Legal Affairs Roundtable Series on National Security Transformation
Project on National Security Reform
Guiding Coalition

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About the Project on National Security Reform

The transpartisan Project on National Security Reform (PNSR) was established to assist the nation in an urgently needed transformation of the national security system. PNSR has differentiated itself in many ways, especially by its vision for a future national security system, from numerous prior efforts that sought to rethink national security for the 21st century. PNSR envisions a collaborative, agile, and innovative system that integrates all elements of national power – both vertically and horizontally – and successfully addresses security challenges based on timely, informed decisions and decisive action.

PNSR has developed a network that touches the broad spectrum of public and private-sector partners and participants that are critical to traditional and nontraditional security threats and opportunities. Whereas the first phase of PNSR’s work focused on identifying problems and developing recommendations, it subsequently has focused on development of tools for actual implementation and applying its holistic principles for long-term reform to many of today’s challenges. This unique focus has provided a deeper understanding of the challenges.

The project is led by James R. Locher III, a principal architect of the Goldwater-Nichols Act that modernized the joint military system. PNSR’s Guiding Coalition, comprised of distinguished Americans with extensive service in the public and private sectors, sets strategic direction for the project. PNSR works closely with other nonprofit organizations, universities, industry, and private foundations.
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The Legal Affairs Roundtable Series on National Security Transformation report is based on discussions that occurred during three roundtables and a concluding conference. This report however, does not infer concurrence or agreement on the conclusions by participants or the endorsement by any individuals or any institutions listed. The report acknowledges that participants had a rich discussion hallmarked by diverse ideas and healthy disagreements. Any recommendations are those of the Project on National Security Reform. The goal of the roundtables was to stimulate discussion and explore avenues of potential reform.

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The Roundtable Series

The Legal Affairs Roundtable Series on National Security Transformation is designed to gather input from leading national security attorneys, practitioners, and subject matter experts regarding legal impediments to, and remedies for, the optimal performance of the U.S. national security system, as well as other legal implications of national security reform. The Roundtable Series consists of three roundtables and a concluding conference.

Roundtable 1: Role of the National Security Council

The National Security Council was established in the National Security Act of 1947 to advise the president on the integration of national security policies. What began as a limited advisory council, however, has expanded into a vast interagency system supported by a staff with limited authority and resources. According to some experts, the modern international security environment has increasingly strained the NSC system to a point where changes in legal authorities are desirable to improve the management and integration of national security missions. The purpose of the Legal Affairs Roundtable on the Role of the National Security Council, held on December 8, 2010, at the Washington office of Arnold & Porter LLP, was to identify and discuss the legal issues associated with proposed changes to the NSC system.

Roundtable 2: Unity of Effort in National Security Operations Abroad

In recent decades, the United States has increasingly confronted national security problems that require the simultaneous application and integration of military and civilian capabilities. According to some experts, the effectiveness and efficiency of these operations are significantly frustrated by dual chains of command for military and civilian capabilities, evidenced by recent experiences in Afghanistan and Iraq. The purpose of the Legal Affairs Roundtable on Unity of Effort in National Security Operations Abroad, held on February 23, 2011, was to examine the practical, political, and legal aspects of alternative means to promote unity of effort in U.S. national security operations abroad.

Roundtable 3: Current State of Intelligence Reform

In the aftermath of the September 11 attacks, the Intelligence Reform and Terrorism Prevention Act of 2004 was enacted, resulting in arguably the most sweeping structural changes to U.S. intelligence since the establishment of the Central Intelligence Agency in the National Security Act of 1947. The recent legislation created, among other things, the Office of the Director of National Intelligence and the National Counterterrorism Center.
In the seven years since it was enacted, experts and practitioners have identified a number of challenges associated with the legislation. The purpose of the Legal Affairs Roundtable on the Current State of Intelligence Reform, held on May 6, 2011, was to identify these challenges and to discuss the relevant legal issues.

Conference on the Legal Issues of National Security Transformation

The Legal Affairs Roundtable Series on National Security Transformation concluded with a Conference on the Legal Issues of National Security Transformation, held November 14, 2011. The concluding conference brought together participants of the previous three roundtables, as well as a broader audience, to discuss the overall findings of the roundtables and to explore other legal issues associated with national security reform.

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List of Acronyms

CIA – Central Intelligence Agency
COM – Chief of Mission
DHS – Department of Homeland Security
DNI – Director of National Intelligence
DNS – Director of National Security
DoD – Department of Defense
DoS – Department of State
DSOP – Directorate for Strategic Operational Planning
EOP – Executive Office of the President
FBI – Federal Bureau of Investigation
GAO – Government Accountability Office
HSC – Homeland Security Council
IC – Intelligence Community
IG – Inspector General
JIATF-S – Joint Interagency Task Force South
ODNI – Office of the Director of National Intelligence
IRTPA – Intelligence Reform and Terrorism Prevention Act of 2004
NCTC – National Counterterrorism Center
NSA – National Security Agency
NSC – National Security Council
NSC/PC – National Security Council Principals Committee
NSC/DC – National Security Council Deputies Committee
NSC/IPC – National Security Council Interagency Policy Committees
NSS – National Security Staff
OMB – Office of Management and Budget
QDDR – Quadrennial Diplomacy and Development Review
S/CRS – State Department’s Office of the Coordinator for Reconstruction and Stabilization
SES – Senior Executive Service
USAID – United States Agency International
Executive Summary and Results of Concluding Conference
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Introduction

The national security system is arguably the most important part of the U.S. government as it is the key to keeping Americans and the United States secure. Its legal foundation derives from 1947 when the system was designed for the Cold War environment. Since September 11, 2001, the United States has made some changes to components of its national security system, including the creation of the Department of Homeland Security and the implementation of the Intelligence Reform and Terrorism Prevention Act of 2004, which resulted in structural changes for the intelligence community.

Yet, many observers suggest the national security system has not kept up with the times, as the world and national security problems have become increasingly complex, requiring new levels of strategic guidance and multi-agency considerations and activities. This raises questions about what can and should be done. Can the currently authorized NSC system, including presidential authority, handle the modern security environment or are new legal authorities to manage and integrate national security missions required? What changes are needed to promote unity of effort in U.S. national security operations abroad? What challenges continue to persist within the revised intelligence community system and how best should senior leaders address them? Are current authorities adequate for the 21st century?

Legal Issues of National Security Transformation represents the culmination of a year of work by more than eighty dedicated U.S. national security attorneys, practitioners, and subject matter experts. During three roundtables, participants and observers debated the legal impediments to, and remedies for, the optimal performance of the U.S. national security system—specifically in the National Security Council (NSC), unity of effort proposals, and the Intelligence Community (IC). Additionally, during a concluding conference, the participants discussed the legal challenges for making those reforms. This summary presents key findings and assessments from these sessions.

On the basis of these assessments, PNSR recommends steps the legal community could take to help achieve national security transformation. Consensus was not achieved with regards to all recommendations or areas for change, and this executive summary is not intended to provide definitive answers to this complex and controversial area of public policy. Rather, the report should help frame future debates and spur more people into action on this very important issue.
Major Assessments and Findings

The roundtable sessions focused on the National Security Council, unity of effort within national security operations abroad, the current state of intelligence reform, and legal challenges and opportunities for transformation. These sessions resulted in the following general assessments about the opportunities to transform the current national security system.

The Necessity of Reform

The U.S. national security system – though fueled by a dedicated, talented civilian workforce and premier military – is mostly ‘stovepiped’ and hierarchical, posing roadblocks to integrated consideration of national security policy and issues. The concept of national security has also expanded over the past decade to include not only diplomacy, wars and terrorism, but also economic instability and natural disasters. Broadly, the national security system lacks sufficient strategic direction, system-wide management, and the ability to anticipate. It is inefficient, with unnecessary duplication of effort and budgets narrowly designed to individual departmental needs rather than overall national goals and missions. Congress’ focus is similarly stovepiped and unable to promote and oversee efforts to achieve broad national goals. The current budget crisis and expected future austerity will only make these structural problems more apparent since fewer resources will be available to cover the inefficiencies of the current system.

Roundtable observers noted that although the aperture of national security has widened and interagency authorities have increased somewhat in recent years, adaptation has not kept pace with change in the security environment. Without more substantial reform – or even transformation – of the current system, the risk of the United States being unable to prevent a major catastrophe grows.

After the September 11th attacks, the management and integration of multi-agency missions became well recognized as a central organizational challenge. Although significant changes were made to the national security system, including the creation of the Department of Homeland Security, Office of the Director of National Intelligence, and National Counterterrorism Center, experts have consistently reported that these changes have not fully resolved this organizational challenge.

Today, the issue for policymakers appears not to be whether the management and integration of multi-agency missions should continue to be improved, but how this should be accomplished. No universal consensus exists. Some roundtable participants believed the modern security environment requires major changes in top-level management structures
of the executive branch, as well as the creation of decentralized integrating mechanisms to manage and integrate select multi-agency missions. This kind of transformation of the national security system would create a new structure. Other participants believe that improvements should be made by adapting the current organizational framework of the National Security Council (NSC) system. They are willing to adopt reforms but feel it is best to build on the smaller internal changes that arise organically within departments.

As the national leader and the only official presiding over the whole national security apparatus, the president has an especially important role in pursuing systemic transformation and in managing the system itself. Yet, presidents have so many duties it is hard for them to give sustained attention to reform, especially in the presence of widespread political partisanship. Consequently, others often have to champion change and pursue political consensus for it.

KEY REFORM OPPORTUNITIES

All four of the meetings resulted in insights and recommendations for future action.

First Roundtable: National Security Staff Challenges for Strategic Management

The National Security Staff (NSS) is the hub of the national security system. It has historically provided staff support and crisis management for the president. The NSS runs a network of interagency committees that produce policy options, although basically each cabinet department and agency represents itself in pursuit of its desired policy outcomes and other interests. Many observers note that the NSS lacks the capacity to provide adequate strategic management functions, including the ability to design and prescribe overall national strategy with specific planning and resource guidance, to employ mission-based budgeting, and to direct coherent management across the national security system.

Participants agreed that a strategic management function is needed to underpin, guide, and integrate the national security system for greater effectiveness and efficiency, but they did not reach consensus on how this should be done or whether increased authority is necessary.

Most roundtable participants recognized that the current NSC system struggles to be an effective management and integration arm of the president in a security environment characterized by increasing complexity, uncertainty, and speed. Some argued the NSS should strategically manage the system but lacked sufficient authority to do so. Some contended that the NSS’s small size limits its capacity to control or direct larger,
well-funded departments. Others argued the function of the NSS should be limited to convening interagency meetings and setting agendas. They suggested the problem is not sufficient authority, but rather the failures to use it effectively, delegate, and overcome institutional resistance.

**Role of the National Security Advisor:** One of the deeply debated issues at this roundtable was the appropriate role of the national security advisor. Currently, the demands on the national security advisor keep him from providing strategic direction to the national security system. Some have suggested that a new position – a director of national security – could be created to focus on system management, leaving issue management in the hands of decentralized interagency teams. The director of national security could be a Senate-confirmed position allowing for better reporting to Congress on national security matters. The new position could be modeled on the director of the office of management and budget, another Senate-confirmed official within the executive office of the president. However, many participants questioned the wisdom of requiring that a key advisor to the president be beholden to Congress and the raised a number of other possible legal challenges for the new position. Supporters of a Senate-confirmed director of national security noted that many other key advisors to the president, such as cabinet secretaries, director of national intelligence, chairman of the joint chiefs of staff, and the director of the office of management and budget, are Senate confirmed and testify before Congress.

**Legal Impediments:** Participants identified a number of legal impediments to current or potential functions performed by the NSC and its staff. For those who suggested improving the NSC system within its current organizational framework, legal impediments tended to be rooted in statutes and appropriations laws that they view as unduly restricting the flow of resources across departmental lines and hindering the creation of an interagency culture in the civilian workforce, as well as congressional rules that further inhibit the efficiency of the executive branch as well as the effectiveness of congressional oversight. These participants argued for relaxing rigid laws related to resource allocation, modifying personnel laws and civil service rules to promote a more effective interagency culture within the civilian workforce, and reforming committee jurisdictions in Congress in a more rational and coherent fashion. Others suggested creating a new framework that decentralized interagency work, so that presidential intervention was less necessary. The legal impediments to this course of action usually arose from concerns about what powers the president could delegate to his staff.
In recent decades, the United States has increasingly confronted national security problems that require the simultaneous application and integration of military and civilian capabilities. According to some experts, the effectiveness and efficiency of these operations are significantly frustrated by dual chains of command for military and civilian capabilities. In addition, the complexity and connectedness of today’s threats extend beyond the boundaries of individual nations and call for whole-of-government regional perspectives and competencies for which today’s system is neither empowered nor organized. The second roundtable examined the practical, political, and legal aspects of promoting unity of effort in U.S. national security operations abroad.

Mission Managers: The concept of mission managers was first proposed in an article by Dr. Christopher Lamb and Ambassador Ed Marks entitled, Chief of Mission Authority as a Model for National Security Integration (National Defense University, December 2010). The authors argue the inability of the president to delegate executive authority for integrating department and agency efforts is a major shortcoming. The paper proposes a congressionally sanctioned mechanism allowing the president to delegate his executive authority for the management of specific high-priority national security missions to a Senate-confirmed official. Mission managers, supported by small interagency teams, would have presumptive authority to direct the implementation of a clearly articulated strategy, resourced by departments and by direct congressional appropriations as needed. A cabinet official could appeal a mission manager’s decisions to the president if he or she felt other missions were being improperly subordinated or the department’s functional expertise and resources were being improperly degraded.

Roundtable participants generally agreed on the need for better interagency cooperation and for executive cross-agency authority to be developed. Existing solutions, such as czars or lead agencies, have proven inadequate.

Views differed about involving Congress in legislating mission managers and interagency teams. Some argued that the president already has sufficient authority and Congress should not be involved in executive branch organization as a matter of principle. Those favoring congressional involvement argued that the proposed reforms require legislation due to the Appointments Clause of the Constitution, which implies any individual in the interagency space who exercises meaningful authority to compel departments to act would have to be an “officer of the United States” and officers of the United States must have their positions established by statute. In the end, most
participants agreed that it would be wise to involve Congress in this restructuring regardless, since political backing is likely to be essential.

Regional Unity of Effort: Currently, the president has two lines of authority in foreign regions: civilian lines that run through cabinet secretaries and ambassadors and military lines that pass through a military chain of command. In Washington, regional boundaries vary widely by agency, making collaboration difficult and creating multiple seams. The Economy Act of 1933 imposes restrictions on applying personnel, services, and funds from one executive agency to support another. In regions, tensions occur when the lines of authority and missions overlap or are not well defined.

Most participants agreed in principle that there is a need for improved regional integration. They considered an integrated regional center as proposed by PNSR, but did not reach consensus.

Participants cited U.S. Southern Command, U.S. Africa Command, and NCTC’s Directorate of Strategic Operations (DSOP) as integrating entities but described limitations in each. These and other new entities would require better mechanisms and clearly articulated guidance from the president, along with his or her ongoing commitment and support. Legal issues pertaining to the integrated regional centers largely paralleled those discussed with regard to mission managers. Participants felt that pursuing genuine and sustainable integration at the regional level would require more than presidential initiative.

Interagency Teams in the Field: U.S. government personnel and actions abroad are normally organized under an ambassador’s chief of mission (COM) authority or the command authority of a combatant commander. Some roundtable participants argued that these authorities are insufficient to integrate actions among multiple civilian agencies or to unify military efforts with those of civilian agencies. They argued national security problems, such as crisis and post-conflict operations, are increasingly complex and multidimensional, necessitating more formal directive authority for interagency leadership. Others emphasized personal leadership and informal partnerships as the keys to successful collaboration. Teams deployed in Iraq and Afghanistan provide examples and lessons, highlighted by the success of interagency teams targeting Al Qaeda in Iraq. This success is documented in the National Defense University report, “Secret Weapon: High-value Target Teams as an Organizational Innovation,” by Dr. Christopher Lamb and Evan Munsing (2011).

Participants generally affirmed the need for interagency teams in the field, which requires decentralized arrangements that permit interagency authorities at the sub-regional level.
PNSR has proposed a hybrid organizational structure with increased use of empowered cross-functional teams with wide latitude for problem solving, and crisis task forces with integrated chains of command whose leaders would have directive authority. At this point, no one below the president has sufficient authority to oversee the complex interagency nature of the work of interagency teams. To have staying power, these organizational innovations would require legislative and cultural changes. Participants generally agreed that institutionalizing unity of effort at the sub-regional level would require legislation to change authorities, oversight, and funding.

Third Roundtable: Intelligence Budgeting and Oversight

In the aftermath of the September 11th attacks, Congress enacted the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, the most significant structural changes to the U.S. intelligence community since the establishment of the Central Intelligence Agency in the National Security Act of 1947. This legislation created, among other things, the Office of the Director of National Intelligence and the National Counterterrorism Center. Since its enactment, experts and practitioners have identified a number of challenges associated with the implementation of the legislation and current state of the Intelligence Community (IC). The required level of integration across the sixteen components of the Intelligence Community has not been achieved.

The third roundtable focused on the challenge of intelligence oversight, information management, and the future of intelligence reform. The threats being faced by the United States and the constant need for well-sourced and analyzed intelligence require IC members to attempt to develop the best practices possible.

Roundtable participants generally agreed that improvements could and should be made within the IC. Key areas for reform focused on the role of the DNI, integration within the IC, and new uses for technology.

Enabling the DNI: The director of national intelligence (DNI) has statutory power to control the budget for the intelligence community, but in reality has been stymied in those efforts. If the DNI were given the authority to manage mission requirements and priorities more directly, then he or she could create a national intelligence program budget better aligned with strategic requirements. This effort may require a larger staff for the Office of the DNI. Additionally, increasing the DNI's ability to shift resources among different agencies and activities based on mission prioritization would allow the DNI to direct the budget in ways similar to the secretary of defense's ability to manage the budget of each service.
The Oversight Process: Oversight is an important part of the intelligence process. When done correctly, it can stop problems before they occur. Both the Intelligence Community’s inspectors general and congressional committees have struggled with finding the proper balance between being knowledgeable and experienced about the community they oversee and being captured by bureaucratic interests. Correctly balancing the involvement of insiders and outsiders in oversight, possibly on a rotating basis, could help.

Information Sharing Policies: Because it goes against the secretive culture of the intelligence community, information sharing has been difficult especially with state and local officials. A more distributive model that increases incentives for information sharing would allow for more effective intelligence use. However, increased information sharing must be balanced by improved counter-intelligence efforts, such as permitting managers to see in real time what information people are accessing.

Although some roundtable participants believe that the president has the authority to resolve the major issues in the IC and related departments, others believe legislation is necessary. The most contentious legal issues are over the extent of the president’s power for restructuring the intelligence community across departments and to delegate authority to the DNI to freely move around missions, information, people and money. Ultimately, participants generally agree on the need to create consensus in both the executive and legislative branches on the direction and legal aspects of intelligence reform as a necessary first step.

Concluding Conference: Legal Impediments and Constitutional Challenges to Reform

The national security system is ultimately defined and governed by a hierarchy of legal instruments. The key element discussed in the concluding conference is whether the Constitution, existing laws, executive orders, and presidential directives provide an adequate baseline for whole-of-government approaches to managing national security.

Sufficiency of Legal Instruments: During the roundtables, some observers described the legal instruments, including existing laws and executive orders, as collectively insufficient for the organization and operation of the national security system. The laws generally protected the status quo where departments and agencies could defend their internal hierarchies and budgets, instead of pursuing a network of open, cross-boundary, collaborative teams led by empowered leaders. This old system does not function in the current environment because one department alone cannot perform national security missions.
Participants agreed that some new legal instruments are needed, but they did not reach consensus on what those instruments are or if a major legislation was required.

For many levels of reform, the current legal instruments are likely sufficient because the president has a great deal of flexibility in how he or she structures the national security system. However, for transformation of the national security structure, Congress would likely be required to act.

There are also several reasons why new legal instruments may be sought despite having informal means of achieving the same ends—including the permanency that comes with a statute. Many changes are made ad hoc or in response to a crisis, but they are never internalized or fully adopted by the different agencies involved, which means that the lessons from those experiences are often forgotten once the context shifts again. New legal instruments can help memorialize and retain those changes.

Constitutional Design: Article I of the Constitution provides the legislative branch the powers to declare war; to establish, maintain and regulate the military; and to fund national security activities throughout all departments and agencies. Congress also has the Constitution's general authority to make laws “necessary and proper” for carrying out all of the federal government’s powers. Article II of the Constitution empowers the president with executive powers for national security as commander-in-chief of the military, with the lead role in foreign policy and to administer the operational elements of the government. In addition to the words of the document, numerous court interpretations define their application.

Participants agreed that many kinds of reforms could be achieved without infringing on the constitutional-assigned powers of the different branches. However, the participants recognized that in areas of national security and foreign policy it is not always clear where the lines are to be drawn. The legal community has not come to consensus on these boundaries.

Ultimately, the Constitution provides the executive the initiative to act for the purpose of effectiveness in national security to avert threats when political consensus does not exist and urgency is required. In contrast, generally promoting the efficiency of the national security system is largely a congressional responsibility under the “power of the purse” or a shared responsibility with the executive in orchestrating conditions for improved bureaucratic performance. As a result, the president can make some small or short-term changes, but major transformation will need the support of both the executive and legislative branches.

One participant contended that the Constitution was designed so that each president has the capability to structure his national security team as he or she wishes.
Many of the solutions that have been recommended could be addressed through presidential leadership, instead of through a change in statute or regulation. Having the president express the reasons for his decisions and write down the authority he is delegating, even internally, may be a more effective way to determine whether the problems being faced relate to a lack of constitutional authority.

Framing the Issue: Participants at the concluding conference also debated whether it was better to focus on major transformation or specific issues that exemplify the need for reform. One possible area to focus on that was raised repeatedly is cyber security, which involves many of the issues of interagency cooperation, public-private collaboration, and immediacy. Currently, the Departments of State, Justice, Defense and Homeland Security all claim some responsibility for this issue, while agencies in the IC contend that they have the most capacity to address it.

However, others contended that if September 11th was not sufficient to inspire major national security transformation, then cyber attacks that happen daily could not inspire that change. Additionally, there are dozens of current issues that demonstrate the challenges of the current national security system—including space competition and nation reconstruction—which should not be ignored.

Participants agreed that using case studies like cyber security could be useful, but it should not distract people from the overall goal of national security transformation.
Recommendations for the Legal Community

Each roundtable resulted in recommendations for future transformation of the national security system. However, the premise behind the entire series was that lawyers have a particular role to play in any kind of reform, as they can both identify legal problems and help create solutions through new or re-purposed legal instruments. As a result, this section focuses on five important next steps the legal community, and specifically the American Bar Association as the voice of that community, can take to help shape and advance national security transformation. These recommendations are not meant to be exhaustive, but rather to highlight some major areas for action that the legal community is especially well positioned to take.

• Develop a definition for national security law and an agreed upon body of statutes and executive orders that make up this law.
• Draft and advance transformation proposals in various different forms.
• Outline the scope of executive authority and what changes require legislative action.
• Advocate publicly for national security transformation.
• Review how congressional organization affects attempts to create a whole-of-government approach to national security issues.

1. Develop a definition for national security law and an agreed upon body of statutes and executive orders that make up this law.

The study of national security law tends to focus on specific issues and authorities rather than systemic management and the realignment of organizational structures. It also often reflects the narrowness of old concepts of national security that are tied to military power, diplomacy, and intelligence, instead of including new threats to U.S. security that range from economic instability to changes in the world's population. Despite several useful textbooks on national security law, there is no agreed upon definition for national security and no restatement of the relevant statutes. PNSR recommends the legal community:

• Develop this definition as well as express which legal instruments and principles should be used in this area of the law.

2. Draft and advance transformation proposals in various different forms.
Given that changes have to be expressed in the legal language of legislation, executive orders or directives, the ability to put forth specific proposals in the correct form depends upon the active involvement of the legal community. Initiatives to better understand the legal dimensions and boundaries for transformation proposals could also help develop creative solutions to old problems.

Additionally, participants generally agreed that national security transformation is currently stymied politically, even though its issues are not partisan. This political deadlock reduces the motivation for Congress to examine the issues. The legal community may make a significant contribution to the nation by creating proposals that would be ready when a different political climate takes shape in Washington, D.C. PNSR recommends the legal community:

- Identify specific laws that have impeded the effective and efficient operation of the national security system.
- Draft legislation and executive orders that would carry out different policy proposals for improving the national security system.
- Assess what legal challenges will be posed to the drafted legal instruments and prepare rebuttal arguments.

3. Outline the scope of executive authority and what changes require legislative action.

Many proposed reforms to the national security system do not require legislation and can be acted upon by the president through directives or by departmental and agency leaders. The question of which reforms require statutes is in part a constitutional question related to the separation of powers between the legislative and executive branch, with which the federal courts have repeatedly struggled. Lawyers in the executive branch will probably come to conclusions on this topic outside of the public’s eye and with no way for people to challenge them. However, the legal academia can influence the opinions of lawyers in those positions through thoughtful scholarship. PNSR recommends the legal community:

- Continue to explain the relationship of executive power to Congress, especially when the president can act without Congress.
- Study and discuss the claim of the “unitary president” or the concept that the president holds total control over the executive branch, especially as it applies to the president’s ability to delegate authority for interagency work.
• Examine when a position requires confirmation and whether congressional confirmation makes a person less valuable as an advisor to the president.

4. Advocate publicly for national security transformation.

One challenge for transformation efforts has been generating public support. Many people have struggled to turn ideas about national security reform into national issues that the public discusses and debates. The legal community could help address this need by educating the public. PNSR recommends the legal community:

• Use law schools to continue the dialogue among the national security actors, policymakers, and the legal academe to help develop a well-formed picture of challenges to national security practice in the 21st century.
• Communicate a coherent picture of what is meant by national security to the general public, as well as outline the key policy debates surrounding reform.
• Publicly lobby for proposed changes to the national security system.

5. Review how congressional organization affects attempts to create a whole-of-government approach to national security issues.

In Congress, committees almost exclusively focus on individual departments and agencies rather than interagency or whole-of-government activities. Consequently, congressional authorization, appropriation, and oversight activities examine national security on a piecemeal basis, and no committee in Congress is responsible for the system-wide issues that are at the core of 21st century national security concerns. Worse, any effort at system-wide transformation has to run the gauntlet of multiple committees, giving special interests significant opportunities to defeat changes. Reorganizing how Congress budgets, authorizes, and oversees national security matters may not be possible at the current time. Although research and proposals could be developed along those lines, there are smaller reforms that may be possible now. PNSR recommends the legal community:

• Advocate for a select committee on national security, akin to the one for intelligence, to address whole-of-government concerns.
• Re-energize the congressional caucus on national security, so that they can begin to consider what congressional organizational changes would be necessary to address future national security issues.
Conclusions

This report on the Legal Issues of National Security Transformation illustrates the need to continue work on national security transformation, and for the legal community to take a more active role. Over the course of three roundtables and a concluding conference, the participants agreed that our national security system is not prepared to face the kinds of challenges that are likely to arise in the 21st century. Participants identified specific remedies such as the reduction of restrictions on the flow of resources across departmental lines, the promotion of a stronger interagency culture, improved congressional rules to further the efficacy of the executive branch and congressional oversight, and improved use of existing authority. The goal would be for the government to adopt a new organizational style, centered on task-oriented cross-functional teams connected in temporary, open networks to facilitate whole-of-government or whole-of-nation action. There is a great deal of debate over how to achieve this goal.

