

NLWJC - Kagan

Counsel - Box 033 - Folder 002

OSTP/NASA Dispute [1]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20500

December 7, 1995

*Elena -
Full. We're getting
pressure from DOE +
NASA to adjust this.*

MEMORANDUM FOR DISTRIBUTION

FROM: JEFF HOFGARD 

SUBJECT: Meeting Notice on NSC/PD-25

There will be a meeting on Wednesday, December 13 at 2:00p.m. in room 422 (OEOP) to discuss agency views on the enclosed draft amendment to paragraph 9 of NSC/PD-25. Please telephone your name and date of birth to Ms. Cynthia Chase at 456-6031 for access to the building.

Enclosure: (as stated)

Distribution:

NSC/Seaton
OMB/Horrigan
EPA/Preuss
DOT/Rappaport
State/Hodgkins
DOD/Johansen
ACDA/Sweeney
USNRC/Federline
NASA/Reese
DOE/Cook
WHCounsel/Kagan

3 2
DRAFT

Paragraph 9 of NSC/PD is replaced by the following paragraph:

9. A separate procedure will be followed for launching nuclear systems. As environmental impact analysis or nuclear safety evaluation report, as appropriate, will be prepared. The President's approval is required for launches of spacecraft utilizing reactors and other devices with a potential for criticality and radioactive sources containing total quantities greater than 1,000 times the A₂ value listed in Table I of the International Atomic Energy Agency's Safety Series No.6, Regulations for the Safe Transport of Radioactive Materials, 1985 Edition (as amended 1990). Launch of sources containing quantities greater than 0.1 percent of the A₂ value from this table will be forecasted quarterly to the Office of Science and Technology Policy (OSTP). This report is for information, and is not intended to introduce a new approval procedure. An ad hoc Interagency Nuclear Safety Review Panel consisting of members from the Department of Defense, Department of Energy, the National Aeronautics and Space Agency and the Environment Protection Agency will evaluate the risks associated with missions requiring the President's approval and prepare a Nuclear Safety Evaluation Report. The Nuclear Regulatory Commission will participate as a technical advisor to the panel as appropriate. The head of the sponsoring agency will request the President's approval for the flight through the Office of Science and Technology Policy. The Director is authorized to render approval for such launchings, unless he considers it advisable to forward the matter to the President for a decision.

Elena - 10/17
as discussed. Let
me know your
thoughts on date
of this memo.

Thanks.

Jeff (66043)

THE WHITE HOUSE

WASHINGTON
October 12, 1995

MEMORANDUM FOR JEFF HOFGARD

FROM: ELENA KAGAN *EK*
Associate Counsel to the President

SUBJECT: MODIFICATIONS TO NSC/PD-25

This memorandum briefly summarizes conversations we have had respecting recent modifications to NSC/PD-25. You asked me to review those modifications in light of objections raised by NASA and the Department of Energy. In accord with this request, I spoke with persons from these agencies, as well as with Paul Colburn, Special Counsel in the Office of Legal Counsel of the Department of Justice. Colburn and I concur in the view that there is no need to rescind or otherwise amend the modifications to NSC/PD-25, though an interpretive memo from the Office of Science and Technology (OSTP) to affected agencies may be in order.

Colburn and I agree that the modifications to NSC/PD-25 will not significantly alter the party structure or probability of success of litigation brought to challenge a decision to launch space nuclear systems. We also agree that the modification will not significantly alter the government's ability to withhold critical documents, including the nuclear safety evaluation report, from disclosure under FOIA; at the very most, it will change the identity of the agency responsible for the decision to disclose or withhold. In short, objections based on the legal consequences of the modifications to NSC/PD-25 are not sufficiently strong to support rescission of those modifications.

Other objections that NASA and the Department of Energy have raised are operational in nature: they relate to the role OSTP will play under the modified NSC/PD-25 in the process leading up to a launch of space nuclear systems. Colburn and I believe that these objections overstate the operational changes resulting from the modification of NSC/PD-25; we understand the directive primarily to formalize existing practice. An interpretive memo from OSTP to the affected agencies, stating OSTP's understanding of the operational effects of the modification, may be warranted in these circumstances.

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THE WHITE HOUSE
WASHINGTON

Memo to Hbgard

- Memorializing what
I've advised / said.
re: subversive memo.

~~Ed Frankel~~

George Reese

Paul album

OSTP doesn't envision true change - agreed.

Potential real issue -

possible FOIA litigation

OSTP in middle

now - ^{OSTP} take back suit

before
now - predecisional

now - final ag. decision.

govt's position more vulnerable than before.

1. Lawsuit - Δ (basic ops doesn't change, true)

2. FOIA

Hea -
Before PD -

OSTP would say - talk to NASA

NASA " " predecisional

Now it's OSTP's report -

Can't just refer request

to other agency. And

because it's not quite

A NASA head's decision (?)

it's not predecisional.

ME
lawsuit brought after launch
decision will look the same -
OSTP will be involved
either way

And I can't see how a law-
suit on the basis of the report
itself ever would arise.

Who comes up with? POS still
defends. This is just a formality -
whose name is in the caption

What is their 3rd agency practice?

Does it refer a request?
Wt generally - does originating in ag-
part of ref + approval practice.

Exemp 3 - factual questions
to be released anyway.

Less delib. when assessment is for
OSTP (Pres issue than when for NASA? No.

Not signif. enough to really ^{req. a.} change

Deliberative or non-deliberative - That doesn't
change

only thing that might - and it might not - is
rehearsal s. Big shit.

- shouldn't change even rehearsal s.

} Who can see the argument the other way.
should still refer to originating ag -
ag that creates the doc is the one that processes
it under FOIA.

But this isn't crystal clear.

Might subject EOP to discovery / suit?

Defendant is US-

Justice handler debar.

Doesn't ask as to production of docs whether
partic entities mentioned in captions

Any greater involvement or
OSTP's understanding?

↓
Maybe in some way,
docs can be reassessed
short of another memo
to law lake.

Sued over Galileo / Ulysses launches

EIS - NEPA

Then - INSERP -

Sci Advisor - band on rec., + our anal of INSERP
report, says Y or N.

We think - has to be kept as internal process.
Internal to fed govt.

Risk - establish OSTP as an agency.

Dan Metcalf
FOIA.

Then - does disclosure under FOIA (unless exemption
applies)

Sarah Nazare

NASA.

→ will call Monday
w/ plan of action

→ SAR - Risk is this -

Safety anal by Ken 5
Safety eval report → why accept

INSERP does the report - replaces 3 sep.

- Ad hoc - reqs. accepted mission by mission
Job is to write SER, which all ags
can accept.

SER - also no conclu.

just says - accurate stmt of risks

POE/POD write NAST

NAST Admin decides whether to launch.

Applicants process - who pay, are / how they get the report
Reporting responsibilities -

reqs - here's what it has to look like - now can be
ignored.

Funding

↳ NASA has bulk of cost -

agencies pay for something

Does NASA have auth to fund it or ag

like this?

Q - can ags hire consultants?

MAN NOT
SATISFY DOE
REGS
DOE NOT
EVAL ANY
MORE

wof make

make

- Advion / Indep operation
Arushonj

NSC PD 25
1977

9. A separate procedure will be followed for launching space nuclear systems. An environmental impact statement or a nuclear safety evaluation report, as appropriate, will be prepared. In addition, the President's approval is required for launches of spacecraft utilizing radioactive sources containing more than 20 curies of material in Radiotoxicity Groups I and II and for more than 200 curies of material in Radiotoxicity Groups III and IV (as given in Table I of the NASC report of June 16, 1970 on "Nuclear Safety Review and Approval Procedures." An ad hoc Interagency Nuclear Safety Review Panel consisting of members from the Department of Defense, Department of Energy, and National Aeronautics and Space Administration will evaluate the risks associated with the mission and prepare a Nuclear Safety Evaluation Report. The Nuclear Regulatory Commission should be requested to participate as an observer when appropriate. The head of the sponsoring agency will request the President's approval for the flight through the Office of Science and

*with
sponsoring
agency?*

Technology Policy. The Director is authorized to render approval for such launchings, unless he considers it advisable to forward the matter to the President for decision.

Zbigniew Brzezinski

Zbigniew Brzezinski

1. level of material needed for Pres approval

2. Ad hoc panel - SER

INSERP

head of NASA, DOE, DOD -

adpt mems

eval of subty anal of ags.

where does it go? silent on where report.

practice - ^{to} sponsoring ag (DOD or NASA)

Also - OSTP

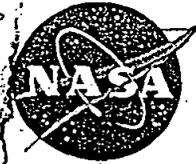
*on 6/11/77
8/1/77
1977*

Jeff Hotzard

6-6043

National Aeronautics and
Space Administration
Office of the Administrator
Washington, DC 20546-0001

RECEIVED
ACTION to JASANTINO
INFO to JHG-WAPES
Huhmann
Johns
Carbell
NOFGARD



EC 14 1994

The Honorable John H. Gibbons
Assistant to the President
for Science and Technology
Executive Office of the President
Washington, DC 20500

SIG of JHG
Stationery WJH
DATE DUE 1-5-94

Dear Dr. Gibbons:

NASA currently uses the National Aeronautics and Space Council (NASC) document, "Nuclear Safety Review and Approval Procedures for Minor Radioactive Sources in Space Operations," dated June 16, 1970. In an effort to consolidate reporting requirements with other U.S. Government agencies, NASA has worked closely with the U.S. Air Force (USAF) Safety Agency to consolidate NASA and USAF reporting requirements for planned launches of radioisotopes into space.

NASA respectfully requests your concurrence to use the radioisotope quantity limits specified in Appendix A of the Air Force Instruction 91-110, dated March 1994, in lieu of those specified in Appendices A, B, and C of the referenced NASC document. NASA believes that these limits are more representative of the potential hazard of using radioisotopes in space. In addition, this will allow a common set of reporting limits within NASA and the Department of Defense, as well as those currently used by the Department of Transportation for ground and air transport of radioisotopes.

If you have any questions regarding this change, please do not hesitate to contact John Lyver of the Safety and Mission Assurance Office at 358-1155.

Sincerely,

Daniel S. Goldin
Administrator

*Need new levels -
This - need to modify directive*



ATOMIC ENERGY

ASSISTANT TO THE SECRETARY OF DEFENSE
3050 DEFENSE PENTAGON
WASHINGTON, DC 20301-3050

DEC 14 1994



Dr. Frank von Hippel
Office of Science and Technology Policy
Executive Office of the President
Old Executive Office Building
Washington, DC 20506

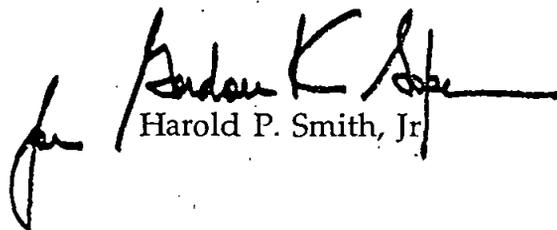
Dear Dr. von Hippel:

The current requirements for reviewing, processing, reporting, and authorizing the use of minor radioactive sources in space operations are specified in Department of Defense Directive (DoDD) 3200.11, "Major Range and Test Facility Base," September 29, 1980. This directive incorporates the categorization of radioisotopes and space launch approval procedures outlined in the 1970 National Aeronautics and Space Council (NAS) document "Nuclear Safety Review and Approval Procedures for Minor Radioactive Sources in Space Operations." The 1970 NAS guidance is outdated and inconsistent with current national and international radiation protection policies.

The Air Force has submitted a proposal to change the NAS guidance (enclosed). I concur with this proposal. In contrast to the 1970 guidance, the proposed nuclear safety review and approval procedures equate the space use of minor radioactive sources to specific radiation doses and to quantities of radioactive materials recognized by national and international communities. Through this improved categorization of the associated radiological risks, the proposed replacement guidance enhances overall safety in the use of radioisotopes in space operations.

Thank you for your assistance in updating the 1970 NAS guidance. My action officer is Major Rex R. Kiziah, (703) 697-3575.

Sincerely,


Harold P. Smith, Jr.

Enclosure

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20500

March 22, 1995

*interagency mfg.
DOE, NASA, DOD
0517
re levels approval for Pres approval.
Also an op to clear up INSRP regarding*

MEMORANDUM FOR: JOHN GIBBONS
FROM: JANE WALES
SUBJECT: CONFORMING REQUIREMENTS FOR THE LAUNCH OF RADIOACTIVE SOURCES INTO SPACE

The NASA Administrator and Assistant to the Secretary of Defense for Atomic Energy have both separately requested your assistance in updating the technical criteria for the launch of radioactive sources into space contained in NSC/PD-25. This 1977 Directive requires the President's approval for launches containing radioactive materials in excess of quantities specified in a 1970 NASC (National Aeronautics and Space Council) document. It is the 1970 NASC radioisotope list that is specifically outdated, and does not reflect current national and international radiation protection guidelines.

We have reviewed this list with an interagency group consisting of members of the Departments of Defense, Energy and NASA. The 1970 NASC list was derived from 1967 IAEA regulations -- then the most current international guidance. Since that time, improved categorizations of radiological risk have resulted in several updates to the IAEA lists. As an example of why an update is necessary, NASA recently used a small Ca^{41} calibration source on a sounding rocket experiment. Ca^{41} is not mentioned in the 1970 NASC document, but is in the more complete 1985 IAEA regulations.

