

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Alan Kreczko to John re: Follow-up Memo (1 page)	ca. 03/1994	P5 2043
002. memo	Anthony Lake to President William J. Clinton re: Armstrong Litigation (1 page)	03/24/1994	P5 2044
003. memo	Anthony Lake to President William J. Clinton re: Armstrong Litigation; duplicate of 002 (1 page)	03/24/1994	P5 2044 Dup.
004. memo	Alan Kreczko to Anthony Lake re: Armstrong Litigation (2 pages)	03/21/1994	P5 2045
005. draft	Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment on NSC Recordkeeping Claims (81 pages)	03/18/1994	P5, P6/b(6) 2046

COLLECTION:

Clinton Presidential Records
NSC Records Management
([Access and NSC Records])
OA/Box Number: 3913

FOLDER TITLE:

9420372

Kelly Hendren
2008-0978-F
kh485

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

20372

John,

Tony tells me President decided this morning we should litigate.

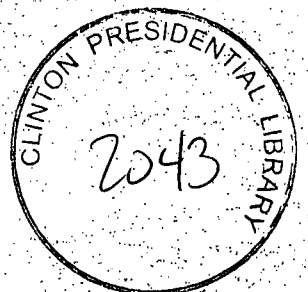
We need to move this follow-up memo into President this afternoon, ASAP, so we can refer to it in our brief and briefings of press and Congressional staff.

If signed today, I would intend to make some Congressional staff calls this afternoon. I'd like to talk to you about who I should call, and also discuss handling press tomorrow.

Please call.

Alan

X 66538



20372
THE PRESIDENT HAS SEEN
3.24.94

THE WHITE HOUSE
WASHINGTON

March 24, 1994

94 MAR 23 12:12

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: ANTHONY LAKE *RL*
SUBJECT: Armstrong Litigation

Purpose

To direct the NSC to maintain a disclosure policy with respect to certain of its documents.

Background

We are moving ahead to implement your decision that we will litigate the status of the NSC in the Armstrong case, on the basis that the NSC is a solely Presidential entity. Our brief will be filed Friday at 4:00 p.m.

As you know, our litigating stance is driven by legal considerations. However, it could be misportrayed as an effort to cloak the NSC in more secrecy than past Administrations. (Past administrations have processed public requests for access to certain categories of NSC documents. If we establish that the NSC is solely Presidential, we could, as a legal matter stop that practice.) Therefore, because it is good policy and to dispel any misperceptions, John Podesta, Bernie Nussbaum and I all recommend that notwithstanding our litigating posture, you direct the NSC to continue to make accessible to the public certain categories of NSC documents, and to leave certain categories of NSC documents to the next Administration as part of the NSC's institutional records (as past Administrations have done.)

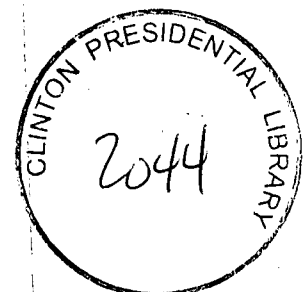
We intend to draw attention to the directive when briefing Congress on Thursday and the press on Friday on the fact that we will be asserting in litigation that the NSC is solely Presidential and, as such, not subject to the Freedom of Information Act.

RECOMMENDATION

That you sign the directive at Tab A.

Attachment
Tab A Memorandum for the NSC

04 MAR 24 12:25



PHOTOCOPY
WJC HANDWRITING

CLINTON LIBRARY PHOTOCOPY

cc: Vice President
Chief of Staff

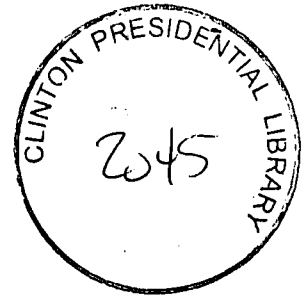
NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

March 21, 1994

ACTION

MEMORANDUM FOR ANTHONY LAKE

FROM: ALAN KRECZKO *AK*
SUBJECT: Armstrong Litigation



While we do not yet have a Presidential decision, we are preparing to litigate on the basis that we are Presidential.

We must file our brief on Friday, by 4:00 p.m. The brief (draft at Tab III) argues that the sole function of the National Security Council is to advise and assist the President. While you do not need to review the brief, you might find interesting the discussion of the evolution of the NSC and how it has been used by different Presidents.

We need to take several actions contemporaneous with or in advance of the filing of the brief.

First, we need a Presidential decision directing the NSC to continue to review public requests under FOIA-like standards for certain categories of NSC documents, notwithstanding our legal assertion that we are totally Presidential and, therefore, exempt from FOIA. This decision is needed to demonstrate that we are asserting we are Presidential solely for legal reasons, and not to cloak the NSC in more secrecy than past administrations. A memo to the President is attached at Tab I. We recommend you sign it now, with the understanding that John Podesta will forward it immediately if the President chooses the litigate option.

Second, we need a supporting affidavit from you for the litigation. The purpose of the affidavit is to demonstrate that the NSC staff operates at your direction, to advise and assist the President. We will need to file the affidavit with our brief on Friday. A first draft of the affidavit is at Tab II. I would appreciate any comments/inputs at an early stage since we will need to coordinate this with Justice. (If you provide the affidavit it is likely that plaintiffs will seek your deposition concerning the operation of the NSC. This may require a several hour commitment of your time. While we could redo the affidavit for Will's signature instead, you are in a much stronger position to attest to the facts in it.)

Third, we are planning to brief interested congressional staff on Thursday, and the five major newspapers on Friday. In each, our

emphasis will be that the "solely Presidential" argument is driven by legal considerations, and that as a matter of policy, the President has directed that the NSC continue to make some of its records accessible under FOIA-like standards. We also intend to issue a brief press statement on Friday at 4:00 p.m.

Concurrences by: Don Steinberg *by AK*, Bill Danvers *by AK*, Bill Leary *by AK*

RECOMMENDATION

1. That you sign the memorandum for the President at Tab I, recommending that he direct the NSC to continue a policy of disclosure of certain NSC documents. ✓
2. That you review and provide me preliminary comments on the draft affidavit at Tab II. *ok. Needs to be 7:15 if in ad stand.*
3. That you authorize congressional consultations, coordinated with Bill Danvers, on Thursday afternoon.

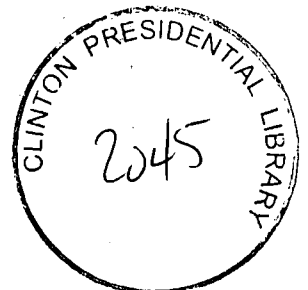
Approve *R* Disapprove _____

4. That you authorize a briefing of major newspapers on Friday morning (coordinated with Don Steinberg).

Approve *R* Disapprove _____

Attachments

Tab I Memo to President
 Tab A Disclosure Direction to NSC
 Tab II Draft Affidavit
 Tab III Draft Brief



July 1. (703) 522-5348
(202) 514-4782

DRAFT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT ARMSTRONG, et al.,

Plaintiffs,

v.

EXECUTIVE OFFICE OF THE PRESIDENT,
et al.,

Defendants.

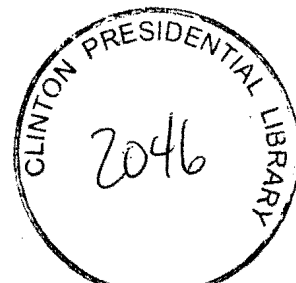
DRAFT 3/18/94 4 PM
PRIVILEGED ATTORNEY WORK
PRODUCT; ATTORNEY-CLIENT
PRIVILEGED

Civil Action No.
89-0142 (CRR)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON
NSC RECORDKEEPING CLAIMS

PRELIMINARY STATEMENT

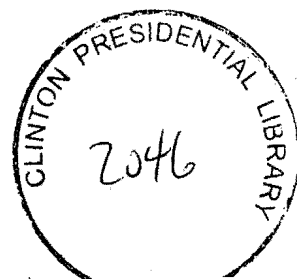
From its creation in 1947, ^{as its sole} The National Security Council (NSC) has (had as its) function to advise and assist the President in the exercise of his national security and foreign relations powers under Article II of the Constitution. The NSC has no independent authority. Under its organic statute, and as a matter of historical practice, the Council acts as an arm of the President, providing him with recommendations and as his alter ego in seeing that his policies are carried out. For these reasons, records created or received by the NSC, including those on electronic communications systems, are properly treated as "Presidential records" under the Presidential Records Act of 1978 ("PRA"), 44 U.S.C. 2201, and not as Federal records subject to the Federal Records Act ("FRA"), 44 U.S.C. §§ 2101, 2901, 3101, 3301, or records of an "agency" subject to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.



CLINTON LIBRARY PHOTOCOPY

It is true that the NSC has treated itself as subject to the FOIA with respect to some of its records, and has also scheduled such records under the FRA. In its August 1993 decision in this case, however, the Court of Appeals for the District of Columbia Circuit effectively held that NSC could not maintain such a bifurcated system of records -- treating some as "federal" records (and "agency" records subject to FOIA), and some as "presidential." Armstrong v. Executive Office of the President, 1 F.3d 1274, 1290-96 (D.C. Cir. 1993). Notwithstanding the fact that NSC had subjected itself to the procedures of and jurisdiction under FOIA ^{with respect to some of its records} the D.C. Circuit noted that the question of NSC's status had never been definitively decided, and remanded to this Court for a determination of whether it is an agency subject to FOIA.

Under settled case law, an EOP entity is not an agency under the FOIA if it solely advises and assists the President. The structure and functions of the NSC as set forth in the 1947 National Security Act, the functions that have been assigned to the Council through Presidential directives, and the historical record, demonstrate that NSC exists solely to advise and assist the President in the discharge of his core constitutional national security responsibilities. Accordingly, plaintiffs' challenge under the Federal Records Act to the NSC's electronic communications record-keeping practices must be rejected because the Court lacks jurisdiction to review the recordkeeping practices of a presidential entity subject solely to the

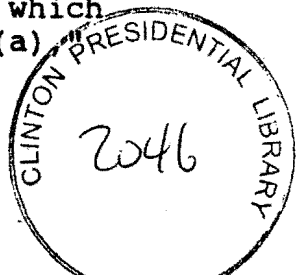


Presidential Records Act. Armstrong v. Executive Office of the President, 924 F.2d 282 (D.C. Cir. 1991) ("Armstrong I").¹

A reaffirmation by this Court of the NSC's traditional role as advisor and assistant to the President creates no significant discontinuity with the past. On the one hand, holding the NSC to be solely an advise and assist entity recognizes its key role as part of the essentially confidential process of developing and implementing national security policy. On the other hand, because the President has directed the implementation of a voluntary disclosure policy that will, in many respects, resemble FOIA, see part __, infra, information that can be made available

Also enables continuity
of practice ~~that~~ of previous
Presidents that

¹ Pursuant to ¶ 20(b) of the January 27, 1994 Stipulation and Order, defendants file this brief principally to apprise the Court that all electronic communications created or received within the National Security Council (NSC), for purposes of NSC's recordkeeping practices, should be treated as "presidential" in nature. See Parts I-III. While the court of appeals remand also concerned the recordkeeping practices of the Office of Science and Technology Policy ("OSTP"), see Armstrong, 1 F.3d at 1290, OSTP has issued guidance under which records created or received on its electronic communication systems shall be treated as Federal records. No other individual or component of the EOP creates both federal and presidential records on existing electronic communications systems within the EOP. The EOP's general guidance on categorizing "presidential" and "federal" records throughout the EOP (including records created or received on electronic communications systems) is set forth in two memoranda titled "Presidential Records" and "Federal Records," respectively, each dated May 5, 1993, as amended on March __, 1994 (see Exh. __ and __). In part __, infra, defendants separately address whether any of the materials within the scope of plaintiffs' present FOIA request, as set forth in ¶ 1 of the January 27, 1994 Stipulation and Order, "are properly treated as 'presidential,' including being "Presidential records for which disclosure is currently restricted under 44 U.S.C. § 2204(a) see id., at ¶ 6.



to the public will be. This litigation, at least as it pertains to NSC, should come to an end.²

STATUTORY AND HISTORICAL BACKGROUND

A. National Security Act of 1947

The National Security Act of 1947, 50 U.S.C. § 402, established the National Security Council^{NSC} to serve as "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), reprinted in 1947 U.S. Code Cong. Serv. 1487, 1494 (Exh. No. submitted herewith).³

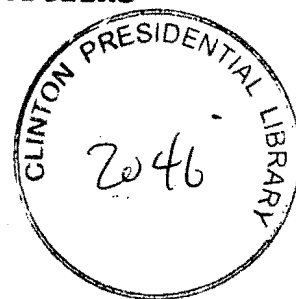
Under the Act, the Council^{NSC} is comprised of the President, the Vice President, the Secretary of State and the Secretary of Defense. 50 U.S.C. § 402(a)(1)-(4).⁴ The President may also

² During the pendency of this litigation, no records or any of the materials subject to the Court's injunction that may contain record information (i.e., backup tapes and hard disks) will be disposed until the NSC's legal status is resolved. Furthermore, as discussed in part infra, the plaintiffs FOIA request will continue to be processed pursuant to ¶¶ 4-10 of the January 27, 1994 Stipulation and Order.

³ The creation of the NSC was one part of a much broader purpose of the 1947 Act to unify the military services by establishing the Department of Defense over the Departments of the Army, Navy and Air Force. See Title II of Pub. L. No. 253, 61 Stat. 495 (Exh No. submitted herewith). The Act also formally established the Joint Chiefs of Staff and the Central Intelligence Agency. Id., § 102.

⁴ In addition, the Director of Central Intelligence and Chairman of the Joint Chiefs of Staff are statutory advisers to the NSC directed by the President to attend Council meetings. See Presidential Decision Directive ("PDD") 2, January 20, 1993, Exh. No. submitted herewith). In addition, President Clinton has directed that the membership of the Council also include the Secretary of the Treasury, the Representative to the United Nations, the Assistant to the President for National Security

(continued...)



be supplemented by

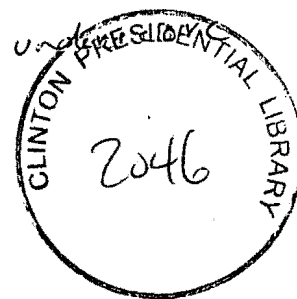
The presence of the President?

with advice
concerning
designate the secretaries and under-secretaries of other executive and military departments to serve at his pleasure.

Id., § 402(a)(7).⁵ The Act provides that "[t]he President of the United States ^{or his designee} shall preside over meetings of the Council." Id., § 402(a).

Since its inception in 1947, the statutory purposes and functions of the National Security Council have remained constant. Section 402(a) of the Act provides, in part:

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

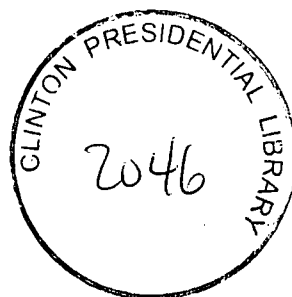


⁴(...continued)

Affairs, the Assistant to the President for Economic Policy, the Chief of Staff to the President.

⁵ Council membership and participants have changed somewhat since 1947, but throughout its existence the Council's members have been cabinet members and other senior executive officials. For example, under the 1947 Act, membership on the NSC included the President, Secretaries of State and Defense, and the service secretaries for the Army, Navy, and Air Force, as well as the chairman of the National Security Resources Board. The 1949 amendments to the Act deleted the service secretaries as NSC members, added the Vice President, and authorized the President to add members from among secretaries and under-secretaries of other executive departments. See National Security Act of 1947, supra, § 101(a); National Security Act Amendments of 1949, Pub. L. No. 216, § 3, 63 Stat. 590, 591 (1949). See also Mutual Security Act of 1951, Pub. L. No. 165, § 501(e)(1), 65 Stat. 517, 522 (1951) (adding Director for Mutual Security); Department of Defense Reorganization Act, Pub. L. No. 99-433, § 203, 100 Stat. 1011 (1986) (making the Chairman of Joint Chiefs of Staff a participant, "subject to the direction of the President"); Anti-Drug Abuse Act, Pub. L. No. 100-690, §§ 1003(a)(3), 1009, 102 Stat. 4181, 4182 (1988) (formerly codified at 5 U.S.C. § 402(f)) (temporarily making the Director for National Drug Control Policy a participant, "subject to the direction of the President").

effectively in matters involving national security.



Id. § 402(a).

Subsection (b) of the Act provides:

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

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

emphasis added

(2) to consider policies on matters of common interest to the department and agencies of the Government concerned with the national security, and to make recommendations to the President in connection therewith.

