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file
Armstrong

December 23, 1993

By Telecopier

Mark Levy
Deputy Assistant Attorney General
Civil Division
Department of Justice
Constitution Avenue and 10th Street NW
Washington D.C. 20530

Re: Armstrong v. Executive Office of the President
(Settlement Discussions - Presidential Records Issues)

Dear Mark:

We are writing to respond to the letter delivered to us yesterday, containing defendants' response to the suggestions for compromise on the Presidential records issue that plaintiffs made a month ago in our letter of November 12, 1993, and orally at the meeting on November 23, 1993.

At the outset, we must note that your characterization of the proposals that plaintiffs presented is inaccurate in a number of respects. However, your letter makes clear that the bottom line is that defendants are rejecting virtually all of the ideas that we have presented for cutting back on the NSC records treated as presidential in absolute, uncompromising terms. Indeed, the December 22 letter indicates that defendants are not willing to accept any significant departure from their earlier positions on this issue, first presented to us on October 26, 1993.

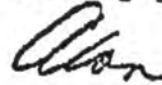
As we indicated two months ago, the October 26, 1993 proposal is wholly unacceptable to plaintiffs as a basis for settlement. The same is true of the modest modification of that proposal outlined in the December 22, 1993 letter. Both proposals, in our view, seek to treat more NSC program records as presidential than the Reagan and Bush guidelines that have given rise to this litigation and, if accepted, would actually decrease access to such NSC records under the FOIA. In an event, regardless of the actual numbers, neither of these proposals provides any reasonable basis for settlement because they are almost totally unresponsive to the concerns that have given rise to this litigation.

If the December 22, 1993 letter represents defendants' considered and final position on the suggestions for compromise that we advanced in November, there is no point in further discussions on this issue. We will plan to litigate this issue, and we believe that we should inform the Court of this in our next

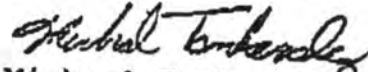
Mark I. Levy
December 23, 1993
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submission. We will draft a proposed timetable for litigating the issue in the hopes that the parties can agree on a schedule to present to Judge Richey. We plan to continue to pursue the possibility of settlement on other issues, with the assumption that the standards for distinguishing Presidential and Federal records will be determined through litigation rather than settlement.

Sincerely yours,



Alan B. Morrison


Michael Tankersley

cc: Jason Baron



Washington, D.C. 20530

CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
FAX TRANSMITTAL COVER STREET



DATE: 12/23/93
TO: Neal Wolin
FAX NUMBER: 395-1039
FROM: JRS am
FAX NUMBER(S) ROOM 1000
COMMERCIAL: 202-616-8470
CONFIRMATION NO.: 202-616-8474

THERE ARE A TOTAL OF 3 PAGES INCLUDING THIS COVER PAGE IN
THIS TRANSMITTAL

Jan 7

John - for 1:00 Armstrong
meeting

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File Armstrong

Armstrong v. Executive Office of the President
CA 89-0142

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U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

September 20, 1993

MEMORANDUM FOR ALAN J. KRECZKO

Special Assistant to the President and Legal Adviser
National Security Counsel

RE: Status of NSC as an "Agency" under FOIA

This memorandum responds to your request that we reconsider our opinion of September 6, 1978, in which we concluded that the National Security Council ("NSC") is an "agency" for the purposes of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, in light of a recent decision by the Court of Appeals for the District of Columbia Circuit. Upon reconsideration of this issue in light the decisions of the recent court of appeals and our understanding of the current functions of the NSC, we conclude that the NSC is not an agency for FOIA purposes.

I.

In 1978, this Office advised the NSC that it was an agency for purposes of FOIA for two reasons.¹ First, we examined the legislative history of the FOIA section that defines "agency"² and concluded that Congress intended for the NSC to be included within the statutory definition. We also concluded that the NSC's governing statute, 50 U.S.C. § 401, the statute authorizing the creation of the Central Intelligence Agency ("CIA"), 50 U.S.C. § 402, and subsequent executive orders expanded the NSC's functions beyond those of advising and assisting the President by

¹See Memorandum of John M. Harmon, Assistant Attorney General, Office of Legal Counsel to Robert J. Lipshutz, Counsel for the President, Sept. 6, 1978 ("1978 opinion").

²For the purposes of the Freedom of Information Act, the term "agency" includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 557(f).

granting the NSC "substantial independent authority to perform specific functions," Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); see Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980).³ We opined that "the NSC is a body which has functions, power and authority of its own and is not simply the alter ego of the President." See 1978 Opinion at 15. Subsequent legal developments, however, lead us to conclude that the analysis in our 1978 opinion is no longer applicable.

II.

Prior to 1974, the FOIA incorporated the Administrative Procedure Act's ("APA") definition of "agency."⁴ However, in 1974 Congress amended FOIA to include a definition which would cover entities that perform governmental functions and control information of interest to the public but fall outside the APA definition. The House Report on the amendment explained the meaning of the expanded definition by citing examples of "functional entities" included within it. The National Security Council was among those listed, along with the Council of Economic Advisers, the Office of Telecommunications Policy, the Federal Property Council, and the Office of Management and Budget. See H.R. Rep. No 93-876, 93rd Cong., 2d Sess. 8 (1974). Relying primarily on this Report, we concluded in our 1978 opinion that Congress intended FOIA's definition of "agency" to include the NSC.

However, the language of the House Report is not dispositive of this issue. The Senate version of the amendment contained a less expansive definition⁵ and its Report mentioned

³In Kissinger, the Court concluded that entities within the Executive Office of the President were subject to the requirements of the FOIA with the exception of the "President's immediate personal staff [and] units whose sole function is to advise and assist the President." 445 U.S. at 156. The Court adopted the "substantial independent authority" test formulated by the D.C. Circuit in Soucie to determine whether a unit's falls within that exception.

⁴See 5 U.S.C. § 551(1) which defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency" with the exception of Congress, the courts of the United States, governments of the territories or possessions of the United States and the government of the District of Columbia.

⁵The Senate version of the amendment expanded the APA definition of "agency" by adding, specifically, the United States Postal Service, the Postal Rate Commission and "any other

only two specific units, the U.S. Postal Service and the National Railroad Passenger Corporation. See S. Rep. No. 93-854, 93 Cong., 2d Sess., 33 (1974). When the bill went to the conference committee, the conferees adopted the House version of the amendment but the Report deleted specific mention of Executive Office establishments in favor of the judicially formulated test set forth in Soucie and Kissinger. The Conference Report stated: "With respect to the meaning of the term 'Executive Office of the President,' the conferees intend the result reached in Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." Conf. Rep. No. 93-1200, 93d Cong., 2d Sess., 14-15 (1974).

The court in Rushforth v. Council of Economic Advisers, 762 F.2d 1038 (D.C. Cir. 1985), rejected the argument that specific mention of the Council of Economic Advisers in the House Report led to the conclusion that the amendment, as enacted, covered the Council. As the court stated, "[T]he 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." Id. at 1040-41. Thus, to the extent that our 1978 opinion relied on the legislative history that the Rushforth court rejected as non-dispositive, the analysis is no longer viable.

III.

The recent cases addressing the question of whether an Executive Office entity is an agency for FOIA purposes have applied the sole-function test developed by the D.C. Circuit in Soucie, endorsed by the 1974 Conference Committee Report, and adopted by the Supreme Court in Kissinger. See Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259 (D.C. Cir. 1980), Rushforth v. Council of Economic Advisers, 762 F.2d 1038 (D.C. Cir. 1985), and Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993). See also Energy Research Foundation v. Defense Nuclear Facilities Safety Board, 917 F.2d 581 (D.C. Cir. 1990) (applying the Soucie sole-function test to an "independent establishment in the executive branch"). Under that test, an entity provides only assistance and advice to the President and is not an agency for purposes of the FOIA if the unit does not

authority of the Government of the United States which is a corporation and which receives any appropriated funds." See Conf. Rep. No. 93-1200, 93d Cong., 2d Sess., 14-15 (1974).

have "substantial independent authority to perform specific functions."

The test requires a specific inquiry into the authority granted to the entity and courts examine governing documents, such as statutes and executive orders, in order to determine the types of functions an entity has the authority to perform. For example, in Pacific Legal Foundation, the court initially looked at the statute which created the Council on Environmental Quality and determined that statute provided for an advisory role only. Pacific Legal Foundation, 633 F.2d at 1262. The court then examined the executive orders that have expanded the statute's original grant of authority. It concluded that since the President gave the Council the authority to coordinate and evaluate federal programs, issue guidelines and promulgate regulations, the Council's functions were no longer limited to advising and assisting the President. Id. at 1262, 1263.

Following the same analysis, the court in Rushforth concluded that the authority of the Council of Economic Advisers was limited to advising and assisting the President. Rushforth, 762 F.2d at 1043.⁶ Similarly, the court in Meyer examined the Executive Order that created the President's Task Force for Regulatory Relief and determined that the Task Force's functions were limited to giving advice and assistance to the President. Meyer, 981 F.2d at 1291-95.

A.

An examination of the National Security Act of 1947, 50 U.S.C. §402, the statute which establishes the NSC, reveals that its authority is limited to advising the President on issues of foreign and domestic intelligence. The statute states that the NSC's functions 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

⁶The Council of Economic Adviser's governing statute, 15 U.S.C. § 1023, authorizes the CEA to (1) assist and advise the President in the Preparation of the Economic Report; (2) gather, compile and submit to the President timely and authoritative information concerning economic developments and economic trends; (3) to appraise the various programs and activities of the Federal Government and make recommendations to the President; (4) to develop and recommend to the President national economic policies to foster and promote free competitive enterprise; and (5) to make and furnish whatever material the President may request on matters of Federal economic policy.

Government to cooperate more effectively in matters involving the national security.

50 U.S.C. § 401(a). In addition, the NSC is authorized to perform such other functions as the President may direct, for the purpose of more effectively coordinating the policies and functions of the departments and agencies . . . and it shall . . . 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 . . . and (2) to consider policies on matters of common interest to the departments and agencies of the Government concerned with the national security, and make recommendations to the President in connection therewith.

50 U.S.C. § 401(b). We conclude that the National Security Act does not contemplate the NSC performing any functions other than those associated with advising and assisting the President.

The duties and functions of the NSC are established also by presidential directives issued by each President at the beginning of his or her administration. The directive issued by the Clinton administration, which we understand to be similar to the majority of those issued, describes the NSC as the "principal forum for consideration of national security policy issues requiring Presidential determination." It states that the NSC "shall advise and assist [the President] in integrating all aspects of national security policy as it affects the United States . . . [and] shall be [the President's] principal means for coordinating Executive departments and agencies in the development and implementation of national security policy." See Presidential Decisional Directive No. 2., Jan. 20, 1993. It is our opinion that none of the duties listed in this directive rise to the level of "substantial independent authority to perform a specific function" because in each instance, the NSC is either advising the President on national security policy issues or assisting the President in the implementation of that policy.⁷

⁷The directive also creates two standing committees, one for Cabinet-level officials and another for senior sub-Cabinet level officials, to serve as forums for policy issues affecting national security. See Presidential Decisional Directive No. 2 at 2. Although the President does not serve on either of these committees, the groups' responsibilities are limited to advising the President on the interagency-implementation of national security policy.

B.

At the time of our previous opinion, the NSC was charged, specifically, with directing and supervising the activities of the Central Intelligence Agency ("CIA"). See 50 U.S.C. §403(1) (1988). This was a distinct statutory obligation that existed independently of its duty to advise the President. Accordingly, we concluded that NSC could not be viewed as a unit whose sole function consisted of advising and assisting the President.

However, 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. The previous § 403 read "[t]here 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 exercise the powers of the Directory during his absence or disability. . . ." Id. That section now simply reads, "[t]here is established a Central Intelligence Agency." Other provisions make it clear that the Director of Central Intelligence is responsible for supervising the activities of the CIA. See e.g., § 403-3(d). These statutory changes eliminate the 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.⁸ 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). Although this language suggests that the NSC may direct agency action, recent interpretations of similar language suggest otherwise. In discussing a similar situation in Meyer, the court concluded that the language did not "authorize . . . the Task Force, qua Task Force to give directions to the executive branch. Instead, the OMB Director took up that responsibility" Meyer, 981 F.2d at 1294. With regard to the authority to provide general direction to the OMB Director, the court said "In that respect, . . . the Task Force theoretically was positioned between the OMB Director and the President, placing the Task Force only a hair's breadth from the President" and concluded that the Task Force members were functioning as assistants to the President. Id.

⁸The 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.

Accordingly, we conclude that the amendment's language authorizes the NSC to serve only as an advice and assistance panel.

C.

