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2012

INSS STRATEGIC PAPER

INSS

United States Air Force
Institute For National Security Studies

**US AIR FORCE
INSTITUTE FOR NATIONAL SECURITY STUDIES
USAF ACADEMY, COLORADO**

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Nuclear nonproliferation currently holds a prominent position in U.S. national security planning. The Obama administration has focused on a number of nonproliferation activities including the development of policies and the negotiation of agreements. While the military participates in the formulation of U.S. government policy, it does not always come to the table with the same level of expertise in the negotiation of international agreements as other U.S. government agencies. To avoid the compromise of military equities, it is essential that the military be proactive in the negotiation of nonproliferation agreements; the Joint Staff must help to shape the process rather than merely react to it. Given the frequent rotation of military personnel, the Joint Staff could benefit from the hiring of a career civil servant to review and represent the chairman on nonproliferation and arms control matters.

Nuclear nonproliferation currently occupies an enviable position of prominence in U.S. national security planning. President Obama is as committed to and personally interested in nuclear nonproliferation as any American President has ever been. Two months into the administration, the President has given his Prague Speech¹ focusing primarily on nuclear nonproliferation and disarmament; played an active role in the Nuclear Nonproliferation Treaty² (NPT) Review Conference;³ hosted the first Nuclear Security Summit;⁴ and negotiated, signed, and gained Senate advice and consent to ratification of the New START⁵ agreement. This flurry of activity demonstrates a unique emphasis on this area of national and international security. President Obama is also committed to the ratification of the Comprehensive Nuclear Test Ban Treaty⁶ (CTBT) and to the negotiation and conclusion of a Fissile Material Cutoff Treaty⁷ (FMCT). These initiatives in aggregate represent a remarkable level of personal interest and engagement in nuclear nonproliferation from a U.S. President. What does this mean for the

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military? Should the military change the way it does business in this area? This paper examines the issue and concludes that the military approach to nuclear nonproliferation in particular, and nonproliferation generally, while not broken, has not adapted to the dynamic changes in the national security environment since the end of the Cold War, and could be significantly improved with a minimal additional allocation of resources and an improved focus with the addition of a career member of the Senior Executive Service (SES) on the Joint Staff to handle exclusively arms control and nonproliferation issues. When positive change may be implemented with relative ease and low cost, it is an opportunity.

The U.S. military is unusually preoccupied. With two recent wars, drastic budget cuts looming, an increasingly assertive and militarily capable China and a resurgent Russia rearing their collective heads, the Iranian and North Korean nuclear weapons programs, the repeal of “don’t ask, don’t tell,” Wikileaks, etcetera, focusing the attention of military leaders on additional topics is difficult. While few other matters can hope to command serious attention in such an environment, nonproliferation should be one of them due to the risks of inattention. As noted, the administration is engaging on a number of nonproliferation policies/agreements with potentially significant implications for the military. The Joint Staff provides military advice on nonproliferation policy proposals, but must more proactively anticipate and engage on these issues earlier in the decision cycle due to the security implications of international inspection regimes and requirements often attendant to treaty and political commitments.

There is no authoritative definition of nonproliferation or arms control. Some might argue that nonproliferation applies to Weapons of Mass Destruction (WMD), generally defined as nuclear, chemical, and biological weapons, but that definition is problematic in that some experts, including the author, do not view chemical weapons or Radiological Dispersal Devices (RDD) otherwise known in the vernacular as “dirty bombs” as WMD.⁸ Others would broaden the scope to include all conventional and non-conventional arms. On the Joint Staff all nonproliferation and arms control matters are handled by the Directorate of Strategic Plans and Policy (J-5).

Nonproliferation is the legal means of inhibiting proliferation of WMD or other weapons. It employs national and international law, treaties, agreements, legislation and regulations designed to stem or restrict the flow of equipment and technology which might be useful to terrorist groups or outlaw states. Arms control is a generic term referring to all types of limitations on production, development and use of weapons, especially WMD and includes disarmament and reductions in classes of weapons. Counter-proliferation is the military response to proliferation; far more muscular and immediate in its effect. It is the physical means of stopping proliferation through the employment of military force, as exemplified by Israeli attacks on Iraq’s Osirak reactor in 1981 and, more recently, on Syria’s Al-Kibar

reactor in 2007. The Stuxnet cyber attack on Iran's nuclear facilities arguably shares nonproliferation and counterproliferation characteristics.