Id. § 402(b).

Subsection (d) of the Act provides:

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

Id. § 402(d).

Finally, Section 402(c) of the Act provides that "the Council shall have a staff to be headed by a civilian executive secretary who shall be appointed by the President." 50 U.S.C. § 402(c). The executive secretary, subject to the direction of the Council, is authorized to appoint and fix the compensation of

"such personnel as may be necessary to perform such duties as may be prescribed by the Council in connection with the performance of its functions." Id.⁶

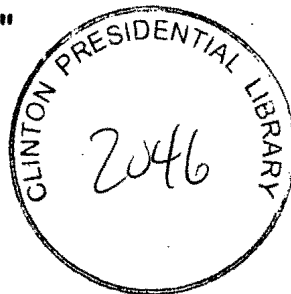
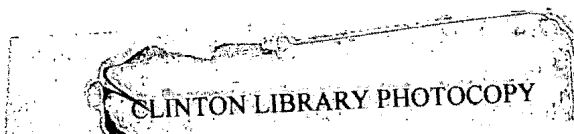
B. The Historical Development of the NSC

The NSC was born primarily of the lessons of World War II. During the war, President Franklin D. Roosevelt coordinated much national security policy himself through personal consultation with the Chiefs of Staff of the military services, personal advisors, (and in collaboration with British Prime Minister Winston Churchill.⁷) The American military's exposure to the British Combined Chiefs of Staff and Committee of Imperial Defense led to a movement to establish similar coordinating bodies in the United States to avoid the more ad hoc advisory system that characterized the Roosevelt era.

Shortly after the war, work began (in earnest) on reorganizing the entire U.S. national security structure. The debate pitted those intent on unifying all of the military services into a single department of national defense and others, led by Navy

⁶ Since 1947, the President has issued Executive orders designating some of the specific topics on which the NSC is to advise and assist the President. Current executive orders specify, inter alia, that NSC shall be involved in the formulation of policy regarding emergency preparedness, E.O. 12656, E.O. 12472, E.O. 12127; the protection of (sensitive) national security information, E.O. 12356; foreign investment, E.O. 11858; and intelligence activities, E.O. 12333. The NSC's specific functions under these orders are discussed in part infra.

⁷ See Hoxie, Gordon R. "The National Security Council," Presidential Studies Quarterly (Winter 1982) (Exh. No. _____ submitted herewith) at 108.



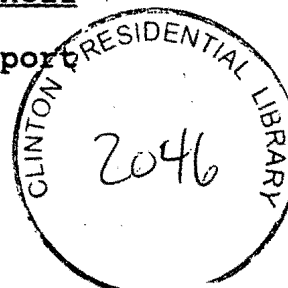
Secretary James L. Forrestal, who favored a high-level, inter-agency national security coordinating body in lieu a unified defense agency.⁸

Forrestal associate Ferdinand Eberstadt prepared a study on the matter which first coined the phrase "National Security Council," Nelson (Exh. No. __) at 362, to be a "kind of a war cabinet in which the responsibilities of the President could be vested." Hammond (Exh. No. __) at 899. Under the Eberstadt proposal, the President would chair the NSC and, in his absence, the Vice President. Id. Membership would include the Secretaries of State, War, Navy and Air, with the Joint Chiefs of Staff and Central Intelligence Agency as part of its deliberations.⁹

Since he favored a unified defense department, Truman discarded the Navy's proposed alternative, the National Security Council, in a December 1945 proposal to Congress. Nelson (Exh No. __) at 362; Sander (Exh. No. __) at 374. Ultimately,

⁸ See Paul Y. Hammond, "The National Security Council as a Device for Interdepartmental Coordination: An Interpretation and Appraisal." American Political Science Review, December 1960, at 899 (hereafter "Hammond") (Exh No. __ submitted herewith); Alfred D. Sander "Truman and the National Security Council, 1945-47, Journal of American History, September 1972 at 370 (hereafter hereafter "Sander") (Exh. No. __ submitted herewith); Anna Kasten Nelson, "President Truman and the Evolution of the National Security Council," Journal of American History, September 1985, at 360-362 (hereafter "Nelson") (Exh. No. __ submitted herewith).

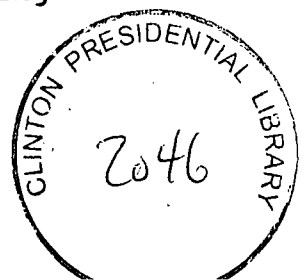
⁹ See Karl F. Inderfurth and Lock K. Johnson, Decisions of the Highest Order: Perspectives on the National Security Council (Pacific Grove, California: Brooks/Cole 1988) (hereafter "Inderfurth") (Exh. No. __ submitted herewith), Eberstadt Report Excerpts, at 33.



however, Truman assented to establishing an NSC in order to obtain Navy support for defense unification, Nelson (Exh. No. ____) at 363; Sander (Exh. No. ____) at 375, but not before significant changes in NSC's proposed functions.

Truman's advisors in the Bureau of the Budget (hereafter "BOB") "look[ed] at the proposal from the point of view of the Presidency." Sander (Exh. No. ____) at 379. The Bureau was concerned that the council was intended "to try to capture the President to get decisions made collectively in his presence." Id. at 378. They were also concerned that the proposed NSC "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." Id. at 379. The Bureau was also concerned that the council would be dominated by the military and that no staff outside of the military was planned. Id.

For these reasons, the Bureau recommended that NSC be solely advisory to the president and not be given any authoritative functions in the statute. Sander (Exh. No. ____) at 379. The Bureau proposed virtually all of the advisory language that remains in the National Security Act today, including that "the function of the Council shall be to advise the President with respect to the integration of foreign and military policies and to enable the military services and other agencies of the Government to cooperate more effectively in matters involving national security." Id.

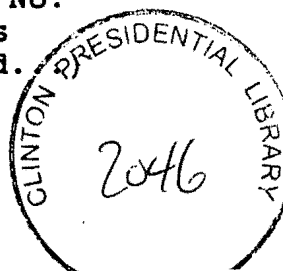


(1) The Truman NSC

After the 1947 Act was signed into law, competing visions of how the NSC would actually function again emerged, see Nelson (Exh. No. ____) at 364, and the view that NSC should serve solely as an advisory arm of the President again prevailed. James Forrestal, who became the first Secretary of Defense, viewed the NSC as "a part of the defense establishment." Id. at 364. He "envisioned a council at which the President would rarely preside, since the major function of the council was to relieve the President." Id. The NSC would act "within the broad scope of policies already approved by the President" and might recommend action to individual departments without first referring the matter to the President. Id. Forrestal wanted the NSC to be housed as close as possible to the Secretary of Defense, and to preside himself over the Council in the President's absence. Id.

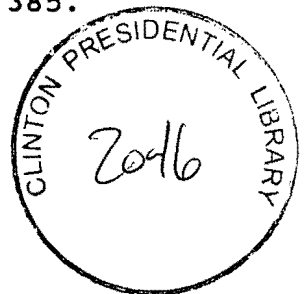
The Bureau of the Budget again had a much different view, and regarded the NSC staff as a "further enlargement of the Presidential staff." See Nelson (Exh. No. ____) at 365. The Bureau recommended that the NSC secretariat be housed in the Executive Office building "since the basic reason for the Council's existence is to advise and aid the President." Id. See also Sander (Exh. No. ____) at 387.¹⁰ It also believed the

¹⁰ See James S. Lay and Robert H. Johnson, Organizational History of the National Security Council During the Truman and Eisenhower Administrations (hereafter "Lay & Johnson") (Exh. No. ____ submitted herewith) at 6, n.16 ("In fact, office space was (continued.)



council should not circumscribe the President's ability to make decisions freely, and recommended that it be regarded in the same manner as the President's cabinet, focused on national security affairs. Nelson (Exh. No. ____) at 365; Sander (Exh. No. ____) at 384. Finally, the Bureau recommended that the statutory executive secretary be considered the President's man rather than that of the Council, an administrative assistant who should have full access to the President. Id. "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 (Exh. No. ____) at 385.

Truman, of course, accepted the plan from the BOB. It was consistent with his determination that the presidency never be weakened while he was in charge. It also reflected his view that only the president could really make the tough decisions on foreign policy.



Nelson (Exh. No. ____) at 366.

At the NSC's first meeting on September 26, 1947, President Truman, according to NSC Executive Secretary, Sidney W. Souers, "indicated that he regarded it as his council" See Sander (Exh. No. ____) at 387. Truman used the council "'only as a place for recommendations to be worked out. . . . The policy itself has to come from the President, as all final decisions have to be made by him.'" Id. (citation omitted).

¹⁰(...continued)
provided for the Executive Secretary in the Pentagon, but never occupied. The decision to locate the Council offices in the Executive Office Building reflected a conscious recognition of the Council's role as a staff arm to the President.")

Truman also made clear from the beginning that, when he approved recommendations made by the Council, 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 (Exh. No. ___) at 13.

In Reorganization Plan No. 4 of 1949, the NSC was formally placed within the Executive Office of the President, "thus formalizing a de facto situation." See Senate Report 838, 81st Congress, 1st Session at 2 (Exh. No. ___ submitted herewith).

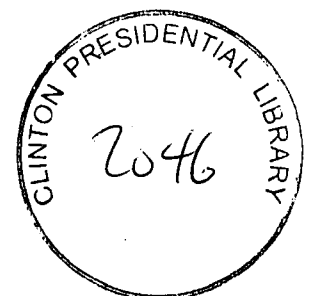
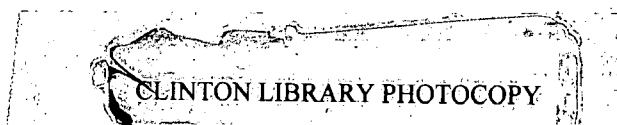
The Senate Report on this reorganization stated:

The President as chairman controls NSC business, making his desires known through the executive secretary who is appointed by the President without Senate confirmation, and who acts as the President's staff assistant for national security matters.

Id. at 2. The report went on to cite a memorandum prepared by the Truman Administration in support of this reorganization which concluded that:

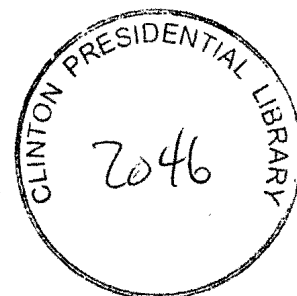
the Council function of advising the President indicates the desirability of its official recognition as a strictly Presidential staff organization, a high-policy planning arm of the President. It pulls together factors involved in a national security problem and presents to the office an integrated 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 * * *

Id.



Following the advice of his Budget Bureau, Truman stayed away from many early NSC meetings, attending just 12 of 57 meetings between the September 26, 1947 meeting and June 23, 1950. Lay & Johnson (Exh. No. ____) at 5, n.11. During this period, the NSC focused on studies concerning critical areas of the world. Id. at 9. After approval by the President, the NSC staff would prepare a paper for presentation to the Council. Nelson (Exh. No. ____) at 368; Lay & Johnson (Exh. No. ____) at 11.

. . . A day or two after the Council meeting the Executive Secretary submitted to the President the record of the Council's actions and the policy papers as amended and adopted by the Council, including any remaining differences of view. . . . The President acted upon the Council's recommendations, deciding any remaining differences of view. The President approved only the "Conclusions" of the policy paper; these became the national security policy on the subject.



Lay & Johnson (Exh. No. ____) at 12-13."

The NSC staff during the Truman Presidency was organized in three parts. See Lay & Johnson (Exh. No. ____) at 8. The NSC Executive Secretary was considered an assistant to the President, and worked to coordinate and keep the President apprised of Council activities. Id. The NSC Secretariat performed duties such as circulating papers and preparing agendas. Id. These offices constituted the permanent Council employees. Id. An "NSC Staff" was created consisting of officials detailed on a

" In April 1949, Truman told the NSC that its reports and those from the CIA "'proved to be one of the best means available to the President for obtaining coordinated advice as a basis of reaching decisions.'" Nelson at 376-77 citing Minutes of NSC Meeting, April 2, 1949.

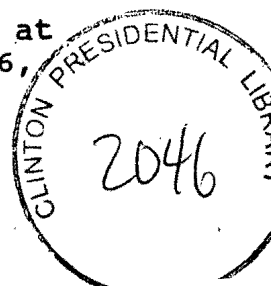
full time basis by the departments and agencies represented on the Council. Id. at 8. Because the Council expected to deal primarily in foreign affairs, the Staff was headed by a State Department official called the "Coordinator." The Staff was assigned to the Council on a full-time basis and physically located together in NSC offices, though they also maintained offices in and contact with their representative agencies. Id. at 10.¹²

The outbreak of the Korean War marked a turning point in the history of the NSC. Nelson (Exh. No. ____) at 372. "The President began to preside regularly at Council meetings and made clear that he intended to use the Council to discuss every policy matter concerning the national security." Id. at 373.¹³ Truman also created a new "NSC Senior Staff," by directing NSC members to appoint an individual at the assistant secretary level to meet every two weeks and participate actively in NSC staff work, while existing NSC Staff within the EOP became their Staff Assistants. Id. at 17.

Of particular significance, Truman assigned the Executive Secretary to direct the Senior Staff's activities, ending the

¹² Another staff structure was added in November 1947, when the military services designated "Consultants" to the Executive Secretary from the plans and operations divisions of the military services. Lay & Johnson (Exh. No. ____) at 8. This interagency staff assisted in substantive research and prepared papers for NSC consideration. Id. at 11.

¹³ From June 28, 1950 to January 9, 1953, Truman presided at 62 of 71 Council meetings. Lay & Johnson (Exh. No. ____) at 16, n.29.



State Department's coordination role. Lay & Johnson (Exh. No. ____) at 17. For the first time, this established staff supervision within the EOP in "an official without departmental ties." Id. at 17-18.

(2) The Eisenhower NSC

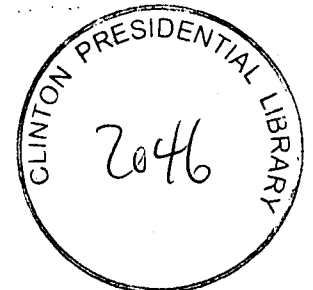
President Dwight D. Eisenhower established new and distinct structures within the NSC, and used them extensively throughout his Presidency. But the fundamental purpose of the NSC -- to advise and assist the President in the discharge of national security policy -- did not change.

Eisenhower conceived of the NSC as:

a corporate body composed of individuals advising the President in their own right, rather than as representatives of their respective departments and agencies. Their function should be to seek, with their background and experience, the most statesmanlike solution to the problems of national security, rather than to reach solutions which represent merely a compromise of departmental positions.

Lay & Johnson (Exh. No. ____) at 30. Eisenhower national security assistant Robert Cutler wrote in 1956:

Fundamentally, the Council is a vehicle for a President to use in accordance with its suitability to his plan for conducting his great office. The Congress provided the vehicle, but it is in the President's discretion to do with it what he wishes.¹⁴



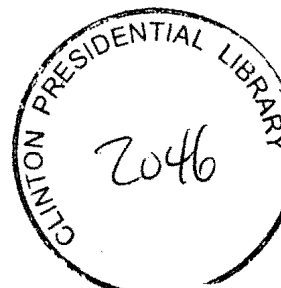
¹⁴ Robert Cutler, "The Development of the National Security Council," Foreign Affairs, April 1956, reprinted in Inderfurth & Johnson pp. 55-65 (hereafter "Cutler in Inderfurth & Johnson") (Exh. No. ____ submitted herewith) at 56.

In March 1953, Eisenhower approved a plan developed by Cutler that reflected several key principles for NSC's organization, including the "importance of the Presidential advisory character of the Council, and, deriving therefrom, the importance of adjusting the Council's operation to the needs of the new President." Lay & Johnson (Exh. No. ____) at 30. The most significant feature of Cutler's March 1953 plan was the role of Special Assistant to the President, which he assumed at that time. Id. Cutler described this non-statutory position as "the principal executive officer of the National Security Council." March 1953 Report, Exh No. ____ at ____.

This change represented the designation by the President of a member of the White House staff as his principal staff officer for national security affairs. The Executive Secretary, who had previously performed this general role, was reappointed as head of the career staff of the Council

Lay & Johnson (Exh. No. ____) at 26.