Since the establishment of the NSC as an Executive Office entity, Presidents have given the NSC duties and responsibilities through executive orders. In 1978, we opined that many of the executive orders "empowered [the NSC] to perform important, substantial and far-reaching governmental functions relating to intelligence matters." However, our recent review of those orders still effective reveals that they do not grant the NSC any "substantial independent authority to perform specific functions" as required by the Soucie sole-function test. The majority of these orders require the NSC to provide guidance and direction for national security policy.⁹ As we stated earlier, in this capacity the NSC is merely assisting and advising the President as mandated by the National Security Act of 1947 and the latest Presidential Decisional Directive.¹⁰

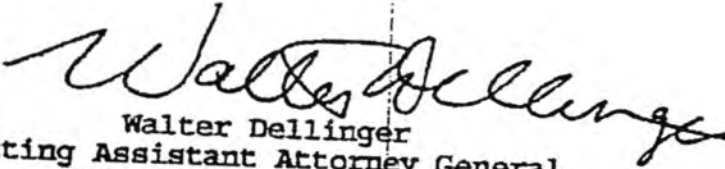
⁹There are some executive orders that give us pause. For example, Executive Order No. 12356 authorizes the NSC to review declassification decisions of the Director of the Intelligence Security Oversight Office. However, it is our understanding that the NSC has never performed this function and has no established procedure. Although the Soucie test focuses on the authority to act, the Meyer court stressed the actual actions of the Task Force and suggested on several occasions that absent an indication that the entity performed the function, the Task Force would not be charged with that function. Meyer, 981 F.2d at 1294, 1295, 1297.

We are also aware that, 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." We conclude that 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, it is our understanding that the NSC does not perform this function on a regular basis.

¹⁰In our 1978 opinion, we took the position that the legislative history of FOIA necessitated a very narrow interpretation of the term "assist." See 1978 opinion, n.9. However, the cases give the term a much broader meaning. See e.g., Rushforth, 762 F.2d at 1043; Meyer, 981 F.2d at 1294.

IV.

In light of our understanding of NSC functions, we conclude that the FOIA definition of "agency" does not include the NSC. Our examination of the statutes, directives and executive orders that authorize the NSC to act establishes that it has not been given any "substantial independent authority to perform specific functions" as that test has been applied by the courts. Accordingly, our 1978 opinion is withdrawn.


Walter Dellinger
Acting Assistant Attorney General
Office of Legal Counsel

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Department of Justice

Washington, D.C. 20530

6 SEP 1978

MEMORANDUM FOR ROBERT J. LIPSHUTZ
Counsel to the President

Re: Status of NSC as an "Agency" Under FOIA

You have asked whether the National Security Council is an agency for Freedom of Information Act purposes. We conclude, in general, that it is. This opinion does not, however, address the questions of (1) whether the National Security Council, although an agency under FOIA for most purposes, might be considered not an agency for other purposes, 1/ or (2) which records held by the Council are agency records within the meaning of the Act. 2/

The Freedom of Information Act

The Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976), places certain duties, responsibilities and obligations relating to public access to government information on

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1/ C.f. Renegotiation Board v. Grumman Aircraft Engineering, Inc., 421 U.S. 168, 188 n. 25 (1975). In that case the Supreme Court suggested that a Regional Renegotiation Board might be an "agency" in some of its work and not an "agency" in the rest of its work.

2/ It follows from the conclusion that NSC is an agency for FOIA purposes that records belonging to NSC are agency records under FOIA, but NSC may hold records that belong to persons or entities that are not agencies for FOIA purposes. In this connection, it may be pertinent to note that the NSC staff views itself as not only performing the functions prescribed in the National Security Act of 1947 but also as serving as "supporting staff to the President in the conduct of foreign affairs," 40 Fed. Reg. 47746 (1975); 32 CFR § 2102.1(b)(1976), and thus as "an extension of the White House Office."

"each agency" of the Government of the United States. For the purpose of the Act

. . . the term "agency" as defined in section 551(1) [of 5 U.S.C.] . . . includes any executive department, Government corporation, Government controlled corporation, or any other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency. 5 U.S.C. § 552(e) 3/

Crucial to our consideration is that, according to the definition of § 552(e), the term agency, for FOIA purposes, includes establishments in the Executive Office of the President. The National Security Counsel (NSC) is, without

3/ This definition was added to the Act by the 1974 Amendments, Act Nov. 21, 1974, Pub. L. No. 93-502 §3, 88 Stat. 1564. Prior to amendment the FOIA definition of agency was exclusively that of the Administrative Procedures Act, 5 U.S.C. § 551(1). In relevant part § 551(1) defines agency as

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

The amended definition has been incorporated into the Privacy Act of 1974, 5 U.S.C. § 552a(a)(1) and the Government in the Sunshine Act, 5 U.S.C. § 552b(a)(1).

doubt, an establishment, 4/ and it is within the Executive Office of the President. 5/ Thus, NSC is squarely within the plain language of the definition and were it not for the legislative history of the 1974 Amendments there could be no doubt that it would have to be considered an agency for FOIA purposes.

The Senate version of the 1974 Amendments expanded the APA definition of agency only by adding it to the United States Postal Service, the Postal Rate Commission and "any other authority of the Government of the United States which is a corporation and which receives any appropriated funds." The Senate Report explained this expanded definition of agency as follows:

4/ The term establishment is not defined in § 552(e) or elsewhere in the FOIA or APA. It is evident, however, that the NSC must be considered an establishment in view of the existence of its 99 member staff. (Of these 69 are permanent employees of the NSC; 30 are detailed from other agencies.) The NSC, or its staff at any rate, is easily identifiable as a body separate from other entities within the Executive Office of the President. Money is appropriated for it and it "owns" its furniture, fixtures and supplies. It pays its employees, keeps their administrative records, and handles personnel matters which relate to them. In short, it has a clear, independent administrative existence.

5/ As discussed below, the NSC was created by the National Security Act of 1947. It was transferred to the Executive Office of the President by Reorganization Plan No. 4 of 1949, 5 U.S.C. App., 14 Fed. Reg. 5227, 63 Stat. 1067.

Section 3 expands on the definition of agency as provided in section 551(1) of title 5. That section defines "agency" as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia." This definition has been broadly interpreted by the courts as including "any administrative unit with the substantial independent authority in the exercise of specific functions," which in one case was held to include the Office of Science and Technology. (Soucie v. David, 44 F.2d 1067, 1073 (1971).)

Nonetheless, the U.S. Postal Service has taken the position that without specific inclusionary language, amendments to the FOIA "would not apply to the Postal Service." (Hearings, vol. II at 323.) To assure FOIA application to the Postal Service and also to include publicly funded corporations established under the authority of the United States, like the National Railroad Passenger Corporation (45 U.S.C. § 541), section 3 incorporates an expanded definition of agency to apply under the FOIA. S. Rep. No. 93-854, 93d Cong., 2d Sess., 33 (1974).

The House version of the Amendments also contained an expanded definition of the term agency. This definition was broader and more explicit than that of the Senate version and it prevailed in conference to become, with slight modification, 5 U.S.C. § 552(e). Its language relating to establishments within the Executive Office of the President was identical to that agreed upon in conference. The House Report explains the meaning of that language by citing examples of "functional entities" included within it.

The term "establishment in the Executive Office of the President," as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order. H.R. Rep. No. 93-876, 93d Cong., 2d Sess., 8 (1974) (emphasis added).

held NOT AN Agency

Speaking in more general terms the House Report notes that the definition of agency was expanded

. . . to include those entities which might not be considered agencies under Section 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public. Id.

cited by the dissent in Mayers

The Conference Report, after explaining the differences between Senate and House versions of the expanded definition of agency, notes that "The conference substitute follows the House bill." Conf. Rep. No. 93-1200, 93d Cong., 2d Sess., 14 (1974) (emphasis added). That report states that by the definition the conferees ". . . intend[ed] to include within the definition of 'agency' those entities encompassed by 5 U.S.C. § 551 and other entities including . . ." 6/ Id.

6/ The list following "including" does not include the NSC, or any other unit in the Executive Office of the President. Two entities are included by name. These are the United States Postal Service and the Postal Rate Commission, both of which were included by express language in the Senate version.

Commenting further the report reveals that "Expansion of the definition of 'agency' in this subsection is intended to broaden applicability of the Freedom of Information Act. . ." Id. at 15. In addition, the Conference Report deals specifically with the meaning of "Executive Office of the President." It states:

With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in Soucie v. David, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President. Id.

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A fair summary of the 1974 Amendments and their history as it relates to the question whether Congress intended that the NSC be included in the FOIA definition of agency is as follows: (1) The language which Congress used in the definition included in the legislation itself is broad enough to be viewed as an expression of congressional intent that all establishments within the Executive Office of the President, including the NSC, be treated as agencies for FOIA purposes. (2) The Senate Report (and the Senate version of the legislation) indicates an intention that the "new" definition continue to include all government entities included in the APA definition as interpreted by the courts. The black letter rule, as expressed in the Senate Report, is that "any administrative unit with the substantial independent authority in the exercise of specific functions" should be viewed as an

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7/ Although it is honored primarily in the breach, the plain meaning rule of statutory construction in which legislative history is ignored still has some vitality. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976). Its application becomes more likely when the legislative history is more ambiguous than the statutory language being construed.

agency under the FOIA. This language was explicitly linked to Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), which involved a unit within the Executive Office of the President.

(3) The House Report shows an unequivocal intention to include NSC in the FOIA definition of agency. (4) The Conference Report, while stating generally that the intent of Congress in redefining "agency" was to expand the definition in order to broaden the applicability of FOIA, declares that the conference bill follows the House version and expresses the specific intent that, with respect to the Executive Office of the President, entities within the "result reached" in Soucie v. David, supra, be included but that those constituting the President's personal staff or "whose sole function is to advise and assist the President" be excluded.

Thus, both the language of the Act itself and of the explanation of it contained in the House Report include, by literal application, the NSC as an agency subject to FOIA. The Conference Report, which states that the conferees followed the House version of the legislation, expresses the intent (as did the Senate report with respect to the term agency as used in APA) that -- at least for entities in the Executive Office of the President -- a functional approach be adopted. That is, an establishment within the Executive Office should not automatically be classified an agency (nor automatically excluded) but should be treated as such only if it has the authority to function at least in part as an agency.

Based on the foregoing we conclude that there is a very substantial risk that the NSC would be held to be an agency squarely on the basis of the unambiguous language of the Act and of the House Report. Under conventional standards of statutory interpretation a court would be justified in so holding on these grounds alone, at least in the sense that such a conclusion would clearly be reasonable. We believe, nevertheless, that the proper legal test for determining whether NSC is included within the FOIA definition

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of agency, must be derived from the Conference Report and is, therefore, whether it is invested with "substantial independent authority in the exercise of specific functions." 8/ It should not be viewed as having substantial independent authority if it is either the President's staff or a unit whose sole function is to advise and assist 9/ the President.

8/ We view reference to the "result reached" in Soucie v. David as reference to the interpretation of that case in the Senate Report. That is, that entities within the Executive Office of the President may be treated as agencies for FOIA purposes if they have "substantial independent authority in the exercise of specific functions." An entity would not have substantial independent authority if it were either the President's staff or a unit whose sole function is to advise and assist the President.

9/ Within the context of the legislative history, which clearly expresses a general intent to expand the coverage of FOIA, "assist" must be read narrowly. We do not believe that units within the Executive Office can be viewed as "assisting" the President, in the sense that the word "assist" is used in the Conference Report, when they perform substantive governmental functions, even if the purpose for their having the authority to perform such functions is to enable them to fulfill a primary role of assisting (or advising) the President. To conclude otherwise would make a dead letter of inclusion of establishments within the Executive Office of the President within the definition of an agency for FOIA purposes, since the function of all of the units within the Executive Office and, indeed, of the Office itself is, in a broad sense, to assist the President.

The National Security Council

The National Security Council was created by the National Security Act of 1947, and together with its functions, records, property, personnel, and unexpended appropriations, allocations and other funds (available or to be made available) was transferred to the Executive Office of the President by Reorganization Plan No. 4 of 1949, 5 U.S.C. App., 14 Fed. Reg. 5227, 63 Stat. 1067. As presently constituted the statutory body consists of the President, the Vice President, and the Secretaries of State and Defense. It has a staff of 99 (69 permanent employees, 30 detailed from other departments) which, at present, is headed by a staff secretary. 10/

According to its statutory mandate

The function of the Council shall be to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving national security. 50 U.S.C. § 402(a)

The National Security Act also assigns to the NSC, under the heading "additional functions," the following duties:

In addition to performing such other functions as the President may direct, for the purpose of more effectively coordinating

10/ Section 402(c) of 50 U.S.C. directs that the NSC staff be headed by a presidentially appointed executive secretary. This position, which in past administrations has often been filled by the President's Assistant for National Security Affairs, is presently vacant. As a practical matter, however, current operating procedures make the NSC staff very much the staff of the President's Assistant for National Security Affairs, and it is he whom they work for primarily in fact if not in form.

the policies and functions of the departments and agencies of the Government relating to the national security, it shall, subject to the direction of the President, be the duty of the Council --

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

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

50 U.S.C. § 402(b)

The Council is further authorized to ". . . from time to time, make such other reports to the President as it deems appropriate or as the President may require." 50 U.S.C. § 402(d).

