

# PART I - THE CENTRALITY OF INSTITUTIONS, POLICY, AND PROCESS

## Staying Left of Boom: The Central and Essential Role of the NSC

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***Synopsis:** The NSC — the Council, the process, and the staff - will remain central and essential to the government’s counterterrorism mission. First, military and intelligence activities to counter terrorism will increasingly rely on the President’s constitutional authority. Second, the recognition of new threats in the form of emerging technologies and domestic terrorism necessitate a national response and the resolution of legal policy questions that require Presidential authority and bureaucratic leadership to address. Third, the U.S. having learned to use all the instruments of national power to counter terrorism, the NSC will remain the forum where choices are made about which tools to use in context. However, with the focus on new challenges, the end of the “Forever Wars,” and the drift away from “a Global War on Terrorism” the President and his immediate staff will devote less attention to the counterterrorism mission as it changes. These factors place a premium on good NSC process, including internal and external transparency, purposeful staffing, and maintaining contact with the counterterrorism mission. These are not difficult “lessons” to identify; the challenge - as always - is in applying the lesson in the context of competing domestic and international priorities and real-world crises. This article suggests ways to embed good process into the NSC system to better meet the challenges ahead.*

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#### INTRODUCTION: THE CENTRAL AND ESSENTIAL ROLE OF THE NSC

The National Security Council is “the principal forum for consideration of national security policy issues requiring Presidential determination.” The NSC is, of course, three things. First, it is the Council, which means the President as well as the Vice President, Secretary of State, Secretary of Defense, the DNI, CIA Director, and Chairman of the Joint Chiefs of Staff, and on a more episodic basis, the Secretary of Treasury and Secretary of Energy and such other officials as the President (or National Security Advisory) designates. Second, it is the principal process by which the President is briefed on and makes national security decisions. This process includes a Principals Committee (PC) and a Deputies Committee (DC), which can act in their own right using statutory enabling authority and delegated presidential authority, or they may refer matters to the Council or President alone. The Deputies Committee has, but not always, played a defined role in crisis management, which can include counterterrorism. Third, “the NSC” is also a staff. The most important “staff” member is the Assistant to the President for National Security Affairs (APNSA), commonly referred to as the National Security Advisor. In the area of Counterterrorism, critical actors have also included the Assistant to the President for Homeland Security and Counterterrorism (AP/HSCT), the Senior Director for Counterterrorism, and the Legal Adviser.

In legal theory, the NSC staff “advises and assists” the President in performing his national security duties; that is because the staff has no authority beyond the authority that comes from acting at the direction of the President and the persuasive authority that comes with proximity to the President. The staff has at various times been described as too large, too layered, and too powerful. The staff is also essential: as a conduit for getting information to and from the President, in running the interagency process, and in driving decisions through the PC and DC or directly to the President for timely resolution.

This paper addresses (some) lessons learned from the past twenty years (and before) that should inform the next twenty years (and beyond) regarding the NSC and the counterterrorism mission. This starts with a recognition that the NSC — the Council, the staff, and the process — will remain central and essential to the

counterterrorism mission. This seems an obvious point to any casual observer of the United States Government (USG) and its efforts to combat terrorism.

But let's unpack the observation. Twenty-years after 9/11, the United States is facing new threats and challenges, like COVID-19, climate change, the rise of China, and a declining Russia seeking to assert great power influence. The United States has grown tired of and lost interest in a "global war on terror" and what came to be known as the "forever wars" in Afghanistan and Iraq. The USG has also created a sustainable and functional counterterrorism apparatus; successful efforts to counter terrorism should not require continuous presidential attention. Each of these factors suggests the NSC will give counterterrorism less time and attention than during the previous two decades.

But make no mistake, one lesson learned from the past twenty years and the years before is that the NSC — the Council, the process, and the staff — diverts its attention from terrorism at the Nation's peril. Does that mean that terrorism should remain a sleepless presidential priority? No. The President, like the government, can address multiple challenges at once. He must; it must. But the NSC staff and process remain the essential link between identifying threats, and a policy and decision-making process to address those threats in a timely and contextual manner using all the tools of national power. This observation has multiple implications.

