

# National Security Reform for the Twenty-first Century: A New National Security Act and Reflections on Legislation's Role in Organizational Change

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## INTRODUCTION

National security threats in the twenty-first century, such as terrorism, proliferation, failing states, and climate change, are fast, dynamic, and complex. Meeting them successfully requires a capacity to integrate all instruments of U.S. national power – diplomacy, military force, intelligence, law enforcement, foreign aid, homeland security, education, transportation, and health and human services – into a single system supporting a common mission.

Despite the best efforts of our devoted public servants, our government is not organized to deliver integrated performance on a sustained basis to meet the existential threats that we face. Good people may in some cases overcome a bad system, but over time the problems of the system will prevail. As a nation, we cannot afford ineffectiveness, and in the current budget climate we cannot afford even inefficiency.

To address this gaping hole in the U.S. national security system, the Project on National Security Reform (referred to here as the “Project”) undertook a comprehensive study of the national security system and the problems inherent in interagency collaboration. The Project found that while departments and agencies for the most part accomplish their core missions, they are ill equipped to integrate their efforts to meet the multidimensional challenges of the twenty-first century successfully. The Project’s report, *Forging a New Shield*, which was released in November 2008, recommends thirty-eight reforms aimed at aligning the U.S. government with the current security environment.<sup>1</sup>

Though the need for change is readily apparent, the means to accomplish the appropriate changes are not. Some of the Project’s reforms are appropriately implemented by executive order or presidential directive. Others, however, require statutory changes or alterations to congressional rules. And still others can presumably be implemented by either executive order or by statute. While the means used to accomplish national security

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1. PROJECT ON NATIONAL SECURITY REFORM, *FORGING A NEW SHIELD* (2008), available at [http://www.pnsr.org/data/files/pnsr\\_forging\\_a\\_new\\_shield\\_report.pdf](http://www.pnsr.org/data/files/pnsr_forging_a_new_shield_report.pdf).

reform can take several forms, the Project believes that to achieve true reform, there must ultimately be a new national security act to replace the National Security Act of 1947.<sup>2</sup>

Part I of this article describes the Project, its findings, and its recommendations. Part II discusses specific legal issues raised by the recommendations. Part III offers thoughts on the power and limits of law in effecting organizational change.

#### I. PROJECT DESCRIPTION, FINDINGS, AND RECOMMENDATIONS

The Project, founded in early 2007, is a nonpartisan initiative that examines reorganization of the U.S. government's national security system to meet twenty-first century threats. It focuses not on hot-button policy issues such as detainee treatment but rather on the mechanics of government – how it operates and how it can perform better as a system. Funded and supported by Congress, foundations, and corporations, the Project is overseen by a Guiding Coalition, a bipartisan group of former senior federal officials and other individuals with extensive national security experience.<sup>3</sup>

Until issuance of its report in November 2008, the Project was focused on analyzing the problems with the government's national security system and generating high-level recommendations. The Project had over 300 national security professionals involved in the production of the 700 page report, a volume of case studies, and other supporting research.

The Project has now turned to one of its key aims, which is to make its recommendations actionable. To that end, the Project's Legal Working Group is tasked with drafting the legal instruments – including statutory language, executive orders, presidential directives, and congressional rule changes – that are necessary to implement the Project's recommendations.

The recommendations respond to the criticism that the U.S. national security system is organized to prevail against the last challenge, not the ones ahead. Today's national security system was shaped by the National Security Act of 1947, which was created with the lessons of World War II in mind and the challenges of the Cold War on the horizon.<sup>4</sup> Although there

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2. Pub. L. No. 80-253, 61 Stat. 495 (codified as amended in scattered sections of 50 U.S.C.).

3. Guiding Coalition members include former Speaker of the House Newt Gingrich, Ambassador Thomas Pickering, General Brent Scowcroft, U.S. Air Force (Ret.), and former Central Intelligence Agency General Counsel and Senate Armed Services Committee General Counsel Jeffrey Smith. General James Jones, U.S. Marine Corp (Ret.), Admiral Dennis Blair, U.S. Navy (Ret.), James Steinberg, Michèle Flournoy, and Ashton Carter were members of the Guiding Coalition prior to their appointment to senior level positions in the Obama administration.