This is also an opportunity to make clear INSRP (Interagency Nuclear Safety Review Panel) reporting arrangements that were a past source of confusion, and to reflect the recent strengthening of the independent safety review function. None of the proposed changes will affect the Cassini mission in anyway.

Recommendation: Sign the attached letter to the National Security Advisor proposing changes to NSC/PD-25.

Attachments:

- Proposed Letter to Tony Lake
- Explanation of Proposed Changes to NSC/PD-25
- Paragraph 9, NSC/PD-25
- NASA Administrator Letter Dec. 14, 1994
- ASD (AE) Letter Dec. 14, 1994

Explanation of Proposed Changes to Paragraph 9, of NSC/PD-25 (proposed deletions to current text are struck through, proposed additions are in italics)

1. Proposed modification to radioisotope limits:

A separate procedure will be followed for launching space nuclear systems. An environmental impact statement or nuclear safety evaluation report, as appropriate, will be prepared. ~~In addition, The President's approval is required for launches of spacecraft utilizing reactors and other devices with a potential for criticality and radioactive sources containing more than 20 curies of material in Radiotoxicity Groups I and II and for more than 200 curies of material in Radiotoxicity Groups III and IV (as given in table I of the NASC report of June 16, 1970 on "Nuclear Safety Review and Approval Procedures."~~ *total quantities greater than 1,000 times the A_2 value listed in Table I of the International Atomic Energy Agency's Safety Series No. 6, Regulations for the Safe Transport of Radioactive Materials, 1985 Edition (as amended 1990). For radioisotopes whose A_2 value is unlimited, a value of 4×10^2 TeraBecquerels (Tbq) (1.0 Curie) shall be used as the A_2 value.*

Rationale: Ensure any device with the potential for achieving criticality is included. The A_2 value is the quantity of isotope that the IAEA considers may undergo ground, sea or air shipment without special packaging. There are no specific IAEA standards for space launch. This replaces the U.S. space launch standard based on a 1970 NASC list (which also used 1,000 times the then comparable A_2 equivalent) with a comparable 1990 IAEA standard. For Pu^{238} , the most important isotope, the 1970 NASC document required the President's approval for more than 20 curies of Pu^{238} . With the proposed change, the President's approval is required for more than 5.4 curies. The smallest quantity of Pu^{238} used in space is 35 curies in a single Radioisotope Heat Unit -- used for thermal spacecraft control. A few isotopes have undesignated A_2 values. Most notable of these is depleted uranium, which is used in mock warhead testing. For these cases the interagency group recommended assigning a limit of 1.0 Curies.

2. Proposed Modification

Launch of sources containing quantities greater than 0.1 percent of the A_2 value from this table will be forecasted quarterly to the Office of Science and Technology Policy (OSTP). This report is for information, and is not intended to introduce a new approval procedure.

Rationale: The 1970 NASC document required that launches containing these amounts of material be forecasted quarterly to the OSTP. NASA, DoC and DoD provide these forecasts regularly, citing the 1970 NASC guidance. This language is copied from the NASC document and is intended to ensure that the EOP is notified as a matter of courtesy on launches containing more than 1/1000 the amount of material that the IAEA considers to not require special packaging before it is launched into space, since it has the potential of reentering on another nation's territory.

3. Proposed Modification

An ad-hoc Interagency Nuclear Safety Review Panel, which will report to the OSTP and consisting of members from the Department of Defense, Department of Energy, and National Aeronautics and Space Administration and the Environmental Protection Agency will evaluate the risks associated with the missions requiring the President's approval and prepare a Nuclear Safety Evaluation Report. The Nuclear Regulatory Commission should be requested to will participate as an observer a technical advisor to the panel as when appropriate. The head of the sponsoring agency will request the President's approval for the flight through the Office of Science and Technology Policy. The Director is authorized to render approval for such launchings, unless he considers it advisable to forward the matter to the President for a decision.

? how? because no
- larger ad hoc?

Rationale: Reflects recent strengthening of the independent safety review process, and clarifies the panels reporting task to prepare a safety evaluation report for the OSTP Director.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20500

Jeff - FYI
I punch out
on Apr 17 -
Jef

March 22, 1995

Need new levels.
Also - clarify report by
management TS.

MEMORANDUM FOR: ANTHONY LAKE
FROM: JOHN H. GIBBONS 
SUBJECT: PROPOSED UPDATE TO NATIONAL SECURITY COUNCIL
PRESIDENTIAL DIRECTIVE 25 (1977)

National Security Council Presidential Directive 25 (NSC/PD-25), signed December 14, 1977 by President Carter's National Security Advisor, Zbigniew Brzezinski, provides direction to agencies governing the launch of space systems involving nuclear material. The directive states that the head of the sponsoring agency will request the President's approval through the Office of Science and Technology Policy. Two NASA missions, Cassini and Mars Pathfinder, currently require this approval.

Both NASA and the Department of Defense have requested my assistance in modifying the directive as it relates to the methods of determining when Presidential approval is required. Specifically, the directive currently states that;

..the President's approval is required for launches of spacecraft utilizing radioactive sources containing more than 200 curies of material in Radiotoxicity Groups III and IV (as given in Table I of the NASC report of June 16, 1970)

We have convened a technical agency group that concurs with the NASA and DoD advice that the NASC guidance is inconsistent with current national and international radiation protection measures. Consequently, I recommend that this isotope list be replaced with reference to a current International Atomic Energy Agency list. I also recommend updating the PD to clarify reporting arrangements and to reflect strengthening of the independent safety process that we have begun for Cassini. A proposed modification to paragraph 9 of the PD that will technically update the approval procedure and conform it to current practices is attached (TAB A).

I appreciate your assistance in modifying the directive to reflect current practice. I have asked Jane Wales to facilitate this proposed update with NSC staff.

Attachment:
Proposed Modification to PD/NSC-25

Proposed Modifications to Paragraph 9 of PD/NSC-25 (1977)

9. A separate procedure will be followed for launching space nuclear systems. An environmental impact statement or nuclear safety evaluation report, as appropriate, will be prepared.—~~In addition, The President's approval is required for launches of spacecraft utilizing reactors and other devices with a potential for criticality and~~ radioactive sources containing ~~more than 20 curies of material in Radiotoxicity Groups I and II and for more than 200 curies of material in Radiotoxicity Groups III and IV (as given in table I of the NASC report of June 16, 1970 on "Nuclear Safety Review and Approval Procedures."~~ *total quantities greater than 1,000 times the A_2 value listed in Table I of the International Atomic Energy Agency's Safety Series No. 6, Regulations for the Safe Transport of Radioactive Materials, 1985 Edition (as amended 1990). Launch of sources containing quantities greater than 0.1 percent of the A_2 value from this table will be forecasted quarterly to the Office of Science and Technology Policy (OSTP). This report is for information, and is not intended to introduce a new approval procedure.* An ~~ad-hoc~~ Interagency Nuclear Safety Review Panel, *which will report to the OSTP* and consisting of members from the Department of Defense, Department of Energy, and National Aeronautics and Space Administration *and the Environmental Protection Agency* will evaluate the risks associated with the missions *requiring the President's approval* and prepare a Nuclear Safety Evaluation Report. The Nuclear Regulatory Commission ~~should be requested to~~ *will* participate as ~~an observer~~ *a technical advisor to the panel as* when appropriate. The head of the sponsoring agency will request the President's approval for the flight through the Office of Science and Technology Policy. The Director is authorized to render approval for such launchings, unless he considers it advisable to forward the matter to the President for a decision.

FOR OFFICIAL USE ONLY

20395

THE WHITE HOUSE
WASHINGTON
MAY 17, 1995

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF THE TREASURY
THE SECRETARY OF DEFENSE
THE SECRETARY OF THE INTERIOR
THE SECRETARY OF AGRICULTURE
THE SECRETARY OF COMMERCE
THE SECRETARY OF HEALTH AND HUMAN SERVICES
THE SECRETARY OF TRANSPORTATION
THE SECRETARY OF ENERGY
DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET
ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY
UNITED STATES TRADE REPRESENTATIVE
CHIEF OF STAFF TO THE PRESIDENT
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
DIRECTOR OF CENTRAL INTELLIGENCE
DIRECTOR OF THE OFFICE OF SCIENCE AND TECHNOLOGY POLICY
CHAIRMAN OF THE COUNCIL ON ENVIRONMENTAL QUALITY
DIRECTOR OF THE ARMS CONTROL AND DISARMAMENT AGENCY
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
ADMINISTRATOR OF THE NATIONAL AND AERONAUTICS AND SPACE ADMINISTRATION
CHAIRMAN OF THE NUCLEAR REGULATORY COMMISSION
DIRECTOR OF THE NATIONAL SCIENCE FOUNDATION

*modifications -
1. New Goals - ask
2. INSEP - ad hoc struck.
3. - agency dispute -
did not know -
never discussed.
Mast Gen/Comm -
Gene Repp
DOE
Beverly Cole*

SUBJECT: Revision to NSC/PD-25, dated December 14, 1977, entitled Scientific or Technological Experiments with Possible Large-Scale Adverse Environmental Effects and Launch of Nuclear Systems into Space

As a result of an OSTP-led interagency review updating the technical criteria for the launch of radioactive sources into space, the following changes are directed to NSC/PD-25, dated December 14, 1977, which is now unclassified. These changes, based upon the unanimous consent of the interagency review, modify the directive to reflect current international practice and standards.

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A95-01117

FOR OFFICIAL USE ONLY

Paragraph 9 of NSC/PD-5 is replaced by the paragraph below:

9. A separate procedure will be followed for launching nuclear systems. An environmental impact analysis or nuclear safety evaluation report, as appropriate, will be prepared. The President's approval is required for launches of spacecraft utilizing reactors and other devices with a potential for criticality and radioactive sources containing total quantities greater than 1,000 times the A₂ value listed in Table I of the International Atomic Energy Agency's Regulations for the Safe Transport of Radioactive Materials, 1985 Edition (as amended 1990). Launch of sources containing quantities greater than 0.1 percent of the A₂ value from this table will be forecasted quarterly to the Office of Science and Technology Policy (OSTP). This report is for information, and is not intended to introduce a new approval procedure. An Interagency Nuclear Safety Review Panel, which will report to the OSTP and consisting of members from the Department of Defense, Department of Energy, National Aeronautics and Space Administration and the Environmental Protection Agency, will evaluate the risks associated with missions requiring the President's approval and prepare a Nuclear Safety Evaluation Report. The Nuclear Regulatory Commission will participate as a technical advisor to the panel as appropriate. The head of the sponsoring agency will request the President's approval for the flight through the Office of Science and Technology Policy. The Director is authorized to render approval for such launchings, unless he considers it advisable to forward the matter to the President for a decision.

All other paragraphs of NSC/PD-25 (1977) remain unchanged and in force.

Anthony Lake

Anthony Lake
Assistant to the President
for National Security Affairs

- ① OSTP authority to play this role
- ② DOT context
- ③ w/ counsel

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Ed Frankel - #1 - 358-2432
George Reese - #2

NASA now says -

We'll be sued for Corina mission.
Before - you were sealed off.
Now you're in the middle of the ground.

Suits by anti-nuke groups.
Inquire aft launch.
Challenging safety analysis.

Complicates the case - The more parties, the more delay.

Q of whether FOIA exemptions would apply differently?

DOE -

Need indep eval of safety and
INSTR - used to be indep
now no longer.

Jeff Hirschman
6-6043



Office of the General Counsel

Washington, DC 20546



FACSIMILE COVER SHEET

DATE: 9/7/95

FROM:

Name: Sara Najjar-Wilson
Code: GG **Phone:** 202-358-2086
FAX No. (202) 358-4355

TO:

No. Pages Sent: 4 + LEAD

Name: Ms. Elena Kagan
Code: OGC/W.H. **Phone:** 456-7594
FAX No. 456-1647

MESSAGE:

*For Commentator +
Shadrach
[Signature]*

IMPORTANT: The information contained in this facsimile message is intended only for the use of the individual to whom it is addressed and may contain information that is privileged and confidential. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error

ATTORNEY-CLIENT PRIVILEGED

BY FACSIMILE

September 7, 1995

NOTE TO: Ms. Elena Kagan
FROM: Sara Najjar-Wilson
Re: PD/NSC-25

For your information and appropriate considerations, enclosed are some of the "talking points" Bev Cook and I promised you as a result of our conversation on August 29, 1995.

Thank you very much for your assistance. We look forward to again hearing from you.



Sara

Enclosure (3pp)

cc (by fax, with enclosure):

DoE/NE-50/Ms. Cook

ATTORNEY-CLIENT PRIVILEGED

ATTORNEY-CLIENT PRIVILEGED

IMPLICATIONS OF CHANGES/LOGISTICS

Currently Followed (Old) Process:

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"DOE will retain title to the radioisotope power systems at all times."

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- Designing, developing, fabricating, evaluating, testing, and delivering the RTGs...

- Providing (with the assistance of NASA and any other appropriate agencies) an evaluation of hazards involved for credible nuclear incidents (e.g. Safety Analyses Report)..."

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Key Points: INSRP is constituted to support a specific launch, OSTP does not have a separate or ostensible role until the User agency (NASA) requests nuclear launch safety approval, although OSTP is kept informed throughout the process.

