13-3792-cv

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MAIN STREET LEGAL SERVICES, INC.,
Plaintiff-Appellant,

v.

NATIONAL SECURITY COUNCIL,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK, CASE NO. 13-CV-948

BRIEF FOR PLAINTIFF-APPELLANT

RAMZI KASSEM
Supervising Attorney

DOUGLAS COX
Of Counsel

NASRIN MOZNU
VERSELY ROSALES
Law Student Interns
Main Street Legal Services, Inc.
CUNY School of Law
2 Court Square
Long Island City, NY 11101
(718) 340-4558
Counsel for Plaintiff-Appellant

CORPORATE DISCLOSURE STATEMENT

As required by Fed. R. App. P. 26.1, Plaintiff-Appellant states that Main Street Legal Services, Inc. is a private, non-profit organization. Accordingly, it has no parent corporation, nor does any corporation own more than ten percent of its stock.

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STATEMENT OF JURISDICTION

Plaintiff Main Street Legal Services, Inc. ("Main Street" or "Plaintiff") brought claims under the Freedom of Information Act (the "FOIA"). 5 U.S.C. § 552(f)(1). Joint Appendix 4 ("JA__"). The District Court (Hon. Eric N. Vitaliano) had subject matter and personal jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B). The District Court granted Defendant National Security Council's ("NSC") motion to dismiss and a final judgment was entered on August 7, 2013. JA23. Plaintiffs filed a timely notice of appeal on October 7, 2013. JA24. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED

1. Whether the National Security Council is an "agency" under the Freedom of Information Act.

2. Whether the District Court abused its discretion in denying Main Street's request for discovery.

STATEMENT OF THE CASE

I. Plaintiff's FOIA Request

Plaintiff Main Street Legal Services, Inc., submitted a FOIA request to the National Security Council, dated November 27, 2012, asking for two separate sets of records. JA25. First, Plaintiff requested all records related to the killing of U.S. citizens and foreign nationals by drone strike. *Id.* Second, Plaintiff requested all NSC meeting minutes taken in the year 2011. *Id.* In a letter dated December 14, 2012, but postmarked January 18, 2013, Defendant responded to Plaintiff's FOIA request by asserting that the NSC was not subject to the FOIA and withheld the requested records. JA29.

II. The NSC and Drone Killings

Congress created the NSC[1] in the National Security Act of 1947, 61 Stat. 495 (codified as amended at 50 U.S.C. § 3021) (formerly § 402).[2] The NSC includes the National Security Council proper, whose congressionally delegated functions include advising the President "with respect to the integration of

[1] Unless otherwise indicated, the use of the term "NSC" throughout this brief is intended to encompass the entire NSC structure of interagency committees and working groups, as well as the National Security Staff.

[2] In May 2013, the Office of Law Revision Counsel completed an editorial reclassification of Title 50 of the *United States Code*, see notice at http://uscode.house.gov/editorialreclassification/reclassification.html. The District Court below unfortunately cited outdated section numbers throughout its August 6, 2013 Opinion. JA9. To avoid confusion, therefore, Appellant cites to both the current and former sections.

domestic, foreign, and military policies relating to the national security," assessing and appraising the "objectives, commitments, and risks of the United States," and considering policies on matters of common interest" to agencies "concerned with the national security." *Id.* at § 3021(a)-(b) (formerly § 402(a)-(b)). Congress provided for a National Security Staff. *See id.* at § 3021(c) (formerly § 402(c)). Congress also established an NSC Committee on Foreign Intelligence, whose delegated functions include establishing policies relating to the conduct of U.S. intelligence activities, and an NSC Committee on Transnational Threats, which is tasked with "coordinat[ing] and direct[ing] the activities" of the U.S. government relating to combating "transnational threats." *Id.* at § 3021(h)-(i) (formerly § 402(h)-(i)). The President sits on neither of these Committees. *See id.*

The President also establishes and delegates authorities to NSC committees including a Principals Committee, a Deputies Committee, and a latticework of Interagency Policy Committees. *See* Presidential Policy Directive – 1 (Feb. 13, 2009). The President further delegates authority to the NSC through Executive Orders in areas such as intelligence, communications, and cyber-security. An unknown number of other Presidential delegations of authority to the NSC are documented in non-public records in the control of the Defendant-Appellee. The NSC also independently promulgates regulations. *See, e.g.,* 47 C.F.R. pt. 211

(NSC telecommunications regulations); 32 C.F.R. pt. 2102 (NSC Privacy Act regulations).

More specifically, the NSC has had a significant, and expanding, role in the nomination and selection of individuals, including U.S. citizens, to be targeted in lethal drone strikes. The U.S. government has officially acknowledged the killing of U.S. citizens in such attacks. *See* Letter from Eric Holder, U.S. Attorney Gen., to Patrick J. Leahy, U.S. Congress, May 22, 2013 (acknowledging killing of four U.S. citizens in U.S. drone strikes).[3] The U.S. government has also acknowledged that the NSC plays a central role in decisions to kill citizens of the United States and other nations in drone strikes. *See* John Brennan, *Answers to Questions for the Record from Senate Select Committee on Intelligence*, at 5 (confirming central role of NSC in "process of deciding to take such an extraordinary act").[4] Specifically, the Executive has officially acknowledged the responsibility of an NSC Committee on which the President does not sit. *See id.* (citing the NSC Principals Committee).

Other reports have described the involvement of the NSC Deputies Committee and the NSC Counterterrorism Security Group in nominating and approving individuals for lethal targeting. *See* Mark Hosenball, *Secret Panel Can Put Americans on "Kill List,"* Reuters, Oct. 5, 2011 (stating that "targeting

[3] Available at http://www.justice.gov/ag/AG-letter-5-22-13.pdf.

[4] Available at http://www.intelligence.senate.gov/130207/posthearing.pdf.

recommendations are drawn up by a committee of mid-level" NSC officials that are then sent to "the panel of NSC 'principals'");[5] Daniel Klaidman, *John Brennan, Obama's CIA Chief Nominee Could Restrain the Agency*, Daily Beast, Feb. 5, 2013 (stating that NSC's Counterterrorism Security Group "work[s] through individual targeting 'nominations'");[6] *The Process Behind Targeted Killing*, Wash. Post, Oct. 23, 2012 (stating that NSC Deputies Committee "culls the rosters" of individuals for targeting).[7]

The President's role in the targeting process is unclear and appears limited. *See* Mark Hosenball, *Secret Panel Can Put Americans on "Kill List,"* Reuters, Oct. 5, 2011 (stating that NSC "kill" panel "informs the president of its decisions" and that the "role of the president in ordering or ratifying a decision to target is fuzzy"). The Justice Department White Paper on killings outside of recognized battlefields, for example, does not on its face require presidential approval, but only authorization "by an informed, high-level official." Dep't of Justice, *Lawfulness of*

[5] Available at http://www.reuters.com/article/2011/10/05/us-cia-killlist-idUSTRE79475C20111005.

[6] Available at http://www.newsweek.com/john-brennan-obamas-cia-chief-nominee-could-restrain-agency-63317.

[7] Available at http://www.washingtonpost.com/world/national-security/the-process-behind-targeted-killing/2012/10/23/4420644c-1d26-11e2-ba31-3083ca97c314_graphic.html.

a Lethal Operation Directed Against a U.S. Citizen who Is a Senior Operational Leader of Al-Qai'da or an Associated Force, at 9.[8]

III. Procedural History

As a result of the NSC's withholding of records related to such drone killing policies and deliberations requested under the FOIA, Main Street commenced suit in the U.S. District Court for the Eastern District of New York on February 21, 2013. JA4. The NSC moved to dismiss the suit pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim on which relief can be granted and, in the alternative, pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction. Def.'s Mot. to Dismiss, at 1, 3. Main Street opposed NSC's motion to dismiss and requested discovery with respect to "the complete scope of the NSC's current powers and responsibilities." Pl.'s Opp'n, at 19.

On August 7, 2013, the District Court granted NSC's motion to dismiss and held that "the NSC is not an agency subject to FOIA." JA9. The District Court noted that the issue whether the NSC was an agency was a matter of first impression in this Circuit, but deferred to the D.C. Circuit's decision in *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996), in which a sharply divided panel had held that the NSC was not an agency. The District Court rejected Main Street's reliance on the plain statutory language of the FOIA, which

[8] Available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

unambiguously defines "agency," 5 U.S.C. § 552(f)(1), to include establishments within the Executive Office of the President. JA13. The District Court also rejected statements by the Supreme Court in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), indicating that the NSC was an agency under the FOIA as "dicta" and found the fact that the NSC had previously promulgated FOIA regulations and administered an active FOIA program for almost two decades to be "simply irrelevant." JA20.

Finally, the District Court rejected Main Street's arguments that a long series of publicly-known NSC functions and legal authorities delegated from both Congress and the Executive, and pursuant to which the NSC exercises significant, independent authority without the involvement of the President establish that the NSC is agency under the FOIA. JA18. The District Court also denied Main Street's request for discovery into additional non-public functions and authorities holding that the publicly-known list of NSC authorities, which is incomplete, was nevertheless "wholly sufficient" to determine that the NSC was not an agency. JA21. The District Court held that even if the NSC "and its subcommittees are involved in policy formation or implementation," the NSC is still not an "agency." JA18-19.