The House Report on the National Security Act of 1947 comments that "This Council [the NSC] . . . gives us for the first time in our history a means for bringing together the responsible heads of Government charged with recommending and carrying out our foreign policies after making a careful appraisal of our domestic and military potentials." H.R. Rep. No. 961, 80th Cong., 1st Sess., 3 (1947). The Senate Report characterizes the Council as "Essentially . . . an advisory body to the President with respect to the integration of domestic, foreign, and military policies, so as to enable the military services and other departments and agencies of the Government to cooperate more effectively in matters involving the national security." S. Rep. No. 239, 80th Cong., 1st Sess., 10 (1947). The Senate Committee which reported favorably on Reorganization Plan No. 4 of 1949 stated flatly that

11122 - House Report No 961

11115 - Senate Report No 239¹⁰ -

"It [NSC] is an advisory body to the President and not one of the various agencies within the National Military Establishment." S. Rep. No. 838, 81st Cong., 1st Sess., 2 (1949). It also noted that "The President as chairman controls NSC business . . ." Id. and that NSC and NSRB (National Security Resources Board) "were made advisory agencies to the President by the National Security Act of 1947." Id. at 3.

It is clear from the statutorily prescribed functions of the NSC listed above and from the legislative history of the Act which created it as well as from nearly contemporaneous congressional commentary that the Council is intended to function primarily as an advisory body in support of the President and specifically to aid him to plan for the effective and efficient unitary utilization of the various departments and agencies of the Government having responsibilities for the Nation's security. That this is its primary function does not, however, answer the question whether NSC is vested with substantial independent authority in the exercise of specific functions or whether its sole function is to advise and assist the President.

much text

In addition to the establishment of the NSC, the National Security Act of 1947 created the CIA. That agency was "established under the National Security Council," 50 U.S.C. § 403(a), and is given certain duties "under the direction of the National Security Council," 50 U.S.C. § 403(d), including the duty "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." 50 U.S.C. § 403(d)(5).

The legislative history of the Act makes it clear beyond doubt that in establishing the CIA "under" the NSC and in making it subject to the Council's "direction" Congress intended that the National Security Council be the supervisory authority over the Central Intelligence Agency.

According to the Senate Report

The Central Intelligence Agency provided for by Section 102 exists now as the Central Intelligence Group. The bill establishes the agency under the National Security Council and assigns to that Council the supervisory authority and responsibility now exercised by the National Intelligence Authority created by Executive Order of the President and composed of the Secretaries of State, War, and Navy. S. Rep. No. 239, supra, at 10. (emphasis added)

The Executive Order referred to in the Senate Report was actually a Presidential Directive. It provided, in pertinent part:

To The Secretary of State, The Secretary of War, and The Secretary of the Navy.

1. It is my desire, and I hereby direct, that all Federal foreign intelligence activities be planned, developed and coordinated so as to assure the most effective accomplishment of the intelligence mission related to the national security. I hereby designate you, together with another person to be named by me as my personal representative, as the National Intelligence Authority to accomplish this purpose.

2. Within the limits of available appropriations, you shall each from time to time assign persons and facilities from your respective Departments, which persons shall collectively form a Central Intelligence Group and shall, under the direction of a Director of Central Intelligence, assist the National Intelligence Authority. The Director of Central Intelligence shall be designated by me, shall be responsible to the National Intelligence Authority, and shall sit as a nonvoting member thereof.

3. Subject to the existing law, and to the direction and control of the National Intelligence Authority, the Director of Central Intelligence shall: . . .

Presidential Directive of January 22, 1946, 3 CFR 1080 (1943-1948 Compilation) (emphasis added)

In addition, the Senate Report on Reorganization Plan No. 4 of 1949, while stating flatly that NSC "is an advisory body to the President," recognized that "It also directs the Central Intelligence Agency which coordinates intelligence activities." S. Rep. No. 838, supra at 2, 4.

Unquestionably, the National Security Council, which is an administrative unit 11/ and is an establishment within the Executive Office of the President, has explicit statutory authority to supervise and direct the Central Intelligence Agency. In our opinion the existence of this legal authority in the NSC over the CIA constitutes substantial independent authority in the exercise of at least one (very important) specific function. It prevents NSC from being viewed as a unit whose sole function is to advise or assist the President.

We have considered the possibility that NSC should be viewed as advisory only because the President, as a member, controls its actions and decisions. The argument runs that in all cases Council action must be viewed as presidential action since the President will inevitably dominate in Council affairs. Thus, Council participation in national security matters, the argument continues, is, at most, hortatory and not substantive. This argument fails for two reasons.

11/ See footnote 4, supra.

In spite of the fact of the President's membership, the National Security Council was created by Congress as an entity distinct from the presidency. It was transferred, still as a distinct entity, along with all of its functions to the Executive Office of the President by executive order. As a legal matter, then, the independent authority which it possesses, it possesses as the National Security Council. To the extent that the Council's authority is exercised by the President 12/, it may reasonably be viewed as exercised by him in his capacity as Chairman of the NSC. 13/

Exec. OR Even if it were a sound proposition that the statutory NSC, as a Council with the President as a member, is capable of assuming an advisory role only (because of the President's membership), the Council would not escape agency status for FOIA purposes. This is so because, from administration to administration, Presidents, invoking the authority granted them by 50 U.S.C. § 402(b) to assign to the NSC "such other functions as the President may direct," have, themselves, vested NSC committees on which they have not retained membership with legal authority to perform specific, substantive functions. Current examples are the two NSC committees created by PD/NSC-2, the Policy Review Committee (PRC) and the Special Coordination Committee (SCC), both of which are empowered by executive order to perform important, substantive and far-reaching governmental functions relating to intelligence matters and both of which are legally permitted to act without presidential participation. See Executive Order 12036 §§ 1-2 (PRC) and 1-3 (SCC), 43 Fed. Reg. 3674, 3675 (1978). The existence of such delegated power 14/ in these committees

12/ NSC is, of course, subservient to the President, as President, as are all executive departments and agencies. This, however, does not mean that it, or they, are without independent authority.

13/ Under current practice presidential decisions on national security matters are promulgated via directives of a series entitled "Presidential Directive (PD)/NSC." See PD/NSC-1.

14/ The fact that a government entity exercises only delegated powers does not prevent it from being treated as an agency for
(Footnote 14/ continued on page 15)

committees (and other similar NSC committees which existed in prior administrations, such as the 303 and 40 committees, the Committee on Foreign Intelligence (CFI), and the Operations Advisory Group (OAG), see Executive Order 11905 §§ 3b (CFI) and 3(c) (OAG) 41 Fed. Reg. 7703, 7707-7709 (1976)) prevent the NSC from being viewed as solely advisory and without legal authority to exercise specific governmental functions.

Important, too, is the common understanding, the argument stated above notwithstanding, that the NSC is a body which has functions, power and authority of its own and is not simply an alter ego of the President. This understanding was expressed by the President himself in his statement accompanying the promulgation of Executive Order 12036. He said:

The National Security Council and its two standing Committees -- the Special Coordination Committee (SCC) and the Policy Review Committee (PRC) -- will, short of the President, provide the highest level of review and guidance for the policies and practices of the Intelligence Community. 14 Weekly Comp. of Pres. Doc. 214 (Jan. 30, 1978). (emphasis added)

Conclusion

We conclude that there is a substantial risk that NSC could be held to be an agency by a simple, literal application of the language of 5 U.S.C. § 552(c). In our view, the better approach is to examine whether NSC is within the exception from inclusion stated in the Conference Report. This requires testing whether NSC has substantial independent authority in the exercise of specific functions or whether it is simply an establishment in the Executive Office of the President whose

14/ continued from page 14

FOIA purposes. Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710 (D.C. Cir. 1973), reversed on other grounds, 421 U.S. 168 (1975).

sole function is to advise and assist the President. Since NSC is given clear statutory authority to supervise and direct the CIA, as well as because of the NSC functions in Executive Order 12036, we conclude that it has independent legal authority to exercise specific functions and that, as a legal matter, it cannot be viewed as existing solely to advise and assist the President. It is not, therefore, within the exception of the Conference Report, and, being an establishment in the Executive Office of the President not within that exception, is an agency for FOIA purposes. 15/



John M. Harmon
Assistant Attorney General
Office of Legal Counsel

15/ It has not entered into our conclusion but we would point out that there is not a great deal of equity in the position that NSC is not an agency for FOIA purposes. NSC, although reserving the question of the applicability to it of FOIA, has staff members assigned to process FOIA requests in accordance with its published FOIA guidelines. See 40 Fed. Reg. 7316 (1975), 32 CFR § 2101 (1976). Further, due to the nature of the work of the NSC and its staff it is clear that valid exemptions are available for the vast bulk of the material which constitutes NSC records. Yet, there may be records in the possession of the NSC staff which are not sensitive or advisory in nature and which may be of interest to the public, such as some fiscal records.

We have also considered whether NSC could raise a valid constitutional claim to general immunity from the FOIA and believe this possibility is very weak. Certain records of the NSC could if necessary be protected by a claim of executive privilege, but such a claim could not successfully be invoked to preclude Congress from opening some NSC administrative records and other nonsensitive records to which the claim could not reasonably attach to public view, nor could it be shown on evidence now available that the Act's impact on NSC is so onerous that its ability to function in support of the President has been or will be destroyed or crippled.

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December 23, 1993

By Telecopier

Mark Levy
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Civil Division
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Washington D.C. 20530

Re: Armstrong v. Executive Office of the President
(Settlement Discussions - Presidential Records Issues)

Dear Mark:

We are writing to respond to the letter delivered to us yesterday, containing defendants' response to the suggestions for compromise on the Presidential records issue that plaintiffs made a month ago in our letter of November 12, 1993, and orally at the meeting on November 23, 1993.

At the outset, we must note that your characterization of the proposals that plaintiffs presented is inaccurate in a number of respects. However, your letter makes clear that the bottom line is that defendants are rejecting virtually all of the ideas that we have presented for cutting back on the NSC records treated as presidential in absolute, uncompromising terms. Indeed, the December 22 letter indicates that defendants are not willing to accept any significant departure from their earlier positions on this issue, first presented to us on October 26, 1993.

As we indicated two months ago, the October 26, 1993 proposal is wholly unacceptable to plaintiffs as a basis for settlement. The same is true of the modest modification of that proposal outlined in the December 22, 1993 letter. Both proposals, in our view, seek to treat more NSC program records as presidential than the Reagan and Bush guidelines that have given rise to this litigation and, if accepted, would actually decrease access to such NSC records under the FOIA. In an event, regardless of the actual numbers, neither of these proposals provides any reasonable basis for settlement because they are almost totally unresponsive to the concerns that have given rise to this litigation.

If the December 22, 1993 letter represents defendants' considered and final position on the suggestions for compromise that we advanced in November, there is no point in further discussions on this issue. We will plan to litigate this issue, and we believe that we should inform the Court of this in our next

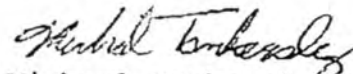
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December 23, 1993
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submission. We will draft a proposed timetable for litigating the issue in the hopes that the parties can agree on a schedule to present to Judge Richey. We plan to continue to pursue the possibility of settlement on other issues, with the assumption that the standards for distinguishing Presidential and Federal records will be determined through litigation rather than settlement.

Sincerely yours,



Alan B. Morrison



Michael Tankersley

cc: Jason Baron



U.S. Department of Justice

Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

December 22, 1993

Alan B. Morrison, Esq.
Michael E. Tankersley, Esq.
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
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Re: Armstrong v. Executive Office of the President
(NSC Presidential/Federal Recordkeeping)
Settlement Discussions (F.R. Evi. 408)

Dear Alan and Michael:

By letter dated November 12, 1993, you provided us your views, and made alternative proposals, with respect to the dividing line between those records that would be treated as presidential records and those treated as federal at the National Security Council. The parties have since met on two occasions and exchanged ideas and views concerning your proposals and this issue in general. We agreed to set forth our revised views on the matter in light of all the discussion that has occurred.

We recognize that both parties wish to avoid protracted litigation on this issue in order to facilitate resolution not only of this question but other related questions in the case such as the processing of the FOIA request by the NSC. As both sides have recognized from the outset of our discussions, settlement will be achieved only if the parties focus on fashioning a practical resolution rather than adhering to legal theories.

The framework of our current position is derived from the second alternative counterproposal (the "counterproposal") set forth in your November 12 letter in which you proposed a "vertical" approach for the designation of presidential records. Our comments on this second alternative should be understood in the context of our continuing proposal to treat as federal all records that are sent or received from outside the White House, including formal statements of an Administration's national security policy, meeting notices, lists of attendees, agendas, option papers, summaries of conclusions, and minutes of interagency meetings (NSC, PC, DC, and IWG).