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ATTORNEY-CLIENT PRIVILEGED

P R I V I L E G E D P R I V I L E G E D P R I V I L E G E D

O How litigation becomes different

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- Explanation of midstream changes to PD's paragraph 9
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*Thru
to
SAC?*

- Panels no longer in an ad hoc status or ad hoc role, to evaluate the nuclear launch safety analysis of the program office of the mission agency, for the mission agency, on a mission by mission basis.

*also
relevant?*

- OSTP role preempts the mission agency and prior to the request of the mission agency; no longer a "review" of interagency document or consideration of mission agency recommendation.

*what
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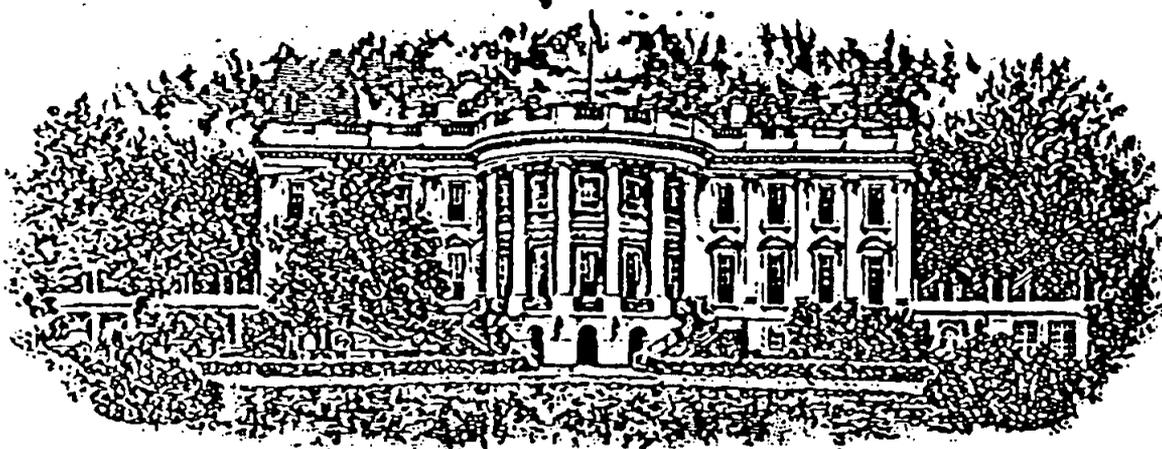
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4. Role of the EOP (OSTP & NSC) as declarants/witnesses in litigation against the mission agency.

ATTORNEY-CLIENT PRIVILEGED

The White House



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: _____

TO: Teresa Roxborough

FACSIMILE NUMBER: 202-514-0539

TELEPHONE NUMBER: _____

FROM: Elena Kagan

TELEPHONE NUMBER: 456-7594

PAGES (WITH COVER): 15

COMMENTS: Last Page

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National Aeronautics and
Space Administration
Office of the Administrator
Washington, DC 20546-0001

ACTION to J. Garrison
INFO to JHG-WA/ES
Fuhmann
Johns
Carroll
NOFGARD



EC 14 1994

The Honorable John H. Gibbons
Assistant to the President
for Science and Technology
Executive Office of the President
Washington, DC 20500

SIG of JHG
Stationery WH
DATE DUE 1-5-94

Dear Dr. Gibbons:

NASA currently uses the National Aeronautics and Space Council (NASC) document, "Nuclear Safety Review and Approval Procedures for Minor Radioactive Sources in Space Operations," dated June 16, 1970. In an effort to consolidate reporting requirements with other U.S. Government agencies, NASA has worked closely with the U.S. Air Force (USAF) Safety Agency to consolidate NASA and USAF reporting requirements for planned launches of radioisotopes into space.

NASA respectfully requests your concurrence to use the radioisotope quantity limits specified in Appendix A of the Air Force Instruction 91-110, dated March 1994, in lieu of those specified in Appendices A, B, and C of the referenced NASC document. NASA believes that these limits are more representative of the potential hazard of using radioisotopes in space. In addition, this will allow a common set of reporting limits within NASA and the Department of Defense, as well as those currently used by the Department of Transportation for ground and air transport of radioisotopes.

If you have any questions regarding this change, please do not hesitate to contact John Lyver of the Safety and Mission Assurance Office at 358-1155.

Sincerely,

Daniel S. Goldin
Administrator

*Need new levels -
This - need to modify directive*



ATOMIC ENERGY

ASSISTANT TO THE SECRETARY OF DEFENSE
3050 DEFENSE PENTAGON
WASHINGTON, DC 20301-3050

DEC 14 1994



Dr. Frank von Hippel
Office of Science and Technology Policy
Executive Office of the President
Old Executive Office Building
Washington, DC 20506

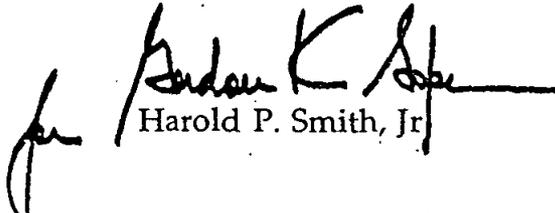
Dear Dr. von Hippel:

The current requirements for reviewing, processing, reporting, and authorizing the use of minor radioactive sources in space operations are specified in Department of Defense Directive (DoDD) 3200.11, "Major Range and Test Facility Base," September 29, 1980. This directive incorporates the categorization of radioisotopes and space launch approval procedures outlined in the 1970 National Aeronautics and Space Council (NASC) document "Nuclear Safety Review and Approval Procedures for Minor Radioactive Sources in Space Operations." The 1970 NASC guidance is outdated and inconsistent with current national and international radiation protection policies.

The Air Force has submitted a proposal to change the NASC guidance (enclosed). I concur with this proposal. In contrast to the 1970 guidance, the proposed nuclear safety review and approval procedures equate the space use of minor radioactive sources to specific radiation doses and to quantities of radioactive materials recognized by national and international communities. Through this improved categorization of the associated radiological risks, the proposed replacement guidance enhances overall safety in the use of radioisotopes in space operations.

Thank you for your assistance in updating the 1970 NASC guidance. My action officer is Major Rex R. Kiziah, (703) 697-3575.

Sincerely,


Harold P. Smith, Jr.

Enclosure

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20500

*interagency mtg.
DOE, NASA, DOD
OST
re levels approval for Pres approval.
Also an op to clear up INSER? regarding*

March 22, 1995

MEMORANDUM FOR: JOHN GIBBONS
FROM: JANE WALES
SUBJECT: CONFORMING REQUIREMENTS FOR THE LAUNCH OF RADIOACTIVE SOURCES INTO SPACE

The NASA Administrator and Assistant to the Secretary of Defense for Atomic Energy have both separately requested your assistance in updating the technical criteria for the launch of radioactive sources into space contained in NSC/PD-25. This 1977 Directive requires the President's approval for launches containing radioactive materials in excess of quantities specified in a 1970 NASC (National Aeronautics and Space Council) document. It is the 1970 NASC radioisotope list that is specifically outdated, and does not reflect current national and international radiation protection guidelines.

We have reviewed this list with an interagency group consisting of members of the Departments of Defense, Energy and NASA. The 1970 NASC list was derived from 1967 IAEA regulations -- then the most current international guidance. Since that time, improved categorizations of radiological risk have resulted in several updates to the IAEA lists. As an example of why an update is necessary, NASA recently used a small Ca^{41} calibration source on a sounding rocket experiment. Ca^{41} is not mentioned in the 1970 NASC document, but is in the more complete 1985 IAEA regulations.

This is also an opportunity to make clear INSRP (Interagency Nuclear Safety Review Panel) reporting arrangements that were a past source of confusion, and to reflect the recent strengthening of the independent safety review function. None of the proposed changes will affect the Cassini mission in anyway.

Recommendation: Sign the attached letter to the National Security Advisor proposing changes to NSC/PD-25.

Attachments:

- Proposed Letter to Tony Lake
- Explanation of Proposed Changes to NSC/PD-25
- Paragraph 9, NSC/PD-25
- NASA Administrator Letter Dec. 14, 1994
- ASD (AE) Letter Dec. 14, 1994

Explanation of Proposed Changes to Paragraph 9, of NSC/PD-25 (proposed deletions to current text are struck through, proposed additions are in italics)

1. Proposed modification to radioisotope limits:

A separate procedure will be followed for launching space nuclear systems. An environmental impact statement or nuclear safety evaluation report, as appropriate, will be prepared. ~~In addition, The President's approval is required for launches of spacecraft utilizing reactors and other devices with a potential for criticality and radioactive sources containing more than 20 curies of material in Radiotoxicity Groups I and II and for more than 200 curies of material in Radiotoxicity Groups III and IV (as given in table I of the NASC report of June 16, 1970 on "Nuclear Safety Review and Approval Procedures."~~ *total quantities greater than 1,000 times the A_2 value listed in Table I of the International Atomic Energy Agency's Safety Series No. 6, Regulations for the Safe Transport of Radioactive Materials, 1985 Edition (as ammended 1990). For radioisotopes whose A_2 value is unlimited, a value of 4×10^2 TeraBecquerels (Tbq) (1.0 Curie) shall be used as the A_2 value.*

Rationale: Ensure any device with the potential for achieveing criticality is included. The A_2 value is the quantity of isotope that the IAEA considers may undergo ground, sea or air shipment without special packaging. There are no specific IAEA standards for space launch. This replaces the U.S. space launch standard based on a 1970 NASC list (which also used 1,000 times the then comparable A_2 equivalent) with a comparable 1990 IAEA standard. For Pu^{238} , the most important isotope, the 1970 NASC document required the President's approval for more than 20 curies of Pu^{238} . With the proposed change, the President's approval is required for more than 5.4 curies. The smallest quantity of Pu^{238} used in space is 35 curies in a single Radioisotope Heat Unit -- used for thermal spacecraft control. A few isotopes have undesignated A_2 values. Most notable of these is depleted uranium, which is used in mock warhead testing. For these cases the interagency group recommended assigning a limit of 1.0 Curies.

2. Proposed Modification

Launch of sources containing quantities greater than 0.1 percent of the A_2 value from this table will be forecasted quarterly to the Office of Science and Technology Policy (OSTP). This report is for information, and is not intended to introduce a new approval procedure.

Rationale: The 1970 NASC document required that launches containing these amounts of material be forecasted quarterly to the OSTP. NASA, DoC and DoD provide these forecasts regularly, citing the 1970 NASC guidance. This language is copied from the NASC document and is intended to ensure that the EOP is notified as a matter of courtesy on launches containing more than 1/1000 the amount of material that the IAEA considers to not require special packaging before it is launched into space, since it has the potential of reentering on another nation's territory.

3. Proposed Modification

An ad-hoc Interagency Nuclear Safety Review Panel, which will report to the OSTP and consisting of members from the Department of Defense, Department of Energy, and National Aeronautics and Space Administration and the Environmental Protection Agency will evaluate the risks associated with the missions requiring the President's approval and prepare a Nuclear Safety Evaluation Report. The Nuclear Regulatory Commission ~~should be requested to~~ *will* participate as ~~an observer a~~ *technical advisor to the panel as* when appropriate. The head of the sponsoring agency will request the President's approval for the flight through the Office of Science and Technology Policy. The Director is authorized to render approval for such launchings, unless he considers it advisable to forward the matter to the President for a decision.

? how? because no
- inter ad hoc?

Rationale: Reflects recent strengthening of the independent safety review process, and clarifies the panels reporting task to prepare a safety evaluation report for the OSTP Director.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20500

*Jeff - FYI
I punch out
on Apr 17
JH*

March 22, 1995

*Need new levels.
Also - clarify report by
management TS.*

MEMORANDUM FOR: ANTHONY LAKE
FROM: JOHN H. GIBBONS *JHG*
SUBJECT: PROPOSED UPDATE TO NATIONAL SECURITY COUNCIL
PRESIDENTIAL DIRECTIVE 25 (1977)

National Security Council Presidential Directive 25 (NSC/PD-25), signed December 14, 1977 by President Carter's National Security Advisor, Zbigniew Brzezinski, provides direction to agencies governing the launch of space systems involving nuclear material. The directive states that the head of the sponsoring agency will request the President's approval through the Office of Science and Technology Policy. Two NASA missions, Cassini and Mars Pathfinder, currently require this approval.

Both NASA and the Department of Defense have requested my assistance in modifying the directive as it relates to the methods of determining when Presidential approval is required. Specifically, the directive currently states that;

..the President's approval is required for launches of spacecraft utilizing radioactive sources containing more than 200 curies of material in Radiotoxicity Groups III and IV (as given in Table I of the NASC report of June 16, 1970)

We have convened a technical agency group that concurs with the NASA and DoD advice that the NASC guidance is inconsistent with current national and international radiation protection measures. Consequently, I recommend that this isotope list be replaced with reference to a current International Atomic Energy Agency list. I also recommend updating the PD to clarify reporting arrangements and to reflect strengthening of the independent safety process that we have begun for Cassini. A proposed modification to paragraph 9 of the PD that will technically update the approval procedure and conform it to current practices is attached (TAB A).

I appreciate your assistance in modifying the directive to reflect current practice. I have asked Jane Wales to facilitate this proposed update with NSC staff.