#### I. THE IMPORTANCE OF KEEPING CONTACT

Good policy, like good process, only works if it is connected to events on the ground, which is to say, to the reality of what is occurring outside of Washington. Presidents and NSCs can, and do, keep track of more than one issue or priority at a time. But presidential time is scarce, as is NSC time (the Principals Committee and Deputies Committee). Public focus, attention, and support is also finite and hard to sustain (see COVID-19) especially if it is pulled in multiple directions at once. Moreover, the maxim that "when everything is a priority, nothing is a priority" is a truism because it is generally true.

The most likely outcome after "the Forever Wars" is that counterterrorism will "recede" as a national and presidential security priority, with the exception perhaps of domestic terrorism. This will impact the counterterrorism mission at the NSC in multiple ways, each of which must be accounted for and addressed in a purposeful manner.

- Presidents will engage with the issue on a crisis basis, rather than on a sustained policy basis. At least at the presidential level, this risks more reactive than proactive decision-making and policy.
- Counterterrorism will not command the same budget, personnel, or presidential and NSC attention. This will make sustained programmatic efforts at deterrence, like "Countering Violent Extremism" (CVE) programs, more difficult, and pull toward reactive rather than proactive efforts.

- A loss of priority and focus at the presidential level can also result in mission drift and the loss of contact with an issue at the staff level. Here, the NSC staff is more important, not less, than when terrorism is a constant presidential priority.
- It is the NSC staff that must maintain contact with the issues and threats in the field. We have seen what can occur when this does not happen. The U.S. lost contact with the threats emanating from Afghanistan after the Soviet withdrawal in 1989 and the rise of the Taliban. It occurred again in 1993 when the President was surprised to learn that the U.S. humanitarian mission in Somalia had drifted into a combat mission.

The NSC staff cannot lose contact with the counterterrorism (CT) mission. Of course, it is insulting to contemplate or suggest that this will happen. The risk is not that it will happen by design or soon. No NSC staff sets out to disconnect from an issue. But at the senior levels of government, it could and likely will happen over time: in three, five, or seven years, or until the next catalytic event, if the NSC staff does not guard against such drift.

What is the solution? An embedded bureaucracy dedicated to countering terrorism is one safeguard. The United States has such a bureaucracy. But linking that bureaucracy to the NSC process and presidential decision-making is the duty and role of the NSC staff. This starts with understanding that role and responsibility, and then creating procedural mechanisms that will pull and push information up through the NSC to the President. Such a process should purposefully address the following factors.

## II. THE AUTHORITY TO ACT OVERSEAS WILL DERIVE FROM THE PRESIDENT'S CONSTITUTIONAL AUTHORITY

After 9/11, the USG relied on the Authorization to Use Military Force<sup>†</sup> (AUMF) as well as the president's Article II constitutional powers as domestic authority for taking military action against terrorists, including targeted killing. Using the *Youngstown* paradigm, this placed the President at the zenith of his authority. Under the Law of Armed Conflict (LOAC) (embedded in U.S. law through the Uniform Code of Military Justice, military orders, and Title 18 of the U.S. Code) targets were either authorized within the framework of an ongoing armed conflict (Afghanistan and Iraq), or as individual acts of self-defense, incorporating both a decision to resort to force as well as specific decisions about an application of the means and methods of warfare (e.g. Yemen, Africa).

Twenty-years after 9/11 and the AUMF, we are returning to a pre-9/11 legal landscape, where the authority to take military action, including engaging in targeted killing, will likely rely exclusively on the President's Article II constitutional

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<sup>†</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, S.J. Res. 23, 107th Cong. (2001).

authorities. That is because the United States will no longer be engaged in an ongoing armed conflict in Afghanistan (and perhaps Iraq) and the AUMF, if it can still plausibly apply anywhere, will be an even less credible source of authority, linked as it is to “nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11.” (One likely exception may be Afghanistan after September 11, 2021, where the return of the Taliban to power may revive and restore the AUMF as a source of authority for military actions taken there.)

### III. A TIMELY AND TRANSPARENT PROCESS OF DECISION

Unless there is a successor legislative authorization to the AUMF and/or the U.S. is engaged in an armed conflict, military action against terrorists will rely on the President making the constitutional decision to resort to force, and likely in the context of one-off events, also deciding on the means and methods for doing so. This means that the President’s role in authorizing military action to counter terrorism will increase.

