

No. 13-3792

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Main Street Legal Services,
Plaintiff-Appellant,

v.

National Security Council,
Defendant-Appellee.

On Appeal from the United States District Court for
the Eastern District of New York

APPELLEE BRIEF

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APPELLEE BRIEF

JURISDICTIONAL STATEMENT

In this action under the Freedom of Information Act (“FOIA”), plaintiff invoked the district court’s jurisdiction under 5 U.S.C. § 552. JA 4. On August 7, 2013, the district entered final judgment, dismissing the case in its entirety. JA 23 (Order); JA 9-22 (Memorandum Opinion). Plaintiff filed a timely notice of appeal on October 7, 2013. JA 24; *see* Fed. R. App. P. 4(a)(1). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the National Security Council is an “agency” for the purposes of the Freedom of Information Act.
2. Whether the District Court abused its discretion in denying plaintiff’s request for discovery.

STATEMENT OF THE CASE

I. Statutory Background

Subject to enumerated exceptions, FOIA generally requires Government agencies to make records publicly available upon request. *See* 5 U.S.C. § 552. For purposes of FOIA, the term “agency” is defined to “include[] 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).

In adopting the current definition of “agency” in 1974, Congress codified the D.C. Circuit’s decision in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), which had interpreted the previous definition to exclude parts of the Executive Office of the President (“EOP”) that served only to advise and assist the President and did not wield “substantial independent authority in the exercise of specific functions.” *Id.* at 1073, 1075. *See* H.R. Rep. No. 93-1380, at 14 (1974); *see also* *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996).

Congress created the National Security Council (“NSC”) in the National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified at 50 U.S.C. § 3021), and provided that its function “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.” 50 U.S.C. § 3021(a). Shortly thereafter, the NSC was formally placed within the EOP.

See S. Rep. 81-838, at 2 (1949) (citing Reorganization Plan No. 4 of 1949, *reprinted in* 5 U.S.C. app. at 101-102).¹

The President presides over the NSC personally, *see* 50 U.S.C. § 3021(a), and the other members of the Council include the Vice President, Secretary of State, Secretary of Defense and other senior-level officials, *Id.* § 3021(a)(1)-(8). The NSC has a staff, headed by an Executive Secretary, appointed by the President, that assists the NSC with the performance of its functions. *Id.* § 3021(c).

“[S]ubject to the direction of the President,” the NSC possesses statutory authority 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,” *id.* § 3021(b)(1), and “to consider policies on matters of common interest to the departments and

¹ President Franklin D. Roosevelt created the EOP in order to “reduce the difficulties of the President in dealing with the multifarious agencies of the executive branch and assist him in distributing his responsibilities as the chief administrator of the Government by providing him with the necessary organization and machinery for better administrative management.” Reorganization Plan No. I of 1939, Message of the President, *reprinted in* 5 U.S.C. app. at 531 (2006).

agencies of the Government concerned with the national security, and to make recommendations to the President in connection therewith,” *id.* § 3021(b)(2). The NSC “advise[s] and assist[s]” the President in “integrating all aspects of national security policy” and accomplishes these functions through various committees that serve as interagency coordinating bodies, subject to the direction of the President. JA 31-32 (Presidential Policy Directive-1, “Organization of the National Security Council System,” Feb. 13, 2009 (“PPD-1”)).

President Obama, like his predecessors, has further organized the National Security Council System into various committees to assist him in carrying out his national security responsibilities and to retain control over these important matters. *See, e.g.*, JA at 31-32 (The NSC Principals Committee “will continue to be the senior interagency forum for consideration of policy issues affecting national security, as it has been since 1989”); *id.* at 32-33 (The NSC Deputies Committee “shall review and monitor the work of the NSC interagency process”); *id.* at 33-34 (Interagency Policy Committees shall be the “main day-to-day fora for interagency coordination of national security policy”). These Committees consist of senior department officials and are chaired by either the

President's National Security Advisor (the Principals Committee), Deputy National Security Advisor (the Deputies Committee), or members of the NSC staff (Interagency Policy Committees). 50 U.S.C. § 402(h)-(i); *see also* JA 30-24 (PPD-1).