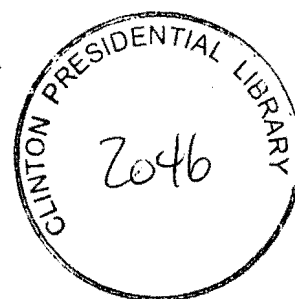
The Special Assistant was responsible for determining the NSC's agenda, subject to the President's desires, and for briefing the President in advance of Council meetings and for presenting discussion at those meetings. Lay & Johnson (Exh. No. ____) at 26; see also March 1953 Report, Tab No. ____ at ____ . The Special Assistant was also charged with bringing to the President's attention lack of progress in carrying out assigned tasks, and recommendations for appropriate action. Lay & Johnson (Exh. No. ____) at 26; As under Truman, however, responsibility



for implementation of policy under the Eisenhower NSC rested with responsible agency heads. Id.

Eisenhower also reorganized the NSC staff. The Senior Staff of interagency officials designated by President Truman was re-named the "Planning Board," and the NSC staff assistants were re-named the Board Assistants. Lay & Johnson (Exh. No. ____) at 25. These staffs continued to have the same functions, although, of significance, the Special Assistant to the President was named as Chairman of the Planning Board in lieu of the NSC executive secretary. Id.

The Special Assistant plays a leading role in the Planning Board as presiding officer and as a non-voting participant. . . . [A]s the principal staff officer of the President for national security affairs, he is concerned primarily to ensure that the paper is adequate and satisfactorily reflects the views of the members of the Planning Board representing the various agencies.



Lay & Johnson at 33. This meant that the principal NSC staff would be coordinated by an assistant to the president.¹⁵

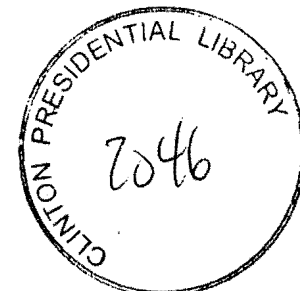
Another significant organizational change under President Eisenhower was the establishment of the Operations Coordinating Board (hereafter "OCB"). The OCB's function was to "advise with"

¹⁵ Another staff innovation under Eisenhower was the establishment within NSC of a small "Special Staff" under the supervision of the Deputy Executive Secretary. Lay & Johnson (Exh. No. ____) at 27. This staff performed, inter alia, "independent analysis and review of each Planning Board report before its submission to the Council," as well as a "continuous examination of the totality of national security policy with a view toward determining if gaps existed which should be filled and if important issues or anticipated developments were sufficiently explored." Id.

those agencies responsible for actually implementing a national security policy recommended by the NSC and approved by the President.¹⁶ Lay & Johnson (Exh. No. __) at 36-37. This included matters such as operational planning, and coordinating the execution of such plans, but not the power to direct any action. Id. at 37. The OCB's mandate was limited to international affairs, but nonetheless it was involved in the bulk of Presidentially-approved national security policies. Id.¹⁷

Thus, under Eisenhower the National Security Council was viewed as sitting "at the top of Policy Hill."

On one side of this hill, policy recommendations travel upward through the Planning Board to the Council, where they are thrashed out and submitted to the President. When the President has approved a policy recommendation, it travels down the other side of Policy Hill to the departments and agencies responsible for its execution. . . . Part way down this hill is the Operations Coordinating Board, to which the President refers an approved national security policy as its authority to advise with the relevant department and agencies as to their detailed operational planning



¹⁶ The OCB was chaired by the Under Secretary of State and, included the Deputy Secretary of Defense, the Director of the Foreign Operations Administration, the Director of Central Intelligence, and a representative of the President. Lay & Johnson (Exh. No. __) at 36.

¹⁷ Initially, the OCB was staffed separately from the NSC staff. See Lay & Johnson (Exh. No. __) at 40-41. In February 1957, however, President Eisenhower issued a revised Executive order placing the OCB within the structure of the National Security Council. OCB staff were moved into the Executive Office Building adjacent to the NSC staff, and the staffs were integrated into a single NSC staff and funded through appropriations to the NSC. Id.

See Cutler in Inderfurth & Johnson (Exh. No. __) at 58.

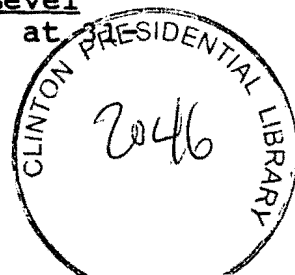
The Eisenhower system also emphasized "carefully staffed and carefully written documents." See Cutler in Inderfurth & Johnson at 58. This "tendency toward formality and stylization" deliberately "eliminated the informal 'kicking about' of a problem at the Council meeting." Id. at 59. The Eisenhower system accepted this disadvantage in favor of a decision-making process "based on an exactly prepared and commonly understood statement of facts and recommendations." Id.

(3) The Kennedy NSC

The NSC system in administration of John F. Kennedy was marked by less formal and structured means for providing the President advice on national security issues. Kennedy was influenced by a study of the Eisenhower NSC organization undertaken by Senator Henry M. Jackson's Committee on Government Operations, Subcommittee on National Policy Machinery.¹⁸ The Jackson Subcommittee issued a report in December 1960 (hereafter "Jackson report"),¹⁹ which criticized several elements of the Eisenhower NSC and foreshadowed many of the changes which Kennedy made that underscored NSC's function as an arm of the President.

¹⁸ See Bromley K. Smith, Organizational History of the National Security Council During the Kennedy and Johnson Administrations at 6 (hereafter "Smith") (Exh. No. __ submitted herewith).

¹⁹ Henry M. Jackson, The National Security Council: Jackson Subcommittee Papers on Policy-making at the Presidential Level (New York: Praeger, 1965) (Exh. No. __ submitted herewith) at 42.



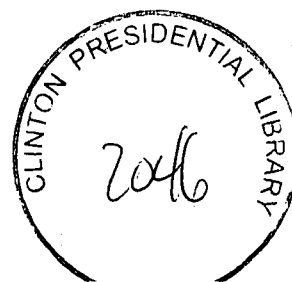
The report called the NSC Planning Board a "policy paper production" system which was "not a creative instrument for developing and bringing forward imaginative and sharply defined choices" Jackson Report (Exh. No. __) at 33-34. The Eisenhower Operations Coordinating Board of NSC was also singled out for criticism as "having little impact on the real coordination of policy execution." Id.

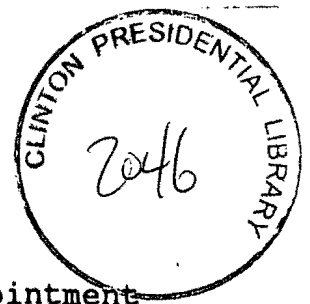
The Jackson report concluded that "the real worth of the Council to a President lies in its being an accustomed forum where he and a small number of his top advisers can gain that intellectual intimacy and mutual understanding on which true coordination depends." Jackson Report (Exh. No. __) at 38. Accordingly, the report made several suggestions to "deinstitutionalize" and "humanize" the NSC process. Id. at 39.

Of note, the Jackson report recommended that "[t]he Council exists only to serve the President" and should meet only when the President wishes its advice. Jackson Report (Exh. No. __) at 39. In lieu of the Planning Board, it recommended the use of more informal working groups, and also recommended that:

The President at all times should have the help and protection of a small personal staff whose members work "outside the system," who are sensitive to the President's own information needs, and who can assist him in asking relevant questions of his departmental chiefs, in making suggestions for policy initiatives not emerging from the operating departments and agencies, and in spotting gaps in policy execution.

Id. at 41.





McGeorge Bundy embraced much of what the Jackson report recommended. On December 31, 1960, in announcing the appointment of McGeorge Bundy as his Special Assistant for National Security Affairs, the President-elect announced his intention "to consolidate under Mr. Bundy's direction the National Security Council secretariat, the staff and functions of the Operations Planning Board and the continuing function of special projects within the White House staff." Smith (Exh. No. __) at 9. Kennedy also directed Bundy to simplify the NSC organization "toward the end that we may have a single, small, but strongly organized staff unit to assist me in obtaining advice from, and coordinating the operations of, the government agencies concerned with national security affairs." Id.

The OCB was in fact abolished, see Smith (Exh. No. __) at 13-14, as well as the function of the Planning Board as staff to the NSC. The operations of the Council also changed considerably. Kennedy regarded "formal meetings of the National Security Council which include a much wider group as not effective," id. at __, and utilized informal or ad hoc groups outside of the NSC structure. He met three to four times a week with NSC principals, the Secretaries of State and Defense, the Director of Central Intelligence, the Vice President and Bundy, but not in a formal NSC Council meeting. Id. at 17.²⁰

²⁰ One notable example of a non-permanent entity used by Kennedy was the designation of the Executive Committee of the National Security Council ("EXCOM") to deal with the Cuban missile crisis of 1962. Smith (Exh. No. __) at 45-46. EXCOM was (continued...)

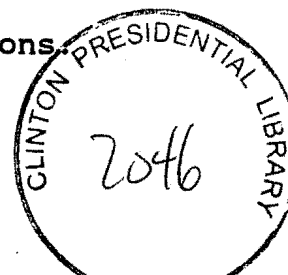
Also, in contrast to the staff emphasis in the 1950s on coordination of issues for the Council, "Bundy made clear that the business of the revised national security staff would go well beyond what would be treated in formal meetings of the Council." Id. "'It is our purpose . . . , in cooperation with other Presidential staff officers, to meet the President's staff needs throughout the national security area.'" Id. 43-44 quoting Bundy.²¹

(4) The Johnson NSC

The changes to the NSC's function made by President Kennedy -- a greater reliance on informal meetings and the use of NSC staff as personal advisors -- were carried over by President Lyndon Johnson, though with some additional variations suited to his own style. At his first NSC meeting on December 5, 1963, Johnson indicated that "not all national security work could be done in meetings of the Council." Smith (Exh. No. __) at 57. Johnson planned "to use the Council from time to time as a forum in which national security matters could be examined," but also "to hold special meetings for special purposes." Id.

²⁰(...continued)
not permanent and was dissolved in January 1963 after the missile crisis was over. Id. at 46.

²¹ In lieu of a formal process of preparing papers for the President through the NSC and receiving Presidential decisions thereon, the Kennedy Administration developed National Security Action Memoranda ("NASM"), signed by either the President or Bundy, which set forth specific instructions, requests for studies, questions to be answered, or solicited recommendations. Smith at 23.



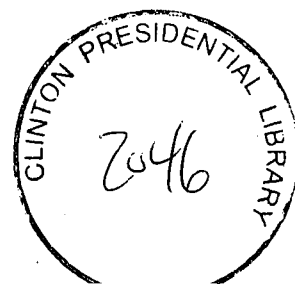
Johnson preferred national security advice directly from his Secretaries of Defense and State. Smith (Exh. No. ___) at ____.

The trademark advisory mechanism of his administration was the Tuesday Luncheon Group with these officials and his national security adviser, and a few trusted others. Id. "[A]s Johnson's attention increasingly focused on the conflict in Vietnam, the Tuesday lunch was transformed into the principal forum for directing strategy and tactics associated with the war effort." Inderfurth (Exh. No. ___) at 92.

In 1966, Johnson signed a directive assigning the Secretary of State "'authority and responsibility . . . for the overall direction, coordination and supervision of interdepartmental activities of the United States overseas." Inderfurth (Exh. No. ___) at 93. This directive also established a Senior Interdepartmental Group (SIG) to oversee the implementation of the administration's foreign policy, which, of note, was to be chaired by a State Department representative and not the President's national security adviser. Id.

(5) The Nixon NSC

The Nixon Administration NSC system, in the words of national security adviser, Henry Kissinger, sought to combine "the best features of the two systems: the regularity and efficiency of the National Security Council, coupled with procedures that ensured that the President and his top advisers considered all the realistic alternatives.'" Inderfurth at 94

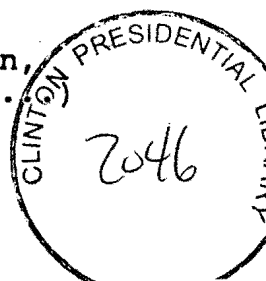


quoting Kissinger, The White House Years (Boston: Little Brown, 1979).

On his first day in office, President Nixon issued National Security Decision Memorandum 2, which declared that the "National Security Council shall be the principle forum for consideration of policy issues requiring Presidential determination." See Exh. No. __ submitted herewith. Nixon directed that the NSC meet regularly, with a discussion limited to agenda subjects, and he designated the Assistant to the President for National Security Affairs responsibility for determining the agenda and ensuring that necessary papers were prepared. Id. Nixon also established several NSC interagency subcommittees, virtually all of them chaired by Kissinger, and abolished the Senior Interagency Group established by Johnson and chaired by the State Department. Id.; see also Inderfurth at 95.

The Nixon NSC structure reflected the President's plan to centralize foreign policy making under his personal control and, as history records, Kissinger, on Nixon's personal behalf, assumed substantial responsibility for foreign policy, from Vietnam, to arms control, to the opening to China. Inderfurth & Johnson at 95.²²

²² When Gerald R. Ford assumed the Presidency on August 9, 1974, he signed National Security Decision Memorandum 265, under which the "National Security Council shall assist [him] in carrying out my responsibilities for national security affairs" and the National Security Council shall continue to be the principal forum for consideration of policy issues requiring Presidential determination." See Exh. No. __ submitted herewith). Ford continued the NSC system inherited from Nixon. (continued.)

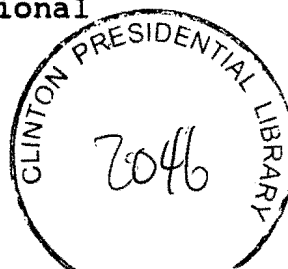


(6) The Carter NSC

President Carter assumed office with the goal of downgrading the role of a high-profile national security adviser and placing renewed emphasis on "cabinet-government" in the discharge of his national security responsibilities. See Inderfurth (Exh. No. __) at 96. On January 20, 1977, Carter signed Presidential Directive NSC-2, which established the organizational structure of his National Security Council System. See Exh. No. __ submitted herewith). It set forth the goal of placing "more responsibility in the departments and agencies while insuring that the NSC, with my Assistant for National Security Affairs, continues to integrate and facilitate foreign and defense policy decisions." Id. Carter, like Nixon and Ford, designated the NSC as his "principal forum for international security issues requiring Presidential consideration," and charged his national security adviser with determining the NSC agenda, with the assistance of the NSC staff. Id.

Carter simplified the NSC structure by establishing just two committees: (i) an NSC Policy Review Committee, chaired as designated by the President, to establish interagency coordination where primary responsibility falls on one agency; and (ii) the NSC Special Coordination Committee, to be chaired by

²²(...continued)
and initially designated Kissinger to continue to serve as both Secretary of State and Assistant to the President for National Security Affairs. Inderfurth (Exh. No. __) at 96. Ultimately, Ford appointed Air Force Lt. Gen. Brent Scowcroft as his national security adviser and chairman of several NSC subcommittees Kissinger had chaired. Id.

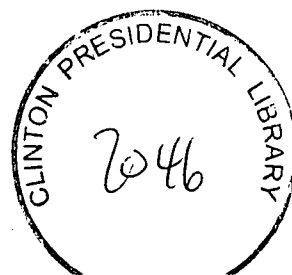


the APNSA, to deal with "cross-cutting" issues requiring interdepartmental coordination. See Exh. No. ____ at ____ . The SCC under Carter's plan was to include the statutory Council members, and the designation of his national security adviser as chairman of this committee set the stage for the APNSA assuming a substantive policy role in the Carter NSC system. Id.

Carter also utilized less formal procedures, including a "Friday breakfast" with the Vice President, Secretary of State, and national security adviser, and later the Secretary of Defense and other top White House staff. Inderfurth & Johnson at 98. Carter also had weekly luncheon meetings with the Secretaries of State and Defense and his national security adviser. Id.

(8) The Reagan NSC

President Reagan also sought to restore the pre-eminence of the responsible cabinet level departments in the NSC process. Reagan's first NSC organizational directive (NSDD 2), issued in March 1982, repeated prior directions that the NSC shall be the "principal forum for consideration of national security policy issues requiring Presidential decision." See Exh. No. ____ submitted herewith at ____ . Of significance, however, NSDD 2 included an express provision that the Secretary of State is the President's "principle foreign policy advisor" and, as such, was "responsible for the formulation of foreign policy and the execution of approved policy." Id. Further, Reagan assigned to the Secretary of State "responsibility . . . for the overall direction, coordination, and supervision of interdepartmental



activities incident to foreign policy formulation" -- nominally the functions of the NSC itself. Id. Reagan also set forth the specific responsibilities of the Secretary of Defense and CIA Director, and charged them with similar coordination responsibilities for matters incident to their respective jurisdictions. Id.