The legal community has a special role to play in trying to educate, structure, and advocate for national security transformation. Ultimately, any change to the national security system will depend on our understanding of the existing legal instruments and our ability to create effective new ones. The questions of whether legal tools are sufficient for national security reform or whether the Constitution acts as an impediment are legal ones that require the expertise of lawyers. The legal community may even be able to find short-term solutions – such as bridges between stovepipes – that will help people recognize the need and importance of transformation without harming U.S. security interests. While policymakers still need to determine what kind of national security system they want to have, lawyers can provide invaluable insight into what options are available and the challenges associated with each one. It is for this reason that PNSR hopes the American Bar Association, and other legal organizations, will expand their research and analysis of the issues surrounding national security transformation, and contribute their authoritative voice to the public debate on needed changes.
Roundtable 1: Role of the National Security Council

By Cody Brown
Participants

Chair
Juan Zarate, Senior Advisor, Center for Strategic and International Studies

Moderators
James Baker, Judge, U.S. Court of Appeals for the Armed Forces
Christopher J. Lamb, Distinguished Research Fellow, National Defense University, Institute for National Strategic Studies
Gordon Lederman, Counsel, Senate Committee on Homeland Security and Governmental Affairs
Juan Zarate, Senior Advisor, Center for Strategic and International Studies

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Michael Allen, Executive Director, Bipartisan Policy Center National Security Preparedness Group
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Harvey Rishikof, Chair, ABA Standing Committee on Law and National Security
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Michael Edney
Andrew S. Effron
Richard Falkenrath
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Roger George
Susan Ginsburg
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John Herbst
Philip Heymann
W. George Jameson
Sergio Jaramillo
Jack LeCuyer
Kirk McConnell
Sonya Michel
Brandon Milhorn
Judith A. Miller
Nick Palarino
Michael Smith
David Trulio
John Tsagronis
William Webster
Joe Whitley
The wider knowledge is spread of the nature of the Council and its place in the Government, the better job the Council will be able to do in the long run.

– Sidney W. Souers, 1948
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Executive Summary

After the September 11 attacks, the management and integration of multi-agency missions became nearly universally accepted as a central organizational challenge confronting the U.S. Government in light of the new primary national security mission of the United States, namely counterterrorism, an inherently interagency exercise. Although significant changes were made to the national security system post-September 11, including, among other things, the creation of the Department of Homeland Security, the Office of the Director of National Intelligence, and the National Counterterrorism Center, experts have consistently reported that these changes have not fully resolved this central organizational challenge.

Today, the issue for policymakers appears to have become not whether the management and integration of multi-agency missions should continue to be improved, but how it should be accomplished. On this question, no universal consensus exists. On the one hand, some participants believe the modern security environment requires, among other things, major changes in top-level management structures of the executive branch, as well as the creation of decentralized integrating mechanisms to manage and integrate select multi-agency missions. On the other hand, some participants believe that improvements should be made using the current organizational framework of the National Security Council (NSC) system.

Regardless of whether policymakers, practitioners, and experts conclude that the current NSC system should subsist or should be transformed, lawyers play an important role in the decision-making process by spotting relevant legal issues and providing sound legal counsel based on legal text and court precedence, if any. The Legal Affairs Roundtable on the Role of the National Security Council, held on December 8, 2010, at the Washington office of Arnold & Porter LLP, was designed to gather input from leading attorneys, practitioners, and subject matter experts to discuss the legal issues associated with proposed changes to the NSC system.
Covering the Discussion

During the roundtable discussion, participants expressed a range of views regarding the proper functions of the NSC and National Security Staff (Staff) in the modern international security environment. For example, some participants argued that the function of the Staff should be limited to convening interagency meetings and setting agendas. Other participants argued that, despite the best efforts of presidents and talented Staff, the current NSC system lacks sufficient legal authority to serve as an effective management and integration arm of the president in a security environment characterized by increasing complexity, uncertainty, and speed. Finally, participants argued that the staff has authority to assist the President if the President so directs or delegates integration authority based on longstanding constitutional practices. Yet, the use of this authority is rare either because Presidents do not delegate the authority or due to institutional resistance.

Although participants reached no consensus regarding what functions the NSC and Staff should be performing in the current security environment, participants identified a number of legal impediments to current or potential functions performed by the NSC and Staff. For participants who suggested improving the NSC system within its current organizational framework, legal impediments tended to be rooted in statutes and appropriations laws that, in their view, unduly restrict the flow of resources across departmental lines and hinder the creation of an interagency culture in the civilian workforce, as well as congressional rules that further inhibit the efficiency of the executive branch and the effectiveness of congressional oversight. These participants argued, in turn, for relaxing rigid laws related to resource allocation, modifying personnel laws and civil service rules to promote a more effective interagency culture within the civilian workforce, and reforming committee jurisdictions in Congress in a more rational and coherent fashion.

For participants who argued for broader changes to the NSC system, legal impediments tended to be rooted in the Appointments Clause of the U.S. Constitution and statutes that limit the role of the Staff in managing and integrating multi-agency missions. These participants argued, in turn, for the statutory creation of an empowered director of national security, as well as statutorily empowered interagency teams to manage and integrate select national security issues.

Perhaps no issues garnered as much agreement as those related to the limitations of legislation in shaping the NSC system, as well as the role of Congress in overseeing the system. For example, participants generally agreed that attempts to legislate reforms to the
NSC system require an executive-legislative branch partnership because while Congress has the power to legislate, the president has the power to implement legislation, as well as the authority to direct executive branch agencies and to determine how and when decisions will be made, and in accord with what process. Moreover, participants generally agreed that the internal structures and processes of Congress need to be reformed in order to improve not only the performance of the executive branch, but also the quality of congressional oversight on behalf of the American people.

PROPOSITIONS

1. Modern presidents, through the National Security Council system, are unable to consistently and effectively manage and integrate multi-agency missions in the modern international security environment.

   Argument: Under current law, the president is the only official in the U.S. government who has the legal authority to manage and integrate multi-agency missions, and the Staff has only limited authority to assist the president. This architecture, designed in 1947, is out-dated and was designed for a very different international security environment. During the Cold War, national security problems were relatively simple, allowing departments to approach problems largely on their own. But as problems have become more complex, they have increasingly migrated into the NSC system and have exceeded the capacities of the president and Staff. Despite the best efforts of presidents and talented Staff, modern presidents cannot be expected to effectively manage and integrate the multitude of multi-agency problems given the president's vast span-of-control, the equally vast responsibilities of the presidency, the increasing demands on the current NSC system, and the limited authority of the Staff to assist presidents.

   Counterargument: Although the current NSC system may not be perfect, it has served America well and has become a model for other nations, evidenced by two allies who recently adopted the NSC as a model for national decision-making in their home countries. Interagency efforts have worked exceptionally well when the president is engaged, the objective is clear, roles and responsibilities are clear, authorities and resources are adequate, and risk is tolerated. Ultimately, responsibility rests with the president to convey clear expectations, provide continuous oversight, and hold senior NSC leadership accountable for the performance of the NSC system. When multi-agency missions are poorly managed and integrated, the cause is not generally the lack of legal authority (with the exception of certain homeland security contexts), but rather the misapprehension of
facts, misjudgments regarding response requirements, or the failure of leadership in compelling departmental cooperation. Moreover, under the American form of presidential government, there is no alternative to presidential management and integration of multi-agency missions.

2. The national security advisor should be transformed into a statutorily empowered director of national security to perform system management.

*Argument*: The responsibilities of the national security advisor are excessively burdensome. Not only is the advisor expected to serve as the president’s alter ego on all national security matters, the advisor is expected to generate facts and recommendations for various national security issues and is expected to serve as the indefatigable crisis manager for the priority issue of the day. These expectations are unrealistic, drawing the national security advisor into the inbox and away from system management. The overall result is missing strategic direction and suboptimal performance of the national security system. One proposal is to transform the national security advisor into a director of national security (DNS) who would be statutorily empowered to focus on system management,¹ leaving issue management largely in the hands of decentralized interagency teams. Moreover, the DNS would be Senate confirmed and subject to congressional oversight which would provide Congress with the ability, for the first time, to oversee and hold someone in the executive branch accountable for the management of the interagency system. The DNS must be statutorily created because the lines of authority from the president to the heads of departments and agencies are codified in statute. In the words of the 9/11 Commission: “The problem is nearly intractable because of the way the government is currently structured. Lines of authority run to the expanding executive departments . . . . It is hard to break down stovepipes when there are so many stoves that are legally and politically entitled to have cast-iron pipes of their own (emphasis added, p. 403).”

*Counterargument*: To the extent a statutorily empowered DNS would seek to independently direct a White House process, the DNS would be arguably

¹ System management would entail, among other things, overseeing the macro-level national security processes, including strategy development, planning, and resource allocation; securing presidential approval of charters for interagency teams; monitoring the performance of interagency teams; overseeing and de-conflicting interagency teams; and continually assessing the performance of the system.
unconstitutional. Although the responsibilities of the national security advisor are onerous, the position has functioned sufficiently well for decades and the case for major change, such as creating a DNS, has not been sufficiently justified. The issue is White House leadership, not organizational arrangements. The national security advisor’s portfolio, while admittedly broad, provides flexibility for presidents to use the advisor in a manner that suits each president’s management style and it is the advisor’s responsibility to delegate these responsibilities effectively. Not only would the President likely resist congressional attempts to fix White House processes, but the bureaucracy would also resist in order to protect their current statutory authorities. To the extent the DNS would wield authority over Cabinet officials, the creation of the DNS would be tantamount to creating an unelected prime minister with practically full authority over the levers of government, yet with little political accountability. Furthermore, subjecting the DNS to Senate confirmation and congressional testimony would undermine the confidential relationship between the president and the DNS, and presidents would ultimately seek advice elsewhere. This would create competition between the DNS and other advisors, thereby creating a new set of problems. Similarly, the DNS would become marginalized in the interagency system if the DNS is viewed as beholden to Congress.

3. The management and execution of select multi-agency missions should be decentralized into statutorily empowered interagency teams.

Argument: The increasing complexity, uncertainty, and speed of modern national security problems make it unrealistic for such problems to be effectively managed using a centralized management structure, let alone a management structure led by a president with a vast span-of-control, equally vast responsibilities, increasing demands on the current NSC system, and who cannot legally delegate authority to his staff to make decisions and direct departmental resources on his behalf. The lessons of many national security failures point to problems of unity of command in the U.S. Government, while interagency teams have brought on many successes. Unfortunately, when these successes occur, the bureaucracy often reverts to its stovepipe system and has to relearn how to collaborate, often too late, for the next national security challenge. Just as the business community adapted to an increasingly complex and fast-paced business environment by utilizing empowered cross-functional teams, so too should the U.S. Government learn the organizational lessons of the private sector and adopt the empowered interagency team approach to solving complex and fast-paced problems facing the national security system. Statutorily empowered, decentralized interagency teams would not only draw the relevant
expertise from across government to solve complex problems, but they would be able to do so more quickly and with greater focus than the current system.

Counterargument: To the extent these statutorily empowered interagency teams would circumscribe the president’s authority to manage the executive branch, conduct foreign relations, or alter the military chain of command, these teams would arguably be unconstitutional. The current NSC system has functioned sufficiently well for decades and the case for major change, such as creating statutorily empowered teams, has not been sufficiently made. The president already has authority to create interagency task forces and presidents are generally averse to legislation that would prescribe specific organizational arrangements. In addition, the creation of these teams would arguably be politically untenable because every Cabinet official would be asked to give up authority over their respective departmental resources. But even if these teams were established, there is no guarantee that departments would be willing to provide their best people and assets. Furthermore, the creation of these teams could be expensive considering the overhead associated with standing up and operating entirely new organizations. Moreover, based on existing congressional committee structures, the heads of these interagency teams could be forced to spend significant resources reporting to numerous committees in both the House and Senate.

4. Congressional oversight structures and processes should be reformed to improve interagency mission performance and the quality of oversight.

Argument: Jurisdictional lines in Congress are fragmented and congressional committees are almost exclusively focused on the performance of individual departments and agencies at the expense of interagency missions and activities. In fact, no single committee exists in either chamber to oversee the performance of interagency missions and activities. As a result, funding decisions are made primarily on the basis of the needs of individual departments, rather than the needs of national interagency missions. In some cases, departments are required to report to numerous congressional committees, which unduly drains both congressional and departmental resources. Fragmented congressional jurisdiction also hinders the ability of any one congressional committees to provide needed and timely support to a single national security mission involving multiple departments or agencies. Undue tension also exists between the political branches regarding the value of particular reporting requirements, the Senate process for confirming presidential nominees, and other congressional restrictions on the use of appropriated funds for multi-
agency activities. Ultimately, this divides Congress and impedes its ability to check and hold executive power accountable on the paramount national security questions of our time.

Counterargument: Even if a committee were to be given jurisdiction over interagency activities, the committee may not have access to sufficient information to conduct meaningful oversight. This is because no officer of the United States manages the NSC system and, therefore, there is no executive branch official who Congress can call to testify about the management of the interagency system, with the exception of departmental officials. Furthermore, giving a congressional committee jurisdiction over interagency matters may not solve the problem it was designed to address because of the difficulty associated with distinguishing interagency matters from non-interagency matters. The committee would likely be a constant source of friction and other committees could collectively unite to marginalize its potentially vast reach. Moreover, while redundancy in the current oversight process causes inefficiencies, it also creates certain advantages, such as diversity of thought, additional checks on executive power, as well as internal checks on the power of any one congressional committee.
Founding the NSC and Issues Today

Throughout most of American history, presidents managed executive affairs not with sizeable White House staffs, but with the direct assistance of Cabinet officials who were confirmed by the Senate and statutorily authorized to direct resources within their respective departments. But as the functions of the federal government expanded over time, particularly after the New Deal, so did the management burdens on the presidency. As a result, in 1936, President Franklin D. Roosevelt created the President’s Committee on Administrative Management, commonly referred to as the Brownlow Committee, to study ways to improve the management of executive affairs.

“The forward march of American democracy at this point of our history,” the Brownlow Committee stated, “depends more upon effective management than upon any other single factor.” The committee “condemned the existing situation” and stated that “the President of the United States, managing the biggest business in the world, now has less assistance than many State Governors, city managers and mayors, and executives of even small private concerns.” The committee produced a five-point plan for executive reorganization, including the creation of six assistants to the president “to aid him in dealing with the regular departments and agencies.”

Based in part on the committee’s recommendations, Roosevelt created the Executive Office of the President (EOP) in 1939, pursuant to statutory-based executive reorganization authority, to ensure “that the President will have adequate machinery for the administrative management of the Executive branch of the Government.” Within the EOP, Roosevelt established a White House Office to “serve the President in an intimate capacity in the performance of the many detailed activities incident to his immediate office.”

Inside the White House Office, Roosevelt created new ‘assistants to the president’ as recommended by the Brownlow Committee. These new assistants would serve as, in Roosevelt’s words, “personal aides” and would assist him “in such matters as he may direct, and at the specific request of the President, to get information and to condense and summarize it for his use.” In light of congressional concerns and statutory authorities vested in Cabinet officials, Roosevelt’s executive order explicitly stated that these assistants “shall have no authority over anyone in any department or agency” and shall not “be interposed between the President and the head of any department or agency.”

While it was true that these new presidential assistants were not interposed between statutory lines of authority between the president and Cabinet officials, it was also true that the absence or presence of statutory authority was not necessarily
determinative of power bases inside the U.S. Government. These presidential assistants became uniquely positioned, sitting near the apex of American power, to significantly influence bureaucratic processes as a result of their proximity to the president, their role as presidential advisors, and as conduits – sometimes gatekeepers – of information between the president and the departments.

The creation of the EOP was the most significant organizational innovation in American government since the establishment of the original departments in 1789. Roosevelt had succeeded, for the first time, in securing a presidential staff whose interests and perspectives were aligned exclusively with the presidency and were no longer fully intertwined with departmental parochialism and preoccupation. Roosevelt had planted an organizational seed at the heart of American power that, according to the Budget Bureau – which served as the organizational conscience of the presidency throughout the 1940s – had the potential to produce an effective and lasting instrument for managing executive affairs, if utilized properly. Harold Smith, a skilled administrator and director of the bureau under both Presidents Roosevelt and Truman, dispatched a letter to Roosevelt in 1944 concluding, “history will show that your greatest contribution to Federal administration was the conception and establishment of the Executive Office of the President.”

Changes in the White House architecture soon ran parallel with organizational changes occurring elsewhere in the executive branch. Pearl Harbor had revealed significant flaws in national security machinery, including the inadequacy of intelligence and coordination among the Departments of War and Navy. “The tragedy at Pearl Harbor was as much the result of the inadequate military system which provided for no unified command, either in the field or in Washington, as it was any personal failures of Admiral Kimmel and General Short,” Clark Clifford later wrote in an unpublished history of military unification used by Truman for his memoirs. “The idea of coordinating our defense by ‘mutual cooperation’ alone between two separate and uncoordinated military establishments was thoroughly discredited.” Clifford became one of Truman’s closest

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2 The author is grateful to Randy Sowell, Archivist at the Truman Library, for his assistance in providing additional explanation and documentation regarding this unpublished memorandum.
confidants and served as the lynchpin of unification negotiations within the executive branch.

During his time in the Senate, as chairman of the Special Senate Committee to Investigate the National Defense Program, known simply as the Truman Committee, Truman became intimately familiar with the waste and inefficiency resulting from separate military departments. He became convinced that “our national security was in grave danger so long as it had to depend on a system which provided only for voluntary mutual cooperation between independent departments and commands.”

In August 1944, the same month Truman resigned his chairmanship and launched his vice-presidential campaign, Truman wrote an article in Collier’s Magazine publicly calling for the unification of the Departments of War and Navy.

When Truman became president in 1945, his commitment to military unification solidified, as did opposition from the Navy. But it was only after the Navy submitted an alternative plan to unification at the request of a Senate committee that Truman began considering “an organizational need that [he] had not fully considered before.” The Navy’s plan, commonly known as the Eberstadt Plan, broadened the debate beyond military unification and argued for the creation of a National Security Council (NSC) to coordinate military activities with broader policies affecting foreign affairs and economic issues. Because of this plan, Ferdinand Eberstadt, a key architect of the 20th century national security architecture, has been widely credited for conceptualizing the NSC. But according to George Elsey, a well-placed source at the time who served as naval duty officer in the White House Map Room under Roosevelt and who later served on Truman’s White House staff, credit for the NSC more properly resides on the shoulders of two stalwarts of the 20th century – George Marshall and Winston Churchill.

It was General George Marshall who had vigorously advocated such an organization since 1943, who sold the idea to the President, [Secretary of the Navy James] Forrestal, [Secretary of War Henry] Stimson, and others. Marshall had discussed the British Cabinet Secretariat with Churchill as early as May 1943, and Churchill had sent Marshall a description of the British Cabinet Secretariat in the summer of 1943. Marshall had circulated these documents to [Harry] Hopkins and [Adm. William] Leahy at the White House and numerous others. Eberstadt was a persuasive and consistent proponent of the National Security Council, but, in my opinion, he did not originate the idea.
According to Clark Clifford, Truman acknowledged that the proposal for an NSC may have been “partially designed to draw attention away from defects of coordination between the Army and Navy,” but he also came to believe the concept of the NSC was the “most important contribution” of the Navy’s report. He was not alone. Clifford was an early convert to the concept of the NSC. In December 1945, shortly before serving as Truman’s special counsel, he referred to the NSC in a letter to his predecessor, Judge Rosenman, as “[o]ne of the most vital recommendations of the Eberstadt report, and the one with which I agree most strongly.” Secretary of the Navy James Forrestal also later testified before the Senate Committee on Armed Forces that the NSC “is perhaps the most important feature” of the unification debate.

But as the concept for the NSC began to develop, those in government responsible for protecting presidential prerogatives and managing foreign relations raised constitutional concerns. Harold Smith, as head of the Budget Bureau and who met personally with legislators on behalf of the president to discuss unification legislation, warned Truman as early as April 8, 1946, that the most recent draft bill had “questionable provisions.”

The following day, Senator Elbert Thomas, chairman of the Senate Committee on Military Affairs, introduced a bill (S. 2044) that purported to unify the services and called for the creation of a Council of Common Defense—an early version of the NSC. “The function of the Council shall be the coordinating and integrating of common defense policies,” the bill read. The council, chaired by the president, would “bring into common action the common defense policies of the United States and provide for unity in the execution thereof.” The bill also authorized the president to delegate certain presidential powers to more effectively coordinate the departments.

Weeks later Smith dispatched a memo to Truman warning against the “organizational devices of the ‘Eberstadt plan’” that were “not substitutes for unification” and were, “in their present form, highly dangerous.” He described the “greatest threat” as the proposed council. “This Council is presented as a means of relieving the President of work,” Smith stated. “This it does by divesting the President of authority and responsibility which he cannot lose and still be President under our form of Government.”

As congressional hearings were being held in 1946, the secretaries of Navy and War remained at loggerheads over unification, although they both agreed on the need for
a council. Truman tapped Clifford to assist in the negotiations and in the winter of 1946, after a private meeting at Forrestal’s home, Clifford worked out a legislative outline for unification with Adm. Forrest Sherman, a Navy representative, and Gen. Lauris Norstad, a War representative. Days after Truman reaffirmed his commitment to unification in his 1947 State of the Union Address, rooting his argument for unification primarily in cost-savings, Forrestal and Secretary of War Robert Patterson notified Truman that they had reached agreement on military unification.

Following the Forrestal-Patterson agreement, draft legislation began circulating almost immediately. According to an early draft, the NSC’s function would be “to integrate our foreign and military policy” and the decisions of the NSC, subject to the authority of the president, “shall establish the approved policy of the departments and agencies represented in the Council.” But the Budget Bureau continued its constitutional objections, referring to these provisions as the “most dangerous features” of the proposed bill that “would seriously undermine the position of the President.”

The draft bill delegates authority, which the President alone can delegate. In the American scheme of things, the President is responsible for the ultimate formulation of foreign policy, and as President and also Commander-in-Chief, of military policy. Even though saving words, “Subject to the direction and control of the President,” are used, this bill’s proposal for placing the coordination of military and foreign policies in other than an advisory agency is a usurpation of the necessary powers of the President and a direct violation of our Constitutional system.xx

Ironically, Secretary of State George C. Marshall, who George Elsey credited with the original conception of the NSC, was particularly concerned with Congress meddling in the area of foreign affairs via statute. A few years prior, the Supreme Court had declared in United States v. Curtiss-Wright Export Corp. that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,”xxi and Marshall argued strenuously for the deletion of the NSC provisions in their entirety. As secretary of state, Marshall had been largely absent from negotiations to unify the military prior to reading the draft legislation and he viewed the NSC provisions as “extraneous” to the fundamental purpose of the unification bill. He also believed the bill “would evidently by statute dissipate the constitutional responsibility of the President for the conduct of foreign affairs [and] diminish the responsibility of the Secretary of State.”xxii
Marshall and the Budget Bureau both invoked the president’s authority under Article 2 of the U.S. Constitution, specifically citing the president’s inherent authority over foreign affairs and his authority over military affairs as commander-in-chief, to oppose the statutory creation of the NSC in its early form. Their arguments ultimately succeeded, in part. President Truman submitted his unification bill to Congress on February 26, 1947 to establish the NSC by statute as merely an advisory body. Consequently, no person or structure other than the president was authorized to formulate U.S. foreign policy and force the alignment of departmental capabilities for multi-agency missions by making decisions, resolving disagreements among departments, and directing departmental resources, i.e., integrating the departments. Absent presidential intervention, the NSC would be merely an advisory and coordinating body, not an integrating body.

On July 26, 1947, the NSC was established in the National Security Act of 1947 alongside a National Military Establishment, the precursor to the Department of Defense, and a Central Intelligence Agency. The president would chair the NSC and statutory members included the secretaries of state, defense, army, navy, air force, and the chairman of the National Security Resources Board. Subsequent amendments and organizational changes modified statutory membership to include, for most of the NSC’s history, the president, vice president, and the secretaries of state and defense. The director of central intelligence (and later the director of national intelligence), operating under the direction of the NSC, and the chairman of the Joint Chiefs of Staff also became long-time statutory advisors to the NSC.

The statutory function of the NSC, unchanged since its inception, was “to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.” Subject to the direction of the president, the NSC was also responsible for assessing and appraising “the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security” and for considering “policies on matters of common interest to the departments and agencies of the Government concerned with the national security.” In addition, the act authorized the NSC to perform “such other functions as 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.”
To support the work of the NSC, the act established a full-time staff, led by a civilian executive secretary who was appointed by the president, but not subject to Senate confirmation. The NSC staff was given no statutory authority to direct departmental resources, and no specific duties or staff structures were prescribed. The creation of the NSC staff led to a convergence, for the first time, of Truman’s reorganization of national security machinery and the ongoing refinement of the EOP architecture. Although the NSC staff was not originally established as part of the EOP, the White House and Budget Bureau treated the NSC staff as “in effect, a further enlargement of the Presidential staff” and the bureau advocated for treating the executive secretary as a presidential assistant.\textsuperscript{xxiv} Two years later, Truman formally transferred the NSC to the EOP.\textsuperscript{xxv}

Admiral Sidney Souers, the first director of central intelligence under the Central Intelligence Group, the predecessor of CIA, was appointed as the first NSC executive secretary. In a rare public appearance for a self-described “anonymous servant of the Council,” Souers addressed the Joint Orientation Conference of the National Military Establishment in November 1948 and described early NSC practices. He stated, for example, that the NSC assumed as its primary role national security assessments and appraisals while tending to avoid considering interagency policies. He made clear that the NSC was not involved in “implementing any policies.” The staff, which was housed in what is now known as the Old Executive Office Building, consisted of a secretariat, staff members, and consultants. The early budget of the NSC was $200,000, which funded 30 NSC staffers at the time, representing a balance of careerists and detailees to ensure both continuity and relevance.\textsuperscript{xxvi}

As executive secretary, Souers described his own role as an “assistant to the President” who “maintains the President’s files on Council business and briefs him daily on the progress of work in hand.” Souers not only served as the chief administrator of the NSC, he also served as President Truman’s confidant for national security affairs. Correspondence between Harry Truman, from Independence, and Sidney Souers, from St. Louis, suggests that Truman, or “Boss,” held few men in higher esteem than Souers, or “Sid.” As the role of the NSC expanded under President Dwight D. Eisenhower, the position of executive secretary evolved into a career position and the executive secretary’s advisory duties were largely stripped away and vested in a new position, entitled ‘special assistant to the president for national security affairs.’ The latter portion of this White House commission designation, specifically ‘assistant for national security affairs,’ was adopted by subsequent presidents and has been colloquially translated ‘national security advisor.’ Eisenhower’s first assistant, Robert “Bobby” Cutler, is often referred to as the
the first national security advisor, but the duties that Souers performed, the influence he exerted, and the bond that developed between Souers and Truman suggests that Sidney Souers may properly be described as, in the modern sense, the first national security advisor.

During the implementation of the NSC, the Budget Bureau continued protecting what it viewed as presidential prerogatives. For example, the bureau asserted shortly after passage of the act, but prior to Justice Jackson’s influential concurrence in Youngstown Sheet & Tube Co. v. Sawyer, that the statutory creation of the NSC “has in no way either increased the President’s authority or decreased his responsibility” and the new statute “should in no way restrict or circumscribe his freedom to reach a ‘Presidential position.’” As further protection, the bureau advised Truman to refrain “from attending the majority of Council meetings” in order to “assure the advisory nature of the Council’s actions and guard against it becoming an operating body.” The bureau’s persistence safeguarded not only what it viewed as Truman’s prerogatives, but it protected the flexibility of future presidents to shape and reshape the functions, staff, structures, and processes of what became known as the NSC system.

Over time, different administrations faced different challenges, and different presidents brought different styles, priorities, and relationships to the presidency. The flexible nature of the NSC allowed these differences to be accommodated. The elasticity of the system was particularly evident during early administrations. For example, whereas President Eisenhower, a former general and supreme allied commander, preferred to rely predominately on a formal process and highly structured NSC system, consisting of separate structures for policy development and policy implementation, Presidents John F. Kennedy and Lyndon Johnson preferred less formality and structure and tended to rely more heavily on the State Department for staff work. Under President Richard Nixon, due in large part to an early organizational plan produced by then-National Security Advisor Henry Kissinger that sought to draw the strengths from both the Eisenhower and Johnson administrations, a more stable framework for the NSC system began to emerge. And since the end of President Ronald Reagan’s second term the basic framework of the NSC system has remained relatively stable.

The organization of the NSC system, a byproduct of decades of experience, is typically outlined in presidential directives at the start of each administration. Presidential directives issued by recent presidents have described the role of the NSC in similar terms.
Under President Obama, for example, the NSC is “the principal forum for consideration of national security policy issues requiring Presidential determination.” Statutory members now include the president, vice president, secretaries of state, defense, and energy. Other members designated by Obama include the secretary of treasury and homeland security, the attorney general, the U.S. ambassador to the United Nations, the president’s chief of staff, and the national security advisor. The director of national intelligence and the chairman of the joint chiefs of staff also attend meetings as statutory advisors, and other officials are invited to attend meetings bearing on their issue portfolios.