Main Street filed a Notice of Appeal on October 7, 2013, which was docketed in this Court as 13-3792-cv.

STANDARDS OF REVIEW

This Court reviews a district court's grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) *de novo*. *Todd v. Exxon Corp.*, 275 F.3d 191, 197 (2d Cir. 2001).

This Court reviews a district court's discovery rulings for abuse of discretion. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 175 (2d Cir. 1998).

SUMMARY OF THE ARGUMENT

This case arises from the NSC's improper withholding of records, which Main Street Legal Services requested pursuant to the FOIA, relating to the central role of NSC committees in nominating and selecting citizens of the United States and other nations for drone "kill lists."

The FOIA's basic purpose is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The FOIA reflects "a general philosophy of full agency disclosure," *Fed. Labor Rel. Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir. 1992), and is designed so that the people may "know what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989).

It is difficult to imagine government records more centrally implicating the transparency and accountability purposes of the FOIA than those memorializing interagency meetings in which citizens of the United States and of nations not at war with the United States, are selected for targeting by lethal drone strikes. Even if such records were so sensitive or highly classified as to be exempt from disclosure under the FOIA's provisions, subjecting them to the statute's reach at least ensures their preservation and, by extension, the possibility of future

disclosure, transparency, and informed policy reform and oversight. The President has publicly asserted that the NSC's "kill list" process is internally subject to "clear guidelines, oversight and accountability." President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013).[9] In this case, however, the NSC has sought to insulate its deliberations and any resulting records from almost all meaningful forms of accountability or oversight.

The plain language of the FOIA, its legislative history, Supreme Court precedent, decades during which the NSC had FOIA regulations and an active FOIA program, and the extensive functions and legal authorities of the NSC all lead to the conclusion that the NSC is an agency under the statute. Nonetheless, the District Court deferred to the erroneous and outdated analysis of *Armstrong v. Executive Office of the President,* 90 F.3d 553 (D.C. Cir. 1996), which departed from the letter and spirit of the FOIA and rests on standards not recognized by this Circuit. Moreover, the District Court summarily rejected a discovery request that would have identified other NSC legal authorities relevant, and necessary, to a fair adjudication.

The effect of the District Court's holding is to insulate categorically from the FOIA records of meetings and activities of interagency committees and working groups engaged in substantial decision-making, policy implementation, and

[9] Available at http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

coordination of agency action that involve no participation by the President yet determine the government's use—and possible abuse—of its most significant power: secretly reviewing the conduct of citizens of the United States and citizens of nations not at war with the United States and deciding whether they live or die.

Under controlling law, the NSC is, and should remain, an agency subject to the FOIA.

ARGUMENT

I. THE NSC IS AN AGENCY SUBJECT TO THE FOIA

The unambiguous text of the FOIA, Supreme Court precedent, NSC regulations and practices, and the significant and independent authority delegated to the NSC by Congress and the President all establish that the NSC is an agency under the FOIA.

A. The FOIA Definition of Agency Is Unambiguous

The FOIA unambiguously applies to establishments within the Executive Office of the President, which includes the NSC. *See* Reorganization Plan No. 4 of 1949, 14 Fed. Reg. 5227, 63 Stat. 1067 (transferring NSC to Executive Office of the President). The definition of "agency" under the FOIA has remained substantively unchanged since 1974 and expressly includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government *(including the Executive Office of the President),* or any independent regulatory agency." 5 U.S.C. § 552 (f)(1) (emphasis added).

"Well-established principles of construction dictate that statutory analysis necessarily begins with the 'plain meaning' of a law's text and, absent ambiguity, will generally end there." *Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004). The text of the FOIA is unambiguous in defining agency to include

establishments within the Executive Office of the President, such as the NSC, and therefore no further inquiry ought to be required. *See Fowlkes v. Thomas*, 667 F.3d 270, 272 (2d Cir. 2012) ("Where the words of a statute are unambiguous, our inquiry is generally confined to the text itself.").

B. The Supreme Court Stated the NSC Is an Agency

Further, the only Supreme Court statement on this issue is that "the National Security Council is an executive agency to which FOIA applies." *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 156 (1980); *see also id.* at 146 (stating that NSC is "an agency to which the FOIA *does* apply") (emphasis in original). The Supreme Court in *Kissinger* recognized a very limited exception from the FOIA for records created by individuals who act solely in the capacity of an advisor to the President. The Court in *Kissinger*, however, explicitly differentiated the FOIA requests for Henry Kissinger's individual records at issue, to which the FOIA did not apply, from FOIA requests for "National Security Council records," to which the FOIA does apply. *Id.* at 156.

C. The NSC Has Admitted it Is an Agency Under the FOIA

The NSC itself previously interpreted the *same* statutory definition of "agency" under the FOIA to include the NSC. A month after the definition was enacted, the NSC proposed FOIA regulations. 40 Fed. Reg. 3,612 (Jan. 23, 1975) ("These regulations are proposed under the authority of [the FOIA]"). A month

later, the NSC promulgated final FOIA regulations. 40 Fed. Reg. 7,316 (Feb. 19, 1975). Thereafter, the NSC administered an active FOIA program and was a defendant in multiple FOIA lawsuits in which the NSC did not argue that it was categorically exempt from the FOIA. *See, e.g., Willens v. Nat'l Sec. Council,* 726 F. Supp. 325 (D.D.C. 1989) (FOIA request for NSC records); *Halperin v. Nat'l Sec. Council,* 452 F. Supp. 47 (D.D.C. 1978) (same). Until 1994, the NSC conceded that it was an agency subject to the FOIA. *See Armstrong v. Exec. Office of the President*, 90 F.3d 553, 567 (D.C. Cir. 1996) (Tatel, J., dissenting) (stating that NSC "complied with FOIA during the administrations of Presidents Ford, Carter, Reagan, and Bush" and "declared itself exempt from FOIA only recently while this litigation was pending"). The NSC maintained FOIA regulations until 1998. 63 Fed. Reg. 25,736 (May 8, 1998).

D. Legislative History Shows that the NSC Is an Agency

A court should only "resort to legislative history to determine the statute's meaning" when a statute is "ambiguous." *Puello v Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 327 (2d Cir. 2007). The current definition of "agency" under the FOIA became law in 1974 and provides that an "agency" includes any "establishment in the executive branch of the Government (including the Executive Office of the President)." 5 U.S.C. § 552(f)(1).

Even if, despite the unambiguous language of the FOIA statute, the Supreme Court in *Kissinger*, and the NSC's own interpretations of the law, a consideration of the FOIA's legislative history were necessary, it confirms that Congress intended the NSC to be an "agency" under the FOIA.

When Congress created the current definition of "agency" in 1974, the House report stated:

> The term "establishment in the Executive Office of the President," as used in this amendment, includes such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, *the National Security Council*, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order.

H.R. Rep. No. 93-876, at 8 (1974) (emphasis added).

The House report further clarified that the intent of the 1974 amendment was to expand the definition of "agency" to "include those entities which might not be considered" agencies under the older Administrative Procedures Act definition, 5 U.S.C. § 551(1), "but which perform governmental functions and control information of interest to the public." H.R. Rep. No. 93-876, at 8 (1974).

When the 1974 amendment went to a House and Senate conference, the conference report noted, in a section entitled "Expansion of Agency Definition," that the House definition of "agency" was broader than the version in the corresponding Senate bill and stated explicitly "*the conference substitute follows*

the House bill." H.R. Rep. No. 93-1380, at 14 (1974) (Conf. Rep.) (emphasis added).

Moreover, the 1974 conference report noted that by using "Executive Office of the President" the intent was the "result reached" in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), and that Congress only intended to exclude the "President's *immediate* personal staff or units in the Executive Office whose *sole* function is to advise and assist the President." H.R. Rep. No. 93-1380, at 14 (1974) (Conf. Rep.) (emphasis added). In *Soucie*, the court held that the White House Office of Science and Technology was an agency subject to the FOIA because its "*sole* function" was not to advise and assist the President. 448 F.2d at 1076 (emphasis added). As explained below, the current legal authorities of the NSC provide overwhelming evidence that the NSC is an "agency" under the *Soucie* "sole function" standard.

E. The NSC Is an Agency Under the "Sole Function" Test

The reference in the 1974 FOIA legislative history to *Soucie* illustrates that Congress intended to carve out only an extremely limited exception to the FOIA for certain individuals or units within the Executive Office of the President. In applying the older Administrative Procedures Act definition of "agency," the *Soucie* court explained that if an entity's "*sole* function were to advise and assist the President," that might indicate that the entity "is part of the President's staff

and not a separate agency." *Id.* at 1075 (emphasis added). If, on the other hand, an "administrative unit" has "substantial independent authority in the exercise of specific functions," this would confer "agency status." *Id.* at 1073.

Applying this "sole function" standard, *Soucie* held that the White House Office of Science and Technology ("OST") was an agency subject to the FOIA simply on the basis that its statutory mandate included a *single* additional authority—"to evaluate scientific research programs of the various federal agencies"—that extended beyond its primary function "to advise and assist the President in achieving coordinated federal policies in science and technology." *Id.* at 1073-74. On the basis of this one authority, which the court noted indicated that Congress was "delegating some of its own broad power of inquiry," the *Soucie* court concluded that the "OST's sole function" was not simply "to advise and assist the President," and therefore held that the OST was an agency. *Id*.