II. Prior Proceedings

This case involves plaintiff's November 27, 2012 FOIA request for records relating to "the killing and attempted killing of United States citizens and foreign nationals by drone strikes, and a copy of all National Security Council meeting minutes taken in the year 2011." JA 5. In response to this request, the NSC explained that the "National Security Council is not subject to the Freedom of Information Act," because it is "an organization in the Executive Office of the President that advises and assists the President." *Id.* (internal quotation marks omitted). Plaintiff sought judicial review of the agency's determination, and the district court granted the NSC's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Observing that "[t]he NSC is unique in its organizational structure in that it is chaired by the President personally," the district court concluded that the NSC is not a FOIA agency. JA 11, 13. Noting that the D.C. Circuit had rejected substantially the same arguments

as those presented by plaintiff here in *Armstrong v. Executive Office of the President*, 90 F.3d 553, 556 (D.C. Cir. 1995), the district court observed that “[c]urrent events have changed little” since that case was decided. JA 16.

The district court explained that, in determining whether a unit of the EOP is an agency for purposes of FOIA, a court examines whether the EOP component exercises “substantial independent authority in the exercise of specific functions” or whether the component’s “sole function is to advise and assist the President.” *Soucie v. David*, 448 F.2d 1067, 1073, 1075 (D.C. Cir. 1971). The district court endorsed the D.C. Circuit’s conclusion in *Armstrong* that the “NSC’s delegated powers consist overwhelmingly of advising and assisting the President directly in matters of national security,” JA 17, and observed that “[t]he operational proximity between the President and the Council remains exceptionally close under the current administration.” JA 16. Like the *Armstrong* court, the district court rejected plaintiff’s arguments based on various Executive Orders and other delegations that the NSC served in anything other than a “‘quintessentially advisory’ role only.” JA 18 (quoting *Armstrong*, 90 F.3d at 561). Finally, the district court denied plaintiff’s request for further discovery as

unwarranted, finding the available public records “wholly sufficient” for determining whether the NSC is a FOIA agency. JA 21 n.4.

SUMMARY OF THE ARGUMENT

1. FOIA applies only to “agenc[ies],” a term that encompasses only those entities in the Executive Office of the President that exercise significant independent authority and does not reach ““units in the [EOP] whose sole function is to advise and assist the President[.]”” *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Rep. 93-1380, at 15 (1974)).

Applying this standard, the D.C. Circuit in *Armstrong*, 90 F.3d at 558, held that the National Security Council is not an agency within the scope of FOIA because it plays no “substantive role apart from that of the President, as opposed to a coordinating role on behalf of the President.” *Id.* at 565. Although Congress has subsequently amended FOIA on several occasions, it has left the ruling undisturbed. That inaction is unsurprising. Congress expressly created the NSC to advise and assist the President in the exercise of his core constitutional national security functions, and its structure reflects that function. Any functions delegated to the NSC consist of assisting the President in coordinating the activities of various agencies.

Plaintiff has offered no reason to accept its invitation to go into conflict with the D.C. Circuit, and to conclude that the NSC is a FOIA agency would raise the type of significant constitutional questions that Congress sought to avoid when it excluded from the statute's scope entities within the EOP that exist to advise the President and do not exercise substantial independent authority.

2. The district court did not abuse its discretion in denying plaintiff's request for discovery, which could serve no useful function. The district court correctly determined that the legal question presented by this suit is properly resolved on the basis of publicly available information about the NSC's structure, purpose, and functions and that plaintiff has identified no sound reason to question the district court's discovery ruling.

STANDARD 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*, see *In re Herald*, 730 F.3d 112, 117 (2d Cir. 2013), and a district court's discovery ruling for abuse of discretion, see *Wood v. F.B.I.*, 432 F.3d 78, 82 (2d Cir. 2005).