The NSC system has evolved into a hierarchical structure of interagency committees and groups that support the president as chair of the NSC. Immediately beneath the NSC, a Principals Committee, consisting of NSC members absent the president, serves as “the senior interagency forum for consideration of policy issues affecting national security.” A Deputies Committee supports the Principals Committee by preparing policy materials for more senior review, overseeing subordinate interagency groups, managing day-to-day crises, and under President Obama, it has been instructed to “focus significant attention on policy implementation.” A range of functional and geographical interagency groups, now called Interagency Policy Committees, are established by and under the Deputies Committee to coordinate the details of the development and implementation of particular policy areas in preparation for senior review.

The NSC system is managed out of a front office by the national security advisor on behalf of the president, who has the same limited authority that Roosevelt’s assistants originally exercised – advice and assistance. While the national security advisor has no legal authority to direct departmental resources, as a matter of practice the advisor and his or her staff regularly communicate White House positions that have not been formally approved by the president.

By statute, the NSC staff exists “to perform such duties as may be prescribed by the [NSC] in connection with the performance of its functions.” As noted previously, however, presidents determine these duties as a matter of practice. These duties have tended to fall into four categories, including: (1) presidential staffing, such as preparing briefing books for the president, accompanying the president on foreign trips, and assisting with presidential speeches; (2) interagency coordination, such as facilitating interagency meetings, developing policy recommendations, overseeing implementation, conducting assessments, and managing crises; (3) administrative support, such as scheduling meetings, preparing meeting agendas, taking notes, summarizing discussions
and decisions, and managing NSC records; and (4) specialized support, such as legal affairs, legislative affairs, intelligence, and IT.

Policy staff, typically designated as NSC directors or senior directors, are organized into geographic or functional directorates and may perform numerous duties on any given day, including presidential staffing, interagency coordination, and administrative support. Other professional staff generally manage the specialized support duties. The executive secretary continues to lead a secretariat staff, consisting largely of career civil servants, to manage the paper flow and records. In addition, the key intelligence and communications hub of the NSC system is the Situation Room, which is staffed largely by career military personnel on rotation, as well as select career NSC employees. The total number of NSC staff has depended on legislative limits on White House staff, appropriation limitations, internal policies and guidelines, legislative restrictions on agency detailees, as well as the creativity of EOP lawyers in finding alternative staffing solutions. Today, the staff has expanded to upwards of 300 total staffers, at an annual cost of approximately $12,231,000.

For over 40 years, the Communist threat provided the NSC system, and U.S. national security machinery writ large, with a clear mission and roles around which to organize. This clarity vanished, however, after the Cold War and the United States faced a new international security environment than in the 1940s when the modern national security architecture was created. In the post-Cold War security environment, few significant organizational reforms were spurred in either the executive or legislative branches, leading the 9/11 Commission to conclude as late as 2004 that “the national security institutions of the U.S. government are still the institutions constructed to win the Cold War.”

With few exceptions, organizational changes in the post-Cold War environment were brought about not by strategic foresight, but by sudden reaction. The September 11 terrorist attacks brought the modern international security environment into focus as counterterrorism instantaneously emerged as the primary national security mission of the United States. This new mission led, in turn, to the most sweeping organizational changes in the executive branch since the National Security Act of 1947, and in the midst of two wars in Afghanistan and Iraq.

Entirely new organizations were created, such as the Department of Homeland Security, the Office of the Director of National Intelligence, and the National
Counterterrorism Center. New offices were created inside existing organizations such as the State Department’s Office of the Coordinator for Reconstruction and Stabilization, the FBI’s National Security Division, and the Treasury Department’s Office of Terrorism and Financial Intelligence.

In addition, despite the fact that the NSC was originally established to advise the president on the integration of domestic policies as well as foreign and military policies, an additional presidential advisory system was established under a Homeland Security Council (HSC) that paralleled the structures, processes, and staff under the NSC. The HSC, which maintained its own staff, was responsible for ensuring the “coordination of all homeland security-related activities among executive departments and agencies” and for promoting “the effective development and implementation of all homeland security policies.” Today, the HSC remains in existence, but the formerly bifurcated HSC and NSC staffs have been unified into a national security staff (Staff).

Despite these sweeping changes, some experts and organizations believe these changes did not resolve a fundamental dilemma and longstanding organizational challenge of the American form of government, namely the management and integration of multi-agency missions. They argue that the modern international security environment – characterized by complexity, uncertainty, and speed – increasingly requires the simultaneous application of functional capabilities of multiple departments for national security missions, particularly counterterrorism. But since 1789, the executive branch has been organized by statute into functional Cabinet departments with lines of authority running directly from the president to Cabinet officials, leaving only the president, arguably the most burdened official in the government today, with the legal authority necessary to manage and integrate the departments for multi-agency missions.

If modern interagency missions were being integrated effectively on a consistent basis, there would be little reason to debate modifying organizational arrangements. But in recent years, even prior to the September 11 attacks, some practitioners and experts began to detect problems associated with departmental integration with increasing frequency. For example, in 1997, the National Defense Panel concluded, “our policymaking institutions remain largely as they were during the Cold War” and that our legacy national security machinery “has been unable to integrate smoothly the resources and organizations needed to anticipate and mold a more secure international environment.” The Hart-Rudman Commission, commissioned by the Defense Department, similarly concluded in 2000 that, as a result of the changing strategic environment and increasing frequency of interagency missions, “the integrating function of U.S. policymaking processes will be challenged as never before” and “[m]erely improving the
The following year, and mere months before the 9/11 attacks, the Hart-Rudman Commission forecasted that “[a] direct attack against American citizens on American soil is likely over the next quarter century,” and it further concluded that “[i]n the face of this threat, our nation has no coherent or integrated governmental structures.”

After the September 11 attacks, the management and integration of multi-agency missions became practically universally accepted in the literature as a central organizational challenge confronting the U.S. Government in light of the new counterterrorism mission, an inherently interagency exercise. Organizations such as the 9/11 Commission, the Center for Strategic and International Studies, an independent task force of the Council on Foreign Relations, the Robb-Silberman Commission, the Project on National Security Reform (PNSR), and others, all pointed to challenges posed by the current interagency system and it appears that no major report concluded otherwise.

Today the issue appears to have become not whether the management and integration of multi-agency missions should continue to be improved, but how it can best be accomplished. On this question, no universal consensus exists either inside or outside of government, and two schools of thought stand on two sides of a historic fault line. On one side stand those who believe the modern security environment requires major changes in the top-level management structures of the U.S. Government, as well as the creation of new, decentralized integrating mechanisms – as opposed to coordinating mechanisms – to manage and integrate particular multi-agency missions, subject to the overall direction and control of the president. Among these reformists, for example, PNSR has argued that, despite the best efforts of presidents and talented Staff, modern presidents simply cannot be expected to effectively manage and integrate multi-agency missions given the president’s vast span-of-control, the equally vast responsibilities of the presidency, the increasing demands on the current interagency system, and the limited authority of the Staff to assist presidents in the performance of their duties.

To improve the management and integration of multi-agency missions, PNSR has discussed creating, among other things, a new top-level management structure, as well as new managers and integrators of particular multi-agency missions. For example, PNSR has recommended transforming the current national security advisor into a statutorily empowered director of national security (DNS), along with a supporting staff, who would
be dedicated full-time to ‘system management’ rather than ‘issue management.’ This would entail, among other things, overseeing the macro-level national security processes, including strategy development, planning, and resource allocation; securing presidential approval of charters for interagency teams described below; monitoring the performance of interagency teams; overseeing and de-conflicting interagency teams; and continually assessing the performance of the system. The DNS would be located in the EOP and, unlike the current national security advisor, would be subject to Senate confirmation.

Second, drawing heavily on modern organizational theory, business practices, and corporate innovations, PNSR has discussed creating new, decentralized cross-functional interagency teams, or ‘subordinate interagency organizations,’ which would be statutorily empowered to manage and integrate select national security missions, such as counterterrorism. Although these teams would be authorized in statute, they would ultimately operate pursuant to authority delegated by the president and supervised by the DNS. The teams would augment current departments as horizontal organizational structures vested with command authority, budget authority, and dedicated staffs to work across departmental lines. In the case of both the DNS and the interagency teams, authority to set policy would remain exclusively with the president.

On the other side of the debate, however, stand those who believe that improved management and integration of multi-agency missions should be achieved by the president making improvements to the NSC system within its current legal framework. This argument states that despite imperfections, the NSC system has served the country well since 1947 and large-scale change would do more harm than good. Good leadership, not organizational charts, has more to do with the success or failure of the current NSC system, they argue. Ultimately, responsibility rests with the president to convey clear expectations, provide continuous oversight, and hold senior NSC leadership accountable for the performance of the NSC system. Moreover, like the Budget Bureau and General Marshall, supporters argue that only the president can manage and integrate the departments as a matter of constitutional law.

Supporters could further argue that PNSR’s proposals for a DNS resembles the type of ‘super-Cabinet official’ that has already been considered and rejected by one of the most thorough studies ever conducted on national security machinery. In the early 1960s, Senator Henry Jackson’s Subcommittee on National Security Policy Machinery completed a major study entitled “Organizing for National Security.” The subcommittee’s first report addressed the proposal for a super-Cabinet official and concluded that, although the executive branch was not then organized to effectively integrate the departments, the creation of a super-Cabinet official “would fail to resolve the problems it is meant to meet,
and would also introduce grave new difficulties into the working of our national policy machinery.\textsuperscript{xlvi}

Moreover, the Jackson Subcommittee report recognized that such a proposal would change the fundamental character of the American form of government. Although the Cabinet departments are products of statutory law and not constitutional requirements, the Jackson report recognized the deep tradition of Cabinet officials in American government and expressed profound skepticism for the possibility of change. “Reforms, to be effective, must be made in terms of real requirements and possibilities of the American governmental system,” the report stated. “That system provides no alternative to relying upon the President as the judge and arbiter of the forward course of policy for his administration. It provides no good alternative to reliance upon the great departments for the conduct of executive operations and for the initiation of most policy proposals relating to these questions.”

The debate between those who believe major reform is required and those who believe reform can be accomplished within today’s system is fundamentally an organizational policy disagreement. Regardless of whether policymakers, practitioners, and experts ultimately conclude that the current NSC system should subsist or should be transformed, lawyers play an important role in the decision-making process by spotting relevant legal issues and providing sound legal advice based on legal text and court precedence, if any. Such advice has the power to open or shut organizational options, evidenced by legal arguments made by the Budget Bureau and General Marshall during the drafting of the National Security Act of 1947.

The unique nature of the NSC system, which tends to trigger competing constitutional claims by the executive and legislative branches often without legal precedence or clear judicial guidance, creates unique challenges for lawyers seeking to provide objective legal conclusions in organizational discussions. As an entity located in the EOP, which not only serves as a management arm of the president, but also serves as a repository for privileged presidential advice and as the principal vehicle for exercising the president’s own constitutional authority over foreign relations and military affairs, the NSC system is wrought with potential constitutional and political landmines which require careful navigation guided by sound legal counsel and with respect for the prerogatives of both the executive and legislative branches.
The purpose of the Legal Affairs Roundtable on the Role of the National Security Council, held on December 8, 2010, at the Washington office of Arnold & Porter LLP, was to gather input from leading attorneys, practitioners, and subject matter experts regarding legal issues associated with proposed changes to the NSC system. Although the author has sought to provide, until this point and for the reader’s benefit, context for the NSC system and the roundtable discussion, the sections that follow are designed to summarize actual and unvarnished statements made by participants during the roundtable event, with the exception of modest contextual additions and post-roundtable comments supplied by participants. If participants did not raise a relevant argument, the author did not seek to supply one. If participants made an inaccurate or misguided argument, the author did not seek to expose it.

Because no universal consensus exists on how to improve the management and integration of multi-agency missions, there was an acknowledgment at the beginning of the roundtable discussion that it would be difficult for participants to separate legal issues from policy issues. For example, as one participant noted, legal impediments to the NSC system cannot be identified without first understanding what functions policymakers want the NSC and Staff to perform. For this reason, Section I of this report addresses participants’ divergent views on the proper functions of the NSC and Staff. Section II discusses the actual, perceived, or potential legal impediments to the performance of these functions. Section III discusses possible legal remedies to these impediments. Section IV discusses the role of legislation in shaping the NSC system, as well as the role of Congress in overseeing the system.

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3 Event organizers instructed participants that they could, if desired, submit additional and supplementary comments for the record after the conclusion of the roundtable event. Post-roundtable comments provided by participants have been included in this report.
President Roosevelt
President Truman
Winston Churchill
George C. Marshall
Louis Brownlow
Ferdinand Eberstadt
Harold D. Smith
Robert Patterson
James Forrestal
George Elsey
Clark Clifford
Sidney Souers
What are the Functions of the NSC and Staff?

At the outset of the roundtable discussion, a series of fundamental questions was posed: “Is the NSC as the council, and is the NSC as a process with a staff effective?” a participant asked. “If not, why not? And what should be done about it?” Although these questions underlaid the entire discussion, as one participant suggested, measuring effectiveness, identifying legal impediments, and formulating legal remedies ultimately depend upon the overall objective of the NSC system. In this section, participants’ views are expressed with regard to the current functions being performed by the NSC and Staff, whether or not these functions are sufficient and effective, and what functions they should be performing to meet the national security challenges in the 21st century.

CURRENT FUNCTIONS

The functions of the NSC, and by extension the Staff, are derived from the National Security Act of 1947, as amended, as well as written and oral presidential directives. By statute, the functions of the NSC include advising the president on the integration of national security policies, conducting strategic assessments, considering interagency policies, and performing other coordinating functions prescribed by the president. As a matter of practice, the president determines the functions of the NSC with the advice and assistance of the national security advisor.

During the roundtable discussion, participants noted that the last three presidential directives have defined the role of the NSC in similar terms and the text of the most recent presidential directive, Presidential Policy Directive 1, was read aloud: “The NSC shall be the principal forum for consideration of national security policy issues requiring Presidential determination.” Other NSC functions contained in the directive, such as the NSC’s role in coordinating the development and implementation of national security policies, periodically assessing major foreign policy initiatives, and managing crises, were not recited.

One participant argued that the recited function did not fully reflect the functions performed by the NSC as a matter of practice. For example, he observed that, although the function prescribed in the latest directive properly captured the advisory role of the NSC, it did not account for the fact that most national security issues considered within the NSC system never reach the NSC or the president’s desk. Instead, he argued that most issues are considered and decided at lower-levels by NSC senior directors or chairs of interagency committees. This causes confusion, he argued; because it is not always clear whether the senior director or chair is authorized to be making the decision.
The functions of the Staff, like the functions of the NSC, are derivative of both statute and presidential directive. According to the National Security Act, for example, the NSC is responsible for prescribing the functions of the Staff. As a matter of practice, the president and the national security advisor determine staff functions. Participants cited a range of functions currently performed by the Staff as a matter of practice, including setting agendas, convening meetings, developing and communicating policy, making decisions and directing departments to one degree or another, monitoring implementation, and managing crises.

The functions that generated the most discussion, however, involved assertions by multiple participants that the Staff is involved, to one degree or another, in making decisions and directing departmental actions that are not formally approved by the president. Although there appeared to be consensus that these functions are currently performed by the Staff, as discussed in greater detail in Section II, different views were expressed with regard to whether these functions are proper.

The range of functions currently performed by the Staff led one participant to wonder whether there was a distinction between the ‘advise and assist’ function of the Staff and what appeared to be an evolving management function of the Staff. In attempting to account for this perceived evolution in Staff functions, he suggested that national security problems used to be relatively simple, which allowed departments to approach problems largely on their own. But as problems have become more complex, these problems have increasingly migrated into the NSC system thereby shifting greater management responsibilities onto the shoulders of the Staff.

Assessment of Current Functions

Participants expressed different views on whether the functions currently being performed by the NSC and Staff are sufficient and effective to meet the national security challenges in the 21st century. “The fundamental issue in front of us is: Do we have a problem with our current system?” asserted a former departmental official. “And the answer to that is ‘absolutely.’ We have a system designed in 1947 for a very different world and is not capable of operating in the complex, rapidly paced world of today.”

Participants from various perspectives reinforced the notion that the current international security environment is different from 1947. For example, participants argued that national security problems have grown in complexity with multiple variables going into the decision-making process, creating less confidence that actual outcomes of particular decisions will match expected outcomes; the quantity of information flowing into the decision-making process has dramatically increased; the private sector is more
interwoven with national security issues; State and local officials, particularly governors
and city chiefs, have become key actors in national security affairs; and the overall scope of
national security has expanded.

Although participants agreed on the changing nature of the security environment,
different views were expressed regarding how to adapt to it and whether the current
functions of the NSC and Staff are sufficient and effective. From the reformist
perspective, particular focus was placed on the need to bolster the management and
integrative functions of the Staff. It was argued that the current national security
architecture continues to be dominated by departmental interests at the expense of the
national interest. “We are dominated by the departments and agencies at a time in which
almost all of the major national security issues require a multi-agency approach,” it was
argued. “So the question is how do we begin to manage this as a system, rather than just
focus on the components.” Another subject matter expert similarly argued that there is no
one in the U.S. Government, aside from the president, who has the legal authority to
actually manage the national security system. This creates a ‘bottle-neck’ problem for
issues within the NSC system, he argued, which requires the empowerment of others to
manage and integrate national security problems on behalf of the president.

But other participants looked at the issue differently. For example, a former Staff
member considered it important to not merely focus on problems, but also to understand
“what works well in government?” He acknowledged that there are problems with
interagency efforts, but he argued that there are also examples of interagency efforts that
have worked “exceptionally well.” Analyzing only the problem areas could lead one to
conclude that an entirely new system is needed, he argued. But if the common
characteristics of successful efforts could be identified and replicated perhaps an entirely
new system would be unnecessary. In his research, these common characteristics include
solid leadership, a clear mission, clear roles and responsibilities, adequate authority and
resources, political attention from the White House, and a willingness of leaders to accept
risk. He also noted that decision-makers need timely and accurate information, well-
considered options, and a sense of how a plan will be implemented.

Questioning the notion that the current NSC system is ineffectual, another former
executive lawyer noted that at least two significant allies have recently adopted the NSC
system as a model for national decision-making in their home countries, tailored to their
own needs, roles, and history. In this light, he asked whether our current system is “really
that broken or just not used in [as] an effective manner as it might be?” He continued,
“[i]s the NSC model really dysfunctional? Or is it a question of how do we better integrate
all the instruments of national power in the field. If so, our real impediments [may be] ones of funding and personnel resources and authority[,] not NSC process.”

**PROSPECTIVE FUNCTIONS**

In the end, participants expressed significantly different views on what functions the NSC and Staff should be performing. On one end of the spectrum, it was argued that the Staff’s functions should be limited to convening interagency meetings and setting agendas. On the opposite end of the spectrum, it was argued that, despite the best efforts of presidents and talented Staff, modern presidents simply cannot be expected to effectively manage and integrate multi-agency missions given the president’s vast span-of-control, the equally vast responsibilities of the presidency, the increasing demands on the current interagency system, and the limited authority of the Staff to assist presidents in the performance of their duties. As a result, some participants proposed creating a director of national security who would be statutorily empowered to conduct ‘system management’ on behalf of the president, as well as creating decentralized interagency teams which would be statutorily empowered to manage and integrate select national security missions.

Within these two poles, and likely within existing legal frameworks, one participant proposed a comprehensive set of Staff functions: (1) crisis management, (2) presidential staffing, (3) end-to-end management of the national security system, and (4) the development of the system itself. The term ‘end-to-end management’ does not imply operational control by the Staff over national security missions, the participant argued, but rather entails the establishment of policy, development of strategy, alignment of resources with national security missions, oversight of implementation, and assessments. “If those are the things you think the National Security Council and Staff ought to be doing,” a participant remarked, “then go and look at the National Security Strategy published last May and look at each of the departmental quadrennial reviews and ask yourself: Is there any glint of any of those quadrennial reviews being informed by the National Security Strategy or informed by policy and resource guidance to the agencies for putting those integrated budgets together?”
What Laws Impede the Performance of these Functions?

Although participants reached no universal consensus regarding what functions the NSC and Staff should be performing in the 21st century, the range of functions proposed by participants and described in Section I informed further discussions regarding actual, perceived, or potential legal impediments to the performance of such functions. For purposes of this section, the term ‘legal impediment’ is defined as the inability of the NSC or Staff to optimally perform one or more functions identified in Section I as a result of a legal rule. These impediments were rooted in four types of instruments, including the Constitution, statutes, appropriations laws, and congressional rules.

APPOINTMENTS CLAUSE

The Appointments Clause, set forth in Article 2 of the Constitution, was identified by one former executive lawyer as a fundamental legal constraint on the functions of the Staff, particularly with regard to making decisions and directing departmental action. Described by the Supreme Court as one of the “significant structural safeguards of the constitutional scheme,”[xlvii] the Appointments Clause sets forth the process and requirements for appointing officers of the United States.

[The president] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

As additional background, the first issue under the Appointments Clause is whether an individual qualifies as an officer of the United States. An officer, unlike an employee, exercises “significant authority pursuant to the laws of the United States.”[xlviii] Whether an individual exercises significant authority depends upon the facts of each case. If the individual is determined to be an officer of the United States, the second issue is whether the individual is a principal officer under the Appointments Clause, or an inferior officer under the Excepting Clause.[xlx] Principal officers must be appointed by the president, subject to Senate confirmation. The default manner of appointment for inferior officers is the same for that of principal officers,[l] but inferior officers may, pursuant to
Based on the Appointments Clause, the lawyer who raised the issue concluded that it is “unconstitutional at some point for the National Security Council Staff to be making decisions.” He reasoned that the Staff, as presidential assistants, are not officers of the United States and are not appointed in the manner specified in the Appointments Clause. As a result, he concluded that the “National Security Council staff can’t independently organize their own sock drawer” and stay within the bounds of the Appointments Clause. Instead, he asserted that the Staff “are only following the Constitution when they are conveying the directives and decisions of the president, who may make decisions.” In other words, the Staff “can’t do anything without channeling the president’s direct authority.” There was no discussion of what status the NSC executive secretary, a statutory position, maintains under the Appointments Clause.

Another executive lawyer reinforced this general legal interpretation of the Appointments Clause. “That is a [legal] position that has been consistent through administrations,” he asserted. But a former Staff member and non-lawyer replied, “if it is consistent, it is consistently violated. The NSC staff direct things all the time.” The former executive lawyer acknowledged that “it does happen all the time,” but there are legal complexities associated with whether the decisions and directions are being carried out pursuant to a presidential structure or direction.

In subsequent correspondence, a former executive lawyer rejected the notion that Staff currently ‘directs’ departments and, therefore are not at risk of violating the Appointments Clause. He reasoned that there is a difference between the Staff directing departments and the Staff providing direction for departments. “NSC staff do not direct agencies,” he argued, “but they do provide direction to agencies, because they are assisting the President perform his duties.” In some cases such direction comes directly from the president, he noted, but in other cases it is often provided by the Cabinet members of the NSC, i.e., Principals, who are officers of the United States. He further argued that the Staff can provide direction to departments using all the persuasive authority they can muster. In such a case, the department “can either decide to act on the ‘direction’ using its own authority, or it can request clarification or direction from [the president] or the [Principals Committee].”

National Security Act of 1947

The National Security Act of 1947, as amended, sets forth the statutory limits of the functions and activities of the NSC and Staff. As previously mentioned, the statutory
functions of the NSC include advising the president on the integration of national security policies, conducting strategic assessments, considering interagency policies, and performing other coordinating functions prescribed by the president.

One participant argued that the current statute authorizes the Staff to perform the full range of functions described in Section I, including directing departmental action. But most participants believed that directing departmental action, or becoming ‘operational,’ is one step too far. “To me, operational is when the Staff attempts to direct action,” one former departmental official argued, “[and] I think that is very legally problematic.” He argued that when the Staff seeks to direct departments it violates the statutory chain of command that runs from the president to Cabinet officials, it undermines congressional oversight, and it confuses the departments because departmental staff often do not know whether the NSC senior director or chair of an interagency committee is authorized to make a particular decision. This, in turn, directly impacts ‘buy-in’ from departments and, by extension, hinders successful implementation of policies.

In seeking to clarify the official’s comment, a former executive lawyer asked, “One quick question, direct action on behalf of the president or direct action in their own right?” In response, the former departmental official recounted an experience by which the president had personally instructed a Cabinet official to pursue a particular course of action and when the official went back to his department and instructed his staff to carry out the president’s order, within two hours he received reports that the White House was objecting to the plan. The Cabinet official reportedly responded, “Well, what part of the building?” This is part of the problem, the participant argued. “The president has the total authority to direct, but the Staff should not be the vehicle for directing action, certainly not on their own motion.” As a matter of practice, however, he believed that direction from senior White House staff, such as the national security advisor or the president’s chief of staff, would be appropriate.

Nonetheless, another departmental official argued that departmental staff needs direction from the White House. In some cases, a participant argued, such direction is not only desirable as a practical matter, but also critical. “Post-9/11, I’m telling you that if NSC staff and White House office staff were not able to direct action by executive agencies it would have been completely unmanageable given the scale of that crisis and that was across multiple different fronts – foreign and domestic, economic, transportation, budgetary, legal, intelligence, police, lots of different things,” a former Staff member recounted. Moreover, departmental staff can always decline the Staff’s direction, he noted, which would generally elevate the issue within the NSC system for further resolution.
CABINET AUTHORITIES

For some participants, particularly those who believe major reform is required, the NSC and Staff are not currently equipped with the legal authorities necessary to effectively manage and integrate national security missions in the modern international security environment, statutory authorities vested in Cabinet officers were, themselves, viewed as key legal impediments to the optimal performance of the national security system. For illustrative purposes, one former Staff member discussed an attempt to create an interagency mechanism to coordinate particular activities of the National Counterterrorism Center and the National Counterproliferation Center. In addition to general confusion over the roles and authorities of both entities, he described the Cabinet departments as ‘revolting’ whenever this new mechanism was perceived as reviewing or dictating departmental activities because the departments viewed it as infringing on their own statutory authorities.

Another subject matter expert, similarly addressing challenges posed by Cabinet authorities, noted that the 9/11 Commission had grappled with this very issue. He paraphrased the following conclusion reached by the commission: “It is hard to break down stovepipes when there are so many stoves that are legally and politically entitled to have cast-iron pipes of their own.” The report continued:

Recalling the Goldwater-Nichols legislation of 1986, Secretary Rumsfeld reminded us that to achieve better joint capability, each of the armed services had to “give up some of their turf and authorities and prerogatives.” Today, he said, the executive branch is “stove-piped much like the four services were nearly 20 years ago.” He wondered if it might be appropriate to ask agencies to “give up some of their existing turf and authority in exchange for a stronger, faster, more efficient government wide joint effort.” Privately, other key officials have made the same point to us.

According to the subject matter expert, these Cabinet authorities are the reason why no one person for the president, just because the president says so, can help him manage the system. To further illustrate the challenge posed by these authorities, he recalled the following anecdote:

When President [George W.] Bush realized the War on Terror was going to require the integration of many different departments and agencies he tried to
recruit [Gen.] Wayne Downing to do the job for him. And the first thing that happened was that the Department of Defense sent a legal memo to [National Security Advisor] Condoleezza Rice saying, “No. There is a chain of command codified in law and neither Wayne Downing or anyone else, regardless of their credentials, is going to do anything to interfere with that chain of command.” And many other departments and agencies could have sent similar memos.

He further recalled that when the NSC was originally established in the National Security Act of 1947 the Budget Bureau had insisted that the NSC be established as an advisory body, not an integrating body. In addition, he noted that the national security advisor, too, has “no statutory authority, no statutory standing, [and] no ability to do systems management.” The result, in his judgment, is that the president is unable to turn to anyone in government to solve problems that “are endemic to the system writ large.” As discussed in greater detail in Section III, however, not all participants shared the view that Cabinet authorities are impediments to the current national security system. One participant noted, for example, that the president’s chief of staff has tremendous influence over departmental activities.

FISCAL AND PERSONNEL LAWS

Participants generally agreed that the rigidity of current fiscal and personnel laws impede the swift allocation of fiscal and human resources across departmental lines to address fast-moving national security problems and, more generally, impede the development of an interagency culture. “It is the congress which legislates impediments to the flexibility and fluidity required in order to move resources to deal with complex issues,” one former official argued. The primary reason for such rigidity was traced to Congress’s reluctance to give up its strongest leverage over policymaking, i.e., the power of the purse.