4. For a discussion of the history of the National Security Act, see PROJECT ON NATIONAL SECURITY REFORM, THE NATIONAL SECURITY COUNCIL: A LEGAL HISTORY OF THE PRESIDENT'S MOST POWERFUL ADVISERS 1-9 (2008), available at <http://www.pnsr.org/data/images/the%20national%20security%20council.pdf> [hereinafter LEGAL HISTORY].

were flaws, the system arguably worked successfully during the Cold War. Twenty years after the end of the Cold War, our nation faces new threats, ranging from cyberterrorism to influenza epidemics, and some old threats with modern twists, such as piracy. We have not kept up with the character and scope of change in the world despite the tectonic shift occasioned by the end of the Cold War, the advent of globalization, the telecommunications revolution, and the shock of the September 11 attacks. Integration of U.S. government capabilities across all departments is critical to ensure that we can respond to national security challenges, very few of which can be met by one department acting alone.

The U.S. national security system has used various methods for achieving interagency integration. First, it has used standing or informal committees such as the National Security Council's principals, deputies, and policy coordination committees, as well as informal crisis arrangements such as executive committees. Second, it has used "lead agencies," in which a department that seems to have most of a national security mission within its purview is designated as the leader to guide and in turn be supported by other departments. Third, the U.S. national security system has used "czars," or individual leaders appointed by the president. For instance, Lt. Gen Douglas Lute was appointed by President Bush as the czar for Iraq and Afghanistan, with a rank equal to the national security advisor. However, such czars rarely receive authority commensurate with their responsibilities. A fourth method employed to integrate government capabilities is interagency collaborative agreement. The Human Smuggling and Trafficking Center is one such arrangement created by agreement of the Departments of Justice, State, and Homeland Security. Other examples include the Federal Bureau of Investigation Joint Terrorism Task Forces, the military's Joint Interagency Task Force South for counternarcotics purposes, and the Provincial Reconstruction Teams in Iraq and Afghanistan.

The Project found that none of these mechanisms has achieved interagency integration on a sustained and successful basis. The Project concluded as follows:

- Each department generally performs its core missions effectively. However, when departments are required to work together, they often fail to integrate their capabilities and expertise to operate as effectively. In other words, the U.S. national security system does not operate as a cohesive unit with unity of purpose and effort.
- Coherent policy planning and effective implementation suffer from intense interagency competition.

- Integration takes place essentially only at the White House level, which overburdens the President and is an unrealistic way of managing the system.
- Policy makers are frustrated with the system and try to bypass it or create informal arrangements.
- Resources are generally allocated for department-specific capabilities, not overall missions, and resources are not linked to strategy.
- “Soft power” – the civilian side of the national security system – is inadequately resourced, one reason that the military takes on missions not traditionally in its domain.
- The human resources system reinforces the department-specific orientation and does not prepare or reward government personnel adequately for operating effectively in the interagency space.
- Congress reinforces the system management problems built into the national security system.

The Project adopted a number of recommendations designed to remedy these problems in the current system. These recommendations seek to achieve the following:

- To focus the national security system on national missions rather than department-specific missions, such as by creating a Director for National Security to manage the national security system.
- To achieve unity of purpose and unity of effort on an interagency basis, such as by merging the National Security Council (NSC) and Homeland Security Council and employing interagency teams to create strategies and oversee implementation on critical national security issues.
- To link resources by requiring that NSC strategies be informed by available resources and that NSC strategies guide the Office of Management and Budget’s resource decisionmaking.
- To maximize the contribution of human resources to the success of interagency activities, such as by requiring that service in another department be a prerequisite for promotion in one’s own department and by creating a national security professional corps that has expertise on interagency issues.
- To create an interagency focus on Capitol Hill through the formation of a select committee on interagency issues in both the Senate and the House of Representatives.

## II. LEGAL ISSUES RAISED BY PROJECT RECOMMENDATIONS

### *A. Desirability of a Statute v. Executive Order*

Although many of the Project's recommendations can be implemented by executive order, the Project believes that ultimately a new national security act is needed. To be sure, the benefit of executive orders is that they do not require a protracted period of congressional debate and compromise. Executive orders can be issued quickly by the President, and rescinded just as quickly.