ARGUMENT

I. The District Court Properly Determined That the National Security Council Is Not an Agency under FOIA.

A. FOIA Has No Application to Components of the EOP That Advise the President and Do Not Exercise Substantial Independent Authority.

“By its terms, FOIA applies only to an ‘agency[.]’” *Citizens for Responsibility and Ethics in Washington v. Office of Admin. (CREW)*, 566 F.3d 219, 222 (D.C. Cir. 2009). As originally enacted, FOIA incorporated the definition of “agency” in the Administrative Procedure Act, which includes any “authority of the Government of the United States[.]” Pub. L. No. 89–554, § 551(1), 80 Stat. 378, 381 (1966) (codified as amended at 5 U.S.C. § 551(1)); *see also CREW*, 566 F.3d at 222.

In 1974, Congress amended FOIA’s definition of “agency” to include, more specifically, “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). In amending the statute, Congress codified the D.C. Circuit’s decision in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), which had interpreted the previous definition to exclude parts of the Executive

Office of the President that served only to advise and assist the President and did not wield “substantial independent authority in the exercise of specific functions.” *Id.* at 1073, 1075; *see* H.R. Rep. No. 93-1380, at 15 (“[W]ith respect to the meaning of the term ‘Executive Office of the President’ the conferees intend the result reached in *Soucie*”); *see also* *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996) (“That the Congress intended to codify *Soucie* is clear enough”); *Meyer v. Bush*, 981 F.2d 1288, 1291 (D.C. Cir. 1993) (same).

Accordingly, “[a]lthough the 1974 amendments expressly include the EOP within the definition of ‘agency,’ the Supreme Court relied upon their legislative history to hold that FOIA does not extend to ‘the President’s immediate personal staff or units in the Executive Office [of the President] whose sole function is to advise and assist the President[.]’” *CREW*, 566 F.3d at 222 (quoting *Kissinger*, 445 U.S. at 156 (quoting H.R. Rep. No. 93-1380, at 15)). In subsequent decisions, the D.C. Circuit has engaged in several related inquiries to determine whether a unit of the EOP is an

agency within the meaning of FOIA.² As summarized in *CREW*, the court has asked “whether the entity exercises substantial independent authority,” *Armstrong*, 90 F.3d at 558 (internal quotation marks omitted), “whether . . . the entity’s sole function is to advise and assist the President,” *id.* (internal quotation mark omitted), and in an effort to harmonize these tests, “how close operationally the group is to the President,” “whether it has a self-contained structure,” and “the nature of its delegat[ed]” authority, *Meyer*, 981 F.2d at 1293. *CREW*, 566 F.3d at 222.

“However the test has been stated, common to every case in which [the D.C. Circuit has] held that an EOP unit is subject to FOIA has been a finding that the entity in question ‘wielded substantial authority independently of the President.’” *CREW*, 566 F.3d at 222 (quoting *Sweetland v. Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995) (per curiam)). See, e.g., *Soucie*, 448 F.2d at 1073-75 (Office of Science and Technology (“OST”) covered by

² Although decisions of the D.C. Circuit are, of course, not binding on this Court, the Court has noted that D. C. Circuit opinions construing FOIA “are entitled to appropriate weight.” *Continental Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977) (per curiam); see also *Inner City Press/Cmtty. on the Move v. Bd. of Governors of Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006).

FOIA because it has independent authority to evaluate federal scientific research programs, initiate and fund research projects, and award scholarships); *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978) (Office of Management and Budget exercises substantial independent authority because it has a statutory duty to prepare the annual federal budget to aid both Congress and the President and “Congress signified the importance of OMB’s power and function, over and above its role as presidential advisor, when it provided . . . for Senate confirmation of the Director and Deputy Director of OMB.”); *Pacific Legal Found. v. Council on Env’tl. Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980) (Council on Environmental Quality “coordinate[s] federal programs related to environmental quality[,] . . . issue[s] guidelines to federal agencies for the preparation of environmental impact statement[s],” and “issue[s] regulations to federal agencies for implementing all of the procedural provisions of [the National Environmental Policy Act].”).