Attachment:

Proposed Modification to PD/NSC-25

Proposed Modifications to Paragraph 9 of PD/NSC-25 (1977)

9. A separate procedure will be followed for launching space nuclear systems. An environmental impact statement or nuclear safety evaluation report, as appropriate, will be prepared. ~~In addition, The President's approval is required for launches of spacecraft utilizing reactors and other devices with a potential for criticality and radioactive sources containing more than 20 curies of material in Radiotoxicity Groups I and II and for more than 200 curies of material in Radiotoxicity Groups III and IV (as given in table I of the NASC report of June 16, 1970 on "Nuclear Safety Review and Approval Procedures."~~ *total quantities greater than 1,000 times the A_2 value listed in Table I of the International Atomic Energy Agency's Safety Series No. 6, Regulations for the Safe Transport of Radioactive Materials, 1985 Edition (as amended 1990). Launch of sources containing quantities greater than 0.1 percent of the A_2 value from this table will be forecasted quarterly to the Office of Science and Technology Policy (OSTP). This report is for information, and is not intended to introduce a new approval procedure.* An ~~ad-hoc~~ Interagency Nuclear Safety Review Panel *which will report to the OSTP* and consisting of members from the Department of Defense, Department of Energy, and National Aeronautics and Space Administration *and the Environmental Protection Agency* will evaluate the risks associated with the missions *requiring the President's approval* and prepare a Nuclear Safety Evaluation Report. The Nuclear Regulatory Commission should be requested to *will* participate as ~~an observer~~ *a technical advisor to the panel as* when appropriate. The head of the sponsoring agency will request the President's approval for the flight through the Office of Science and Technology Policy. The Director is authorized to render approval for such launchings, unless he considers it advisable to forward the matter to the President for a decision.

FOR OFFICIAL USE ONLY

20395

THE WHITE HOUSE

WASHINGTON

March 17, 1995

MEMORANDUM FOR THE VICE PRESIDENT
 THE SECRETARY OF STATE
 THE SECRETARY OF THE TREASURY
 THE SECRETARY OF DEFENSE
 THE SECRETARY OF THE INTERIOR
 THE SECRETARY OF AGRICULTURE
 THE SECRETARY OF COMMERCE
 THE SECRETARY OF HEALTH AND HUMAN SERVICES
 THE SECRETARY OF TRANSPORTATION
 THE SECRETARY OF ENERGY
 DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET
 ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY
 UNITED STATES TRADE REPRESENTATIVE
 CHIEF OF STAFF TO THE PRESIDENT
 ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
 DIRECTOR OF CENTRAL INTELLIGENCE
 DIRECTOR OF THE OFFICE OF SCIENCE AND TECHNOLOGY POLICY
 CHAIRMAN OF THE COUNCIL ON ENVIRONMENTAL QUALITY
 DIRECTOR OF THE ARMS CONTROL AND DISARMAMENT AGENCY
 CHAIRMAN OF THE JOINT CHIEFS OF STAFF
 ADMINISTRATOR OF THE NATIONAL AND AERONAUTICS AND SPACE ADMINISTRATION
 CHAIRMAN OF THE NUCLEAR REGULATORY COMMISSION
 DIRECTOR OF THE NATIONAL SCIENCE FOUNDATION

SUBJECT: Revision to NSC/PD-25, dated December 14, 1977, entitled Scientific or Technological Experiments with Possible Large-Scale Adverse Environmental Effects and Launch of Nuclear Systems into Space

As a result of an OSTP-led interagency review updating the technical criteria for the launch of radioactive sources into space, the following changes are directed to NSC/PD-25, dated December 14, 1977, which is now unclassified. These changes, based upon the unanimous consent of the interagency review, modify the directive to reflect current international practice and standards.

*modifications -
 1. New levels - work
 2. INSEP - ad hoc struck.
 3. - agency dispute - didn't know - never discussed.
 ASST Gen/Comm.
 George Reer
 DOE
 Beverly Cole*

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A95-01117

Paragraph 9 of NSC/PD-25 is replaced by the paragraph below:

9. A separate procedure will be followed for launching nuclear systems. An environmental impact analysis or nuclear safety evaluation report, as appropriate, will be prepared. The President's approval is required for launches of spacecraft utilizing reactors and other devices with a potential for criticality and radioactive sources containing total quantities greater than 1,000 times the A₂ value listed in Table I of the International Atomic Energy Agency's Safety Standards, Part 6, Regulations for the Safe Transport of Radioactive Materials, 1985 Edition (as amended 1990). Launch of sources containing quantities greater than 0.1 percent of the A₂ value from this table will be forecasted quarterly to the Office of Science and Technology Policy (OSTP). This report is for information, and is not intended to introduce a new approval procedure. An Interagency Nuclear Safety Review Panel, which will report to the OSTP and consisting of members from the Department of Defense, Department of Energy, National Aeronautics and Space Administration and the Environmental Protection Agency, will evaluate the risks associated with missions requiring the President's approval and prepare a Nuclear Safety Evaluation Report. The Nuclear Regulatory Commission will participate as a technical advisor to the panel as appropriate. The head of the sponsoring agency will request the President's approval for the flight through the Office of Science and Technology Policy. The Director is authorized to render approval for such launchings, unless he considers it advisable to forward the matter to the President for a decision.

All other paragraphs of NSC/PD-25 (1977) remain unchanged and in force.

Anthony Lake

Anthony Lake
Assistant to the President
for National Security Affairs

- ① OSTP authority to play this role
- ② DOT context
- ③ WHT counsel



Office of the General Counsel

Washington, DC 20546



FACSIMILE COVER SHEET

DATE: 9/7/95

FROM:

Name: Sara Najjar-Wilson
Code: GG Phone: 202-358-2986
FAX No. (202) 358-4355

TO:

No. Pages Sent: 4 + LEAD

Name: Mrs. Elena Kagan
AGENCY or Code: OGC/W.H. Phone: 456-7594
FAX No. 456-1649

MESSAGE:
For Communication #
Shado Jones
[Signature]

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ATTORNEY-CLIENT PRIVILEGED

BY FACSIMILE

September 7, 1995

NOTE TO: Ms. Elena Kagan
FROM: Sara Najjar-Wilson
Re: PD/NSC-25

For your information and appropriate considerations, enclosed are some of the "talking points" Bev Cook and I promised you as a result of our conversation on August 29, 1995.

Thank you very much for your assistance. We look forward to again hearing from you.



Sara

Enclosure (3pp)

cc (by fax, with enclosure):

DoE/NE-50/Ms. Cook

ATTORNEY-CLIENT PRIVILEGED

ATTORNEY-CLIENT PRIVILEGED

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ATTORNEY-CLIENT PRIVILEGED

P R I V I L E G E D P R I V I L E G E D P R I V I L E G E D

O How litigation becomes different

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- OSTP role outside the charter of the panels by the mission agency or the interagency coordination and funding - i.e., DoE (nuclear material "owner"), DoD (launch vehicle or range "owner"), NASA (mission agency).

3. FOIA challenges against the EOP (OSTP) for reports submitted to and preemptively accepted by OSTP that are essentially predecisional NASA or DoE reports and not final documents until accepted by the mission agency.

4. Role of the EOP (OSTP & NSC) as declarants/witnesses in litigation against the mission agency.

currently possible - if greater role, more chance for inclusion

ATTORNEY-CLIENT PRIVILEGED

CORRECTED BRIEF

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 8, 1995

No. 95-5057 Consolidated With No. 95-5061

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SCOTT ARMSTRONG, et al.,

**Plaintiffs-Appellees,
Cross-Appellants,**

v.

EXECUTIVE OFFICE OF THE PRESIDENT, et al.,

**Defendants-Appellants,
Cross-Appellees.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR THE APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, appellants submit the following certifications:

PARTIES AND AMICI

The plaintiffs-appellees are Scott Armstrong, a journalist, author, and founder of the National Security Archive, a non-profit research library located in Washington, D.C.; the National Security Archive; the Center for National Security Studies, a non-profit research institute in Washington, D.C., operated as a project of the Fund for Peace, Inc.; Eddie Becker, a researcher and consultant to the National Security Archive; the American Historical Association; and the American Library Association.

The named defendants-appellants are the Executive Office of the President; the National Security Council and the Office of Administration, components of the Executive Office of the President; the White House Communications Agency, an entity of the Department of Defense; and Trudy Peterson, Acting Archivist of the United States. The issues on appeal concern primarily defendant National Security Council.

No amici appeared in the district court and there are no amici in this appeal.

RULINGS UNDER REVIEW

The ruling under review is the district court's opinion and order entered on February 14, 1995 (Richey, J.) (JA 175-284). Plaintiffs have also cross-appealed from this same decision. The case number in the district court is 89-142. The decision is unreported as of this date.

RELATED CASES

This case was previously before this Court in Armstrong v. Bush, No. 90-5173, reported at 924 F.2d 282 (D.C. Cir. 1991); and Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993). On March 1, 1995, this Court (Edwards, C.J., Silberman, Buckley) granted appellants' Emergency Motion for a Stay Pending Appeal (JA 295). By order dated March 10, 1995, this Court on its own motion consolidated the appeal (No. 95-5057) and cross-appeal (No. 95-5061). By order entered April 6, 1995, this Court granted expedition of the appeal.

Counsel are aware of no other related cases within the meaning of Rule 28(a)(1)(C). However, the issue presented in this appeal, whether the National Security Council is an "agency" within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. 552(f), will affect all FOIA cases against the National Security Council. Counsel are aware of the following FOIA cases pending in the United States District Court for the District of Columbia: 1) Computer Professionals for Social Responsibility v. National Security Agency, et al., No. 93-1074 (RMU); 2) William L. McKone v. NSA, NSC, Civil No. 90-2119 (TPJ), consolidated with McKone v. NARA, Civil No. 92-2178 (TPJ); 3) Anderson v. CIA, et al., Civ. No. 94-2032 (JR); 4) Electronic Privacy Information Center v. National Security Council, No. 95-CV-0461 (SS). Also pending is Gilmore v. Department of State, et al., Civil Action No. 95-1098 (N.D. CA.).


FREDDI LIPSTEIN
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GLOSSARY

APA	Administrative Procedure Act
Armstrong I	Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991)
Armstrong II	Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993)
CEA	Council of Economic Advisors
CEQ	Council on Environmental Quality
C.F.R.	Code of Federal Regulations
DCI	Director of Central Intelligence
FOIA	Freedom of Information Act
ISOO	Information Security Oversight Office
JA	Joint Appendix, including Exhibit Volumes
NCS	National Communications System
NSC	National Security Council
NSDD	National Security Decision Directive
OLC	Office of Legal Counsel, United States Department of Justice
OMB	Office of Management and Budget
OST	Office of Science and Technology
PDD	Presidential Decision Directive
Task Force	Task Force on Regulatory Relief created by President Reagan

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EXECUTIVE OFFICE OF THE PRESIDENT, et al.,

Defendants-Appellants,
Cross-appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the National Security Council is an "agency" within the meaning of the Freedom of Information Act, 5 U.S.C. 552(f).

2. Whether the district court erred in holding the NSC's recordkeeping guidance was arbitrary and capricious because the NSC did not adequately explain its change in position.

STATUTES INVOLVED

Pertinent provisions of the National Security Act of 1947 (50 U.S.C. 402 et seq.), the Presidential Records Act (44 U.S.C. 2201 et seq.), the Federal Records Act (44 U.S.C. chapters 21, 29, 31 and 33), the Freedom of Information Act (5 U.S.C. 552), and Executive Order 12,958 are contained in an Addendum to this brief.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court's jurisdiction was based on 28 U.S.C. 1331 and 5 U.S.C. 552(a)(4)(B). Appellate jurisdiction lies under 28 U.S.C. 1292(a)(1). On February 22, 1995, defendants timely appealed the district court's February 14, 1995 order (JA 285).

STATEMENT OF THE CASE

Nature of the Case. Defendants appeal from an order entered on February 14, 1995, by the district court (Richey, J.) holding that the National Security Council ("NSC") is an "agency" within the meaning of the Freedom of Information Act, 5 U.S.C. 552(f) ("FOIA"), and ordering the NSC, with limited exceptions, to preserve its records in accordance with the Federal Records Act rather than the Presidential Records Act. Plaintiffs cross appeal the district court's ruling that, in "limited circumstances" when "high level officials" act solely to advise and assist the President, their records may be treated in accordance with the Presidential Records Act.

Statement of Facts and Procedural History.

A. THE NATIONAL SECURITY COUNCIL

The National Security Council was created by the National Security Act of 1947, 61 Stat. 499 (1947) (codified at 50 U.S.C. 402). Council membership and participants have changed somewhat since 1947, but throughout its existence the Council's members have been the President and cabinet-level officials. The current statutory members are the President, the Vice-President and the Secretaries of State and Defense. The Act provides that "[t]he

President of the United States shall preside over meetings of the Council" (id. §402(a)). In addition, "[t]he Council shall have a staff to be headed by a civilian executive secretary who shall be appointed by the President" and is not subject to Senate confirmation (50 U.S.C. 402(c)).

The Council's function is:

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 national security.

Id. "[S]ubject to the direction of the President," the Council also is

(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.

Id., §402(b). The Council has "such other functions as the President may direct" (§§402(b) (d)).

B. COURSE OF PROCEEDINGS

1. Prior Proceedings.

The complex history of this case is described in this Court's prior opinions in Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991) (Armstrong I) and Armstrong v. Executive Office of the

President, 1 F.3d 1274 (D.C. Cir. 1993) (Armstrong II). As pertinent to the issues in this appeal, the NSC historically has treated most of its records as presidential records (JA 985; JA 74, ¶192) and has managed these records either as donated historical materials of the President or pursuant to the Presidential Records Act since it became effective in 1981 (JA 985; JA 1312).¹ These records have been transferred to the Presidential Library of the respective President upon the completion of his term in office (JA 985; JA 1296, ¶4).