However, a statute brings benefits as well, despite the lengthy period of time necessary to enact it. A statute creates permanence, which provides stability for the system and also can overcome resistance from entrenched bureaucrats who might otherwise think that they can wait out an administration until the next President issues a new executive order. In addition, a statute makes Congress a stakeholder and makes it more likely that Congress will conduct vigorous oversight – including by getting commitments from nominees that they will implement the statute aggressively. Finally, a statute can tap into Congress's premier constitutional power for compelling executive branch action: the power of the purse. The President may create structures and processes and fund them temporarily by transferring resources, but ultimately it is Congress that provides resources on a sustained basis. Without Congress's input and resources, a presidentially imposed solution to interagency integration may wither for lack of funding.

### *B. Legal and Political Complications of Reform*

Several key recommendations highlight novel legal issues and intricate political considerations raised by national security reform. The Project recommends a merger of the NSC and the Homeland Security Council, creation of a Director for National Security and interagency issue teams, and integration of the civilian and military chains of command in particular circumstances. Each of these reforms, while critical to successful reform efforts, brings both legal and political challenges.

#### *1. Merger of the NSC and the Homeland Security Council*

The Project recommends a merger of the NSC and the Homeland Security Council into the President's Security Council, which would address both the traditional security issues and the nontraditional issues relating to security, such as economic and energy concerns. Unlike the NSC and the Homeland Security Council, the President's Security Council's membership would not be specified in a statute. This reinforces the fact that due to the complex and dynamic nature of twenty-first century

threats, formulation and implementation of security law and policy require organizational fluidity and seats for all appropriate departments at the policy making table.

The statute creating the Homeland Security Council permits joint meetings with the NSC.<sup>5</sup> Accordingly, the President could designate NSC meetings as being joint NSC and Homeland Security Council meetings. Also, there is no prohibition on so-called “dual-hatting”; the NSC staff may serve as Homeland Security Council staff as well. Indeed, there is a precedent for the President taking such an approach. Congress previously created NSC committees to focus on matters such as transnational threats, and Presidents reportedly responded by designating NSC meetings as also being NSC committee meetings.

Of course, it may be better for the President’s Security Council to be created by statute, like the NSC. No President has challenged the constitutionality of the National Security Act of 1947’s creation of the NSC per se, but the creation of a President’s Security Council does raise the separation of powers question concerning Congress’s authority to structure the President’s advisory system.<sup>6</sup>

## 2. *Creation of a Director for National Security, National Security Executives, and Interagency Teams*

The Project recommends the creation of a Director for National Security to replace the current Assistant to the President for National Security Affairs (the so-called National Security Advisor). The National Security Advisor has no statutory basis; the Advisor is the creation of a presidential directive.<sup>7</sup> No presidential directive in the public domain has enumerated duties for the National Security Advisor involving end-to-end management of the national security system. The Project has proposed that the Director for National Security have such management duties as the formulation of national security strategies for the President’s approval and assessment of system performance for the President’s information.

The Project also recommends the creation of interagency teams on critical national security issues to be led by National Security Executives, who would be individuals of great stature, comparable to senior-level political appointees in the departments. The National Security Executives would report to the Director for National Security. The teams would have

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5. Homeland Security Act of 2002, Pub. L. No. 107-296, §906, 116 Stat. 2135, 2259 (codified at 6 U.S.C. §496 (2006)).

6. See LEGAL HISTORY, *supra* note 4, at 10 (discussing President Truman’s initial discomfort with the NSC with regard to the President’s position as chief executive).

7. *Id.* at 20 (the position of Special Assistant to the President for National Security Affairs, the National Security Advisor (NSA), was created by President Eisenhower at the suggestion of Robert Cutler, whom Eisenhower eventually appointed as the first NSA).

charters approved by the President; they would formulate plans for interagency action to be approved by the President, and assess performance.

These recommendations generate questions concerning how to create these new positions and what authorities they can have. The Appointments Clause of the Constitution creates two types of officers of the United States, principal officers and inferior officers.<sup>8</sup> Under the Appointments Clause, both principal officers and inferior officers must be established by statute. A principal officer is appointed by the President with the advice and consent of the Senate. Inferior officers are appointed by the same means as principal officers, unless Congress instead directs that they be appointed by the President, the heads of the departments, or the courts.