Counterproliferation, particularly in the form of kinetic attacks of suspected nuclear sites, risks escalation to war and may have adverse consequences to include reinforcing a regime's determination to pursue nuclear weapons or terrorism. Regardless, it is clearly a military mission. But how does the military engage in nonproliferation—an arena traditionally the province of diplomats?

The three nonproliferation instruments noted above, the NPT, CTBT, and FMCT, are good examples of types of agreements where the military participates in the formulation of U.S. Government (USG) policy at different stages of the negotiations continuum. The NPT entered into force, the CTBT has been negotiated and signed (but not ratified) by the United States but has not entered into force, and the FMCT has yet to be negotiated, notwithstanding a unanimous UN General Assembly Resolution⁹ over a decade ago to do so. Nonetheless, positions and proposals are continually being developed, refined, shared, and negotiated with the international community on all three of these. As those proposals arise, the Joint Staff, as part of the U.S. "interagency" (those federal departments interested in particular matters under consideration), has a seat at the table, and consequently a voice in the formulation of the ultimate USG position on such matters.

Since the interagency operates by consensus, agreement is often reached at the working level, but if one agency representative disagrees with a proposal, the issue is elevated to the Assistant Secretary level, the Deputy Secretary level, the Cabinet level, and if agreement cannot be reached there, to the NSC and the President for decision. A typical nonproliferation agreement under consideration in the interagency would likely have representatives participating from the State Department, the Office of the Secretary of Defense, the Joint Staff, the Nuclear Regulatory Commission, the Department of Energy's National Nuclear Security Administration, and a member of the Intelligence Community at the table. The Joint Staff is often the only uniformed military representative present and speaks for the military services and major commands. It is a serious responsibility, requiring continual coordination.

Non-military agencies involved in interagency meetings send experts. These are typically career civil servants who have been working these issues for years or political appointees with relevant experience. Military representatives, by contrast, are rotated every 2-3 years and have little or no prior experience, knowledge, or training in this area. This results in an unfair contest. The author has tremendous respect for the Joint Staff representatives who learn quickly and labor under broad portfolios and crushing workloads, with little support staff and nearly no institutional memory to aid them, except for a few civilian experts in select areas where continuity is deemed essential. This should be one of them. Due to the complexity of the issues under consideration, the Joint Staff representative may

understandably require a year to learn the technical issues, related national security issues, and relevant negotiating history sufficient to effectively participate in the process. Yet negotiations move forward and commitments are made with the potential of serious implications for U.S. military equities. The military risks incurring unacceptably binding commitments that could have been foreseen and prevented with more institutional knowledge and expertise.

The military usually takes an arms-length approach to nonproliferation agreements, generally viewing them as a nuisance with little practical relevance to military priorities. Typical instructions to military representatives attending such interagency meetings and negotiations with foreign states or international institutions are normally to permit the negotiators to do whatever they want so long as military “equities,” or vital interests, are not impacted. The military equity in such agreements is accomplishing its mission without impairment from potentially onerous treaty obligations.

It is important to understand the dynamics of the negotiation of international agreements, (treaties and Executive Agreements) and how that fits into the political process. Often, an administration of either political stripe negotiating an arms control or nonproliferation treaty may seek to conclude it prior to the end of its term of office, or even prior to a summit or other major event at which it is customary to announce progress. This often results in increased urgency to complete negotiations and to maximize the public relations value of a high-visibility signing ceremony. Given the current administration’s interest in New START, for example, it would be reasonable to speculate that there was significant political pressure exerted in order to complete the negotiations and obtain Senate advice and consent so rapidly.

As negotiations near completion, political statements are made publically about the agreement, raising expectations. As allies, negotiating partners, and domestic and international constituencies justifiably anticipate the conclusion of the agreement, the political pressure and momentum become overwhelming and any organization in opposition resists at its peril and, therefore, typically must obtain the personal support of the cabinet official at the head of the department. Since the issue could have been addressed earlier, raising it at that point tends to make the official look foolish and unprepared, so it rarely occurs. Yet the 11th hour is typically when the military finally focuses sufficiently to appreciate fully the dangers lurking in agreements that prior to more deliberate consideration appeared innocuous or even irrelevant to national security priorities. The Joint Staff must now be engaged in such negotiations from the start.