Further illuminating the limited exception to the FOIA represented by the "sole function" test, the *Soucie* court held that the OST record at issue, the so-called "Garwin Report," was an "agency record" subject to the FOIA despite the fact that the OST created it *based on an explicit request from the President* to evaluate a federal program and despite the fact that the report "contained opinions, conclusions and recommendations" specifically "prepared for the advice of the President." *Id.* at 1071.

In short, the *Soucie* "sole function" test should properly exclude "only a small subset of entities within the Executive Office of the President that do not themselves 'do' anything apart from advising the President and assisting him in what he does." *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 569-70 (Tatel, J., dissenting).

As described in detail below, the NSC is an organizational behemoth, consisting of hierarchies of committees engaged in substantive policy formation, decision-making, and implementation. That the NSC is vested with broad, non-advisory functions and authorities and is therefore an agency under the "sole function" test is amply illustrated by its sprawling structure, its numerous delegated authorities from Congress and the Executive, and its intimate involvement and decision-making in some of the most troubling assertions of government power, including drone killings and brutal interrogation techniques. The NSC "engag[es] in just the sort of official activity" the the "FOIA [was] designed to bring into public view." *Id.* at 570 (Tatel, J., dissenting). In sum, if the NSC walks like an agency, talks like an agency, and squawks like an agency, then it must be an agency.

1. NSC Functions Delegated by Congress

As an initial matter, it bears emphasis that Congress created the NSC by statute and, therefore, it exists independent of any act by the President and the

President "has no authority to eliminate, *sua sponte*, the NSC." *Armstrong v. Exec. Office of the President*, 877 F. Supp. 690, 704 (D.D.C. 1995), *rev'd*, 90 F.3d 553 (D.C. Cir. 1996).

Moreover, in addition to advising the President, 50 U.S.C. § 3021(a) (formerly § 402(a)), Congress has expressly empowered the NSC with "additional functions" that include the "duty" to "*assess and appraise* the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security," and to "consider policies on matters of common interest to the departments and agencies of the Government concerned with the national security." 50 U.S.C. § 3021(b) (formerly § 402(b)) (emphasis added). This is precisely the type of inquiry power delegated by Congress that the *Soucie* court found, alone, satisfied the "sole function" test.[10] 448 F.2d at 1075. But for the NSC, this authority is just the tip of the iceberg.

Congress also established a Committee on Foreign Intelligence within the NSC that is tasked with "identifying the intelligence required to address the national security interests of the United States," "*establishing priorities* (including

[10] While these NSC authorities are "subject to the direction of the President" and the NSC is directed to "make recommendations to the President," that does not diminish the significance of Congress' direct delegation of power to the NSC to "assess and appraise" national security "objectives, commitments, and risks" in the same way that, in *Soucie*, the authority of the OST to evaluate federal scientific programs was sufficient to make the OST an agency even if, as with the "Garwin Report" at issue in *Soucie*, the authority may be exercised at the direction of the President and, indeed, for the very purpose of advising him. 448 F.2d at 1071.

funding priorities) among the programs, projects, and activities that address such interests and requirements," and "*establishing policies* relating to the conduct of intelligence activities of the United States, including appropriate roles and missions for the elements of the intelligence community and appropriate targets of intelligence collection activities." 50 U.S.C. § 3021(h) (formerly § 402(h)) (emphasis added).

As just one illustration of the substantial independent authority Congress delegated to the NSC through this Committee, a Senate report found in 2008 that the authorization for conducting specific intelligence activities involving Department of Defense employees traveling to Rome to meet with Iranian intelligence officials to obtain evidence to support the 2003 invasion of Iraq came from the "broad authority" of the NSC's Committee on Foreign Intelligence to "establish policies relating to the conduct of intelligence activities." S. Rep. No. 110-346, at 9 (2008) (quoting 50 U.S.C. § 3021(h)).[11] The Senate noted that the independent authority the NSC Committee had exercised was separate from and "in addition to" the function of the Committee to perform "such other functions as the President may direct." *Id*.

Moreover, Congress mandated that the NSC's Committee on Foreign Intelligence conduct annual reviews regarding U.S. national security and

[11] Avaliable at http://www.intelligence.senate.gov/pdfs/110346.pdf.

intelligence-gathering. 50 U.S.C. § 3021(h)(4) (formerly § 402(h)(4)). The independent nature of these duties is underscored by the requirement that this NSC Committee report annually not only to the NSC proper, but also to an outside official, the Director for National Intelligence. 50 U.S.C. § 3021(h)(5) (formerly § 402(h)(5)).

Congress further established an NSC Committee on Transnational Threats, whose broad mandate is "to coordinate *and direct* the activities" of the U.S. government relating to combating "transnational threats," and which Congress expressly directed to "identify transnational threats," "develop strategies to enable the United States Government to respond to [such] transnational threats," "*monitor implementation* of such strategies," "assist in the resolution of operational and policy differences among Federal departments and agencies in their response to transnational threats," "*develop policies and procedures* to ensure the effective sharing of information about transnational threats among Federal departments and agencies," and "*develop guidelines* to enhance and improve coordination of activities of Federal law enforcement agencies and elements of the intelligence community outside the United States with respect to transnational threats." 50 U.S.C. § 3021(i) (formerly § 402(i)) (emphasis added).

Congress has therefore delegated to the NSC through this Committee precisely the types of authority that even the D.C. Circuit and the Defendant-

Appellee have identified as sufficient to constitute substantial independent authority and to confer agency status: "coordinat[ing] federal programs and issu[ing] guidelines." *See* Def.'s Mot. to Dismiss, at 7-8 (citing *Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259 (D.C. Cir. 1980) (holding Council on Environmental Quality to be agency subject to FOIA)).

The significance of the NSC's independent authority through the Committee on Foreign Intelligence and the Committee on Transnational Threats is further underscored by the fact that Congress created and empowered the NSC through these Committees *over the express objection of the President*. *See* Presidential Statement on Signing the Intelligence Authorization Act for Fiscal Year 1997, 2 *Pub. Papers* 1813 (Oct. 11, 1996) ("Although I am signing this Act, I have concerns about the provisions that purport to direct the creation of two new National Security Council (NSC) committees.").[12]

2. NSC Functions Delegated by the Executive

The President has also delegated significant, independent functions to the NSC via both Presidential Policy Directive and Executive Order.

[12] Additional statutory examples demonstrate the breadth of the substantial, independent authorities Congress has delegated to the NSC. *See, e.g.*, 50 U.S.C. § 3021(g) (formerly § 402(g)) (establishing within NSC a Board for Low Intensity Conflict directly empowered by Congress to "coordinate the policies of the United States for low intensity conflict"); 50 App. U.S.C. § 454(g) (Congress directing NSC to advise Director of Selective Service System and mandating factors to be considered by NSC in "the performance of its duties under this subsection").

a. Presidential Policy Directive – 1

Under Presidential Policy Directive – 1, "Organization of the National Security Council System," Feb. 13, 2009 ("PPD-1"), the President established that the NSC Principals Committee, on which the President does not sit, shall be the "senior interagency forum for consideration of policy issues affecting national security" which shall record its "conclusions and decisions." JA31-JA32. The President also delegates significant authority to the NSC Deputies Committee which shall "review and *monitor*" the work of the NSC interagency process." JA32 (emphasis added).[13] The President directs that the NSC Deputies Committee shall focus on "policy *implementation*" and shall conduct "[p]eriodic reviews of the Administration's major foreign policy initiatives." JA32 (emphasis added). Further, the President delegates to the NSC Deputies Committee the significant authority of being "responsible for day-to-day crisis management" and that, in doing so, it will report not to the President, but to the NSC. JA33. The delegation of power to the NSC Deputies Committee to draw "conclusions" and make "decisions" is also express. JA33.

[13] The Congressional Research Service suggests that the use of "monitor" in President Obama's Directive is significant in that it "may indicate a determination to enhance the NSC's ability to oversee implementation of presidential decisions on national security issues." Cong. Research Serv., RL30840, *National Security Council: An Organizational Assessment* 23-24 (2011).

Finally, the NSC Deputies Committee is delegated the authority to establish NSC Interagency Policy Committees to which the President assigns authority to "*[m]anage[]* the development and *implementation* of national security policies by multiple agencies of the United States Government." JA33-34 (emphasis added). Interagency Policy Committees are the "main day-to-day fora for interagency coordination of national security" and have the authority to "*review and coordinate* the implementation of Presidential decisions in their policy areas." JA34 (emphasis added).

The District Court dismissed the significance of such Presidential delegations of authority by selectively quoting the use of the terms "advise" and "assist" within PPD-1 without examining the substantial nature of the legal authority and functions the President actually delegated. JA18. While the availability of evidence outlining the precise outer contours of such authorities is limited by the NSC's refusals to comply with the FOIA and by the District Court's denial of Plaintiff's request for discovery—both the subject of this appeal—publicly available information nevertheless demonstrates the independent functioning and significant authority exercised by, and within, the NSC and the importance of subjecting consequential NSC activities to the FOIA.