The D.C. Circuit has, however, “consistently refused to extend FOIA to an EOP unit that lacks substantial independent authority.” *CREW*, 566 F.3d at 223. *See, e.g., Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1043 (D.C. Cir. 1985) (the Council of Economic Advisors “has no regulatory

power under [its] statute. It cannot fund projects based on [its] appraisal, as OST might, nor can it issue regulations for procedures based on the appraisals[.]”); *Meyer*, 981 F.2d at 1297 (Although President’s Task Force on Regulatory Relief included senior White House staffers and cabinet officers whose agencies fall under FOIA, the Task Force was not a FOIA agency because it lacked substantial authority independent of the President “to direct executive branch officials.”); *Sweetland*, 60 F.3d at 854 (members of the Executive Residence staff do not exercise substantial authority independent of the President because they only “assist[] the President in maintaining his home and carrying out his various ceremonial duties.”); *CREW*, 566 F.3d at 222-224 (Because nothing establishes that Office of Administration “performs or is authorized to perform tasks other than operational and administrative support for the President and his staff, we conclude that [it] lacks substantial independent authority and is therefore not an agency under FOIA.”).

B. The National Security Council Exists to Advise the President And Does Not Wield Substantial Independent Authority.

As most directly relevant here, the D.C. Circuit in *Armstrong* held that the National Security Council is not an agency within the scope of FOIA

because it plays no “substantive role apart from that of the President, as opposed to a coordinating role on behalf of the President.” *Armstrong*, 90 F.3d at 565. That decision was clearly correct, and although Congress has amended FOIA on several occasions since *Armstrong* issued, *see., e.g.*, OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat 2524; OPEN FOIA Act of 2009, Pub. L. No. 111-83, 123 Stat 2147, it has not disturbed the ruling.

Congress created the NSC “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.” 50 U.S.C. § 3021(a). The powers vested in the NSC are those necessary to advise and assist the President. “[S]ubject to the direction of the President,” the NSC is authorized “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,” *id.* § 3021(b)(1), and “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,” *id.* § 3021(b)(2). *See Armstrong*, 90 F.3d at 561 (the NSC “‘has from its inception been a highly personal instrument of the President’” and “‘remain[s] a strictly advisory body’” (quoting John Tower *et al.*, *Report of the President’s Special Review Board*, at II-1, II-2 (1987))).

The composition and structure of the NSC reflect its advisory nature. The President personally presides over the NSC, *see id.* § 3021(a), whose other members include the Vice President, Secretary of State, Secretary of Defense and other senior-level officials, *id.* § 3021(a)(1)-(8). As the D.C. Circuit recognized, “the close working relationship between the NSC and the President indicates that the NSC is more like ‘the President’s immediate personal staff’ than it is like an agency exercising authority, independent of the President.” *Armstrong*, 90 F.3d at 567.

In *Armstrong*, the D.C. Circuit considered a variety of delegations of authority to the NSC cited by the plaintiff in that case that purportedly demonstrated its independent authority. The court concluded, however, “that, notwithstanding Armstrong’s detailed efforts to document a decisional role for the NSC staff, the staff exercises no substantial authority either to make or to implement policy.” 90 F.3d at 561. “Insofar as the staff

has been delegated authority to make policy recommendations for approval by the President, his [National Security Advisor], or the statutory Council, the staff's functions are, of course, quintessentially advisory." *Id.* The court further observed that "[l]ikewise, to the extent that the NSC assists the President in coordinating the activities of the various agencies with national security responsibilities, it exercises no authority of its own." *Id.*³

C. Plaintiff Offers No Basis on Which To Conclude That the NSC is an Agency Within the Meaning of FOIA.

Plaintiff offers several arguments in support of its suggestion that this Court go into conflict with the D.C. Circuit. Plaintiff misapprehends the relevant principles of law and the nature and function of the NSC.