In the context of international agreements, which may become the supreme law of the land,¹⁰ any number of military equities could be affected by the often legally binding commitments contained therein. For example, Nuclear Weapon Free Zones potentially implicate or restrict military operations. The proposed Southern Hemisphere Nuclear Weapon Free Zone, a UN perennial, requires careful assessment

of possible consequences. The military also has a strong interest in protecting sensitive sites and keeping classified material secure, yet nonproliferation agreements often give international inspectors authority to search anywhere they deem appropriate. These military equities often conflict with the goals of treaties, which often seek transparency and verification. The military may also have a major positive interest in an arms control treaty if it constrains or provides insight into activities of potential adversaries.

Unfortunately, the military rarely seizes on such opportunities, reflexively viewing nonproliferation proposals negatively.

Even though the military generally treats nonproliferation as a sleepy backwater, events such as nuclear testing by India and Pakistan certainly arouse it, as can a direct assault on military equities, such as the Ottawa Landmines Convention.¹¹ Since the military relies heavily on landmines to protect South Korea from the north, such a ban was viewed as absolutely unacceptable, and the military led the way in the interagency to ultimately block U.S. participation in the Convention. In a proposed treaty to ban landmines, or, conventions to ban or limit other weapons, such as tanks, warships, or artillery, the risk to military equities is obvious and it reacts accordingly. But there are costs and attendant risks that accompany what may be perceived as knee-jerk opposition to such initiatives. The military is then placed in the position of arguing for U.S. nonparticipation in a treaty, as it did with Ottawa, in which case the United States, typically a leader in nonproliferation, is marginalized. Even though this may at times be appropriate, the optics are detrimental to the military, which may ultimately be viewed as merely rejecting proposed initiatives more out of habit than from a principled and reasoned stance.

Military objections may be overridden by a President committed to the objectives of the treaty. Arms control issues in particular are politically charged. The military often hurts its cause in the interagency by not sufficiently taking the political and strategic aspects into consideration, often opposing such agreements on narrow military grounds. This is why the Joint Staff would greatly benefit from some institutional memory, greater expertise, broader perspective, and improved process in this area.

In many other nonproliferation agreements, the dangers to military equities are far less apparent and may often have been agreed to before the military can even react. For example, DoD sees very little likelihood of the use of nuclear weapons by nation states, and one rarely hears military professionals discussing such employment. Why should the Army or Marine Corps be concerned about the CTBT when those services have no nuclear weapons? Why should they be concerned about the Biological Weapons Convention¹² (BWC) or Chemical Weapons Convention¹³ (CWC) when chemical and biological weapons have been outlawed?

In the CWC negotiations, for example, the proposed definition of chemical weapons to be prohibited for use as a means of war included riot control agents, such as tear gas. But the military

requires tear gas in several situations such as to control rioting POWs (thus saving lives since other options include shooting them); to provide just one example of why the military would not have concurred on such language had it been aware of the implications. Yet this issue was not recognized or addressed until late in the negotiations.

In the context of legally binding agreements, major issues may be determined by the simple placement of a comma versus a semicolon, making it virtually impossible for a novice to identify this incipient problem. Military equities risk compromise where a proposed treaty provision is harmful to the military but where other agencies have no equity or concern. For example, the State Department does not require tear gas, and its equities differ substantially from those of the military.

Multilateral negotiations such as the CWC take place at the Conference on Disarmament (CD) in Geneva, which operates by consensus. Such negotiations proceed at a glacial pace. Since 66 states are involved, consensus may take years to attain. The CWC took over a decade to negotiate. The CD has taken nearly 15 years trying to agree to begin negotiations on a FMCT. Perhaps the slow pace of these agreements lulls the military into a false sense of security.

For example, the United States and Russia negotiated, in 1998 and 2000, agreements for the disposition of 32 metric tons of weapons grade plutonium removed from nuclear weapons. Bilateral agreements are negotiated much more quickly than multilateral ones. The major contention in this agreement was liability—not a military equity. Other agencies posed no objection. A careful reading, however, revealed that no provision required disposition of plutonium to be accomplished concurrently. Assuming U.S. efficiency and Russian inefficiency, a possible scenario was sequential disposition, or worse, U.S. disposal of plutonium without Russian disposition. So a provision was added requiring concurrent disposition, ensuring parity in disarmament. It was a simple fix, and when proposed early in the negotiations, both sides concurred. But had this proposal arisen at the 11th hour, it would almost certainly have been rejected, regardless of merit, due to the political momentum attained.

