, ODNI/GC, Chairman’s Legal, DOD, and State. Other lawyers, and briefers, are invited as necessary. As with the APNSA, the Legal Adviser should honestly broker and present the views of the interagency community, while ensuring that advice is timely and relevant to the decisions policymakers are considering. The Legal
Adviser must also do so in a manner that does not bargain legal advice down to lowest common denominators or consensus views, while at the same time preserving an independent voice and input as an adviser.

Third, NSC/Legal serves as the “Office of the General Counsel” to the NSC as an institution. Thus, the Office handles personnel matters, funding questions, litigation, responds to subpoenas and document requests, and serves as the NSC staff’s designated ethics office.

A number of structural questions arise regarding the provision of national security legal advice to the President and NSC. As is often the case with processes that afford options, there is no singular “correct” answer, but there are indeed wrong answers. Eliminating the office, or dual-hatting policy or executive staff to also serve as legal advisers, are examples. The first would eliminate an essential conduit of interagency legal advice to the President and the NSC process as well as the advantages of proximity and familiarity when providing advice. The second presents an inherent cognitive conflict present when one is serving as one’s own lawyer or ethics advisor, negating as well, the ability to say one “relied on counsel.”

The most important ingredient to providing timely, contextual, and meaningful legal advice is to have the right people in the right roles. Timely advice is pre-decisional, informs options and not just recommendations, and meets operational timelines. Contextual advice is specific and tailored to the situation presented or that may emerge and in the location and form where it is needed. Meaningful advice is honest advice that doesn’t work back from “yes,” but moves forward from policy intent to find a way to yes with honor and with the Constitution intact. Meaningful advice includes legal policy input, such as the consequences of proceeding in one manner versus another, while distinguishing between law, legal policy, and policy. The second most important ingredient is to have Principals, especially the President, APNSA, and Counsel to the President who agree on a process for the provision of legal advice and then insist upon its use, even when they don’t like the advice.

Sound bureaucratic architecture helps to ensure that legal advice is provided and that it is effective. It can also help identify problems. But in the end, good process and honest advice depends on personality, not structure. The right persons with the wrong architecture will find ways to provide timely meaningful, and contextual legal advice. Whereas the wrong persons, even with the right architecture, will find ways to work around or undermine that architecture.

In the last three presidencies, three different architectural models have generally been used.
1. The NSC Legal Adviser was an NSC employee reporting to the APNSA while “appropriately” coordinating with and keeping the Counsel to the President informed. National security legal advice to the NSC and within the EOP was coordinated and provided exclusively through NSC/Legal to include advice to the Vice President and OVP. The NSC Lawyers Group was the primary source of interagency legal input into the NSC.

2. The NSC Legal Adviser reported to the Counsel to the President as well as to the APNSA. Legal advice to the VP was provided by the Counsel to the Vice President. And, legal advice to the NSC was provided via three separate channels with no one channel being exclusive – the Counsel to the President, the Counsel to the VP, and NSC/Legal. The Lawyers Group was chaired by NSC/Legal, but interagency lawyers meetings were also held by the Counsel to the President, and the Counsel to the VP, with and without coordination with, and in some cases, the knowledge of NSC/Legal or the Lawyers Group.

3. The NSC/Legal Adviser was dual hatted as a Deputy Counsel to the President and was part of the Office of Counsel to the President. The Office of Counsel to the President, usually in the form of the NSC/Legal Adviser, advised the OVP and served as the exclusive conduit for national security legal input to and interagency coordination for the NSC, using the Lawyers Group.

A. **Should the NSC Legal Adviser serve within the Office of the Counsel to the President (referred to here as a White House Counsel Model), or operate independently as NSC staff, while keeping the Counsel to the President appropriately informed (referred to here as an NSC Model)?**

**Advantages of an NSC Model:**

- May enhance the relationship and bond between NSC/Legal and its principal “clients” the APNSA and DAPNSA.
- May provide for more timely, efficient, and definitive legal advice where NSC/Legal speaks with its own voice, for example, at PCs, DCs, or in staff meetings.
- May better integrate the Legal Office into the NSC staff.
- To the extent the Office of the Counsel is identified with other issues within the White House, including political issues, it may enhance perceptions of NSC/Legal as an independent and objective source of national security law and honest-broker of interagency views if it is independent from the more “political” Office of White House Counsel.
- May increase the odds that a national security law specialist from either the career service or from private life will serve in the role of Legal Adviser.
Advantages of a White House Counsel Model:

- Clarifies the “chain of command” making one official, the Counsel, ultimately and definitively responsible and accountable on questions of national security law.
- Better avoids the risk of forum shopping by EOP personnel or agencies who may seek to appeal NSC/Legal advice to the Counsel to the President.
- Mitigates the risk of differing views on matters of constitutional law or presidential prerogative.
- May enhance the status, and thus bureaucratic weight and influence of NSC/Legal inside and outside of the EOP, to be dual hatted as a Deputy Counsel.
- It may increase the budgetary headroom for additional lawyers. The Counsel’s Office, in theory, would be more willing to bring on additional lawyers than the NSC, where the National Security Advisor will see the assignment of NSC slots to lawyers as a zero-sum loss for policy positions.

B. Should the Vice President rely on his own Counsel for national security legal advice or should there be a single central national security law adviser within the White House and NSC system?

Advantages of the VP’s Counsel providing national security legal advice:

- The Vice President should be able to select his own lawyer, in order to inform his own views on the law, just as the Chairman has his own lawyer independent of DOD/GC.
- Where the VP selects his own lawyer and there is an attorney-client relationship, the VP is more likely to seek legal advice on national security matters and counsel is more likely to have immediate and necessary access to the VP.

Disadvantages:

- Having an alternative source of national security legal advice within the EOP can result in forum shopping and lack of clarity on the law by EOP staff and agencies.
- The Vice President is a member of the NSC and the National Security Advisor to the Vice President is a member of the PC and DC. Therefore, the OVP should receive and operate on the same legal advice as the NSC and NSC process does.
- Unless the Counsel to the VP is a member of the Lawyers Group, the CVP will not speak with the knowledge or benefit of interagency views on the law.
• There should only be one legal voice on matters of national security law and that voice should be the President’s.

IV. What is/are the appropriate mechanism(s) to regulate the relationship between the President and NSC staff and the Department of Justice and FBI?

The relationship between the President, the NSC, and the NSC staff on the one hand, and the law enforcement agencies (i.e., the Justice Department and the FBI) on the other hand, is as complex as it is vital. That is because these agencies perform critical national security functions, engaged in the prevention and response to terrorism and espionage. In this role they should be subject to appropriate NSC direction. However, at the same time, they perform a law enforcement function that should be independent of political or policy direction or interference.

While the Department of Justice, including the FBI, necessarily works daily with the NSC and NSC staff on matters of policy, litigation, and national security, the DOJ and FBI in their law enforcement roles generally and necessarily operate without NSC direction or input. The FBI should go where the facts lead, not where policy or political actors guide or direct.

However, many law enforcement investigations present national policy questions appropriately addressed to and by multiple government actors, including the President and not just the FBI. Policy debates over encryption, for example, illustrate the point. As a result, the law enforcement community has a policy stake in the President’s legislative agenda and vice-a-versa. As illustration, a terrorism or espionage investigation can have both criminal and national security implications. Further, the FBI is a hybrid agency with both a preventive and investigative mission. That means the NSC, and the NSC process, must include DOJ and the FBI in some manner. Indeed, the PATRIOT Act recognized the necessity of sharing law enforcement information, including criminal investigatory information like grand jury material with national security actors and decision-makers. Law enforcement investigative matters may also implicate U.S. national security and foreign policy interests about which the President should be aware, and perhaps in certain circumstance, have an opportunity to influence. For example, there exists a process in civil litigation by which the United States can express a statement of interest on behalf of the United States Government in cases involving private parties and foreign entities, including foreign heads of state.

The question then is not whether to integrate the law enforcement function into the national security process, including the NSC process, but how best to do so without influencing or jeopardizing the independence of criminal investigation or appearing to do so. The complexity of the question may increase if members of the NSC or NSC staff are themselves the subject of inquiry.
There are at least five procedural options that are not mutually exclusive. Indeed, different administrations have at times used all five channels concurrently.

1. **Communications run to and from the FBI through the Department of Justice** – This insulates the FBI from the appearance or risk of White House/NSC influence on investigations. However, it also takes additional time and risks the loss of essential knowledge and nuance as information is communicated in either direction.

2. **Designate appropriate functions or fora as communication channels** – Allows ground rules to be established and understood in advance where it is understood that the free flow of communication to and from FBI is appropriate. This has included, for example, counterterrorism matters addressed through the CCSG as well as counterintelligence cases like Aldrich Ames. The question then is which conduits to open.