Presidents and their lawyers will need to determine and espouse a view regarding the limits of the commander in chief’s authority to take military and intelligence actions against terrorists — a task some Presidents have been hesitant to do—without the benefit of the legislative safety net of the AUMF. In addition, Presidents and their lawyers will need to understand the LOAC principles of targeting. And the NSC process will need to include an expeditious process of making constitutional as well as targeting decisions against terrorists posing imminent threats from overseas.

### IV. THE IMPORTANCE OF PURPOSEFUL STAFFING

When it comes to terrorism (or for that matter, any other national security challenge), there is a tension — real and perceived — regarding the roles of the NSC, the process, and the staff. That is, in part, because there is an inherent tension between setting, overseeing, and implementing policy. There are functions that clearly fall within one rubric or the other, but there are also functions that reach across all three disciplines. In addition, the NSC staff attracts individuals who lean forward, toward action.

To simplify for the purpose of illustration, if one placed the NSC CT process on a continuum from one of “direction” to “delegation,” the Obama Administration might appear at one end representing the White House *direction of policy*. At the other end, representing a *delegation of authority*, is the Trump Administration. (Although here, one might note that the Trump Administration had its own continuum between National Security Advisors.)

The lesson here is not that one model is the right model, although chaos is clearly the wrong model. The lesson is that Presidents and their National Security Advisors should be purposeful about adopting a process for making counterterrorism decisions. Being purposeful includes affirmative and accountable presidential decisions about what must or should be subject to NSC review and

decision in advance of need. Of course, where the President's authority is required to act, the President must decide, or at minimum provide specific or generalized authority in the form of a finding or operational direction to the Secretary of Defense or another appropriate official. One thing we also know but repeatedly learn is that the President gets the process he desires, demands, or tolerates.

#### V. GOOD PROCESS LEADS TO BETTER RESULTS

Counterterrorism places unusual, albeit not unique, practice strains on national security actors. A January 2009 Office of Legal Counsel memoranda repealing earlier opinions regarding so-called "Enhanced Interrogation Techniques [EIT]" stated, "in the months following 9/11, attorneys in the Office of Legal Counsel and in the Intelligence Community confronted novel and complex legal questions in a time of great danger and under extraordinary time pressure." Of course, with national security that is almost always the case. It may explain what occurred, but with counterterrorism it cannot excuse what occurs.

A good NSC process is one that addresses the sorts of cognitive biases and decisional pressures — which operate like decisional pathologies — that are endemic to counterterrorism. For example, when the mission is to prevent a catastrophic attack in the United States, there is a natural tendency to overreach. Policymakers and operators would rather err on the side of going one investigation too far than falling one investigation short. The necessity to act with speed and secrecy is also endemic. Therefore, a good process is one that:

- Effectively **fuses information from across the government**, including open sources, and not just from those agencies and entities embedded in the CT mission. The fusion of information from non-traditional CT actors like CDC, National Institute of Standards and Technology (NIST), PTO, USDA, and EPA is vital as well.
- Includes **mechanisms to assess the intermediate and long-term consequences of U.S. actions, not just their immediate impact**. Notably, the most controversial actions taken to counter terrorism in the past twenty years were taken outside normative CT processes of review and without the sort of "other hand" analysis that mitigates the cognitive biases associated with counterterrorism and the pressure to protect lives. Contrast, for example, the process leading up to the raid to kill or capture Osama Bin Laden, and the "process" resulting in the adoption of the EIT.
- Makes **purposeful, accountable, and transparent choices about the size and role of the NSC staff**. Such choices account for the importance of seniority and knowledge of the interagency process, as well as the inherent tendency of staff to proliferate in size, roles, and titles. The more effective the office and the bureaucrat, the more

likely they are to grow in layers and move from a role advising the President to one of “running” the government.

- Ensures NSC **personnel and assignments are transparent**, at least within the USG. In a democracy, the public ought to know who occupies critical government positions and whether turnover may jeopardize the mission. At the very least, the USG ought to know who the key NSC staff actors are to effectively engage the NSC process. And yet, the NSC has not publicly released a staff diagram since 9/11. This should change.
- Because **presidential memos are not self-implementing, utilizes oversight mechanisms to validate that policies and decisions have the effects intended**, and to inform the development of new policies based on those effects while also assuring that decisions are implemented as intended. For example, NSC staff should ask: Are Rules of Engagement realistic? In what manner do they constrain mission accomplishment? Are those constraints based on sound policy, presidential direction, or required by law? Are U.S. methods of intelligence collection, including interrogation, lawful? Are policy and legal prescripts followed?
- Recognizes that **“you get what you inspect, not what you expect.”** Putting aside the substance and merits of EIT, one thing that is remarkable is that no one in any Washington bureaucracy seems to have ventured into the field to see how the policies were being implemented, suggesting they either did not want to know or did not think to do so.