Each Administration also has left behind some records for the purpose of promoting continuity in national security policy (JA 985). These records, previously described as NSC "institutional" files (id.; JA 1381, No. 94), were managed pursuant to the Federal Records Act (JA 985; JA 1296, ¶4; JA 73, ¶189). Since 1975, NSC has voluntarily searched these institutional files in response to FOIA requests (JA 985).

Plaintiffs challenge NSC's recordkeeping guidance which permits records generated by the NSC to be treated as presidential records subject to the Presidential Records Act. Plaintiffs contend that all of NSC's records are agency records subject to the FOIA.

2. This Court's Remand in Armstrong II.

In Armstrong II, this Court observed that, since the definition of a presidential record in the Presidential Records Act specifically excludes records of an "agency" as that term is

¹ President Nixon's papers, including the records of his NSC, are subject to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2111 note.

defined under the FOIA, 44 U.S.C. 2201(2)(B)(i), the Presidential Records Act would apply only to records that are not "agency" records under FOIA (1 F.3d at 1292). The Court recognized that it previously had held in Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), that "only entities 'whose sole function [is] to advise and assist the President' are not separate agencies subject to the FOIA" (1 F.3d at 1295), and that an agency cannot be an agency for some purposes and not for others (id., citing Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980)). Observing that there had never been a definitive ruling on whether the NSC is an "agency" within the meaning of the FOIA, the Court remanded to the district court to determine whether the NSC may properly treat any of its records as presidential records (1 F.3d at 1296).²

In response to this Court's ruling, the NSC sought the advice of the Justice Department's Office of Legal Counsel ("OLC"). In a September 1993 opinion, OLC advised NSC that, because it solely advises and assists the President, it is not an agency under the FOIA (JA 1026-1033).³ The President endorsed OLC's decision, but instructed NSC's Executive Secretary to institute a voluntary disclosure policy for appropriate NSC records (JA 217).

² NSC's practice of separately maintaining institutional and presidential records was subject to conflicting judicial interpretation by the trial courts and never ultimately decided (JA 1317-1324; 1325-1337; 343-345).

³ In two earlier opinions in 1973 (JA 988 at 1003-1005) and 1978 (JA 1017-1025), OLC expressed conflicting views on this issue.

3. District Court Opinion On Remand.

The district court held that the NSC is an agency because it does not solely advise and assist the President but rather exercises substantial authority independently of the President (JA 196-202). In reaching this conclusion, the court stated that it "need only find that an entity perform one additional role beyond rendering advice and assistance to the President in order to declare that an entity is an "'agency'" (JA 203).

The court held that the NSC exercises independent authority in "numerous areas" (*id.*), including, *inter alia*, its oversight of the CIA, its role in providing guidance and direction to intelligence, counterintelligence and similar activities of the intelligence community (JA 200) and its role in providing "overall policy direction" for the protection of classified information (*id.*). The court also held that NSC's FOIA regulations, published in the Code of Federal Regulations, "are presumptively deemed rules of an agency" (JA 197). Similarly, the court held that because the NSC "has primary and authoritative review responsibility regarding FOIA requests for material classified and maintained by the NSC, by the President or his staff where there is an NSC interest" (JA 198-99), the NSC performs an adjudicatory function independent of the President.

Alternatively, the court ruled that "[e]ven if the NSC did not perform rulemaking and adjudication, and otherwise exercise substantial authority independently of the President" (JA 208), the NSC's declaration that it is not an "agency" under FOIA was

arbitrary and capricious because it failed to provide a "reasoned explanation" for this position (JA 208-10).

Notwithstanding its conclusion that the NSC meets the FOIA definition of "agency," the court held that it "must give affect [sic] to both the FRA and the PRA" (JA 205 & n.10). Accordingly, the court held that in "limited circumstances" when "high level officials of the NSC * * * act not as members of an agency but, [sic] solely as advisors to the President," their records are governed by the Presidential Records Act (JA 207).

The court held that subjecting the NSC to FOIA is not an unconstitutional intrusion into the President's powers because the NSC in the past had processed FOIA requests and because the FOIA exemptions would adequately protect from disclosure sensitive national security documents (JA 210-12).

Based on its conclusion that the NSC is subject to FOIA and the Federal Records Act, the court ordered that "the Executive Office of the President and the Archivist shall forthwith adopt new guidelines for the National Security Council * * * in accordance with the Court's Opinion * * * " (JA 215).⁴

STANDARD OF REVIEW

The district court's injunction rests on an erroneous interpretation of the FOIA and the National Security Act. Accordingly, this Court's review is de novo. Rochester Pure Water Dist. v. EPA, 960 F.2d 180, 184 (D.C. Cir. 1992).

⁴ On March 1, 1995, this Court stayed the obligation to issue new guidance pending appeal (JA 295).

SUMMARY OF ARGUMENT

1. The central issue in this appeal is whether the National Security Council may create, maintain and preserve its records under the scheme of the Presidential Records Act. Because the Presidential Records Act expressly excludes official records of an agency as defined in the Freedom of Information Act, the analysis of the issue turns on whether the NSC is an "agency" within the meaning of the FOIA, 5 U.S.C. 552(f). While the FOIA definition of "agency" includes entities within the Executive Office of the President, the courts and Congress have recognized that this definition does not include the President, his close advisors or units in the Executive Office that are not independent of the President.

In determining whether an entity in the Executive Office of the President is sufficiently independent of the President that it would be covered by FOIA, this Court recently clarified that the crucial inquiry is the particular entity's degree of independence from the President as informed by (1) its operational proximity to the President, (2) the nature of any delegation of authority, either from Congress or the President, and (3) the structure of the entity (Meyer v. Bush, 981 F.2d 1288, 1293 (D.C. Cir. 1993)).

2. Under the Meyer analysis, it is clear that the NSC is not independent of the President. First, it would be difficult to conceive of an entity in closer operational proximity to the President than the NSC, given that the President himself is the head of the Council and controls its operations through the

National Security Advisor, an assistant to the President who is not subject to Senate confirmation. The Supreme Court has held that neither the Office of the President nor the National Security Advisor is subject to FOIA (Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980)). It follows that a Council that includes the President, and over which he presides, cannot be subject to FOIA.

Second, neither the Congress nor the President has delegated substantial independent authority to the NSC. Article II of the Constitution vests the President with inherent powers over national security affairs. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-320 (1936); Department of Navy v. Egan, 484 U.S. 518, 527 (1988); Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948). In the National Security Act of 1947, Congress created the National Security Council to advise the President in carrying out these responsibilities. Because of the non-delegable nature of the President's Article II powers, President Truman insisted that the Council be limited to a strictly advisory role. Congress acceded to Truman's view, and in the National Security Act delegated no independent authority to the Council.

Since the statute delegates no independent authority to the NSC, the issue is whether any President since Truman has delegated substantial independent authority to the NSC. In light of Congress's deliberate accession to Truman's insistence that the Council must be strictly advisory, it should not lightly be presumed that any subsequent President would so radically

transform the nature of the Council by assigning it independent authority to exercise his constitutional responsibilities. In fact, the record shows that every subsequent President from Eisenhower to Clinton has jealously protected the powers of the Presidency by maintaining the NSC as a strictly advisory body and has delegated no independent authority to the NSC. Each President has confirmed the Council's role as the President's advisory council by placing his National Security Advisor in charge of the Council's daily operations and by developing the NSC staff as the President's personal staff.

The district court concluded that subsequent Presidents had in fact delegated substantial independent powers to the NSC through a series of Executive orders and Directives which assign to "the NSC" such functions as policy analysis, the development of proposals and recommendations, coordination of various national security agencies and monitoring the execution of policy. However, the assignment of these functions to the Council over which he presides evidences the President's retention of control, rather than a delegation of independent authority. In ascribing independent functions to "the NSC," the court never explained how the Council headed by the President and managed on his behalf by the President's personal assistant, the National Security Advisor, can act "independently" of the President.

The court could only have concluded that the NSC exercised independent functions by implicitly divorcing the President from the Council and by ignoring the historical understanding and

uniform determination of every President since Truman that the NSC exists solely to advise and assist the President. Similarly, the NSC staff cannot operate independently in directing other agencies because the staff is controlled by the National Security Advisor and the President, and because every agency head has direct recourse to the President.

Third, although Congress provided a skeletal structure of the NSC, it gave no particular structure or function to the staff. The NSC staff is subject to the President's direction through his National Security Advisor and operates in the same close proximity to the President as other White House staff whose exclusive role is to advise and assist the President.

In addition, 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. Department of Justice, 491 U.S. 440, 466 (1989)). This Court has recognized that Article II protects confidential communications directly with the President as well as among his confidential advisors, and that the candor of such communications may be inhibited by the expectation of public dissemination. In view of the NSC's close proximity to the President, and the daily interaction of the Council and the 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 district court's attempt to accommodate the Presidential Records Act with the FOIA and the Federal Records Act, through the creation of an exception for "high level officials" who "in limited circumstances" act solely to advise and assist the President, belies its conclusion that the NSC is an "agency." In light of the constant interaction between the President, the National Security Advisor and the staff, it would seriously disrupt the NSC's mission if the possession of presidential records by lower level NSC officials could transform those records into agency records and subject them to the Federal Records Act and to FOIA.

3. The district court's alternative ruling, setting aside NSC's current recordkeeping guidance as arbitrary and capricious because the NSC did not adequately explain its "sudden" change in position, is equally erroneous. If the NSC is not a FOIA agency, the court had no jurisdiction to prevent the NSC from asserting its legal rights. Moreover, the court ignored the fact that the NSC had never subjected its presidential records to FOIA.

ARGUMENT

THE NATIONAL SECURITY COUNCIL IS NOT INDEPENDENT OF THE PRESIDENT AND THEREFORE IS NOT AN AGENCY WITHIN THE MEANING OF THE FOIA.

Introduction. The Freedom of Information Act requires each "agency" to make its records, with certain exceptions, available to any person who requests them, and grants the district courts jurisdiction to order such disclosure (5 U.S.C. 552(a)(4)). While the FOIA definition of "agency" includes entities within the Executive Office of the President, Congress made clear that

this definition does not include the President, his close advisors or units in the Executive Office that are not independent of the President (H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14-15 (1974); S. Rep. No. 1200, 93d Cong., 2d Sess. 15 (1974) (identical language)).

This Court has refined the factors designed to distinguish whether entities in the Executive Office of the President are sufficiently separate from the President that they would be subject to FOIA. Most recently, in Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993), this Court reiterated that the crucial inquiry is the particular entity's degree of independence from the President, and explained the factors that must be analyzed in making that determination. Under the Meyer factors, the NSC is not independent of the President; therefore, it is not an "agency" under FOIA.

I. THIS COURT LOOKS TO THE DEGREE OF INDEPENDENCE FROM THE PRESIDENT IN DETERMINING WHETHER AN ENTITY IS SUBJECT TO FOIA.

The FOIA originally adopted the Administrative Procedure Act ("APA") definition of "agency" (5 U.S.C. 551(1)):

each authority of the Government of the United States, whether or not it is within or subject to review by another agency * * * .

In Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), this Court stated that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions" (id. at 1073, emphasis added). In concluding that the Office of Science and Technology ("OST") is "a separate agency, subject to the requirements of the

codify the result reached in Soucie (H.R. Rep. No. 1380, supra, at 15).

Applying the Soucie test to other entities within the Executive Office of the President, this Court has held that the Council on Environmental Quality ("CEQ") is an agency under FOIA (Pacific Legal Found. v. Council on Env'tl. Quality, 636 F.2d 1259, 1262 (D.C. Cir. 1980)), but that the Council of Economic Advisers ("CEA") is not (Rushforth v. Council of Economic Advisers, 762 F.2d 1038 (D.C. Cir. 1985)). Acknowledging that the two entities had virtually identical organic statutes (Rushforth, id. at 1043), the Court found significant the fact that Executive Orders had expanded CEQ's statutory authority so that it was authorized to issue legally binding guidelines and regulations (Pacific Legal, 636 F.2d at 1262 (citations omitted); Meyer, 981 F.2d at 1292). By contrast, CEA had no regulatory power; its mandate was to "appraise federal programs" and "make recommendations to the President" (Rushforth, 762 F.2d at 1042-43). The Court gave "little weight" to the 1974 House Report's enumeration of the CEA since "the Conference elected to embrace [the Soucie] test to be substituted for a listing of the entities to be included * * * " (Rushforth, 762 F.2d at 1040-41).

In Meyer v. Bush, 981 F.2d at 1297-1298, this Court held that a group of senior advisers to the President, working together within the Executive Office of the President as the Task Force on Regulatory Relief ("the Task Force") and chaired by the Vice President, did not constitute an agency under the FOIA. The Court rejected plaintiffs' argument that the Task Force was more

National Security Archive v. Archivist, 909 F.2d 541, 545 (D.C. Cir. 1990) (White House Counsel's Office is not a FOIA agency)).