Also worthy of note is the tendency of the services to espouse unrealistically expansive views of certain equities. For example, the Navy has taken the approach that any treaty inspection regime involving inspectors boarding U.S. Navy ships is unacceptable as a violation of sovereign immunity. This approach is superficially appealing, but more appropriate to the 18th century than the 21st. The Navy has valid concerns regarding the security of naval fuels, for example, in the proposed FMCT. But with an administration firmly behind FMCT, a desire to remain outside the treaty verification regime will not be well received. The Navy will also need to more convincingly address why it allowed those very equities to be compromised in the CWC and in the Additional Protocol to the U.S. Safeguards Agreement with the

IAEA, both of which allow challenge inspections anywhere in the United States, including ships. Now is the time for the military to begin considering acceptable alternatives.

Any inspections on U.S. territory, which as a legal matter include U.S. warships, are technical violations of sovereign immunity. Such immunity, however, is waived when a state accedes to a treaty permitting such inspections. There are recognized methods which effectively minimize risk during inspections. Utilization of “managed access” protects sensitive equipment while allowing inspectors access to an area. But truly sensitive areas may be restricted or items in certain rooms of a building may be shrouded from inspection. Such inspections occur regularly in the United States under the NPT, based upon the U.S. Voluntary Offer, and are possible, although none have yet occurred, under the CWC challenge inspections (but have occurred under CWC destruction monitoring).

The military must begin to address nonproliferation agreements proactively, looking beyond the limited focus of damage control. The military should organize and equip itself to shape the process rather than merely resisting, minimizing, or ignoring it. Early, active engagement provides benefits analogous to legal involvement in negotiations. When a government or corporate entity begins negotiations and takes certain positions, it may be problematic if no lawyers are involved. Too often, only once negotiators realize that a mistake has been made will they consult a lawyer. Inevitably, late legal engagement results in very limited options to choose from, all of which are usually unpalatable. With early legal involvement, many more acceptable options are often available.

The Joint Staff previously relied upon OSD representatives for detailed expertise required for such negotiations, but this assumption no longer applies. The OSD staff no longer has the number of Action Officers or depth of experience that it once did, and there are inevitably cases where the Joint Staff and OSD have different views.

ORGANIZATIONAL DYNAMICS

A discussion of organizational dynamics may not seem to naturally follow from a discussion of how the military deals with nonproliferation issues, but in fact, they are two sides of the same coin. Ultimately, the military approach to nonproliferation and its primary focus on nuclear, biological and chemical weapons, has seeped into how the military establishment handles nuclear weapons or vice versa. Only nuclear weapons remain, and only the Air Force and Navy possess them. Nonetheless, recent events have demonstrated the validity of this assertion.

Large organizations and bureaucracies, have certain traits, such as risk aversion and rewarding individuals who are in the most favored part of that organization. The Air Force, for example, considers pilots, and especially fighter pilots, to be the elite of that service. Therefore, those officers tend to be promoted faster and given better assignments than non-pilots. Predictably, Air Force leadership largely

consisted of fighter pilots. Transport pilots and missile officers are generally not provided the same opportunities. This concept also applies within other service branches. For judge advocates, assignment as a trial lawyer is considered a more favorable assignment than legal assistance. Military organizations tend to have favored branches, units, and “plum” assignments within them, and it quickly becomes well known that assignments to certain units increases or reduces one’s chances of promotion, or of making general.

The Air Force institutionally devalued its nuclear program in this manner. The end of the Cold War led the Air Force to question the value of the nuclear mission. The elimination of Strategic Air Command (SAC) was viewed as sending this message. This led to a gradual disinterest in and neglect of nuclear weapons, and the “best and brightest” looked for other career paths. Ultimately, this steady decline contributed to the accidental shipment of nuclear missile parts to Taiwan¹⁴ and the Air Force flight of a B-52 loaded with live nuclear weapons from Minot Air Force Base (AFB) to Barksdale AFB.¹⁵ An investigation conducted by Admiral Donald, the Director of Naval Reactors, ultimately led to the firing of the Secretary and Chief of Staff of the Air Force. Admiral Donald’s report indicated a decline in the Air Force nuclear mission focus. The shipment to Taiwan was symptomatic of the degradation of authority, standards of excellence, and technical competence within the nation’s ICBM force. The report found that the Air Force did not have a clear, dedicated authority responsible for the nuclear enterprise, and that years ago, the career path in the nuclear field was well-established and prestigious, but no longer.

The response from the Air Force to these public relations disasters was to create Global Strike Command, headed by a lieutenant general, communicating that this career field now matters. The same decrease in focus and attention applies to the nuclear nonproliferation discipline. The Joint Staff should learn from the calamitous Air Force experience with neglect of nuclear weapons and apply the same new approach to nuclear nonproliferation.