Although few specific laws were cited, such as the Economy Act, one former executive lawyer recalled that during his time in the executive branch Congress would frequently attach riders to appropriation bills restricting the use of funds for specific interagency activities. In these cases, the lawyer recalled, even if a president wanted to bring departments together to solve a common problem he could not do so as a matter of law. Another lawyer noted, however, that these provisions have been treated as unconstitutional by nearly every president. Although he did not doubt the provision deterred some interagency coordination, he viewed the provision as “almost a dead letter.”

In subsequent correspondence, however, another former executive lawyer noted that the president already has authority to direct and control agency budgets either directly
or through the Office of Management and Budget. “So one question is why isn’t it wielded in a more effective manner?” he asked. “The second question then becomes, what additional legal authority might the executive need to use the funding tool to fuel cross-functional entities?”

In addition, current civil service laws were cited generally as an impediment to fostering an interagency culture within the civilian workforce. Although the military personnel system is structured to afford service members the opportunity for mid-career and senior career training and education, a participant noted, the civilian agencies only do so in a token manner. He concluded, “[n]o wonder someone who starts at [the Department of] State when they are 22 and is still at State when they are 55 thinks like a State Department bureaucrat.”

**CONGRESSIONAL RULES**

Participants also generally agreed that the efficiency of the executive branch is significantly impeded by jurisdictional lines in Congress, established by congressional rules, and congressional relations with the executive branch more generally. “Unless something can be done about how Congress interacts with the executive branch,” one participant argued, “efficiency will not be achieved. It is time for reform of the other branch.” A former executive branch official recalled that the 9/11 Commission argued that an effective executive branch was dependent upon the reorganization of oversight structures and processes within Congress:

> Of all our recommendations, strengthening congressional oversight may be among the most difficult and important. So long as oversight is governed by current congressional rules and resolutions, we believe the American people will not get the security they want and need. The United States needs a strong, stable, and capable congressional committee structure to give America’s national intelligence agencies oversight, support, and leadership. Few things are more difficult to change in Washington than congressional committee jurisdiction and prerogatives. To a member, these assignments are almost as important as the map of his or her congressional district. The American people may have to insist that these changes occur, or they may well not happen. Having interviewed numerous members of Congress from both parties, as well as congressional staff members, we found that dissatisfaction with congressional oversight remains widespread.\(^{iv}\)
The official concluded that Congress is as much of an obstacle in the debate over improvements to executive branch performance than it is an assistant. A congressional lawyer agreed that Congress could be an obstacle, while noting in jest, “except for my committee.” He illustrated the challenge that Congress faces by recounting a 2007 legislative effort to give the head of the Department of Homeland Security’s Intelligence and Analysis authority over the entire intelligence architecture within the department. Some components chose not to cooperate and contacted their separate authorizing committees to object to this legislative effort. He used this anecdote to illustrate that jurisdictional lines in Congress have real consequences for the executive branch. “The strongest form of leadership is leadership by example,” noted a former executive lawyer. “That is as true for the President as it is for the Congress.”

OTHER IMPEDIMENTS

Although the roundtable was focused primarily on legal issues, one participant noted in subsequent correspondence that it is also important to acknowledge that impediments to the NSC system may also be rooted in pathologies of the NSC process and personalities. In the case of the process, for example, he argued that because the NSC and Staff tend to be focused on crises and decisions, as opposed to pre-decisional and post-decisional aspects of national security, the process tends to drift to these areas as well, sometimes at the expense of strategic planning and appraisals of decisions already made. “Good process checks against such tendencies, or as Justice Jackson said, the tendency to focus on the immediate,” he argued. “The solution then, is not more law, but keen recognition of these pathologies and a commitment to a process that addresses them.”
What are the Possible Legal Remedies for these Impediments?

Having identified a range of possible functions the NSC and Staff should be performing in the 21st century, as well as several legal impediments for the optimal performance of such functions, in this section participants describe potential legal remedies to address these impediments or otherwise enhance the management and integration of the national security system. These remedies include, among other things, the creation of a director of national security, the creation of empowered interagency teams, the relaxation of rigid laws related to resource allocation, personnel reform, the resurrection of executive reorganization authority, and congressional reform.

DIRECTOR OF NATIONAL SECURITY

As described earlier, some participants believe that, despite the best efforts of presidents and talented Staff, modern presidents simply cannot be expected to effectively manage and integrate multi-agency missions given the president's vast span-of-control, the equally vast responsibilities of the presidency, the increasing demands on the current interagency system, and the limited authority of the Staff to assist presidents in the performance of their duties. In addition, the Staff is precluded from performing such essential management functions as making decisions and directing resources as a result of the Appointments Clause, statutory limitations of the Staff, and potential conflicts with Cabinet authorities. As a result, PNSR has proposed transforming the national security advisor into a statutorily empowered director of national security (DNS), with a supporting staff, who would conduct 'system management,' subject to the direction of the president. The DNS would be Senate-confirmed and would exercise authority delegated by the president, including authority to make decisions and de-conflict the cross-functional teams that PNSR envisions as a corollary recommendation.

A former congressional lawyer noted that there was a striking similarity between the legislative concept for the DNS and the purpose behind the Goldwater-Nichols Act of 1986, both of which were intended to enhance management and integration by modifying chains of command. In the case of Goldwater-Nichols, command authority was transferred from military service chiefs, who became principally responsible for training and equipping personnel, to unified combatant commands. In the case of the DNS, some – yet still undetermined – amount of authority would be transferred from Cabinet officials to the DNS. Two key differences were also noted, however. First, unlike Goldwater-Nichols, there is not yet consensus on the nature of the problem that the DNS proposal is designed to resolve. Goldwater-Nichols was successful, it was argued, because
policymakers spent years building consensus on the nature of the problem. Second, whereas Goldwater-Nichols involved modifying authorities within a single department, the DNS proposal would involve modifying authorities across the entire executive branch. This would create problems for, among other things, the authorization and appropriations processes in Congress.

A former senior executive branch official questioned the wisdom of the DNS proposal on several grounds and asked whether there may simply be an irredeemable conflict between the Constitution and efficiency of action. For example, he argued that the creation of a DNS would be tantamount to creating an unelected prime minister with practically full authority over the levers of government, yet with no political accountability. This alone made such a proposal, in his judgment, questionable in a democracy. He further argued that the creation of the DNS would invite Congress into a domain that properly belongs to the president. He, and others, also questioned whether creating the DNS would actually solve the problem it was designed to resolve or whether the DNS would simply inherit the problem.

The actual solution, in his view, was not top-down management but rather creating greater mobility in executive branch structures and encouraging the president to be creative in the use of existing powers, especially in utilizing the Cabinet itself. In this regard, he asserted that the British model has demonstrated that a Cabinet-form of government can be mobilized to solve common problems. In the end, he was not persuaded of the need to legislatively override the authorities of Cabinet departments and he concluded that the president already has “substantial power” to manage and integrate national security missions. The issue is one of presidential management, he asserted, “and I don’t know how you legislate that.”

But a subject matter expert argued in subsequent correspondence that the DNS proposal would not result in a de facto prime minister because the DNS would not exercise as much authority as participants may have presumed, and because the president would ultimately remain in charge of the entire cabinet and could direct interagency teams (discussed below) or departments at any point in time. Although the DNS would be given additional authority, this authority would be limited to a confined role of system management, which is actually less broad, he argued, than what is currently expected of the national security advisor. In other words, he argued, “there is middle ground between an unempowered, advisor-only [national security advisors] trying to trade on their relationship with the president, and an all-power[ful] Prime Minister type figure.” He referenced a paper, circulated to participants in advance, that justified the increased – but
limited – authority that a DNS would exercise as a system manager rather than an expert on every national security topic:

[O]verall system performance is currently ignored. The president is too busy and day-to-day issue management consumes the national security advisor and staff. The result is missing strategic direction, reactive rather than proactive communications, few resource allocation tradeoffs, poor institutional memory, and poor performance assessment in general. National security advisors are expected to be virtually omnipotent, omniscient, and omnipresent on all matters related to national security: 1) personally close to the president, serving as his alter ego on all national security matters; 2) substantively dominant on all national security issues; and 3) indefatigable as constant crisis manager for the priority issue of the day. These expectations are unrealistic, drawing the national security advisor into the inbox and away from system management. The overall result is lack of strategic direction and poorer system performance.

In other words, the creation of the DNS is designed to actually reduce the overall responsibilities of the national security advisor, in his view, while increasing his or her authorities within a narrower role. The goal is to provide the DNS with a more realistic, although admittedly still difficult, set of responsibilities, he argued. “With a clear role for system management (and not issue management), the DNS would only help the president assign missions to interagency teams for intrinsically interagency matters that cannot be handled by a lead agency approach,” he argued. Emphasizing the central role of the president, he further noted that “department heads could dispute the decisions of these interagency teams and appeal to the president for redress when necessary.”

Another former executive lawyer argued in subsequent correspondence that the recommendation for a DNS appears to be an attempt to create a director of national intelligence for national security purposes. In such a case, he argued the recommendation “would be still-born, resisted by Presidents and likely unconstitutional, if it purports to direct a White House run process.” As an alternative, he suggested finding a president or national security advisor who believe the proper role of the national security advisor is to perform these functions. But this would run counter to the Brent Scowcroft model, which, in his judgment, many believe is the most effective model for any national security advisor. “[A]s some have learned, you cannot have an effective [national security advisor], serving as [the president’s] alter ego, if there are other shadow [national security advisors] and/or a competitive base or process at work at the same time.” He reasoned, “[t]o the extent the
position is located outside the White House, proponents will need to explain how it will effectively wield authority, not violate principles of privilege, or present all the same issues that a DNI does, and then some because the subject matter is all national security and not just intelligence.”

Another former senior departmental official warned against looking at these issues only from a staff perspective. He reminded participants that Cabinet officials do know how to talk to one another and that interagency activities occur not only through the Staff, but also through Cabinet officials themselves. The best coordination he ever witnessed, he recalled, involved Cabinet officials who agreed upon a set of clear objectives and principles at the beginning of an interagency process, which then provided valuable guidance for lower-level staff. He further cautioned against the notion that everything will work better if responsibility is moved to the White House, as in the case of the DNS.

After discussing the merits of the DNS proposal, one subject matter expert who supported the DNS proposal recited a portion of Federalist No. 23 to emphasize, by analogy, that giving the president the effective means to delegate power for the system management and integration of multi-agency missions is not alien to any constitutional provisions or traditional American government:

Is there not a manifest inconsistency in devolving upon the federal government the care of the general defense, and leaving in the State governments the effective powers by which it is to be provided for? Is not a want of co-operation the infallible consequence of such a system? And will not weakness, disorder, an undue distribution of the burdens and calamities of war, an unnecessary and intolerable increase of expense, be its natural and inevitable concomitants? Have we not had unequivocal experience of its effects in the course of the revolution which we have just accomplished?

In his judgment, replacing the term ‘State governments’ with ‘departments and agencies’ would aptly describe the problem facing the national security system today. “Yes what we’re trying to do here today is very difficult,” he remarked, “but it’s not on the level of rewriting the Constitution or Federalism, etc. We’re really just talking about coherence within the executive branch. That’s not too much to expect from our government.”

**EMPOWERED INTERAGENCY TEAMS**

While the proposal for a DNS would create a statutorily empowered full-time system manager and integrator atop the national security system, reformists believe that in
an international security environment characterized by increasing complexity, uncertainty, and speed, the DNS could not be expected to manage the full range of national security issues while at the same time managing the system. But without modifications to current legal authorities, the Appointments Clause and potential conflicts with Cabinet authorities would preclude any other individual or organization from assisting the president and DNS in managing and integrating particular national security issues. For this reason, PNSR has recommended creating complementary and statutorily empowered decentralized interagency teams to manage and integrate the expertise and capabilities of the departments for select issues. These empowered interagency teams would maintain budget authority independent of the departments and would be statutorily empowered to command departmental resources assigned to them under the direction of the president through the DNS.

According to a former departmental official, the increasing complexity, uncertainty, and speed of the international security environment is a challenge that the business community similarly confronted in the mid-1980s when corporations began utilizing cross-functional teams which drew the relevant expertise from various components of the corporation to manage complex projects in an integrated fashion. This organizational innovation focused attention on the problems facing the corporation as a whole, rather than merely the problems facing the components. But, in his view, the U.S. Government has not yet learned this organizational innovation.

The current interagency system remains dominated by departmental interests and authorities at the expense of the national interest, he argued. He noted that the Defense Department learned this lesson after Pearl Harbor when President Roosevelt created unified military commands. But the military services fought back, he said, and found congressional allies to prevent it. It was not until Congress passed the Goldwater-Nichols Act of 1986, however, that the U.S. Government returned to the idea of unified commands by transforming the military components into service providers for unified combatant commands. “In the interagency space, we are still the day before Pearl Harbor,” he concluded. “We are trying to do complex things that ought to be done by cross-functional teams.”

Participants noted that different types of interagency teams have begun to emerge organically and through legislation, although none of these teams are empowered to actually manage and integrate the departments to achieve national security objectives. For example, the National Counterterrorism Center’s Directorate for Strategic Operational Planning (DSOP) was mentioned as a type of interagency team that serves as an ‘appendage’ to the NSC system and Staff. According to one participant involved in the
early legislative discussions, DSOP was designed by Congress to bridge the gap between high-level counterterrorism policy established in the NSC system and tactical-level counterterrorism operations carried out by the departments. Unlike the NSC system, which resides in the EOP, Congress lodged DSOP’s interagency counterterrorism planning functions alongside intelligence community functions within NCTC to ensure that Congress could oversee its activities without confronting claims of executive privilege.

Like interagency mechanisms that came before it, the head of DSOP was given no authority to direct departmental resources. In lieu of directive authority, a participant recalled, Congress sought to give DSOP additional prestige to influence departmental action by creating a direct reporting line from the director of NCTC/DSOP to the president. This reporting line also helped avoid the perception of departments that DSOP was ‘captured’ by the intelligence community, since the other half of NCTC was part of the intelligence community. According to a former executive branch official, the close working relationship between the director of NCTC/DSOP and the Staff was critical for ensuring a continuous stream of information between the Staff to DSOP. But another former official, while acknowledging that it was a new organization at the time and experiencing natural growing pains, referred to the stand-up of DSOP as a “disaster.” Requests for information sent by DSOP created a sense, in at least one agency, that there was too much process and bureaucracy without clear value being provided in return.

The State Department’s Office of the Coordinator for Reconstruction and Stabilization (S/CRS) was also discussed as one type of interagency team. Unlike DSOP, S/CRS is housed directly in a Cabinet department, and for four years it operated pursuant only to presidential directive, not legislation. A participant argued that the absence of legislation made it easier for departments to mount a more effective guerilla campaign against the program, and he noted that without legislation, it took S/CRS three years to achieve agreement across the interagency on roles and responsibilities of the departments.

Despite the absence of legislation, at the technical-level, he argued that integration was achieved through interagency negotiations with the creation of a civilian response corps across eight different agencies. At the resource-level, S/CRS “didn’t quite solve it.” Although S/CRS was provided enough funds to get by and received congressional funding in both 2008 and 2009, he argued that, because of pressure applied on appropriators by USAID, S/CRS continues to be funded through two separate accounts in USAID and the State Department. Nevertheless, S/CRS was able to create a unified budget, but, in his opinion, operations are not as smooth as they might otherwise be with a single funding stream. At the crisis response-level, “the results aren’t so good,” he noted. To solve the “perpetual inefficiency of our government in responding to crises,” S/CRS created the
Interagency Management System which was approved by all of the relevant departments, “but of course it has never been used [in any meaningful fashion].” In explaining why this system has never been used, he remarked:

We operate in an inefficient way because it is politically convenient. When a crisis erupts anyone who has any plausible stake in that crisis and enough political clout will grab a piece of it. And as a consequence, you have multiple working groups or multiple senior groups, multiple chains of information and chains of command all doing duplicative work that cuts against each other.

The Interagency Management System is one model that would have stopped this duplicative work, in his view, but it never gained traction. He suggested that one possible remedy would be for this type of process to be codified, although he conceded that it may raise separation of powers issues and it would require the president to actually employ it.

Other participants warned against viewing legislation as the only means for achieving what empowered interagency teams are at least partially designed to achieve. The critical role of presidential leadership was also emphasized on multiple occasions and in various ways. One former official argued that if a president insists that an interagency team needs to work, it will work and some of the problems identified by participants will disappear. In other words, “[a]n engaged and demanding president will get results.” Another former senior official similarly concluded that the job of the president is to ensure Cabinet officials act as an ensemble. If they choose not to, the president should fire them, he asserted plainly.

The way to make government operate is for a president to make clear that he will not tolerate its failing to operate. And the way to make that clear is to dismiss people who fail at that process. The more heads there are on a pike to illustrate what happens if you will not learn to collaborate as needed by the country, the better. And that should be done sooner rather than later in any given administration.

A former executive lawyer also argued that the president already has the legal authority today to stand up organizations outside of the EOP to assist him in making crisper decisions and integrating information. For example, he argued that the president could task an existing officer under the Appointments Clause to lead a task force, staffed by departmental detailees and resourced through existing fiscal authorities, to gather
information and intelligence, assemble documents for presidential decision through the NSC system, and provide advice to the president and the heads of other departments—all without new legislation. Legislation is only required, he argued, if the president wants the official to make decisions and direct departmental action. If so, the question becomes whether such legislation would come at an unacceptable cost for the president. For example, would Congress require periodic reporting by this official or would Congress require the submission of intelligence assessments to congressional committees? The trick, he stated, is to find a legislative solution that can still be effective but does not contain burdensome requirements to a point that the official becomes marginalized.

**RESOURCE FLEXIBILITY AND PERSONNEL REFORM**

To address what participants viewed as rigid fiscal and personnel laws that impede the swift allocation of fiscal and human resources across departmental lines and, more generally, impede the development of an interagency culture, several participants recommended that Congress should provide the president with additional flexibility for structuring, empowering, and resourcing interagency organizations. From a congressional perspective, there was a willingness to consider a tradeoff whereby additional flexibility could be given to the president in return for greater access to the management functions of the Staff.

In addition, to ensure that personnel are properly trained for interagency missions, multiple participants argued that reforms must be made to personnel laws and systems. According to one participant, changes in personnel systems “is a center of gravity for any effective legal or structural reforms.” Such incentives need to be enacted in order “to overcome the natural inclination to protect one’s own agency’s equities and to respond to new tasking with the usual reaction of ‘not our problem or mission,’ ‘don’t have money for this, so send more if you want us to do it,’ or ‘it’s not on our priority list.’”

The key, in his view, is “to develop cross-cutting cultures and commitments that can transcend the organizational parochialism that slows cooperation and integration across the stove-pipes.” He suggested several ways of achieving this, including joint training opportunities and incentives for cross-organizational assignments such as making joint duty assignments mandatory for promotion to senior career positions, or entry into the Senior Executive Service, as well as joint promotion boards to ensure that only officers with demonstrated “jointness” take positions of major responsibility. Other participants expressed support for these changes.

Another participant noted that, while the Defense Department has created an interagency culture among the military services, there is no comparable system in the civil
service which, in his view, is “dangerous” for our Republic. But in subsequent correspondence, another participant pointed to the Civilian Response Corps as “a great initiative and one that warrants further study and discussion” because it addresses the need for, among other things, resource flexibility. He also noted that the National Defense University and the Army schools at Fort Leavenworth have taken the lead in training personnel from all entities in interagency process and the importance of integrating policy and resources at the interagency level, task organization level, and between headquarters and the field.

**Reorganization Authority**

Related to the argument that additional flexibility should be afforded the president in resourcing interagency missions, a participant argued that Congress should also afford the president additional flexibility in structuring the executive branch. As a former senior executive branch official, he argued that congressional attempts to precisely define interagency structures have not been entirely successful or desirable, and perhaps Congress could pass a statute that would allow the president to delegate authority and determine the structures and processes that, in the president’s judgment, would most effectively execute the laws and carry out national policy. The type of reorganization authority described by the participant had, in fact, been statutorily authorized by Congress in various forms throughout most of the 20th century. But after a Supreme Court decision cast constitutional doubt on the legislative process associated with such authority, Congress allowed the reorganization authority to expire in the mid-1980s and it has never been reauthorized.iv

**Congressional Reform**

To address the impediment to executive branch efficiency caused by current jurisdictional lines in Congress, participants advocated for reforming the way in which Congress oversees the executive branch. Participants offered no specific changes, however, with regard to how congressional oversight should be reformed other than suggesting, generally, that committee structures should reflect a more rational and coherent organization.

**Other Remedies**

In addition to the foregoing legal remedies, some participants focused their comments on other ways to enhance the management and integration of national security
missions within current legal frameworks. For example, one participant argued that the critical question may not be, “Who is in charge of a particular mission?” It may be, “Who is in charge of what?” In other words, clarifying roles and responsibilities for not only the Staff but also the departments could improve the functioning of the system. In this vein, one participant noted that assigning clear responsibility to a department, and then holding them accountable is critical. “If it is not my responsibility, I’m not going to want to spend my resources on it,” he said. “I won’t want to send my best people.” Alternatively, multiple participants argued that another way to enhance integration within existing legal frameworks is simply to incentivize or sanction departments who are non-compliant. According to one participant, “[t]o do that, it seems like there are three mechanisms you can use: budget authority, changing the responsibilities or portfolios or agencies, or controlling the personnel promotion or tenure within an agency.”
What is the Proper Role of Congress?

Because the NSC system is a unique organization inside the U.S. Government that serves as both a repository for privileged presidential advice and as the principal vehicle for exercising the president’s constitutional authority over foreign relations and military affairs, it is particularly vulnerable to competing claims by the legislative and executive branches regarding who has the power to shape the system. This was a theme that recurred throughout the roundtable discussion and for which ambiguity appeared to triumph over clarity. Which branch of government is entitled to determine the structures and processes of the NSC system? What is the proper role of Congress in overseeing the system? These are the questions addressed by participants in the following section.

**Legislative Limitations**

The unique nature of the NSC system tends to trigger competing constitutional claims by the political branches regarding who ultimately determines the structures and processes of the NSC system. Prior to discussing specific remedial options during the roundtable, therefore, executive and congressional lawyers discussed the constitutional and practical limitations of statutory reforms of the NSC system. From the executive perspective, for example, one lawyer argued that “[t]here is a point at which the lawyers for the president would view an effort to legislate the advice that the president receives on national security matters as unconstitutional, as interfering with his particularly unique authority to manage as chief executive and commander in chief of national security functions of the United States.” Efforts to reorganize the Staff by Congress flirts with this unconstitutional line because, he reasoned, the Staff is currently the mechanism used by the president to receive that advice.

As one example of this conflict, he cited to the statutory creation of the U.S. Coordinator for the Prevention of Weapons of Mass Destruction Proliferation and Terrorism inside the EOP to advise the president on the prevention of weapons of mass destruction proliferation and terrorism. This was described as a “very difficult exercise for the executive branch” because the president and the national security advisor were not convinced they needed a person organized in that way to provide that advice. Setting aside the legalities of the issue, he argued that the fundamental question is whether the advice will be effective. “Giving the president advice is not at all helpful in affecting policy unless the president values it,” he remarked. “And generally speaking, if he’s not ordering it he’s probably not going to value it.” In addition, if the new statutory adviser is semi-beholden to Congress, in the sense that he would have to report to Congress on a periodic basis, “he
will be the kind of nose that is under the tent that will be excluded from the most sensitive discussions.” For these reasons, he concluded, “trying to legislate that reorganization is a very difficult and probably ultimately ineffective exercise.”

Another former executive lawyer reinforced this view by noting, although Congress has the power to legislate, the president has the power to implement. He noted that there are numerous examples where Congress has sought to tell presidents how to organize the Staff and presidents have essentially ignored such prescriptions, as was the case with the statutory creation of the NSC committees on transnational threats and foreign intelligence.

In addition to these limitations, executive lawyers also noted that legislation enshrines rigidity in an otherwise flexible system, which can complicate and frustrate the optimal performance of the NSC system. A former Staff member argued that while a statutory structure in the EOP may initially work for one president, administrations change, principles change, and circumstances change. He argued that an examination of current statutory structures inside the EOP indicates that many such structures have become irrelevant ‘crustaceans’ on the EOP.

Several lawyers pointed to the current NSC statute as an example of this phenomenon. For example, the statute lists the director for Mutual Security and the chairman of the National Security Resources Board as members of the NSC despite the fact that both positions became obsolete decades ago. In this vein, a former executive lawyer remarked to laughter, “[h]alf of the existing NSC statute is embarrassing.” He further noted that even if there was general consensus regarding what reforms should be made to the NSC system, when Congress gets involved there is no guarantee that the resulting legislation will actually reflect the original consensus. As a result, he concluded that the likelihood Congress could produce a better statute than the current one is quite remote.

Congressional lawyers, on the other hand, shared different perspectives. A congressional lawyer acknowledged, “discomfort in trying to legislate what kind of advice a president receives,” yet he did not believe there was a constitutional limitation for Congress to legislate EOP structures. In his view, the issue was not whether Congress can legislate in this area as a matter of law, but how it should be done. In this regard, he believed the key to effective legislation was to balance many different equities. As one example, during the legislative debates in advance of the Intelligence Reform and Terrorism Prevention Act of 2004, the question was asked: ‘Who should perform the president’s daily intelligence briefing?’ He noted that there was great reluctance by at least one congressional committee to dictate who should brief the president on intelligence.
Another congressional lawyer noted that Congress obviously believes it can legislate in the EOP based on the statutes that are currently in effect, including statutes that created the Office of Management and Budget, the U.S. Coordinator for the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, and the NSC committees on transnational threats and foreign intelligence – all of which were statutorily established in the EOP. But he acknowledged that effective legislation pertaining to the Staff requires an executive-legislative partnership because while Congress has the power to legislate the president has the power to implement.

He also questioned whether – based on the range of functions being performed by the Staff today, including making decisions and directing departmental action – viewing the Staff as simply presidential advisors is “somewhat anachronistic.” Instead, he suggested that policymakers should begin to consider whether there is a meaningful difference between Congress seeking to legislate advice to the president, which tends to intrude upon presidential prerogatives, and legislating the Staff’s management of the system, which tends to be understood by both branches as a proper realm of congressional oversight. If this is a relevant distinction, he noted it would have distinct implications for how presidents and future Congresses would view efforts by Congress to legislate and oversee future Staff designs.

Participants also mentioned several other distinct advantages to congressional action. For example, one participant with extensive foreign policy experience noted that the relative permanence afforded by the statutory creation of executive branch structures and processes does result in greater rigidity, but it also provides greater certainty for the executive branch. While he understood the desire to protect presidential prerogatives, he also asserted that institutionalizing an interagency process makes sense because the current process is generally ad hoc and must be reinvented every time. But even if the process were to be institutionalized, he noted that the president would still need to implement it in a fashion envisioned by the statute. In addition, a congressional lawyer noted that there are other potential benefits of legislation for the executive branch, including the possibility of receiving additional funds and greater flexibility.

**INTERAGENCY OVERSIGHT ‘VOID’**

Congressional oversight of the NSC system was described by one congressional lawyer as “something of a void.” As a repository for privileged presidential advice located in the EOP, the executive branch tends to withhold information from Congress on the grounds of executive privilege, he stated. This was described as a “fairly serious issue from
the congressional perspective” because without information it is difficult to conduct effective oversight.

As an example, one congressional lawyer pointed to White House ‘czars’ and argued that if these czars were only providing advice to the president, then at least one committee in Congress would not be concerned because the president is entitled to have his own advisers. But the problem arises when Congress is not provided even basic information regarding what functions these individuals are actually performing. If these individuals are engaged in activities that are impacting the lives of people, he viewed it as incredibly important for Congress to have a clear mandate for oversight and a single individual who can be held accountable to the American people for that action and implementation.

A former departmental official noted that czars are simply a reflection that the current system is broken. The congressional lawyer did not disagree and asserted that the issue is not whether the system should be improved, but how best to do so. He argued that czars are a poor way to proceed because they cause push back from the departments and Congress, which ultimately leads to ineffective implementation.
The Role of Legislation in Shaping the NSC

During the roundtable discussion, participants expressed a range of views regarding what functions the NSC and Staff ought to be performing in the modern international security environment. Some participants suggested that improving the management and integration of multi-agency missions should be accomplished within the basic legal framework of the current NSC system. Others argued that, despite the best efforts of presidents and talented Staff, the current NSC system lacks sufficient institutional authority to serve as an effective management and integration arm of the president in a security environment characterized by increasing complexity, uncertainty, and speed.