3. **Gatekeepers/Bridges** – Designate trusted personnel on both sides of the bureaucracy to communicate on sensitive matters with full knowledge of the limits and implications of doing so and in an accountable manner. In the past, this bridge has run in both directions from NSC/Legal to FBI/GC as well as from and to what is now the DOJ/National Security Division.

4. **FBI Staff Presence on the NSC Staff** – It has also been done by having FBI designate officers to serve on the NSC staff to handle law enforcement and intelligence issues and cases. For example, FBI officers have traditionally served in the NSC Intelligence Directorate as counterintelligence specialists. However, just as you would not and could not transmit all military and defense input to the President and NSC through a colonel in the Defense Directorate; it is not functional to do so with national security and law enforcement information generated by or relevant to the FBI.

5. **Cross-Hatch at the Agency Head Level** – On the most sensitive matters, information can be shared at and limited to the highest levels. This might be done by having regular meetings between the FBI Director and National Security Advisor/Homeland Security Advisor, or between the Attorney General and Deputy Attorney General and the Counsel to the President. Such meetings build trust and establish process. They are also accountable and traceable. The risk is that such meetings might delay the transfer of essential information until the next meeting and that essential nuance or detail will be lost as it is conveyed up the chain of command.

The key is to identify and use the right option in appropriate context, and to avoid an ad hoc or episodic response to the process questions presented. Ad hoc process leaves to individual actors faced
with case specific issues and deadlines the choice of where and how to communicate with law enforcement. This means the process must be established, known, and understood. If so, it will also be accountable.

V. **What role should the NSC, the APNSA, and NSC staff play with respect to intelligence?**

**Does the NSC, in practice, perform its 12333 functions effectively?**

Executive Order 12333, as amended by 13470, states:

“The NSC shall act as the highest Executive Branch entity that provides review of, guidance for and direction to the conduct of all national foreign intelligence, counterintelligence, and special activities, and attendant policies and programs.”

This language is found in an Executive order; however, it reflects constitutional law and statute as well, both of which place the President at the head of the intelligence table, should the President wish. The President is Commander in Chief and Chief Executive. The President is responsible for taking care that the laws be faithfully executed.

Likewise, the National Security Act of 1947, as amended, gives the President direct responsibility for the authorization of certain intelligence activities, including covert action, as well as with keeping appropriate members of Congress fully and currently informed. To be clear, the President does not perform these functions alone; the President performs these functions, if at all, with the NSC as a whole, and through the DNI, CIA Director and the President’s intelligence alter ego, the National Security Advisor, along with the NSC staff.

The question presented is not necessarily quantitative (i.e., should the President do more or less, should the NSC, or NSC staff, do more or less), but rather qualitative.

- Is the IC receiving meaningful and timely input from the President and other members of the NSC?
- Is the President making conscious rather than default intelligence choices?
- Is the President’s role clearly defined and are the President’s expectations clearly communicated and understood within the IC?

There are arguments for and against a greater Presidential role:
Advantages:

- Intelligence is central and essential to the wise and effective use of all of the national security tools – diplomacy, law enforcement, force, sanctions. Therefore, it should follow that if the President is accountable and responsible for U.S. national security, the President should be directly involved in and accountable for the collection and use of the information that informs that policy.
- The President is also the only official with the authority to direct all of the IC. Whether understood or not, the President is the “constitutional DNI,” because the President alone has the legal authority and bureaucratic capacity to direct (rather than coordinate) all elements of the intelligence community. However, Presidents have not generally embraced this role, in the same manner that they more visibly serve as Commander in Chief.
- Finally, the more involved the President and the NSC are in the generation of intelligence, the more likely intelligence collection and activities will directly respond to and inform the needs of senior policymakers.
- Presidents consciously consider and manifest their role as Commander-in-Chief. They should consciously do the same as the leader of the intelligence community, especially given the critical link between intelligence and the role of Commander-in-Chief. Such a conscious intelligence role would no more eclipse the role of the DNI than the President’s role as Commander-in-Chief eclipses that of the Chairman of the Joint Chiefs.

Disadvantages:

- There is a reason that Congress chose to make the DNI a statutory advisor to the NSC and not a policymaking member. Intelligence should shape policy, not the other way around.
- The less direct the President’s actual role, the more realistic the President’s plausible deniability in the event intelligence activities are disclosed.
- Moreover, the more direct the President’s role in the intelligence function, the more likely congressional oversight will take on a partisan rather than a functional tone. Too direct a presidential role in the collection and analysis of intelligence information may also result in or appear to result in the “ politicization” of intelligence.
- Finally, the President has so many roles already, assumption of additional responsibilities is not advised. Restated, being the DNI is a full time job and responsibility.

VI. Is there a better mechanism for coordinating whole-of-government process and decision-making than NSC process?
There are three recurring broad-brush complaints about the process of national security decision-making. First, policy and process are dominated by the White House and the NSC. Second, United States foreign policy is too militarized; it depends too heavily on military options, as well as on the military to implement non-military options. Third, United States policy and process do not timely and effectively capture and utilize a whole-of-government approach to national security challenges and issues. Each of these complaints touch in some manner on the NSC’s capacity to effectuate a whole-of-government (WOG) response to national security.

Part of the problem is that whole-of-government approaches to national security present an array of questions and challenges that go well beyond the size and function of the NSC and NSC staff. These challenges include:

1. Budgetary authority and capacity.
2. Legal Authority.
3. Personnel capacity.
4. Accountability and oversight.

The question presented in the context of this paper, is whether there is a better presidential process than the NSC process to effectuate whole-of-government approaches to policy development and implementation and whole-of-government responses to crises.

Yale President Whitney Griswold said, “The answer to a bad idea is a better idea.” So far, no President has come up with a better system to synthesize information, coordinate policy, make decisions, and harness an all-of-government approach to national security at the national level than the NSC system. In part that is because the NSC system is flexible and potentially nimble, and thus can be tailored and shaped to need. In short, Presidents have broad discretion on who they put on the NSC, and how the staff is structured and functions. It also reflects the reality that where the NSC decides to act, it acts with all the constitutional and statutory authority the President as well as Secretaries of State and Defense bring to bear.

The key NSC process question then is not whether the NSC is the appropriate mechanism to effectuate a whole-of-government approach or response to a national security problem. The threshold question is when should the NSC retain jurisdiction over a whole-of-government problem and when should it assign a problem elsewhere. The critical action here is to timely and consciously decide between three options.
Should the NSC retain control over a problem or crisis? If so, the question becomes at what level should coordination and direction occur, the NSC, the Principals Committee, the Deputies Committee, or at the IWG level.

If the NSC does not retain jurisdiction, the question becomes where should such a response be effectuated? The options include, but are not limited to: (a) the military chain of command; (b) a lead Department or Agency; (c) a leader federal or state officer at the national, regional, or local level based on standing guidance like the National Response Framework; (d) an ad hoc process, such as a specific task force, such as those standing task forces that address consular emergencies, or a one-off structure, such as that used to respond to Ebola, or the Deepwater Horizon disaster.

Whether the policy or issue involved warrants advance delegation to a standing process, such as those reflected in the Maritime Operational Threat Response (MOTR) process, which delegates to an interagency process decision-making in response to certain threats while reserving to agency participants the option of elevating disagreements up the policy chain of command. Likewise, the Joint Terrorism Task Force process, which vertically links national agencies to field components while also linking local and state agencies horizontally.

Here, as elsewhere, the goal is not to advocate for a specific outcome, but rather for a purposeful choice, using a decisional template.

**Conclusion**

Good process leads to better results. In national security, no process is as important as the President’s process. That is because the President is the central and often essential national security actor. It is also because, the President usually does not address national security questions unless: (1) they are inherently presidential, in which case they often involve questions of international (and U.S.) peace and security; (2) the bureaucracy or NSC Principals are divided, in which case they likely are hard issues; or, (3) they require a whole-of-government response, in which case they likely present heightened bureaucratic and leadership challenges.