With respect to the second factor, the Court observed that "[t]he greater the scope of the delegation * * * the more independence an entity will exercise" (981 F.2d at 1293). The "responsibility for providing 'guidance' and 'direction' to the OMB Director, and the authority to resolve disputes between agencies and OMB 'or [to] ensure that they are presented to the President'" did not show a substantial delegation of independent authority to the Task Force (*id.* at 1294-95). The Court reasoned that it would be unlikely that an agency head who reports directly to the President would acquiesce in a Task Force decision unless he believed that it was the President's opinion, and that it was implicit that Task Force members would not resolve disputes without presenting them to the President unless they already knew his views (*id.* at 1295).

Finally, the court noted that the absence of a firm structure made the Task Force more like the President's personal staff (981 F.2d at 1296). It also rejected the argument that the Vice President's membership on the Task Force gave it "added clout and independent authority," citing plaintiffs' concession that, "if the Vice President alone held the exact duties of the Task Force, [he] would not be an agency for purposes of FOIA" (*id.* at 1295).

In sum, to determine whether an entity is independent of the President, under Meyer, the Court looks to the degree of independence from the President of a particular entity by

analysis of (1) the operational proximity to the President, (2) the nature of any delegation of authority, and (3) the structure of the entity. Under these criteria, as we show below, the NSC is not independent of the President; therefore, it is not an "agency," and the FOIA does not apply to it.

II. UNDER THIS COURT'S CRITERIA, THE NSC IS NOT INDEPENDENT OF THE PRESIDENT.

A. Because The President Is The Head Of The NSC And Controls Its Operation, The NSC Operates In The Closest Proximity To The President.

First and foremost, the President himself serves on and presides over the NSC (50 U.S.C. 402(a)), an "operational proximity" (Meyer, 981 F.2d at 1294) the district court totally ignored. Although a creation of Congress, the NSC is unique in the specification that the President, the constitutional head of a separate branch of government, sits as a member of and the head of the Council.

Congress recognized the President's constitutional separateness when it excluded the President and his close advisors from the expanded definition of "agency" in the 1974 amendments to the FOIA, and the Supreme Court has held that the Office of the President is not subject to the FOIA (Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980)). It follows that a Council that includes the President, and over which he presides, cannot be subject to the FOIA.

Moreover, the National Security Act ensures the President's control of the NSC's operations. "In addition to performing such other functions as the President may direct," and "subject to the direction of the President," the Council is "to assess and

appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power * * * 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" (50 U.S.C. 402(b) (emphasis added)).

This Court's reference in Meyer to President Lincoln's remark is equally appropriate here. After receiving the unanimous vote of his cabinet against a certain decision, Lincoln announced: "'The vote has been taken. Seven noes, one aye -- the ayes have it" (Meyer, 981 F.2d at 1297 n.9 (citing R. Fenno, The President's Cabinet 29 (1963))). The President's role as presiding and directing official of the NSC shows that it is precisely what Congress intended it to be: the President's Council.

B. Neither The National Security Act Nor The President Has Delegated Any Functions To The NSC Other Than To Advise The President.

As this Court recognized in Meyer, an entity's independence from the President may be determined in part by looking at the nature of any delegation of authority. "The greater the scope of the delegation -- which also usually implies less continuing interaction with the President -- the more independence an entity will exercise" (981 F.2d at 1293). The NSC has been delegated no independent authority; indeed, the Council members and the staff constantly interact with the President and his National Security Advisor who manages the NSC on the President's behalf.

1. The Act delegates no independent authority to the NSC.

The National Security Act delegates no independent authority to the Council. Under 50 U.S.C. 402, the NSC's functions are: (i) to advise the President with respect to the integration of domestic, foreign, and military policies; (ii) to coordinate the policies and functions of the departments and agencies; (iii) to assess and appraise the objectives, commitments, and risks of the United States; and (iv) to consider policies on matters of common interest to the national security departments and agencies, and (v) to make recommendations to the President (50 U.S.C. 402(a), (b), (d)). These functions are strikingly similar to the statutory functions of the CEA (Rushforth, 762 F.2d at 1043), and plainly fall within the ambit of advising and assisting the President.

2. When the Council originated, President Truman determined that it would not be delegated independent functions. The genesis of the advisory nature of the Council lay in competing views of the Council primarily represented by Secretary of the Navy, James Forrestal, and President Truman's Bureau of the Budget. Forrestal saw the Council as a policy coordinating body with statutory powers that would relieve the President of certain commander-in-chief responsibilities.⁶ Truman's advisers in the

⁶ See Paul Y. Hammond, The National Security Council as a Device for Interdepartmental Coordination: An Interpretation and Appraisal, Am. Pol. Sci. Rev., Dec. 1960, 899 ("Hammond") (JA 1193); Alfred D. Sander, Truman and the National Security Council, 1945-47, J. Am. History, Sept. 1972, at 369, 370 ("Sander") (JA 1173); Anna Kasten Nelson, President Truman and the Evolution of the National Security Council, J. Am. History, Sept. 1985, at 360-362 ("Nelson") (JA 1154).

Bureau of the Budget were concerned that the type of Council proposed by Forrestal "delegated authority which only the President can delegate since in the American constitutional system only the President is responsible for the ultimate formulation of foreign and military policy" (Sander, JA 1183). Accordingly, the Bureau recommended that the NSC be made solely advisory to the President and not be granted any authoritative functions (*id.*), a recommendation that was embodied in the 1947 Act. The legislative history affirms that the NSC is "an advisory body to the President with respect to the integration of domestic, foreign and military policies." S. Rep. No. 239, 80th Cong., 1st Sess. 10 (1947) (JA 874).

Even after the Act was passed, Forrestal, who became the first Secretary of Defense, continued to view the NSC as "a part of the defense establishment" (Nelson, JA 1158), where the President would rarely preside, since, in Forrestal's view, "the major function of the council was to relieve the president" (*id.*). By contrast, President Truman's advisers within the Bureau of the Budget continued to regard the NSC staff as a "further enlargement of the Presidential staff" and recommended that the NSC secretariat be housed in the Executive Office Building "since the basic reason for the Council's existence is to advise and aid the President" (Nelson, JA 1159 (emphasis added); Sander, JA 1191).⁷ The Bureau recommended that the

⁷ See James S. Lay & Robert H. Johnson, Organizational History of the National Security Council During the Truman and Eisenhower Administrations at 6 n.16 (1960) (monograph) (hereafter "Lay & Johnson") (JA 1034).

Executive Secretary created by the 1947 Act be considered the President's representative, an administrative assistant who should have full access to the President (Nelson, JA 1159; Sander, JA 1188). "The bureau felt this close relationship to the President rather than the council was proper because the basic reason for the council's existence was to advise and aid the President" (Sander, JA 1188-89).

The President sided with the Bureau since its plan "was consistent with his determination that the presidency never be weakened while he was in charge * * * and [i]t * * * reflected his view that only the president could really make the tough decisions on foreign policy" (Nelson, JA 1160). As Truman recalled

There were times during the early days of the National Security Council when one or two of its members tried to change it into an operating super-cabinet on the British model. Secretary Forrestal and Secretary Johnson [Forrestal's successor as Secretary of Defense], for instance, would at times put pressure on the Executive Secretary. What they wanted him to do was to assume the authority of supervising other agencies of the government. * * * Forrestal for some time had been advocating our using the British Cabinet system as a model * * * but under the British system there is a group responsibility of the Cabinet. Under our system, the responsibility rests on one man - the President. To change it, we would have to change the Constitution, and I think we have been doing very well under our Constitution.⁸

Truman used the Council "only as a place for recommendations to be worked out. Like the Cabinet, the Council does not make

⁸ Truman, Harry S., Memoirs, Vol. Two: Years of Trial and Hope, (Doubleday, 1956) at 60.

decisions. The policy itself has to come down from the President, as all final decisions have to be made by him." He also made clear that the Council was to have no operational role. When Council recommendations were approved by the President, they were to be implemented "by all appropriate Executive departments and agencies of the U.S. Government under the coordination of the department or agency head who had the primary responsibility for implementation of the policy involved" (Lay & Johnson, JA 1050).

In Reorganization Plan No. 4 of 1949, the NSC was formally placed within the Executive Office of the President. See S. Rep. No. 838, 81st Cong., 1st Sess. 2 (1949) (JA 892). A Truman Administration memorandum cited in the committee report approving the recommendation stated (JA 893, emphasis added):

the Council function of advising the President indicates the desirability of its official recognition as a strictly Presidential staff organization, a high-policy planning arm of the President. It pulls together the factors involved in a national security problem and presents to the office an integrated proposal for a United States policy. This requires the coordination of Cabinet members and other high Government officials which can and should be done only by the President or in his name * * * .

President Truman thus shaped the statute that created the NSC as a purely advisory body. Further, by moving it into the

⁹ Memoirs, supra at 59-60. As Truman stated, "Even when the President sits as chairman in a meeting of the National Security Council and indicates agreement, nothing is final until the Council submits a document to the President. The document states that the Council met and recommended such-and-such an action, 'which met with your approval.' When the President signs this document, the recommendation then becomes a part of the policy of the government" (*id.*).

Executive Office and making the Executive Secretary his personal representative and by not delegating it any independent authority, he also took critical steps to ensure that the NSC would be strictly the President's advisory council. This "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" is entitled to "special weight." Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933); accord, Washington Water Power Co. v. FERC, 775 F.2d 305, 322 (D.C. Cir. 1985).

3. No subsequent President has delegated to the NSC his constitutional powers over national security affairs. Since the statute delegates no independent authority to the NSC, the issue is whether any President since Truman has delegated substantial independent authority to the NSC. In fact, just as Truman molded the NSC as an advisory body in order to protect the powers of the presidency, so every President since Truman has jealously guarded these constitutional powers and has used the NSC solely as an advisory body. In particular, two important steps confirmed the Council's role as the President's personal advisory council: 1) the creation by President Eisenhower of the position of National Security Advisor, a special assistant to the President, who became responsible for the day-to-day operations of the NSC and the staff, and 2) the development of the NSC staff as the President's personal staff under President Kennedy.

NSC and its staff.¹⁶ The Tower Commission reaffirmed the advisory role of the NSC (JA 1243, emphasis added):

The National Security Council is not a decision-making body. Although its other members hold official positions in the Government, when meeting as the National Security Council they sit as advisors to the President. * * *

The National Security Council has from its inception been a highly personal instrument. Every President has turned for advice to those individuals and institutions whose judgment he has valued and trusted. * * *

Regardless of the frequency of its use, the NSC has remained a strictly advisory body. Each President has kept the burden of decision to himself, in accordance with his Constitutional responsibilities.

President Clinton has continued the tradition of using the NSC as his personal advisory council. As had his predecessors, he specifically directed that the NSC exists to "advise and assist [the President] in integrating all aspects of national security policy as it affects the United States" (Presidential Decision Directive 2 ("PDD 2") at 1 (Jan. 20, 1993) (JA 980)).¹⁷ As in previous administrations, President Clinton's National Security Advisor, Anthony Lake, administers the NSC system on the President's behalf (*id.*; JA 863-64, ¶¶5-6).

4. The district court erred in holding that the NSC has been delegated independent authority. The district court identified several areas in which it concluded that the NSC had

¹⁶ John Tower, Edmund Muskie, & Brent Scowcroft, Report of the President's Special Review Board, at I-1 (1987) ("Tower Commission Report") (JA 1235, 1240).

¹⁷ See Exhs. 9-12, 15, 16 (JA 934-962, 975-979).

been delegated authority to act independently of the President (JA 199-202). Before addressing these individually, we note several important general points.

As we have already seen, what is at stake here is the President's constitutional authority over national security affairs under Article II of the Constitution. In light of Congress's deliberate accession to President Truman's insistence that the Council must be strictly advisory, it should not lightly be presumed that any subsequent President would so radically transform the nature of the Council by assigning it independent authority to exercise his constitutional responsibilities. This is especially true given the fact that the President, who obviously cannot personally carry out each task or activity associated with his constitutional responsibility over national security, can establish a council of national security cabinet officials and a supporting staff entirely apart from any statutory provision (cf. Egan, 484 U.S. at 527). It is inconceivable that a President would give such a council independent authority to exercise the President's constitutional powers.

In fact, far from delegating any independent authority to "the NSC," the assignment of functions to the Council over which he presides evidences the President's retention of control. The district court, in ascribing independent functions to "the NSC," never explained how the Council headed by the President and managed on his behalf by the President's personal assistant, the National Security Advisor, can act "independently" of the

President. This omission is particularly telling in light of the Supreme Court's holding that neither the Office of the President nor the National Security Advisor is subject to FOIA (Kissinger, 445 U.S. at 156). The district court could only have concluded that the NSC exercised independent functions by implicitly divorcing the President from the Council and by ignoring the historical understanding and uniform determination of every President since Truman that the NSC exists solely to advise and assist the President.