A Department of Justice report on an investigation into detainee interrogations, for example, illustrates both the structure and extent of NSC

decision-making. The investigation found that an NSC Policy Coordinating Committee served as the primary forum for policy decision-making for detention issues. U.S. Dep't of Justice, Off. of Inspector Gen., *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* 17 (2008). Only issues the Policy Coordinating Committee could not resolve were "bumped up" to the NSC Deputies Committee and only if the Deputies were unable to decide on an issue would it be "raised to the [NSC] 'Principals'" Committee. *Id*. Authority is thus exercised at each level independent of the President. *See Meyer v. Bush*, 981 F.2d 1288, 1308 (D.C. Cir. 1993) (Wald, J., dissenting) ("The President's delegation [of] authority to keep an issue from even reaching his desk is a clear indication [of] significant authority to deal independently with regulatory issues.").

The significance of such independent NSC functions is highlighted, moreover, by the gravity of their subject matter. It was "NSC officials," for example, who created the Special Access Program for the CIA's detention and "enhanced interrogation" program. Declaration of Leon E. Panetta, Director, CIA, at ¶ 30, June. 8, 2009, *ACLU v. Dep't of Def.*, No. 04-4151 (S.D.N.Y.) (stating also that CIA is responsible for limiting access to information about program "in

accordance with the NSC's direction").[14] NSC officials affirmatively *approved* the interrogation program that utilized torture and cruel, inhumane, and degrading treatment. *See, e.g.*, S. Comm. on Armed Servs., *Inquiry into the Treatment of Detainees in U.S. Custody* 16 (Comm. Print 2008) (stating that CIA sought policy approval from NSC in spring 2002).[15]

The NSC created the charter for, and currently oversees, the High-Value Detainee Interrogation Group. *See* Dep't of Def., Directive 3115.13, Dec. 9, 2010 Encl. 1 (citing "National Security Council, 'Charter for Operations of Interagency High-Value Detainee Interrogation Group,' April 19, 2010");[16] Press Release, Dep't of Justice, *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President* (Aug. 24, 2009) (stating that interrogation group was "subject to policy guidance and oversight coordinated by the National Security Council").[17]

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[14] Available at https://www.aclu.org/files/pdfs/safefree/acluvdod_panettadeclaration.pdf.

[15] Available at http://www.levin.senate.gov/download/?id=20d5eeec-4892-4d34-9b15-c32ee31f8245. *See also Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on the CIA's Detention and Interrogation Program* 7 (2009) (stating that NSC "reaffirmed" in 2003 that CIA interrogation program was "lawful and reflected administration policy"), *available at* http://www.intelligence.senate.gov/pdfs/olcopinion.pdf.

[16] Available at http://www.dtic.mil/whs/directives/corres/pdf/311513p.pdf.

[17] Available at http://www.justice.gov/opa/pr/2009/August/09-ag-835.html.

The ongoing controversy over the accuracy of CIA "talking points" provided to members of Congress following the September 2012 attack on U.S. facilities in Benghazi, Libya continue to revolve around decisions made by the Deputies Committee. According to a recent report of the Senate Select Committee on Intelligence, a central issue in the controversy remains "what was discussed during the Deputies Committee meeting that resulted in the final version of the talking points." S. Select Comm. Intelligence, 113th Cong., *Review of the Terrorist Attacks on U.S. Facilities in Benghazi, Libya, September 11-12, 2012 Together with Additional Views, Additional Views, of Vice Chairman Chambliss and Senators Burr, Risch, Coats, Rubio, and Coburn*, at 7 (2014).[18]

As described above, the Executive has also acknowledged that the NSC plays a central role in decisions to kill citizens of the United States and other nations in drone strikes. *See* John Brennan, *Answers to Questions for the Record from Senate Select Committee on Intelligence*, at 5 (confirming central role of NSC in "process of deciding to take such an extraordinary act").[19] Specifically, the Executive has officially acknowledged the responsibility of an NSC Committee on which the President does not sit. *See id.* (citing NSC Principals Committee). Even if, as certain press reports have stated, the President ultimately approves some

[18] Available at http://www.intelligence.senate.gov/benghazi2014/benghazi.pdf

[19] Available at http://www.intelligence.senate.gov/130207/posthearing.pdf.

individuals "nominated" for drone killing, there can be no more significant authority than that wielded by the NSC committees in compiling lists, culling names, and deciding who will be marked for death and who will be spared.

b. Executive Orders

Additional significant and independent authority in a variety of areas and functions other than advising the President is delegated to the NSC by Executive Order. Even the D.C. Circuit has acknowledged that a Presidential delegation of authority, through an executive order, to an entity within the Executive Office of the President can be "sufficient to qualify" an entity as an "agency." *Meyer v. Bush*, 981 F.2d 1288, 1300 (D.C. Cir. 1993).

The NSC exercises authority for "overall policy direction" of the National Industrial Security Program. Exec. Order No. 12,829, §102(a), 3 C.F.R. 570 (1994), *reprinted as amended in* 50 U.S.C. § 3161 app.; *see also id*. at §102(b)(1) (stating that promulgation of directives binding on other agencies are "subject to the approval of the [NSC]"); *id*. at § 102(b)(3) (noting that decisions requiring changes to regulations "may be appealed to the [NSC]"); *id*. at § 102(b)(4) (authorizing NSC to deny individuals access to classified information). The district court in *Armstrong v. Executive Office of the President* found that the NSC was an agency under the FOIA based, in part, on this Executive Order, which the court found provided evidence that "the NSC plays a role in protecting National

Security Information independent of the President." 877 F. Supp. 690, 702 (D.D.C. 1995), *rev'd*, 90 F.3d 553 (D.C. Cir. 1996).

In the area of cyber-security, the President established a Senior Steering Committee with National Security Staff ("NSS," part of the NSC) representatives as co-chairs to which he delegated authority to "exercise overall responsibility" for the "*implementation* of policies and standards" for safeguarding classified information on computer networks, also providing that any "policy or compliance issues" that the Steering Committee could not resolve would be referred to the NSC Deputies Committee. Exec. Order No.13,587, 3 C.F.R. 276 (2011), *reprinted in* 50 U.S.C. § 3161 app. (emphasis added)

The significance of independent NSC responsibilities under Executive Order No. 13,587 is underscored by a high-level finding that the NSC has failed to properly fulfill them. Specifically, the President's Review Group on Intelligence and Communications Technologies recently found that "the implementation" of this Executive Order "has been at best uneven and far too slow" and that "implementation monitoring was not performed at a sufficiently high level" at "the NSS," which has placed "at risk" both "sensitive data" and "potentially lives."

President's Review Grp. on Intelligence & Commc'ns Techs., *Liberty and Security in a Changing World* 252 (2013).[20]

3. NSC Regulations

The NSC has itself promulgated regulations, thereby exhibiting both its significant, independent authority as well as one of the characteristic functions of an "agency." *See, e.g.*, *Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259 (D.C. Cir. 1980) (finding that Council on Environmental Quality was an agency under *Soucie* "sole function" test based, in part, on its promulgation of regulations).

Specifically, the NSC has Privacy Act regulations that are current and remain in force. 32 C.F.R. pt. 2102. This is particularly significant because these NSC regulations undermine the NSC's argument to the District Court in this litigation that it is not an agency. Indeed, the Privacy Act also applies only to an "agency" and it expressly incorporates the FOIA's definition of agency. *See* 5

[20] The NSC has additional independent functions in the areas of intelligence and covert action, Exec. Order. No. 13,470, 3 C.F.R. 218 (2009) (NSC authority to conduct periodic reviews of "ongoing covert action activities," including assessments of "effectiveness and consistency with current national policy" and "applicable legal requirements" of such activities and to "review proposals for other sensitive intelligence operations"); national defense resource preparedness, Exec. Order No. 13,603, 3 C.F.R. 225 (2013) (NSC authority to *formulate* national defense resource preparedness policy); and emergency communications, Exec. Order No. 13,618, 3 C.F.R. 273 (2013) (NSC authority for "[p]olicy coordination, guidance, dispute resolution, and periodic in-progress reviews" for security and emergency preparedness communications to NSC system organized by PPD-1).

U.S.C. § 552a(a)(1) (providing that "the term 'agency' means agency as defined" in the FOIA). The Justice Department's Office of Legal Counsel has opined that the "Privacy Act language conclusively bars an interpretation that would attach different meanings" to the term "agency" in the Privacy Act as opposed to the FOIA. *Applicability of the Privacy Act to the White House*, 24 Op. O.L.C. 178, 181-82 (2000).

The NSC has also issued Mandatory Declassification Review regulations, which remain in force. 32 C.F.R. pt. 2103. These regulations are equally at odds with the NSC's litigation position, as presented to the lower court, given that the relevant Executive Order requires Mandatory Declassification Review only for an "agency" and expressly excludes "entities within the Executive Office of the President that solely advise and assist" the President. Exec. Order No. 13,526, 3 C.F.R. 298 (2010), *reprinted as amended in* 50 U.S.C. § 3161 app.