Although participants reached no consensus regarding what functions the NSC and Staff should be performing in the 21st century, participants identified a number of legal impediments to current and potential functions performed by the NSC and Staff. For participants who suggested improving the NSC system within its current legal framework, legal impediments tended to be rooted in statutory laws that unduly restrict the movement of resources across departmental lines and hinder the creation of a unique interagency culture, as well as congressional rules that further inhibit the efficiency of the executive branch. These participants argued, in turn, for relaxing rigid laws related to resource allocation, modifying personnel laws and civil service rules to promote a more effective interagency culture within the civil service, and reforming congressional jurisdiction in a more rational and coherent fashion.

For participants who argued for broader changes to the NSC system, legal impediments tended to be rooted in the Appointments Clause and other statutes that limit the role of the Staff in managing and integrating multi-agency missions. These participants argued, in turn, for the statutory creation of an empowered director of national security to manage the system, as well as statutorily empowered interagency teams to manage and integrate particular national security issues on behalf of the president.

Perhaps no issues garnered as much agreement as those related to the role of legislation in shaping the NSC system, as well as the role of Congress in overseeing the system. For example, participants generally agreed that attempts to legislate reforms to the NSC system require an executive-legislative branch partnership. Moreover, participants generally agreed that Congress must be reformed in order to improve not only the performance of the executive branch, but also to improve the quality of congressional oversight on behalf of the American people.
Endnotes


ii Exec. Order No. 8248, 4 F.R. 3864, Establishing the Divisions of the Executive Office of the President and Defining Their Functions and Duties (Roosevelt, Sept. 12, 1939) (amended by E.O. 12608; revoked by E.O. 10452).


iv Exec. Order No. 8248, supra note 2.

v Id.

vi Harold D. Smith, Letter to Franklin D. Roosevelt, Nov. 9, 1944; Miscellaneous, 1945-1953 [1 of 2]; Box 130; PSF: Subject File, 1940-1953, Bureau of the Budget File; Papers of Harry S. Truman, Truman Library.

vii Unification—Memorandum, “Keeping the Nation Strong”; Box 17; Papers of Clark M. Clifford, Truman Library.

viii Id.

ix Harry Truman, Our Armed Forces Must Be Unified, COLLIER’S, Aug. 26, 1944, at 16.

x Unification—Memorandum, “Keeping the Nation Strong,” supra note 7.


xii George M. Elsey, Memorandum for James Lay, Apr. 17, 1951; National Defense – Armed Forces unification (folder 15); Box 84; Papers of George M. Elsey, Truman Library.

xiii “Keeping the Nation Strong,” supra note 7.

xiv Id.

xv Clark M. Clifford, Memorandum for Judge Rosenman, Dec. 13, 1945; President Truman’s Fight to Unify the Armed Service 1945-49 [3 of 14]; Student Research File, Truman Library.

xvi Id.

xvii Harold D. Smith, Memorandum for Harry S. Truman, Apr. 8, 1946; Military, 1945-1953; Box 130; PSF: Subject File, 1940-1953, Bureau of the Budget File; Papers of Harry S. Truman, Truman Library.


xix Harold Smith, Memorandum for Harry S. Truman; May 22, 1946; Military, 1945-1953; Box 130; PSF: Subject File, 1940-1953, Bureau of the Budget File; Papers of Harry S. Truman, Truman Library.

xx Unification of the War and Navy Departments, Jan. 30, 1947; President Truman’s Fight to Unify the Armed Service 1945-49 [13 of 14]; Student Research File, Truman Library.


xxii George C. Marshall, Memorandum for Harry S. Truman, Feb. 7, 1947; President Truman’s Fight to Unify the Armed Service 1945-49 [8 of 14]; Student Research File, Truman Library.

amended at 50 U.S.C. § 402 (2006)).

Bureau of the Budget, Memorandum for the President, Aug. 8, 1947; National Defense – Armed Forces unification (folder 6); Box 83; Papers of George M. Elsey, Truman Library.


Unlike Truman and other presidential aides at the time, Souers left behind few documents that shed light on his activities and role in government. This fact has likely contributed to the lack of attention paid to the influential, yet quiet role Souers played in the early years of the modern national security system as the first Director of Central Intelligence and as the first NSC Executive Secretary.

Justice Jackson argued that Presidential powers are not fixed but fluctuated depending upon their disjunction or conjunction with those of Congress. He set forth a tripartite framework for analyzing the constitutionality of presidential actions in relation to congressional actions.

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.


The current NSC statute also includes various obsolete positions, including the director for Mutual Security, the chairman of the National Security Resources Board, the chairman of the Munitions Board, and the chairman of the Research and Development Board. See National Security Act of 1947, 50 U.S.C. § 402(a) (2006).

PPD-1, Organization of the National Security Council System (Barack H. Obama, Feb. 13, 2009).

Id.


and International Studies, *Beyond Goldwater-Nichols: Defense Reform for a New Strategic Era, Phase 1 Report* 21 (Mar. 2004) (Twenty-first century wars are not just military operations, but increasingly demand the use and integration of all the instruments of national power – diplomacy, intelligence, law enforcement, economic and military).


x See 9/11 COMMISSION REPORT, supra note 35, at 350 (“Before 9/11, the United States tried to solve the al Qaeda problem with the same government institutions and capabilities it had used in the last stages of the Cold War and its immediate aftermath. These capabilities were insufficient, but little was done to expand or reform them.”).

xi See *Beyond Goldwater-Nichols*, supra note 38, at 60 (In the post-Cold War, post-9/11 security environment, it is likely that future operations will be both interagency and international in character, requiring a high degree of integration and coordination.).

xii See Council on Foreign Relations, *In the Wake of War: Improving US Post-Conflict Capabilities*, Report of an Independent Task Force 6 (2005) (The higher priority now accorded to nation-building has yet to be matched by a comprehensive policy or institutional capacity within the U.S. government to engage successfully in stabilization and reconstruction missions. Despite some welcome initial moves, responsibility within the U.S. government for stabilization and reconstruction operations is diffuse and authority is uncertain. Policies delineating the proper role of the military and civilian agencies have yet to be articulated. Further, the civilian agencies involved in stabilization and reconstruction activities operate without the benefit of a unified command structure ensuring that policy, programs, and resources are properly aligned.).

xiii See Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Report to the President of the United States* 18 (Mar. 2005) (“Everywhere we looked, we found important (and obvious) issues of interagency coordination that went unattended, sensible Community-wide proposals blocked by pockets of resistance, and critical disputes left to fester. Strong interagency cooperation was more likely to result from bilateral “treaties” between big agencies than from Community-level management.”).

xiv See generally *Project on National Security Reform, Forging a New Shield* (Nov. 2008).


xlix In *Edmond*, the Supreme Court stated, “the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President: whether one is an ‘inferior’ officer depends on
whether he has a superior.” *Id.* at 662. The Court cautioned, however, that it is “not enough” to identify other officers “who formally maintain a higher rank, or possess responsibilities of a greater magnitude.” *Id.* at 662-63. Rather, the majority concluded that “we think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.” *Id.* at 663.

1 *Id.* at 660.


lii *Id.*

liii *See generally* Economy Act of 1932, 31 U.S.C. § 1535 (2006) (authorizing the head of an agency to purchase goods or services from other agencies if amounts are available, the head of the ordering agency decides the order is in the best interest of the U.S. Government, the other agency is able to provide the goods or services, and the head of the agency decides the goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise).


Appendix A. Roundtable Agenda

ROLE OF THE NATIONAL SECURITY COUNCIL
December 8, 2010
Arnold & Porter LLP
555 Twelfth Street NW, Washington, DC 20004-1206

09:30 AM  Registration & Coffee

10:00 AM  Introduction & Overview
Juan Zarate and James R. Locher III

10:20 AM  Session 1: Responsibilities of the National Security Staff and a “Director of National Security”
Judge James Baker and Christopher Lamb

12:00 PM  Lunch Keynote
Sergio Jaramillo, National Security Advisor to the President of Colombia

12:30 PM  Session 2: Subordinate Interagency Organizations
Juan Zarate

01:20 PM  Break

01:25 PM  Session 3: Oversight & Ethic
Gordon Lederman

02:15 PM  Lessons Learned & Next Steps
Juan Zarate and Judge James Baker

03:00 PM  Adjournment
Appendix B. Current NSC Statute


(a) Establishment; presiding officer; functions; composition

There is established a council to be known as the National Security Council (hereinafter in this section referred to as the “Council”). The President of the United States shall preside over meetings of the Council: Provided, that in his absence he may designate a member of the Council to preside in his place.

The function of the Council shall be to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.

The Council shall be composed of—

(1) the President;

(2) the Vice President;

(3) the Secretary of State;

(4) the Secretary of Defense;

(5) the Secretary of Energy;

(6) the Director for Mutual Security;

(7) the Chairman of the National Security Resources Board; and

(8) the Secretaries and Under Secretaries of other executive departments and of 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.

(b) Additional functions

In addition to performing such other functions as 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, it shall, subject to the direction of the President, be the duty of the Council—
(1) to assess and appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purpose of making recommendations to the President in connection therewith; and

(2) to consider policies on matters of common interest to the departments and agencies of the Government concerned with the national security, and to make recommendations to the President in connection therewith.

(c) Executive secretary; appointment; staff employees

The Council shall have a staff to be headed by a civilian executive secretary who shall be appointed by the President. The executive secretary, subject to the direction of the Council, is authorized, subject to the civil-service laws and chapter 51 and subchapter III of chapter 53 of title 5, to appoint and fix the compensation of such personnel as may be necessary to perform such duties as may be prescribed by the Council in connection with the performance of its functions.

(d) Recommendations and reports

The Council shall, from time to time, make such recommendations, and such other reports to the President as it deems appropriate or as the President may require.

(e) Participation of Chairman or Vice Chairman of Joint Chiefs of Staff

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.

(f) Participation by Director of National Drug Control Policy

The Director of National Drug Control Policy may, in the role of the Director as principal adviser to the National Security Council on national drug control policy, and subject to the direction of the President, attend and participate in meetings of the National Security Council.

(g) Board for Low Intensity Conflict

The President shall establish within the National Security Council a board to be known as the “Board for Low Intensity Conflict”. The principal function of the board shall be to coordinate the policies of the United States for low intensity conflict.

(h) Committee on Foreign Intelligence
(1) There is established within the National Security Council a committee to be known as the Committee on Foreign Intelligence (in this subsection referred to as the “Committee”).

(2) The Committee shall be composed of the following:

(A) The Director of National Intelligence.

(B) The Secretary of State.

(C) The Secretary of Defense.

(D) The Assistant to the President for National Security Affairs, who shall serve as the chairperson of the Committee.

(E) Such other members as the President may designate.

(3) The function of the Committee shall be to assist the Council in its activities by—

(A) identifying the intelligence required to address the national security interests of the United States as specified by the President;

(B) establishing priorities (including funding priorities) among the programs, projects, and activities that address such interests and requirements; and

(C) establishing policies relating to the conduct of intelligence activities of the United States, including appropriate roles and missions for the elements of the intelligence community and appropriate targets of intelligence collection activities.

(4) In carrying out its function, the Committee shall—

(A) conduct an annual review of the national security interests of the United States;

(B) identify on an annual basis, and at such other times as the Council may require, the intelligence required to meet such interests and establish an order of priority for the collection and analysis of such intelligence; and

(C) conduct an annual review of the elements of the intelligence community in order to determine the success of such elements in collecting, analyzing, and disseminating the intelligence identified under subparagraph (B).
(5) The Committee shall submit each year to the Council and to the Director of National Intelligence a comprehensive report on its activities during the preceding year, including its activities under paragraphs (3) and (4).

(i) Committee on Transnational Threats

(1) There is established within the National Security Council a committee to be known as the Committee on Transnational Threats (in this subsection referred to as the “Committee”).

(2) The Committee shall include the following members:

   (A) The Director of National Intelligence.

   (B) The Secretary of State.

   (C) The Secretary of Defense.

   (D) The Attorney General.

   (E) The Assistant to the President for National Security Affairs, who shall serve as the chairperson of the Committee.

   (F) Such other members as the President may designate.

(3) The function of the Committee shall be to coordinate and direct the activities of the United States Government relating to combatting transnational threats.

(4) In carrying out its function, the Committee shall—

   (A) identify transnational threats;

   (B) develop strategies to enable the United States Government to respond to transnational threats identified under subparagraph (A);

   (C) monitor implementation of such strategies;

   (D) make recommendations as to appropriate responses to specific transnational threats;

   (E) assist in the resolution of operational and policy differences among Federal departments and agencies in their responses to transnational threats;
(F) develop policies and procedures to ensure the effective sharing of information about transnational threats among Federal departments and agencies, including law enforcement agencies and the elements of the intelligence community; and

(G) develop guidelines to enhance and improve the coordination of activities of Federal law enforcement agencies and elements of the intelligence community outside the United States with respect to transnational threats.

(5) For purposes of this subsection, the term “transnational threat” means the following:

(A) Any transnational activity (including international terrorism, narcotics trafficking, the proliferation of weapons of mass destruction and the delivery systems for such weapons, and organized crime) that threatens the national security of the United States.

(B) Any individual or group that engages in an activity referred to in subparagraph (A).

(j) Participation of Director of National Intelligence

The Director of National Intelligence (or, in the Director’s absence, the Principal Deputy Director of National Intelligence) may, in the performance of the Director’s duties under this Act and subject to the direction of the President, attend and participate in meetings of the National Security Council.

(k) Special Adviser to the President on International Religious Freedom

It is the sense of the Congress that there should be within the staff of the National Security Council a Special Adviser to the President on International Religious Freedom, whose position should be comparable to that of a director within the Executive Office of the President. The Special Adviser should serve as a resource for executive branch officials, compiling and maintaining information on the facts and circumstances of violations of religious freedom (as defined in section 6402 of title 22), and making policy recommendations. The Special Adviser should serve as liaison with the Ambassador at Large for International Religious Freedom, the United States Commission on International Religious Freedom, Congress and, as advisable, religious nongovernmental organizations.

(l) Participation of Coordinator for the Prevention of Weapons of Mass Destruction Proliferation and Terrorism

The United States Coordinator for the Prevention of Weapons of Mass Destruction Proliferation and Terrorism (or, in the Coordinator’s absence, the Deputy United States Coordinator) may, in the performance of the Coordinator’s duty as principal advisor to the
President on all matters relating to the prevention of weapons of mass destruction proliferation and terrorism, and, subject to the direction of the President, attend and participate in meetings of the National Security Council and the Homeland Security Council.
Appendix C. Current NSC Directive


**Subject: Organization of the National Security Council System**

To assist me in carrying out my responsibilities in the area of national security, I hereby direct that the National Security Council system be organized as follows.

**A. The National Security Council**

The National Security Council (NSC) shall be the principal forum for consideration of national security policy issues requiring Presidential determination. The functions, membership, and responsibilities of the NSC shall be as set forth in the National Security Act of 1947, as amended, and this Presidential Policy Directive. The NSC shall advise and assist me in integrating all aspects of national security policy as it affects the United States – domestic, foreign, military, intelligence, and economic (in conjunction with the National Economic Council). Along with its subordinate committees, the NSC shall be my principal means for coordinating executive departments and agencies in the development and implementation of national security policy.

The NSC shall have as its members the President, Vice President, Secretary of State, Secretary of Defense, and Secretary of Energy, as prescribed by statute. In addition, the membership of the NSC shall include the Secretary of the Treasury, the Attorney General, the Secretary of Homeland Security, the Representative of the United States of America to the United Nations, the Assistant to the President and Chief of Staff (Chief of Staff to the President), and the Assistant to the President for National Security Affairs (National Security Advisor). The Director of National Intelligence and the Chairman of the Joint Chiefs of Staff, as statutory advisers to the NSC, shall attend NSC meetings. The Counsel to the President shall be invited to attend every NSC meeting, and the Assistant to the President and Deputy National Security Advisor shall attend every meeting, and serve as Secretary. When international economic issues are on the agenda of the NSC, the NSC’s regular attendees will include the Secretary of Commerce, the United States Trade Representative, the Assistant to the President for Economic Policy, and the Chair of the Council of Economic Advisers. When homeland security or counter-terrorism related issues are on the agenda, the NSC’s regular attendees will include the Assistant to the President for Homeland Security and Counter-Terrorism. When science and technology related issues are on the agenda, the NSC’s regular attendees will include the Director of the Office of Science and Technology Policy. The heads of other executive
departments and agencies, and other senior officials, shall be invited to attend meetings of
the NSC as appropriate.

The NSC shall meet regularly and as required. The National Security Advisor, at
my direction and in consultation with other members of the NSC, shall be responsible for
determining the agenda, ensuring that necessary papers are prepared, and recording NSC
actions and Presidential decisions in a timely manner.

B. The NSC Principals Committee

The NSC Principals Committee (NSC/PC) will continue to be the senior
interagency forum for consideration of policy issues affecting national security, as it has
been since 1989. The National Security Advisor shall serve as Chair, and its regular
members will be the Secretary of State, the Secretary of the Treasury, the Secretary of
Defense, the Attorney General, the Secretary of Energy, the Secretary of Homeland
Security, the Director of the Office of Management and Budget, the Representative of the
United States of America to the United Nations, the Chief of Staff to the President, the
Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff.

The Assistant to the President and Deputy National Security Advisor, the Deputy
Secretary of State, the Counsel to the President, and the Assistant to the Vice President
for National Security Affairs shall be invited to attend every meeting of the NSC/PC.
When international economic issues are on the agenda, the NSC/PC’s regular attendees
will include the Secretary of Commerce, the United States Trade Representative, the
Chair of the Council of Economic Advisers, and the Assistant to the President for
Economic Policy, who, at the discretion of the National Security Advisor, may serve as
chair. When homeland security or counter-terrorism related issues are on the agenda, the
NSC/PC’s regular attendees will include the Assistant to the President for Homeland
Security and Counter-Terrorism, who, at the discretion of the National Security Advisor,
may serve as chair. When science and technology related issues are on the agenda, the
NSC’s regular attendees will include the Director of the Office of Science and Technology
Policy. The heads of other executive departments and agencies, along with additional
senior officials, shall be invited as appropriate.

The NSC/PC shall meet at the call of the National Security Advisor, in
consultation with the members of the NSC/PC. The National Security Advisor shall
determine the agenda in consultation with the other committee members, and shall ensure
that necessary papers are prepared and that conclusions and decisions are communicated
in a timely manner.
C. The NSC Deputies Committee

The NSC Deputies Committee (NSC/DC) shall review and monitor the work of the NSC interagency process (including Interagency Policy Committees established pursuant to section D below).

The NSC/DC shall also help ensure that issues being brought before the NSC/PC or the NSC have been properly analyzed and prepared for decision. The NSC/DC shall focus significant attention on policy implementation. Periodic reviews of the Administration’s major foreign policy initiatives shall be scheduled to ensure that they are being implemented in a timely and effective manner. Such reviews should periodically consider whether existing policy directives should be revamped or rescinded.

Finally, the NSC/DC shall be responsible for day–today crisis management, reporting to the National Security Council. Any NSC principal or deputy, as well as the National Security Advisor, may request a meeting of the Deputies Committee in its crisis management capacity.

The Assistant to the President and Deputy National Security Advisor shall chair the NSC/DC. Its members are the Deputy Secretary of State, the Deputy Secretary of the Treasury, the Deputy Secretary of Defense, the Deputy Attorney General, the Deputy Secretary of Energy, the Deputy Secretary of Homeland Security, the Deputy Director of the Office of Management and Budget, the Deputy to the United States Representative to the United Nations, the Deputy Director of National Intelligence, the Vice Chairman of the Joint Chiefs of Staff, and the Assistant to the Vice President for National Security Affairs. When homeland security or counter-terrorism related issues are on the agenda, a regular attendee of meetings of the NSC/DC will include the Assistant to the President for Homeland Security and Counter-Terrorism and Deputy National Security Advisor, who, at the discretion of the Assistant to the President and Deputy National Security Advisor, may serve as chair. When international economic issues are on the agenda, a regular meeting of the NSC/DC will include the Deputy Assistant to the President and Deputy National Security Advisor for International Economics, who, at the discretion of the Assistant to the President and Deputy National Security Advisor, may serve as chair. When science and technology related issues are on the agenda, a regular meeting of the NSC/DC will include an Associate Director of the Office of Science and Technology Policy. The chair may invite representatives of other executive departments and agencies, and other senior officials, to attend meetings of the NSC/DC as appropriate.

The Assistant to the President and Deputy National Security Advisor shall be responsible – in consultation with the members of the NSC/DC for calling meetings of
the NSC/DC, for determining the agenda, for ensuring that the necessary papers are prepared, and for preparing and circulating conclusions and decisions in a timely manner. The NSC/DC shall ensure that all papers to be discussed by the NSC or the NSC/PC fully analyze the issues, fairly and adequately set out the facts, consider a full range of views and options, and satisfactorily assess the prospects, risks, and implications of each.

D. Interagency Policy Committees

Management of the development and implementation of national security policies by multiple agencies of the United States Government shall be accomplished by the NSC Interagency Policy Committees (NSC/IPCs). The NSC/IPCs shall be the main day-to-day fora for interagency coordination of national security policy. They shall provide policy analysis for consideration by the more senior committees of the NSC system and ensure timely responses to decisions made by the President. The NSC/IPCs shall be established at the direction of the Deputies Committee, and be chaired by the NSC (or NEC, as appropriate); at its discretion, the NSC/DC may add co-chairs to any NSC/IPC if desirable. The NSC/IPCs shall convene on a regular basis to review and coordinate the implementation of Presidential decisions in their policy areas. Strict guidelines shall be established governing the operation of the Interagency Policy Committees, including participants, decision making path, and time frame.

An early meeting of the NSC/DC will be devoted to setting up the NSC/IPCs and providing their mandates for reviewing policies and developing options in their respective areas for early consideration by the interagency committees established by this directive. The NSC/IPCs will replace the existing system of Policy Coordination Committees.

The Vice President and I may attend any and all meetings of any entity established by or under this directive.

This document is the first in a series of Presidential Policy Directives that, along with Presidential Study Directives, shall replace National Security Presidential Directives as instruments for communicating presidential decisions about national security policies of the United States. This Directive shall supersede all other existing presidential guidance on the organization of the National Security Council system. With regard to its application to economic matters, this document shall be interpreted in concert with any Executive Order governing the National Economic Council and with Presidential documents signed hereafter that implement either this directive or that Executive Order.
Appendix D. Jackson Subcommittee on Super-Cabinet Officers


Contemplating the problems now faced by a President, some have concluded that he requires the assistance of a new “super-Cabinet” official who would deal across the board with national security problems. The idea is not new. In 1955 former President Herbert Hoover suggested creating two appointive Vice Presidents, one responsible for foreign and the other for domestic affairs. More recently, President Eisenhower’s Advisory Committee on Government Organization has studied variants of the concept of a “super-Cabinet” official.

In July of this year, Gov. Nelson Rockefeller, former Chairman of the Advisory Committee, appeared before the Subcommittee on National Policy Machinery and made a specific proposal for statutory creation of a “First Secretary” of the Government.

This officer would be appointed by the President subject to Senate confirmation. In Governor Rockefeller’s words, he would be “above the Cabinet” and exercise Presidential authority by delegation in all areas “of national security and international affairs.” The First Secretary would be authorized “to act for the President at the Prime Ministerial level.” He would have statutory designation as “Executive Chairman of NSC” and would have statutory authority by delegation from the President to appoint the heads of subordinate and related interdepartmental committees. The First Secretary would have a staff of his own, and would supervise the personnel of the National Security Council and the Operations Coordinating Board. He would also be “empowered to use and reorganize all of the interdepartmental planning machinery in the area of national security and foreign affairs.”

At first glance, the proposal may appear an answer to current difficulties in the operation of policy machinery. The First Secretary’s perspective would be expected to encompass the whole range of national security problems. He would be charged with giving committee coordinating mechanisms the stiffening of authoritative direction. Theoretically, he would be no mere White House staff assistant but a super-Cabinet member, thus able to direct fellow Cabinet members in a way that ordinary Presidential aides cannot. Theoretically again, he could relieve a President of many burdens both within the Government and in negotiations with other chiefs of Government. Finally, he could act as a first adviser to the President on foreign policy in its full modern context.
Careful analysis of the First Secretary proposal, however, reveals serious shortcomings and limitations. The proposal would fail to solve the problems it is meant to meet, and would also introduce grave new difficulties into the working of our national policy machinery.

This proposal raises two problems. One concerns a First Secretary’s relationship with department heads.

Giving a man the title of “First Secretary” does not thereby give him power. Under this proposal, the Secretaries of State and Defense and other Cabinet officers would retain their present statutory functions and authority. These officials would continue to be accountable to the Congress for the proper performance of their statutory duties. They would equally continue to be responsible to the President.

Being responsible to the President, the Secretaries of State and Defense and other Cabinet officers would report directly to him. They would be bound to question the decisions of a First Secretary; his placement between them and the President would inevitably generate friction and resentment. The First Secretary could gain the power he needed only if the President consistently accepted the First Secretary’s judgment over that of his department heads.

But if the President were consistently so deferential to his First Secretary, who then would be President?

And who would then be willing to be Cabinet officers? The primacy of the First Secretary could conceivably be established by filling Cabinet offices with relatively submissive men who lack strong convictions or much will of their own. But this is a period of history when our Government needs more – not less – vigor and drive in high positions. This end would not be served by choosing for Cabinet positions men who could acquiesce to the downgrading of the historic posts that they are asked to occupy.

A second problem raised by this proposal involves the relations of the First Secretary to the President.

The historical record shows that Presidential assistants draw effective power from their demonstrated intimacy with the President. On numerous occasions in the past a President has deputized an intimate adviser to take charge of certain plans or operations and to act for him in dealing with department heads. In varying degree, such men as House, Hopkins, Byrnes, and Adams have served effectively as Presidential deputies. But the positions of such men were always very different from that proposed for the First Secretary. Past deputyships have been ad hoc assignments given temporarily at the President’s own pleasure to persons in his confidence whose intimacy with him was matched by their complete dependence on him. At the height of their effectiveness in
Government, a Hopkins or an Adams drew power, not from statutes, titles, staffs, or paper prerogatives of any sort, but solely from the President’s evident confidence in them and reliance on them.

Yet the proposed First Secretary would be in a very poor position to sustain that intimate relationship even if he had it at the outset. His statutory position, his formal status in the Government, his supervision of assorted staffs, his chairmanship of manifold committees, his attraction for the press, and his accountability to the Senate which confirmed him – all would mitigate against the maintenance of his close, confidential, personal relationship with the President.

It is most unlikely that a President would in fact give a First Secretary the consistent backing and support he would require to maintain his primacy over other Cabinet members. To do so would run the risk that the First Secretary would become an independent force, politically capable of rivaling the President himself. It would run the further risk of rousing combined opposition from departmental and congressional sources and from affected interest groups.

The likelihood of congressional opposition to domination of departments by a “super-Cabinet” officer rests on the fact that Congress is constitutionally the creator of departments, the source of their statutory mandates, and the steward of their operations. Congressional committees long associated with particular governmental agencies could be expected to side with those agencies in their efforts to assert independence of the First Secretary. He would enjoy no counterpart of the solicitude which congressional committees often show to the heads of departments and agencies within their jurisdiction.

It is essential that a President have full, frank, and frequent discussions with his departmental and agency chiefs. To fully understand the meaning and consequences of alternative courses of action, he must expose himself directly to the clash of argument and counterargument between advocates of different policy courses. Papers, no matter how carefully staffed, can never convey the full meaning of the issues in question. To the degree a First Secretary insulated the President from day-to-day contact with key Cabinet officers, he would leave his chief less knowledgeable than ever about matters he alone had to decide.

Even if the President were to give the First Secretary substantial backing, this official would still be unable to do the job expected of him. For the critical budgetary decisions on the allocation of resources between national security needs and other national needs would still be outside his jurisdiction.
Only the President's responsibility is as wide as the Nation’s affairs. Only he can balance domestic, economic, and defense needs – and if anyone else were to be given the job the President would become a kind of constitutional figurehead.

In summary: Our governmental system has no place for a First Secretary. He is thought of as a mediator and a judge of the conflicting national security policies advocated by the major departments, the Congress and its committees, and private groups. But in the American system only one official has the constitutional and political power required to assume that role and to maintain it. That official is the President of the United States. He cannot be relieved of his burdens by supplying him with a “deputy” to do what only he can do.
Appendix E. PNSR Report on the Director of National Security

*Project on National Security Reform, Forging a New Shield 503, 503-05 (Nov. 2008).