(1) Principle of Verticality: Your counterproposal began with the premise that "all records that are directed to the President, the National Security Adviser, or the Deputy National

Security Adviser, from any NSC staff member may be treated as presidential records, and vice versa, but all other records are federal." Your counterproposal recognized that, in many cases, more than one NSC staff member would participate in the preparation of a memorandum and, accordingly, expanded upon the vertical approach by proposing to treat as presidential a record (including drafts) which involved three or fewer "co-authors/consultants ('participants')." During our meetings, you agreed that the NSC Staff Secretary, the Executive Secretary, the Deputy Executive Secretary, and the secretarial staff would not count toward these three participants, and also indicated some willingness to include as presidential records specific types of records transmitted to a larger number of NSC staff asking, for example, for comments on drafts of presidential speeches.

While the principle of verticality provides a useful line, we see no basis in either principle or practicality on which to treat records between NSC staff and the President, the Assistant to the President for National Security Affairs (APNSA) and the Deputy Assistant to the President for National Security Affairs (DAPNSA) as presidential if they are created by two NSC staff and as federal if they are created by four NSC staff. All such communications "advise and assist" the President, APNSA, and DAPNSA, and are presidential records, regardless of the number of NSC staff involved. Constraining such consultations on the basis of an arbitrary number of staff participants would unduly interfere with the "advise and assist" function of the NSC staff. Accordingly, while we are prepared to consider a solution along vertical lines, the designation of a presidential record sent vertically to the President, APNSA, DAPNSA cannot depend upon the number of staff "participants" in the record.

(2) Intra-staff Communications: Your counterproposal provided that drafts of records to the President, APNSA and DAPNSA, "along with memos among/between [a maximum of three] participants specifically discussing a draft, would be presidential also." Although we are heartened by your willingness to treat some intra-staff communications as presidential, for the reasons stated above, we feel strongly that the number of staff involved in the preparation of a record going to the President, APNSA, or DAPNSA is not an appropriate criterion for determining whether a record between staff members is presidential or federal. For purposes of settlement, however, we would offer to treat as presidential only those intra-staff records specifically discussing a communication to or from the President, the APNSA, and DAPNSA (including those intra-staff records referring to such a communication on its face). We would also treat as presidential intra-staff records specifically discussing a communication to any other Assistant or Deputy Assistant to the President. Together, these intra-staff communications are most closely linked to advising and assisting the President.

This approach would extend our original proposal to include as federal records intra-staff communications, for example, relating to IWGs and other policy matters, that do not specifically discuss a communication to or from the President, the APNSA, DAPNSA or any other Assistant or Deputy Assistant to the President. This proposal is intended to address your concerns that our prior proposal -- in which intra-staff communications "related to" vertical presidential communications would be presidential -- swept too broadly. By requiring a tight link between NSC staff communications and communications going up or coming down the line, we seek to accommodate your more general concern that records unrelated to advising and assisting the President not be treated as presidential.

(3) NSC Staff Communications with Other Staff of the White House Office: During our meetings, an issue arose as to the treatment of communications between NSC staff and other White House Office staff. Although the volume of such record material is relatively small, we believe it is essential that communications between NSC staff and other White House staff be treated as presidential. As a matter of principle, there is no basis for distinguishing the APNSA and DAPNSA from other White House staff; and, as a practical matter, NSC staff have important contact with other White House staff, often on sensitive matters.

We appreciate that plaintiffs have expressed a willingness to treat as presidential communications between the NSC Legal Adviser's office and the Counsel to the President. However, given the primary advise and assist function of NSC, treating communications between NSC staff and other staff of the White House Office as other than presidential records would unduly interfere with NSC's ability to carry out its vital function. Accordingly, it is our position that all communications between NSC staff and other staff of the White House Office should be treated as presidential.

(4) NSC Staff Access to Presidential Records: Your counterproposal contemplates a system in which records that are presidential when created would lose their presidential record status if and when at a later date they are shared with other NSC staff: "if such a record were sent to any NSC staff person not listed as a participant, or made available, either physically or electronically to any other non-participant at NSC or any other federal agency, the record would be federal." We believe that such an approach would have substantial adverse consequences on the efficiency and effectiveness of the NSC by creating obstacles to NSC staff having the benefit of previous NSC staff work. We appreciate that you are willing to recognize an exception to your proposed general rule for legal documents so that all staff could have access to those documents without changing their status. This access principle should be applied generally, however, because staff access to substantive presidential records is no less

important than access to legal documents in the NSC's advise and assist function.

(5) Indexes to Presidential Records: You have also proposed that the NSC produce an index of its presidential records that would be treated as a federal record. Although it is not dispositive for settlement purposes, we begin from the premise that there is no legal obligation to create such an index when underlying documents are preserved. We also believe that such an index would be a presidential record during the life of the Administration, since the index itself would include information on presidential materials and would reveal advice and recommendations under review by the President. However, in order to settle the case, we would be happy to consider any specific proposals you may have for creating such an index for presidential records that might be prepared in a manner that would allow it to be deemed a federal record upon the conclusion of the Administration.

(6) Presidential Records at the End of the Administration: You have also raised the issue whether, at the end of the Administration, a complete set of NSC presidential records could be copied and designated as federal records. As a statutory matter, presidential records designated by a President during his term in office should be treated in accordance with the provisions of the Presidential Records Act upon the conclusion of a President's term.

Summary of Defendants' Pending Proposal

1. Outside Records: Records that are sent or received from outside the White House, including formal statements of an Administration's national security policy, meeting notices, lists of attendees, agendas, option papers, summaries of conclusions, and minutes of interagency meetings (NSC, PC, DC, and IWG), would be treated as federal, as indicated in our original proposal.
2. Litigation, administrative and other records deemed federal in our original proposal would continue to be treated as federal.
3. Verticality: All communications between NSC staff and the President, APNSA, DAPNSA would be treated as presidential.
4. Intra-staff: Intra-staff communications specifically discussing communications to or from the President, APNSA, DAPNSA, or any other Assistant or Deputy Assistant to the President would be treated as presidential. All other intra-NSC staff communications would be treated as federal.

5. NSC Staff to WHO: All communications between NSC staff and all staff of the White House Office will be treated as presidential.
6. NSC Staff Access to Records: NSC staff access to presidential records will not change the status of those records.

We have tried in this proposal to accommodate plaintiffs' concerns that the designation of presidential records not be overbroad while at the same time protecting the NSC's ability to carry out its core function to advise and assist the President. To the extent differences remain, we believe that discussions can profitably continue on this issue, particularly since the deadline for reporting to the Court on this matter is not until February 4, 1994. We of course are willing to meet with you to discuss the issue further, but it would be useful for you to provide in writing first your reaction to this proposal as well as any fresh ideas you may have for resolving remaining differences.

We look forward to hearing from you.

Sincerely yours,



Mark I. Levy
Deputy Assistant Attorney General

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November 12, 1993

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Re: Armstrong v. EOP -- Presidential Records

Dear Mark:

Thank you for arranging the meeting on Wednesday and for answering our questions regarding defendants' views on the dividing line between presidential records and federal records at the National Security Council. On the plaintiffs' side, we have been searching for the kind of "reasonable compromise" that you have suggested is in the interest of both sides and that would still enable us to settle this issue in a way that will assure that many more substantive records of the NSC are subject to FOIA and the Federal Records Act than has been the case in the past, as we believe the law requires. We have outlined below two alternatives for your consideration, but before discussing them specifically, let me say a few words by way of background, some of which we have said before, and some of which may be entirely new to you or others who will read this letter.

First, in the portion of this litigation in which we challenged the legality of the current guidelines distinguishing between federal and presidential records, we sought to narrow the latter category substantially in order to increase the NSC records that are subject to FOIA (even if many are not immediately available because of national security reasons) both during an Administration and prior to the end of the automatic five/twelve year waiting period after the end of an Administration during which no presidential records are available to the public. If anything, the distinction between presidential and federal records became more important after the Court of Appeals ruled that records management decisions under the Presidential Records Act were not subject to judicial review, thereby opening the possibility that records improperly labelled as presidential might be destroyed, or transferred to a non-agency. And, although our clients may not have standing to raise the issue directly, the institutional memory of the NSC is likely to be seriously damaged, at some considerable cost to the country, by making large amounts of policy-related

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records presidential records and then removing those records from NSC control at the end of an administration. After all, our problems in Bosnia, Somalia, and Haiti, to name just three, did not begin on January 21, 1993, and it would have been very helpful to the incoming NSC at least to know what their predecessors thought about these areas before grappling with these very difficult problems.

Second, assessing our litigation risks in terms of outcome, without any assessment of likelihood of success, we have very little to lose by going back to court, at least in terms of ending up with a worse result than either the existing guidelines or those that you proposed in your letter of October 13, 1993. I suppose that it is possible that the courts might hold that the NSC is not an agency for any purpose and that none of its records is subject to FOIA or the federal records acts, but I very much doubt it. Surely, nothing in the case law suggests that such a result is at all likely. Moreover, since many of the documents that defendants would treat as federal records are available from other agencies, where the FOIA waiting lines are much shorter, and since there is relatively little public interest in most of the rest of the records that would be treated as federal under your proposal, we would lose very little, even if we lost in the worst possible way. Stated bluntly, other than a modest additional investment of time beyond the several thousand hours that we have already spent, we have almost nothing to lose from litigating this issue, unless a compromise would significantly advance our goals described above. We would not presume to assess the consequences to the NSC of a worst case scenario in which we were to prevail on our basic legal proposition that the NSC is an agency and that all of the records created or used by its staff are federal records, even when the staff is providing advice directly to the President.

Third, if the case is litigated, the likelihood of a court finding a middle ground is almost nil. Neither our legal theory nor yours provides much room for compromise, nor is it likely that the facts to be presented to the court will suggest a middle ground, even if the court sought to construct one from existing precedent, all of which points to the extremes. Indeed, even the two alternatives that we propose below would never be adopted by a court as a matter of law, because they are practical solutions, perhaps achievable in settlement or in legislation, but not in a judicial forum.

Fourth, any solution must be workable in the sense that those who must decide whether a record is presidential or federal must be able to make that decision easily, using objective criteria. And the standards must be such that, even assuming the good faith of those who will make these routine decisions, records cannot be improperly placed into the presidential category in a wholesale way.

that would undermine our goal of substantially increasing the proportion of substantive, as opposed to administrative, records that the NSC treats as federal. It is because of these concerns that the phrase "relating to" is so unacceptable to us, especially given the number of places it appears and the breadth which the NSC apparently gives to it. And, although we have tried, we have been unable to find a way to narrow the phrase that significantly reduces these problems.

Despite these efforts, we have not yet been able to formulate a creative solution that would fully satisfy the interests of both sides. There are, however, two alternatives that represent compromises that would provide both sides with something more than if they were to litigate and lose, although obviously less than if they were to litigate and prevail. Under both of these proposals, records that would be treated as federal under your October 13th proposal would continue to be federal, and the records described in these alternatives as federal would also be federal records.

The first alternative is the "limited presidential circle" approach, under which the records circulated exclusively among a designated group of senior NSC staff could be treated as Presidential, and all other NSC records would be federal. This limited circle would include the National Security Adviser, his Deputy, the thirteen or so "area" heads, and perhaps one or two others at very high levels of the NSC. We are not locked into the precise numbers or job titles, but any adjustments would have to be consistent with our overall concept, which is to create a readily ascertainable dividing line that would encompass a finite number of senior NSC officials and treat only their records as presidential.

Records could be freely exchanged within this group, as well as made available to clerical staff for filing, without losing their presidential character. On the other hand, once they were shared with other NSC staff, either in their preparation, for their use, or simply for informational purposes after they were completed, they would lose their presidential designation. They would also become federal if they were placed, either physically or electronically, where others outside the circle would have access to them. We recognize that this proposal assumes a hierarchical operation that does not fit the way that you have described the NSC's operations, which is part of the reason that we have made a second proposal. On the other hand, this alternative does afford very real protection for advice that goes directly to the President and his two most senior national security advisers, and it should be relatively easy to administer. And, of course, it would significantly expand the number of federal records at the NSC.

Our second alternative embodies a different approach, under which all records that are directed to the President, the National

Mark I. Levy
November 12, 1993
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Security Adviser, or the Deputy National Security Adviser, from any NSC staff member may be treated as presidential records, and vice versa, but all other records are federal. Under this "vertical" approach, records not directed to, or directed from, one or more of the three designated persons, would be federal. This would mean that even background papers prepared by NSC staff that were directly used in the preparation of admittedly presidential records would be federal records.

We recognize that in many cases more than one person will participate in preparing a memo on a topic, and so we would expand the vertical approach to treat as presidential records those with a small number of co-authors/consultants ("participants") (we suggest a maximum of 3), provided that the names of each such participant appears on the face of the record. Drafts of such records, along with memos among/between participants specifically discussing a draft, would be presidential also. But if such a record were sent to any NSC staff person not listed as a participant, or made available, either physically or electronically, to any other non-participant at NSC or any other federal agency, the record would be federal. Similarly, a response or follow-up from the President or the National Security Adviser concerning a record treated as presidential could, if sent only to the participants, be treated as presidential, as could records emanating from, for example, the National Security Adviser that did not respond to any prior communication, provided that it was directed to three or fewer NSC staff.