Although there are several Supreme Court and lower court cases in this area, the law is far from clear. Only officers of the United States – principal or inferior – may exercise significant authority under the laws of the United States. *Buckley v. Valeo* was the first case to shed light on the importance of officers and the types of authorities that can be allocated only to them.<sup>9</sup> The Supreme Court in *Buckley* held that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by [the Appointments Clause].”<sup>10</sup>

*Buckley*, however, does not address what types of authorities may be given to principal and inferior officers, respectively, and how the authority of principal officers differs from that of inferior officers. Also, while neither *Buckley* nor any later case sets a specific floor for “significant authority,” it seems clear that any individual in the interagency space who exercises meaningful authority to compel departments to act will be held to be an officer of the United States.

The difference between principal and inferior officers was addressed most recently in *Edmond v. United States*.<sup>11</sup> There, the Supreme Court explored the difference between principal and inferior officers in terms of their respective reporting relationships. The Court stated that “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.”<sup>12</sup> Thus, to be an inferior officer – and be able to be exempted by Congress from Senate confirmation – an officer

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8. U.S. CONST. art. II, §2, cl. 2. Only “inferior officers” are referred in specific terms in the Appointments Clause. Principal officers are the “Officers” who are not “inferior.”

9. 424 U.S. 1 (1976).

10. *Id.* at 126. For further discussion regarding the *Buckley* decision and the distinction between principal and inferior officers, see Note, *Congressional Power Under the Appointments Clause After Buckley v. Valeo*, 75 MICH. L. REV. 627, 630–635 (1977).

11. 520 U.S. 651 (1997).

12. *Id.* at 662.

must report to some individual below the President, not directly to the President.

Based on these requirements, positions not created by statute – such as the National Security Advisor and Homeland Security Advisor under the recent Bush administration – cannot exercise significant authority under the laws of the United States. If the President issues presidential directives to create the Director for National Security and National Security Executives to lead interagency teams, it is most likely that they could not exercise any actual authority over the departments. Instead, their power would flow from their advisory capacity to the President and the President's demonstration of support for them. If, however, they were created by statute, they could become officers of the United States, exercise significant authority under the law, and thus wield some power over the departments.

### *3. Support of Interagency Activities*

The creation of interagency teams highlights another legal issue. How should departments and agencies work together when there is very little statutory text structuring such work? As mentioned above, the Project concluded that one of the major failings of the national security system is its inability to harness the capabilities of individual departments for national missions. In contrast to the detailed statutory authorizations for departments within the executive branch, there is a relative dearth of statutory text addressing the way that departments should work together. For example, obstacles to funding interagency collaborative activities have been a major impediment to their success. The search for start-up funding causes delays, and the lack of sustainable funding makes long term development more difficult.

The Economy Act is one of the few pieces of legislation that addresses how to work together in the interagency space.<sup>13</sup> It permits some flexibility in the area of interagency integration by allowing government agencies to purchase goods or services from other agencies. There are limitations on transfers under the Economy Act – including the fact that the transfers must be in the best interest of the United States, and the head of the agency must decide when goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise. Indeed, gaining the department head's assent can be a time consuming process, which is inconsistent with today's dynamic environment fueled by technological capability, compelling the government operate in so-called "Internet time."

Thus, it may be that a new budget account for interagency activities needs to be created. Indeed, the Project recommended a contingency fund for interagency activities. However, Congress has historically been loath to approve contingency funds due to a desire to maintain its power over the purse.

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13. Economy Act of 1932, 31 U.S.C. §1535 (2006).

#### 4. *Integration of Civilian and Military Chains of Command*

Another Project recommendation proposes integrating civilian and military chains of command in particular circumstances. Dual chains of command complicate unity of purpose and effort when there are complex contingencies – such as counterinsurgency – that require deep civil-military integration. There is frequently confusion over who is in charge in those circumstances. Confusion can be aggravated significantly by personality clashes. One notable exception was the unified military and civilian structure established under the Civil Operations and Revolutionary Development Support (CORDS) organization during the Vietnam War. Pushed aggressively by President Lyndon Johnson, CORDS placed civilian pacification programs under military command and gave them access to military money and personnel.<sup>14</sup> In general, civil-military integration has occurred when there have been strong interpersonal relationships and individuals dedicated to overcoming bureaucratic constraints.