1. Plaintiff first urges that the Court should interpret the FOIA definition to encompass all parts of the Executive Office of the President on the ground that the statutory definition does not specifically exempt units

³ For similar reasons, the NSC is not a FOIA agency under *Meyer's* elaboration of the *Soucie* standard. *Meyer*, 981 F.2d at 1293; *see also Tighe v. U.S. Dep't. of Justice*, 312 F.3d 70, 77 (2d Cir. 2002) (citing *Meyer* standard). While the NSC has a self-contained structure, it operates in close proximity to the President and has been delegated no significant authority. *See Armstrong*, 90 F.3d at 558-60 (finding that NSC is not an agency under the *Meyer* factors).

within the EOP. *See* Br. 38. This argument asks the Court to disregard the statute's legislative history, relied on by the Supreme Court when it explicitly held that "'units in the [Executive Office of the President] whose sole function is to advise and assist the President'" are not FOIA agencies. *Kissinger*, 445 U.S. at 156 (quoting H.R. Rep. 93-1380, at 15). As the D.C. Circuit observed in *Rushforth*, the legislative history demonstrates that Congress adopted the *Soucie* test rather than attempt to identify units of the EOP outside the scope of the definition. *See Rushforth*, 762 F.2d at 1040-41.

Plaintiff similarly errs in urging that *Kissinger* held that the NSC is a FOIA agency. *See* Br. 14. The status of the NSC as an agency was not at issue in *Kissinger*. Applying the *Soucie* inquiry, the Supreme Court explained that the plaintiff had requested notes of telephone calls for a period "in which Kissinger was serving as Assistant to the President," and that "these telephone notes were not 'agency records' when they were made." *Kissinger*, 445 U.S. at 156. The Court referred to the NSC as an "agency" when describing the court of appeals' holding and the language of the House Report but had no need to opine on the issue. *See* 445 U.S. at 156; *see also id.* at 146. As the district court in this case observed, "*Kissinger* was not out of harmony with, nor certainly did it bar, the D.C. Circuit's

holding in *Armstrong*. Seventeen years after *Armstrong* and 33 years after *Kissinger*, the same is true today.” JA 20.

Plaintiff seeks to revive the argument, rejected in *Armstrong*, that the NSC should be deemed a FOIA agency because of its prior compliance with FOIA and promulgation of FOIA and Privacy Act regulations, *see* Br. 14-15, 37, or alternatively because the Office of Legal Counsel once concluded that the NSC was a FOIA agency although it subsequently repudiated that conclusion, *see* Br. 37. The D. C. Circuit in *Armstrong* explained that the NSC’s “prior references to itself as an agency are not probative on the question . . . whether [it] is indeed an agency within the meaning of the FOIA.” 90 F.3d at 566. The court recognized that, “quite simply, the Government’s position on that question has changed over the years,” and an entity’s earlier stance that it was covered by FOIA “should not be taken to establish as a matter of law that [it] is subject to those statutes.” *Id.* *See also* *CREW*, 566 F.3d at 225 (A government unit’s “past views have no bearing on the legal issue whether [the] unit is, in fact, an agency subject to FOIA.”).

2. Plaintiff unsuccessfully attempts to show that the NSC wields substantial independent authority and that the D.C. Circuit erred in

concluding otherwise. As the D.C. Circuit explained, the National Security Act of 1947 does not vest independent authority in the NSC. *Armstrong*, 90 F.3d at 567. The President presides over the NSC, and all of the actions of the NSC are taken under his direction. Given this close relationship, plaintiff faces a heavy burden to show that that the President or Congress has delegated significant independent authority to the NSC. *Id.*

None of the legislative delegations plaintiff identifies, Br. 19-23, many of which were considered and rejected in *Armstrong*, suggest otherwise. NSC's functions, including assessment and appraisal of military power and consideration of national security policy, 50 U.S.C. § 3021(b), are quintessential advice and assistance functions. Unlike the evaluation of federal scientific programs at the OST, any assessment is provided to the President and is, therefore, not a delegation of legislative power that would give the NSC authority independent of the President. *Cf. Soucie*, 448 F.2d at 1075 (Delegation of the duty to evaluate federal programs to the OST "delegate[ed] some of [Congress's] own broad power of inquiry").⁴

⁴ Plaintiff points to, Br. 20-23, statutory delegations to the Committee on Foreign Intelligence and the Committee on Transnational Threats. See 50 U.S.C. § 3021(i) (Committee on Transnational Threats will "coordinate

Continued on next page.