As a practical matter, this approach would probably require that presidential files would have to be kept separately from other NSC records, with limitations imposed on access. In the case of electronic records, once a non-participant was given access, the record would have to be reclassified as federal. In the case of paper records, copies in the possession of participants would be treated as presidential, but any copies that were received by non-participants would be federal. This would result in some cases in the same record being both presidential and federal, but that is hardly a novel notion since even now, if an internal White House memo that is plainly presidential is copied and sent to an agency, such as DOD, that record would be federal in the hands of the agency and presidential at the White House.

We recognize that it is possible for there to be some evasion, purposeful or otherwise, if, for example, a participant showed a non-participant a paper copy of a presidential record and then took it back, or if she allowed the non-participant to read an electronic presidential record on her computer screen, but we are prepared to accept that risk. However, we would also expect that NSC would develop an appropriate indexing system for all of its records, in part to reduce the risk of mislabelling federal records

Mark I. Levy
November 12, 1993
Page 5

as presidential, and that the index itself would be a federal record.

All of this discussion has related to the NSC, but we note that even your recent proposals continue to suggest that some records of the Office of Science and Technology are presidential, despite Soucie. We believe that there is no legal basis for your claim regarding OSTP, and we are unwilling to treat any of its records as presidential unless you can find some new authority which has not previously surfaced in this litigation to support that claim.

In the interest of sending these proposals to you as soon as possible, we have not attempted to spell out all their details or put them in language appropriate for a settlement agreement. We recognize that there may be some ambiguities about how we see these proposals working, and if there are, please call, and we will try to explain further what we mean. We also reserve the right to make modifications to the proposals as we get further along in the process, although we do not expect that there will be any changes in the basic concepts.

The question for defendants is, does either of these alternatives provide a basis for further discussion? While awaiting your response, we will continue to ponder the matter further, as well as work on resolving the other issues.

Sincerely yours,



Alan B. Morrison

cc: Jason Baron (by telecopier)



U.S. Department of Justice

Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

November 5, 1993

BY FACSIMILE

Alan Morrison, Esq.
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Re: Armstrong v. Executive Office of the President
-- Settlement Discussions (F.R. Evi. 408)

Dear Alan:

This letter is in response to your letter of November 1, 1993, concerning the proposal we made on October 26 in an effort to find some possible middle ground as to which records the National Security Council ("NSC") will treat as Presidential and which as federal. We set forth below and in the accompanying attachments the status of the documents provided with your letter under both current NSC practice and our October 26 proposal, and indicate why the NSC treats or would treat a document as falling into the Presidential or federal category.

Two preliminary points should be made. First, you incorrectly stated that our proposal would result in fewer NSC records being treated as federal. While some records presently treated as federal would be treated as Presidential under our proposal, a greater number of records presently treated as Presidential would be treated as federal.

Second, several of the documents provided with your letter would have been treated as Presidential records, not federal records or agency records subject to FOIA, under current NSC practice. As you know, the prior releases in Armstrong have involved unique sets of materials which were created and preserved by NSC staff in their paper form largely due to the presence of ongoing investigations of the Independent Counsel's office and/or special searches of the backup tapes. Therefore, the treatment of these particular documents under FOIA is not dispositive of either how such materials otherwise would have been classified under existing recordkeeping practices or under the NSC's settlement proposal.

It is also not correct to say that all of the documents you provided would be treated as Presidential records under our October 26 proposal. The documents are listed on the accompanying table,

along with a designation of their status under current NSC practice and our October 26 proposal. As you can see, Document Nos. 2 through 5 are treated as federal records under both current practice and our October 26 proposal. Document Nos. 6 through 10, 13 through 15, and 17 through 24 would be treated as Presidential records under both current practice and the October 26 proposal. Document Nos. 1, 11, 12, and 16 are federal records under current practice and would be treated as Presidential records under the October 26 proposal.

In sum, our October 26 proposal would result in no change in status for 20 of the 24 documents you provided. The reason for these designations under current practice and our proposal are provided in the attached table. The reason for the change in the four documents is as follows.

Document No. 1 is currently treated as a federal record because it relates to a Deputies Committee Meeting. It would be treated as Presidential under our proposal because it is a staff communication which was not transmitted to or received from outside the White House.

Document Nos. 11 and 16 are currently treated as a federal record because they relate to the specific federal record category of intelligence activities. They would be treated as Presidential under our proposal because they were received by the Deputy Advisor to the President for National Security Affairs.

Document No. 12 is currently treated as a federal record because it relates to the specific federal record category of interagency meetings. It would be treated as Presidential under our proposal because it was received by the Advisor to the President for National Security Affairs.

As noted in our October 26 letter, our proposal seeks to enable the President to control access to the most sensitive NSC records, while establishing intelligible rules capable of practical implementation and avoiding the burdens and risks of litigation. The core function of the NSC -- to "advise and assist" the President in national security matters -- cannot effectively be accomplished if the President cannot control access to these most sensitive deliberative documents.

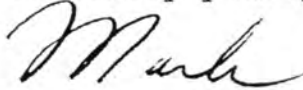
You seem to suggest that records properly may be deemed to be federal where much of the information contained therein is "factual," and you characterize the government's interest as protecting "advice" given to the President. We disagree with this approach to the issue. Clearly, many, if not most, documents created by NSC staff in the process of advising and assisting the President will contain factual information. In our view, whether a record contains largely or only "factual" information, although relevant in a FOIA analysis, does not inform the analysis as to

whether or not it should be treated as Presidential or federal. We regard as a critical aspect of advising and assisting the President the presentation of facts on a given national security issue, not only the presentation of "advice" as to how to proceed.

Accordingly, our October 26 proposal proceeds from the premise that the NSC exists to advise and assist the President, through his National Security Advisor and Deputy National Security Advisor, in the discharge of his statutory and constitutional national security responsibilities, and that its records related thereto are properly treated as Presidential. In an effort to resolve this litigation, we also recognize that some NSC records, including those received from or transmitted outside the White House, may be treated as federal.

We hope the foregoing will provide you with some additional understanding as to our proposal. We look forward to receiving your proposal and to discussing this matter with you further.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Mark".

Mark I. Levy
Deputy Assistant Attorney General

DOCUMENTS ACCOMPANYING PLAINTIFFS' NOV. 1, 1993 LETTER

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION</u>	<u>NSC</u> <u>CURRENT</u>	<u>TREATMENT</u> <u>PROPOSED</u>
1.	04/11/90	Memorandum for William Sittmann through Richard N. Haass from Sandra Charles; Subject: NSC/Deputies Committee Meeting on Iraq	F	P
	Current:	Federal: Deputies Committee Meeting Papers		
	Proposed:	Presidential: staff communication not transmitted outside the White House.		
2.	04/12/90	Memorandum for Mr. Carnes Lord, <u>et al.</u> , from William F. Sittmann; Subject: NSC/Deputies Committee Meeting on Iraq	F	F
	Current:	Federal: Deputies Committee Meeting Papers.		
	Proposed:	Federal: Deputies Committee Meeting Papers sent to or received from outside the White House.		
3.	04/16/90	The NSC/Deputies Committee Meeting, Iraq Agenda	F	F
	Current:	Federal: Deputies Committee Meeting Papers		
	Proposed:	Federal: Deputies Committee Meeting Papers sent to or received from outside the White House.		
4.	No Date	United States Department of State, Discussion Paper for Iraq PCC	F	F
	Current:	Federal: Deputies Committee Meeting Papers		
	Proposed:	Federal: Deputies Committee Meeting Papers sent to or received from outside the White House.		

5. 05/18/90 Memorandum for Dr. Carnes Lord, et al., F F
from Brent Scowcroft; Subject: Deputies
Committee Review of PCC Paper on Iraq
- Current: Federal: Deputies Committee Meeting
Papers
- Proposed: Federal: Deputies Committee Meeting
Papers sent to or received from
outside the White House.
6. 2/02/87 Note From William Tobey to NSREL, NSSES, P P
Subject: Attendance
- Current: Presidential: not related to
specific federal record category.
- Proposed: Presidential: staff communication
not transmitted outside the White
House and not related to specific
federal record category.
7. 1/24/87 Note From Robert E. Linhard to P P
DAPNSA Colin Powell; Subject: Thoughts
on How to Proceed on SDI and ARMS
Control Issues General
- Current: Presidential: not related to
specific federal record category.
- Proposed: Presidential: received by DAPNSA.
8. 11/25/86 Note from William Cockell to APNSA P P
John Poindexter; Subject: CJCS
Testimony
- Current: Presidential: not related to
specific federal record category.
- Proposed: Presidential: received by APNSA.
9. 11/25/86 Note from Bob Pearson to APNSA P P
John Poindexter; Subject: Resignation
- Current: Presidential: not related to
specific federal record category.
- Proposed: Presidential: received by APNSA.

10. 11/10/86 Note from David Major to APNSA John Poindexter; Subject: ARMS SALES TO IRAN P P
- Current: Presidential: not related to specific federal record category.
- Proposed: Presidential: received by APNSA.
11. 01/15/87 Note from David Major, Subject: MEMO FOR [APNSA Frank Carlucci] FROM DGM, NEED SOONEST TODAY-TOP SECRET; and Note From: David Major to APNSA Frank Carlucci, Subject: Longtree Espionage Case F P
- Current: Federal: related to specific federal record category of Intelligence Activities.
- Proposed: Presidential: received by APNSA Frank Carlucci.
12. 12/19/83 Note from Robert M. Kimmitt to APNSA Robert McFarlane; Subject: Meeting Times F P
- Current: Federal: related to specific federal record category of Interagency Meetings.
- Proposed: Presidential: received by APNSA.
13. 02/17/87 Note from Paul S. Stevens to NSDBK, Subject: Gates Confirmation Hearings P P
- Current: Presidential: not related to specific federal record category.
- Proposed: Presidential: staff communication not transmitted outside the White House and not related to specific federal record category.

14.	02/18/87	Note Elaine M. Mitsler to NSDBK, Subject: Reminder	P	P
Current: Presidential: not related to specific federal record category.				
Proposed: Presidential: staff communication not transmitted outside the White House and not related to specific federal record category.				
15.	12/19/86	Note from Bob Pearson to DAPNSA Alton Keel; Subject: Crazy Going Ons In Colombia	P	P
Current: Presidential: not related to specific federal record category.				
Proposed: Presidential: received by DAPNSA.				
16.	12/30/86	Note from Bob Pearson to DAPNSA Colin Powell Forwarding 12/31/86 Note from Ken DeGraffenreid to DAPNSA Colin Powell; Subject: Serious Espionage Case At Embassy Moscow	F	P
Current: Federal: related to specific federal record category of Intelligence Activities.				
Proposed: Presidential: received by DAPNSA.				
17.	03/27/86	Situation Room Evening Summary	P	P
18.	04/02/86	Situation Room Evening Summary	P	P
19.	03/23/86	Situation Room Evening Summary	P	P
20.	03/29/86	Situation Room Morning Summary	P	P
21.	03/31/86	Situation Room Evening Summary	P	P
Current: Presidential: not related to specific federal record category.				
Proposed: Presidential: created for and received by the President, APNSA, DAPNSA.				

22. 10/09/86 Note From Scott Sullivan to Oliver North; Subject: Payoff for the USSR's Debt Strategy

P

P

Current: Presidential: not related to specific federal record category.

Proposed: Presidential: staff communication not transmitted outside the White House and not related to specific federal record category.

23. 09/29/86 Note From Oliver North to RBM; Subject: Americans Disappeared In Cyprus

P

P

Current: Presidential: not related to specific federal record category.

Proposed:: Presidential: staff communication not transmitted outside the White House and not related to specific federal record category.

24. 04/15/86 Note From Oliver North to RBM forwarding Note From Rob McDaniel, forwarding Note From Tyrus Cobb; Subject: Demarche from Tom Klestil

P

P

Current: Presidential: not related to specific federal record category.

Proposed: Presidential: staff communication not transmitted outside the White House and not related to specific federal record category.

PUBLIC CITIZEN LITIGATION GROUP

SUITE 700

2000 P STREET N.W.

WASHINGTON, D. C. 20036

(202) 833-3000

November 1, 1993

BY HAND

Mark I. Levy
Deputy Assistant Attorney General
Department of Justice
Civil Division
10th & Constitution Ave., N.W.
Washington, D.C. 20530

Re: Armstrong v. Executive Office of the President

Dear Mark:

Following up our most recent meeting at which we discussed the dividing lines between Presidential and Federal records at the National Security Council, Mike and I have been working with our clients to try to find some possible middle ground on this issue. Our major stumbling block at this time involves the issues presented in this letter. In particular, we simply do not know how we can accept a settlement that would result in fewer records being treated as Federal records than was the case under the old guidelines, particularly given the factual nature of the documents that could be withheld and their substantial distance from the presidential advisory process. If you can give us an explanation for the NSC's treatment of such materials as Presidential records, we might be better able to understand your position, but we need some further assistance from you.