#### VI. GOOD PROCESS ALSO ENCOMPASSES THE FULL CYCLE OF THE CT MISSION FROM PLANNING TO COMMUNICATION

One lesson from the decades before and after 9/11 and reinforced by the Nation’s response to COVID-19 is the importance of conveying a clear and consistent message about threats. This starts with the most important bully pulpit in the country: the presidency. When the time comes to warn and mobilize the Nation, six post-9/11 lessons emerge:

- The pandemic taught us the importance of trust as well as consistency. If the public does not trust the source of information, it will not listen.
- If given a choice of messages, the public will hear the message it wants to hear.
- A presidential speech is not the same as the delivery of a message, neither is a presidential speech a communications plan or strategy.

- Many military and intelligence actions to counter terrorism, like targeted killing and extraordinary rendition, will be controversial. This will more likely be the case when, for example, the USG does not disclose the intelligence information on which its actions are predicated. This may be a necessity, but it should always be a purposeful rather than a default choice. Silence defers to America's opponents the completion of the narrative as to why something happened and against whom. It is at the presidential level through the exercise of constitutional authority that one hand/other hand questions about whether and when to reveal intelligence sources and methods can and should be resolved as part of the decision process.
- Moreover, if as projected, the USG is bound to rely on the President's constitutional authority alone as the legal basis for undertaking military or intelligence activities, then the NSC will need to be prepared to articulate the legal basis for U.S. activities in a way it has not had to do when operating under the AUMF.
- Finally, it is the President's duty to keep the American public from being surprised, and it is the NSC staff's duty to keep the President from being surprised.

## VII. GOOD PROCESS LINKS OVER-THE-HORIZON THREAT ANALYSIS WITH CURRENT POLICY PLANNING AND ACTION

Generals are sometimes said to prepare to fight the last war. The same might be said of counterterrorism officials. However, the comment seems unfair and too simple an explanation for a harder problem. After 9/11, with the advent of the homeland security mission, it became popular to describe the way the government considered new terrorism threats with the analogy of youth soccer players chasing the soccer ball. But we are past that point. The challenge is not one of imagination, but of harnessing the resources of the government to contend with all the challenges we have imagined that have not yet materialized. Restated, we are good at identifying over-the-horizon issues and threats; we are not good at linking those emerging threats to policy action and decision until the threat is in our face, or in current popular vernacular, "right of boom." Staying left of boom is the job of the NSC staff: to create a plan (or ensure a plan is created), link that plan to the policy and budget cycles, and then ensure it is implemented through the counterterrorism bureaucracy. COVID-19 is a case in point. The threat was perceived on a strategic level. The CDC and the Intelligence Community (IC), among others, warned of a coming pandemic for years. Tactical warning arrived in the form of a CDC announcement in January 2020 and the formation of the White House Coronavirus Task Force. But this warning was not linked to national policy action and response.



The NSC's success in combatting terror will likely hinge on whether the President and NSC is successful in linking an effective bureaucratic and policy response to address four threats for which we already have strategic warning. It is the role and responsibility of the NSC staff to link that strategic warning to informed policy and sustained effort, and to do so in a proactive manner.

#### *A. Overseas Terrorist Organizations*

The threats that motivated passage of the AUMF remain. Terrorist organizations like, al-Qaida, AQAP, ISIS, al-Shabab, Hezbollah, the IRGC, Boko Haram, and others who wish to emulate their actions continue to seek the tools for mass casualty events, including the use of WMD capacities and drones.

#### *B. Emerging Technologies*

Ask technologists what worries them most about the advent of emerging and disruptive technologies like Artificial Intelligence and Quantum Computing and most will likely point to synthetic biology and the potential of state and non-state actors to manipulate DNA sequences to create new diseases to use as weapons. This is a quintessential NSC issue because an effective policy response necessarily cuts across agencies, including non-traditional CT actors like USDA, EPA, Commerce, and NIST. It also necessitates personnel and budgetary commitments across years. One lesson from the past twenty years is to double down on “dual use” functions — like public health — that are certain to be needed no matter which threat eventually emerges.