The NSC's Committee structure, on which plaintiff places considerable reliance, Br. 20-22, provide a means of gathering information and advising the President, but these Committees do not have the power to take action. No President has delegated significant independent authority to the NSC, and Presidential Policy Directive-1 makes clear that the Committee structure is designed to coordinate an interagency process that assists the President in carrying out his national security responsibilities. The Committees exist to facilitate a process of developing options for the President and to implement decisions, *see* PPD-1 at 2, 5 (describing "Presidential decisions" made with NSC input and implemented by committee-member agencies) as well as to coordinate and monitor policy issues affecting national security. *See* PPD-1 at 3 (NSC Deputies Committee

and direct the activities" relating to transnational threats); 50 U.S.C. § 3021(h)(4) (Committee on Foreign Intelligence will develop strategies, guidelines, policies and procedures relating to interagency information sharing and conduct annual reviews of national security and intelligence-gathering activities). The NSC Committees function like the Task Force on Regulatory Relief, which the D.C. Circuit in *Meyer* held was not a FOIA agency: "The Task Force seems to have been merely a committee which convened periodically to bring together the views of various cabinet department heads concerning significant proposed regulations, and to shape for the President's decision intra-agency disputes which, in truth, only he can resolve." *Meyer*, 981 F.2d at 1298.

shall “review and monitor” the interagency process); *id.* at 2-3 (Principals Committee is an “interagency forum” for consideration of national security policy). They do not exercise any substantial independent authority. *Cf. Meyer*, 981 F.2d at 1294 (finding “no indication that the Task Force, *qua* Task Force, directed anyone . . . to do anything”). To suggest otherwise would effectively “empt[y] the word ‘assist’ in the *Soucie* test of all meaning.” *Meyer*, 981 F.2d at 1297. Nor does the fact that the Committees perform their coordinating functions on important matters of national security change the analysis. Br. 26-27. The relevant consideration is the independence of the authority, and it is clear that the Committees exercise none.

The Executive Orders providing for an NSC and NSC Staff role in safeguarding certain classified information cited by plaintiff underscore that the NSC exercises no significant authority independent of presidential control. *See* Exec. Order No. 13,587, 76 Fed. Reg. 63,681 (Oct. 7, 2011) (NSC Staff sit on Senior Steering Committee responsible for developing policy and standards for safeguarding classified information); Exec. Order No. 12,829, 58 Fed. Reg. 3749 (Jan. 6, 1993) (NSC provides “overall policy direction” for the information security program). *See also Armstrong*, 90

F.3d at 562 (rejecting contention that an executive order giving the NSC a role in administering information security protections vested the NSC with independent authority). Because responsibility and power over classified information flow directly from the President's role as Commander-in-Chief, *see Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988), it is appropriate that the President, through the NSC, provides overall policy direction and monitors other agencies to ensure that the President's objectives are achieved.

Plaintiff briefly mentions two additional Executive Orders, Nos. 13,603 and 13,618, concerning emergency preparedness. Br. 31 n.20. The first provides that that NSC "and Homeland Security Council, in conjunction with the National Economic Council, shall serve as the integrated policymaking forum for consideration and formulation of national defense resource preparedness policy and shall make recommendations to the President on the use of" statutory authorities. *See* Exec. Order No. 13,603, § 104(a), 77 Fed. Reg. 16,651 (Mar. 16, 2012). This order again highlights the NSC's advisory role. The second order provides that "[p]olicy coordination, guidance, dispute resolution, and periodic in-progress reviews for the functions described and assigned herein shall be

provided through the interagency process established in” PPD-1. Exec. Order No. 13,618, § 2.1, 77 Fed. Reg. 40,779 (July 6, 2012). This order likewise recognizes NSC’s function as a forum for discussion and negotiation rather than an entity with its own authorities.