Moreover, as this Court has recognized, advisors to the President may also supervise and provide direction to others in the Executive branch on behalf of the President and still act within the advise and assist framework, if they are operationally close to the President, and no delegation of authority purports to establish independent powers (Meyer, 981 F.2d at 1294-1295).

a. Intelligence Activities. The district court erred in stating that "[b]y statute, the NSC is the head of the Central Intelligence Agency" (JA 199). While the National Security Act of 1947 established the CIA "under" the NSC and subject to its direction (61 Stat. 499 (1947), sec. 102(a)), the NSC was never the "head" of the CIA. Rather, the statute makes the Director of Central Intelligence the head of the CIA (50 U.S.C. 403(a), (c)). The CIA acts under the direction of the NSC "[f]or the purpose of coordinating the intelligence activities of the several Government departments and agencies * * * " (61 Stat. 498, §102(d)). The NSC's relationship to the CIA, from the beginning, was characterized by the receipt of information, policy

coordination and oversight -- functions in accord with the advisory role of the NSC under the National Security Act (50 U.S.C. 402(b)). The NSC was never granted authority to administer the CIA as if it were the head of the agency, nor to execute the CIA's responsibilities under the law (Exec. Order 12,333, §1.8; 50 U.S.C. 403-3(d)). Furthermore, Congress has amended 50 U.S.C. 403 to eliminate the NSC's "supervisory" role over the CIA. The section now provides simply, "There is established a Central Intelligence Agency" (Intelligence Organization Act of 1992, Pub. L. No. 102-496, Title VII, §704).

In support of its conclusion that the NSC acts independently of the President, the district court recited, out of context, a single sentence from Executive Order No. 12,333, that the NSC is "the highest Executive Branch entity that provides review, guidance and direction to the conduct of all national foreign intelligence, counterintelligence, special activities, and attendant policies and programs" (Executive Order 12,333 §1.2(a), JA 398-99) (JA 199-200). The same section of the Order recognizes that the NSC was created to "advise the President" with respect to national security matters (Executive Order 12,333 §1.2(a), JA 399). Properly read to account for the President's leadership of the Council, the sentence simply places responsibility for coordination of intelligence activities at the highest level of the Executive Branch -- the President's council (Scowcroft Decl., JA 1345, ¶13). Indeed, one of the most significant intelligence functions, the approval and oversight of covert actions, "is subject to direct Presidential control" and

the NSC and its committees and staff solely advise and assist the President in this area (Scowcroft Decl. JA 1345-47, ¶¶14-16). Moreover, the NSC's Senior Director for Intelligence Programs testified that the NSC staff solely advise and assist the President through the National Security Advisor and the Deputy Advisor.¹⁸

Indeed, under Executive Order 12,333 and the Intelligence Organization Act of 1992, the Director of Central Intelligence is "responsible directly to the President and the NSC" (Executive Order No. 12,333, §1.5, JA 400), and "acts as the principal adviser to the President for intelligence matters related to national security" (50 U.S.C. 403(a)(2)(B)). Since the Director has direct recourse to the President, it is inconceivable that the NSC could direct the CIA in any way that was truly independent of the President and did not reflect his desires and intentions (Meyer, 981 F.2d at 1295).

b. Protection of National Security Information. Equally unpersuasive is the district court's reference to the NSC's role in "providing 'overall policy direction'" for the information security program under Executive Orders 12,356, §5.1(a) (executive branch)¹⁹ and 12,829, §102(a) (industrial security program)²⁰ (JA 200). Since the responsibility and power over classified information flow directly from the President's role as

¹⁸ JA 1568-1596, Deposition of George Tenet, pp. 6, 7, 9:7-13 and 16-18; 11:3-15; 12:11-22; 15:16-20; 16:6-16; 18:12-22; 19:5-20:9.

¹⁹ 47 Fed. Reg. 14874 (April 2, 1982) (JA 423).

²⁰ 58 Fed. Reg. 3479 (Jan. 5, 1993) (JA 434).

Commander-in-Chief (Egan, 484 U.S. at 527), it makes sense for the President's council to provide overall policy direction.

Furthermore, actual administration and implementation of these Executive orders lie with the Information Security Oversight Office ("ISOO") and the various other entities that generate classified information, all entities outside the NSC.²¹ It would be remarkable, however, if the President ceded full discretion to ISOO and the agencies to carry out his constitutional authority in this area without some tie-back to the President to ensure that it is carried out in accordance with his wishes. See Cole v. Young, 351 U.S. 536, 546 (1956). NSC's supervision of ISOO's implementation of these Executive Orders provides that assurance.

On April 17, 1995, President Clinton issued Executive Order 12,958, which supersedes Executive Order 12,356.²² Under this Order, overall policy direction lies with the Director of OMB, in consultation with the National Security Advisor (Executive Order 12,958, §5.2). This new Order leaves no doubt that the President retains ultimate authority over classified information which he exercises through the National Security Advisor (e.g., Exec. Order 12,958, §§3.2(c), 3.4(c), 5.2(c), 5.4(d) and (e)), or through the Director of OMB and ISOO (e.g., §§1.4(e); 1.7(c); 5.2(a) and (b), 5.3(a) and (b)).

²¹ Executive Order 12,356, §5.1(b) (JA 430A); Executive Order 12,829, §102(b) (JA 434).

²² Executive Order 12,958 is contained in the Addendum to this Brief.

The district court noted that the NSC conducts mandatory declassification review, which it characterized as a typical agency "adjudicatory" function (JA 198-99, 200), but this function proves nothing about the NSC's independence from the President. As NSC's Director of Access Management testified, the information subject to NSC's review is primarily information in which there is a presidential or NSC interest (JA 1525-1567, Van Tassel Deposition, pp. 35:22-36:10). Thus, this review is nothing more than internal management of information NSC generates in advising and assisting the President (32 C.F.R. 2101.41; Van Tassel Dep. 35:22-36:10; 10:10-17; 12:1-7; 17:18 to 18:8; 23:4-17; 19:2-3; 20:7-12). To the extent that other agencies' regulations provide for appeals to the NSC (JA 441-445), those regulations reflect that ultimate authority over classified information lies with the President who heads the NSC. President Clinton's new Executive Order leaves no doubt on this matter: it provides for appeal to the President through the National Security Advisor (e.g., Executive Order 12,958, §3.2(c), 5.4(d)).

The district court cited NSC's review of non-disclosure agreements as evidence of an independent function (JA 199). However, it is the National Security Advisor, in his role as the President's advisor, who performs the key functions of approving particular implementations of the President's policy requiring non-disclosure agreements (JA 513-551).

c. Telecommunications Policy. The district court concluded that the NSC's role in "directing, coordinating and developing

policies and programs" of the National Communications System constituted a delegation of authority independent of the President (JA 201, citing Executive Order 12,046 (JA 585)).²³ These policy responsibilities, however, are assigned not to the NSC but to the Secretary of Defense, the National Security Advisor, and another presidential assistant.²⁴

The National Communications System ("NCS") is comprised of entities within the Federal government which own or lease telecommunications assets, and was originally charged by President Kennedy to provide necessary communications for the Federal government under all conditions, including nuclear attack.²⁵ The Secretary of Defense is its "Executive Agent" (Executive Order 12,472, §(1)(e)), responsible for "ensur[ing] that the NCS conducts unified planning and operations," in order to maintain an effective and responsive emergency telecommunications capability (*id.*, §1(e)(2)). Since the System was created, telecommunications policy has been supervised by an assistant to the President, who is responsible for "policy direction of the development and operation" of the System. This Assistant works closely with the National Security Advisor (JA 582), who provides guidance concerning the President's emergency

²³ The relevant order is actually Executive Order No. 12,472, 49 Fed. Reg. 13471 (April 3, 1984) (JA 594).

²⁴ The district court's cryptic reference to "a 1990 Directive" and citation to a "National Security Directive" (JA 201) making "an NSC committee responsible for federal policies with respect to the security of telecommunications systems" (*id.*) is mystifying.

²⁵ See JA 581.

telecommunications policy.²⁶ In fact, the record indicates personal presidential involvement in telecommunications policy (e.g., JA 1451-1461; 1474).

d. Emergency Preparedness. The district court cited Executive Order 12,656 (JA 651), National Security Decision Directive ("NSDD") 47 (1982) (JA 675) and NSDD 314 (1988) (JA 699) in support of its erroneous conclusion that the NSC had been delegated "overall responsibility for a national security emergency preparedness policy" (JA 201).

Although Executive Order 12,656 (JA 653) provides that the "National Security Council shall be responsible for developing and administering such policy" (*id.*, § 101(a)), the rest of the Order, and its implementation by presidential directive, give no indication that the NSC acts beyond its advise and assist function, or actually undertakes "administrative" responsibilities for this policy. The Order provides simply that the NSC shall be "the principal forum for consideration of national security emergency preparedness policy" (*id.*, §104(a), JA 653). Under the Order, the Director of the Federal Emergency Management Agency coordinates the activities of other Federal agencies which are responsible for implementing a broad array of emergency preparedness programs which are carried out independently of the NSC (*id.*, Parts 2 through 28, JA 653-665).

²⁶ See JA 370-379; 600-608. The circular on telecommunications precedence procedures states that "the National Security Council is issuing this circular, on behalf of the President" (47 C.F.R. §213.1(b)).

NSDD 47, a 1982 presidential directive, sets forth the President's policy and directed a now-defunct entity called the Emergency Preparedness Mobilization Board to formulate policy and planning guidance, coordinate planning, resolve issues, and monitor progress with respect to emergency preparedness (NSDD 47 at 12 (JA 687)). The directive provided that "[unresolved issues would] be referred to the National Security Council for resolution and Presidential decision," a function plainly within NSC's advise and assist role (*id.*; *cf. Meyer*, 981 F.2d at 1295).

NSDD 314 (JA 699) concerns a National Security Information and Situation Management System and sets up a crisis management working group which is to "further develop the NSI&SMS and strengthen interagency capabilities and procedures for the collection, coordination, transmission, and dissemination of information in support of the President and the NSC interagency process" (JA 702, emphasis added).²⁷ The working group reported to the Policy Review Group which was chaired by the Deputy National Security Advisor, who is also an assistant to the President. Nothing in this directive suggests that the NSC has been delegated authority to act independently of the President.

e. Arms Control Verification. In NSDD 65 (JA 760), President Reagan established an NSC Arms Control Verification Committee, chaired by the National Security Advisor, and composed of senior representatives of the Secretaries of State and Defense, the DCI, the Chairman of the Joint Chiefs, and the Arms Control and Disarmament Agency (JA 761). Its role was to deal

²⁷ See note 29, *infra*.

with arms control verification policy issues "comprehensively, in an integrated fashion" (JA 760).

The district court's reliance on NSDD 65 is misplaced. The Verification Committee's functions and process were all directed at advising and assisting the President, especially in providing necessary information for compliance reports to Congress which, under Pub. L. No. 99-145, the President himself must present (e.g., JA 776; 1489-1493). Thus, the Committee's work involved no exercise of independent authority.²⁸

f. Non-Proliferation. The district court's reference to NSC's role in reviewing export licenses potentially involving nuclear explosives or nuclear nonproliferation matters (JA 201-202) is erroneous for two reasons. First, the authority to issue export licenses is expressly reserved to the Secretary of Commerce. By statute, the President may not delegate his authority with respect to export licenses "to any official of any department or agency the head of which is not appointed by the President by and with the advice and consent of the Senate" (50 U.S.C. App. 2403(e)). Since the President himself is the head of the NSC, and the Executive Secretary and National Security Advisor are not subject to Senate confirmation, the NSC could

²⁸ The court's fleeting reference to an NSC Memorandum of January 2, 1990, creating a Verification Technology Working Group (JA 799), is equally unpersuasive. That group was to provide a "forum for the exchange of information" on cooperative verification measures, to develop monitoring requirements and recommendations for enhancement of National Technical Means, "and for coordination and cooperation in maximizing the benefits of such R&D" (*id.*).

not, consistent with this statute, be delegated independent authority in this area.

Second, under Procedures Established Pursuant to the Nuclear Non-Proliferation Act of 1978 (15 C.F.R. Part 778, Suppl. 1, §1.b. (JA 706), review of export license applications by other agencies occurs only when the Departments of Energy and Commerce have first determined that such review is appropriate (JA 708). The review occurs through a Subgroup on Nuclear Export Coordination, whose voting members are representatives from Commerce, Energy, Defense, State, and the Arms Control Disarmament Agency. A non-voting NSC representative may attend the meetings (JA 736 n.2). The Subgroup's review function is to provide advice and recommendation to the Department of Commerce.

The district court cited a single step from a multi-step procedure for resolving disputes within the Subgroup (56 Fed. Reg. 6701, §5a(ii) (JA 726)) (JA 201), but ignored the fact that the final step of that process is referral to the President (JA 726, §5a(iii)), and that nothing in the interagency review process "shall derogate from the statutory authority of any agency" (*id.*, §5c) (JA 718). Nothing in these procedures, or in National Security Directive 53 (JA 746), also cited by the court, purports to interpose the NSC or NSC staff as the decision-making authority.

g. Public Diplomacy. NSDD 77 (JA 802), the sole authority the district court cited in support of its conclusion that the NSC acts independently of the President in the area of public diplomacy (JA 202), provides no support for that conclusion.

That presidential directive created a Special Planning Group, charged with "overall planning, direction, coordination and monitoring of implementation of public diplomacy activities" (JA 803). This Planning Group was chaired by the National Security Advisor and included the principals of all of the agencies involved: the Secretaries of State and Defense and the Director of the United States Information Agency (JA 802). Committees of the Group were chaired by agency representatives, and all activities were carried out by the responsible agency. NSC staff provided "staff support" to the Planning Group (JA 804-805). Nothing in NSDD 77 reflects a delegation of authority to the NSC independent of the President.

h. Promulgation of Regulations. As evidence that the NSC performs a "classic 'agency'" function, the district court cited the fact that NSC published in the Code of Federal Regulations ("C.F.R.") rules governing its voluntary public access policy and other substantive policies it coordinates among agencies in the government (JA 197-98). The court reasoned that because only regulations that are published in the C.F.R. have legal effect, such regulations are presumptively rules of an agency (JA 197), and therefore the NSC is an agency.