The Reagan directive also set up three different "Senior Interagency Groups" (SIGs) for defense, foreign policy, and intelligence, on which his national security adviser served but which were all chaired by a representative of a cabinet agency. See Exh. No. __ at __. Finally, Reagan established another layer of NSC subcommittees, called "Regional and Functional Interagency Groups," to be established by the Secretary of State and responsible for certain world regions or substantive issues (such as arms control). Id.

NSDD 2 firmly installed the cabinet government model in the area of national security affairs. It lodged central bureaucratic and policy responsibilities at the cabinet level, and assigned only minimal supporting missions to the NSC staff. The directive divided the broad field of security policy, as it did the interagency process, into three distinct parts Within these spheres, it drew direct lines of accountability for policy and process alike, from the responsible cabinet officer to the President.²³

²³ Stevens, Paul Schott, "The Reagan NSC: Before and After," Perspectives on Political Science (Spring 1990) (Exh. No. __ submitted herewith) at 119.

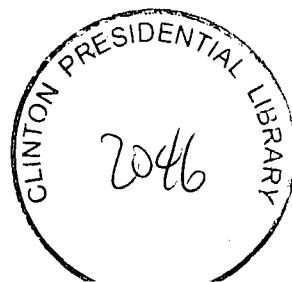


In June 1981, Reagan also established the National Security Planning Group, comprised of the President, the Vice President, the Secretaries of State and Defense, the CIA Director, and some of the President's senior White House staff, to discuss national security matters. See Exh. No. ___ submitted herewith. Staff were not permitted to attend. Id. The NSPG, rather than the "National Security Council," became the principal forum within the Reagan Administration for national security decision-making. Id.

The Reagan-era NSC was marked by an intrusion by some NSC staff into the actual conduct of covert operations in the Iran-contra matter. In the wake of disclosure of these staff activities, Reagan established a Special Review Board, know as the Tower Board, to study the appropriate role and functions of the NSC and its staff. Of the NSC, the Tower Board wrote:

The National Security Council is not a decision-making body. Although its 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 to those individuals and institutions whose judgment he valued and trusted. . . . Regardless of the frequency of its use, the NSC has remained strictly an advisory body. Each President has kept the burden of decision to himself, in accordance with his Constitutional responsibilities.²⁴

²⁴ See Excerpts from Tower Board Report (Exh. No. ___ submitted herewith) at ___.

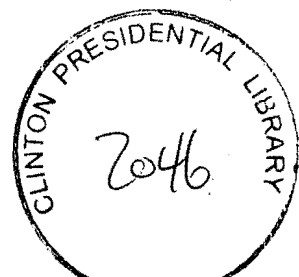


On March 31, 1987, Reagan issued a directive implementing a number of the Tower Board's recommendations. See Exh. No. ___ submitted herewith. It expressly prohibited NSC staff from assuming any operational roles in covert activities. Id. It also provided that

all NSC participants shall sit as advisors to the President in connection with the President's exercise of authority under the Constitution and laws of the United States. In their capacity as department and agency heads, NSC participants shall ensure the effective and expeditious implementation of overall national security policies established by the President. Execution and implementation of such policies shall not be the responsibility of the Assistant to the President for National Security Affairs or of the NSC Staff except as the President specifically directs.

(8) The Bush NSC

The NSC system in the Bush Administration, set forth in National Security Directive 1 (NSD 1), see Exh. No. ___ submitted herewith, was not unlike its immediate predecessors. For example, President Bush incorporated by reference the NSC functions set forth in the 1947 Act, designated the NSC as the "principal forum for consideration of national security policy issues requiring presidential determination, and directed that the "NSC shall advise and assist the President in integrating all aspects of national security policy as it affects the United States " Id. President Bush directed further that "NSC will be the President's principal means for coordinating Executive departments and agencies in the development and implementation of national security policy." Id.

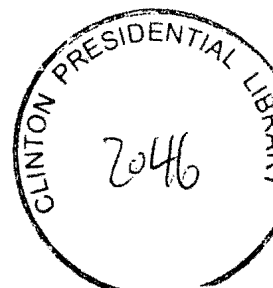


Again as in the past, President Bush designated his Assistant for National Security Affairs to be administrator of the NSC process, including by developing, upon consultation with the Secretaries of State and Defense, the NSC's agenda and ensure that necessary papers were prepared. See Exh. No. ___ at ___. Various NSC subcommittees were established, including a Principals Committee chaired by the National Security Adviser and comprised primarily of the NSC principals, and a Deputies Committee, chaired by the Deputy Assistant for National Security Affairs, with interagency representatives at the Assistant Secretary level. Id.

(9) President Clinton's National Security Council System

On the day he was sworn into office, President Clinton set forth the basic purpose and structure of how the National Security Council would operate during his administration in Presidential Decision Directive 2 ("PDD 2"). See Exh. No. ___. PDD 2 incorporates by reference the functions of the NSC set forth in the National Security Act of 1947, and states that under President Clinton, the National Security Council is organized "to assist [the President] in carrying out [his] responsibilities in the area of national security" and will be "the principal forum for consideration of national security policy issues requiring Presidential determination." Id.

The President 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" and

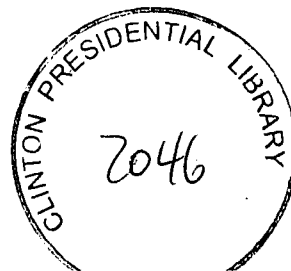


that "[a]long with its subordinate committees, the NSC shall be [his] principal means for coordinating Executive departments and agencies in the development and implementation of national security policy." See Exh. No. ___ at ___.

PDD 2 also directs that President Clinton's NSC system will be administered on the President's behalf by his Assistant for National Security Affairs, Anthony Lake.²⁵ See Exh. No. ___. Mr. Lake, chairs the NSC "Principals Committee," which includes the Cabinet-level officials on the full Council (including the Secretaries of State and Defense, the U.N. Representative, CIA Director and Chairman of the Joint Chiefs of Staff), in discussing issues for which the personal attendance of the President is not appropriate. Id. Mr. Lake, working in consultation with the Secretaries of State and Defense, is also responsible for calling committee meetings, determining the agenda, and ensuring that the necessary papers are prepared. Id. The President has also directed that the NSC staff shall assist the national security advisor in undertaking his role to administer the NSC process. Id.

Under President Clinton's NSC organization, there is also a second level committee called the "Deputies Committee," comprised of the deputies of Principals Committee members, including the Under Secretary of Defense for Policy, the Under Secretary of

²⁵ The APNSA is not a statutory member of the NSC nor a statutory staff officer of the NSC. Rather, the APNSA is a direct adviser to the President on national security issues within the White House Office.



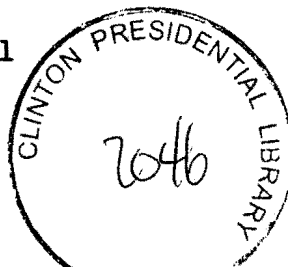
State for Political Affairs, the Deputy Director of the CIA, and the Vice Chairman of the Joint Chiefs of Staff. See Exh. No. ____.

This NSC committee is chaired by another direct presidential advisor, the Deputy Assistant to the President for National Security Affairs ("DAPNSA"). The Deputies Committee ensures that all papers discussed by the full NSC or the Principals Committee fully analyze the issues, fairly and adequately set out the facts, consider a full range of views and opinions, and satisfactorily address the prospects, risks, and implications of each. Id. The Deputies Committee is concerned, in particular, with overseeing the implementation of the President's national security policy among the various agencies and departments responsible for implementation. Id. Finally, the Deputies Committee is also responsible for day-to-day crisis management and reporting to the National Security Council. Id.

THE INSTANT PROCEEDINGS

A. Procedural History of Plaintiffs Claim on NSC Record-keeping Practices.

The plaintiffs have challenged the NSC's recordkeeping guidance as contrary to law because, inter alia, it instructs staff to save certain material as Presidential records when, plaintiffs contend, NSC records must be scheduled exclusively as Federal records because NSC is an agency subject to the FOIA. See Armstrong v. Executive Office of the President, 810 F. Supp. 335, 347-48 (D.D.C. 1993). This Court previously rejected the plaintiffs' position, and agreed with the defendants that the NSC may lawfully designate and segregate presidential and federal

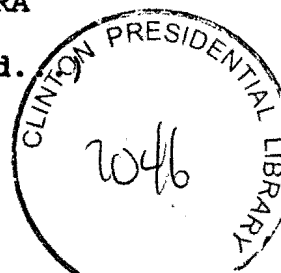


records. The Court held that NSC's guidelines distinguishing Presidential records were not judicially reviewable. Armstrong, 810 F. Supp. at 347-48; Armstrong, 139 F.R.D. 547, 551 (D.D.C. 1991).

The plaintiffs cross-appealed this Court's ruling and, as previously noted, the court of appeals reversed, holding that the NSC's guidelines defining Presidential records may be judicially reviewed. Armstrong, 1 F.3d at 1290-96. The court of appeals remanded for further proceedings "to determine whether NSC's guidelines inappropriately classify as presidential records materials that would otherwise be subject to the FOIA." Id. at 1296.

In reaching its decision, the court of appeals effectively held that NSC could not maintain such a bifurcated system of records -- treating some as "federal" records (and "agency" records subject to FOIA), and some as "presidential." Armstrong v. Executive Office of the President, 1 F.3d at 1290-96 (D.C. Cir. 1993). First, the court of appeals found that, since the definition of a Presidential record in the PRA specifically excludes any documentary materials of an "agency" as that term is defined under the FOIA, 44 U.S.C. 2201(2)(B)(i), the Presidential Records Act would apply only to records that fall outside the scope of the FOIA because they are not agency records. Id. at 1292.²⁶

²⁶ "Put another way," the court of appeals held, "the PRA provides that the definition of "agency" records in the FOIA
(continued.)



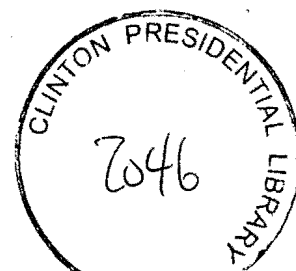
Next, the court of appeals reaffirmed its decision in Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), that "only entities 'whose sole function is to advise and assist the President' are not separate agencies subject to the FOIA." Id. at 1295. See also Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980). Thus, according to the court of appeals, if an EOP component is an agency subject to the FOIA, it cannot also create Presidential records under the PRA. While the NSC has subjected itself to the procedures of and jurisdiction under FOIA, the court noted that the question of NSC's status had never been definitively decided. Id. at 1296. Hence, the issue this Court must decide on remand is whether the NSC is in fact an "agency" subject to the FOIA and, thus, creates only Federal records and not Presidential records.

Plat. to its views on clear-cut holding.

B. Prior NSC Recordkeeping Practices and Decision on Presidential Status

[Throughout this litigation, the defendants have sought to preserve the right of the National Security Council to maintain distinct categories of records: (1) those subject to the Presidential Records Act; and (2) those subject to the Federal Records Act, which may include agency records subject to the FOIA.] Defendants have previously set forth on the record and in response to plaintiffs' discovery, the system under which NSC

²⁶(...continued)
trumps the definition of "presidential records" in the PRA." Armstrong, 1 F.3d at 1292.



sought to treat records under both presidential and federal record statutory schemes and which plaintiffs claim was unlawful.

To briefly summarize that system, the NSC Secretariat has, since the Truman Presidency, maintained two major, physically separate filing systems for documents created by the NSC staff. See Declaration of Brenda S. Reger III ¶ 6; Answer to Interrogatory No. 17; Supplemental Answer to Interrogatory No. 8. Documents are logged into one or the other system when they are sent to the Secretariat. Id. The "institutional" files contain documents relating to the formal NSC process. These typically include, among others, background or options papers for discussion in meetings of the Council or a Council sub-group, memoranda for the President on issues on which consensus has been reached, and any resulting Presidential directives to the agencies. See Answer to Interrogatory No. 6. These files have been maintained at the NSC in order to provide continuity in national security matters between Presidencies. When their disposition is appropriate, institutional files have been scheduled pursuant to the Federal Records Act.

The "Presidential" files contain the rest of the work of the NSC staff. See Answer to Interrogatory No. 6. These files are treated as exclusively Presidential, subject to the control of the President. Outgoing Presidents, with the exception of President Nixon, have transferred these files to their Presidential Libraries. See Supplemental Answer to Interrogatory No. 9. However, by special agreement between departing and

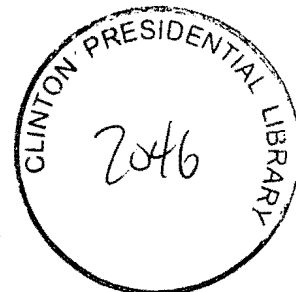


incoming President's, documents in these files have sometimes also been left behind for purposes of continuity. See Supplemental Answer to Interrogatory No. 9. These files have been managed pursuant to the Presidential Records Act since 1981.

NSC's past practice in responding to FOIA requests can be traced to the promulgation of FOIA regulations in February 1975, not long after the 1974 amendments to FOIA enacted in the fall of 1974. 40 Fed. Reg. 7316 (February 19, 1975). In these regulations, the NSC did not concede that it is, as a matter of law, an agency subject to the FOIA. ^{And it continued treat Presidential} Rather, the regulations were "intended to guide NSC Staff response to requests for classified information under the amended Freedom of Information Act, insofar as it is applicable." 32 C.F.R. 2101 (emphasis added).

When these regulations were promulgated, the extent to which the 1974 FOIA amendments applied to the NSC had not been adjudicated (and, indeed, is the subject of this lawsuit 20 years later). Over the past twenty years, the NSC has received conflicting guidance on its obligations under the FOIA.

In 1973, the Justice Department, Office of Legal Counsel ("OLC"), advised the Counsel to the President that the NSC was not an agency subject to the disclosure provisions of the Administrative Procedure Act based on the sole function test. See Exh. No. __ submitted herewith. The Justice Department also advised that the NSC could reserve the question of its agency status and comply with the Act to the extent possible, but that

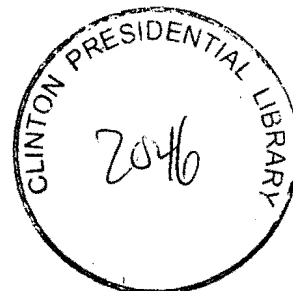


any FOIA regulations should similarly reserve the question of agency status. Id.

In 1978, OLC reversed its 1973 opinion and advised the Counsel to the President that, "in general," the NSC could be considered an agency subject to the FOIA due to its relationship at that time with the Central Intelligence Agency, while reserving its opinion on the specific question of whether the NSC is an agency only for some purposes, or only in regards to some records. See 2 Office of Legal Council Opinions, 197, 205 (1978). The NSC continued its policy of maintaining institutional and Presidential systems and searching the former in response to FOIA requests.

The propriety of NSC's practice of maintained two filing systems for institutional/federal and presidential records seemed to be confirmed in a 1984 decision of this Court which upheld NSC's policy of searching only institutional records in response to a FOIA request. In Dow, Loehnes & Albertson v. U.S. Information Agency, et al., Civ. Action. No. 82-2569, slip op. at 3 (D.D.C. Sept. 28, 1984) (Exh. No. __ submitted herewith), the court held:

Documents received or generated by NSC in its Presidential-advisor capacity. . . are not "agency records" within the meaning of FOIA. To the extent that NSC, "as an element of the White House". . . generates documents to advise and assist the President, it does not function as an "agency" within the meaning of FOIA. . . . Moreover, documents in the non-institutional files otherwise obtained by the NSC do not meet the flexible test for agency records status described in Bureau of National Affairs v. U.S. Dep't of Justice



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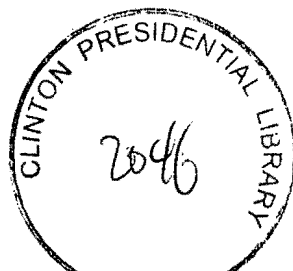
In the first appeal heard in the this litigation, the court of appeals acknowledged as a factual matter the NSC's practice of maintaining two types of records.

Because NSC advises the President and has statutory obligations, it creates both presidential and federal records.

Armstrong I, 924 F.2d at 286 n.2. This Court, accordingly, declined to review the distinction between Presidential and institutional files in evaluating the NSC's recordkeeping guidance. Armstrong v. Bush, 139 F.R.D. 547, 551 (D.D.C. 1991).