As a result, it is essential that the President-elect, and the President-elect’s immediate team, address the governance questions identified in this paper in a timely, purposeful, and deliberate manner. There will be little time to do so. But one thing is certain: there will be less time to do so in January. Moreover, it will be time well spent because the NSC, NSC process, and NSC staff will directly impact all the national security decisions that follow.
NUCLEAR NONPROLIFERATION IN THE INTERAGENCY

DAVID S. JONAS*

Introduction

Nuclear nonproliferation matters are as much a part of the interagency decision-making process as any other policy issue. For policy makers to create coherent nuclear nonproliferation programs and make informed policy decisions, they must understand the interagency process and the often competing interests involved. This portion of the American Bar Association’s Standing Committee on Law and National Security Report considers the interagency process as it applies to nonproliferation -- offering a brief overview of the participants, the process, and the problems that sometimes arise. At the outset of this paper, several points are important to understand. First, nuclear nonproliferation is the legal means of stopping proliferation. It encompasses treaties, agreements, international organizations, etc. It is distinct from counter-proliferation, which is the more muscular, military response to proliferation, such as the Israeli bombing of the Iraqi and Syrian nuclear reactors. Additionally, a briefing on nuclear nonproliferation matters could certainly be understood to encompass so called “WMD.” There is no generally agreed, working definition of WMD, as many definitions exist, and it would be helpful to arrive at a common understanding of this important term. Definitions vary wildly from something that can kill less than ten people to a device that can kill hundreds of thousands. This author believes that the only true WMD is nuclear weapons or improvised nuclear devices. The reason is that chemical weapons are not militarily effective and generally kill no more personnel than a conventional artillery round. Biological weapons have never been deployed in a militarily significant manner and neither chemical or biological weapons cause any damage to infrastructure. Nuclear weapons alone can truly threaten to wipe out millions of lives and the infrastructure of an entire city in the blink of an eye. Regardless, chemical and biological nonproliferation would be handled in this same manner by the interagency. As to the often discussed “dirty bombs,” while these contain radiological material, they do not contain fissile material, so cannot cause a nuclear explosion. Any people killed by such a device would be killed by the conventional explosive, and so these weapons are also surely not WMD.

* David S. Jonas is a partner at FH+H, a DC area national security law firm. He served as General Counsel of both the National Nuclear Security Administration and the Defense Nuclear Facilities Safety Board. A retired U.S. Marine Corps officer, he also served as nuclear nonproliferation planner for the Joint Chiefs of Staff. He teaches Nuclear Nonproliferation Law and Policy at Georgetown and George Washington University Law Schools and has also taught that course at the U.S. Naval War College. The views expressed are his own and do not necessarily reflect the views of any of the above government agencies, universities, or FH+H.
I. The Participants

The interagency process is the means by which executive agencies with overlapping jurisdiction over a matter, such as nuclear nonproliferation, coordinate with each other and provide a whole of government approach to such problems. There are hundreds of instances of nuclear nonproliferation decisions in the interagency. For example, interagency officials must convene to consider everything from preparing for International Atomic Energy Agency (IAEA) meetings or Non-Proliferation Treaty (NPT) Preparatory Committee Meetings and Review Conferences, to considering minor international agreements and major treaties. Even political statements to be made by U.S. officials and nonbinding agreements such as the Joint Comprehensive Plan of Action, also known as the Iran Nuclear Deal must be filtered through this process.

One specific example of nonproliferation in the interagency is the 1998 “Nuclear Cities Initiative,” a program created to address proliferation concerns arising from the fall of the Soviet Union.¹ When the Cold War ended, the Soviet Union’s once well-funded ten “nuclear cities” faced economic and political hardship.² The economic climate in the nuclear cities created a significant proliferation risk; Soviet weapons scientists, finding themselves underpaid or unemployed, might sell sensitive information or fissile material to countries or non-state actors seeking to develop nuclear weapons. The problem would likely increase as Russia continued to downsize what was now an unsustainably large nuclear weapons arsenal.³ Recognizing the risks created by this precarious situation, the United States began the Nuclear Cities Initiative in an effort to improve the socioeconomic conditions in the nuclear cities and find civilian employment for displaced Soviet nuclear weapons scientists.

As is typical in the executive branch, the Nuclear Cities Initiative required the involvement of several agencies: the Department of Energy (which implemented the program), the Department of Commerce, the Department of State, the Department of Defense (which includes the Joint Staff and the Office of the Secretary of Defense), the intelligence community, and the Agency for International Development. Generally, any agency with an interest or “equity” in a matter has an opportunity to participate. With issues as multifaceted as nuclear nonproliferation, this means coordinating with the multiple agencies or offices with jurisdiction over foreign affairs, defense, energy, etc.

One agency that will always be involved in international nuclear nonproliferation policy issues is the Department of State. Pursuant to Circular 175⁴ and the Case-Zablocki Act,⁵ the Department of State is the lead on foreign policy, and other interested agencies must concur before negotiating any international agreement on behalf of the United States. This may not be necessary where an “umbrella” agreement is already in place. This applies even where an agency has independent authority to negotiate international
agreements. The Department of Energy, for example, may conclude international agreements under the Atomic Energy Act, but must nonetheless coordinate with the Department of State.\textsuperscript{vi}

II. The Process

These agencies coordinate through the interagency process. Nonproliferation policy coordination happens at multiple levels, ranging from subject matter experts within the interested agencies all the way up to the President of the United States.

The lowest level at which agencies coordinate is the various Interagency Policy Committees or sub-Interagency Policy Committees (aka Interagency Working Groups or Policy Coordinating Committees – depending on the administration).\textsuperscript{vii} Interagency Policy Committees are sub-cabinet level committees that facilitate the interagency management of complex policy issues.\textsuperscript{viii} These groups consist of subject matter experts, lawyers, and officials from the relevant agencies and are responsible for most of the day-to-day coordination of nonproliferation policy.\textsuperscript{ix}

The next level of interagency coordination is the Deputies Committee. The senior sub-Cabinet interagency Committee, the Deputies Committee handles higher-level national security issues and deals with day-to-day crisis management. It monitors the interagency process and the work of the Interagency Policy Committees. It is also responsible for ensuring that policy issues are properly analyzed and prepared before reaching the highest levels of coordination. Officially, the Deputies Committee consists of Deputy Secretaries, though Under Secretaries may attend by designation. Members include, for example, the Deputy Secretary of State, the Deputy Secretary of Defense, the Deputy Attorney General, and the Deputy Secretary of Energy. Other senior executive offices participate as appropriate. Legal input will almost certainly have been provided to the senior policy official attending for each agency at this level of coordination, and above.

Above the Deputies Committee is the Principals Committee. The Principals Committee is a cabinet level forum that includes the Secretaries of State, Defense, Homeland Security, Treasury, and Energy as well as other executive agency heads.

Finally, the highest level at which agencies coordinate nonproliferation policy, is the National Security Council.\textsuperscript{x} Established by the National Security Act of 1947, the National Security Council is the principal forum for national security policy issues. The National Security Council is responsible for coordinating foreign and defense policy among the various agencies and advising the President with respect to domestic, foreign, and military policy matters affecting national security.\textsuperscript{xi} The Council includes, by statute, the President (who chairs the Council); the Vice President; and the Secretaries of
The Chairman of the Joint Chiefs of Staff and the Director of National Intelligence serve as the military and intelligence advisors to the Council. Other executive agencies attend as appropriate. In addition to the statutorily required members, the Council also includes the Secretary of the Treasury, the Attorney General, the Secretary of Homeland Security, the United States’ Representative to the United Nations, the President’s Chief of Staff and the President’s National Security Advisor. It is the President, however, that may choose to make the final decision as to nonproliferation and national security policies.

These interagency committees operate by consensus -- taking an action only when all the agencies in the committee agree. Most policy decisions are made at lower levels of interagency coordination. If an agreement cannot be reached or if the issue involves particularly high-level national security concerns, however, the matter is elevated to a more senior forum. Ideally, any policy disputes that arise, involving ongoing programs, are resolved at the lowest possible level. Indeed, efficiency demands that the vast majority of decisions be made at the lowest level authorized to make it. Issues decided at the highest levels must be either very contentious or extremely sensitive. This discussion assumes that major decisions, such as use of force to address proliferation threats, would be made by the President, and the lower levels would then determine how to accomplish this mission.

III. The Problems

Often, interagency policy disagreements arise because of differing priorities and interests. For the Department of State, for example, nonproliferation policy is a significant concern. For the Department of Defense, which prioritizes national security, however, nonproliferation policy and agreements are a secondary concern, such that, for example, the Joint Staff’s interest in nonproliferation agreements extends only to ensuring that such agreements do not impact the ability of the military to defend the nation. Consequently, the Departments of State and Defense often find themselves at odds in nonproliferation matters.

One example of differing agency priorities is the United States’ Voluntary Offer Agreement. The Voluntary Offer Agreement is an arrangement with the IAEA whereby the United States offers the IAEA increased access to its facilities for the application of safeguards. The Pentagon, being primarily concerned with defense of the nation, generally seeks to ensure that such agreements do not impact the ability of the military to defend the nation. Consequently, the Department of Defense fought to include a robust national security exclusion into the agreement, as it often does. The Department of Defense saw increased access to United States nuclear, military and intelligence facilities as a national security risk. It had a strong interest in limiting IAEA access.
The Department of State, on the other hand, prioritizes international diplomacy and generally focuses on concluding international agreements. The Department of State viewed the Voluntary Offer Agreement as a demonstration of transparency and leadership by the United States -- a display of the United States’ commitment to fulfilling its NPT obligations. The State Department saw that the Voluntary Offer Agreement might also encourage other nuclear weapons states to conclude similar agreements with the IAEA. Thus, the Department of State’s interest was to maximize IAEA inspector’s access. In the end, the Voluntary Offer Agreement included a national security exception under which national security facilities, activities, and information with direct national security significance to the United States were excluded from IAEA inspection and complementary access. The list of such facilities is regularly updated and provided to the IAEA.