The system needs an overarching authority dedicated to full-time system management on behalf of the president. The current national security advisor lacks the authority to fulfill this purpose. When national security advisors abandon their honest broker role for more aggressive policy development and system direction, the powerful Cabinet officials and departments raise legal impediments to the exercise of such authority and also resist policy implementation. If national security advisors do not abandon their honest broker role, they can only organize and clarify department positions for the president, leaving him to perform whatever integration and system management his schedule and impossible span of control permit. To assist the president with national security system management, a new position is required, which PNSR has given the title “director for national security.” The director for national security would facilitate the preparation and coordination of departments that are to be assigned new national security missions and associated roles and functions, but also would have the duties specified in the following chart, of which apply to other recommendations discussed below:

<table>
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<tr>
<th>Conclusions</th>
<th>Recommendations</th>
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<tbody>
<tr>
<td>1. The system is grossly imbalanced, supporting strong departmental capabilities at the expense of integrating mechanisms.</td>
<td>1. Create in statute the position of director for national security, within the Executive Office of the President, with the following duties:</td>
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<tr>
<td>2. Poor system integration (from basic information to capabilities to authority relationships) leads to poor efficiency. The system:</td>
<td>– Serving as the principal assistant to the president on all matters relating to national security</td>
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<td>– Is reactive, not anticipatory; prone to crisis management</td>
<td>– Promoting effective performance of the national security system</td>
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<tr>
<td>– Doesn’t manage issues “end to end” from assessment to policy implementation and evaluation</td>
<td>– Developing the National Security Strategy, National Security Planning Guidance, and National Security Resource Document, to include resource allocation for interagency teams and task forces (in conjunction with the director of the Office of Management and Budget [OMB])</td>
</tr>
<tr>
<td>– Is expensive to run and wastes resources</td>
<td>– Requires informal “work around” behaviors and processes that seem</td>
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<td>– Requires informal “work around” behaviors and processes that seem</td>
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expedient, but ultimately reduce system efficiency and effectiveness

3. The authority relationship between Cabinet secretaries and national security advisors is conflicted and confusing.

– Cabinet members must balance statutory obligations to build, manage, and safeguard departmental capabilities with their roles as presidential advisors on national missions.

– Security advisors must serve as honest brokers who fairly represent department positions on any issue but also advise the president and serve as his primary source of integrated perspective.

– In close collaboration with the intelligence community, identifying and/or validating national security opportunities and threats that require an interagency response, either at the national or regional level, and recommending their assignments to appropriate interagency teams, interagency crisis task forces, or lead departments and agencies

– Securing presidential approval for each interagency team, its charter (specifying mission, objectives, authorities, and resources), and the strategy developed by the team

– Monitoring the performance of interagency teams approved by the president

– Assisting the president in overseeing and reconciling differences among teams, task forces, and other multiagency organizations, and conflicts between interagency organizations and departments and agencies

– Assessing continually the efficiency and effectiveness of the system

– Supporting the president’s supervision and coordination of the policies, plans, and actions that are the primary responsibility of a single department or agency

– Creating appropriate organizational linkages and arrangements across regional and issue-specific teams to ensure unity of purpose with the president’s security strategy

One of the director for national security’s duties would be overseeing a set of processes designed to improve system management. He or she would be responsible for developing the National Security Strategy, National Security Planning Guidance, and the National Security Resource Document, all of which would enable the White House to allocate resources consistent with strategic direction. The National Security Review would
be performed at the beginning of each presidential term in order to prioritize objectives, establish risk management criteria, specify roles and responsibilities for priority missions, assess required capabilities, and identify capability gaps. Based upon the results of the National Security Review, National Security Planning Guidance would be prepared and issued annually to all national security departments and agencies. The planning guidance would provide specific objectives, directives, and measures of performance to national security organizations and also require some small number of integrated interagency plans to build required capabilities. These processes would include resource allocation for the interagency teams and task forces discussed below (in conjunction with the director of OMB).

There are good arguments for and against requiring the advice and consent of the Senate on a nomination of a person to serve as the director for national security. Some of these arguments cut both ways, including the plusses and minuses of making this official accountable to Congress. Senate confirmation would, as a practical matter, establish a primary official to provide authoritative testimony on system-wide national security matters, reports, and interagency missions and activities. The legal standing it would give the director would be indispensable in carrying out the duties of the position. Indeed, it is hard to imagine how a person exercising the authorities of what is currently one of the most powerful positions in government, and which will become even more powerful if PNSR’s recommendations are accepted, would not be accountable to the legislative branch in some degree.

Yet, a confirmable director for national security also would have major disadvantages, beginning with accountability to Congress, which would disrupt the director’s singular responsibility to serve the president. Confirmation could undermine the director’s confidential relationship with the president to the degree that the president may feel compelled to rely on other unconfirmed advisers, a development that would weaken the director’s ability to run the national security system. In addition, responding to Congress would levy another burden on an official who would have vast duties.

Given the strong arguments for and against making the director for national security confirmable, PNSR’s Guiding Coalition decided not to rule on the issue at this time. If the president and Congress act on PNSR’s recommendations, the confirmation of the director for national security position would be a key issue for those authorities to address. PNSR’s Guiding Coalition will continue to study this issue and may advance its own recommendation in the future. Meanwhile, the key point is that, regardless of confirmation, the director for national security would still have to have authorities and responsibilities not now assigned to the assistant to the president for national security.
affairs. The director for national security would have authority to run the national security system and to decide which issues to assign to lead departments and agencies and which to assign to interagency teams. He or she would also direct the activities of the Executive Secretariat, which in turn would run the human capital, knowledge management, and long-range assessment and planning activities for the national security system. In addition, the director for national security would assist the president by developing the proposed National Security Strategy, National Security Planning Guidance, and National Security Resource Document (in conjunction with the director of OMB).
Appendix F. PNSR Report on Interagency Teams

*Project on National Security Reform, Forging a New Shield 511, 511-14 (Nov. 2008).

While the security advisor must be empowered to provide system management, he or she cannot be responsible for managing the numerous issues that the system must be capable of handling. Instead, new, more decentralized mechanisms that can integrate cross-functional expertise and capabilities are required. The existing national security system’s structure, which is a source of strength but also many problems, subdivides into disciplines—diplomacy, military, intelligence, economics, etc. The departments and agencies that provide core expertise should not be replaced but augmented with horizontal organizational structures that can provide better integration across functional disciplines and do so for a range of critical issues. Horizontal organizations create the kinds of empowered teams identified as an option in Part V of this report. They work with diverse expertise formed around types of processes and problems. In the case of the national security system, teams could be created to confront challenges such as nuclear proliferation in the Middle East or Northeast Asia, extremist Islamic terrorism, Colombian drug trafficking, energy security, global warming, etc. Departments and agencies would not be able to impose boundaries on individuals to collaborate in a multidisciplinary fashion.

With this new hybrid organizational structure, the national security system would no longer resemble a small group of barons overseeing their fiefdoms under the less than watchful eye of a distant and distracted king. Rather, it would operate much like professional and leading high-tech organizations, in which actors take on issues by assembling teams comprised of their peers. The teams remain under the direction of higher authority but are provided wide latitude for how they solve problems. Team leaders and members are judged by their performance against desired outcomes and not for their devotion to one leader’s perspective or an organization’s interests. Over time, this type of self organization wherein many different levels of the system can create teams and the teams themselves have broad authority and latitude to solve problems within the scope of their mandates and subject to selective intervention by higher authority will better handle complexity, making fast and informed decisions.

The national security system could not suddenly absorb a large number of empowered teams. Instead, the transition to such teams would need to evolve slowly and would best begin under the direct supervision of the president and his director for national security to ensure they were successful. Thus, the first teams would be small in number and focused on the president’s top national security priorities. They would be prototypes
for later teams and it would be important to get their attributes and functions right. Team attributes are specified in the chart below.

<table>
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<th>Conclusions</th>
<th>Recommendations</th>
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<tr>
<td>1. Presidential intervention to integrate or resource missions well centralizes issue management and burdens the White House.</td>
<td>1. Initiate the process of shifting the management of national security issues from the President’s Security Council staff (and supporting interagency committees) to interagency teams, starting with a small set of presidential-priority-issue teams.</td>
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<tr>
<td>– Interagency committees cannot integrate different agency perspectives into alternative courses of action, each of which would represent a combined effort from multiple agencies, and make and implement the decision with unity of effort.</td>
<td>– They would be led by a national security executive with national stature.</td>
</tr>
<tr>
<td>– Even with a declared policy, unified effort frequently breaks down during implementation leading to poor performance.</td>
<td>– The team leader selects team members based on expertise needed to successfully accomplish mission.</td>
</tr>
<tr>
<td>– All presidents, regardless of initial inclinations, end up asserting greater centralization control over priority issues:</td>
<td>– Teams without representation from a relevant department or agency would have senior points of contact to ensure good communication between the team and the departments and agencies that will carry out the interagency mission.</td>
</tr>
<tr>
<td>– The problem with centralizing policy development and implementation is that the relatively small White House staff cannot cover the range of necessary issues.</td>
<td>– The team would endure until its mission is accomplished, but leadership and membership could change as circumstances warrant.</td>
</tr>
<tr>
<td>– The White House only succeeds in establishing clear policy and strategy for a small number of issues, and often in an untimely fashion.</td>
<td>– Team leaders and members would be required to complete a training program administered by the Executive Secretariat of the President’s Security Council that would include team leader and member responsibilities, operating procedures, dynamics, and conflict resolution. It would also distinguish collaboration from cooperation.</td>
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<td>– The team would perform its mission under</td>
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a presidentially-approved charter. The charter would include the specified mission, clear objectives, team authorities, and initial resource levels.

– The team would develop a strategy for achieving the charter’s objectives. The strategy would include an assessment of alternative approaches, integrated for the whole government, along with advantages and disadvantages and ways to minimize the latter; the responsibilities of existing or newly created organizations within the strategy; milestones and measures by which to judge progress toward meeting the objectives.

– Once approved by the president, the team would have the responsibility for assessing the strategy and associated plans and making necessary adjustments that are within its mandate or recommending adjustments that require approval.

◆ The team would monitor department and agency progress toward achieving mission objectives.

◆ The team would exercise authority under its charter to adjust responsibilities and resources.

◆ In case of major adjustments that constitute a change in strategy, the team would recommend changes to the president that would be staffed through the President’s Security Council.

– In addition to commenting on initial team strategy and major adjustments, department and agency heads would be able to challenge
team recommendations and decisions by appealing them to the president on the basis of unacceptable damage to national interests.

It is important to be clear about the limited authority of the teams and their relationship with the director for national security. The teams are provided wide latitude for how they solve problems, but they remain under the supervision of the director for national security, who serves the president. Since the president, advised by his Security Council, and the director for national security focus on high-level policy and strategy, they will not want to intervene in team activities often. At the same time, they must retain the capacity for well-informed operational and crisis decision-making. This includes the ability to delve down into an issue when that seems necessary, and after careful review, issue corrective directions.

This point bears some elaboration. The Tower Commission’s investigations and recommendations on Iran-Contra popularized the notion that White House staff should not delve into or control operational details. But it is important to remember that Iran-Contra became a scandal because White House staff worked around congressional restrictions in a manner that was generally agreed to be illegal, poorly coordinated, and ultimately based on poor decisions and bad direction. Interagency teams would relieve the system’s tendency to find ways to work around the ineffective formal structures and processes. In addition, however, in the new, more transparent system, structured for collaborative decision-making, it would be entirely appropriate for higher authority on occasion, after due deliberation, to guide subordinate decision-making. It will also be common for interagency teams, sometimes challenging one another, and sometimes challenged by Cabinet departments, to appeal conflicts for resolution by higher authority. The division of labor in these recommendations, between those responsible for strategic direction and those charged with decentralized issue management, does not preclude supervision by higher authorities. Leaders with broader vision and charged with reconciling competing objectives must have the responsibility and capacity to intervene to obtain information and occasionally direct the details of subordinate operations. This holds true both for presidential priority teams and the crisis task forces recommended below.

It is also important to be clear about the expected growth in team decision-making. While the new national security system should absorb interagency teams slowly at
first, and at the national level under close supervision, they have potential for making rapid progress in addressing global and regional issues from an integrated whole-of-government perspective. If the president is given the means to use interagency teams, which we believe requires statutory changes, then based upon their performance, he may well choose to proliferate them as circumstances demand. As empowered teams prove, they are better able to integrate diverse expertise and capabilities to achieve national priority objectives quickly and efficiently, and as department and agency leaders recognize and accept their division of labor with the interagency teams, the system will continue to evolve.

In particular, the more teams proliferate, the greater will be the need for intervening levels of decision authority to manage team efforts. Teams will focus on and give priority to their missions and issues. As the use of teams proliferates, it will become more necessary and challenging to coordinate and reconcile their efforts. In the future, it will not be necessary or helpful to have all team efforts directly supervised by the director for national security and his or her staff.
About the Author

Cody M. Brown has studied the structures, processes, and staff of the National Security Council since its creation in 1947. His research has included personal interviews with dozens of former NSC staffers and departmental officials, extensive literature reviews, as well as archival research conducted on-site at the Truman Library in Independence, MO, the Eisenhower Library in Abilene, KS, and the Nixon Library in College Park, MD. He is the author of The National Security Council: A Legal History of the President’s Most Powerful Advisers. He previously served as Senior Counsel and Chief of Legal Research at the Project on National Security Reform where he co-chaired a flagship project to optimize the NSC system within current legal frameworks, and he partnered with senior leaders at the National Counterterrorism Center to improve the strategic operational planning capabilities for counterterrorism. As an attorney, he has staffed or advised members of both the U.S. House and Senate on national security issues. He served on the Senate Special Investigation into Hurricane Katrina while serving on the Senate Homeland Security and Governmental Affairs Committee. He subsequently served as Legislative Counsel for a member of the House Homeland Security Committee where he managed a national security portfolio and drafted related legislation. He later served as law clerk to a Minnesota district court judge and managed a U.S. congressional campaign. He earned his undergraduate degree from Northwestern College, his Juris Doctorate from Hamline University School of Law, and his Master of Laws from Georgetown University Law Center where he studied constitutional issues and national security law under top government officials. He lives in Alexandria, Virginia.
Roundtable 2: Unity of Effort in National Security Operations Abroad

By Priscilla J. Enner and Nathaniel F. Olson
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Acknowledgments

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Executive Summary

In recent decades, the United States has increasingly confronted national security problems that require the simultaneous application and integration of military and civilian capabilities. According to some experts, the effectiveness and efficiency of these operations are significantly frustrated by dual chains of command for military and civilian capabilities, evidenced by recent experience in Afghanistan and Iraq. In addition, the complexity and connectedness of today’s threats extend beyond the boundaries of individual states and call for whole-of-government regional perspectives and competencies for which today’s system is neither empowered nor organized. Even the best ideas, developed at the strategic level in Washington, DC, cannot succeed without the proper tools and capabilities.

On February 23, 2011, several dozen current and former national security practitioners and policymakers convened to address these issues in the second of a series of three legal roundtables on national security transformation. The purpose of this roundtable was to examine the practical, political, and legal aspects of alternative means to promote unity of effort in U.S. national security operations abroad. Participants were asked to discuss whether Congress and the executive branch should undertake fundamental organizational reform to promote greater unity of effort in U.S. national security operations abroad.

EXPLANATION OF FORMAT

The three main sections of this report – unity of effort, regional unity of effort, and sub-regional unity of effort in action – parallel the topics of the three sessions at the roundtable held on February 23, 2011. In each section, there is first an introduction that aims to give the reader a brief background and to note other key substantive issues that participants were asked to consider. And again following the format of the roundtable itself, all three of the main sections are organized around these framing questions:

- Is it needed?
- Is it practical?
- How could it be achieved legally?

We found that this device helped focus the conversation at the roundtable and that it was advisable to maintain the format here. Please note that participant comments are not necessarily recounted in chronological order, though we feel they are still presented with appropriate context. Finally, for the sake of brevity, under each of the framing
questions we have offered a synthesis of major takeaways – often broken into “pro” and “con” feedback – and relayed the most salient participant feedback in bullet form.
Unity of Effort

This session asked participants to start at a fundamental level by considering these issues:

- Is unity of effort important to national security operations?
- If so, how can it be achieved?
- Should Congress intervene to prescribe unity of effort?

To help ground the conversation in specifics, participants were asked to consider a recent article by Dr. Christopher Lamb and Ambassador Ed Marks entitled, “Chief of Mission Authority as a Model for National Security Integration” (National Defense University, December 2010). The paper proposes a congressionally sanctioned mechanism allowing the president to delegate his executive authority for the management of specific high-priority national security missions to a Senate-confirmed official that the authors call a “mission manager.” Because the authors use resident ambassadors’ Chief of Mission authority over country teams as a foundational model that requires expansion in order to be useful, they refer to the mission manager’s envisioned mandate as expanded Chief of Mission (COM) authority.

Mission managers, supported by a small team, would have presumptive authority to direct the implementation of a clearly articulated strategy, resourced by departments and by direct congressional appropriations as needed. A Cabinet official could appeal any of the mission manager’s decisions to the president if she felt other missions were being improperly subordinated or her department’s functional expertise and resources were being improperly degraded.

Some argue the current system functions well enough with good leadership and when the president is sufficiently engaged. The authors argue, to the contrary, that the inability of the president to delegate executive authority for integrating department and agency efforts is a major shortcoming. Departments and agencies with strong organizational cultures, large budgets, and authorities codified in law are necessary but also obstacles to unity of effort, especially in an era of increasingly multidisciplinary challenges. They also assert that none of the various approaches to solving the problem already used by presidents – NSC committees, “lead agencies,” and “czars” – has proven consistently effective.
IS IT NEEDED?

Participants discussed the need for more integrated efforts to tackle problems that cannot be contained in a single stovepiped department or agency. It was generally agreed that most of today’s challenges are increasingly beyond neat categorization and often are not dealt with efficiently when the capacities for addressing them are divided among agencies.

- Participants agreed that, below the Executive Office of the President, the executive branch is organized in stovepipes, making it difficult and time consuming for the president to delegate across departments, except in the case of resident ambassadors. Managing natural events or human-made crises and integrating foreign policy programs is becoming an increasingly significant challenge. In light of the need for interagency cooperation, and in the absence of changes in bureaucratic structure and strategy, an executive cross-agency authority could be developed. Existing solutions, such as czars or lead agencies, were thought to be hugely inadequate. Though designated by the president, czars and lead agencies are not provided with unlimited authority over agencies or other entities. Some participants believed that because they lack authority to produce results, it is difficult and even unfair to hold them accountable. Other participants took the view that while appointed czars do have some authority and can be held accountable for failure, they seldom have the type of authority they really want, which is something akin to the authority held by a combatant commander.

- Participants also generally agreed that the authority held by a resident ambassador as head of the country team might point the way toward a viable near-term solution if augmented, as recommended by Lamb and Marks, with (1) presumptive authority; (2) a mandate that expands the scope of the mission manager’s authority to a well defined mission; and (3) a process to adjudicate issues raised by functional departments and agencies.

- Some participants paused to note that there has in fact been recent progress in forging interagency integration, albeit incremental and isolated. One pointed to the National Counterterrorism Center’s (NCTC) Directorate of Strategic and Operation Planning (DSOP). NCTC is past some of the initial interagency resistance it first encountered. Moreover, it has developed a positive relationship with the Office of Management and Budget (OMB). The director of NCTC works more closely than ever with the director of OMB, with the endorsement of the National Security Staff and the
president. For the FY2012 president's budget request, NCTC was responsible for government-wide counterterrorism budget analysis. This ability to represent counterterrorism both programmatically and at discrete levels is an important role, for which NCTC was designed. Access to OMB has had a positive impact on NCTC's role, and participants agreed that interest from the president himself would have an even greater effect.

IS IT PRACTICAL?

Proponents of expanded COM authority noted that the mandate of resident ambassadors was the clearest example of cross-department executive power, with longstanding executive and congressional support and a long record of reasonably successful implementation. Given the significant impracticalities of the current system, the adaptation of an existing authority to meet current needs seems highly preferable.

• Participants noted several times that existing COM authority works well most of the time. Thus, while the expanded COM mechanism would not replicate a military chain of command, it could improve management of interagency issues relative to the current system. The novel challenges of the current environment ultimately require systemic reform, but in the meantime, innovating on the COM authority and applying it elsewhere would be a major step forward.

• All participants seemed to agree that the presidential support and leadership for the initiative was a key requirement for success. In this respect proponents identified a parallel with business experience. One participant recounted the story of a senior official at a Fortune 50 company who said he had tried to introduce horizontal teams but failed because the heads of functional divisions instructed their staff serving on a horizontal team to participate but remember whom they worked for. The point was made that unless the CEO ensures that the heads of the functional departments support the spirit of the initiative, it will fail. Similarly, absent presidential backing, ambassadors have failed to achieve unity of effort on their country teams and have sometime been recalled for allowing too much friction to develop. The president’s expectations for agency support to horizontal teams thus would be a major determinant of the teams’ success.

Arguments against the practicality of expanded COM authority contended that the challenges encountered in the existing use of COM authority would likely persist under mission managers.
Regarding existing COM authority, participants cited two main limitations. With the exception of State Department personnel, an ambassador does not have a meaningful impact on evaluation reports for members of the country team. Personnel instead take directions from their headquarters, because their career paths would otherwise be jeopardized. Embassy assignments last about two years and are considered short-term projects. It was thus recommended that for greater effectiveness, a mission manager would require the authority to impact careers. The other limitation to the COM authority is the political nature of conflicting policy goals, which are developed in Washington, DC. For example, pursuing criminals in a given country could undermine other initiatives there, causing considerable repercussions. These kinds of challenges would persist under expanded COM authority. Proponents argued, however, that the persistence of such difficult trade-offs in policy goals was an argument for, and not against, the need for mission managers. Mission managers would make their best judgments depending on local circumstances and if policy opponents felt the stakes were high enough to merit review by the president, they could escalate the issue.

Similarly, participants differed in their views of the types of issues that could benefit from expanded COM authority. One found from experience that interagency team efforts worked well for urgent issues that tended to have greater consensus on the need, whereas in the day-to-day operational context, interagency cooperation tended to fall apart more quickly. Another participant countered that intermediate issues were most resistant to interagency cooperation, but coordination for major national security issues and day-to-day activities worked fairly well. At the embassy level, an ambassador could in fact achieve coordinated day-to-day work. More difficult issues, however, required agency representatives to seek guidance from headquarters in Washington. Still another participant concluded that there was no pattern in this area, with various case studies providing opposing conclusions on the matter.

The ad hoc nature of new relationships and roles was raised as another challenge that expanded COM authority would encounter. It would be important to design processes to establish the teams and provide strategic guidance and clear priorities. This would likely be the responsibility of the National Security Staff. It was also emphasized that the quality of team members – in particular their training for such roles – would be a factor in the team’s success. Proponents of expanded Chief of Mission authority agreed that one component of the reforms would be a process to adjudicate issues raised by functional departments and agencies. Further, they agreed it would be better
if such a process were codified, but argued the president could also institute it informally.

• Two other potential problems were discussed but dismissed as manageable. First, although it might appear that expanded COM authority would place an additional burden on the president to reconcile competing interests, it could actually lighten his load. After the president articulates expectations for teams, he would only have to resolve major disputes. By contrast, in the current system, if the president wants to ensure unified effort, he must intervene persistently because no other official has the authority to do so. Second, some surmised that Cabinet officials might resist this model as a threat to their authority. The counter-argument was that they would likely learn to appreciate this mechanism once they understood that mission managers would only be assigned intrinsically interagency missions and that the daunting scope of such missions means they are beyond the effective management of any single department. The eventual acceptance of the Goldwater–Nichols Act reforms by the military Services is instructive in this regard. In that case, the Services fiercely resisted ceding any authority to combatant commanders and the Chairman of the Joint Chiefs of Staff, but over time they rightly came to see their respective man/train/equip missions as both all consuming and vital to the joint mission.

**HOW COULD IT BE ACHIEVED LEGALLY?**

Arguments discouraging congressional involvement were premised on constitutional separation-of-powers principles and contended that Congress’ primary role in this domain was oversight of executive branch activities. Moreover, it was argued that Congress should easily understand the national security imperative that would compel the executive branch to develop an improved coordinating mechanism for a particular mission without prior congressional sanction.

• Some participants disagreed with involving Congress in executive branch organization as a matter of principle. They underscored that Article 2 of the Constitution empowers the president as commander-in-chief to appoint and remove officials, within certain boundaries. Other parts of the Constitution require that he share some powers, for example in the ratification of treaties. Article 1, Section 8 of the Constitution limits presidential powers fairly specifically, most importantly through the Congress’ power of the purse. Generally, however, the president’s power increases when addressing foreign policy issues. Fundamentally, once Congress has authorized an activity and appropriated funds, it becomes an overseer, with its power lying in
modification of certain legal authorities and the threat to remove funding. Thus, these participants contended, the success of the proposed expanded COM authority would depend on the effectiveness of presidential leadership, and would not require significant congressional legislation.

• More substantive constitutional concerns with the mission manager concept were also raised. One participant questioned the constitutionality of a mission manager and expanded COM authority on two separate but related grounds. First, the Opinions Clause (Article 2, Section 2) refers to cabinet secretaries providing their input directly to the president on matters affecting their departments. It does not provide for an intermediary or alternative officer, such as a mission manager, in this process. A system giving presumptive authority to a new officer with a new mechanism to resolve disputes could create Opinions Clause conflicts. The filling of this new office and the related dispute resolution system would therefore need to be entirely discretionary to the president’s authority. A second and potentially more problematic issue is the mission manager’s interference with the structure of executive departments, referred to in the Opinions Clause, Appointments Clause (Article 2, Section 2), and the Twenty-Fifth Amendment. In other words, there is an established construct of executive departments. The installment of another office, which managed and directed those departments, would arguably be a disruption of that structure and violation of the Constitution.

• Another participant observed that this likely would not be a significant drafting problem, as there is ample precedent. The National Security Act of 1947 – and more to the point, the amendment to the Act in 1949 – downgraded the Departments of the Army and Navy, subordinating them to the Department of Defense. The former are explicitly mentioned in the Constitution, but the latter is not. A mission manager with expanded COM authority could likewise pass constitutional muster.

Arguments favoring congressional involvement took a different view of Congress’ oversight role, noted funding mechanisms that could impact the expanded COM authority, and questioned the permanency and consistency of a mechanism dependent solely on the president.

• It was noted that Article 1, Section 8 of the Constitution provides broad authority for Congress, and Members are already involved at lower levels of the executive branch, including specifying responsibilities at the deputy-assistant-secretary level. Congress is also involved in the details of Article 2, which provides the president with certain
powers but does not clearly delineate his independence from the Congress. Thus, national security is a “team sport,” as one participant put it. The Senate confirms presidential appointees with constitutional authorities and control over budgets, and Congress performs several key oversight functions, far beyond mere observation.

- More to the point, it was argued that the proposed reforms, which include the concept of “presumptive authority” for mission managers, require legislation. By definition, presumptive authority to act on behalf of the president to direct departments and agencies would include the power to override existing department and agency statutory authorities. Participants argued that a crosscutting integrated authority would require legislation for two reasons. First, according to the Appointments Clause of the Constitution, any individual in the interagency space who exercises meaningful authority to compel departments to act would have to be an “officer of the United States,” and officers of the United States must have their positions established by statute. Second, legislation would avoid cabinet officials appealing to existing authorities codified in statute as a legal reason to debate a mission manager’s authority.

- Other arguments were offered for the benefits of legislation. As noted previously, reform cannot work without presidential support, but the best outcomes are generated by cooperation between the executive and legislative branches. Moreover, in addressing national security issues, Congress has been capable of moving relatively quickly. One example provided was the Authorization for the Use of Military Force signed on September 18, 2001. While Congress doesn’t directly manage crises or engage in diplomacy, it can provide a framework for crisis management, presidential leadership, and other factors that enable greater unity of effort.

- Fundamentally, the legal challenges were not seen as insurmountable. Regardless of where the legal impetus comes from, statutory changes will go through legal counsel and may ultimately be reviewed by courts. Expressing the national security imperative for reform can help this process to some degree. While participants felt the judicial branch would give deference to the executive branch’s need to remain flexible, they also believed that congressional involvement would be useful in overcoming any controversy.