It was not until the court of appeals' August 1993 decision that the propriety of NSC maintaining both institutional files, searched for FOIA requests and scheduled under the FRA, and Presidential files scheduled under the PRA, was questioned. In response to that ruling, the NSC again sought the advice of the Justice Department's Office of Legal Counsel. In an opinion issued in September 1993, OLC advised NSC that it exists solely to advise and assist the President and is not an agency under the FOIA. This opinion was based on the NSC functions set forth in 50 U.S.C. § 402; the comprehensive control of the APNSA over NSC Staff set forth in Presidential directives; a reassessment of prior OLC analysis of the reach of impact of FOIA on the NSC; and a change in law regarding the NSC's oversight responsibilities over the CIA.

In sum, the record reflects that the National Security Council has previously sought to accommodate the important

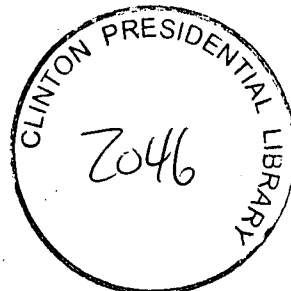


interests that underlie the Presidential Records Act, as well as the Freedom of Information Act and the Federal Records Act, by seeking to treat distinct categories of records under these statutes. However, since its approach to recordkeeping and information management no longer appears to comply with the law as analyzed by the D.C. Circuit in the Armstrong case, NSC has affirmed its historical and current mission of solely advising and assisting the President on national security matters.

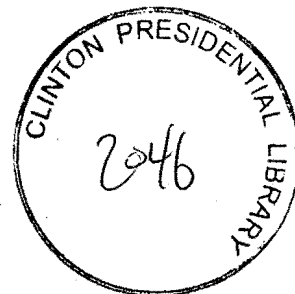
NSC, however, will not abandon its practice of making ^{certain} ~~as~~ ~~much~~ information as ~~possible~~ available to the public. President Clinton has directed that NSC ^{establish} ~~continue to maintain~~ procedures for making available to the public those NSC records and information which ^{were left by the outgoing Administration,} ~~have previously been made available in response to FOIA requests~~ and, as appropriate, NSC records of the Clinton Administration. The Executive Secretary has, accordingly, directed the Information Policy Directorate at NSC to revoke the current FOIA regulations and replace them with a voluntary disclosure policy covering the same documents which previously were searched in response to FOIA requests:

NSC records which have previously been designated and maintained as institutional records and, thus, which previously have been searched by NSC in response to FOIA requests, shall continue to be searched and, subject to the exemptions from disclosure set forth in that Act, made available on discretionary basis -- notwithstanding the NSC's status as a Presidential entity within the EOP.

charge



See Exh. No. __, Itoh Mem. __. ²⁷



ARGUMENT

I. THE NATIONAL SECURITY COUNCIL IS NOT AN AGENCY WITHIN THE MEANING OF THE FOIA AND, THEREFORE, CREATES SOLELY PRESIDENTIAL RECORDS.

A. An Entity is not a FOIA Agency if its Sole Function is to Advise and Assist the President.

The court of appeals ruled in Armstrong II that the determination of whether an EOP component such as NSC may create "Presidential records" under the PRA depends on whether the component is an "agency" subject to the FOIA. Armstrong II, 1 F.3d at 1292. The FOIA requires each "agency" to make its records, with certain exceptions, available to any person who requests them, and grants district court jurisdiction to order such disclosure. The FOIA defines "agency" to include "any executive department, Government corporation, Government controlled corporation, or other establishment in the executive branch of Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f).

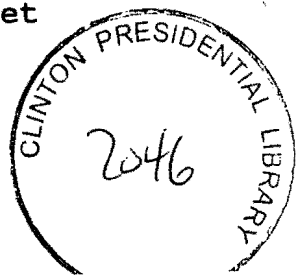
Despite this definition, however, the "legislative history is unambiguous in explaining that 'Executive Office' does not include the Office of the President." Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980).

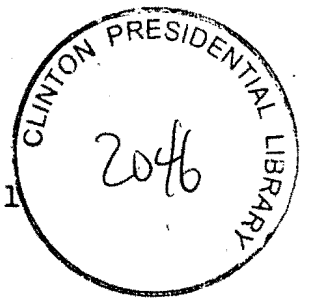
²⁷ Also, as discussed in part __, infra, NSC will continue to process plaintiffs' pending FOIA request, and a determination on NSC's status as presidential would not affect access to these materials under the provisions of the PRA.

In addition, Congress made clear that the definition does not cover "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. Rep. No. 93-1380, 93rd Cong., 2d Sess. 14-15 (1974); S. Rep. No. 1200, 93d Cong., 2d Sess. 15 (1974), reprinted in, 1974 U.S.C.A.A.N. 6293 (1974) (identical language). In arriving at this definition, Congress intended to codify the result reached in Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). See H. Rep. No. 93-1380, at 15.²⁸

In Soucie, the court of appeals held that the Office of Science and Technology ("OST"), predecessor to the current Office of Science and Technology Policy ("OSTP"), is "a separate agency, subject to the requirements of the [FOIA]" Soucie, 448 F.2d at 1073. The court held that Congress, in acquiescing to the President's reorganization plan creating the OST, "clearly contemplated that OST would function as a distinct entity and not merely as part of the President's staff." Id. at 1074. The court stated that "[i]f the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency." Id. at 1075. However, the court noted that the OST had

²⁸ The House Report to the 1974 FOIA amendments originally incorporated the definition of an agency under the Administrative Procedure Act, 5 U.S.C. § 551(1), and the National Security Council and the Council of Economic Advisers were listed among examples of such agencies subject to the FOIA. Conferees on the measure deleted specific mention of Executive Office establishments in favor of the judicially formulated test set forth in Soucie and Kissinger.





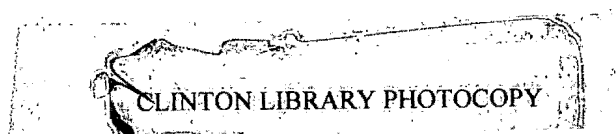
inherited the "broad power of inquiry" over certain federal programs delegated by Congress to the National Science Foundation. When this responsibility was transferred, "both the executive branch and members of Congress contemplated that Congress would retain control over information on federal programs accumulated by OST" Id. Hence, in performing this function, OST acted essentially as an agent of the Congress.

"By virtue of its independent function of evaluating federal programs," the court held, OST did not act solely to advise and assist the President and, thus, must be considered an agency under the FOIA. Id.

In Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980), the Council on Environmental Quality ("CEQ") acknowledged that it was an "agency" under the Sunshine Act, which incorporates the FOIA definition of the term, contending instead that it was an agency only when not advising the President.²⁹ Pacific, 636 F.2d 1259, 1263 (D.C. Cir. 1980). The court of appeals held that CEQ was an agency, emphasizing that, [as with the OST in Soucie, the CEQ was "independently authorized to evaluate federal programs." Pacific, 636 F.2d at 1263. In particular, under executive orders expanding its statutory authority,] the CEQ was authorized to

don't
emphasize

²⁹ The Court rejected the concept that agency status can vary depending on which function the entity is performing, relying on Ryan v. Dept. of Justice, 617 F.2d 781 (D.C. Cir. 1980) (Attorney General's records, created in role as Presidential advisor, regarding judicial nominations, are agency records). Pacific, 636 F.2d at 1264.



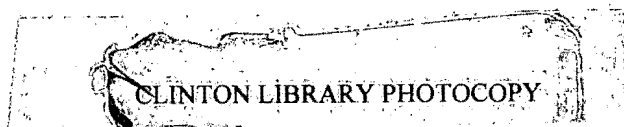


issue guidelines to federal agencies for the preparation of environmental impact statements, . . . to issue regulations to federal agencies for implementing all of the procedural provisions of NEPA, . . . [and to] publish[] and periodically revise[] the national contingency plan for the removal of oil and hazardous substances from navigable waters.

Pacific, 636 F.2d at 1262 (citations omitted). Indeed, in analyzing the holding in Pacific, the court of appeals recently stressed that CEQ's regulations were "legally binding on the agencies" Meyer, 981 F.2d at 1292. Such independent authority rendered CEQ an agency.

The court of appeals provided a more detailed explanation of the "sole function" test in Rushforth v. Council of Economic Advisers, 762 F.2d 1038, 1042-1043 (D.C. Cir. 1985), in which it held the Council of Economic Advisers ("CEA")^{not} to be an agency. Although its organic statute is "for all practical purposes[] identical" to CEQ's, the CEA was held solely to advise and assist the President. Rushforth, 762 F.2d at 1043. Congress authorized the CEA to "assist and advise the President" in preparing the Economic Report, "to gather" information concerning economic developments, and "to appraise" federal programs and make recommendations to the President with respect to those programs, and "to develop and recommend to the President national economic policies." Id. at 1042 n.6; 15 U.S.C. § 1023(c). The Court contrasted these functions with the functions at issue in Soucie and Pacific.

Each one of CEA's enumerated statutory duties is directed at providing. . . advice and



assistance to the President. For example, the CEA is directed to appraise federal programs relative to a particular statutory policy and make recommendations to the President in that regard. 15 U.S.C.

§ 1023(c)(3). The duty to appraise is directly connected to the Council's duty to make recommendations.



Id. at 1042-43.

The Court in Rushforth held that the CEA is not an agency because it "has no independent authority such as that enjoyed by either CEQ or OST." Rushforth, 762 F.2d at 1042.

CEA has no regulatory power under the statute. It cannot fund projects based on the appraisal, as OST might, nor can it issue regulations for procedures based on the appraisals, as CEQ might.

Id. at 1043. Consequently, where the independent authority of OST and CEQ to investigate and regulate federal programs rendered them agencies, CEA's function of gathering data and appraising federal programs in order to advise and assist the President rendered it a non-agency under the sole function test.³⁰ CEA also did not ask the court to find that it was both an agency and not an agency, as CEQ and OST had. Rushforth, 762 F.2d at 1041.

Last year, the Court of Appeals held that a group of senior advisers to the President, grouped together within the EOP as the Task Force on Regulatory Relief ("the Task Force") and chaired by

³⁰ The court in Rushforth held that specific mention of the Council of Economic Advisers (along with the NSC) as an agency in the House Report was entitled to "little weight" since "the Conference elected to embrace a test to be substituted for a listing of the entities to be included; the outcome of the case before us should, accordingly, turn on an examination of Soucie and the sole-function test enunciated in that case." Rushforth, 762 F.2d at 1040-41. See Meyer, 981 F.2d at 1292.

the Vice-President, did not constitute an agency. Meyer, 981 F.2d 1288. In this case, the court focused in particular on the meaning and application of what the term "assist" means as part of the Soucie "advise and assist" sole function test.

The Task Force was staffed with Office of Management and Budget personnel. The purpose of the Task Force was to review pending and past regulations "'and recommend appropriate legislative remedies'" to the President. Meyer, 981 F.2d at 1289-90 (citation omitted). The Task Force was also to guide the Office of Management and Budget in implementing other aspects of the President's Executive Order on regulatory reform. Meyer, 981 F.2d at 1290. The Court distinguished these functions from those of OST and CEQ:

OST was a FOIA agency precisely because it could act directly and independently beyond advising and assisting the President

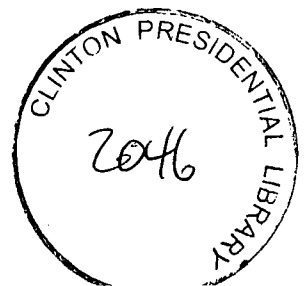
* * *

CEQ differed [from CEA], however, because several executive orders had given it the power to coordinate federal environmental programs and to issue guidelines to federal agencies [as well as] the authority to promulgate regulations -- legally binding on the agencies. . . .

Meyer, 981 F.3d at 1292.

The Meyer court set out "three interrelated factors" bearing on whether "those who help the President supervise others in the executive branch" solely advise and assist the President.

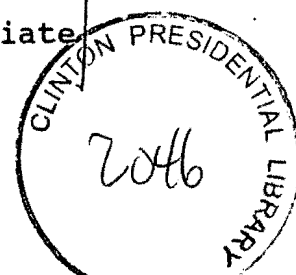
We must ask how close operationally the group is to the President, what the nature of its delegation from the President is, and whether it has a self-contained structure.



Meyer, 981 F.2d at 1293. The Court found that the Task Force, a collection of cabinet officials and other senior Presidential advisers, stood "only a hair's breadth from the President" and "were acting not so much as the heads of their departments, but rather as the functional equivalents of assistants to the President. . . ." Meyer, 981 F.2d at 1294. See also Nat'l Security Archive v. Archivist, 909 F.2d 541, 545 (D.C. Cir. 1990) (holding that the White House Counsel's Office, a component of the Office of the President, cannot be a FOIA agency). The Court also found that the delegation of "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. Meyer, 981 F.2d at 1294-95. Finally, the Court noted that the "lack of a separate staff" reinforced the conclusion that the Task Force lacked "independent authority" and was "simply a partial cabinet group." Meyer, 981 F.2d at 1296.

Thus, cases applying the "sole function to advise and assist" test to units within the Executive Office of the President have turned on two crucial inquiries. First, is the entity at issue "close to the President operationally" in the way CEA and the Task Force were? Second, has the entity been delegated "'substantial independent authority,'" Meyer v. Bush, 981 F.2d 1288, 1292 (D.C. Cir. 1993) (quoting Soucie, 448 F.2d at 1073-75), to "take direct action," such as award money, initiate

doesn't
fit



research, or issue guidelines or regulations binding on other agencies or members of the public. Rushforth, 762 F.2d at 1041-43.

B. The National Security Council Exists Solely to Advise and Assist the President

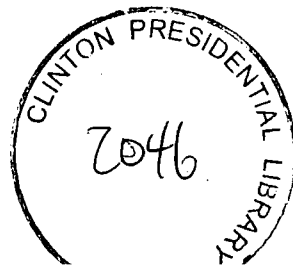
As a preliminary matter, it is established law that the Office of the President is not an agency subject to the FOIA. Kissinger, 445 U.S. at 156. It is also settled that the office of the Assistant to the President for National Security Affairs is not an agency subject to the FOIA. Id.

The issue before the Court is whether the National Security Council, an assembly of ^{consisting of President, Vice-President and} cabinet-level national security officials, located within the EOP, ~~over which the President presides by law, and which the President operates directly through his National Security Adviser, nonetheless~~ is an agency under the FOIA and, hence, creates only Federal records and not Presidential records.*

1. ^{Preside of President. Corporate. Operationally close.}
2. The NSC's Statutory Functions Demonstrate ^{Confirm} that it Exists Solely to Advise and Assist the President.

The starting point for determining whether the NSC solely advises and assists the President must be the National Security Act of 1947. The statute itself addresses the basic inquiries raised in Meyer as to "how close operationally" the entity at issue is to the President and the nature of the delegation of authority at issue.

First, under Section 402(a) of the Act, the President himself serves on and presides over the NSC. 50 U.S.C.



§ 402(a). This provision makes the President the head of the entity. Since the Office of the President is not subject to the FOIA, Kissinger, 445 U.S. at 156, a body such as NSC over which the President presides also cannot be subject to the FOIA.*

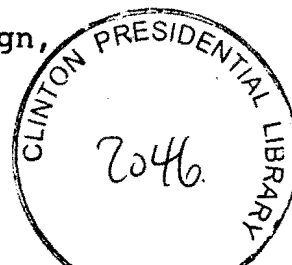
Second, the NSC's legislatively created structure also demonstrates, under the Meyer analysis, that it is not an agency. Again, under Section 402(a), the statute creates a "council" which includes not only the President and Vice President, but also several cabinet level officials such as the Secretaries of State and Defense. Other high-ranking officials join the Council's deliberations, such as the chairman of the Joint Chiefs of Staff and the Secretary of the Treasury, the Director of Central Intelligence, and senior White House advisers to the President such as his Assistant for National Security Affairs. The Council, then, is an assemblage of advisers, much like the President's cabinet, and thereby entirely lacks the structure of an "agency" of government. Meyer, 981 F.2d at 1293. *Even more so than given practice of* Like the Task Force in Meyer, these advisers stand "only a hair's breadth from the President," and are "acting not so much as the heads of their departments, but rather as the functional equivalents of assistants to the President. . . ." Meyer, 981 F.2d at 1294. *More so, since Pres. is in.*

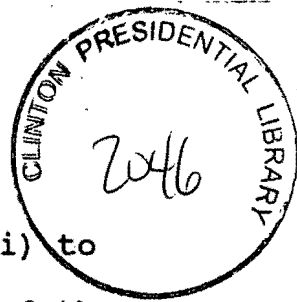
Third, the functions of the NSC set forth in the statute demonstrate that it exists solely to advise and assist the President. As noted above, under the National Security Act of 1947, 50 U.S.C. § 402, the NSC's functions are: (i) to advise the President with respect to the integration of domestic, foreign,

* President's membership

alone distinguishes

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and military policies; (ii) to effectively coordinating the policies and functions of the departments and agencies; (iii) to assess and appraise the objectives, commitments, and risks of the United States for the purpose of making recommendations to the President; and (iv) to consider policies on matters of common interest to the national security departments and agencies and make recommendations to the President. See 50 U.S.C. § 401(a), (b) and (d). None of these functions falls outside the ambit of advising and assisting the President. Indeed, the legislative history of the Act states plainly that 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), reprinted in 1947 U.S. Code Cong. Serv. 1487, 1494.