In the past, we have raised inquiries about why certain types of records should be Presidential and not Federal Records. That is again our question, but this time with respect to the enclosed NSC documents that were released under the Freedom of Information Act. The information contained in these records is generally factual in nature, is no longer (if it ever was) properly classified, and all of it appears to be the kind of information that should be released in the ordinary course under the FOIA. However, as we understand your proposed definition of Presidential records, in particular the "relating to" language that we discussed, all of these records would be labelled Presidential records and, hence, not available under FOIA and subject only to the Presidential Records Act.

For the purposes of these settlement discussions, we put aside any questions about whether the NSC could reconcile its new

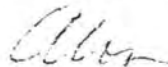
Mark I. Levy
November 1, 1993
Page 2

proposal with the previous release of these materials under the FOIA. We probably disagree on that question, but it is irrelevant to our efforts to try to find a mutually agreeable standard that will govern categorization of the materials in the future.

Instead, we present these documents as concrete examples of the types of records that will be subject to whatever dividing line is established for Presidential and Federal records, and we would like to know what valid interests the NSC believes are served by classifying the records as Presidential so that we can see if plaintiffs can propose a way to accommodate those interests without sacrificing our own. We understand your interest in protecting advice from the Assistants to the President for National Security Affairs to the President, but none of the enclosed material falls into that category. We simply do not understand why, as a matter of policy, leaving aside questions of law, these records should be treated as Presidential and hence outside the FOIA and FRA entirely.

We have some possible alternatives that we are considering to address the issue of distinguishing Presidential and Federal records, but wish to present them in a package. Therefore, it is essential that you get back to us as soon as possible with your response to this letter. If you can do so by the end of this week, we will attempt to formulate our position internally and respond to defendants early in the week of November 8, but until we have a response from you, the ball is in defendants' court.

Sincerely,



Alan B. Morrison

Enclosures



U.S. Department of Justice
Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

October 26, 1993

BY MESSENGER

Alan B. Morrison, Esq.
Michael E. Tankersley, Esq.
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Re: Armstrong v. Executive Office of the President
-- Settlement Discussions (F.R. Evi. 408)

Dear Alan and Michael:

Pursuant to the settlement meeting among the parties held last Monday, October 18, 1993, this constitutes our further settlement proposal. My apologies for being unable to deliver this package earlier in the day today.

A. EOP Agency Component Recordkeeping Guidance. As discussed at our settlement meeting, key agency components of the EOP have proceeded along the lines of a "bottom-up" approach, *i.e.*, drafting recordkeeping guidance that would be approved by the Archivist but would be issued independently of whatever draft guidance is ultimately contemplated for issuance by the Archivist as to the rest of the government. The drafts contemplate ultimate implementation of electronic recordkeeping but may also include, depending on the component, interim guidance for use until such recordkeeping is in place. Pursuant to our discussions, and in fulfillment of paragraph 2 of the Stipulation of the parties filed on September 30, 1993, I have attached at Tab A drafts of e-mail recordkeeping guidance from the following EOP agency components: National Security Council, Office of Administration, Office of Management and Budget, Office of Science and Technology Policy, and the Office of the United States Trade Representative. Included within Tab A are proposals from both the NSC and OSTP on how they propose to separate presidential and federal records.

Please note the following about the drafts. First, in the case of the Office of Administration's draft "Proposed OA Record Management System for Management of Records Created Using

Alan B. Morrison, Esq.
Michael E. Tankersley, Esq.
October 26, 1993
Page 2

Electronic Mail," the document includes reference to proposed dates only because completion of discrete items are in some cases dependent on outside contract support and feasibility of technical proposals. Since these limit OA's ability to control any prescribed deadlines, the dates are to be regarded as benchmarks to which the administration is committed.

More generally, as we previously stated, the drafts of recordkeeping guidance being provided to you, including discussions of future recordkeeping systems, have been given to plaintiffs for the purpose of furthering settlement, and are not intended to bind defendants to a position in the litigation on any and all matters contained therein.

B. NSC Presidential/Federal Guidance. Given the focus on the NSC in this litigation, the NSC's proposed breakdown of presidential and federal records may bear explanation.

The NSC's proposal for distinguishing which records will be treated as federal and which will be treated as Presidential is based on principled guidelines and provides intelligible rules capable of practical implementation. It will result in the federal designation of as many records as possible, consistent with proper NSC operations and the policies of the Presidential Records Act.

The proposal will designate a far larger percentage of the NSC's records as federal than the current guidelines do. The following categories of records now treated as Presidential will be treated as federal: Presidential Determinations, Presidential Messages and Proclamations, OMB Referrals, Aircraft Requests, Agreements, Foreign Travel Requests, and Approvals of Significant Military Exercises.

The proposal starts with two basic rules: (1) records originating from or disseminated outside of the White House will be treated as federal, and (2) internal documents most inextricably related to advising and assisting the President -- those to or from the President, the APNSA and the DAPNSA -- will be treated as Presidential.

Intra-staff communications related to Presidential records or NSC policy documents -- interagency meetings of the NSC or its subgroups and Presidential Directives -- will be treated as Presidential Records. Intra-staff records related to all other federal record categories will be treated as federal.

Alan B. Morrison, Esq.
Michael E. Tankersley, Esq.
October 26, 1993
Page 3

The proposal will enable the President to control access to the most sensitive NSC records upon a change of administrations. It will also avoid the burdens of processing and the costs and risks of litigation that would occur if such records (which are largely classified and, thus, rarely subject to disclosure under FOIA) were treated as federal for the purposes of the FOIA.

C. User Directories. In furtherance of settlement of the FOIA portion of the lawsuit, you have requested that we provide user directories for the Reagan-era NSC and EOP/OA PROFS backup tapes, showing the names and userids of people with notelog storage areas for the dates November 22, 1986, February 28, 1987, and January 7, 1989 (only the latter for EOP/OA). I can respond as follows:

1. The EOP/OA user directory for the January 7, 1989 tape is attached at Tab B.1.

2. With respect to the NSC backup tapes for 1986 and 1987, it appears that the systems backups necessary to provide this information for the 1986 and 1987 dates were never saved. However, I am informed that defendants already produced to you a list of all users, with userids, authorized to create calendars or documents on the system for those dates. Because this listing may not have included every userid or user capable of sending a note, we here supplement it with a complete listing of all userids for October 19, 1986, and March 16, 1987 (see attached at Tab B.2 and B.3). This will provide you with all the information we have from the tapes themselves on this score.

3. For the NSC January 7, 1989 backup tape, we are presently in a position to provide userids and users authorized to create calendars or view documents (see Tab B.4). We are, however, continuing to consult with staff at WHCA on the matter of getting to you a complete user directory. Unfortunately, key personnel at WHCA are away this week. We intend to get back to you as soon as possible early next week.

D. Other Matters

We have reviewed carefully the materials you provided to us (Michael's letter to Jason Baron dated Oct. 21, 1993), for examples of more acceptable definitions of "record" status. Frankly, we are somewhat confused by the excerpts since the definitions they contain do not appear to differ from the statutory definition, from

Alan B. Morrison, Esq.
Michael E. Tankersley, Esq.
October 26, 1993
Page 4

NARA's definition in existing regulations, or from the definition in the draft guidance NARA provided last week. To the extent that your materials contain details that describe the desirable features of an electronic recordkeeping system or contain language that expressly recognizes the transient nature of electronic communications and therefore the need to ensure that federal employees are aware of recordkeeping obligations, we may be able to include similar provisions in the next draft of EOP agency guidance, and would certainly hope to discuss such matters further with you in ongoing settlement discussions. We did not, however, have sufficient time to analyze which provisions might be appropriate for inclusion in today's drafts in light of the specific operations and responsibilities of each EOP component.

I look forward to our next meeting scheduled for tomorrow at 11:00 a.m. We have cleared into the Main Justice building the same individuals present at the first meeting.

Sincerely yours,



Mark I. Levy
Deputy Assistant Attorney General

Enclosures

NSC SETTLEMENT

DRAFT

Distinguishing Between Federal and Presidential Records

The NSC will treat as federal records the formal statements of an Administration's national security policy; meeting notices, lists of attendees, agendas, options papers, summaries of conclusions, and minutes of interagency meetings (NSC, PC, DC, and IWG); and records that are sent or received from outside the White House. In addition, the NSC will treat as federal records those materials exchanged between NSC staff (not including those exchanged with the APNSA or DAPNSA) relating to such matters other than policy directives and meetings files. NSC federal records (including electronic records) include the following types of records:

- Presidential Decision Directives (PDD)
- Presidential Review Directives (PRD)
- Presidential Determinations (PD) and Executive Orders (EO)
- National Security Council Meetings (NSC)
- Principals Meetings (PC)
- Deputies Committee Meetings (DC)
- Interagency Working Group Meetings (IWG)
- Documents Originating Outside the White House Related to Sensitive Intelligence or Counterintelligence Activities
- Office of Management and Budget (OMB) Referrals
- Presidential Messages and Proclamations
- Aircraft Requests
- Agreements
- Foreign Travel Requests
- Approvals of Significant Military Exercises
- NSC Staff Speaking/Appointment Requests
- Documents Related to Lawsuits and Investigations Involving the NSC
- Requests for Access to Documents
- NSC Staff Correspondence

The NSC will treat as Presidential records those documentary materials created or received by or for the President, the APNSA, and the DAPNSA, and any related materials that are exchanged between NSC staff. NSC Presidential records (including electronic records) include the following types of records:

- Memoranda and Other Documents for or from the President, the APNSA, or the DAPNSA (including all intra-staff documents related to policy directives)
- Memoranda and Talking Points for the President, the APNSA, and the DAPNSA for Use in Meetings (including all intra-staff documents related to NSC, PC, DC, and IWG meetings)
- Presidential Memos of Conversation (MEMCONS)
- Presidential Memos of Telephone Conversations (TELCONS)
- Heads of State Visits (Briefing Books)
- Presidential Trip Preparations (Briefing Books)
- Presidential Speeches
- Correspondence With the President, the APNSA, and the DAPNSA

4

4

Scott ARMSTRONG; Gary M. Stern; Ed-
die Becker; National Security Archive;
Center for National Security Studies,
American Historical Association and
American Library Association, Plain-
tiffs-Appellees,

EXECUTIVE OFFICE OF THE PRESI-
DENT, OFFICE OF ADMINISTRA-
TION; National Security Council; Tru-
dy Peterson, Acting Archivist of the
United States; White House Commu-
nications Agency, Defendants-Appellants.

Scott ARMSTRONG; Gary M. Stern; Ed-
die Becker; National Security Archive;
Center for National Security Studies,
Plaintiffs-Appellees,

EXECUTIVE OFFICE OF THE PRESI-
DENT, OFFICE OF ADMINISTRA-
TION; National Security Council; Tru-
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(Two Cases)

Scott ARMSTRONG; Gary M. Stern; Ed-
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Center for National Security Studies;
American Historical Association; Amer-
ican Library Association, Plaintiffs-Appellants,

EXECUTIVE OFFICE OF THE PRESI-
DENT, OFFICE OF ADMINISTRA-
TION; National Security Council; Tru-
dy Peterson, Acting Archivist of the
United States; White House Commu-
nications Agency, Defendants-Appellees.

Nos. 93-5002, 93-5048, 93-
5156 and 93-5177.

United States Court of Appeals,
District of Columbia Circuit.

Argued June 15, 1993.

Decided Aug. 13, 1993.

Researchers and nonprofit organizations
challenged proposed destruction of federal
records. The United States District Court
for the District of Columbia, 721 F.Supp. 343,
denied motion to dismiss and certified order
for interlocutory appeal. The Court of Ap-
peals, 924 F.2d 282, affirmed in part and

reversed and remanded in part. After mo-
tion for protective order was granted in part
and denied in part, 139 F.R.D. 547, the Dis-
trict Court, 810 F.Supp. 335, found that ma-
terials stored on National Security Council
(NSC) electronic mail communications sys-
tem were records subject to Federal Records
Act (FRA). In addition, the District Court,
Charles R. Richey, J., 821 F.Supp. 761, en-
tered order of contempt against executive
office of President (EOP), NSC, federal ar-
chivist for failure to promulgate new regula-
tions. In consolidated appeal, the Court of
Appeals held that: (1) mere existence of
paper printouts of electronic materials did
not affect "record" status of electronic com-
munications unless paper versions included
all significant material contained in electronic
records; (2) it was not within agencies' dis-
cretion to exclude relevant information such
as identity of sender and recipient of elec-
tronic communications from preserved rec-
ord; and (3) agencies were not in contempt
of court order which did not contain direct
order to promulgate new regulations.

Affirmed in part; reversed and remand-
ed in part.

1. Records ⇨3

Government agencies did not reasonably
discharge their obligations under the Federal
Records Act (FRA) by instructing employees
to print out paper version of any electronic
communication that fell within statutory defi-
nition of "record" and by managing "hard-
copy" documents so produced in accordance
with the FRA; hard copy printouts pre-
served by agencies could omit fundamental
pieces of information which were integral
part of original electronic records. 44
U.S.C.A. § 2101 et seq.

