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 next 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.

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.

(1) 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.

(2) 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.

(3) 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.

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