Finally, plaintiff points to decades-old NSC regulations to suggest that the NSC exercises significant independent authority. *See* Br. 31-33 (citing regulations promulgated under the Privacy Act of 1974 and a 1978 executive order, 32 C.F.R. pt. 2102, 40 Fed. Reg. 47,746 (Oct. 9, 1975); 32 C.F.R. pt. 2103, 44 Fed. Reg. 2384 (Jan. 11, 1979), and joint regulations promulgated by the NSC and the Office of Science and Technology Policy, 47 C.F.R. pt. 201-216, 55 Fed. Reg. 51,056 (Dec. 11, 1990)). The Privacy Act regulations⁵ lay out procedures for requesting NSC records; the executive order regulations lay out procedures concerning declassification decisions

⁵ The NSC’s Privacy Act regulations – which were promulgated in 1975 when the NSC was complying with FOIA and have not been amended or cited in a single judicial opinion since that time – expressly provide that the Privacy Act may not apply to the NSC, *see* 32 C.F.R. § 2102.1(a) (“Insofar as the Privacy Act . . . applies to the [NSC]”), and explain that the NSC Staff acts as an extension of the White House Office when assisting the President in his conduct of foreign affairs, such that its records in that capacity were not subject to the Privacy Act, *see id.* § 2102.1(b).

for NSC documents. These do nothing more than notify the public of the NSC's internal procedures for releasing information. They do not impose restrictions or duties on any private parties or other government entities.

The joint regulations with the Office of Science and Technology Policy, published in 1990, pertain to telecommunications policy during emergencies. They contain general statements of policy, *e.g.*, 47 C.F.R. § 201.3, assign emergency duties to different agencies, *e.g.*, *id.* § 202.1, and spell out procedures for private parties to apply to use radio frequency during emergencies, *id.* § 214.2. They assign several functions to the National Security Advisor, including to “[a]dvice and assist” the President, *id.* § 202.3(b)(1)(i),(c)(1), and to “[p]rovide policy oversight and direction of the activities of the [National Communications System].” *Id.* § 202.3(b)(1)(ii). None of these regulations give the NSC authority independent of the President.

D. Application of FOIA to the NSC Would Raise Significant Separation of Powers Concerns.

Significant constitutional concerns counsel against a ruling that the NSC is a FOIA agency. It should not lightly be presumed that Congress intended to alter “the relative powers of coordinate branches of

government,” *Public Citizen v. Dep’t of Justice*, 491 U.S. 440, 466 (1989) (The Court is “loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.”). In view of the NSC’s close proximity to the President and the daily interaction of the Council and the NSC Staff with the President and the National Security Advisor, application of FOIA to the NSC poses the potential for unwarranted interference with the President’s core constitutional functions.

The constitutional basis of the President’s right to confidential communications is well-established. See *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 381-82 (2004); *United States v. Nixon*, 418 U.S. 683, 705-06 (1974). The potential for interference with the President’s core constitutional functions by subjecting the NSC to FOIA is evident. The NSC is a cabinet-level advisory group that aids the President in carrying out his constitutional responsibilities in conducting foreign affairs and protecting national security. The knowledge that any communications could be disclosed under FOIA could cause the President’s advisors at the NSC to “temper candor . . . to the detriment of the decisionmaking process.” *Id.* at 705. Congress likely had these constitutional

considerations in mind when exempting from FOIA entities, like the NSC, that have the sole function of advising and assisting the President. *See Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909-10 (D.C. Cir. 1993); *see also United States v. Espy*, 145 F.3d 1369, 1373 (D.C. Cir. 1998) (“The Supreme Court defined ‘agency’ narrowly under FOIA on the assumption that Congress would not have wished to chill discussion between close presidential advisors.”). In excluding the President from FOIA’s definition of “agency,” Congress was “‘keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President’s daily operations,’ and thus sought ‘to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President’s term of office.’” *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1292 (D.C. Cir. 1993) (citation omitted); *see also Ryan v. Dep’t of Justice*, 617 F.2d 781, 788 n.19 (D.C. Cir. 1980). Moreover, these concerns are heightened when the intrusion would chill the exercise of the President’s core constitutional functions in the area of foreign affairs and national security. For these reasons, if any doubt existed as to the NSC’s status,

the Court would properly interpret the statute to avoid raising unnecessary constitutional concerns.