In sum, the NSC cannot be considered an "agency" subject to the FOIA under its basic statutory charter because: (i) the President himself presides over its activities; (ii) the entity itself is an assembly of other cabinet-level national security advisors to the President; and (iii) its statutory functions are purely advisory.

Ultimately, however, the role of the NSC as advisory to the President is based on more fundamental grounds. Because the membership of the NSC includes the President, Vice President, and the Secretaries of State and Defense, and given its purely advisory role, the National Security Council could exist entirely apart from any statutory setting. The President's authority over

Statute provides a staff. Although absence of staff found to be independent

Office has staff, as does CEA, yet
each been found not agency.

~~NSC is Basic issue remains~~

~~whether~~ Basic issue remains

same, whether independent

authority. The NSC staff

operates as foreign policy staff

of President (Lake affidavit).

It ~~operates~~ has no independent

authority to direct agencies

or departments. It operates

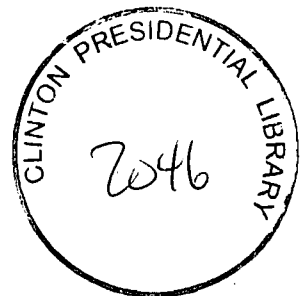
in ^{the same} close proximity to the

President as other White House

staff, and is ~~not~~ integrated

into the daily operation of

the White House staff



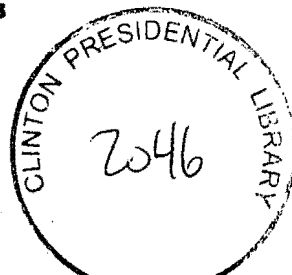
the national security policies of the United States derives from his authority under Article II, Section 2 of the Constitution as both commander-in-chief of the Armed Forces and as chief of state. See U.S. Const. Art. II, § 1, cl. 1, § 2, cl. 1 & 2. These constitutional responsibilities form the basis of "[t]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require for its exercise an act of Congress. . . ." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). This exclusive power is instead "conferred by the Constitution." Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948).³¹

The role and functions of the National Security Council cannot be viewed apart from the President's Article II authority

³¹ An early Congress expressed this understanding clearly:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

Curtiss-Wright, 299 U.S. at 319 (quoting 8 U.S. Sen. Reports Comm. on Foreign Relations, p. 24 (1816)) (emphasis added).

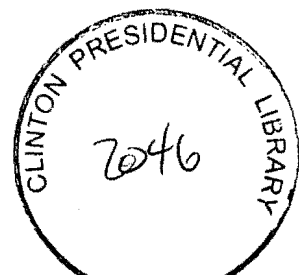


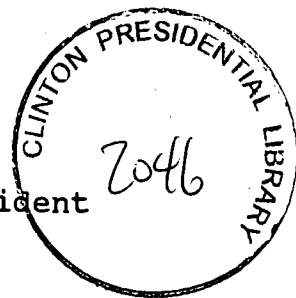
over the national security policies of the United States. The President cannot personally carry out each task or activity associated with his constitutional responsibilities over national security, and the NSC exists to serve as his alter ego to advise and assist him in carrying out the President's responsibilities. Hence, the role of the NSC as "advisory" does not hinge in the final analysis on its statutory mandate, but on the fundamental notion that the Constitution vests in the President plenary authority to speak as the sole organ of the United States in international relations.

3. Under Presidential Directives, the NSC Has Functioned to Advise and Assist the President.

Other sources of authority are relevant to the question of whether an entity within the EOP has been delegated "substantial independent authority" which renders it subject to the FOIA. In the case of the NSC, a crucial [?] record of its role and functions may be found in the Presidential directives under which the NSC's structure and functions are set forth from one administration to the next to suit the particular needs of the President.

President Clinton's Presidential Decision Directive (PDD 2), is fully consistent with the National Security Act, reaffirming that the NSC is to be an arm of the President to advise and assist him in the integration and coordination of national security policy. President Clinton's immediate predecessors in office utilized substantially similar presidential directives to





organize the NSC as an entity to advise and assist the President in the conduct of his national security responsibilities.

Indeed, the directives of Presidents Clinton, Bush, Reagan, Carter, Ford, and Nixon incorporate each of the following features: (i) restated the functions of the NSC set forth in the 1947 Act; (ii) designated the NSC as the principal forum for consideration of national security policy issues requiring presidential determination; (iii) provided that the NSC's function is to advise and assist the President in the discharge of his national security responsibilities; (iv) directed that the Assistant to the President for National Security Affairs manage the NSC system by overseeing the preparation of an agenda and policy papers; and (v) designated the APNSA and DAPNSA as chair of key NSC interagency committees.³²

These directives demonstrate that under President Clinton as well as past Presidents, the NSC system is formally organized solely to advise and assist the President. Not only has such a role been expressly stated by the President, including by reference to the advisory functions in the 1947 Act, but the administration of the NSC system by the President's assistant for national security affairs, as assisted by the NSC staff, demonstrates that the NSC process is an instrument subject to direct Presidential control.*

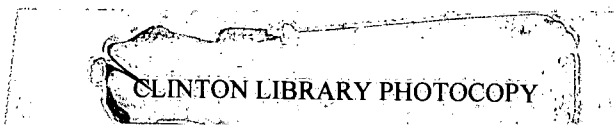
Neither NSC staff nor subsidiary body have independent authority
direct agency (later declaration)

As with the Council itself, the functions undertaken by the APNSA and NSC staff ultimately derive not from the 1947 Act, but

³² FOOTNOTE CITE TO ALL

* Later def. class. - no

at 11





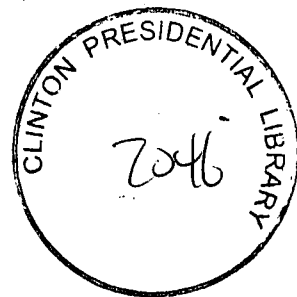
from the President's authority under Article II of the Constitution over national security affairs. The President cannot personally carry out each task associated with his national security policies, and the APNSA and NSC staff serve as alter egos of the President as they advise and assist him in carrying out the President's responsibilities. This is the case whether the APNSA and NSC staff are involved in advising and assisting the President directly, or through their efforts to administer the NSC process and oversee and coordinate the President's policy through that process. Unlike cabinet secretaries, neither the APNSA, DAPNSA, special assistants to the President serving on the NSC staff, nor the NSC staff itself, including the statutory Executive Secretary, are subject to confirmation by the Senate. These individuals are appointed solely by the President, and their role is to assist him in carrying out his Article II duties. The regularity of the roles, functions and administration of the NSC over the past decades demonstrates its role as an instrument to advise and assist the President has not changed since its inception.

c. The Historical Record Demonstrates that the NSC is An Advisory Arm to the President

The historical development of the National Security Council set forth above demonstrates that it was conceived, established, and utilized as an instrument of the President, providing advice and assistance related to the discharge of his core constitutional national security responsibilities, and molded by each President to conform to his own personal management style.

Even before it was created, the Eberstadt study proposed that:

The National Security Council (NSC) . . . would only be advisory to the President, for it was also an accepted premise of the Eberstadt group, as well as Forrestal and the Navy protagonists in the unification controversy, that the President could not be forced to share the Constitutional responsibilities of his office.



Hammond at 899.

President Truman also regarded the NSC as an advisory instrument of the President:

Both the cabinet and council are parts of the President's immediate official family. As such, their use and operation in any particular instance are subject to the President's personal discretion and judgment.³³

As Truman NSC aide Sidney Souers put it:

It should therefore be clear that the Council itself does not determine policy. It prepares advice for the President as his cabinet level committee on national security. With complete freedom to accept, reject, and amend the Council's advice and to consult with other members of his official family, the President exercises his prerogative to determine policy and to enforce it.

Inderfurth & Johnson, Souers at 50.

President Truman took critical first steps to establish the NSC as a Presidential arm by making clear its advisory function and establishing its staff within the EOP. Nelson at 378.

³³ Sidney W. Souers, "Policy Formulation for National Security," American Political Science Review, 43 (June 1949) 534-543, reprinted in Inderfurth & Johnson, pp. 48-54, at p. 49.

The fairly elaborate NSC structure established to support President Eisenhower met his particular demands for thorough analysis before national security advice was given to him.

The most obvious was President Eisenhower's predilection, acquired in his military service, for completed staff work. He preferred a policy process which ensured thorough staff review of papers submitted to him for consideration.³⁴

Under Eisenhower, "at the Council table all sides are present."

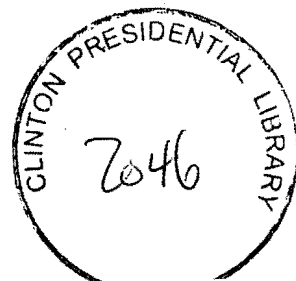
Here, together in give-and-take argument, are the President's principal advisers, stating their views before each other and before the President, upon whom rests the burden of decision; questioning and being questioned; each having his free, full opportunity to speak before the die is cast.

Id.

President Kennedy's use of the NSC system reflected his own management style: fewer formal meetings and formal papers, and far less of a committee structure, and an enhanced use of NSC staff as independent advisors to the President. Kennedy turned to the NSC "for substantive policy advice rather than for mere policy coordination" and, in this way, "the NSC became more visible, more intimate with, and more committed to each particular president."³⁵ He also chose to rely less on the

³⁴ Robert H. Johnson, "The National Security Council: The Relevance of its Past to Its Future," Orbis, v. 13, Fall 1969 at 715.

³⁵ Margaret Jane Wyszomirski, "The Deinstitutionalization of Presidential Staff Agencies," Public Administration Review, (Sept./Oct. 1982) at 452.



Council in favor of more informal meetings and special task forces, underscoring that the role of the NSC is contingent on how the President chooses to carry out his national security responsibilities under the Constitution.

President Johnson demonstrated that axiom by relying more on his own innovations to the NSC process, such as the Tuesday Luncheon Group.

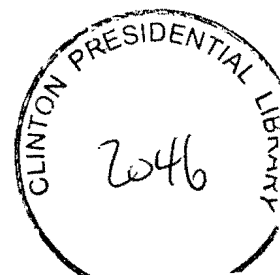
President Nixon also utilized an NSC system that was clearly an extension of the President's direct and personal control over national security policy. The Nixon NSC structure reflected the President's plans to centralize foreign policy making under his personal control. Nixon's use of the NSC system in this manner, through Kissinger, was consistent with the view that

[i]t is not, of course, the NSC which makes decisions. The President makes decisions, in accordance with his Constitutional responsibility, and the NSC remains an advisory body as conceived by the 1947 National Security Act³⁶

President Carter also made clear, even before taking office, that, "in the final analysis, the national security process he established would be responsive to his personal control."

Inderfurth & Johnson at 96. Id. The responsibility for the conduct of foreign affairs, Carter stated, "lies in the White House with the President" and he "would represent the country in

³⁶ U.S. Congress, U.S. Senate, Committee on Government Operations, Subcommittee on National Security and International Operations. The National Security Council: Comment by Henry Kissinger, March 3, 1970, 91st Congress, 2nd session (Washington: Government Printing Office. 1970) ("Kissinger Letter") at 2.



foreign affairs."³⁷ The advisory role of the NSC under Carter was demonstrated in the President's memoirs, where he wrote: that the NSC staff "was particularly adept at incisive analysis of strategic concepts, and were prolific in the production of new ideas, which they were eager to present to me." Id. at 98.

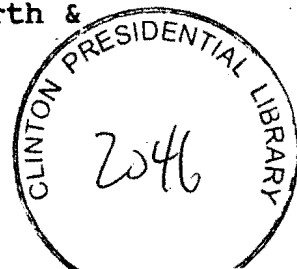
President Reagan's initial treatment of the NSC system demonstrated his choice to instill direct advisory authority in cabinet agencies. In the aftermath of Iran-contra, he issued a directive which strengthened the NSC's advisory process, made clear that the execution and implementation of policies would lie outside of the NSC and, in particular:

stressed the NSC staff's character as just that, a staff, and articulated its essential roles and missions in assisting the security advisor with assigned management and policy advisory duties.

Stevens at 120. In the end, the Reagan-era NSC led to a reaffirmation of the proper and traditional role of the NSC as an advisory arm to the President.

The advisory role of the Bush-era NSC is reflected in the views of Bush's national security adviser, Brent Scowcroft. According to the Tower Board report, which Scowcroft helped write, the APNSA is to be an "honest broker for the NSC process" who "assures that issues are clearly presented to the President" along with "all reasonable options [and] analysis of their

³⁷ See also Kevin V. Mulcahy, "Foreign Policy making in the Carter and Reagan Administrations," Presidential Studies Quarterly (Spring 1986), pp. 280-299, reprinted in Inderfurth & Johnson, pp. 122-135, at 124.



disadvantages and risks," and that "the views of the President's other principal advisors are accurately conveyed." The APNSA must also "provide advice from the President's vantage point" since "the President is [his] only constituency." The APNSA must also monitor "the actions taken by the executive departments in implementing the President's national security policies" and "ask the question whether these actions are consistent with Presidential decisions" This reflects the roles that Scowcroft saw for the NSC process during the Bush Administration

In sum, the record of each President, reflected in Presidential directives, or the recorded history of their NSC system, demonstrates that since Truman NSC has been regarded and treated as an advisory arm which assists the President in carrying out his national security constitutional responsibilities.

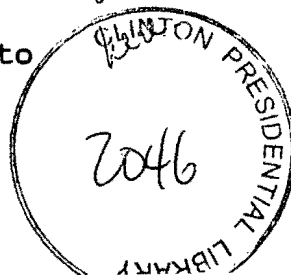
D. Presidents Have Not Delegated Independent Authority to the NSC Though Executive Orders

As discussed infra, the NSC is subject to directives and orders which further define its organization and mission. However, such additional directives must, in the first instance, be assessed relative to a particular statutory policy, Rushforth, 762 F.2d 1042-43, in this case a policy which establishes a Council to serve as an instrument of the President in the conduct of national security affairs. Each of the Executive orders touching the NSC furthers that purpose.

Since 1947, Presidents have issued Executive orders designating some of the specific topics on which the NSC is to

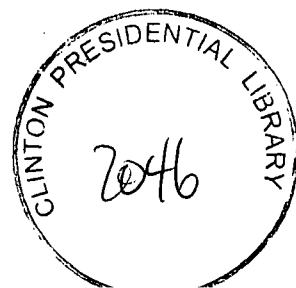
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advise the President, as well as the manner in which the NSC is to assist the President by transmitting his policies to the agencies and monitoring their implementation. A review of orders currently in effect indicates that they do not grant the NSC any "substantial independent authority to perform specific functions," but simply require the NSC to provide guidance and direction for national security policy. Consistent with its statutory purpose to advise and assist the President on national security issues, current executive orders specify, inter alia, that NSC shall be involved in the formulation of policy regarding national security emergency preparedness, E.O. 12,656, 53 Fed. Reg. 47,491 (1988); E.O. 12,472, 49 Fed. Reg. 13,471 (1984); the protection of sensitive national security information, E.O. 12356, 47 Fed. Reg. 14874 (1982) and, E.O. 12,829, 58 Fed. Reg. 51,753 (1993); foreign investment, E.O. 11858, 40 Fed. Reg. 20,263 (1975); and intelligence activities, E.O. 12333, 46 Fed. Reg. 59,941 (1981).