Differing interests not only arise between agencies, but within agencies as well. When the Department of Defense coordinates policy, it brings a representative from both the Office of the Secretary of Defense and the Joint Staff. The Joint Staff assists the Chairman of the Joint Chiefs of Staff in providing the best military advice to the Secretary of Defense and to the President. Though it reports to the Secretary of Defense, a civilian, it has its own views on nonproliferation issues. In the context of a nonproliferation agreement, the Joint Staff’s primary concern is that the agreement not affect the military’s ability to accomplish its mission in defense of the nation.

Furthermore, while a cabinet department as a whole may not prioritize nonproliferation, agencies within the department might. The Defense Threat Reduction Agency, for example, is an agency within the Department of Defense tasked specifically with combating weapons of mass destruction. A similar situation occurs with the Department of Energy and the National Nuclear Security Administration (NNSA), a semi-autonomous agency within the Department of Energy. In an unusual pairing of missions, NNSA’s Office of Defense Programs is tasked with making nuclear weapons while NNSA’s Office of Defense Nuclear Nonproliferation is tasked with eliminating them. This does not really involve working at cross purposes, since it is clearly not U.S. nuclear weapons that NNSA’s Office of Nuclear Nonproliferation seeks to eliminate, but still, the obvious disparity in their missions within the same department is rather unique.

While interests within an agency generally align, that is not always the case. The NNSA itself contains multiple offices related to nonproliferation, among them: the Office of Defense Programs and Defense Nuclear Nonproliferation. The former maintains the nuclear weapons stockpile, while the latter seeks to eliminate them. Given their contradictory mandates, these offices are likely to disagree. Such differing priorities and interests create inescapable conflict, be it between agencies or between offices within an agency.
This is why the interagency process is so vitally important and illustrates the necessity of an efficient process to handle these issues.

Lawyers play a critical role in the interagency process, often attending the initial meetings. On rare occasion, a legal issue can be the most difficult matter to resolve. In such an event, interagency working group meetings might be attended only by lawyers until the legal issue can be resolved by consensus. On very rare occasions, when the lawyers simply cannot agree, the matter may be conclusively resolved by the Department of Justice’s Office of Legal Counsel for matters of domestic law, and by the State Department’s Legal Advisor when matters of international law are implicated.

IV. Scenario Planning

Given the above discussion, it is also well worth considering what nuclear nonproliferation events/scenarios/crises that the new administration might confront. Here are several:

- North Korea conclusively demonstrates to the world that it has the capability to launch an ICBM with a nuclear warhead, capable of hitting the continental United States;
- Iran tests a nuclear weapon and claims that it has a stockpile of 50-100 warheads;
- A dirty bomb is detonated in an American city;
- Russia moves nuclear weapons to its naval base at Tartus, Syria.

A new administration would also have to decide how to handle such issues bureaucratically, should they arise. For example, should North Korea and Iran be handled by a geographic IPC, a nonproliferation IPC, or a specific IPC for that issue alone? Who would chair that IPC? Who should participate? Are there new tools that could be brought to the table? Should other agencies that typically do not participate in such meetings, now attend?

Conclusion

Nuclear nonproliferation and national security policy matters, as complex and important as they are, require coordination with multiple agencies -- civilian agencies, military agencies, international programs, energy programs, defense programs, etc. To make effective nonproliferation policy, decision makers need to understand and appreciate the process and the interests involved.

ii NUCLEAR THREAT INITIATIVE, Russia’s Ten Nuclear Cities (June 1, 2002), http://www.nti.org/analysis/articles/russias-ten-nuclear-cities/.


viii Id. at 17.


xii Presidential Policy Directive 1, supra note 12 at 1-2.


xix Whittaker et al., supra note 26 at 50.

Essential Conclusions

1. Is the U.S. government adequately organized to address current and emerging threats and opportunities in homeland security? No. Existing legal and organizational structures limit the Secretary of Homeland Security’s ability to effectively organize and direct necessary operations and activities of the Department of Homeland Security to protect the U.S., even in emergencies.

2. Do we need a change in the law or processes to address these gaps? Yes. Targeted statutory changes would provide the Secretary of Homeland Security with limited, temporary authorities during a crisis to effectively manage a Federal response in coordination with other Federal agencies, state governments and the private sector.

3. Does the U.S. government have adequate authorities and processes in place to partner with and, if needed, to direct third parties (NGO, IGO, private parties)? No. We need new, innovative approaches to strengthen partnerships between government and the private sector for homeland security, especially during emergencies.

Homeland Security: Evolving Concept of Governance for a Multi-Risk World

Homeland security is both a strategic and legal concept, and describes governance activities to prepare for, prevent and respond to a range of events and conditions that present a risk of direct harm to the people, territory, property, and information of the United States, and risk to its underlying ability to maintain prosperity and constitutional order in the face of a diverse array of potential disaster and crises. It is also an evolving concept both legally and strategically.

Because of its origins in concerns about terrorism, which resulted in foundational legislation after the horrific attacks of 9/11, homeland security as a concept remains principally associated with terrorism that threatens the U.S. However, a number of incidents and insights have broadened the functionality and concept of homeland security. These include the shifting nature of international terrorism, more prevalent violent extremist attacks originating in domestic movements and groups, the experience of civil breakdown after Hurricane Katrina, the regional and national impacts of the Deepwater Horizon oil spill, and the increased vulnerability of digital networks and associated technological systems to cascading
cyber disruptions. All of these are combined with citizen expectations of effective government response to such events while maintaining customary legal order. Thus “homeland security” today is a much broader concept. Homeland security is about sustaining civil security, resilience and constitutional governance through a diverse range of law, policy and strategic activities to protect the U.S., its people and prosperity from a range of harms. In its focus on civil security, it both supplements and overlaps the national security framework established in the twentieth century.

Evolving threats to the U.S. are driven by a changing world:

- The terrorist threat is growing and increasingly de-centralized;
- Growing cyberspace threats raise danger to U.S. critical infrastructure;
- Biological concerns are growing: bioterrorism, pandemics;
- Growing risk of nuclear terrorism through proliferation of nuclear/radiological materials; and
- Transnational criminal organizations are increasing in strength and capability, accelerated by climate change and aging infrastructureiv

Beyond these trends, there are additional changes in the world that present risks to the U.S. and demand government attention, including, for example:

- Human security: Transnational migration. There is a dramatic increase in massive population movements across traditional borders, driven by pressures of conflict, poverty
- Human security: Technology security. The growth and advancement of technology, particularly in robotics, unmanned systems and nanotechnology, without enforceable legal and policy frameworks to manage the impacts of these technologies, present new risks to human security that are not yet fully understood.
- Climate change: Climate change is a security risk because it aggravates regional problems such as poverty, social tensions, environmental degradation and weakened governance that threaten stability in a number of countries.v Changes in weather patterns, frequency and intensity of weather events, and sea level rise challenges access to food and water, spurs population movement across borders to escape impacts, and increases state competition for resources.vi

Organizing for Homeland Security: Shared Responsibilities of Government and Private Sector

The U.S. Constitution provides for a federal, dual-sovereign system of government, with a central Federal government with limited, specified powers and state, tribal and local governments with responsibility for public safety, emergency management and law enforcement within their respective
jurisdictions. Outside of government, the private sector is a powerful actor in homeland security. Private companies own or operate the majority of property, including critical infrastructure, within the U.S. This includes, for example, power, telecommunications, transportation, manufacturing, trade and other commerce, banking, healthcare and agriculture. The activities of these private sector companies and other actors are governed by a range of statutes and executive directives, including varying levels of requirements concerning the security and resilience of those activities.

**The Executive Branch: Shared Responsibility**

Within the Executive Office of the President, the National Security Council (NSC) is responsible for formulating national and homeland security strategy and policy for ultimate decision making by the President.

The executive branch is organized by cabinet departments and subordinate operating agencies or elements. The Department of Homeland Security (DHS) is the primary executive agency with responsibility for homeland security. Additionally, most agencies of the executive branch have some level of responsibility that contributes to the security of the U.S. in relation to terrorism and the resilience of U.S. critical infrastructure more generally. For example, the Department of Justice is responsible for the investigation and prosecution of criminal activity, including terrorism. The Department of Defense is responsible for the national defense of the U.S. but also provides essential homeland security support to DHS and State governors upon the President’s direction during a domestic incident or crisis declared by the President.

Other Federal agencies also have authorities and capabilities for activities associated with homeland security. For example, the Department of Energy is responsible for electric grid resilience and security, the Environmental Protection agency is responsible for prevention and response to environmental disasters, and the Department of Health and Human Services is responsible for prevention, preparedness and response to pandemics.

