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.

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

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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 175\(^iv\) and the Case-Zablocki Act,\(^v\) 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.\(^vi\)

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).\(^vii\) Interagency Policy Committees are sub-cabinet level committees that facilitate the interagency management of complex policy issues.\(^viii\) 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.\(^ix\)
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.\(^x\) 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.\(^{xi}\) The Council includes, by statute, the President (who chairs the Council); the Vice President; and the Secretaries of State, Energy, and Defense.\(^{xii}\) 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.\(^{xiii}\) It is the President, however, that may choose to make the final decision as to nonproliferation and national security policies.\(^{xiv}\)

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 make its mission more difficult to accomplish. Thus, when negotiating the Voluntary Offer Agreement, 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.\textsuperscript{xx} The former maintains the nuclear weapons stockpile, while the latter seeks to eliminate them.\textsuperscript{xxi} 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 next 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.

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


Id. at 17.


Please also note that for additional information on the NSC, refer to the ABA Paper prepared by Judge Jamie Baker, submitted concurrently with this paper.


See Agreement Between The United States of America and The International Atomic Energy Agency for the Application of Safeguards in the United States, U.S.-IAEA, Nov. 8, 1977 [hereinafter Voluntary Offer Agreement].


Whittaker et al., supra note 26 at 50.