Under E.O. 12,656, "[t]he National Security Council is the principal forum for consideration of national security emergency preparedness policy." E.O. 12,656, § 104(a). The President sets the nation's emergency preparedness policy, and the NSC is responsible, "[p]ursuant to the President's direction, . . . for developing and administering such policy." Id., § 101(a). The director of the operational agency in this area submits "periodic



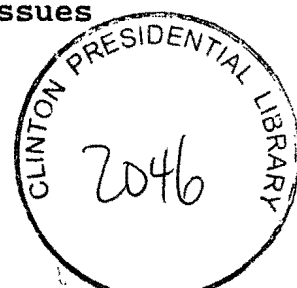
reports to the National Security Council on implementation." Id.
§ 104(c).³⁸

Similarly, in regard to national security issues concerning telecommunications functions in an emergency, the NSC serves to "[a]dvise and assist the President in coordinating the development of policy, plans, programs and standards," "[p]rovide policy direction. . . should the President so instruct," and receive reports from the agencies. E.O. 12472, §§ 2(a)&(b), 1(e)(4). See also Id., § 2(c)(1) (The NSC's "Planning and Oversight Responsibilities" are to "advise and assist the President in. . . [c]oordinating the development of policy. . . [p]roviding policy oversight and direction").³⁹

The NSC also provides "overall policy direction for the information security program" set up by E.O. 12,356, and oversees the work of the implementing agency, the Information Security Oversight Office, including approving regulations and transmitting a report from that office to the President. E.O. 12356, §§ 5.1(a), 5.2. Certain decisions of the Director of the

³⁸ The NSC also oversees the Federal Emergency Management Agency's civil defense policies in order to coordinate it with the "Nation's overall strategic policy. . . ." E.O. 12148, § 2-204, 44 Fed. Reg. 43,239 (1979).

³⁹ The regulations implementing these executive orders similarly stress that, in times of war, the APNSA provides "general policy direction for the exercise of the war power functions of the President. . . should the President issue implementing instructions. . . ." 47 C.F.R. § 202.3(a). In peacetime, the "National Security Adviser shall. . . [a]dvise and assist the President in coordinating the development of policy. . . ." 32 C.F.R. § 202.3(c). The NSC's "circular" on these issues is issued "on behalf of the President. . . ." 32 C.F.R. § 213.1(b).



Information Security Oversight Office, which is part of the General Services Administration, are appealable to the NSC. Id., §§ 5.2(b)(1), (3) & (4).⁴⁰

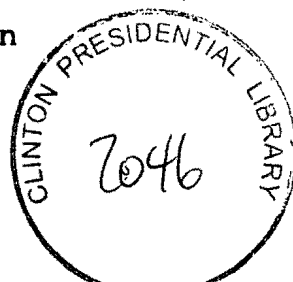
The NSC receives "recommendations and analyses" from the Committee on Foreign Investment in regards to the impact of foreign investment in the United States. E.O. 11858, § 1(c).

Finally, the NSC coordinates the nation's intelligence effort on behalf of the President. The NSC is directed to "advise the President" with regard to intelligence matters and is consequently charged with providing "review of, guidance for and direction to the conduct of" intelligence policies and programs. E.O. 12333, § 1.2(a).⁴¹

The NSC's relationship to the Central Intelligence Agency does not change the equation. As part of the NSC's coordination role, the Director of Central Intelligence is "responsible directly to the President and the NSC" and is charged with being

⁴⁰ The National Industrial Security Program similarly is run by the Information Security Oversight Office "report[ing]" and "recommend[ing]" to the President through the NSC. E.O. 12,829, § 102(b)(7) & (8). The NSC approves the Office's implementing regulations and serves to manage disputes between that office and agency heads. Under the authority of the same executive order, 32 CFR § 2003.20(k) provides that "only the NSC may grant and agency's request for a waiver from the use of the SF 312." In this capacity the NSC is merely assisting the President because the regulation does not require the NSC to exercise "substantial independent authority." The actual determination is made by the Director of the Information Security Oversight Office and the Department of Justice. See 32 CFR § 2003.20(k). Furthermore, the NSC does not perform this function on a regular basis.

⁴¹ This function requires the NSC to "submit to the President a policy recommendation, including all dissents, on each special activity. . . ." Id. at § 1.2(b).



the "primary adviser to the President and the NSC on national foreign intelligence. . . ." Id. at §§ 1.5 & 1.5(a).

Accordingly, the Director of the Central Intelligence Agency is a participant at all NSC meetings, as well as a full member of the Principals Committee. PDD 2, p. 1-2. See also, 50 U.S.C.

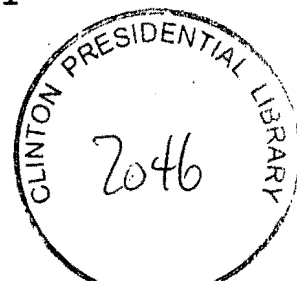
§ 402(h). The Deputy Director of the Central Intelligence Agency similarly is a full member of the Deputies Committee. PDD 2, p.

2. The full participation of the Director and Deputy Director of the Central Intelligence Agency reflects the fact that they advise the President directly, or through the NSC over which he presides, or through the APNSA, just as other NSC principal members. The NSC, thus, has no independent authority to direct the Director of the Central Intelligence Agency.⁴²

Recent changes in the National Security Act of 1947

^{confirm}
~~establish~~ that the Central Intelligence Agency, through its Director, is responsible directly to the President, not to NSC as an independent authority. Section 403 of the Act as it originally read stated: "There is established under the National Security Council a Central Intelligence Agency with a Director of Central Intelligence who shall be the head thereof, and with a Deputy Director of Central Intelligence who shall act for, and

⁴² The Director of Central Intelligence is also authorized to "establish mechanisms which translate national foreign intelligence objectives and priorities approved by the NSC into specific guidance for the Intelligence Community. . . ." Id. at § 1.5(m). Appeals of certain actions by the Director must be made "to the President." Id., § 1.6(c). Similarly, "special activities" may be approved only "by the President." Id., § 1.8(e).

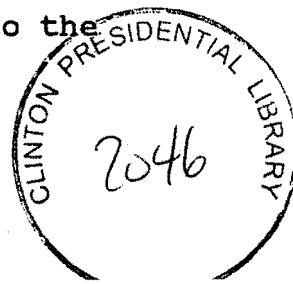


exercise the powers of the Directory during his absence or disability" Id. See 50 U.S.C. § 403(a) (1988). The Intelligence Authorization Act for Fiscal Year 1993, Pub. L. No. 102-496, amended the National Security Act of 1947 by removing the NSC as the supervisory body of the CIA. That section now simply reads, "[t]here is established a Central Intelligence Agency." Other provisions make it clear that the Director of Central Intelligence, not the NSC, is responsible for supervising the activities of the CIA. See, e.g., § 403-3(d).

These statutory changes eliminate any supervisory authority over the CIA the NSC once possessed. Additionally, the 1993 Act makes the NSC, along with the President, responsible for giving direction to the Director of Central Intelligence.⁴³ For example, the Director is responsible for providing national intelligence to the President, and others, under the direction of the NSC. See § 403-3(a) In connection with directing the activities of the CIA, the Director is required "to perform such other functions and duties related to intelligence affecting the national security as the President or the NSC may direct." See § 403-3(d)(5). See E.O. 12,333, § 1.8(e)&(f).

The NSC does, however, oversee and direct certain Central Intelligence Agency operations, but only pursuant to Presidential directives or formal findings. For example, the President can

⁴³ The Director of Central Intelligence serves as (1) the head of the U.S. intelligence community, (2) the principal adviser to the President for intelligence matters related to the national security, and (3) head of the CIA.



authorize intelligence actions by making a finding. ____ U.S.C. §
____. Any significant modification of that intelligence action
similarly requires a Presidential finding. _____ U.S.C. §
_____. Thus, authority the Central Intelligence Agency is
that of the President.

III. APPLICATION OF THE FOIA TO THE ENTIRE NSC, INCLUDING
ITS DOMINANT AND PRIMARY ADVISORY FUNCTION, WOULD BE AN
UNCONSTITUTIONAL INTRUSION INTO THE PRESIDENT'S
CONSTITUTIONAL RESPONSIBILITIES FOR FOREIGN AND
MILITARY AFFAIRS.

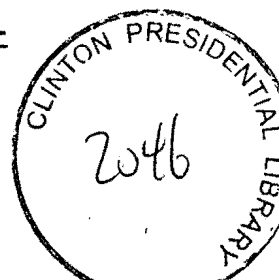
If the Court agrees with our first argument that the NSC's
"sole function" is to advise and assist the President, the case
is at an end. Should the Court disagree that the NSC's sole
function is to advise and assist the President, however, then
application of the "sole function" test, subjecting the entire
NSC to FOIA, would result in an unconstitutional intrusion into
the President's core Article II powers as commander in chief and
as the sole organ of foreign relations. It is clear beyond cavil
that if it is not the "sole" function of the NSC to advise and
assist the President, it is far and away the dominant and primary
function with very little staff activity that could be
characterized as anything like "substantial independent
authority" that defined an agency in Soucie. In this context, a
literal application of the Soucie "sole function" test would
result in holding that the entire NSC is an "agency" subject to
the FOIA. Not only would that result be unconstitutional, it is
also a result that Congress cannot have intended, and the FOIA
must be construed to avoid these constitutional problems.



1. It is well established that the President has a constitutional right, "grounded in the separation of powers between the Branches of the Federal Government," Univ. of Pennsylvania v. E.E.O.C., ___ U.S. ___, 110 S. Ct. 577, 585 (1990) to receive confidential advice from his close advisers. Accord Public Citizen v. Department of Justice, 491 U.S. 440 (1989); Ass'n of American Physicians and Surgeons v. Clinton, 997 F. 2d 898, 909 (D.C. Cir. 1993) ("If a President cannot deliberate in confidence, it is hard to imagine how he can decide and act quickly" as envisioned by the Framers).

"This Article II right to confidential communications attaches not only to direct communications with the President, but also to discussions between his senior advisers." American Physicians v. Clinton, 997 F.2d at 909. Application of the FOIA to cover the giving of such advice would be inconsistent with the President's constitutional right to receive unfettered confidential advice from his advisers. See Judge Buckley's concurring opinion in American Physicians v. Clinton, 997 F.2d at 924-25. See also Justice Kennedy's concurring opinion in Public Citizen v. Department of Justice, 491 U.S. at 482-489.

Moreover, the courts have also been particularly sensitive to intrusions into national security deliberations, due to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require for its exercise an act of Congress. . . ." United States v. Curtiss-

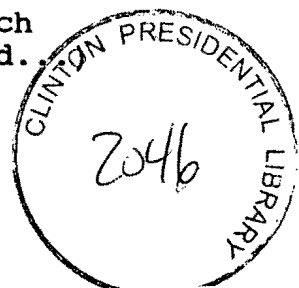


Wright Export Corp., 299 U.S. 304, 320 (1936). This exclusive power is instead "conferred by the Constitution." Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948). See also, U.S. Const. Art. II, § 1, cl. 1, § 2, cl. 1 & 2; Department of the Navy v. Egan, 484 U.S. 518, 527 (1988).

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 these Presidential responsibilities preclude Congress from prying into the relationship between the President and his staff in this area. Curtiss-Wright, 299 U.S. at 320 (quoting 1 Messages and Papers of the Presidents, p. 194).⁴⁴ Thus, "[c]ourts have traditionally shown the utmost deference to Presidential responsibilities' for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of 'a President's generalized interest in confidentiality.'" Harlow v. Fitzgerald, 457 U.S. 800, 812, n.18 (1981) (quoting United States v. Nixon, 418 U.S. at 710-11).⁴⁵

⁴⁴ Thus, then Representative, but soon to be Chief Justice, Marshall stated in 1800, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col 613 (March 7, 1800) (quoted in Curtiss-Wright, 299 U.S. at 319).

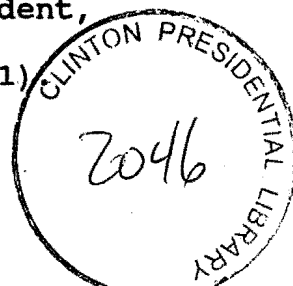
⁴⁵ Similarly, the Court has held that it may not interfere with the "conduct of diplomatic and foreign affairs, for which
(continued.)



The give and take among the President's national security staff is the engine of the advisory process assisting the President in his constitutional responsibilities for foreign and military affairs. Subjecting those communications to congressional and judicial review would intrude directly into the heart of the President's deliberations in this quintessential Presidential sphere, violating his right to receive confidential advice from his advisors on foreign and military affairs.

As described above, the NSC is composed of the President himself, as well as the Vice-President, the Secretaries of State and Defense, and other high-ranking officials close to the President (see 50 U.S.C. 402). The statute itself refers to the function of the NSC to serve as "an advisory body to the President" on national security issues. Id. Its legislative history makes plain that "essentially, the Council is an advisory body to the President." S. Rep. No. 239, 80th Cong., 1st Sess. 10 (1947). Under this scheme, the President has great discretion in the manner in which he uses the NSC in support of the advise and assist role recognized in the statute. We have shown above [that the NSC does not exercise additional functions beyond simply advising and assisting , and in any event that the NSC does not exercise "substantial independent authority." But even if we are

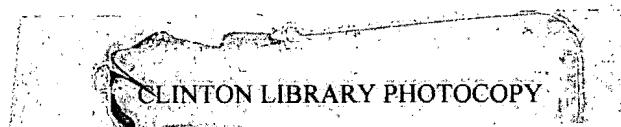
⁴⁵(...continued)
the President is exclusively responsible." Johnson v. Eisentrager, 339 U.S. 763, 789 (1950). Compare Nixon v. Fitzgerald, 457 U.S. 731, 750 (1981) (noting that since foreign affairs information is "'properly held secret'" by the President, judicial review of executive actions in this area are "'intolerable'") (quoting Chicago & Southern, 333 U.S. at 111).



in error here, the grant of such additional, ancillary functions cannot, consistent with separation of powers principles, subject the NSC's dominant and primary advisory function to congressional regulation and judicial oversight. Under the separation of powers principles, Congress cannot subject to the FOIA an entire entity that is this close to the President -- and indeed of which he is personally a part -- simply by statutorily assigning that entity minimal functions beyond rendering advice and assistance.⁴⁶ Indeed, we are aware of no case in which an entity that includes the President himself has been held to be an agency subject to the FOIA or any part of the APA. In short, application of the FOIA to the National Security Council would encounter serious constitutional obstacles.

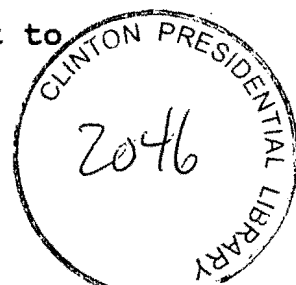
2. The FOIA should be construed to avoid such a constitutional confrontation in accordance with settled principles of statutory construction holding that courts should decline to construe statutes to raise unnecessary constitutional problems. See Public Citizen, 491 U.S. at ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"), and American

⁴⁶ It would, of course, be unconstitutional to hold that records within the control of a non-FOIA entity -- the APNSA -- could be subject to FOIA in any event. It is settled law that the APNSA is not subject to FOIA, Kissinger, 445 U.S. at 156; thus, any records personally and directly under his control are not subject to FOIA.



Physicians v. Clinton, 997 F.2d at . This principle applies with particular force when courts address questions of whether Congress intended to regulate the President or the conduct of his duties. It is well-settled that the federal courts will hesitate to hold that Congress intended to regulate the President unless Congress has explicitly so indicated its intention. See Franklin v. Massachusetts, 112 S.Ct. 2767, 2775 (1992); Armstrong v. Bush, 924 F. 2d 282, 289 (D.C. Cir. 1991) (Armstrong I) (the President is not an "agency" under the Administrative Procedure Act); American Physicians v. Clinton, 997 F. 2d at 905.

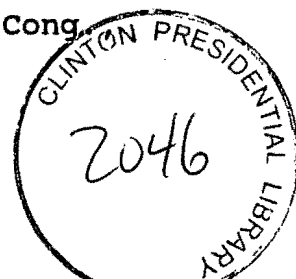
The statutory definition of "agency" under FOIA, see 5 U.S.C. 552(f) and 5 U.S.C. 551(1), in no way compels a reading that requires coverage of the President and his close advisers. Armstrong I, 924 F.2d at 1294-1295. The legislative history of the FOIA explicitly states Congress's clear intention not to regulate the President or his close advisers. See H.R. 1380, 93d Cong., 2d Sess. 14 (1974). Indeed, Congress has not only explicitly refrained from regulating the President through the FOIA, it has also been very circumspect in regulating the President through the Presidential Records Act in order to avoid a separation of powers clash. See Armstrong I, 924 F.2d at 290; Armstrong v. Bush, 721 F. Supp. 343, 350 (D.D.C. 1989). As the D.C. Circuit and this Court observed, Congress is well aware of the questionable nature of its authority to regulate "the conduct of the President's daily operations," and it therefore legislated very carefully in the Presidential Records Act, in order not to



interfere with the President's daily operations while in office.