Finally, the NSC and the Office of Science and Technology (the entity held to be an "agency" in *Soucie*) jointly promulgated regulations relating to telecommunications, 47 C.F.R. pt. 201- pt.216, regulations which the dissent in *Armstrong* found to be a "classic example of substantial independent authority." 90 F.3d 553, 572 (D.C. Cir. 1996) (Tatel, J., dissenting). Those regulations

provide, among other things, that the NSC has oversight and final decision-making responsibilities for certain government and public telecommunications systems.[21]

4. Additional Non-Public NSC Functions

Defendant-Appellee possesses additional non-public information regarding the function and authorities of the NSC. This includes, but is not limited to, records describing the authorities and duties of specific NSC Interagency Policy Committees created by the NSC Deputies Committee pursuant to PPD-1, JA33-34; relevant non-public Presidential Policy Directives, Presidential Study Directives, "Presidential Policy Guidance,"[22] and similar documents issued during earlier administrations that remain in force; and other non-public legal instruments delegating authority to the NSC.

The existence and relevance of such additional, non-public legal authorities are not speculative. A federal court that reviewed Presidential Policy Directive –

[21] *See, e.g.,* 47 C.F.R. § 213.7(f) (stating that unresolved issues related to allegations of federal government misuse of certain telecommunications systems will be referred to NSC "for decision"); 47 C.F.R. § 213.7(g) (providing that authority to revise decisions regarding allocation of certain communications channels under certain circumstances "is reserved to" NSC); 47 C.F.R. § 211.6(c) (stating that assignment of certain communications priority requests will require in certain circumstances "the approval of" NSC); 47 C.F.R. § 211.6(g) (identifying responsibilities that are "subject to review and modification" by NSC).

[22] *See, e.g.*, President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (referring to "Presidential Policy Guidance" signed on May 22, 2013 relating to drone killing program), *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

6, for example, which relates to global development aid, described it as "a final, non-classified, presidential directive" that "serves as guidance for several policy-making bodies, including twenty-two Executive Branch agencies, *as well as the NSS and National Security Council ("NSC") Deputies and Principals*." *Ctr. for Effective Gov't, v. U.S. Dep't of State*, 2013 WL 6641262, at *4, -- F. Supp. 2d -- (D.D.C. Dec. 17, 2013) (emphasis added).

As another example, a document that purports to be "Presidential Policy Directive – 20" relating to "U.S. Cyber Operations Policy" (whose authenticity the U.S. government has not challenged) was recently leaked to the *Guardian* newspaper.[23] This Directive clearly distinguishes between activities that require Presidential approval and those in which the NSC is delegated significant, independent decision-making authority. The Directive orders, for example, that certain defensive cyber operations can be utilized "if a Deputies or Principals Committee review determines" that the operation "provides an advantageous degree of effectiveness, timeliness, or efficiency compared to other methods commensurate with the risks." *Id*. at 8. The Directive also identifies additional

[23] The Presidential Policy Directive is available at http://epic.org/privacy/cybersecurity/presidential-directives/presidential-policy-directive-20.pdf; *see also* Glenn Greenwald & Ewen MacAskill, *Obama Orders US to Draw Up Overseas Target List for Cyber-attacks*, Guardian, June 7, 2013, *available at* http://www.theguardian.com/world/2013/jun/07/obama-china-targets-cyber-overseas.

levels of the NSC structure even further removed from the President that are responsible for policy decision-making.

In particular, the Directive instructs the National Security Staff ("NSS") within the NSC to formalize a Cyber Operations Policy Working Group as a forum below the Interagency Policy Committees that will be responsible for integrating and addressing certain cyber policy "issues related to the conduct of operations raised by departments and agencies or the NSS" and that for any "unresolved policy conflicts" the NSS shall elevate the issue to "the Deputies and Principals Committees, as appropriate." *Id*. at 11-12. Finally, the Directive delegates other functions to the NSC including that the NSS "shall lead reviews by appropriate departments and agencies of legal issues associated" with certain cyber policies. *Id*. at 14.

The Department of Justice Office of Legal Counsel considers such Presidential Policy Directives to have the force of law equivalent to an Executive Order, *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order*, 2000 WL 33155723 (Op. Att'y Gen. Jan. 29, 2000), which has led one federal court to refer to them as a form of "secret law." *Ctr. for Effective Gov't, v. U.S. Dep't of State*, 2013 WL 6641262, at *9, -- F. Supp. 2d-- (D.D.C. Dec. 17, 2013). Despite the unquestionable relevance of such legal authorities to the issue in this case, the District Court failed to consider the extant evidence of

any such non-public NSC authorities and, further, denied Main Street's request for discovery related to them. *See* Part III, *infra*.

Of course, even based solely upon the publicly available delegations of power to the NSC, any argument that the function of the NSC is purely advisory would be unsustainable. Many of the authorities described above may individually be sufficient to prove that the NSC is an agency under *Soucie*'s "sole factor" test; the cumulative effect is overwhelming. Moreover, the conclusion that the NSC is an agency under *Soucie*'s "sole function" test is supported by three additional facts.

First, *Soucie* itself draws a parallel between the status of the Office of Science and Technology and the NSC. As the *Soucie* court noted, the President determined that it was necessary to elevate responsibilities of the National Science Foundation ("NSF") to an entity better suited to "coordinate Federal science policies or evaluate programs of other agencies" and therefore transferred the NSF's functions to an "administrative unit"—the Office of Science and Technology—that was "'outside the White House Office, but in the Executive Office of the President on roughly the same basis as the . . . *National Security Council*.'" *Id*. at 1074 (quoting Congressional testimony) (emphasis added). The *Soucie* court thus directly equated the nature of the Office of Science and Technology, which it found to be an agency, with that of the NSC.

Second, the NSC's *own* interpretation and application of the *Soucie* test determined that the NSC was an agency. This is evidenced by, as described above, its promulgation of FOIA regulations following the passage of the 1974 FOIA amendments. 40 Fed. Reg. 7,316 (Feb. 19, 1975).

Third, in 1978, the Department of Justice Office of Legal Counsel ("OLC") also specifically concluded that the NSC was an agency under the *Soucie* test. *National Security Council-Agency Status Under FOIA*, 2 Op. O.L.C. 197 (1978), *withdrawn by* Memorandum from Walter Dellinger to Alan J. Kreczko (Sept. 20, 1993). The OLC considered two NSC committees at the time, the Policy Review Committee and the Special Coordination Committee, which the President had empowered via an Executive Order and which were "legally permitted to act without Presidential *participation*" and found their role sufficient, without more, to "prevent the NSC from being viewed as solely advisory and without legal authority to exercise specific governmental functions." *Id.* at 204 (emphasis added).

For all of these reasons, under the controlling authorities in this Circuit, the NSC is an agency under FOIA.

II. THIS CIRCUIT SHOULD REJECT *ARMSTRONG*

While the District Court correctly noted that the status of the NSC as an agency under the FOIA is an issue of first impression in this Circuit, it nevertheless deferred to the U.S. Court of Appeals for the D.C. Circuit by adopting the

erroneous standards and conclusions of *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996). *Armstrong* represents a departure from the plain language of the FOIA and the *Soucie* "sole function" test, allowing the "'advise and assist' exception to swallow the FOIA rule." *Armstrong v. Executive Office of the President*, 90 F.3d 553, 569 (D.C. Cir. 1996) (Tatel, J., dissenting). More broadly, *Armstrong* has the effect of insulating a broad swath of interagency government activity of surpassing public importance from the transparency and accountability mechanisms of the FOIA. This Court should reverse the District Court and decline to extend *Armstrong* to this Circuit.

A. The District Court Gave the D.C. Circuit Undue Deference

Despite long-standing authority holding that "[t]o interpret the terms of a statute, we look first to the statutory language itself," *Puello v Bur. of Citizenship and Immigration Services*, 511 F3d 324, 327 (2d Cir. 2007), and that a court should "resort to legislative history to determine the statute's meaning" only when "a statute is ambiguous," *id*., the District Court nevertheless relegated to a footnote the statutory language of the FOIA, JA13, which unambiguously includes establishments within the Executive Office of the President. 5 U.S.C. § 552(f)(1).

Moreover, while the District Court purported to rely upon language within the legislative history excluding entities whose "sole function" is to advise and assist the President, the District Court nevertheless simply dismissed as "dicta" the

Supreme Court's statements in *Kissinger v. Reporters Committee for Freedom of the Press* that the NSC is an agency under the FOIA. 445 U.S. 136, 146, 156 (1980). This is despite the fact that the Supreme Court in *Kissinger* interpreted precisely the same legislative history and expressly distinguished the limited exception for individuals acting solely in the capacity of a Presidential advisor, to which the FOIA did not apply, from the records of "the NSC, an agency to which the FOIA *does* apply." *Id*. at 146 (emphasis in original). Even if such statements regarding the status of the NSC as an agency were not part of the holding, the Supreme Court—not the D.C. Circuit—would still nevertheless be entitled to some "deference out of respect." *Horne v. Coughlin*, 178 F.3d 603, 605 (2d Cir. 1999).