- Participants also weighed potential advantages and disadvantages of legislation passed by Congress. One participant believed that if expanded COM authority were a legislative initiative, departments and agencies would be more inclined to support mission managers, in the same manner that the military Services support combatant commanders. It would also strengthen the sustainability of the authority. If it were dependent on presidential authority, it would be inconsistent across administrations.
Other participants did not think this was necessarily true. They argued that expanded COM authority would not rely solely on presidential leadership, but on what would then be the executive branch’s established coordination mechanism. In part, the process shaping the mechanism would guide presidential leadership. They cited the example of National Counter Terrorism Center (NCTC). The creation of NCTC in the Intelligence Reform and Terrorism Prevention Act of 2004 (PL 108-458) was the product of much discussion with the White House, multiple redrafting efforts among congressional committees, and the influences of relevant departments and agencies. One result, however, was section 1018, which provides “non-abrogation” language and is often invoked by agencies to exempt themselves from various requirements. A large segment of Congress refused to support the legislation without this provision. This again illustrates the difficulty of operating in an unreformed environment.

- Regarding funding mechanisms, participants noted that for several decades, appropriations legislation has included language barring interagency transfers, ostensibly to make oversight easier. This suggested that the congressional structure would need to adapt. One participant raised the idea of authorization and appropriations committees for interdepartmental organizations, to which other committees could appoint one member.

- In response, another participant observed that in the short term, any reform legislation would fall under the jurisdiction of the government reform committees. Those committees would almost certainly seek partial or full oversight over any new interagency mechanism instead of creating new congressional committees for the purpose. The real key, this participant continued, would be how effectively the appropriations process accommodated the new mechanism.

Overall, the participants agreed that the president is not legally required to include Congress in a re-organization but that it would be politically necessary to do so. Moreover, that support should be as broad as possible, considering that the Congress does not make strategic and tactical decisions. For expanded COM authority to succeed, a united political backing would be essential.
Regional Unity of Effort

This session asked participants to consider the following issues:

• Should the United States use a regional framework for managing national security affairs abroad?
• If so, should this regional framework provide a whole-of-government approach?
• Should the United States consider creating integrated regional centers, as proposed by PNSR and others?

Currently, the president has established two lines of authority in the regions. One is civilian, extending from the president through the secretary of state to the chief of mission in the host country. The second is the military chain of command that extends from the president through the secretary of defense to the geographic combatant commander with assigned regional responsibilities. In Washington, regional boundaries vary widely by agency, making collaboration difficult and creating multiple seams, and the Economy Act (31 USC) imposes restrictions on applying personnel, services, and funds from one executive agency to support another. In the region, tensions occur when the two lines of authority intersect during peacetime and contingency operations when both occupy the same space and missions overlap or are not well defined.

The Department of Defense has two transformational commands grappling with this problem. Southern Command (a mature command) and Africa Command (a new command) have both realigned and embedded other agency personnel in their staffs to improve regional interagency planning and operations. Also, the Department of State has established a number of regional initiatives, such as the Caribbean Basin Security Initiative and the Trans-Sahara Counterterrorism Partnership. They are led and funded by regional and functional bureaus in Washington working in collaboration with other interagency participants but are implemented by affected country teams in the region.

One option proposed by PNSR in its 2008 publication, Forging a New Shield, was to establish integrated regional centers. Paralleling the military concept of the operational level of war, an integrated regional center would serve as the level at which campaigns and major operations are planned, conducted, and sustained to accomplish strategic objectives within a region. Geographically, the region represents the space between Washington, where strategy is articulated, and the host countries, where tactical implementation occurs. Functionally, the regional center would link tactics and strategy by: (1) establishing operational objectives in support of the strategic objectives, (2) sequencing and initiating
actions to implement the operational objectives, and (3) applying resources to bring about and sustain these actions.

IS IT NEEDED?

Most participants agreed in principle that there is a need for improved regional integration. The particulars of the integrated regional center concept, however, proved somewhat difficult for participants to envision.

- The interagency process is designed to produce policy, but it in fact produces compromised policies, and there is no mechanism to drive policy into operations and across departments. A compromised policy begins to unravel soon after leaving the strategic level, and especially at the regional level.
- Participants illustrated the potential significance of a stronger regional approach with several examples. In Latin America, for instance, issues within a particular country often do not rise to their true level of importance, to the point where they benefit from U.S. national resources. However, the region as a whole is more compelling because Latin American countries are interrelated, and they are in America’s backyard. This was an argument that Admiral Stavridis made to the Department of Defense as combatant commander of Southern Command.

IS IT PRACTICAL?

Arguments in support of integrated regional bodies discussed the capacity of existing integrated bodies and what such bodies could provide with increased capacity and support for collaborative efforts.

- The Joint Interagency Task Force South (JIATF-S) is an example where a need was recognized by both the legislative and executive branches. However, it took sixteen years to achieve successful operations, with many wasted opportunities and resources along the way. Moreover, it did not set a precedent for newer issues, such as cyber security. It seems critical that Congress create organizations at the regional level to integrate government capacities to focus on a particular mission.
- NCTC’s Directorate of Strategic Operational Planning again surfaced as an instructive example, as it can generate powerful ideas whenever it can muster a coalition of the willing. Generally, however, its development towards its full potential is slow and hampered. Currently, the White House doesn’t have any entity or mechanism to
which it can turn to for a whole-of-government approach. As envisioned by one participant, a whole-of-government cyber security team could develop robust policy ideas for White House decision.

• A different organizational structure, if done right, could also enhance accountability. The current system allows endless recriminations when failures occur, but under a different structure, failures could more clearly be traced.

• Turning to the Intelligence Community (IC) for an example of the relationship between Washington and the field, one participant said there is a tendency to think of the Director of National Intelligence (DNI) as the top of a hierarchical pyramid. In fact, the pyramid should be flipped, because the DNI serves to facilitate the work of the IC – as a mechanism to empower people on the frontlines. To do their job, they need a clear mission, clear priorities, conflict resolution mechanisms, and processes that drive decisions.

• Again, improvements will require both better mechanisms and clearly articulated guidance from the president, along with his ongoing commitment and support.

Arguments against integrated regional bodies were primarily concerned with maintaining a distinction between strategic and regional levels, effectively managing the broad range of agencies that would participate in steady-state regional activities, and the need for direction from the strategic level.

• One participant stressed that clear strategy and policies should be developed in Washington but that the National Security Council should not direct regional activities. Rather, those working in a region should know their mission as determined at the strategic level and be vested with the authority to execute it. Operational problems are very different from strategic problems. At the same time, it is obviously crucial for the agencies involved to be resourced appropriately, and in this regard unity of effort at the policy/strategic level can have a very direct link to how things work at the regional level.

• Another participant added that using the combatant command as a model would have its limitations. The commands do not have as much power in steady-state activities as is often perceived by outsiders. In fact, the commands often reach back to Washington for guidance. Conflict avoidance activities would become significantly more complex in the number of agencies that are involved. In the example of fresh water and climate change, relevant agencies like the Environmental Protection Agency and U.S. Geological Survey are outside of traditional Title 50 agencies. This will require
broadened thinking about the kind of interagency engagements that are needed, and the ability to effectively manage such diverse skills and contributions.

- One participant stated that, absent greater presidential engagement, attempts at whole-of-government planning and execution are unlikely to solve problems such as cyber security. Fundamentally, no decision has been made on how to proceed with a whole-of-government approach, though it has been discussed in many forums.

**HOW COULD IT BE ACHIEVED LEGALLY?**

**Legal issues pertaining** to the integrated regional centers largely paralleled those discussed with regard to expanded COM authority. The legal challenges would vary depending on the scope of the mission and authority assigned to an integrated regional body.

- Several participants agreed that challenges like forging a more integrated effort at the regional level are often “disguised as legal issues” when they are more fundamentally political issues. This tendency is especially pronounced when fiscal resources come into play – an unfortunate fact given the imbalance in funding across agencies. Moreover, many Department of Defense appropriations are largely unconstrained, and the Secretary of Defense has significant transfer authority codified in Title 10. Appropriations for civilian agencies tend to be much more restricted, so in an ad hoc or established shared task, interagency partners can easily cite their fiscal-law issues as obstacles to their engagement.

- A possible solution to legal issues that would secure congressional buy-in could reside in Title 31. Congress could create a special Treasury account for which relevant agencies have generalized transfer authority, and the president could be empowered to establish subsidiary, mission-specific accounts. At the operational and tactical levels, this would provide relatively unrestricted money directed to missions that deserve priority.

- Congress should also examine the president’s generic reorganization authority, particularly under 5 U.S.C. 901 et seq. Moreover, the president has authority under 3 U.S.C. 301-302 to delegate his authorities to a department head or other Senate-

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4 A useful resource on this topic is September 2005 testimony by Paul Light before the House Government Reform Committee titled "Restoring the President's Reorganization Authority." See http://wagner.nyu.edu/faculty/publications/files/lightReorganizationAuthority.pdf.
confirmed official. One participant asked whether the president could, pursuant to this portion of Title 3, assign to the same official an authority superior to that of the department from which the official came.

In sum, participants felt that pursuing genuine and sustainable integration at the regional level would require more than presidential initiative. However, if Congress does play its part here, it will be important to decide up front whether the legislative end-game is a general organizational framework or a more specific recasting of authorities, as in Goldwater-Nichols.
Sub-Regional Unity of Effort in Action

This session asked participants to consider one central issue:

- Should the United States embrace empowered cross-functional teams and/or integrated chains-of-command as central elements of executing national security operations abroad?

Crises and conflicts often call for surge operations in austere and insecure remote locations. Leaders are typically confronted by overlapping demands to generate and support capabilities, to direct effective action, and to deal with a variety of international and local organizations.

U.S. government personnel and actions abroad are generally organized under an ambassador’s COM authority or the command authority of a combatant commander. Some argue that these authorities are insufficient to integrate actions among multiple civilian agencies or to unify military efforts with those of civilian agencies. They argue that national security problems such as crisis and post-conflict operations are increasingly complex and multidimensional, necessitating more formal directive authority for interagency leadership. Others emphasize personal leadership and informal partnerships as the keys to successful collaboration.

PNSR has proposed a hybrid organizational structure with increased use of empowered cross-functional teams with wide latitude for problem solving, and crisis task forces with integrated chains of command whose leaders would have directive authority. To have staying power, these organizational innovations would require legislative and cultural changes. A recent study by Dr. Christopher Lamb and Evan Munsing – “Secret Weapon: High-Value Target Teams as an Organizational Innovation” (National Defense University Press, March 2011) – documents the powerful results of interagency teams in turning around the Iraq war but acknowledges that “collaboration is a difficult force to harness and institutionalize.”

Is it needed?

Participants generally affirmed the need for interagency teams in the field.

- Participants again underscored the rapidly changing national security environment and nature of complex problems as a significant impetus for cross-functional interagency teams. While the traditional COM authority of resident ambassadors has proven its
usefulness, it too is insufficient in creating the proper conditions for personnel from various agencies to collaborate successfully. Yet the need for collaboration is only growing.

- One participant felt that the Department of Defense is usually viewed as the chief impediment to cross-jurisdictional collaboration but added that, in truth, all agencies have been resistant.
- Solutions to this dilemma require more than emergency authorities for the president. Instead, standing institutions and processes must be developed and maintained to deal with complex challenges and opportunities on a day-to-day basis in areas as diverse as business, communications, and the environment.
- Other participants noted that the issue of accountability and authority demonstrates the need for unity of effort in the field. Even in national security operations abroad, military leaders do not necessarily have command over uniformed personnel from other Services. However, these leaders are still responsible for outcomes.
- One participant argued that unity of command is not needed unless there is an urgent matter for which time is a key factor. More significant than unity of command is unity of effort, particularly in establishing the correct relationships and holding people accountable to act and respond. This does not diminish the importance of unity of effort at higher levels. Even the best policies at the strategic level will ultimately fall short if those in charge at the sub-regional level do not have some mechanism providing them with authority to integrate. Those assigning missions must codify authorities regarding who is in charge and who must contribute. If this step is not taken, those carrying out missions at the sub-regional level can only negotiate least-common-denominator outcomes.

**IS IT PRACTICAL?**

Some participants felt cross-functional teams in the field could not be institutionalized in the context of the current national security system. They argued that issues at this level could be better resolved once changes had been made at the strategic and regional levels. Another argument rejected the notion that one organizational structure could effectively deal with a broad array of national security challenges, emphasizing instead that appropriate responses are situational driven.

- Regarding the unreformed system, interagency teams to date have operated without guidance on collaboration, integrated effort, or national missions. This guidance to departments and agencies must come from the president. Without it, the president is
left without a yardstick to measure performance and departments can play at will, blunting the force of bold ideas. Some institutionalization of coordinating mechanisms and presidential leadership will be required to significantly affect the sub-regional level. Even the progress towards this system will require ongoing presidential attention.

- Some also resisted the idea that a single construct could successfully accommodate all forms of national security operations abroad. Those closer to the tip of the spear operate under unity of command, and are more easily organized for this circumstance. The further from the tip of the spear, the less advisable is unity of command.
- More important than organizational structure are relationships and trust based in a common stake in a venture. There is no substitute for personnel managing processes as a situation develops. For example, there is no organizational mechanism for a principal to decide when to get directly involved in issues of interest to him or her. Making sure the network works will reap greater benefits than moving boxes.

Arguments in favor of introducing interagency teams saw past the hurdles posed in the arguments above to describe the capabilities that loosely structured networks could provide.

- Fundamentally, networks are hugely significant. However, the system does not operate as a network now, but in stovepipes supporting agency interests. At National Security Council deputies meetings, participants are sent with guidance from their department or agency, driven by relatively narrow interests. The National Security Council therefore produces a lowest-common-denominator answer and does not consider policy through the lenses of national missions, strategy, resource-strategy linkages, planning, or evaluations. So what is really in question is the ability to integrate the functional expertise of the government, and while a solution might not be imminent, there is an increasing number and variety of recommendations toward this end.

- One participant cited the example of interagency high-value targeting teams in Iraq, which took more than two years to develop to their full potential – even at a time when Iraq was the top issue in U.S. national security. Perhaps more alarming, the bureaucracy is only recently – and slowly – considering the lessons learned. There is concern that, due to “fatigue” from the experiences in Iraq and Afghanistan, the executive branch and Congress could fail to institutionalize the organizational innovations that these teams have demonstrated. We would do well to recall how relevant agencies were allowed to atrophy after Vietnam. Several of them – with the
notable exception of USAID – were able to recover, but it took many hard years to get there.

• The high-value targeting teams in Iraq serve as an example not only of the benefits a more collaborative approach can yield, but also of the many challenges. The teams learned as they went, starting without interagency participation beyond a few intelligence agencies, and only through handshake agreements and informal partnerships. They were additionally joined by other agencies, such as the FBI, State Department, and NGA. Support from these agencies depended on senior level personnel. At times, mistakes in other areas of the operation, such as Abu Ghraib, caused interagency partners to pull out within hours. It took a significant amount of work to regain momentum and bring these agencies back into the fold.

• This process deliberately avoided lawyers and memoranda of agreement because agencies were more prepared to participate informally. After a certain point, the command group added six Senior Executive Service (SES) level officials from key departments. These SES personnel were permitted to share any information, including their frank opinions, with their agencies. The openness on the part of military officials leading the interagency team fostered support from the SES officials’ home agencies.

• While this lack of codification served the teams well, given their existence in an unreformed system, it was also an Achilles heel in that no one below the president had sufficient authority to oversee the complex, interagency nature of the work. When differing views arose, unity of effort suffered. After a certain time, participants lost commitment to do what was needed only to avoid interagency disputes. At the same time, the president cannot oversee work at this level, and even when he or she does intervene, it is usually not quickly enough to have the desired effect.

• The example of the interagency teams in Iraq points to the need for a decentralized arrangement that permits interagency authorities at the sub-regional level.

HOW COULD IT BE ACHIEVED LEGALLY?

The legal discussion on this topic concluded that legislation was required. Participants generally agreed that institutionalizing unity of effort at the sub-regional level should begin at the strategic level. Legislation would require changes in authorities, oversight, and funding.

• Unity of effort at the tactical level would require a structure and command at the strategic level with the ability to oversee lower levels. This observation was strengthened by the example of S/CRS, which had limited success but an insufficiently
supportive system. The S/CRS Interagency Management System, for example, was largely a concept rather than a reality. This became particularly evident on the ground, where S/CRS, despite its resources and training, struggled to gather support from other agencies to work across interagency lines.

• Political support was also limited. While some parts of the executive branch and the policy statements in the QDDR have reinforced the work of S/CRS, Congress has not funded the reserve element and significantly downsized its ambitions.

• One participant argued that Congress could draft legislation for a single military-civilian chain of command extending from Washington, through the regional level, down to teams on the ground. Other important elements would include crisis management experts who could oversee this chain, a formal planning process, and joint interagency (civilian-military) teams at all levels. Essentially, Congress would finish the work of the Goldwater-Nichols Act and legislate the civilian component. A related enabling factor would be a national security budget that would include defense, diplomacy, development, intelligence, and parts of “non-traditional” national security players, such as the Departments of Commerce and Justice. This too would certainly require congressional action.

• Furthermore, one participant noted that the legal community must recognize that new capabilities and activities necessitated by the environment would require flexibility and innovation in the legal field. In Iraq and Afghanistan, the number of civilians playing roles they have never played before is unprecedented.
The Need to Learn Hard Lessons

Participants engaged in a rich discussion, united by a recognition that the world has changed and that the demands it places upon government have changed. Our industrial-age national security system is vertically aligned, even as every national security priority is horizontal, requiring a high degree of integration. This fact is often most readily accepted in the field, where both military and civilian actors are confronted in stark terms with what is lacking and what is needed. In an unreformed system, they are left to forge a viable way forward on their own. However, these efforts take far too long to come to fruition and can be quite fragile because they are all driven by leadership and personality. Even mechanisms like the expanded COM authority discussed at the roundtable would be susceptible to failure in an unreformed system. Each time we face a new set of circumstances, we are forced to relearn hard lessons. This is a hugely expensive and inefficient way to work. Congress and the executive branch must forge a partnership to institutionalize these lessons.
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Session Two: Regional Unity of Effort


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Session Three: Sub-Regional Unity of Effort in Action


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Roundtable 3: Current State of Intelligence Reform

BY RACHEL SPITZER
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Executive Summary

In the aftermath of the September 11 attacks, the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 was enacted, resulting in arguably the most sweeping changes to the U.S. intelligence community since the establishment of the Central Intelligence Agency in the National Security Act of 1947. The recent legislation created, among other things, the Office of the Director of National Intelligence and the National Counterterrorism Center. In the five years since it was enacted, experts and practitioners have identified a number of challenges associated with the implementation of the legislation and the current state of the Intelligence Community (IC).

The purpose of the Legal Affairs Roundtable on the Current State of Intelligence Reform, held on May 6, 2011 at Bingham McCutchen LLP, was to identify these challenges and to discuss the relevant legal issues. The Roundtable focused on current governance, the challenge of intelligence oversight, information management and the future of intelligence reform. There was a great deal of agreement about both the common problems facing the intelligence community and the possible solutions.

**PROPOSITIONS:**

1. The DNI should use his budget authority to create a true National Intelligence Program budget and create training programs at all levels to improve governance practices.

   **Challenge:** The Director of National Intelligence’s ability to effectively manage the budget of the Intelligence Community is difficult due to: (1) unclear mission requirements and priorities, (2) the small size of the office’s staff and its inexperience with budgets, and (3) the complexity of the budget process.

   **Solution:** Increase the DNI’s authority and ability to manage mission requirements and shift resources among different agencies and activities based on mission prioritization.

   **Challenge:** Intelligence agents and decision-makers have limited familiarity with domestic and international laws that govern their operations. In addition, lawyers in the intelligence community have limited familiarity with intelligence reporting.

   **Solution:** Provide programs similar to the Department of Defense’s Law of Armed Conflict training for intelligence personnel. Provide legal advisors training on intelligence operations and reporting.
2. The IC requires better internal and external oversight to ensure that all sixteen independent agencies involved have clearly defined roles and can be held accountable. In addition, Congressional committees which claim jurisdiction over the IC should be streamlined.

_Challenge:_ Often in the IC oversight investigations are duplicated, the process of oversight is politicized and/or criminalized, the focus is on the individual instead of the programmatic action, the appropriate distance for overseers is unclear and there is no clear way to measure oversight effectiveness.

_Solution:_ The Inspector General’s (IG) focus should be on improving the IC system and conducting qualitative reporting instead of assigning blame for errors. This will increase the mutual trust between IG offices and those they oversee. In addition, the IG should have a mix of insiders and outsiders and rotate personnel through the oversight role to prevent inspectors from becoming too close to an organization.

_Challenge:_ Congressional oversight is divided among multiple committees preventing any single committee from having the “whole picture” and causing agencies to spend a great deal of time responding to numerous Congressional inquires.

_Solution:_ Create crossover members between committees or hold joint hearings in order to decrease the burdens of reporting to Congress. Another option is to utilize the Appropriations Committee to gain a full picture of the IC.

3. The IC should increase the level of information sharing and incorporate additional methods to mitigate counterintelligence risks.

_Challenge:_ The IC has used a hierarchical model in which information flows from the Federal level down to state and local officials. In addition, information sharing runs opposite to the secretive culture of the community.

_Solution:_ Change from a hierarchical information sharing model to a distributive model and increase the incentives for information sharing.
Challenge: The IC must balance the need to share information with the need to protect information from enemies of the United States.

Solution: Develop an auditing function to allow managers to see in real time what information people are accessing and what programs they are running. Also, require supervisor approval to take certain actions or access certain data. Lastly, clarify the punishment for disclosing classified and protected information to increase deterrence.

4. Reform must occur in order to continue to improve the IC, better inform senior leaders and improve policy decisions.

Challenge: There is a range of views amongst participants on the process necessary for reforming intelligence functions. On the one hand, some argue that the President has the authority to make most necessary changes through executive orders and new practices in the National Security Council. On the other hand, some argue that congressional action is necessary or at least prudent to make several necessary changes, especially given that the President has yet to use his authority.

Solution: Reform should occur with the support of both the Executive and Legislative branches.
Introduction

Since the creation of the Intelligence Community (IC) in 1947, experts and government officials have continued to improve the practices of intelligence collection, processing, analysis, and dissemination. As a result, the United States has one of the best ICs in the world. The unfortunate events of September 11, 2001, created a new political climate that made further significant and needed reform possible. In 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA), which created centralized leadership within the IC through the Director of National Intelligence (DNI). The DNI was meant to serve as the President’s chief intelligence advisor and the head of the IC, working to ensure closer coordination and integration of the sixteen agencies that make up the IC.

Like many other pieces of legislation, enactment of IRTPA failed to achieve all that some desired for three main reasons: (1) conflicting motivations by those creating it, (2) a resistive community, and (3) an unclear mission for the DNI.5 When IRTPA was drafted, the Executive branch did not strongly support a centralized IC, and Congress was divided between those that wanted a strong, central, and independent leader and those that preferred to maintain the status quo while in the midst of two wars. Once the DNI was created, the office of the DNI faced significant resistance from the IC agencies. Such resistance came especially from the Departments of Defense, Justice, and Homeland Security, which housed twelve of the sixteen IC agencies.6 Finally, the Office of the DNI has always had trouble defining its mission and role, a topic that continues to be debated.

Although the IC is arguably more effective today then pre-September 11th, participants generally agreed that many challenges remain and continued reform is necessary. The purpose of the Legal Affairs Roundtable on the Current State of Intelligence Reform, held on May 6, 2011, at the Bingham McCutchen LLP, was to gather input from leading attorneys, practitioners, and subject matter experts regarding legal issues associated with proposed reforms to the Intelligence Community. The Roundtable focused on the issues of current governance, the challenge of intelligence oversight, information management and the future of intelligence reform.

6 Id. at 3
Governance

**Internal and external** governance relates to the management, guiding policies, and decision-making processes of the agencies. This necessarily includes the heads of the IC agencies, the Director of National Intelligence (DNI), the National Security Council (NSC), and the President. Congress, the federal courts, the American public, and foreign governments should also be included. Within the Executive branch, governance is an internal process to manage the collection, analysis, and use of intelligence to inform decisions, currently controlled by the DNI. Externally, governance affects the nature and content of our actions as well as the manner in which those actions are perceived.

In order to extrapolate general principles of “good governance,” panel moderators focused the conversation by asking whether the DNI can and should use his budget authority to create a true National Intelligence Program budget. Additionally, the participants discussed how training programs at all levels could improve governance practices.

**The DNI Budget Authority**

Our country is currently facing a budget crisis and Congress is deeply divided on how best to address the problem. Because of this crisis, it is anticipated that federal budgets will be cut, and the IC’s budget will shrink proportionately. The IC budget has historically followed the Department of Defense (DoD) budget. However, the former Secretary of Defense Robert Gates spent much of his last two years planning for possible cuts in military spending, while it is not clear if anyone has done similar planning for the IC. The default position is that each agency within the IC takes the same percentage cut to its budget, and the heads of each agency determine where those cuts will take place. There is no reason to think this is an optimal solution. Instead, the DNI could use his budget authority to direct what programs should be cut or reduced. But could the DNI force the agency leaders to work together in an enterprise that goes beyond their parochial concerns?

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7 The moderators also asked the roundtable participants to ignore some of suggestions for governance reform that they believed would not lead to a fruitful conversation. Included in that list were obvious suggestions, such as increased support for the DNI by the President, and more extreme suggestions, such as the creation of a cohesive intelligence department or the abolishment of the DNI.

There are two primary sources for the DNI’s legal authority to direct the budget process. The Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 gave the DNI certain budget authorities. Among those authorities, IRTPA provides that the DNI shall “provide to the heads of departments containing agencies or organizations within the intelligence community guidance for developing the National Intelligence Program budget,” and “shall develop and determine an annual consolidated National Intelligence Program budget.”

It seems clear from this language, as well as the legislative history behind IRTPA, that the congressional intent was for the DNI to have strong budget authority. Further, the DNI also has the responsibility to “ensure the effective execution of the annual budget for intelligence and intelligence-related activities.” However, the DNI has rarely used that authority. The second source of legal authority is Executive Order 12333, which was amended in 2008 to improve governance of the community and to clarify the powers of the DNI. It instructs, the DNI to “oversee and direct the implementation of the National Intelligence Program and execution of the National Intelligence Program budget.” These two documents allow the DNI to direct the budget creation process within the IC.

Participants discussed three major challenges to the DNI’s ability to effectively manage the budget of the IC: (1) unclear mission requirements and priorities, (2) the small size of the office’s staff and its inexperience with budgets, and (3) the complexity of the budget process.

First, in order to be able to determine annual budget numbers, the DNI needs to articulate IC mission requirements, defined simply as what intelligence senior officials will need to make sound policy decisions. Under President George H.W. Bush, the White House produced one page each year that laid out priorities for the IC. Today, the Cabinet Secretaries make recommendations, which are synthesized into the national priority framework. Every priority on the list includes a substantive issue and the country on which to focus. For example, the list might have nuclear proliferation in Syria, instead of just nuclear proliferation. To move something up the priority list, one must advocate a very specific reason why it has increased in importance. The IC normally turns that priority list into a comprehensive matrix that outlines all of the resources required to meet those priorities. While this process is helpful, it is not statutorily required and it could be replaced at any moment. Additionally, the DNI is still very dependent on the agency

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heads to outline their needs. Finally, while IRTPA instructs the Director of the National Counterterrorism Center (NCTC) to advise the DNI about the extent to which individual agencies have conformed with these priorities in the terrorism field, a similar assessment may not be occurring in other fields. One solution might be to embed intelligence priority setting within the NSC process to make it more stable. Regardless, it is necessary for the NSC staff and the departmental heads to continue to create priority lists and to provide feedback on the IC’s effort.

Second, some participants expressed concern about the DNI’s ability to draft the budget because of his office’s limited ability to oversee the IC. The DNI still does not have sufficient insight into the detailed executions of each agency. One reason for this is the desire by intelligence agencies to withhold certain sensitive pieces of information. An additional problem is the relatively small size of the Office of the DNI (ODNI) staff. While some participants offered that budget and oversight responsibilities could be adequately preformed with the current staff, many argued that the ODNI staff is inadequate. ODNI is required to look at all of the IC budget components and make sense of how funds are spent across agencies on various actions. The ODNI especially lacks the long-term expertise in the budgetary field that would be required to perform these functions. One solution is to increase the number of staff, but that is difficult to implement because it would generally require a budget increase.