#### *C. Domestic Terrorism*

The FBI and others have known for years that the number of domestic terrorist incidents exceeds the number of international terrorist incidents. Terrorism associated with white nationalism and hate groups is increasing. We also are on notice that international terrorism continues to inspire domestic terrorism. The Attorney General has noted that international groups have sought connections to domestic U.S. groups.

Two issues make the President a central and essential actor when it comes to domestic terrorism. First, domestic terrorism is inexorably linked to domestic politics and movements, and this affects how responses to domestic terrorist threats are perceived. The response to the events of January 6, 2021, demonstrate this point. Second, one of the central policy and legal policy issues domestic terrorism brings to the fore is the lawful and appropriate threshold for investigating potential threats manifest in, or emanating from, conduct that *may* be subject to First Amendment protections.

Put another way, the Nation will not and cannot effectively address domestic terrorism and cyber terrorism without better defining the line between what is protected speech and what can serve as an investigative predicate. The Department of Justice should lead in defining this line, but the line will not be drawn and tested in the crucible of courts without the policy and political support

of the President. That makes domestic terrorism a core Presidential responsibility and mission.

Following 9/11, commentators noted that the Department of Justice operated under the burden of a metaphorical Fourth Amendment “wall,” which limited what could be collected and shared by DOJ personnel performing intelligence functions with criminal investigators and prosecutors. The wall was predicated on the presumption that probable cause to engage in intelligence collection was lower than that for criminal investigations, and thus might serve as a backdoor around the higher criminal probable cause standard. This made it harder to connect the dots. However, viewed with retrospective clarity after 9/11, it was apparent the wall was a legal policy artifice intended to uphold the spirit of the law but was never required by it.

The President and the NSC staff should take care not to once again find that they are on the right side of boom, looking back at a First Amendment “wall” based on a presumption that the First Amendment did not allow lawful investigation into an emerging terrorist threat because we were too slow or too cautious in finding and defining the First Amendment line, and having that line validated or overturned in court.

#### *D. Cyberspace*

The United States continues to struggle to address the gamut of cyberattacks, many of which are appropriately viewed as terroristic or terrorism, even if they are not addressed by the CT bureaucracy. However labeled, they will not be effectively addressed without the NSC, NSC process, and NSC staff playing an interagency role in bringing all the tools of national security policy to the challenge of cyber deterrence.

The success of the United States in countering terrorism will hinge in large measure on its ability to address these present and emerging threats. That in turn will hinge on the ability of the NSC, the President, the process, and the staff which are uniquely situated to surge resources, fuse information, and link threat to action. It will also hinge on whether and with what success the USG maintains contact with known and existing threats.

#### CONCLUSION

As the United States pivots to new national security priorities and challenges, and thus away from counterterrorism, the counterterrorism bureaucracy will be asked to do more with less, including less NSC attention. That is not necessarily a bad thing, if it leads to bureaucratic efficiencies and the delegation of appropriate functions resulting in more timely actions. It *is* a bad thing if it turns out to actually mean doing less with less.

One solution is good process. This starts at the top with the NSC: the Council, the process, and the staff. Good process is timely, contextual, and meaningful. It is also transparent. And it covers the full gamut of decision-making requirements: intelligence fusion, planning, options, decision-making, reporting, explanation,

oversight, and adjustment. Good process also addresses the pathologies of counterterrorism decision-making, like secrecy, speed, and the relentless pressure to act to save lives.

If these are obvious lessons, they nonetheless seem to require periodic relearning. The challenge, as always, is in applying the lesson in the context of competing priorities and crises, just as the hard part of connecting the intelligence dots is not the realization that one should do so, but the way one goes about doing so. It may be particularly important to address these lessons at the NSC itself, where there is frequent personnel turnover, including at the top.

A little bit of humility goes a long way as well. Twenty years after 9/11, we may come to think we have seen it all and know it all. We haven't and we don't. With hindsight in hand, we need to approach each day with the urgency of September 11, 2001, but with the wisdom that comes with twenty-years of experience on September 11, 2021. And while the counterterrorism bureaucracy and the NSC should favor senior and experienced personnel, counter terrorism is also a field that will benefit from fresh energy and new perspectives. It is time now to train, equip, and empower the next generation of specialists. These essays are an excellent place to start.

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