Indeed, the fatal flaw of the District Court's opinion is its deference to D.C. Circuit jurisprudence in *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993) and *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996). It is well-settled that the decisions of one circuit are not binding upon another circuit. *Newsweek, Inc. v U.S. Postal Serv.*, 663 F.2d 1186, 1196 (2d Cir. 1981) (rejecting D.C. Circuit's interpretation of federal statute based on Second Circuit's own statutory analysis). Moreover, this Circuit has previously rejected longstanding D.C. Circuit precedent specifically in the FOIA context. *See, e.g.*, *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 150 (2d Cir. 2010) (rejecting D.C. Circuit's "program effectiveness" test for Exemption 4 of FOIA).

Yet, after acknowledging that this Circuit "has not addressed the issue now before [it]," the District Court nevertheless summarily adopted the D.C. Circuit's standards in *Meyer* and *Armstrong* that are, and should remain, alien to this Circuit.

B. *Armstrong* Is Inconsistent with the FOIA

1. The D.C. Circuit's Departure from the FOIA

A full appreciation of *Armstrong*'s unique problems requires briefly placing it in context. As described above, following the 1974 FOIA amendments, which provided the still-current definition of "agency," the NSC promulgated FOIA regulations and began an active FOIA program. In 1978, the Department of Justice Office of Legal Counsel ("OLC") opined that the NSC was an agency subject to the FOIA under the plain language of the statute and under *Soucie*. *National Security Council-Agency Status Under FOIA*, 2 Op. O.L.C. 197, 204 (1978). Meanwhile, courts held that several other entities within the Executive Office of the President were agencies pursuant to the plain language of the FOIA so long as a single function beyond advising the President was present pursuant to the *Soucie* "sole function" test. *See, e.g.*, *Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259 (D.C. Cir. 1980) (holding that Council on Environmental Quality was an agency under *Soucie* "sole function" test based); *Sierra Club v. Andrus*, 581 F.2d

895 (D.C. Cir. 1978), *rev'd on other grounds*, 442 U.S. 347 (1979) (holding that Office of Management and Budget was an agency under the *Soucie* test).[24]

In January 1993, however, a sharply divided D.C. Circuit panel in *Meyer v. Bush* found that a Presidential Task Force within the Executive Office of the President did not constitute an agency under the FOIA. 981 F.2d 1288, 1293 (D.C. Cir. 1993). Instead of applying the *Soucie* "sole factor" test, however, the D.C. Circuit panel created a *new* test for entities within the Executive Office of the President consisting of three factors: (1) whether the entity has a "self-contained structure," (2) its "operational proximity" to the President, and (3) the nature of the powers delegated to it by the President. A vigorous dissent in *Meyer* protested that the first two factors were "entirely creatures of the majority's own making" and that the application of the new test significantly limited the entities within the Executive Office of the President that would constitute an agency, contrary to the text of the FOIA and *Soucie*, 981 F.2d at 1312 (Wald, J., dissenting).

The dissent's warning that *Meyer* constituted a significant alteration in the interpretation of the FOIA was vindicated when, almost immediately thereafter, the

[24] In fact, during this period the only decision in which the D.C. Circuit held that a unit within the Executive Office of the President was *not* an "agency" was *Rushforth v. Council of Economic Advisors*, 762 F.2d 1038 (D.C. Cir. 1985). In *Rushforth*, however, the D.C. Circuit reached the negative conclusion because the Council on Economic Advisors did not have the authority to issue regulations or coordinate or oversee federal programs, *id.* at 1041-43, precisely the types of authority that the NSC exercises today.

NSC asked the OLC to revisit its 1978 opinion finding the NSC an agency under the FOIA. *See* Memorandum from Walter Dellinger to Alan J. Kreczko, *Status of NSC as an "Agency" Under FOIA* (Sept. 20, 1993). In doing so, the OLC expressly acknowledged the substantial effect of *Meyer*, noting that its 1978 opinion had held that "the legislative history of FOIA necessitated a very narrow interpretation of the term 'assist'" in "entities whose sole function is to advise or assist the President," but that *Meyer* had given "the term a much broader meaning." *Id.* at 7. NSC authorities that the OLC had previously found "empowered [the NSC] to perform important, substantial and far-reaching governmental functions relating to intelligence matters" were transformed, post-*Meyer*, into "merely assisting and advising the President," leading the OLC to withdraw its 1978 opinion. *Id*.

Early in 1994, during the *Armstrong* litigation in which the plaintiffs sought to prevent the destruction of NSC records, and during which the NSC had openly admitted that it was an agency under the FOIA, the Executive branch suddenly announced that the NSC was no longer an "agency." *Armstrong v. Exec. Office of the President*, 877 F. Supp. 690 (D.D.C. 1995). An incredulous district court in *Armstrong* thoroughly rejected the NSC's reversed position as "contrary to law" and "without reasoned explanation" and held that the NSC remained an agency. *Id.* at 697. The sharply divided D.C. Circuit panel in *Armstrong*, however,

applying the new *Meyer* standards, reversed and held that the NSC was not an agency under the FOIA. *Armstrong v. Exec. Office of the President*, 90 F.3d 553 (D.C. Cir. 1996). On the basis of *Armstrong* alone, the NSC later withdrew its FOIA regulations. 63 Fed. Reg. 25,736 (May 8, 1998).

The NSC's reversal of its earlier position that it is an agency, therefore, resulted not from any statutory change to the FOIA, but from new standards created out of whole cloth in *Meyer* and applied in *Armstrong* that were, and should have remained, unique to the D.C. Circuit.

2. The *Armstrong* Factors Are Erroneous

An examination of the three-factor test in *Meyer* and *Armstrong* demonstrates why the District Court's reliance on these cases is misplaced.

The first factor applied by *Armstrong* was whether the NSC has a "self-contained" structure. 90 F.3d at 559. As the District Court noted, JA15, the *Armstrong* majority held that the NSC satisfied this factor, finding that the "NSC staff is not an amorphous assembly" that is "convened periodically by the President" but rather a "professional corps" with significant employees "organized into a complex system of committees and working groups" with "separate offices" and "with clearly established lines of authority both among and within the offices." 90 F.3d at 560. That even the District Court and *Armstrong* held that the NSC met

this factor does not detract from the reality that the factor has no basis in the FOIA or in the sound reasoning of *Soucie*.

The second factor is the "operational proximity" of the NSC to the President. The basic problem with this factor is that *all* units with the Executive Office of the President exhibit "proximity" to the President. If anything, this fact should militate in favor of the strict application of the "sole function" test. The majority's rationale in *Armstrong*, however, cuts in the opposite direction, holding that, because the NSC is "proximate" to the President, a court should *heighten* its scrutiny of the independence of "functions" other than advising the President. *See Armstrong v. Exec. Office of the President*, 90 F.3d 553, 560 (D.C. Cir. 1996) (stating that due to NSC's proximity, plaintiffs "must make a strong showing indeed"); *id.* at 567 (stating that due to NSC's proximity, plaintiffs' showing of delegated authority must be "compelling" to "prevail"). Hence, under *Armstrong*, a finding of "proximity" functionally discards the *Soucie* "sole function" test by placing a large thumb on the scale in favor of finding that an entity is not an agency.

If proximity to the President were properly a factor, "virtually every person or entity within the Executive Office of the President would be excluded from the FOIA, contrary to the statute's express inclusion of the Executive Office of the President in its definition of agency." *Meyer*, 981 F.2d at 1309-10 (Wald, J.,

dissenting); *see also id.* at 1310-11 ("When the statute expressly includes establishments within the Executive Office of the President, while the accompanying report language excludes only 'immediate personal staff' and those whose 'sole function' is to advise and assist the President, I have to read the report language to qualify, not obliterate, the statutory directive."). Such a reading also conflicts with guidance from this Circuit that, in those limited situations in which resort to legislative history is necessary to interpret an ambiguous statute, courts must "construct an interpretation that comports with [the statute's] primary purpose and does not lead to anomalous or unreasonable results." *Connecticut ex rel. Blumenthal v. U.S. Dep't of the Interior*, 228 F.3d 82, 89 (2d Cir. 2000) (citing *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982)).

Under the "proximity" factor, the *Armstrong* majority and the District Court also treated the fact that the President heads the NSC Council as essentially dispositive. JA16; 90 F.3d at 560; *see also id.* at 567 (Tatel, J., dissenting) ("I fear the President's membership on the NSC has obscured from my colleagues the extent to which the NSC actually exercises independent authority."). While Congress placed the President at the head of the core Council, the NSC has a separate legal and structural identity and, as described above, it consists of multiple layers of entities of decreasing proximity to the President, performing significant policy formation, decision-making and implementation in the absence of, and

independently from, the President. *See id*. at 568 (Tatel, J., dissenting) (noting "the independent functions exercised by the less proximate NSC staff and numerous interagency groups").[25]

The last factor *Armstrong* applied was the "nature of the authorities" delegated to the NSC. While, in principle, this factor appears similar to the "sole factor" test in *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971), it is impossible to read *Armstrong*'s analysis as consistent with *Soucie*. In *Soucie*, the court identified a single independent authority of the Office of Science and Technology and found it sufficient to satisfy the definition for an agency under the FOIA, despite the fact that the records at issue in *Soucie* were created for the benefit of the President and at his request. *Id*.