Although the concept of an integrated command at the embassy level is codified in U.S. law, the law exempts the military's operational commanders. Title 22 of the U.S. Code gives the chief of mission "responsibility for the direction, coordination, and supervision" of all executive branch employees in a particular foreign country except, *inter alia*, for "employees under the command of a United States area military commander."<sup>15</sup>

Although the term "area military commander" is not defined, it most likely encompasses combatant commanders. Combatant commanders are senior regional and functional commanders, separate from the military services, who are responsible for commanding troops and assets of the military services in order to fight wars and perform missions. Therefore, the chief of mission probably cannot exert any "direction, coordination, and supervision" over military personnel under the authority of a combatant commander.

The Project found that an integrated civil-military chain of command is desirable in particular situations, but that such an arrangement creates complicated legal issues. For instance, could the President, pursuant to his constitutional authority, subordinate a military commander to a civilian official, such as an ambassador, National Security Executive, or a new type of civilian official who has plenary authority over a geographic region?

While an argument could be made that the President, as Commander in Chief, has plenary authority to structure the military chain of command however he or she sees fit, Congress also has a constitutional role in structuring the military chain of command. The Constitution gives

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14. See Dale Andrade, *Three Lessons from Vietnam*, WASH. POST, Dec. 29, 2005, at A23.

15. 22 U.S.C. §3927 (2006).

Congress authority to “provide for the common Defence and general Welfare of the United States,”<sup>16</sup> to “raise and support Armies,”<sup>17</sup> and to “make Rules for the Government and Regulation of the land and naval Forces.”<sup>18</sup>

Congress took a nuanced approach in structuring the military chain of command in the Goldwater-Nichols Department of Defense Reorganization Act of 1986.<sup>19</sup> That legislation strengthened the combatant commanders, who, as noted above, command troops and assets from the various military services in order to fight wars and accomplish missions. The Goldwater-Nichols Act specified the military chain of command – running from the President to the Secretary of Defense and through the chairman of the Joint Chiefs of Staff to the combatant commanders – but included the caveat “unless otherwise directed by the President” at key points throughout the legislation to avoid a charge from the White House that Congress was stepping on the President’s constitutional prerogative.

An integrated chain of command would raise other questions, such as a civilian’s authority over courts-martial, and would raise complicated issues of international law in terms of the status of civilians in the military chain of command. Court-martial authority is an essential element of military command, and it is not clear whether a civilian could or should exercise that authority.

### III. LAW AS AN INSTRUMENT OF ORGANIZATIONAL CHANGE

The law is a critical element of how our national security establishment is organized. The isolated verticals (“stovepiping”) of our system have roots in the law. Lawyers will play a critical role in reforming the national security system, both in drafting statutes and in implementing them. But understanding how the law fits within the larger organizational dynamic is crucial if we are to use the law effectively to reform institutions. The history of the statutes that have reorganized the executive branch – including the National Security Act of 1947,<sup>20</sup> the Goldwater-Nichols Act,<sup>21</sup> the Homeland Security Act of 2002<sup>22</sup> creating the Department of Homeland Security, and the Intelligence Reform and Terrorism Prevention Act of 2004<sup>23</sup> creating the Director of National Intelligence and the National Counterterrorism Center – reveal much regarding the interaction of law,

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16. U.S. CONST. art. I, §8, cl. 1.

17. *Id.* at cl. 12.

18. *Id.* at cl. 14.

19. Pub. L. No. 99-433, 100 Stat. 1012-1017 (codified as amended in scattered sections of 10 U.S.C.).

20. *See supra* note 2.

21. *See supra* note 19.

22. Pub. L. No. 107-296, §101, 116 Stat. 2135, 2142 (codified at 6 U.S.C. §111 (2006)).

23. Pub. L. No. 108-458, 118 Stat. 3734 (codified at 50 U.S.C. §403 (2006)).

policy, politics, institutional rivalry between the branches of government, personality, and happenstance.