Organizing the Federal government for homeland security when there are many agencies with overlapping responsibilities requires a unifying approach. Currently, U.S. policy establishes sixteen critical infrastructure sectors and assigns lead Federal responsibilities for each sector. These sector specific agencies are primarily responsible for strengthening partnerships with critical infrastructure owners and operators and coordinating with DHS.

Notwithstanding the broadened understanding of the mission of homeland security, DHS’ core statutory missions focus on preventing and responding to terrorism and related threats.
However, its components, which are a mix of agencies that existed before DHS was created and were transferred from other departments to DHS when the new department was formed in 2002, carried with them substantial authorities that extend beyond narrowly understood terrorism concerns. For example, the Homeland Security Act brought within DHS the U.S. Secret Service with its protective duties, U.S. Coast Guard with maritime safety and stewardship duties, Federal Emergency Management Agency with its emergency response role, U.S. Customs Service with its broad inspection and tariff enforcement duties, and U.S. Immigration and Naturalization Service with its spectrum of immigration responsibilities. Although some of these agencies were reorganized upon transfer to DHS or subsequently, most retained their original authorities and missions that were broader than protecting against terrorism. While most of these responsibilities fall under the evolving rubric of homeland security aimed at sustaining constitutional governance and civil security in the face of a range of potential disasters or catastrophes, the Homeland Security Act did not fully articulate the broad homeland security mission and did not provide the Secretary of DHS with strong central authority to direct coordinated operations across the department that are called for to address these challenges.

**Necessary Congressional Oversight: A Continuous Challenge**

The original Congressional oversight framework for the agencies and operating components brought into DHS was not altered from pre-existing oversight responsibilities. As a result, today the Department of Homeland Security and its components are subject to the jurisdiction of nearly 100 Congressional committees and subcommittees that exercise jurisdiction over DHS and its many component parts. This has resulted in a disjointed and uncoordinated mosaic of Congressional oversight of the Department and its operating elements. With this disparity of jurisdictional overlaps and turf battles, the Congress is not well-positioned to provide DHS and its elements the unified and rigorous oversight that the nation relies on to ensure the Executive branch is adequately performing its Constitutional duties. There are undoubtedly severe political challenges to untangle and unify the mosaic of committee jurisdictions. However, the Congress can only appropriately perform its Constitutional duty if it simplifies and unifies the oversight of the Department of Homeland Security and operating elements.

**State, Territorial and Tribal Governments: A Team Approach**

The Constitution recognizes the dual-sovereignty of Federal and state/territorial/tribal governments. Within this construct, the State and Federal governments have legally distinct but complementary—and in practice overlapping—powers to provide for the safety of the U.S. and its people from harm. State, territorial and tribal governments within the U.S. are responsible for public safety and
the general welfare of the people within its boundaries provided in state/territorial/tribal constitution and laws and as limited by the U.S. Constitution and Federal law.

States conduct homeland security functions through a range of centralized and decentralized law enforcement and emergency preparedness and response functions. These functions are typically shared between a central state authority and local governments. While states and tribal governments conduct emergency management and law enforcement functions, local governments also perform firefighting, rescue and other first-responder services in direct support of the public.

Organizing for Homeland Security Tomorrow: Imperatives for Improved Governance in a Changing World

DHS should be reorganized with existing authorities to more effectively conduct the range of governance functions it is responsible for today. Originally, the principal mission of DHS was understood to focus on preventing and responding to terrorism, with an acknowledgement of other functions of the legacy agencies that were transferred to DHS. The Homeland Security Act of 2002 created a Department of Homeland Security with this clear principal mission, but without strong central authority vested in the Secretary and with a range of secondary missions that were viewed as related or independent of the department’s primary mission but in any event subordinate to it.

DHS performs a number of functions and activities to prepare for, prevent and respond to a range of threats to the U.S. and its people, including terrorism, transnational crime, cyber threats, undocumented immigration, natural disasters, and technological breakdowns whether accidental or human caused. DHS’ multiple agencies provide resources and carry out responsibilities principally in five broad areas of homeland security:

- Mobility security, including protection of borders and coasts, travel, transportation (air, maritime, and surface), shipping, immigration and migration;
- Cyber and other infrastructure security;
- Pandemics and special weapons defense, including chemical, biological, radiological, and nuclear; and
- Disaster preparedness and response.

What has become clear is that DHS is not focused primarily on terrorism and only in a subordinated way on other missions. Rather it is focused on countering multiple causes of terror by creating resilience. Terrorism, transnational organized crime, major accidents, cascading technology
breakdown, and natural or environmental (or even political) disasters are causal factors to different
degrees across the spectrum of homeland security risks and sectors of the

U.S. economy, government and society. All of these can create situations of massive damage,
terror, and civil breakdown. Indeed, anecdotally, the most resource intensive and visible response
operations since 9/11 have been the DHS responses to Hurricane Katrina, the Deepwater Horizon oil spill,
and Hurricane/Superstorm Sandy.

Notwithstanding this more coherent understanding, DHS has largely remained a department with
the original construct of a core central organization and staffs reporting to the Secretary, with a range of
federated and semi-autonomous operating elements and components. While there have been some
changes to the organization of DHS, the decentralized organization with limited Secretarial authority
prevails. The current model needs to be re-examined in light of the understanding of homeland security as
the set of legal and strategic operational responses to multiple sources of terror, through various means of
achieving security and resilience. With resilience as the principal driver of homeland security, it is worth
examining potential models for better organizing DHS to achieve that goal.

THE DHS JOINT MODEL: GOLDWATER-NICHOLS II

Change the law to provide the Secretary stronger central legal and operational authority,
including greater authority to control and direct the internal actions of components within DHS, to
achieve the Department’s missions.

This model is comparable to the current model within the Department of Defense, which created
a joint force structure distinct from the legacy military services to provide for more unified and
coordinated operations.xii Applied to DHS, this statutory construct would create a stronger central
authority in the Secretary with a number of regional senior officials reporting directly to the Secretary and
responsible for directing operations of DHS entities. The components within DHS would be responsible
for preparing and generating personnel, assets and capabilities for DHS, but the operation of those
resources would be directed by the Secretary through the regional senior officials. The regional senior
officials would be politically appointed with Senate confirmation. This construct would also be similar to
the current structure within the Department of Justice, with strong central authority in the Attorney
General and regional senior officials in the U.S. Attorneys for each District.

THE DHS EMERGENCY AUTHORITY MODEL: LIMITED POWERS DURING CRISIS

Provide a strong set of emergency authorities for the Secretary and DHS in a crisis or major
domestic incident, but limit the authorities to the duration of the crisis. This model would rely on the
current, existing DHS organizational construct during steady state. In a temporary crisis or domestic emergency, including significant threats, the President could issue a finding and direct the implementation of the Secretary’s strong emergency powers within DHS for a limited duration, such as the time necessary to manage the crisis or incident. The emergency powers would enable the Secretary to temporarily direct the reorganization and coordinated operation of DHS components, either directly or through senior officials, to more effectively carry out the missions and functions of DHS. The temporal limit of these emergency powers could be specified in law, such as 90 days, after which specific Congressional authorization would be required to continue the emergency authorities. These would not disturb or affect the authorities of the Attorney General or other Departments.

THE DUAL DEPUTY SECRETARY MODEL: ORGANIZING FOR EFFECTIVE LEADERSHIP

The third model could be integrated with either of the two previous models. It would seek to make DHS’ functions and fundamental purposes more clearly visible and aligned with its organization. The department would gain a second deputy secretary. One Deputy Secretary would oversee all the entities concerned with mobile security: borders, coasts, travel, shipping, transportation, immigration and migration. The second Deputy Secretary would oversee DHS’ other major functions: pandemic and special weapons matters; cybersecurity and infrastructure protection; and emergency preparedness and response. Cybersecurity and infrastructure protection would also benefit from more attention to risk assessment and intrinsic security that would mitigate risks over the long term, rather than exclusive emphasis on incident response. Cross-departmental functions would report to the Secretary.

These models are worth considering to ensure the Secretary and Department of Homeland Security are able to execute the homeland security missions and functions under clear legal authority to address the full range of risks today.

Public-Private Partnerships: Demand for a New Model

Given that most of U.S. critical infrastructure is owned or operated by the private sector, there must be a stronger legal and policy framework to enable coordination and cooperation between the Federal government and private sector during a crisis or domestic incident.

The current landscape provides a combination of prescriptive and incentive-based frameworks to ensure information sharing between the private sector and government. For example, the Cybersecurity and Information Sharing Act of 2015 provided indemnity incentives for private companies to share information regarding cyber incidents with DHS.