In contrast, the *Armstrong* majority declared that, in order for the NSC's authority to be independent, it must be able to act "without the consent of the president." *Armstrong*, 90 F.3d at 563. Such a test is "highly unrealistic" and, were this the bar for independent authority, many agencies now subject to the

[25] When the OLC examined the NSC's status prior to *Meyer*, it similarly rejected the argument that the President's membership on the NSC renders the NSC merely "advisory" by emphasizing that the NSC "was created by Congress as an entity distinct from the Presidency" that has "functions, power, and authority of its own and is not simply an *alter ego* of the President." *National Security Council-Agency Status Under FOIA*, 2 Op. O.L.C. 197, 204 (1978), *withdrawn by* Memorandum from Walter Dellinger to Alan J. Kreczko (Sept. 20, 1993). The OLC analysis stressed that even in those specific situations in which NSC "authority is exercised by the President," that authority "may reasonably be viewed as exercised by him in his capacity as Chairman of the NSC." *Id.*

FOIA would be exempted. *Armstrong*, 90 F.3d at 569 (Tatel, J., dissenting). By this definition only "renegades or freelancers who ignored or disregarded the President's orders would be seen to 'act independently.'" *Meyer*, 981 F.2d at 1308-09 (Wald, J., dissenting) (objecting to majority's position that an entity would not be acting "independently" even if it were simply to resolve disputes "according to the President's known wishes").

Finally, even when the *Armstrong* plaintiffs identified "classic examples of agency action performed without the personal involvement of the President" that illustrated that the NSC's "sole function" was not to advise and assist the President, and that should "subject an entity to FOIA," 90 F.3d at 575 (Tatel, J., dissenting), the *Armstrong* majority moved the goal posts and rejected the authorities because the plaintiffs failed to provide *factual* evidence that the NSC had actually utilized the delegated authority. 90 F.3d at 562 ("We are reluctant to consider the mere formality of a delegation of authority."). This was yet another significant departure from the *Soucie* test and from the FOIA that began with *Meyer*, as the OLC has acknowledged. *See* Memorandum from Walter Dellinger to Alan J. Kreczko, *Status of NSC as an "Agency" Under FOIA* (Sept. 20, 1993), at 7 (noting that "*Soucie* test focuses on the *authority* to act" while *Meyer* "stressed the *actual* actions" of entity in question) (emphasis in original).

C. *Armstrong* Is Outdated

Even assuming for the sake of argument that *Armstrong* used the proper standard, and even further assuming that *Armstrong* properly applied that standard to the NSC's legal authorities in August 1996, *Armstrong* is nevertheless demonstrably outdated by virtue of the NSC's expanded role and legal authorities since that time. Properly applied, the NSC is an agency even under the faulty *Armstrong* standard.

To offer but one example, months after *Armstrong*, Congress created the NSC Committee on Foreign Intelligence, whose authority arguably meets even *Armstrong*'s high bar for independent action. 50 U.S.C. § 3021(h) (formerly § 402(h)). As described above, Congress empowered this Committee, over the objection of the President, with independent authority that extends far beyond advising the President, including a direct reporting requirement to an entity outside of the NSC and the White House. *Id.* at § 3021(h)(5) (formerly § 402(h)(5)). Moreover, that the Committee actually exercised this independent authority has already been established by Congressional investigation. *See* S. Rep. No. 110-346, at 9 (2008).

The District Court erred when it failed to adequately assess such up-to-date NSC authorities. Instead, the District Court quickly determined that it found "no reason to depart from" *Armstrong*'s reasoning and, reflexively embracing

Armstrong's facts, it summarily concluded that none of the NSC's duties can be "'substantial' in comparison to the NSC's fundamental role as an advisory body," nor do they "involve the kind of independence from the President that would characterize the operations of an 'agency.'" JA19. The reality, however, is that the NSC's current functions, described in detail above, Part I.E. *supra*, are sufficient to satisfy even the standards of *Armstrong*.

D. Embracing *Armstrong* Would Undermine the Public Interest

The reasoning and holdings in *Meyer* and *Armstrong* weaken crucial public accountability and transparency mechanisms that ought to govern the momentous activities of the NSC and other entities within the Executive Office of the President. The D.C. Circuit's misguided jurisprudence on this issue not only offers the government a map for circumventing any applicable disclosure obligations, but it also reduces the likelihood that records on matters of grave public consequence will be created at all and, if they are created, it reduces the odds of their preservation. Without such records, of course, the very possibility of future accountability and of intelligent and informed policy reform or oversight vanishes.

Indeed, in her powerful dissent in *Meyer*, Judge Wald warned that the majority's revision of the "sole function" test "clearly maps out the formula for getting around disclosure laws in the Executive Office of the President." 981 F.2d at 1315. The D.C. Circuit's subsequent application of *Meyer* offers empirical

proof that Judge Wald's fears have materialized. Post-*Meyer* jurisprudence in the D.C. Circuit has created an aberrant situation where, despite the FOIA's unambiguous treatment of establishments within the Executive Office of the President as agencies, only five entities within the Executive Office of the President, *less than half*, are currently treated as agencies.[26] Moreover, most of the five entities on this short list are treated as agencies only because of pre-*Meyer* decisions that applied *Soucie*'s "sole function" test. *See Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259 (D.C. Cir. 1980) (Council on Environmental Quality); *Sierra Club v. Andrus*, 581 F.2d 895 (D.C. Cir. 1978), *rev'd on other grounds*, 442 U.S. 347 (1979) (Office of Management and Budget); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (Office of Science and Technology). It is highly questionable whether such entities would survive the *Meyer/Armstrong* test were the D.C. Circuit to reexamine them today.

Moreover, the negative effects of *Meyer*/*Armstrong* are not confined to the *disclosure* of the records of the NSC and other Executive Office of the President entities under the FOIA, but also extend to whether such records are created and

[26] The White House website currently indicates that the only entities within the Executive Office of the President that are subject to the FOIA are the Council on Environmental Quality, the Office of Management and Budget, the Office of National Drug Control Policy, the Office of Science and Technology Policy, and the United States Trade Representative. *See* White House website, http://www.whitehouse.gov/administration/eop/ostp/library/foia/about (visited Jan. 20, 2014).

preserved at all. By holding that the NSC was no longer an "agency," *Armstrong* effectively transformed all NSC records from "agency records"—subject to both the FOIA and the Federal Records Act ("FRA")[27] —into "presidential records" that are subject only to the Presidential Records Act ("PRA"). 44 U.S.C. §§ 2201-07. The PRA is significantly less stringent than either the FOIA or the FRA and is nearly immune from judicial oversight.

In particular, regarding the creation and preservation of "agency" records, the FRA requires that agencies "make and preserve records" documenting agency activities "designed to furnish the information necessary to protect the legal and financial rights of the Government and *of persons directly affected by the agency's activities*." 44 U.S.C. § 3301 (emphasis added). Moreover, agencies cannot destroy records unless, and until, the Archivist of the United States has approved a "records schedule" encompassing the records and permitting their destruction. 44 U.S.C. § 3314. The FOIA also has a preservation function by requiring agencies to maintain responsive records until the FOIA request and any appeals and litigation are complete even if the records otherwise could have been destroyed. *See* Nat'l Archives & Records Admin., *General Records Schedule 14*, Item 11 (defining retention period for "official file copy" of records requested via FOIA).

[27] The statutes collectively referred to as the FRA are codified within chapters 21, 25, 27, 29, 31 and 33 of Title 44.

In contrast, the PRA does not require the creation of documentation in order to protect the legal rights of individuals, but only requires that the President take "steps" to ensure that his duties are "adequately documented." 44 U.S.C. § 2203(a). Crucially, in relation to the preservation of records and as the NSC has already asserted in this litigation, "under the PRA, the President makes the ultimate decision whether to dispose of presidential records, and neither the Archivist, nor Congress, nor the courts may veto that decision." Def.'s Mot. to Dismiss, at 7 (citing *Armstrong*). Indeed, under *Armstrong* the limited recordkeeping obligations of the PRA are not subject to any judicial scrutiny. *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 556 (D.C. Cir. 1996) (noting that while "record-keeping requirements of the FRA are subject to judicial review and enforcement; those of the PRA are not").

In many ways, the stakes at play are quite literally existential and go to the core principles of transparency and accountability that undergird our system of government. The records at issue in this litigation reflect the deliberations and decisions of NSC interagency committees that were undertaken in the absence of the President and resulted in the targeted killings of Americans and of hundreds of citizens of nations not at war with the United States. These same NSC bodies were also involved in the approval of brutal interrogation techniques that were employed by the U.S. government on prisoners overseas and in the vetting of surveillance

deployed against U.S. citizens and leaders of allied foreign governments. These are precisely the types of deeply consequential activity that ought to be subject to the heightened documentation requirements demanded of "agencies" under the FRA.

While many, if not all, such records may be excluded from current disclosure under the FOIA exemption for classified information, 5 U.S.C. § 552(b)(1), the requirement that such records be created and preserved as "agency records" would at the very least ensure a measure of historical accountability when they are declassified, studied, and discussed publicly, decades in the future. Further, the creation and preservation of such NSC records—even if only in highly classified, non-public form—would also enable policymakers and legislators today or in the near future to effect meaningful reform and oversight of the policies and programs in question.