II. The District Court Correctly Denied Plaintiff's Request for Discovery.

The district court correctly concluded that no discovery of any kind was needed in order to resolve whether the NSC is an “agency” within the meaning of FOIA. JA 13; *see also Sweetland*, 60 F.3d at 853 (affirming district court judgment, at motion to dismiss stage, that Executive Residence is not a FOIA “agency”).

The district court properly determined that “the available public records describing the NSC’s structure, purpose and functions are wholly sufficient for a proper adjudication” of whether the NSC is subject to FOIA. JA 21 n.4. The district court did not “erroneously rel[y] on *Armstrong’s* outdated description of” the NSC, as plaintiff contends, Br. 55. Instead, the district court thoroughly examined the current structure and functions of the NSC. *See* JA 16 (discussing operational proximity of the NSC “under the current administration”); JA 18-19 (considering the changes since 1996 in NSC structure, including those implemented by PPD-1 and Exec. Order No. 13,618); JA 18 (rejecting plaintiff’s contention that *Armstrong* is

“outdated” and that “the NSC’s role has changed significantly” since *Armstrong* was decided).

Other than vague assertions, plaintiff has not identified what sorts of discovery it seeks or how it would aid the court’s inquiry. Br. 33-35, 54-56.⁶ Plaintiff correctly concedes that the question whether NSC is covered by FOIA is “fundamental[ly]” a “legal” one, Br. 56 (emphasis in original), and therefore discovery is unnecessary. The two district court cases cited in plaintiff’s brief, Br. 56, do not suggest otherwise. *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), concerned multiple significant questions outside of FOIA about NSC’s recordkeeping practices, none of which are at issue here. The opinions in *Armstrong* made virtually no reference to discovery when discussing the question of NSC’s agency status, and those references were not significant. *See e.g., Armstrong*, 877 F. Supp. at 702 (citing deposition for

⁶ None of the authorities described in plaintiff’s brief as contained in two non-public documents, *see* Br. 33-35, would establish that the NSC exercises significant independent authority, even if the documents’ authenticity could be established. Plaintiff merely notes that one document may be described as serving as guidance for the NSC staff and the NSC Deputies and Principals, *id.* at 34, and that the other describes a role for the NSC that is consistent with that set forth in Part I of this brief, *id.* at 34-35.

yearly number of FOIA adjudications by NSC staff); *id.* at 700-01 (citing interrogatory answers about the size of NSC's staff); *Armstrong*, 90 F.3d at 559-60 (citing declaration noting that some NSC staff members occupy positions in both the NSC and the White House). Similarly, in *CREW v. Office of Admin.*, the district court permitted "*very limited* discovery . . . subject to . . . strict parameters," but only out of an "abundance of caution." 2008 WL 7077787, *1-*2 (D.D.C. Feb. 11, 2008) (emphasis in original). The district court in *CREW* also concluded that the discovery was not required because the available public documents were "specific" and "lack[ed] . . . ambiguity" in "establishing and delineating" the entity's authorities. *Id.* None of the discovery permitted by the district court was cited by the court of appeals. *See CREW*, 566 F.3d at 219. Here, the district court did not abuse its discretion by deciding not to order discovery, having appropriately determined that the publicly available materials clearly and sufficiently set forth the NSC's "structure, purpose and functions." JA 21.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Book Antigua, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,055 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Jaynie Lilley

Jaynie Lilley

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2014, I filed with the Court in hard copy (6 copies) and through the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Jaynie Lilley

Jaynie Lilley

STATUTORY ADDENDUM

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5 U.S.C. § 552

§ 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))) 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).

* * * *

(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

§ 3021 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.

* * * *

(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.