Although this is a positive step forward, it is not enough.
A SPECIAL PRIVATE-PUBLIC MODEL DURING CRISIS

The government should establish a temporary framework that applies during domestic emergencies for limited indemnity of private industry to facilitate information sharing and operational activities to protect the public.

For example, in the event of a domestic incident that presents a clear threat to the security of U.S. critical infrastructure, DHS should have the power to temporarily deputize certain senior private company officers within critical infrastructure sectors with government authority (and limited qualified immunity or privilege) to share information or take specific, limited operational actions to achieve a broader government homeland security objective. This emergency power would enable those private officers to share defined categories of information in a way that enables the government to take appropriate action to safeguard U.S. critical infrastructure while limiting liability of private action. This deputization regime could also permit private actors to take limited operational actions on behalf of the government. For example, in response to a major cyberattack that disrupts regional or nationwide internet or telecommunication services, the Secretary of DHS could temporarily deputize the Chief Information Security Officers of impacted Internet Service Providers, enabling them to voluntarily share sensitive business or proprietary information with qualified immunity from civil liability. Although there are established statutory and policy provisions for Federal deputization of state and local government officials, deputization of private individuals is more limited. This structure would require specific grants of limited authority for temporary periods, including qualified immunity from civil torts for acts taken within the scope of the deputization.

Further, this authority could enable DHS to have specific, directive authority for crisis situations where speed and agility are essential to achieve government objectives while preserving civil liberties.

Conclusion

The Federal government today is better positioned than before to address the range of threats to homeland security. However, the U.S. must take steps to ensure its domestic security, including resilience of our critical infrastructure, during steady state and time of crisis, with appropriate Congressional oversight to maintain the appropriate balance of constitutional power. The models and structures proposed here are intended to increase the effectiveness of the Federal government for homeland security. We must at the same time understand the implications of a more effective Federal government on civil liberties and reinforce the critical role that Congress and the Judiciary have to ensure those interests are preserved.
The “homeland” means the territorial U.S. See Homeland Security Act of 2002, 6 U.S.C. 101. However, homeland security activities are conducted both domestically and internationally to protect U.S. persons and U.S. interests.

The mission of the Department of Homeland Security (DHS) is codified in the Homeland Security Act of 2002: “The primary mission of the Department is to—(A) prevent terrorist attacks within the United States; (B) reduce the vulnerability of the United States to terrorism; (C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States; (D) carry out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and manmade crises and emergency planning; (E) ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress; (F) ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland; and (G) monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and otherwise contribute to efforts to interdict illegal drug trafficking.” See 6 U.S.C. 111. The current statutory mission is as notable for how it restricts as much as empowers the Secretary (subparagraphs (E) and (F)). This reflects an understandable view at the time of enactment that although the 22 components of the new DHS brought their own original authorities and diverse missions, homeland security was about countering terrorism and other activities and operations of the Department were not given the same priority.


Addressing transnational migration as a safety and security issue stresses international and domestic law and policy and U.S. capabilities.


For example, rapid changes in seasonal Arctic sea ice coverage mean increased access to navigable waters and a dramatic rise in ship traffic and other human activity in the Arctic. States are increasing their presence and activity in the Arctic, which is rich in natural resources.

See Critical Infrastructure Protection Act, 42 U.S.C. 5195c. “Critical infrastructure” is defined as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”


For example, the U.S. Customs Service and part of the U.S. Immigration and Naturalization Service (INS) responsible for immigration law enforcement became Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE). The remaining part of INS responsible for immigration and citizenship matters became U.S. Citizenship Immigration Services (USCIS).

This structure contributes to a decentralized DHS that lacks a strong identity, ethos and mission. Perhaps this is only reflection of that DHS is still a young organization (2003) compared to other older institutions (Department of Justice, Department of Treasury, Department of Defense) that took time to mature. However, we should not underestimate the importance of organizational identity for DHS. Poor ethos and morale directly impact readiness and operational effectiveness, and DHS has consistently scored low on annual Federal employee surveys. Secretary Johnson has recognized this and made a concerted effort to improve the focus, leadership and morale of DHS.
employees to improve operational effectiveness. In May 2016, the Secretary announced a new DHS mission statement that was a striking change from prior lengthy attempts: “With honor and integrity, we will safeguard the American people, our homeland, and our values.” Also, DHS employee morale is beginning to improve from prior reports. See “Homeland Security finally shows employee morale improvement, though still rates low.” Washington Post, Sep. 20, 2016.


xiii. The Secretary has very limited command and control authority (such as the Secretary of Defense does) to direct coordinated operational activities of DHS components. The Secretary must instead rely primarily on the authority of the individual component heads. There have been attempts to unify the effort of components. Homeland Security Task Force Southeast, established by the Secretary in 2003, created a task force structure and framework for planning and coordination of a unified response to a mass migration from a Caribbean nation. In 2014, the Secretary established three homeland security task forces (Joint Task Force East, Joint Task Force West, Joint Task Force Investigations) to improve unified effort to protect the U.S. southern land and maritime border. These efforts improved coordination among some DHS components, but did not enable the Secretary to centrally direct operations of DHS forces. For example, coordinated operation of ships, boats, aircraft and personnel from agencies such as Customs and Border Protection, the Coast Guard and Immigration and Customs Enforcement still relies on coordinated decision making by each involved component head.

xiv. The National Defense Authorization Act of 2017, which became law on December 25, 2016, included provisions that authorize the Secretary of Homeland Security to establish DHS Joint Task Forces to secure the land and maritime borders of the U.S., respond to homeland security crises, and establish regionally based operations. This is a significant expansion of the Secretary’s existing authority, but includes significant restrictions. See S.2943 (114th Cong.)

xv. See, e.g., 28 C.F.R. 0.112 – Special deputation; permitting the Director, U.S. Marshals Service to deputize selected employees of private security companies for providing courtroom security for the Federal judiciary.
ECONOMICS AND NATIONAL SECURITY:

SIX QUESTIONS FOR THE NEW ADMINISTRATION

SETH HURWITZ*

Introduction

We take it as a given that U.S. economic strength and growth are sine qua nons of U.S. national security and the projection of U.S. power and values. This is true in both absolute and relative terms. Without a strong economy, the U.S. will be less equipped to protect itself from threats, let alone muster the popular support needed for a foreign policy that actively promotes U.S. interests globally. Weak economic growth in relative terms, meanwhile, will reduce America’s ability to persuade other nations to form common cause with it—or take more forceful action when necessary. As the 2015 National Security Strategy report states, American leadership depends upon a “strong, innovative, and growing U.S. economy in an open international economic system that promotes opportunity and prosperity.”

While some have argued that U.S. foreign policy has in recent decades broken from tradition by failing to accord enough weight to economic interests, the recognition that such interests are an integral component of national security is uncontroversial. Thus, 50 U.S.C. 404, which mandates an Annual National Security Strategy Report, provides that each such report “shall include a comprehensive description and discussion of . . . the proposed short-term and long-term uses of the political, economic, military, and other elements of the national power of the United States to protect or promote the interests and achieve” the “worldwide interests, goals and objectives of the United States that are vital to the national security of the United States” (emphasis added).

Various executive orders indicate the same understanding. For example, Executive Order 13636 defines critical infrastructure as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.” Likewise, Executive Order 13694 states that when the President declares a national emergency under the International Emergency Economic Powers Act, the Secretary of the Treasury shall block the property of responsible persons whose cyber-enabled activities “are reasonably likely to result in, or have

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* Seth Hurwitz is the Founder and CEO of Global Investment Strategy and Solutions LLC. He served as Counsel to the President’s Intelligence Oversight Board under President George H.W. Bush
materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability of the United States and that have the purpose or effect of” doing “significant” cyber damage to critical infrastructure.iii

With this understanding, we turn to whether the USG is adequately organized to meet economic challenges to American national security interests. Our focus is on several particularly important challenges, which are discussed in more detail below:iv

• A rapidly evolving global economy characterized by highly connected markets, global supply chains, enormous capital flows, widely disparate tax treatment of corporations, and climate-related issues
• Cyber threats to U.S. firms and the U.S. economy more broadly
• Issues posed by state capitalism, reflected in the corporate, finance, investment, and cyber realms
• The evolution of existing and new multilateral financial institutions
• Laws and regulations that may need updating

As the “protect or promote” language in Title 50 of the U.S. Code above indicates, these challenges fall into two basic categories. Some threaten our ability to safeguard vital assets such as U.S. critical infrastructure (much of which is in private hands), technology, and access to critical resources. Others threaten our ability to utilize all of the elements of statecraft to influence nations, corporations, individuals, and non-state actors. The line between the two categories is not always sharp.

Below we provide a brief overview of these challenges and discuss some ways in which they might be addressed from a strategic and structural perspective, together with the associated potential advantages and disadvantages.

I. Strategic Perspective

Questions

1. Should an early national security directive or policy paper directly address the issue of economic challenges to U.S. national security?