Instead, if *Armstrong* were extended to this Circuit, the legal obligations that apply to "agencies" would not act as a bulwark against the often irresistible temptation for government officials to operate under "no notes" policies that discourage the creation of records in order to avoid accountability and preserve "deniability." Also left unchecked would be the "built-in incentive" of government entities "to dispose of records relating to 'mistakes.'" *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 41 (D.C. Cir. 1983). In sum, this Circuit's

adoption of *Armstrong* would further undermine the processes of political and historical accountability that are essential to the proper functioning of any democracy.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S REQUEST FOR DISCOVERY

In opposing the NSC's motion to dismiss below, Main Street argued that the District Court could easily conclude that the NSC was an agency subject to the FOIA based solely upon publicly known authorities. But Main Street also added that, should the District Court be inclined to conclude otherwise, discovery "with respect to the complete scope of" the NSC's "current powers and responsibilities" would be warranted. Opposition to Mot. to Dismiss, at 19. The District Court denied Plaintiff's request for discovery. JA21.

The standard for review of a denial of a request for discovery is generally abuse of discretion. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172 (2d Cir. 1998). Here, the District Court dismissively concluded in a footnote that the publicly available NSC functions and authorities alone were "wholly sufficient for a proper adjudication" that the NSC was *not* an agency. JA21. In doing so, the District Court fundamentally misconstrued the nature of the inquiry under the *Soucie* "sole factor" test, in which a single, independent authority delegated to an establishment within the Executive Office of the President is

sufficient to make it an agency. *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). The District Court's conclusion that the NSC's publicly available functions were "wholly sufficient" was tantamount to holding that, not only was the NSC not an agency, but that it *could not be* an agency, irrespective of the complete scope of its functions and authorities. *See* JA18-19 (stating that even if the "Council and its subcommittees are involved in policy formation or implementation," the NSC would still not be an agency).

Moreover, the District Court did not conduct its own independent analysis of the *current* functions and authorities of the NSC. Instead, the District Court erroneously relied on *Armstrong*'s outdated description of NSC functions and authorities, and justified its reliance by summarily—and irrelevantly—concluding that "[c]urrent events have changed little, except perhaps to heighten the American government's concern over (and awareness of) threats to national security interests." JA16.

The discovery Main Street sought into the full scope of NSC functions was the equivalent of a request for jurisdictional discovery, which is appropriate especially "where the facts are peculiarly within the knowledge of the opposing party." *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006 (2d Cir. 1986). While the NSC primarily styled its motion to dimiss pursuant to Federal Rule of Civil Procedure 12(b)(6), and while the District Court decided it on that basis, the NSC

also alternatively requested dismissal pursuant to Rule 12(b)(1) for lack of *subject matter jurisdiction*. Def.'s Mot. Dismiss, at 3 n.3. This acknowledged that the NSC's challenge is in part jurisdictional, based on Plaintiff's fundamental *legal* assertions that the NSC is an agency under the FOIA, and that the NSC therefore was "improperly withholding" agency records. *Id*. (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980), stating that jurisdiction under the FOIA depends upon showing that agency (1) improperly (2) withheld (3) agency records).

Even within the D.C. Circuit, courts have acknowledged that discovery is especially appropriate in cases, such as this, where a government entity asserts that it does not constitute an agency under the FOIA. *See, e.g., Citizens for Responsibility & Ethics in Washington v. Office of Admin.*, 2008 WL 7077787 (D.D.C. Feb. 11, 2008) (holding it necessary to allow FOIA plaintiff to take discovery relevant to whether White House Office of Administration is an "agency" under FOIA). Indeed, *Armstrong* itself involved extensive discovery relating to facts relevant to the NSC's status as an agency. *See Armstrong v. Exec. Office of the President*, 877 F. Supp. 690 (D.D.C. 1995), *rev'd*, 90 F.3d 553, 556 (D.C. Cir. 1996) (referencing deposition testimony and responses to requests for admissions).

The District Court's failure to order discovery into the full scope of the NSC's present functions and authorities—even if any resulting discovery, owing to its sensitive or classified nature, were ultimately reviewed only by the District Court, *ex parte* and *in camera*—undermined the basis of its decision and constitutes an abuse of discretion.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully requests that this Court reverse the District Court's holding that the NSC is not an agency for FOIA purposes or, in the alternative, remand with allowance for discovery.

Dated: January 21, 2014
Long Island City, New York

/s/

RAMZI KASSEM
Supervising Attorney

DOUGLAS COX
Of Counsel

NASRIN MOZNU
VERSELY ROSALES
Law Student Interns

Main Street Legal Services, Inc.
CUNY School of Law
2 Court Square
Long Island City, NY 11101
(718) 340-4558

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,367 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word.

/s/

RAMZI KASSEM
Supervising Attorney

DOUGLAS COX
Of Counsel

NASRIN MOZNU
VERSELY ROSALES
Law Student Interns

Main Street Legal Services, Inc.
CUNY School of Law
2 Court Square
Long Island City, NY 11101
(718) 340-4558

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE & CM/ECF FILING

13-3792-cv *Main Street Legal Services, Inc. v. National Security Council*

I hereby certify that I caused the foregoing Brief for Plaintiff-Appellant to be served on the following counsel for Defendant-Appellee via Electronic Mail generated by the Court's electronic filing system (CM/ECF), with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

STUART F. DELERY
Assistant Attorney General

LORETTA E. LYNCH
United States Attorney

MARK B. STERN
(202) 514-5089
JAYNIE LILLEY
(202) 514-3542
Attorneys, Appellate Staff
Civil Division, Room 7321
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Counsel for Defendant-Appellee

I also certify that an electronic copy of the foregoing Brief for Plaintiff-Appellant was uploaded to the Court's electronic filing system and that nine physical copies of the Brief and the Joint Appendix were sent to the Clerk's Office by U.S. Mail to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576

on this 21st day of January, 2014.

/s/
RAMZI KASSEM

ADDENDUM

5 U.S.C. § 552

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * *

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) 1 shall not make any record available under this paragraph to-

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

* * * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

* * * *

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall-

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for

records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

* * * *

(f) For purposes of this section, the term-

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes-

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

* * * *

50 U.S.C. § 3021 (formerly 50 U.S.C. § 402)

National Security Council

(a) Establishment; presiding officer; functions; composition

There is established a council to be known as the National Security Council (hereinafter in this section referred to as the "Council").

The President of the United States shall preside over meetings of the Council: *Provided*, That in his absence he may designate a member of the Council to preside in his place.

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

The Council shall be composed of-

(1) the President;
(2) the Vice President;
(3) the Secretary of State;
(4) the Secretary of Defense;
(5) the Secretary of Energy;
(6) the Director for Mutual Security;
(7) the Chairman of the National Security Resources Board; and
(8) the Secretaries and Under Secretaries of other executive departments and of the military departments, the Chairman of the Munitions Board, and the Chairman of the Research and Development Board, when appointed by the President by and with the advice and consent of the Senate, to serve at his pleasure.

(b) Additional functions

In addition to performing such other functions as the President may direct, for the purpose of more effectively coordinating the policies and functions of the departments and agencies of the Government relating to the national security, it shall, subject to the direction of the President, be the duty of the Council-

(1) to assess and appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purpose of making recommendations to the President in connection therewith; and
(2) to consider policies on matters of common interest to the departments

and agencies of the Government concerned with the national security, and to make recommendations to the President in connection therewith.

(c) Executive secretary; appointment; staff employees

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

(d) Recommendations and reports

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

* * * *

(g) Board for Low Intensity Conflict

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

(h) Committee on Foreign Intelligence

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

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

(A) The Director of National Intelligence.

(B) The Secretary of State.

(C) The Secretary of Defense.

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

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

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

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

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

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

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

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

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

(C) conduct an annual review of the elements of the intelligence community in order to determine the success of such elements in collecting, analyzing, and disseminating the intelligence identified under subparagraph (B).

(5) The Committee shall submit each year to the Council and to the Director of National Intelligence a comprehensive report on its activities during the preceding year, including its activities under paragraphs (3) and (4).

(i) Committee on Transnational Threats

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

(2) The Committee shall include the following members:

(A) The Director of National Intelligence.

(B) The Secretary of State.

(C) The Secretary of Defense.

(D) The Attorney General.

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

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

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

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

(A) identify transnational threats;

(B) develop strategies to enable the United States Government to

respond to transnational threats identified under subparagraph (A);
(C) monitor implementation of such strategies;
(D) make recommendations as to appropriate responses to specific transnational threats;
(E) assist in the resolution of operational and policy differences among Federal departments and agencies in their responses to transnational threats;
(F) develop policies and procedures to ensure the effective sharing of information about transnational threats among Federal departments and agencies, including law enforcement agencies and the elements of the intelligence community; and
(G) develop guidelines to enhance and improve the coordination of activities of Federal law enforcement agencies and elements of the intelligence community outside the United States with respect to transnational threats.

(5) For purposes of this subsection, the term "transnational threat" means the following:
(A) Any transnational activity (including international terrorism, narcotics trafficking, the proliferation of weapons of mass destruction and the delivery systems for such weapons, and organized crime) that threatens the national security of the United States.
(B) Any individual or group that engages in an activity referred to in subparagraph (A).

* * * *