2. Records ⇨13, 22

If document qualifies as "record" within
definition provided by Federal Records Act
(FRA), FRA prohibits agency from discard-
ing it by fiat but rather requires agency to
procure approval of archivist before dispos-
ing of record. 5 U.S.C.A. § 701(a)(2); 44
U.S.C.A. §§ 2902(1, 2, 5), 3101, 3102, 3105,
3314.

See publication Words and Phrases
for other judicial constructions and def-
initions.

remanded in part. After motive order was granted in part. part, 139 F.R.D. 547, the District Court, 335, found that mail on National Security Council communications systems subject to Federal Records. In addition, the District Court, 761, of contempt against executive (EOP), NSC, federal failure to promulgate new consolidated appeal, the Court of that: (1) mere existence of electronic materials did not constitute "record" status of electronic communications unless paper versions included. If material contained in electronic form was not within agencies' disclosure, relevant information such of sender and recipient of electronic communications from preserved records) agencies were not in contempt of law which did not contain direct evidence of new regulations. reversed and remanded in part; reversed and remanded in part. 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

document qualifies as "record" within
provided by Federal Records Act
RA prohibits agency from discard-
fiat but rather requires agency to
approval of archivist before dispos-
cord. 5 U.S.C.A. § 701(a)(2), 44
§§ 2902(1, 2, 5), 3101, 3102, 3105

publication Words and Phrases
ner judicial constructions and def-
18.

3. Records ④1, 13

Mere existence of paper printouts of electronics communications systems for government agencies does not affect record status of electronic material unless paper versions include all significant material contained in electronic records; electronic documents retain status as federal records after creation of paper printouts and all Federal Records Act (FRA) obligations concerning management and preservations of records still apply. 44 U.S.C.A. §§ 3105, 3301, 3314.

4. Records ↪3

To qualify as "record" under Federal Records Act (FRA), document must be made and received by agency of the United States government under federal law or in connection with transaction of public business, and document must be preserved or appropriate for preservation by that agency as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of government or because of informational value of data in document. 44 U.S.C.A. §§ 3105. 3301. 3314.

5. Records 13

While government agency has some discretion to decide if particular document satisfies statutory definition of "record" in Federal Records Act (FRA), FRA does not allow agency by fiat to declare inappropriate for preservation entire set of substantive electronic communications documents generated by government administrations over seven-year period. 44 U.S.C.A. § 3301.

6. Records 13

Electronic communications of government agencies did not fit within exception to Federal Records Act (FRA) for extra copies of documents preserved only for convenience of reference as electronic communications were not merely extra copies of hard copy printout of electronic communications absent important information present in e-mail system, concerning who sent document and who received it, which will not always be preserved on paper printout. 44 U.S.C.A. § 3301.

7. Records 13.22

For purposes of determining compliance with Federal Records Act (FRA), phrase

"appropriate for preservation" in definition of records allows agency some discretion in deciding whether document meets record definition but does not grant agency discretion to lop off predesignated part of whole series of documents that qualify as records; it would not satisfy FRA to preserve second version of record that was approximation of first version even if second version included all material which, in agency view, was appropriate for preservation. 44 U.S.C.A. § 3301.

8. Records 13, 22

Directive from Congress to preserve adequate documentation of agency's essential transactions did not justify government agency practice of retaining only "substantive information" displayed on computer screen in connection with electronic communications.

44 U.S.C.A. §§ 3101, 3303a, 3314.

9. Records 3, 13

Substantive electronic communications (e-mail) satisfied Federal Records Act (FRA) definition of "records" so that, under FRA, termination of communications was possible only if communications were merely "extra copies" of other documents preserved elsewhere, and, because there were fundamental and meaningful differences in content between paper and electronic versions of documents, electronic versions did not lose their status as "records" as result of printing out copy of on-screen appearance of communications; electronic version had to be managed and preserved in accordance with FRA. 44 U.S.C.A. §§ 3105, 3314.

10. Records 22

Government agencies retain ability to purge incidental electronic communications from their files by acting, with archivist's approval, to dispose of documents that lack sufficient administrative, legal, research, or other value to warrant continued preservation. 44 U.S.C.A. § 3303a(a).

11. Records 13

Federal Records Act (FRA) requirements that each agency have established safeguards against removal or loss of federal records as necessary and required by regulations of an archivist was not met by assigning record managers task of providing oral and written guidance to agency personnel and making those

recordkeeping experts available for resolution of specific problems; agencies had to undertake periodic review of employees' electronic recordkeeping practices. 44 U.S.C.A. § 3105.

12. Contempt ⇐66(7)

Standard of review on appeal from finding of contempt is whether district court abused its discretion.

13. Contempt ⇐60(2)

Order finding government agencies in contempt of earlier court orders to promulgate new recordkeeping programs for electronic federal records was appealable order even though it imposed additional sanction for failure to comply with preexisting order; being placed under threat of future sanction is present sanction and thus is appealable.

14. Contempt ⇐20, 60(3)

While courts have inherent power to enforce compliance with lawful orders through civil contempt, civil contempt lies only if putative contemnor has violated order that is clear and unambiguous and violation is proven by clear and convincing evidence.

15. Contempt ⇐20

Government agencies could not be found in contempt for failure to promulgate new regulations in connection with preservation of electronic communications where agencies were never directly ordered to promulgate those new regulations but rather were informed in "declaratory judgment" that guidelines issued by that direction of agencies were inadequate and not reasonable. Fed. Rules Civ.Proc.Rule 65(d), 28 U.S.C.A.

16. Records ⇐1, 13

Under Presidential Records Act (PRA), the district court had authority to review recordkeeping guidelines regarding presidential records of executive office of President (EOP); court may review EOP guidelines for limited purpose of ensuring that they do not include within their operational definition of presidential records materials properly subject to Freedom of Information Act. 5 U.S.C.A. § 552; 28 U.S.C.A. § 1292(b).

17. Records ⇐13

While federal records are subject to strict document management regime super-

vised by archivist, Presidential Records Act (PRA) gives President virtually complete control over his records during his term of office, and neither archivist nor agency head can initiate any action through Attorney General to effect recovery or ensure preservation of presidential records. 5 U.S.C.A. § 552(f); 44 U.S.C.A. §§ 2201(2), (2)(B)(i), 2204, 2905(a), 3106, 3301.

18. Records ⇐1

Under Presidential Records Act (PRA) records subject to Freedom of Information Act are excluded from class of materials that may be treated as presidential records. 44 U.S.C.A. § 2201(2)(B)(i).

19. Records ⇐1, 13

Judicial review of President's management of admitted presidential records is impliedly precluded by Presidential Records Act (PRA) although records subject to Freedom of Information Act are explicitly exempted from scope of PRA and judicial review of guidelines defining presidential records is allowed under rubric of substantive Freedom of Information Act law. 5 U.S.C.A. § 552(a)(4)(B); 44 U.S.C.A. §§ 2201(2)(B)(i), 2204(a), (b), (c)(1).

20. Records ⇐1, 13, 22

Courts may not review any decisions regarding whether to create documentary presidential record and may not review particulars of presidential records management systems or decisions for disposing of presidential records, but courts may review guidelines outlining what is and what is not presidential record to ensure that materials which are not subject to Presidential Records Act (PRA) are not treated as "presidential records." 44 U.S.C.A. §§ 2203, 2203(a).

See publication Words and Phrases for other judicial constructions and definitions.

21. Records ⇐51

Only entities whose sole function is to advise and assist President are not separate agencies subject to Freedom of Information Act. 5 U.S.C.A. §§ 551(1), 552(f).

archivist, Presidential Records Act gives President virtually complete control over his records during his term, and neither archivist nor agency head take any action through Attorney General to effect recovery or ensure preservation of presidential records. 5 U.S.C.A. § 552(f); 5 U.S.C.A. §§ 2201(2), (2)(B)(i), 2204, 3106, 3301.

Under Presidential Records Act (PRA), materials subject to Freedom of Information Act are excluded from class of materials that are treated as presidential records. 5 U.S.C.A. § 2201(2)(B)(i).

Records 1, 13, 22. Judicial review of President's management of admitted presidential records is not precluded by Presidential Records Act (PRA) although records subject to Freedom of Information Act are explicitly excluded from scope of PRA and judicial review. Guidelines defining presidential records are allowed under rubric of substantive Freedom of Information Act law. 5 U.S.C.A. (a)(4)(B); 44 U.S.C.A. §§ 2201(2)(B)(i); (b), (c)(1).

Records 1, 13, 22. Courts may not review any decision regarding whether to create documentary presidential record and may not review parameters of presidential records management plans or decisions for disposing of presidential records, but courts may review guidelines outlining what is and what is not a presidential record to ensure that materials which are not subject to Presidential Records Act are not treated as "presidential records." 44 U.S.C.A. §§ 2203, 2203(a).

See publication Words and Phrases and other judicial constructions and definitions. Records 51.

Only entities whose sole function is to assist President are not subject to Freedom of Information Act. 5 U.S.C.A. §§ 551(1), 552(f).

22. Records 1

Materials subject to Freedom of Information Act are not "presidential records." 5 U.S.C.A. §§ 551(1), 552(f).

Appeal from the United States District Court for the District of Columbia (Civil Action No. 89cv00142).

Freddie Lipstein, Attorney, U.S. Dept. of Justice, Washington, DC, argued the cause for appellants-cross-appellees. With her on the joint brief were Stuart E. Schiffer, Acting Asst. Atty. Gen., J. Ramsey Johnson, U.S. Atty., Leonard Schaitman, Matthew M. Collette, and Patricia A. Millett, Attorneys, U.S. Dept. of Justice, Washington, DC.

Michael E. Tankersley, Washington, DC, argued the cause for appellees-cross-appellants. With him on the joint brief were David C. Vladeck and Alan B. Morrison, Washington, DC. Patti Ann Goldman, Kate Abbott Martin and Katherine Anne Meyer, Washington, DC, entered appearances.

Before MIKVA, Chief Judge; WALD and HENDERSON, Circuit Judges.

Opinion for the Court filed PER CURIAM.¹

PER CURIAM:

This consolidated appeal presents us with important questions of federal agencies' statutory obligations to manage electronic records as well as issues related to the appropriate use of the civil contempt power to coerce conformity with district court orders.

[1] In the flagship portion of the appeal, defendants-appellants—the Executive Office of the President ("EOP"), the Office of Administration, the National Security Council ("NSC"), the White House Communications Agency, and Trudy Peterson, Acting Archivist of the United States—challenge the district court's conclusion that EOP and NSC guidelines for managing electronic documents do not comport with Federal Records Act ("FRA" or the "Act") requirements.

1. Sections I and II of this opinion were authored by Circuit Judge Wald; Section IV was authored

More specifically, these government agencies and officials contend that, contrary to the court's ruling, they have, in the past, reasonably discharged their FRA obligations by instructing employees to print out a paper version of any electronic communication that falls within the statutory definition of a "record" and by managing the "hard-copy" documents so produced in accordance with the Act. We reject the government's argument on this score. The government's basic position is flawed because the hard-copy printouts that the agencies preserve may omit fundamental pieces of information which are an integral part of the original electronic records, such as the identity of the sender and/or recipient and the time of receipt.

The defendants also appeal the district court's order holding them in civil contempt of its prior order enjoining the Archivist to "take all necessary steps" to preserve federal records and requiring the defendant agencies not to remove, alter, or delete any information until the Archivist takes action to prevent the destruction of federal records. More specifically, they contest the district court's contempt citation grounded in the court's conclusions that (1) the defendant agencies failed to issue adequate recordkeeping instructions to employees in the four months after their former guidelines were held invalid, and (2) the transfer of nearly 6,000 backup tapes to the Archivist "adversely affected" those tapes. Because the district court orders on which the contempt citation rests did not specify that the defendants had an affirmative duty to create new guidelines by a date certain, the district court abused its discretion in holding the defendants in contempt at least in part because of their failure to issue such guidelines within four months. We remand to allow the district court to determine whether, in light of the defendants' speeded-up attempts in recent months to assure preservation of the tapes, its second ground, the failure to preserve these tapes, by itself, justifies a contempt citation.

by Chief Judge Mikva.

Finally, we are presented with a cross-appeal. The plaintiffs-cross-appellants—Scott Armstrong, the National Security Archive, and several other researchers and non-profit organizations—take issue with the district court's conclusion that federal courts have no authority to review NSC and Office of Science & Technology Policy ("OSTP") guidelines differentiating federal records subject to the FRA from presidential records subject to the Presidential Records Act ("PRA"), 44 U.S.C. § 2201 *et seq.* Contrary to the district court, we conclude that the PRA allows limited review to assure that guidelines defining presidential records do not improperly sweep in nonpresidential records. Accordingly, we remand to the district court to determine whether the relevant NSC and OSTP directives categorize nonpresidential records as subject to the PRA.