Globalization, technological change, and geopolitical shifts have dramatically altered the international landscape, enlarging the threat landscape in significant ways. U.S. economic, financial and technological supremacy is being challenged. Vast amounts of capital flow across the world, as interconnected markets instantaneously discount evolving local conditions and changes in expectations, Cybersecurity has also had a multiplicative effect on the threat attack profile. Targets include government
secrets, critical infrastructure, intellectual property, and more. Cybersecurity now permits broadly applied actions on a “micro” scale against private sector actors, as opposed to just a “macro” scale against governments.

The increasing prominence of state capitalism poses another potential challenge to U.S. national security. State capitalism manifests itself in corporate, financial, investment, and digital form. As a group, countries with state-directed economies and higher levels of state participation in markets have become more important in international affairs and this trend appears likely to continue, at least in the short term. It is impacting the system of multilateral financial institutions, as well as many other areas.

The U.S. presently lacks a doctrinal basis for thinking about economic challenges to national security. While economic statecraft, or geoeconomics, is not a new concept—a major economic statecraft initiative was undertaken several years ago at the State Department—and highly targeted financial sanctions (an element of so-called financial statecraft) have become an important piece in the American diplomatic tool kit since the 9/11 attacks, an integrated approach has not been applied across the government as a whole. Such an approach needs to take into account the fact that the more effective economic statecraft is, the more likely other countries and global actors are to institute countermeasures, use similar tools against the United States, and develop new ways to threaten U.S. interests. It is unclear whether the appropriate institutions and structures are in place to address all of these challenges effectively.

Advantages:

• Examining U.S. vulnerability to economic statecraft and other economic threats is a proactive measure which can lead to a focused and integrated plan to anticipate, meet, and mitigate these challenges
• Thinking holistically about these threats will help policymakers better understand their different aspects (offensive, defensive, etc.), increasing the chance that US policy is well thought out and effective
• A directive or policy paper on the economic challenges to U.S. national security would fit neatly within NSC’s traditional role of helping the President develop strategy, set policy priorities, and define the limits that should guide execution

Disadvantages:

• The process may get bogged down in doctrine or magnify a problem that is being addressed elsewhere
• It will (or should) take an extensive review period before a national security directive or policy paper can be completed
• Many of these issues are likely to be resolved only through international practice and consensus

2. Should the U.S. Undertake a Comprehensive Review of its Policy Toward International Economic Institutions? viii

The basic rules under which the international economic system operates reflect the Bretton Woods system set up at the end of World War II. Bretton Woods had several components: the International Monetary Fund, which instituted a system of fixed exchange rates tied to the dollar (and ultimately to gold); the World Bank (originally the International Bank for Reconstruction and Development), which has focused on developmental lending and aid to poorer countries; and the General Agreement on Trade and Tariffs (now the WTO), which has provided the forum for eight successive rounds of multilateral negotiations that have resulted in a substantial reduction in global trade barriers. While these institutions have evolved, they still define the international economic regime. In particular, the fixed exchange rate system broke down in 1971 as a result of the United States no longer holding enough gold to back foreign-owned dollars. This eventually ushered in an era of floating rates (for the most part) and led the IMF to shift its focus to assisting members on macroeconomic matters.

America’s ability to exercise leverage internationally is magnified by Bretton Woods’ rules-based international economic order and the governance structure of its institutions. However, as a result of the ongoing shift in the geopolitical environment, certain less developed countries have made clear their desire to play a more active role in setting the rules of global economic interaction. Without some accommodation of the enhanced importance of such nations, particularly China, the Bretton Woods institutions risk becoming anachronistic or superfluous.

The expansion of the G-7 system to the G-8 in 1997 (when Russia got a seat at the table) and more importantly to the G-20 in 2008, represents a positive adaptation to new global realities. However, the Bretton Woods institutions have been slower to adapt. It is important to note here that the term “adapt” is not intended to signify a retreat from U.S. leadership but rather the flexibility to take a tactical approach that will arguably result in maximizing American influence over the longer term.

The U.S. has indicated an openness to institutional change. For example, the 2015 National Security Strategy states: “We remain committed to governance reforms for [the institutions of the international financial and economic system], including the World Bank and the International Monetary
Fund, to make them more effective and representative.” However, the process has been slow—it took five years (until end of 2015) before IMF quota revision approval made it through the U.S. Congress.\textsuperscript{iix}

Recent developments raise the question of whether U.S. efforts have been “too little, too late”. Other nations, with China in the lead, have been creating new institutions that have the potential to undercut the Bretton Woods system. For example, in July 2014 the so-called “BRICS”—Brazil, Russia, India, China, and South Africa—announced the creation of the BRICS New Development Bank (NDB) to fund infrastructure and development programs. Simultaneously, the BRICS announced the signing of a treaty to establish a BRICS Contingent Reserve Arrangement, which would exercise IMF-like functions. The CRA entered into force in July 2015, with capital of $100 billion.

In October 2014 the Asian Infrastructure Investment Bank (AIIB) was launched. Fifty seven prospective members (not all of which had ratified) were signatories by the end of 2015, when the AIIB’s Articles of Agreement entered into force. China, which first proposed the AIIB, will have the largest voting share, potentially around 36%. Most observers believe the U.S. was slow to respond to this initiative, was caught off-guard when many of its close allies signed on, and is still searching for how best to respond.

Both the NDB and AIIB state that their purpose is complementary to that of existing multinational development banks. While they represent a challenge to U.S. leadership on the international stage, the argument that previously existing institutions do not meet all of the tremendous infrastructure, development, and other needs of Asia and other regions has some force. From a U.S. perspective, major questions include the transparency and governance of these new institutions, and how they might work with, as opposed to at cross-purposes to, existing institutions.

Both the NDB and the AIIB are obviously still works in progress. The NDB has modest capitalization of $50 billion of initial subscribed capital and initial authorized capital of $100 billion. The AIIB also has $100 billion in authorized capital.

Another major recent Chinese-led initiative is the Eurasia-focused One Belt, One Road Initiative. Its key components are the land-based Silk Road Economic Belt and the sea-based Maritime Silk Road. The former is aimed at regional infrastructure development and has already been funded to the tune of $40 billion via the Silk Road Fund, a special reserve established by the Chinese government.

How all these institutions will operate in practice and how they will interact with other multilateral bodies remains to be seen. Individually and collectively, however, they represent a potential challenge to the existing multilateral system that the U.S. has led for seven decades. The U.S. needs to act
sooner rather than later in order to maximize its influence over the institutions and rules that govern the international economic order. This includes considering how to reform older institutions and whether to join or otherwise work with new institutions.

Advantages:

- Participating in one or more of these new institutions is the best way to exercise some influence with respect to issues such as transparency and governance
- Working with these institutions is the best way to ensure that they work most effectively with existing institutions
- Taking no position or action is likely to be counterproductive, particularly since many long-time U.S. allies have not sat on the sidelines

Disadvantages:

- Participation in, or substantial interaction with, new institutions may undercut existing ones or the reform thereof. Focus should be on reforming existing institutions
- Possibility of overreacting to the creation of alternative structures whose purposes remain vague and which may take years to play out, and which may collapse under their own weight due to internal contradictions
- Healthy competition and cooperation with the Asian Development Bank, World Bank, and other international institutions should be welcomed

3. Should the Administration Undertake a Comprehensive Review of Potential Legislative and Regulatory Fixes Related to Economic Challenges to U.S. National Security Interests?

It is essential for a law-based society to have up to date rules governing how to identify and meet the economic challenges posed by globalization, technological change, and geopolitical shifts. Government needs the appropriate authorities while at the same time the private sector must be supported and fundamental rights protected.

In certain cases, such as cybersecurity, it is obvious that the law has been unable to keep up with changes in technology. In others, such as investments, trade, and international institutions, it is less clear whether or how existing laws, executive orders, or regulations should be amended or new laws adopted. While some legislation such as the Cybersecurity Act of 2015 has been passed, a variety of other measures have also been proposed. Specific examples include:
• Proposed legislation that would require revelation of beneficial ownership of corporate entities formed or operating in the United States.
• Recommendations to amend the CFIUS. The Commission on the Theft of American Intellectual Property recommended in 2013, for example, that CFIUS add “an additional evaluative criterion to the review process that assesses the manner in which a foreign company obtains IP [to] help improve IP-protection environments”
• Proposals relating to the ability of private American companies to engage, directly or indirectly, in “hacking back” against malevolent cyber actors.

Advantages:
• A comprehensive review will give the Administration a better shared understanding of legislative gaps and initiatives
• This approach allows for more better prioritization
• A review will help make the case for Congressional support where it is presently lacking
• A review will ultimately foster better executive-legislative coordination on national security issues

Disadvantages:
• A comprehensive review is too ambitious and will distract policymakers in an environment where certain high priority issues are already known and need to be addressed immediately
• A review is intellectually divorced from the practicalities of which pieces of legislation are likely to receive enough Congressional support to pass
• A review is more appropriately initiated by Congress

II. Structural Perspective Questions

1. Should a directorate focused on economic statecraft be added to the NSC, possibly as a replacement to the longstanding International Economics Directorate?