THE WAY AHEAD

The fact that the current administration is so clearly interested in nonproliferation agreements is significant, but not dispositive. Administrations change, and the military role is not to reflexively support a particular administration’s political agenda, but rather to provide the best military advice possible and effectively implement policy once decisions are made.

Certain concrete steps would be helpful. First, the Joint Staff should only assign officers to nonproliferation billets in J-5 who have relevant experience and training. At a minimum, assignment as a nuclear nonproliferation planner, for example, should entail some training in the nuclear fuel cycle and nuclear weapons. It would also be helpful if the officer so assigned had previously served in the J-5 of a major command. Prior international negotiations experience and minimal training in the interagency process would greatly enhance capabilities.

Most critical of all would be for the Joint Staff to hire a career civil servant, ideally at the SES level, to review and represent the Chairman on all nonproliferation and arms control matters. That SES, preferably along with several career civil servants or contractor employees, would provide the continuity that is so sorely lacking on the Joint Staff and could quickly alert incoming Action Officers to the problematic issues in interagency consultations. This person would be an expert in nonproliferation whose concurrence would be required on any and all related matters. To the Joint Staff's great credit, it has taken an important step in this direction by establishing the SES billet of Deputy Director for Strategic Stability in J-5. Unfortunately, that title would place almost any J-5 issue under the purview of that office in addition to nonproliferation, but it is a step in the right direction. But it may only be a nod to the current administration's priorities. This billet must survive the SES cuts in the Pentagon, and even more importantly, survive after the current administration departs. This person can provide the critical continuity inherent in the civilian agencies the Joint Staff negotiates with and can maintain the institutional knowledge lacking on the Joint Staff due to the frequent turnover of military personnel. The nonproliferation billet should also allow for review of senior military officials public statements, which could benefit from occasional but relevant well-placed comments on the topic. Additionally, this official could advise the services and combatant commands of proposals most likely to affect their equities so that they could engage early on in the process.

The services, which oversee assignments and promotions, must recognize this as an area that is vital and career enhancing. The remedy for this need not be a nonproliferation Military Occupational Specialty (MOS), but rather a recognized area of expertise which might then be considered in follow-on tours of duty.

ENDNOTES

¹ Barack Obama, Remarks by President Obama in Prague (April 5, 2009) available at <http://www.america.gov/st/texttrans-english/2009/April/20090406115740eaifas0.9701763.html>.

² Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

³ See www.un.org/en/conf/npt/2010.

⁴ See www.state.gov/nuclearsummit.

⁵ Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S. – Russia, S. Treaty Doc. No. 111-5 (2010), 50 I.L.M. 340 (2011) signed Apr. 8, 2010, entered into force Feb. 5, 2011.

⁶ Comprehensive Nuclear Test Ban Treaty, Sept. 24, 1996, S. Treaty Doc. No. 105-28(1997) 35 I.L.M. 1439.

⁷ No citation is available for this treaty since it has not yet been negotiated.

⁸ See also, Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, Oxford University Press, New York (2009) at 81-82 where Professor Joyner argues that "...there is a serious argument to be

made that including chemical and biological weapons along with nuclear weapons within the term weapons of mass destruction is analytically invalid, or at least sub-optimally descriptive.”

⁹ U.N. General Assembly Resolution, *Prohibition of the Production of Fissile Material for Nuclear Weapons and Other Nuclear Explosive Devices*, G.A. Res. 48/75L, U.N. GAOR, 48th Sess., Supp. No. 49 at 83, U.N. Doc. A/48/49 (1994).

¹⁰ U.S. Const., Art. VI, cl. 2.

¹¹ Formally titled *The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*.

¹² *Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 26 U.S.T. 571, T.I.A.S. 8062, 1015 U.N.T.S.163 (1972). The U.S. acceded to the BWC on Mar. 26, 1975. See also *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, 67, 69, entered into force Feb. 8, 1928. The BWC was ratified by the United States on Jan. 22, 1975 subject to certain reservations.

¹³ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, Apr. 29, 1997, 1974 U.N.T.S. 45, 32 I.L.M. 800 (1993).

¹⁴ Josh White, *Nuclear Parts Sent to Taiwan in Error*, Wash. Post, Mar. 26, 2008.

¹⁵ Josh White, *In Error, B-52 Flew Over U.S. With Nuclear-Armed Missiles*, Wash. Post, Sept. 6, 2007.