Third, the budget process is complex and the OMB imposes limits on the budget-making power of all executive leaders. Currently, the OMB proposes the total amount for the National Intelligence Program budget, based on previous years’ spending. The DNI then collects information from each of the agencies within the IC and creates a detailed budget proposal, often with a counterproposal for the total amount requested. The two parties then negotiate until the OMB finalizes a budget allocation. This figure is sent to Congress as part of the President’s Budget. This process results in a great deal of input from the OMB, and a limit to what the DNI can request on behalf of the IC. For years the DNI has made general determinations about where appropriated funds should go and recommendations on where more funding is needed. For example, the DNI can suggest decreasing funding for collection efforts at the Central Intelligence Agency (CIA) while raising them at the National Security Agency (NSA), but that final decisions are made by OMB and not by DNI. Because the DNI is already in a weakened budget position compared to other departments, the role of the OMB could be even more disruptive to his or her ability to oversee the IC. One discussed solution is to give the DNI budget authority for the entire intelligence community so that he is in an equal position to the heads of other departments.
The three challenges described above focus only on creating a useful budget proposal, but they do not address the DNI’s ability to redirect resources once the money has been appropriated. Currently, it is difficult for the DNI to direct money from supporting one intelligence action to another, especially if that money is moving from one agency to another one. The DNI must get the cooperation of the agency directors, who may have many parochial reasons to say no. He also must notify Congress and obtain approval. As a result of the numerous challenges, reprogramming is not done often.

TRAINING PROGRAMS

When discussing external governance, the workshop participants spent a great deal of time discussing what training is required and received by intelligence agents and analysts. An important suggestion that arose was that intelligence agents and decision-makers need more training on various laws, such as the Law of Armed Conflict, that may impact their decisions. The U.S. military has training programs to ensure that both the lawyers advising and the operators in the field are familiar with and accountable to the laws that govern them. The IC could adopt this practice by requiring all intelligence operators and decision-makers to receive training in a joint IC environment, and to produce after-action reports. The IC program would not be meant to replace legal advisers, but rather to ensure that intelligence agents, analysts and decision-makers understand and comply with various domestic and international laws, even when a lawyer is not there. Additionally, it may also be wise to give intelligence training to lawyers. Reading an intelligence document requires a set of skills that lawyers may not even realize they lack.

There are some challenges for a new IC education program. One issue is how much continued training is necessary. Military lawyers are trained upon commissioning, but they may not receive further education beyond this point. Most Judge Advocates get advanced training predicated upon their current assignment’s requirements. Operational law Judge Advocates become Law of Armed Conflict experts; criminal prosecutors do not. Another area of concern is whether the IC would be responsive to this additional training. The IC legal advisers meet very infrequently, and there are even fewer joint meetings for IC operators. Agencies may resist expending resources, including the time of their employees, on training that does not directly help their near-term objectives. A third point of concern is that the disparity between training and education. The latter is about critical thinking, which impacts the approach people take towards complex problems and ultimately the culture they attempt to create when working. If the IC program does not
focus on education, instead of just training people on the rules, then it may not have much practical impact.
Challenge of Effective Oversight of Intelligence

All three branches of the federal government engage in some form of oversight for the IC. The moderators focused the discussion on appraisals done by the political branches. Executive branch oversight is currently demonstrated most profoundly by the Inspector General (IG) offices of the various agencies. The other form of oversight comes from Congress, especially the committees that hold hearings and authorize funds. Oversight could be defined as an organizational mechanism that is outside the chain of command and reviews what is going on after the fact. This mechanism is distinct from reviewing managerial compliance with the law, which is done within the chain of command. It can also be prospective and proactive, as well as reactive.

In both the executive and legislative contexts there are some inherent challenges to oversight. The IC consists of sixteen independent agencies that have overlapping missions and goals. Additionally, there are several activities and reporting chains that function outside the regular IC agencies, such as the NCTC. This diverse field of actors often lack clearly defined roles, which can make it difficult to define agency accountability. Secrecy lies at the heart of intelligence work, so the IC is culturally inclined not to share information, even to overseers. In addition to these general challenges, there are specific issues in both the executive and legislative contexts.

In general, the participants of the roundtable found that the best way to resolve these problems was to develop mutual trust between those being overseen and the overseers. However, the question remains how to develop that trust while maintaining the confidence of the American public.

Oversight by the Executive Branch

There are several organizations within the Executive branch that play some kind of advisory or oversight role for the IC. The President’s Intelligence Advisory Board, the OMB, the NSC, privacy offices, and equal employment offices are a few examples. Despite the number of overseers available, the quantity of oversight required and tools available have not kept pace with the growth of the IC. The Executive branch increasingly needs to oversee intelligence activities, such as covert actions, sensitive collection done by both military and civilian operators, the use of public funds, and the creation of priorities for the intelligence community.

The roundtable participants highlighted several key challenges for Executive branch overseers. These challenges include limiting investigation duplications, avoiding politicization and criminalization of the process, and refraining from focusing on
individual conduct rather than programmatic actions. Two particular challenges received special attention: the appropriate distance for overseers and the best way to measure oversight effectiveness.

The first challenge is finding the best distance from the actual collection activities while still allowing sufficient detail to have adequate oversight. The closer the overseers are to the activity, the better they will understand it and the more insightful their suggestions will be for change. However, the more knowledgeable the overseer the less he or she will be trusted by anyone outside the organization, since they might be viewed as having adopted the organization’s goals and interests. A possible solution is to ensure that all overseers include both outsiders and insiders. This diversity would ensure that the team could be effective and credible. Another possibility is to rotate more people in and through oversight roles, which would limit the risk of overseers being captured by the organization’s interests.

The second challenge for overseers is measuring their effectiveness. An easy way to measure an overseer’s effectiveness is to count all of the failures he has discovered and addressed, but the IC is very adverse to this kind of “score keeping.” Additionally, more oversight will not necessarily be more effective, so there is not a clear solution when one cannot measure effectiveness. One solution might be to have off-line meetings between IC agency heads to discuss common problems and receive qualitative reports from the IGs. This practice could avoid assigning blame to specific people or organizations, but still develop best practices.

**THE IC INSPECTOR GENERAL AND AGENCY INSPECTORS GENERAL**

A critical institution of executive oversight is the Inspector General of the Intelligence Community (IC IG). This position, which is distinct from the agency IGs, is meant “to create an objective and effective office, appropriately accountable to Congress, to initiate and conduct independent investigations, inspections, audits and reviews on programs and activities within the responsibility and authority of the Director of National Intelligence.”

Like all inspector general offices, the IC IG also raises separation of power issues. It is almost impossible for an IG to disregard an instruction from one of the congressional intelligence committees because the refusal can result in severe budget cuts. However, the committees also expect the IG to initiate investigations into fraud, waste,

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abuse and law compliance without a request from the committee, especially for major problems. As a result, much of the IG’s current time is spent creating reports for Congress. This shifts the IG’s focus away from how to improve the IC system, towards assigning responsibility for problems or errors. Additionally, the DNI has the ability to prohibit any investigation if he believes it is vital to national security interests. As a result, the IC IG can be hampered by the DNI in meeting major demands from Congress.

The agency IGs offices face many of the same challenges as the IC IG. The culture within these offices deals solely with wrongdoing after the fact, instead of being involved earlier in decision-making to ensure the best mechanisms are being used. IGs often struggle with determining whether they have been effective and to ensure they are trusted both by their agency as well as by the public. There is also a general push for IG offices to deal more with granular issues, such as procurement decisions, instead of major investigations. However, IG offices can be extremely helpful and they have access to the best information about their organization’s decisions and processes. They play an important role within their organizations and can also be a key resource for the IC IG.

When creating the IC IG, it is clear Congress wanted that office to work with the agency IG offices. Both the IC IG and an agency IG can open investigations into the same issue, and the two groups can decide who will proceed. The IG office that backs out will still receive the final report, which it may not see if it had not opened its own investigation. As a result, the system is structured so that all IG offices will want to start investigations. This problem could be addressed in the intelligence community’s IG Forum, but the Forum has not been able to reduce much of the redundancy in IC reviews.

Again, the key solution here seems to be to develop trust between the IG offices and their many audiences that they are performing appropriate investigations. This goal requires convincing members of the IC that the IG offices are not just searching for rule-breakers to blame, and convincing Congress that the IC is being held accountable for errors.

Oversight by the Legislative Branch

13 Id. at § 405(f)(1) (“The Director of National Intelligence may prohibit the Inspector General of the Intelligence Community from initiating, carrying out, or completing any investigation, inspection, audit, or review if the Director determines that such prohibition is necessary to protect vital national security interests of the United States.”). The DNI is required to report to the congressional intelligence committees when he has used this authority and why.
The Senate Select Committee for Intelligence was created in 1976, and was followed by the Permanent Select Intelligence Committee in the House the next year. The committee originally investigated allegations of illegal activities by the CIA and FBI. Currently, the Members are asked to authorize funds, legislate on intelligence policy, and oversee intelligence activities, all of which are new oversight tasks. A major addition for congressional oversight is the reporting of covert actions. Title 50 of the U.S. Code describes the required procedures for covert actions, including that even the most sensitive of actions must be reported to certain members of Congress, the Gang of Eight. Since September 11, 2001, there has been a great deal of debate within Congress about whether key pieces of intelligence or reports on covert actions are being kept from the full congressional Intelligence Committees. Congress attempted to address this problem in the Intelligence Authorization Act of 2010, but the debate may really reflect a lack of confidence in the congressional leadership. Regardless, it is clear that all congressional members would like to be informed of new intelligence and are motivated to ensure that the IC is appropriately overseen.

There are many challenges for Congress to be an effective overseer of the IC. The committees are the furthest away from the IC of all of the overseers. They also have a fundamentally adversarial aspect to them, since IC leaders are often called before committees to explain their actions. Congress also has many committees that claim some jurisdiction over the IC aside from intelligence, including the armed services, foreign affairs, homeland security, and judiciary committees. Responding to requests from all of the committees can take a great deal of time, and it hampers the ability of overseers to feel confident that they have the whole picture. Input from multiple sources can result in contradictory and unclear guidance. It may also allow certain IC personnel to game the system, sharing different information with different committees. Finally, Congress does not have a single perspective, but rather several polarized views of the relative roles of Congress and the President. These perspectives have affected the IC more since

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15 50 U.S.C. § 413(b)(c)(2) (2006) (“If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President.”)
September 11th, when the caucuses began to pay more attention to the Intelligence Committees’ work.

The roundtable participants discussed some possible solutions for these challenges. The committees will not give up jurisdiction, so other creative means have to be used to decrease the reporting burden on the IC. One possibility is to have crossover members between committees, a tool that has been implemented in the past, but is not currently in use. Two other possibilities are having joint hearings between committees and clarifying the committee jurisdictions to be more distinct from each other. One participant suggested using the Appropriations Committees to gain a full picture of the IC, a suggestion also made by both the 9/11 and WMD Commissions. The challenge for this suggestion is that the Appropriations Committees already have a lot of work to complete each year. Congress already requires that the IC provide aggregate numbers for four major areas, but they could also ask for mission-based numbers to gain a better sense of how different intelligence priorities are being met. Finally, Congress will need to find leaders who can work with members from both political parties. The politicization of intelligence work is dangerous for everyone, and it can only be avoided by strong leaders in both Intelligence Committees.

A final way discussed that Congress can improve its oversight of the IC is through the Government Accountability Office (GAO), the investigative arm of Congress that examines matters relating to the use of public funds. The Intelligence Authorization Act of 2010 required the DNI to establish a policy for the Comptroller General to access information in the possession of the IC. The hope is that the GAO will be able to use its auditing expertise to review whether funds are being spent efficiently. Unsurprisingly, there has been some push back from the IC, and a general concern that the GAO may try to expand its mission beyond reviewing the use of public funds. The workshop participants did not agree on whether increased use of the GAO would be a helpful addition to congressional oversight. However, there did appear to be consensus that attempts should be made to effectively oversee an area that has been generally ignored before now.

Information Management

Informational management can be viewed in many different ways. The roundtable participants focused on two different approaches: the ideal level of information sharing and the best method to mitigate counterintelligence risks. These two issues are discussed below along with who would be responsible for meeting those goals.

Balancing Information Management and Information Sharing

Information management deals with the organization of the structure, processing, and delivery of information. There has always been a need within the IC for information management, but pressure has been building since September 11th to improve those practices. Many observers, including the 9/11 Commission, have contended that the low level of information sharing between government agencies, especially within the IC, was a key contributing element of several intelligence failures. As a result, many people now equate information management in the IC with improving information sharing.

A big component of information sharing is conveying information to and from the federal, state, and local levels. This work has been limited by several challenges. The first challenge is the hierarchical nature of information sharing. The current process, which was developed in the 1970s, involves information flowing from the federal government downwards. While a more distributive model is being developed, it still emphasizes centralizing information, which increases security concerns and can be inefficient. The best outcomes usually occur when people from various agencies are placed in the field together, so that they create their own networks that can be expanded. A second major issue is mistrust, especially between law enforcement groups and the IC, as well as between state, local, and federal organizations. Intelligence and law enforcement professionals often do not understand the bureaucratic concerns affecting other agencies’ behaviors, and so they can grow to mistrust others’ actions and intentions. Many FBI agents have said that they do not want to share information with local and state agencies. If that is a group’s instinctual response, then true information sharing is unlikely to happen. This mistrust is deepened by the unrealistic expectations many agencies have of what information they will be receiving. Local law enforcement offices often believe they need to receive everything, but they could not process that much intelligence if they had it. An ideal information sharing program would have: (1) a strong network that is not hierarchical, (2) a clearly communicated sense of why people do not want to share certain information, and (3) a way for leaders to manage expectations. Above all, successful
sharing of information amongst different government agencies will require a mental shift by participants about their ownership of that information.

Information sharing is also an aspect of a group’s culture. In the IC, as in any major bureaucracy, culture is partially the result of systematic incentives. For example, if one’s budget will be cut because one does not use all the allocated funds, then an agency is more likely to spend the allocated money frivolously at the end of the budget year. The same incentives can impact the IC. While receiving clearance training, intelligence professionals are repeatedly cautioned not to share information with others. It is difficult for those same people to then attempt to share information with people they do not know at other agencies. Declassifying documents is another major challenge. To move a document from top secret to secret, one must find the originating author to receive his or her approval and write a memo on the change. Until those disincentives are removed a cultural change towards more declassification will not happen. Even without those challenges, information sharing is difficult in the IC because source protection is critically important to agency operators. The IC is structured to limit information sharing because the limitation is believed to improve the effectiveness of intelligence collection. One solution is to expand the IC vision of its mission. If the IC’s business includes information sharing with other actors and analysts, not just with high-level decision-makers, then it will become better at it. The IC actors have to be helped to see the continuing risk of not sharing information with people who need it. Another solution is to move from being organized around how information is collected to what missions we want to achieve.

One participant offered the perspective that increasing information sharing may not increase the amount of success the IC achieves. Instead, the IC should accept that perfect information sharing is not possible and instead look at other issues within information management. One example is that current analysts are often not prepared to create the in-depth, thoughtful, well-written documents that are required of them. One explanation for this problem is that the IC is not structured to promote analysts who demonstrate a deep, strong understanding of an issue. Instead, current analysts often jump from issue to issue on a regular basis. The IC could potentially resolve this problem issue by training analysts to be better thinkers and by revising the promotion process within the IC. The military has developed a good model for this problem. All military officers receive training and education throughout their careers without sacrificing mission capability, something that was made possible by increasing the total number of personnel. The IC has already doubled in size since 2001, but it does not train or educate its employees any more than before. With this model, information management would be improved by
having better analysis of information and staff that are better at thinking about complex problems.

COUNTERINTELLIGENCE – PROTECTING OURSELVES

Counterintelligence is an essential aspect to an ideal information sharing program. It strengthens the value of the information held, and decreases the likelihood that people will withhold information. A critical question for counterintelligence information management is what practical steps can be taken to mitigate the risk that sensitive information will be stolen or leaked. After the 9/11 Commission report, there was a strong call for increased information sharing within the IC. New policies and procedures were put into place to try to ensure that more analysts and decision makers have access to the intelligence they need. However, the leaks within the past year, especially those involving the Wiki Leaks website, have demonstrated the major drawback to those decisions. The question now is whether an increased level of information sharing requires all government agencies and departments to increase their security standards, or whether there are other ways to mitigate risk. The participants came up with a few suggestions, including better audit technology, better review of intelligence users, a smaller number of classified documents, and clearer punishments for not protecting information.

More effective use of better technology could be a simple way to address counterintelligence concerns. Everyone in the IC should be better trained about what information should be placed into different databases and networks. If the goal is to give all analysts access to most intelligence all of the time, such as putting State Department cables on SIPRNet, then a thorough auditing function is necessary. This function would allow managers to see in real time what information people are accessing and what programs they are running. If the IC wants to prohibit a certain behavior on a networked or database system, then it should be impossible to take that action without the approval of a supervisor. One of the concerns about imposing this system is that it is difficult to anticipate what information an analyst might need to access. Maybe a private in Iraq would have a reason to have to read cables about Swedish diplomats. A solution might be a pull-system with pointers for more discoverable information.

The most recent and notable examples of leaked information are not actually counterintelligence failures. Private Bradley E. Manning, the man accused of leaking State Department cables to Wiki Leaks, was not hired by a foreign government or acting as a spy. Instead, he was a soldier with recognized behavioral problems who acted as an insider threat without the assistance of foreign intelligence operators. He would have been even more difficult to track down if he had received training on how to hide his illicit activity.
Human users are often the source of counterintelligence problems, and the solutions are generally better oversight and management, not necessarily better technology. The solution is having supervisors who can recognize how behavioral problems may lead to national security risks.

One roundtable participant argued that the United States cannot assume it has a monopoly on information. In this era of open source information and computer hacking, it is safer to assume that our sophisticated adversaries can see most things that are networked or in databases. When one considers that challenge, a way to mitigate risk would be to classify less information for shorter periods of time. If we operate with fewer secrets, then the ones we have will be easier to protect because we can dedicate more resources to them and it is easier to track them. This approach should also take less legal energy, since there will be fewer court challenges to keeping things classified. This risk calculus should also increase the level of information sharing without worrying about the increase to counterintelligence risk.

A final thought shared by the participants is that internal counterintelligence threats could be diminished if the punishments for leaking information were made clearer. The participants argued for a full array of instrument to address leaks, including administrative sanctions and firing offenders. Some time was spent discussing criminal punishments, which were thought to be currently ineffective. Most people accurately do not think they are going to go to jail if they disclose classified information, because it is difficult to prosecute. If the ramifications of allowing information to be disclosed inappropriately were enforced, then people might be more deterred by the punishment. This solution may require revising the criminal statutes connected to leaking classified information, or decreasing the prosecutorial burdens for proving those crimes.
The Future of Intelligence Reform

The current IC reform mirrors the changes that already occurred in the DoD. When the DoD was created the most challenging issue was differentiating the work of the services while allowing them to integrate. The Navy, Army and Congress were opposed to a closely integrated system, so the Secretary of Defense was structurally weakened. It took forty years and the Goldwater-Nichols Act to reverse that problem. Developing new practices in the IC has similarly been discussed for years, and important progress was made with IRTPA. However, more improvements in the IC are possible. The ODNI is very weak institutionally compared to the power of the component players, especially since those players have congressional support. As a result, integration in the IC has been limited despite the fact that the U.S. faces problems that are dire and complex. The recent deadly attack on Osama Bin Laden demonstrates that the IC is capable of making important contributions to protecting the national security of the United States, especially when it is an urgent priority. Continuing those successes is more likely if the IC persists in developing best practices.

POSSIBLE STEPS FOR REFORM

The workshop participants started with the predicate that the DNI was here to stay as an institution and office. There are six major areas that could be improved to ensure a more integrated and effective IC.

1. The IC could developed shared values, some agreement about the vision and principles with which they will operate. These values may include who their clients are and what kind of information they should be responsible for sharing.
2. The IC could incentivize personnel to work in an integrated manner instead of protecting their department’s interests.
3. The IC could work to build a unifying culture, instead of allowing departmental cultures to dominate. This challenging task may require convincing agencies that it benefits them to go through the DNI to get to the President. Ultimately, it may prove to be impossible for individuals to lose their departmental cultures, similarly to how the different branches of the armed forces still distinguish themselves despite being in the same department.
4. The DNI’s legal authority could be expanded and others in the community could more consistently support his use of it. The DNI truly needs the full backing of the President, and the President needs to trust that the DNI will bring the best
information available to the White House. One way to increase the DNI’s power would be to make him a part of the chain of command for all covert actions. This change would allow the DNI to be responsible for those actions.

5. The ODNI could be given a clearer mission. Currently, the DNI often acts as a coordinator, but if he is defined as being an integrator or leader it should increase his ability to have an impact on the IC.

6. The ODNI could be given real planning and programming power, especially over the budget. This step may require a bigger staff and an increased ability to move money and people around.

To achieve any of these changes, reformers will need to build a consensus among people within the Executive and Legislative branches that integration of the IC is important and that these steps will get achieve that goal.

A major idea that gained traction at the roundtable was the increased use of mission managers. Currently there are sixteen mission managers that oversee “all aspects of national intelligence related to their respective mission areas.” These areas include North Korea, Iran, counterterrorism, and counter-proliferation. The managers are often substantive experts, who bring together people with different backgrounds, including both collection and analysis skills. They also help the DNI identify what is stalling progress on that collection target, which could vary from funding, to human capacity, to not being a collection priority. Currently, the DNI and agency heads meet every two weeks with the mission managers to receive reports on their progress. As a result, the mission managers are often strong briefers who can clearly articulate their goals and demonstrate good judgment. One participant pointed out that this kind of integration is not cheap since IC agencies will not want to lose the capability to operate independently. This problem emphasizes that the DNI needs to direct the use of mission managers, especially since he is the only one with a truly big picture view of the IC.

Several other possibilities for reform were discussed at the roundtable. They include:

- **Comprehensive Intelligence Database**: This proposal would require all finished intelligence to be included in a single database that would be available to all analysts.

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The reports could include some meta-data that would indicate if there is relevant background material. The real challenge for this proposal is the concern about leaks and counterintelligence. For such a database to be accessible to all IC agencies, it might need to be on the Internet. The necessary solution seems to be creating a strong audit capability so that every search will create a report and anomalies can be detected. As a result, the IC would need to develop the database and the counterintelligence team to monitor and investigate its use.

- **Comprehensive Law Enforcement Database**: This database would have input from all government agencies—including the state, local, and federal levels—and possibly also from private organizations. It would be searchable by intelligence analysts to help focus on people connected to terrorism or espionage. This proposal could be the most challenging of all because it would require lots of funding, cooperation from multiple agencies, and possibly changes in the law about how information is collected and used domestically. The DNI is currently empowered to name any information as national intelligence and bring it under his sphere, but it is rarely ever done and not on the scale such a database would require. One solution for the database would be to draw a distinction between a search alone and a search with follow-up action. However, even if that legal distinction was accepted by Congress and the courts, it is unclear whether the American public would trust their government with that much power.

- **Cyber Security**: Currently, most cyber security capabilities lie within the NSA, but most of the authority to protect the government and private sector is with the Department of Homeland Security (DHS). It seems impractical for DHS to duplicate this capability; one solution would be to create a dual-hatted deputy who serves both the NSA and DHS. This person could have her own administrative and technical staff, as well as a civil liberty or privacy office.

- **Cyber Operations**: The U.S. is also developing its cyber offensive operations capabilities. A U.S. cyber operation could be an attack meant to degrade, deceive or destroy the cyber capabilities of another nation. A critical question surrounding cyber operations is what role the IC should play in the development, use, and appraisal of this tool. The workshop participants only briefly touched on this topic and no consensus suggestion was made.

**NEXT STEPS FOR LEGAL PROCESS**

While the participants in the roundtable agree on several of the possible changes to the IC, there is sharp disagreement about what legal process is appropriate or necessary. Several participants believe that the President has the authority to resolve the major issues
at the IC and related departments. Other participants believe that congressional legislation is necessary for the level of reform required. The dividing line for these two perspectives is how much authority the President can delegate to leaders in the IC. While it is clear in the military context that the President can delegate much of his commander-in-chief powers down to the joint command so that officials within the DoD decide whether an action should be carried out by the Air Force or the Navy, it was disputed whether the same delegation could be legally accomplished within the IC. Several people make the distinction that the military is all within one department, and instead analogize the DNI to a czar that cannot force departments to meet a goal. However, others contend that the DNI could be given similar authority to the Secretary of Defense, especially over the independent agencies.

For those that believe the President has enough authority, the key to any reform is the support of the President. There have been four DNIs in five years, which probably indicates that none of them received the backing they hoped for from the White House. The President could increase the DNI’s power and role by requiring that more decisions go through ODNI. For example, the President could require a baseline measurement for IC effectiveness and allow the DNI to both perform that initial test and report on agencies’ improvement. Increasing the DNI’s power would also free the President from having to approve every target and mediate every internal dispute. One possible limitation to the President’s power in restructuring has to do with whether or not he can delegate to the DNI the ability to freely move around resources, including information, people, and money. Affecting resources, especially in the budget context, would likely require congressional action.

For those that believe the President does not have enough authority, the key to reform is congressional action enabling the DNI to move resources around from different agencies and activities. Congress should pass a law allowing agencies to work more effectively in an integrated way, or on more joint task forces. The law should also allow the DNI to have budget authority and determine the senior leaders’ promotions in different agencies. The additional benefit of this approach is that a stronger legal authority for the DNI would give him more confidence to require cooperation by different agencies. One of the challenges for people who believe legislation is necessary is that most statutes have a non-abrogation clause, which keeps the new rules from limiting the power of cabinet-level actors. As a result, any new legislation would not be helpful for components of the IC that are within larger departments. Another major challenge is the difficulty of passing any major legislation in the currently polarized Congress.
A Need for Consensus

The workshop participants generally agreed that improvements could and should be made within the IC. The threats being faced by the United States and the constant need for well-sourced and analyzed intelligence requires IC members to attempt to develop the best practices possible. Key areas of reform focused on the role of the DNI, integration within the IC, and new uses for technology. However, debate amongst participants persisted about whether to initiate changes within the Executive Branch or Congress. Ultimately, attempting to create consensus in both of the political branches about both the need and the direction of intelligence reform will be a necessary first step.
Appendix A: Agenda

INTELLIGENCE REFORM ROUNDTABLE
May 6, 2011
Bingham McCutchen LLP
2020 K Street NW, Washington DC 20006

9:00am Registration and Coffee

9:30am Introduction and Overview

Roundtable Chair: Harvey Rishikof

9:35am Session 1: Governance

Moderators: Benjamin Powell and Judge James Baker

1. Internal Governance
   1.2. The DNI Law and Structure

2. External Governance
   2.2. Identifying Best Practices in the Area of Targeted Killing

11:00am Session 2: The Challenge of Effective Oversight of Intelligence: Executive and Legislative

Moderators: Suzanne Spaulding and Joel Brenner

1. Inherent Challenges for Oversight of the IC
2. Oversight Mechanisms: Strengths, Weaknesses, & Proposals for Improving
   2.1. Oversight by the Executive Branch
   2.2. Oversight by the Legislative Branch

12:00pm Lunch Keynote

Speaker: Dennis Blair, former Director of National Intelligence
The Future of Intelligence Reform

1:00pm  Session 3: Information Management

*Moderator:* Gordon Lederman

1. **Aspirations**
   1.1. What is the ideal for information management, including information sharing?

2. **Governance**
   2.1. Who is responsible for information management and what are the obstacles to reaching the ideal?

3. **Counterintelligence**
   3.1. What are practical steps to mitigate counterintelligence risks from increased information sharing?

2:30pm  Session 4: Reform and the Future

*Moderators:* Harvey Rishikof and James R. Locher III

4:00pm  Conclusions/Discussion

4:30pm  Adjourn
Appendix B: Selected Bibliography


United States Senate Committee on Homeland Security and Governmental Affairs, A Ticking Time Bomb: Counterterrorism Lessons from the U.S. Government's Failure to Prevent the Fort Hood Attack (February 3, 2011).


Testimony on Behalf of the Markle Task Force on National Security in the Information Age, Hearing on Information Sharing in the Era of Wiki Leaks: Balancing Security and