The National Security Act of 1947 created the National Security Council “to advise the President with respect to the integration of domestic, foreign, and military policies related to the national security so as to enable the military services and the other departments and agencies to cooperate more effectively in matters involving the national security” and to perform “other functions the President may direct for the purpose of more effectively coordinating the policies and functions of the departments and agencies of the government relating to the national security.” The lack of a specific reference to “economic” policies—there were only five references to “economic” or “economy” in the original legislation, primarily relating
to conditions of mobilization or war—reflects the traditional political/military focus of the NSC. However, in practice economic statecraft was a key element of postwar U.S. diplomacy.

From the NSC’s inception, staff handled international economic issues and were supported by the President’s Council of Economic Advisors. Over time, however, presidents experimented with other means of addressing international economic issues within the EOP. President Nixon, for example, created an interdepartmental Council on International Economic Policy while President Ford later established an Economic Policy Board. The most important and sustained effort in this regard was President Bill Clinton’s establishment of a National Economic Council in January 1993, with the additional twist that some staffers were dual-hatted to both the NEC and the NSC. This structure remains in place, with a Deputy Assistant to the President for International Economics/Deputy National Security Advisor reporting to both the National Security Adviser (Assistant to the President for National Security) and the NEC Director (Assistant to the President for Economic Policy).

The centrality of economic issues to U.S. national security is reflected in President Obama’s first Presidential Policy Directive, which directs the NSC to “advise and assist me in integrating all aspects of national security policy as it affects the United States – domestic, foreign, intelligence, and economic (in conjunction with the National Economic Council).” Operating under its original Executive Order (with amendments not relevant to this point), the National Economic Council remains responsible, among other things, for “coordinat[ing] the economic policy-making process with respect to . . . international economic issues.” This language suggests that “economic statecraft” (as opposed to economic policy more broadly) is not a focus of either the NSC or the NEC. Steil and Litan have usefully distinguished between “foreign economic policy” (i.e., international economic policy), which “encompasses means which may or may not be economic in the service of economic ends” and economic statecraft, which “applies economic means to ends which may or may not be economic.” The latter is of greatest relevance in the national security context.

Since 1947 the first national security directive of each new President, issued under a new title (e.g., the National Security Decision Directives of President Reagan or the Presidential Policy Directives of President Obama), has outlined the NSC structure. An economic statecraft or geoeconomics directorate would provide a forum to examine economic challenges to national security systematically and to coordinate Administration policy in this area.

Advantages:

- The International Economics Directorate has traditionally focused on foreign economic policy rather than economic statecraft, which is more closely related to national security.
• A new directorate would be better positioned to address current and emerging challenges related to economic warfare, cybersecurity, state capitalism, etc.
• A new directorate would cut across departments and agencies more broadly, benefiting in turn from staffing from a broad range of agencies

**Disadvantages:**

• International economic issues still need to be addressed and should remain a key focus of the NSC
• The focus at this stage should be on reducing the overall size of the NSC not (potentially) expanding parts of it
• Cyber issues already are addressed fully by a number of NSC (and other) staff members

2. **Should there be greater inclusion in the NSC process of senior officials responsible for overseeing financial markets?**

Pursuant to the National Security Act of 1947, as amended, the President, Vice President, Secretary of State, Secretary of Defense, and Secretary of Energy are members of the NSC while the Chairman of the Joint Chiefs of Staff and the Director of National Intelligence are statutory advisors. However, most if not all Presidents have also designated certain other senior officials as Council members. The aforementioned PPD-1 designates the Secretary of the Treasury as one of these officials, continuing a practice that has been used by some but not all Presidents since Harry Truman.

There is an increasing economic component to the national security challenges we face given globalization and the strategic use of economic instruments by other nations. The U.S. likewise needs to consider how best to utilize its economic strengths in pursuit of national security objectives. In addition, the financial system is part of U.S. critical infrastructure, and indeed should be considered critical infrastructure of the global financial system as well.

From a structural perspective, proactively considering issues of economic leverage, coercion, and warfare can best be accomplished through measures such as enhancing the role of the Secretary of the Treasury and incorporating the expertise of one or more market regulators. With respect to the former, in addition to continuing the practice of inclusion on the NSC by designation, the President should consider formal inclusion (by Executive Order) of the Secretary of the Treasury on the Principals Committee. As for market regulators, the President should include financial regulators on the NSC or, at the very least, ensure their frequent and proactive input into the NSC process.
Advantages:

- Way of making sure that key economic issues affecting national security get in front of the NSC and are given full attention
- In the case of the Secretary of the Treasury, this step would be consistent with (albeit an extension of) existing practice in an area where there has been no real disagreement among Presidents of different parties
- Reflects the importance of financial stability and the financial infrastructure to US economic health and national security

Disadvantages:

- Might exacerbate perception of some that the NSC is too large and has taken on too much of a policymaking role
- Spreads the NSC too thin, blurring the line between domestic economic policy and national security policy
- Mandatory inclusion of the Secretary of the Treasury could unnecessarily lengthen NSC meetings and waste Treasury resources
- Could raise the perception that the independent agencies are too involved in the NSC process

3. **Should any major structural changes be made to U.S. departments or agencies to address economic challenges to U.S. national security interests?**

Some observers believe existing departments do not adequately meet economic challenges to U.S. national security interests. Structural changes in government are infrequent although as part of its economic statecraft initiative the State Department did create a new Undersecretary for Economic Growth, Energy, and the Environment, a new Bureau of Energy Resources, and its first-ever Office of the Chief Economist. Some have suggested similar changes in other parts of the government aimed at better meeting strategic economic challenges such as an Office of Policy Planning at Treasury focused on the broad use of sanctions and other tools of economic statecraft (as opposed to implementation of sanctions in particular cases).

Advantages:

- Aligning departmental structures to meet current national security challenges is the logical way to identify, analyze, and meet such challenges
- This approach ideally would result in the creation of a richer set of strategic options that could be utilized at the appropriate time
• Acting at the outset of an Administration creates the greatest likelihood of success

Disadvantages:

• As shown (on a much larger scale) by DHS, structural changes can end up costing an enormous amount of time and distract from, rather than further, the main goal
• Structural changes can also mean more bureaucratization and can blur lines of authority
• Reorganization should not be the first priority of an Administration (particularly if there is a change from one party to the next) given the need both to get up to speed and to address a range of more immediate issues

“Improving Critical Infrastructure Cybersecurity” (Executive Order 13636) (February 12, 2013)

“Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities” (April 1, 2015)

Our discussion here is confined to organizational challenges most directly related to economics and national security. From a broader perspective, almost anything that significantly affects the U.S economy can be viewed as a national security issue. One example is the state of the global economy—something over which the U.S. has limited influence. Another, which is purely a domestic political issue, is the continued lack of a comprehensive budget deal.

Economic statecraft is the use of economic means in support of foreign policy goals.

Blackwill and Harris prefer the term “geoeconomics,” arguing that it captures a means of analysis in addition to the traditional purposive nature covered by the definition of economic statecraft. Robert D. Blackwill and Jennifer M. Harris (War by Other Means: Geoeconomics and Statecraft (Harvard, 2016)). We use the more common term “economic statecraft” in this report.

Financial statecraft is a key component of economic statecraft. Stein and Litan have defined it as “those aspects of economic statecraft that are directed at influencing capital flows” (p. 4). BENN STEIN & ROBERT E. LITAN, FINANCIAL STATECRAFT, THE ROLE OF FINANCIAL MARKETS IN AMERICAN FOREIGN POLICY 4 (Council on Foreign Relations & The Brookings Inst., Yale University Press 2006). Post-9/11 U.S. financial statecraft has included legislation (e.g., Know Your Customer) and tools related to the global financial system. Prominent examples include sanctions against North Korea, Russia, and Iran. For a comprehensive account, see Juan C. Zarate, Treasury’s War: The Unleashing of a New Era of Financial Warfare (PublicAffairs, 2013).

We focus on lending and financial institutions here but obviously the new Administration will need to make important decisions on outstanding trade negotiations since their outcome will have national security implications.

This is an observation, not an effort to ascribe blame to any parties

This paper was drafted prior to the November 2016 presidential election and therefore does not take into account recently announced plans of the incoming Administration such as the creation of a National Trade Council (NTC). The questions below will need to be considered in light of the planned division of responsibilities among the NSC, NEC, NTC, and Homeland Security Council.


Presidential Policy Directive-1 (February 13, 2009)

Stein and Litan, Financial Statecraft, p. 2.