The court's reasoning is illogical. The legal effect of rules published in C.F.R. is irrelevant to the question whether the entity publishing the rules is a FOIA agency. In fact, the statute governing the Federal Register and C.F.R. contains its own definition of "agency" that includes the President for these purposes (44 U.S.C. 1501). Under the district court's reasoning,

mere publication in C.F.R. of an Executive Order would make the President a FOIA agency. The NSC's publishing of regulations in C.F.R. is consistent with its role as an advisory body to the President and does not indicate independence from the President. The NSC should not be faulted because it voluntarily issued formal public notice of its procedures and practices.²⁹

In sum, neither the National Security Act nor any presidential action has delegated the NSC authority to act independently of the President. The district court simply misconstrued the authorities it cited in reaching its contrary conclusion.

C. The Structure Of The NSC Reflects That It Is The Personal Tool Of The President.

The third Meyer factor is whether the entity has a "self-contained" structure which evidences authority independent of the President (Meyer, 981 F.2d at 1296). The district court noted that the NSC had a "firm structure" because it was created by Congress and that the NSC has a staff and separate budget (JA 195). These factors may show that the NSC is "an establishment in the executive branch" (JA 195-96), but simply being an "establishment" does not make the entity a FOIA agency. The statutory creation of an entity is not dispositive of its status; for example, the CEA was also created by statute and has a separate staff and appropriation (15 U.S.C. 1023(b) and (f)), but

²⁹ Moreover, the regulations specifically reserve the question of NSC's status since they are "intended to guide NSC staff response" to FOIA requests "insofar as it [FOIA] is applicable" (32 C.F.R. 2101).

this Court held that the CEA is not an agency (Rushforth, 762 F.2d at 1040-1043).

Similarly, although the absence of a staff may be evidence that an entity does not have independent authority (Meyer, 981 F.2d at 1296), the presence of a staff surely is not dispositive of whether an entity does possess substantial independent authority. The CEA, the White House Counsel's Office and, indeed, the Office of the President all have a staff to advise and assist the President.

Furthermore, neither the National Security Act nor any other statute assigns any functions to the NSC staff. In each administration, the organization and functions of the staff are subject to the direction of the President, through his National Security Advisor. As President Bush's National Security Advisor, Brent Scowcroft, emphasized:

Over time, [the NSC staff] has developed an important policy role within the Executive Branch of coordinating policy review, preparing issues for Presidential decision, and monitoring implementation. But it has remained the President's creature, molded as he sees fit, to serve as his personal staff for national security affairs.

Scowcroft Decl., JA 1341-42, ¶7, (emphasis in Declaration).

President Clinton's organization of the NSC staff, as described in the Declaration submitted by his National Security Advisor, Anthony Lake (JA 862), illustrates its role as the President's personal staff. NSC staff advise and assist President Clinton directly in the exercise of his constitutional responsibilities by, inter alia, preparing written and oral briefings for the President, assisting the President in

responding to congressional inquiries, and preparing public remarks for the President (Lake Decl., JA 864-65, ¶7).

NSC staff also advise and assist the President in organizing and preparing for the President's meetings of the Council, or Principals or Deputies Committee meetings chaired by the National Security Advisor and the Deputy National Security Advisor, by preparing NSC meeting agendas and discussion papers under the direction of the National Security Advisor, and participating in inter-agency working groups (Lake Decl., JA 866-67, ¶¶10-11, 12).³⁰

The staff takes direction from the National Security Advisor (Lake Decl., JA 866, ¶10); it does not "work for" other NSC participants. The NSC staff has no independent authority to direct national security agencies; rather, the staff operates in the same close proximity to the President as other White House staff whose exclusive role is to advise and assist the President (Lake Decl., JA 867 ¶13, JA 868-69, ¶15).

* * *

In sum, even more so than the Meyer Task Force, the NSC functions to advise and assist the President and has no

³⁰ Interagency working groups are part of the NSC's process of advising and assisting the President through his top advisors. At the request of the National Security Advisor or his Deputy, interagency working groups analyze policy options and prepare recommendations for the Deputies Committee and the Principals Committee (Scowcroft Decl., JA 1344-45, ¶12; JA 1592-1671, Itoh Deposition at pp. 24:17 to 25:3; 16:11-16.). The findings of the interagency working groups are passed on to the Deputies Committee, and the Deputies Committee reports, in turn, to the Principals Committee (Itoh Dep. 16:22-23). The Principals Committee then reports "directly to the President if there's consensus" (Itoh Dep. 23:11-17, 24:4-9).

independent authority. The President's personal leadership on the NSC defines its operational closeness to him. The National Security Act delegates no functions to the NSC other than to advise the President, and no President has transformed the NSC's role by delegating to it any of his constitutional authority in national security matters. The particular structure of the NSC and its staff is subject to the President's personal control.

D. Application Of The 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. Department of Justice, 491 U.S. 440, 466 (1989); Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 906 (D.C. Cir. 1993) ("AAPS"); Armstrong I, 924 F.2d at 289)). In view of the NSC's close proximity to the President and the daily interaction of the Council and the 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. Accordingly, FOIA should not be construed to encompass the NSC in the absence of an "express statement of Congress" that this result was intended (Franklin v. Massachusetts, 112 S. Ct. 2767, 2775 (1992)).

1. The constitutional dimension of the President's right to confidential communications is well settled. United States v. Nixon, 418 U.S. 683, 705-706 (1974); AAPS, 997 F.2d at 906; McGehee v. CIA, 697 F.2d 1095, 1108 (D.C. Cir. 1983). It extends

not only to communications directly with the President but to those among his senior advisors as well (AAPS, 997 F.2d at 909).

The potential for interference with the President's core constitutional functions by subjecting the NSC to FOIA is evident. Staff members have continuing interaction with the National Security Advisor and the President (Lake Decl., JA 864-65, ¶¶6-8). This kind of "continuing interaction" with the President "is surely in part what Congress had in mind when it exempted [from FOIA] the President's 'immediate personal staff'" (AAPS, 997 F.2d at 910, quoting Meyer, 981 F.2d at 1293). Indeed, this Court stated that "FOIA's exemption [of the President's personal staff] may be constitutionally required to protect the President's executive powers" (*id.*, citing Soucie).

If FOIA reaches all of the NSC's records, confidential communications between a sitting President and his personal assistants, including the National Security Advisor, will be subject to search, processing for applicable exemptions, discovery burdens and de novo judicial review, notwithstanding the Supreme Court's recognition in Kissinger that neither the President nor his National Security Advisor is subject to FOIA. "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process" (Nixon, 418 U.S. at 705). It would not require an actual disclosure order under FOIA to trench upon the President's right to receive advice in confidence; rather, knowledge that FOIA can be invoked during the

President's term would in itself pose a chilling effect on the advisory role.

The possible availability of FOIA exemptions does not eliminate the constitutional intrusion on the head of a coordinate branch of government (JA 210-11). By that logic, one could argue that application of the FOIA to the Supreme Court would not be harmful because its deliberations would be protected by FOIA exemptions, if properly applied by the courts. Ever since President Washington refused to "lay before the House of Representatives the instructions, correspondence, and documents relating to the negotiation of the Jay Treaty -- a refusal the wisdom of which was recognized by the House itself and has never since been doubted," it has been recognized that the President's responsibilities preclude Congress from intruding upon the relationship between the President and his staff. Curtiss-Wright, 299 U.S. at 320 (quoting 1 Messages and Papers of the Presidents, p. 194). See also Nixon, 418 U.S. at 705-706; cf. Plaut v. Spendthrift Farm, Inc., 63 USLW 4243, 4251 (S. Ct. April 18, 1995) ("the doctrine of separation of powers is a structural safeguard * * * it is a prophylactic device, establishing high walls and clear distinctions"). A grant of authority by Congress to the courts, in the civil context, to review determinations made by the President's closest advisors about the public availability of records held in close proximity to a sitting President would impinge upon the domain and operations of a coordinate branch. The Court should not lightly assume that

2. The district court attempted to accommodate both the scheme of the Presidential Records Act and the scheme of the FOIA and the Federal Records Act by permitting "high level officials of the NSC" to create and maintain presidential records in the "limited circumstances" when they act solely to advise and assist the President. The fact that the district court was constrained to recognize that the NSC and its staff can and do solely advise and assist the President belies its conclusion that the NSC is a FOIA "agency." Moreover, the court's "accommodation" rests on the idea that the "head" can be severed from the "body"; but the NSC and its staff serve the President directly and cannot be severed from the head of the entity -- the President.

Furthermore, the attempted distinction between "high level officials" and other NSC staff is inconsistent with the necessary operation of the NSC in advising and assisting the President. High level NSC officials rely heavily upon lower-echelon NSC staff for background research, information-gathering, policy analysis, and confidential advice that form the foundation of the advice and assistance provided to NSC Senior Directors, and through them, to the National Security Advisor and Deputy Advisors, and, ultimately, to the President (Lake Decl., JA 864-67, ¶¶7-12). It would seriously disrupt the NSC's mission if the possession of presidential records by lower level NSC officials could transform those records into agency records and subject them to the Federal Records Act and to FOIA. Either the NSC would be forced to preclude staff from access to records critical to their areas of responsibility, or the NSC would have to

tolerate the result that once presidential records were put in the possession of staff, the President would lose control over them.

III. THE DISTRICT COURT ERRED IN HOLDING THE NSC'S RECORDKEEPING GUIDANCE ARBITRARY AND CAPRICIOUS BECAUSE THE NSC HAD NOT ADEQUATELY EXPLAINED ITS "SUDDEN CHANGE" IN POSITION.

We have shown that, under this Court's criteria, the NSC is not substantially independent of the President and, therefore, is not subject to FOIA. The district court ruled in the alternative that, "[e]ven if the NSC did not perform rulemaking and adjudication, and otherwise exercise substantial authority independently of the President, the Court would still have to set aside the agency's declaration that it is not an agency as arbitrary and capricious" (JA 208). Thus, the court held, the NSC must be treated as a FOIA agency, even if it legally is not, because an entity that had for many years treated itself "as an agency, [cannot] suddenly change its designation without offering a reasoned explanation for the sudden change * * *" (JA 184-85). This alternative basis for the court's ruling rests on erroneous legal principles and ignores the record.

First, if, as the district court assumed for this alternative ruling, the NSC is not a FOIA agency, it is not an APA agency either (Meyer, 981 F.2d at 1304 (Wald, J., dissenting)), and the court lacked APA jurisdiction to consider whether its recordkeeping practices are arbitrary and capricious. Franklin, 112 S. Ct. at 2776. Moreover, if the NSC legally is not a FOIA agency, it cannot be "arbitrary and capricious" for the NSC to treat itself as a non-FOIA agency.

Furthermore, the court erred in holding that the NSC had not adequately explained its position. This Court, in Armstrong II, questioned whether the NSC could continue its longstanding practice of maintaining both presidential records and records that it treated under the Federal Records Act. After seeking the advice of the Department of Justice's Office of Legal Counsel, which advised that the NSC solely advises and assists the President, and believing Armstrong II precluded its "dual hat" practice, the NSC properly asserted its statutory function of advising and assisting the President on national security matters.³² The President's memorandum to the NSC, endorsing OLC's decision and directing the NSC to maintain a voluntary disclosure policy for appropriate records (JA 217), and the Executive Secretary's implementing memorandum (JA 219) fully explain the dispute concerning recordkeeping practices engendered by this litigation.

At bottom, the court's ruling rests on notions of estoppel. As a matter of law, however, estoppel does not lie against the United States. OPM v. Richmond, 496 U.S. 414 (1990); Doe v. Gates, 981 F.2d 1316, 1321 (D.C. Cir.), cert. denied, 114 S. Ct.

³² Prior to this Court's Armstrong II remand, NSC had filed responses to requests for admissions which reflected its earlier dual hat recordkeeping practices. Following this Court's remand, NSC revised its recordkeeping guidance in light of OLC's September 1993 opinion. Out of an abundance of caution, NSC moved to withdraw its prior responses and conform its admissions to its revised recordkeeping guidance. The district court's denial of this motion (JA 186-87, n.8) was an abuse of discretion since plaintiffs in fact conducted extensive discovery following the NSC's motion for summary judgment and, therefore, were not prejudiced by the motion. The ruling was also contrary to this Court's remand order which recognized that the NSC's status was an undecided legal question.

337 (1993). As a factual matter, the district court ignored the fact that the NSC never subjected to FOIA searches those records it maintained separately as presidential records. The NSC's voluntary effort to maximize disclosure, to the extent the NSC determined would be consistent with its presidential advisory responsibilities, cannot convert the President's council into an ordinary FOIA agency. Cf., Public Citizen v. Department of State, 11 F.3d 198, 203 (D.C. Cir. 1993), quoting Military Audit Project, v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981) (rejecting the "'perverse theory that a forthcoming agency is less to be trusted * * * than an unyielding one' and that to effectively penalize an agency for voluntarily declassifying documents would 'work mischief' * * * by creating an incentive against disclosure"). It was the district court, not the NSC, that announced a radical departure from nearly fifty years of practice.

CONCLUSION

For the foregoing reasons, the judgment of the district should be reversed.

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