*A. How Does Reform Legislation Come About?*

The Goldwater-Nichols Act of 1986 – the most far-reaching defense reform since 1947 – seemed to be a relatively “inside Washington” initiative. The failure of the Iranian hostage rescue and the bombing of the Marine barracks in Beirut exposed problems in the military chain of command that only experts could understand; the U.S. invasion of Grenada was hailed as a victory but regarded by experts as a failure of performance; and there was continuous frustration by U.S. Secretaries of Defense with the performance of the Department of Defense and the inability of the Joint Chiefs of Staff – composed of the heads of the military services – to provide meaningful and timely advice. The legislation was pushed by key members of the congressional armed services committees.

In contrast, the passage of the Intelligence Reform and Terrorism Prevention Act of 2004 was a public affair.<sup>24</sup> Public pressures, including the advocacy on the part of the September 11 attack victims,<sup>25</sup> the emphasis on national security in the 2004 presidential election,<sup>26</sup> and the apparent failure to find weapons of mass destruction in Iraq,<sup>27</sup> led to the enactment of the Act.

It is not clear how a new national security act would be enacted – whether from public pressure, or as an “inside-the-Beltway” endeavor. The need for internal government reform does not necessarily spark public outcry absent an actual disaster.

*B. What Makes Legislation on Organizational Change Successful?*

We can draw some lessons concerning successful reform legislation from the Goldwater-Nichols Act. That effort was successful because it involved precise drafting (on which I will elaborate below); sustained congressional oversight by the armed services committees, including use of the confirmation process to exact promises of support for the Act; avoidance of constitutional issues through some hedging language on the military chain of command; lack of resistance from senior-level officials

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24. See generally NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT (2004).

25. See, e.g., Edwin Chen & Greg Miller, *Bush Signs Intelligence Overhaul into Law*, L.A. TIMES, Dec. 18, 2004, at A1.

26. See, e.g., Janice D'Arcy, *An Unexpected 'Moral' Victory; Bush Benefits As Voters Put Heavy Emphasis on Values*, HARTFORD COURANT, Nov. 4, 2004, at A2.

27. See, e.g., Peter Baker & Walter Pincus, *Bush Signs Intelligence Bill; President Must Now Find an Experienced Hand To Guide 15 Agencies*, WASH. POST, Dec. 18, 2004, at A1.

after enactment; a legion of mid-level officers who were sympathetic; a disciplined military culture that could facilitate imposition of a new organizational paradigm; the leadership ability, political savvy, and strategic sense of General Colin Powell as the first chairman selected after the Goldwater-Nichols Act was enacted; the outsized personality of General Norman Schwarzkopf as the combatant commander leading the Central Command during the Gulf War; and the prestige accruing to the military following victory in the Gulf War.

A law fails if it just moves organizational boxes without having any effect on organizational performance. The objective should be to affect the larger organizational dynamic, practically and significantly. Often the sources of power in an organization are incentives and resources.

- Organizational performance derives in large measure from organizational culture. Organizational culture depends on incentives. Incentives derive in part from an organization's structure and process. Structure and process derive in part from law. Incentives include what an employee needs to do in order to be promoted in a department, and these may include both official and unofficial behaviors or qualities.
- Control of resources includes money and personnel. If the golden rule is that he who has the gold rules, then law needs to affect who has the gold and how she can spend it. That was the rationale of the Intelligence Reform and Terrorism Prevention Act of 2004. The Director of National Intelligence was given control over resources because resources are a major key to power.

Legislative drafters have to differentiate between legislative language that is merely "words on the page" and language that actually has an effect. Statutes are not self-executing. The drafter has to consider how to write legislation in a way that will be effective both practically and for the long term.

Perhaps the best example of how a statute can fundamentally alter the executive branch is the single line in the Goldwater-Nichols Act requiring officers to serve in joint assignments (i.e., assignments outside of their military service, such as on the staff of either the Joint Chiefs of Staff or as a combatant commander) in order to be eligible for promotion to general or admiral. That requirement dramatically affected incentives and thus set in motion a sweeping change of the Defense Department's culture. Twenty years after passage of the legislation, that culture is substantially more joint – more holistic, Department of Defense-wide – than before.