This Court need not and should not raise separation of powers concerns where Congress has not clearly required it, and certainly not where Congress has expressly sought to avoid it. American Physicians v. Clinton, 997 F.2d at . The sole function test crafted by the court of appeals in Soucie does not require that battle between the Branches be joined, especially in the sensitive context of the President's constitutionally assigned sphere of foreign and military affairs.

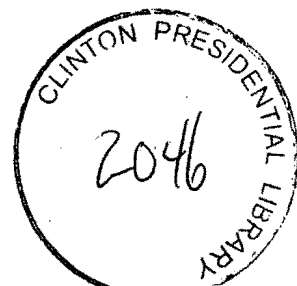
The "sole function" test of Soucie was adopted because of concern that FOIA itself would otherwise be swallowed up since, in a sense, all federal employees serve the President and may be said to render him advice and assistance. See Ryan, 617 F.2d at 787-89. If carried to an extreme, this point would mean that Congress is incapable of subjecting to the FOIA any Executive Branch agency. But these concerns have no application in the case of the NSC, which is composed of the President himself as well as the Vice President and other high-ranking officials close to the President. It therefore cannot be compared to traditional departments or agencies, which have been created by Congress under the Constitution to administer the laws of the United States, such as the Department of Justice (Ryan) or the Office of Science and Technology which Soucie described as an information-gathering arm of the Congress itself. Indeed, in the National Security Act of 1947 Congress specifically created the NSC as "an advisory body to the President" (S. Rep. No. 239, 80th Cong.



1st Sess. 10 (1947)) with the defined function of formulating "advice" to the President "with respect to the integration of domestic, foreign, and military policies" (50 U.S.C. 402).

In short, since the National Security Act makes clear that the dominant and core function of the NSC is indisputably to give advice to the President on national security and foreign policy issues, and since the NSC itself is so close to the President (indeed, the President himself serves on and heads the Council), the National Security Act fully supports the conclusion that the NSC should be regarded as an alter ego of the President or at least the "functional equivalent" of an Assistant to the President within the meaning of FOIA. See Meyer, 981 F. 2d at 1294. At a minimum, it would be inconsistent with the National Security Act, as well as the separation of powers principles expounded above, to hold that Congress intended to open the NSC's dominant and primary role of advising and assisting the President on national security and foreign policy issues to congressional regulation and judicial oversight.

In American Physicians v. Clinton, 997 F.2d at 911, the court of appeals stated that "[t]he question whether the President's spouse is a 'full-time officer or employee' of the government is close enough for us properly to construe the FACA not to apply to the Task Force merely because Mrs. Clinton is a member." In so doing the court relied on what it characterized (997 F.2d at 906) as the Supreme Court's "extremely strained construction of the word 'utilized'" in Public Citizen v.

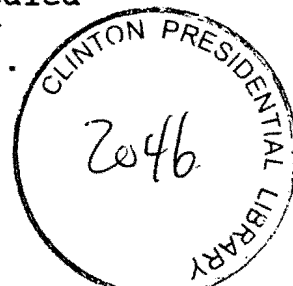


Department of Justice, 491 U.S. at 455-65. In Public Citizen the Supreme Court held that the American Bar Association committee that advised the Attorney General on judicial nominees was not "utilized" by the President because it was established and run by a private organization. If the result in Ass'n of American Physicians followed a fortiori (see 997 F.2d at 911) from the Supreme Court's ruling in Public Citizen, the result here is even more compelling. No "stretch" is needed to find that Congress did not intend to subject to FOIA the entire NSC, including its dominant and primary advise and assist function, and thereby to collide with the President's Article II powers.

IV. PLAINTIFFS' FOIA REQUEST INCLUDES MATERIALS THAT ARE "PRESIDENTIAL"; SUCH MATERIALS WILL BE PROCESSED FOR PUBLIC RELEASE UNDER THE ACCESS PROVISIONS OF THE PRESIDENTIAL RECORDS ACT

Plaintiffs' present FOIA request, as embodied in paragraph 1 of the January 27, 1994 Stipulation and Order (hereafter "¶ 1 FOIA request"), includes materials which were not within the scope of the FOIA at their creation, but which are now subject to public access under the terms and restrictions of the PRA, 44 U.S.C. § 2204.⁴⁷ For this subset of PRA materials otherwise within the scope of the ¶ 1 FOIA request, defendants intend to

⁴⁷ As set forth in more detail below, these materials include approximately 330 of the 800 notes or documents plaintiffs chose from a listing of materials on certain EOP PROFS tapes (¶ 1.a of January 27, 1994 Stipulation and Order), as well as all NSC PROFS materials within the scope of ¶ 1, id., with the exception of agency records of NARA covered within the scope of the Court's September 3, 1993 Order (the "Weinberger materials"). See ¶ 1(ii), id. Plaintiffs' present FOIA request, as embodied in ¶ 1, was stipulated to by the parties as a substitute for their original FOIA request, as amended on February 21, 1992.

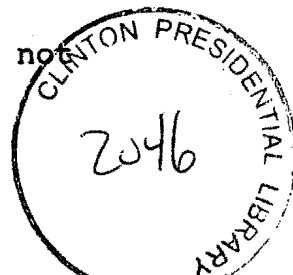


process all such materials for possible public release over the next nine month period, in accordance with the procedures set forth in ¶¶ 1-10 of the January 27, 1994 Stipulation and Order, as well as in accordance with the PRA. We address the applicable provisions of the PRA and relevant FOIA case law before turning to the status of defendants' current PRA/FOIA processing efforts.

A. Access To Any Materials Originally Outside The Scope of The FOIA Is Governed By The Provisions of the PRA

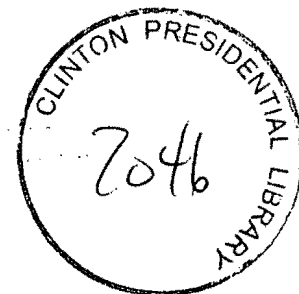
To restate defendants' position, it is a settled matter of law that staff of components of the Executive Office of the President whose "sole function" is to advise and assist the President create "Presidential records" pursuant to the PRA, rather than "agency records" subject to the FOIA. See Armstrong II, 1 F.3d at 1292, 1294-95 (citing Soucie v. David, 448 F.2d at 1067); see also 44 U.S.C. § 2201(2) & 2201(2)(B)(i) (defining "Presidential records" and excluding "records of an agency" as defined in the FOIA, 5 U.S.C. § 552(f)). Thus, records created or received by staff of the Office of the President (including the White House Office and other constituent units of that Office, including the Office of Policy Development), as well as the Office of the Vice President and the Council of Economic Advisers, are beyond the reach of the FOIA during the applicable President's time in office. See relevant case law and legislative history citations, supra at pp. _____.

The PRA in turn governs access to "Presidential records" after a President has left office. Under section 2204 of the PRA, 44 U.S.C. § 2204, a President "shall specify durations, not



to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record," within one of six categories as set out in § 2204(a)(1)-(6). Under § 2204(b)(1), access to Presidential records or reasonably segregable portions thereof, in one of the six restricted categories, shall be restricted until the earlier of either a waiver of the restriction by the former President, or the expiration of the period specified under §2204(a), or a determination by the Archivist that the Presidential record has been placed in the public domain. Under § 2204(b)(2), records which do not contain information in a restricted category, or contain information in a category where the restrictions have expired shall, after the earlier of 5 years or the date the Archivist completes processing of such records, be accessible in accordance with the provisions of § 2204(c). In turn, section 2204(c) states:

Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. * * *



In other words, Presidential records not subject to FOIA during a President's time in office become publicly accessible in all cases after 12 years, in accordance with FOIA law (except for the unavailability of the (b)(5) exemption for purposes of with-

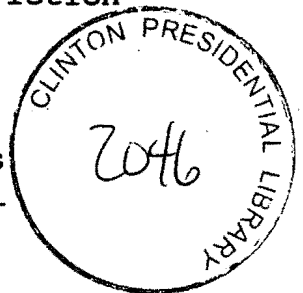
holding). In some cases, presidential records become accessible after 5 years (or sooner), depending on restrictions on access imposed by the former President.

In the case of the former President, prior to the conclusion of his term in office President Reagan formally specified that "access shall be restricted to all categories of Presidential records set forth in Section 2204(a) of the [PRA] for 12 years." See Exh. ---. In subsequent correspondence with the Archivist, the former President waived restrictions for certain designated subcategories of materials within the statutory categories set out in § 2204(2) and (5). See Exh. ---. So far as we are aware, the former President has made no other waivers of the restriction periods.⁴⁸

B. To The Extent Plaintiffs' FOIA Request Involves "Presidential" Materials, Access To Such Materials Will Be Afforded Pursuant to the PRA

The parties' January 27, 1994 Stipulation and Order contemplates a three-step process for processing materials which plaintiffs designated as part of their ¶ 1 FOIA request. First,

⁴⁸ At the time of the original TRO entered in this action, then-President Reagan's position was that materials on the NSC and EOP PROFS constituted either electronic copies of what were presidential records in paper form, or copies of presidential non-record materials. By subsequent agreement between himself and the former Archivist, dated January 19, 1993, former President Reagan designated that backup tapes within the ambit of the Armstrong suit were to be transferred to NARA "to be administer[ed] . . . in accordance with applicable law, court orders, regulation, and agreement" See Exh. ---. Counsel for defendants are informed that former President Reagan interprets this agreement to allow for the processing of all materials on the NSC and EOP PROFS backup tapes consistent with the provisions of the PRA. [cite: letter]

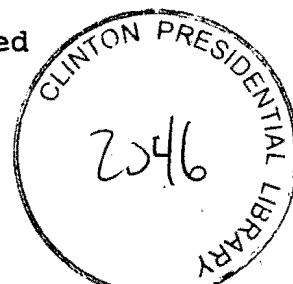


on January 18, 1994 and February 18, 1994, defendants provided plaintiffs with documents including two large indices, representing computer-generated listings of all PROFS note and document entries, as well as additional calendar entries, on selected EOP PROFS and NSC PROFS backup tapes within the scope of plaintiffs' ¶ 1 FOIA request. Thereafter, plaintiffs made designations of which entries on the computer-generated lists they would include within the scope of their ¶ 1 FOIA request, up to a maximum of 2,450 NSC PROFS entries, 15 calendars from the NSC PROFS tapes, and 800 EOP PROFS entries (from the OA PROFS tapes).⁴⁹ Finally, defendants have up to nine months after delivery of plaintiffs' designations to process and release materials so identified, see ¶ 4 of the January 27, 1994 Stipulation and Order. All materials identified within the scope of plaintiffs' ¶ 1 FOIA request will be released, except for personal papers, materials exempt from disclosure under FOIA, or items "that defendants maintain are "Presidential records" for which disclosure is currently restricted under 44 U.S.C. § 2204(a)." January 27, 1994 Stipulation and Order, ¶ 6.

Subject to this agreement of the parties, two distinct categories of materials within the scope of plaintiffs' ¶ 1 FOIA request, are properly treated as "presidential."

A. NSC PROFS Materials

⁴⁹ Plaintiffs notified defendants of 786 of their 800 designations by letter dated March 7, 1994; a prior set of 13 designations was sent by letter of February 7, 1994. See Declaration of William Boorman ("Boorman Declaration"), dated March --, 1994, ¶¶ 4-5 (Exh. ---).



Pending a judicial determination of the legal status of the NSC pursuant to defendants' instant motion, all NSC PROFS materials within the scope of plaintiffs' ¶ 1 FOIA request, with one exception,⁵⁰ are properly considered to be within the scope of the PRA, for the reasons set forth in Parts I-III of this brief, supra.⁵¹ With the approval of former President Reagan,⁵² and at the direction of the Archivist,⁵³ NSC staff will make determinations on release with regard to applicable restrictions and exemptions under the PRA and FOIA.

B. EOP PROFS Materials

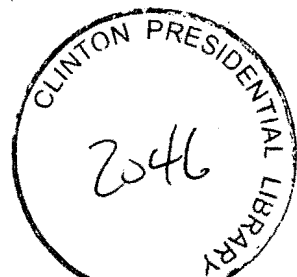
As described in more detail in the Boorman Declaration, in the short time since receipt of plaintiffs' 800 designations pursuant to ¶ 1.a, staff within the EOP's Office of Administration (OA) have undertaken a preliminary review of plaintiffs' designations, to determine whether any of the

⁵⁰ The "Weinberger" materials within the scope of the Court's September 3, 1993 Order and which are also included within plaintiffs' ¶ 1 FOIA request, shall be considered to be "agency records" of NARA for which no restrictions under the PRA are applicable, and thus will be processed solely on the basis of the FOIA.

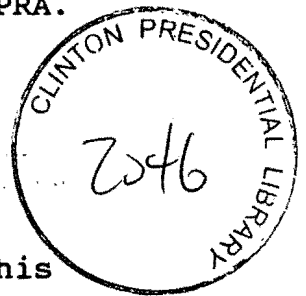
⁵¹ See also n. **, supra (explaining that NSC PROFS materials or portions thereof previously withheld under the FOIA which have been the subject of prior Vaughn indices on file with the Court are also properly treated as "presidential," subject to the FOIA access provisions incorporated into the PRA).

⁵² [Counsel for defendants have been informed that former President Reagan has no objection to NARA and the NSC proceeding to process these materials as "presidential records" subject to the applicable restrictions imposed by the PRA. Cite: letter?]

⁵³ [cite] [letter to be crafted]



materials are properly considered to be "presidential." Boorman Declaration, ¶ 6. As Mr. Boorman states, approximately 330 of the 787 documents residing in the EOP PROFS document database on the January 7, 1989 backup tapes represent documents which, according to computer codings accompanying the listings of documents, indicate that they were created or received by individuals within an office of the EOP which solely advised and assisted former President Reagan, and which were not electronically distributed to or accessed by any individual outside such "sole advise and assist" components. Id., ¶ 7.⁵⁴ These documents consist of documents created or received by individuals within the White House Office (with multiple subcomponents), Office of the Vice President, Office of Policy Development, and Council of Economic Advisors. Id. ¶ 11. As such, they were not "agency records" at their creation, but rather "presidential" at the time of their creation and receipt, and thus are properly now considered to be subject to the PRA.



⁵⁴ Mr. Boorman made this determination based on: (a) his personal review of the information listed on the document database index previously provided to plaintiffs, including information on who created each document, the office(s) of the user(s) to whom the document was electronically transferred, and the identification numbers for each item selected by plaintiffs from the PROFS document index; (b) his review of a sample of documents selected by plaintiffs; and (c) consultations with Terry W. Good, Director of Records Management, White House Office, to verify that such documents were in fact created by, or distributed to, staff of solely "advise and assist" components of the EOP. Id. ¶ 11-13.

Having made this preliminary assessment, and with the approval of former President Reagan,⁵⁵ defendant OA intends to work with NARA, to have custody of paper copies of all of the above "presidential" materials within the scope of the ¶ 1 FOIA request transferred to the Reagan Library, for processing within nine months pursuant to the parties' January 27, 1994 Stipulation and Order, as well as pursuant to the provisions of the PRA. Boorman Declaration, ¶ 8. Defendant OA shall, however, retain custody of any remaining "agency records" within the scope of plaintiffs' ¶ 1.a request for FOIA processing in accordance with the terms of the January 27, 1994 Stipulation and Order. Id. ¶ -

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CONCLUSION

For the foregoing reasons, the Court should dismiss the plaintiffs claim that NSC recordkeeping guidance is not in accordance with law.

⁵⁵ [Counsel for defendants have been informed that former President Reagan has no objection to NARA and OA proceeding to process "presidential" materials on the EOP PROFS tapes as "presidential records" subject to the applicable restrictions imposed by the PRA. Cite: letter?]

⁵⁶ Pursuant to ¶ 5 of the January 27, 1994 Stipulation and Order, the parties have agreed to confer during the processing of the materials within the scope of plaintiffs' ¶ 1 FOIA request "on procedures for expediting the preparation of the Vaughn index and narrowing judicial review of exemptions claimed for these materials." Defendants intend to apply these provisions both with respect to materials solely within the ambit of the FOIA, as well as to those materials which are properly treated as PRA materials which in turn are subject to the FOIA.



Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney general

J. RAMSEY JOHNSON
United States Attorney

DAVID J. ANDERSON
ELIZABETH A. PUGH

JASON R. BARON

ANTHONY J. COPPOLINO

PETER D. COFFMAN

Attorneys, Department of
Justice
Civil Division, Room 1020
901 E Street, N.W.
Washington, D.C. 20530
Telephone: (202) 514-4782
Attorneys for Defendants