But there are distinct limits to legislation's effect on organizational change. Statutes realistically cannot structure relationships at the highest levels of government in terms of the interactions among cabinet secretaries and with the President. And with respect to legislation concerning White

House activities such as the NSC, Homeland Security Council, and President's Security Council, Presidents can find creative ways of satisfying the letter of the law while structuring the advisory system as they wish.

Disputes about legal authorities – or recalcitrance by a department – may never be resolved. Not every dispute between departments gets elevated to the Secretary level for resolution or results in a legal opinion by the executive branch's internal legal authority, the Office of Legal Counsel at the Department of Justice.

Legislative language often is a ball shot into the pinball game of the executive branch. It is not always clear or under Congress's control how statutory language will be interpreted by executive branch actors. Vague language can be molded, interpreted within a cultural context, misinterpreted, and manipulated for bureaucratic ends. Legislative drafters must be focused on how departments will interpret statutory text in practice and must be aware of the conventions that have developed regarding particular language.

An example of vague language is the often used word "coordinate." It appears throughout the U.S. Code and in common executive branch and congressional parlance, but its meaning is unclear. Requiring that one official "coordinate" with another sometimes is interpreted to mean that the second official must actually concur; in other instances "coordinate" means that the second official is merely consulted. And often, when unified action is desired, an official will be given "authority to coordinate" – which leads to ambiguity regarding what authority the coordinator actually has to compel action.

A second example of vague language is the phrase "as appropriate." Statutory direction that the executive branch take an action is often hedged with "as appropriate." This language provides the executive branch with discretion, which ultimately can become an exemption to the statutory requirement. Such language is often used in statutes as a negotiating tool for building the coalition of members of Congress and the presidential support necessary for enacting legislation.

### *C. The Process and Timing of Change*

The implementation of legislation is absolutely critical, and it is a much different endeavor from writing the statutes. Law is very instant, black and white; yesterday the law did not exist, today it does. But in implementation, even the simplest thing is complicated to execute. When it comes to bringing about actual change, it takes a long time for new processes and procedures to be created; the right people to be found to fill the right positions; strategies to be developed; resources to be provided via transfers within the executive branch or the formal two-year cycle by which the executive branch builds its budget proposal and Congress appropriates funding; and mistakes in implementation to be identified and corrected.

The role of personalities and relationships is absolutely critical in government and is frequently not appreciated. The personality of the President affects his national security decisionmaking structure. The personalities of senior political appointees affect their interactions and the nature of the subordinates' interactions. Relationships among key members of Congress can facilitate or even enable the passage of legislation, especially in building bipartisan consensus.

Even if legislation creates clear and strong authority, legislation alone is often not sufficient ultimately to achieve the intended effect. Authority, if not exercised aggressively by the empowered officials in the executive branch, will wither as bureaucratic enemies coalesce and negative precedents are set. In addition, what seems to be clear authority from the congressional perspective can be buried in the executive branch under a mountain of implementing regulations – regulations, for example, that require many signatures and levels of approval before action can occur. Accordingly, to accomplish reform and ensure that legislation ultimately has the effect that Congress intended, there also needs to be strong congressional-executive partnership, clear and decisive statutes, support of key executive branch officials, and sustained congressional oversight.

#### CONCLUSION

The legislative process for achieving organizational reform may be iterative and incremental. Efforts to create a Department of Defense with military services integrated into a cohesive entity are a prime example. First, the National Military Establishment was created in 1947, then there followed a weak Department of Defense shell, then the Secretary of Defense's power was strengthened, and then eventually the Goldwater-Nichols Act was enacted in 1986, culminating a forty-year process.

However, twenty-first century threats do not give the United States forty years to perfect its national security system. Moreover, major reform often comes after a cataclysmic national security event. But the objective of national security reform is to redesign the U.S. government in order to prevent such setbacks.

In sum, although the need for reform is clear, the methods needed to implement that reform include not only a new National Security Act, but also the determined will of stakeholders in the executive branch to implement reforms in an effective and efficient manner. The Project will continue its study of national security reform, including how the Project's proposed reforms may lead eventually to the creation of effective legal instruments to help ensure that U.S. national security is protected in the twenty-first century and beyond.