I. BACKGROUND

A. Statutory Framework

Federal agencies' records creation, management, and disposal duties are set out in a collection of statutes known collectively as the Federal Records Act. See 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.* The FRA, Congress informs, is intended to assure, among other things, "[a]ccurate and complete documentation of the policies and transactions of the Federal Government," "[c]ontrol of the quantity and quality of records produced by the Federal Government," and "[j]udicious preservation and disposal of records." 44 U.S.C. § 2902(1), (2), (5); see also *Armstrong v. Bush*, 924 F.2d 282, 292 (D.C.Cir.1991) ("*Armstrong I*") (the FRA is intended to guarantee that agencies' records management programs "strike a balance between developing efficient and effective records management, and the substantive need for Federal records") (quoting S.REP. No. 1326, 94th Cong., 2d Sess. 2 (1976)). To achieve those ends, the FRA burdens the heads of federal agencies with several obligations. Most basically, each agency head must "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency and designed to

furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101. Moreover, under the Act, agency chiefs must also "establish and maintain an active, continuing program for . . . economical and efficient [records] management," *id.* § 3102, and "establish safeguards against the removal or loss of records [the agency head] determines to be necessary and required by regulations of the Archivist." *Id.* § 3105; see also *Armstrong I*, 924 F.2d at 293 (noting that these provisions, as well as others, furnished "law to apply" under the Administrative Procedure Act ("APA"), see 5 U.S.C. § 701(a)(2), and thus permitted judicial review of agency recordkeeping guidelines' conformity with the FRA).

[2] Besides assigning specific duties to agency heads, the FRA prescribes the exclusive mechanism for disposal of federal records. See 44 U.S.C. § 3314 (no records may be "alienated or destroyed" except in accordance with the FRA's provisions). For these purposes, "records" are defined as

all books, papers, maps, photographs, machine readable [i.e., electronic] materials or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks, publications and of processed documents are not included.

Id. § 3301. If a document qualifies as a record, the FRA prohibits an agency from discarding it by fiat. See *American Friends Service Committee v. Webster*, 720 F.2d 2362 (D.C.Cir.1983) ("Congress did not intend to grant [the agency] . . . a blank check for

he information necessary to protect and financial rights of the Government of persons directly affected by the activities." 44 U.S.C. § 3101. r, under the Act, agency chiefs must establish and maintain an active, comprehensive program for ... economical and efficient management," *id.* § 3102, and h safeguards against the removal of records [the agency head] determines necessary and required by regulations Archivist." *Id.* § 3105; *see also* *Armstrong I*, 924 F.2d at 293 (noting that these as, as well as others, furnished "law" under the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 701(a)(2), s permitted judicial review of agency keeping guidelines' conformity with A).

Besides assigning specific duties to heads, the FRA prescribes the exclusion mechanism for disposal of federal records. *Id.* § 3314 (no records may be deleted or destroyed" except in accordance with the FRA's provisions). For these s, "records" are defined as

books, papers, maps, photographs, magnetic readable [i.e., electronic] materials, other documentary materials, regardless of physical form or characteristics, or received by an agency of the United States Government under Federal law in connection with the transaction of business and preserved or appropriate for preservation by that agency for the conduct of the organization, functions, policies, decisions, procedures, operations, or activities of the Government or because of the informational value of data in the records.

Library and museum materials, or acquired and preserved solely for research or exhibition purposes, except for documents preserved only for convenience of reference, and stocks, publications and of processed documents are not included.

§ 301. If a document qualifies, the FRA prohibits an agency from deleting it by fiat. *See American Friends Committee v. Webster*, 720 F.2d 22 (D.C. Cir. 1983) ("Congress did not intend it [the agency] ... a blank check for

records disposal."). Instead, the FRA requires the agency to procure the approval of the Archivist before disposing of any record. *Cf. id.* at 63. Normally, that approval may be obtained in one of two ways: First, an agency may submit a schedule of records sought to be discarded to the Archivist, who will sign off on the records' destruction only if she concludes that they do not "have sufficient administrative, legal, research, or other value to warrant their continued preservation." 44 U.S.C. § 3303a(a). Second, the agency may jettison certain common types of records pursuant to disposal schedules promulgated in advance by the Archivist (the disposal schedules are, of course, designed to take into account the FRA's goal of preserving documents of "administrative, legal, research, or other value"). *Id.* § 3303a(d).

Under the FRA, the Archivist's duties are not limited to judging the suitability of records for disposal. In addition, the Archivist must "provide guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government and ensuring proper records disposition," *id.* § 2904(a), "promulgate standards, procedures, and guidelines with respect to records management," *id.* § 2904(c)(1), and "conduct inspections or surveys of the records and the records management programs and practices within and between Federal agencies." *Id.* § 2904(c)(7). The Archivist also plays a key role in the FRA's enforcement scheme. If she discovers that an FRA provision has been or is being breached, the Archivist must (1) inform the agency head of the violation and suggest corrections and (2) if ameliorative measures are not undertaken within a reasonable time, submit a written report to Congress and the President. *Id.* § 2115(b). Also, should the Archivist become aware of any "actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of [an] agency," she must notify the agency head of the problem and assist the agency head in initiating an action through the Attorney General for the recovery of wrongfully removed records or for other legal redress. *Id.* § 2905(a); *see also id.* § 3106 (requiring agency heads to notify the Archivist of any unlawful destruction or removal of records and placing upon them an independent duty to seek legal action through the Attorney General to recover the records). If the agency head is recalcitrant in pursuing legal remedies, the Archivist herself is to (1) request the Attorney General to initiate action and (2) inform Congress that she has made that request. *Id.* § 2905(a); *see also Armstrong I*, 924 F.2d at 295 (holding that "if the agency head or Archivist does nothing while an agency official destroys or removes records in contravention of agency guidelines and directives, private litigants may bring suit to require the agency head and Archivist to fulfill their statutory duty to notify Congress and ask the Attorney General to initiate legal action").

torney General for the recovery of wrongfully removed records or for other legal redress. *Id.* § 2905(a); *see also id.* § 3106 (requiring agency heads to notify the Archivist of any unlawful destruction or removal of records and placing upon them an independent duty to seek legal action through the Attorney General to recover the records). If the agency head is recalcitrant in pursuing legal remedies, the Archivist herself is to (1) request the Attorney General to initiate action and (2) inform Congress that she has made that request. *Id.* § 2905(a); *see also Armstrong I*, 924 F.2d at 295 (holding that "if the agency head or Archivist does nothing while an agency official destroys or removes records in contravention of agency guidelines and directives, private litigants may bring suit to require the agency head and Archivist to fulfill their statutory duty to notify Congress and ask the Attorney General to initiate legal action").

B. The NSC and EOP Electronic Communications Systems

Since the mid-1980s, the NSC and the EOP have utilized electronic communications systems to improve their operational efficiency.² These systems allow employees to create and share electronic appointment calendars as well as to transfer and edit word processing documents, but it is their electronic mail (or "e-mail") capacity that has racked up the most mileage. The 1,300 federal employees with access to the EOP and NSC electronic mail systems can, and apparently do, utilize them to relay lengthy substantive—even classified—"notes" that, in content, are often indistinguishable from letters or memoranda. But, in contrast to its paper cousin, e-mail can be delivered nearly instantaneously at any time of the day or week. And, in contrast to telephone conversations, e-mail automatically creates a complete record of the exact information users send and receive.

Other attributes of the EOP and NSC electronic mail systems are also relevant

2. Originally, the EOP employed the "PROFS" computer system. In 1989, the EOP installed another "OASIS" system as an additional means of transmitting information among employees.

The original PROFS system ceased operations in 1992. The NSC has its own PROFS system as well as a similar system known as "All-In-One."

here. First, these systems give recipients the option of storing notes in their personal electronic "log." After receiving a message, a user may instruct the computer to delete the note; otherwise, it will be stored in her log for later use. Second, both the recipient and the author of a note can print out a "hard copy" of the electronic message containing essentially all the information displayed on the computer screen. That paper rendering will not, however, necessarily include all the information held in the computer memory as part of the electronic document. Directories, distribution lists, acknowledgements of receipts and similar materials do not appear on the computer screen—and thus are not reproduced when users print out the information that appears on the screen. Without this "non-screen" information, a later reader may not be able to glean from the hard copy such basic facts as who sent or received a particular message or when it was received. For example, if a note is sent to individuals on a distribution list already in the computer, the hard copy may well include only a generic reference to the distribution list (e.g., "List A"), not the names of the individuals on the list who received the document. Consequently, if only the hard copy is preserved in such situations, essential transmittal information relevant to a fuller understanding of the context and import of an electronic communication will simply vanish. A final relevant fact here is that the individual note logs are not the only electronic repositories for information on the e-mail system. The defendant agencies periodically create backup tapes—snapshots of all the material stored on these electronic communications systems at a given time—that can be used later for retrieval purposes.

C. Procedural History

On January 19, 1989, the final day of the Reagan Presidency, the National Security Archive filed several Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requests for all the material stored on the EOP and NSC electronic communications systems from their installation in the mid-1980s up to that time. Simultaneously, the plaintiffs filed this suit for a declaration that the electronic doc-

uments contained on the NSC and EOP electronic communications systems and back-up tapes were federal and presidential records and an injunction prohibiting those documents' destruction. After agreeing to preserve the electronic tapes, the defendants filed a motion in the district court for dismissal or, in the alternative, for summary judgment. After that motion was denied, see *Armstrong v. Bush*, 721 F.Supp. 343 (D.D.C. 1989), this court, on interlocutory appeal, settled several threshold issues in the litigation. Specifically, we held that the plaintiffs had standing to assert these claims because they were within the zone of interests of the records management provisions of the PRA and the FRA, see *Armstrong I*, 924 F.2d at 287-88, but that the President was not an agency under the APA and that the PRA impliedly precluded judicial review of the President's record creation, management, and disposal decisions under that statute. See *id.* at 288-91. We said, however, that the plaintiffs could seek judicial review of (1) agency guidelines' conformity to the FRA and (2) the agency heads' and Archivist's discharge of their FRA-derived responsibility to take action to prevent destruction or removal of federal records. See *id.* at 291-96. We then remanded the case to allow for supplementation of the record as to the precise guidance—written and oral—that the defendant agencies had given employees. See *id.* at 296-97.

On remand, the parties developed an extensive record, including a Joint Statement of Facts (the "Joint Statement"), and, on January 6, 1993, the district court issued its ruling on all the FRA issues raised by the plaintiffs (the plaintiffs' FOIA claims remain undecided). See *Armstrong v. Executive Office of the President*, 810 F.Supp. 335 (D.D.C. 1993). In that ruling, the district court first addressed whether the communications stored in these electronic communications systems constituted federal records. Because the FRA's definition of "records" includes material "regardless of physical form or characteristics," the court concluded that substantive communications otherwise meeting the definition of federal "records" that had been

contained on the NSC and EOP electronic communications systems and back-up were federal and presidential records. An injunction prohibiting those documents from destruction. After agreeing to preserve the electronic tapes, the defendants' motion in the district court for dismissal, or, in the alternative, for summary judgment. After that motion was denied, *see Armstrong v. Bush*, 721 F.Supp. 343 (D.D.C. 1993), this court, on interlocutory appeal, set aside several threshold issues in the litigation. Specifically, we held that the plaintiffs had no right to assert these claims because they were within the zone of interests of the record management provisions of the PRA and E.O. 12958, *see Armstrong I*, 924 F.2d at 287. We said that the President was not an agency under the APA and that the PRA impliedly precluded judicial review of the President's creation, management, and disposal of records under that statute. *See id.* at 288. We said, however, that the plaintiffs could seek judicial review of (1) agency actions for conformity to the FRA and (2) the Archivist's discharge of his duty under the FRA-derived responsibility to take steps to prevent destruction or removal of federal records. *See id.* at 291-96. We then remanded the case to allow for supplementation of the record as to the precise guidelines—written and oral—that the defendants had given employees. *See id.* at 297.

On remand, the parties developed an extensive record, including a Joint Statement of the President (the "Joint Statement"), and, on January 15, 1993, the district court issued its ruling on the FRA issues raised by the plaintiffs. The plaintiffs' FOIA claims remain undecided. *See Armstrong v. Executive Office of the President*, 810 F.Supp. 335 (D.D.C. 1993). In that ruling, the district court first addressed whether the communications stored on these electronic communications systems constituted federal records. Because the President's definition of "records" includes materials "regardless of physical form or characteristics," the court concluded that substantial communications otherwise meeting the definition of federal "records" that had been

saved on the electronic mail came within the FRA's purview. *See id.* at 340-41.

The court then found that the defendants' current practices for electronic records management were deficient in two key respects. First, assuming *arguendo* that the defendant agencies unequivocally informed their staffs to print out all on-screen information of any electronic note that qualified as a federal record (an assumption that the plaintiffs have vigorously contested throughout this litigation), that instruction was not adequate to meet the FRA's requirements because the "electronic material . . . [is] qualitatively different than a copy printed out in paper form." *Id.* at 341. The district court emphasized that unless employees also printed out the transmittal information stored in the computer but not appearing on-screen, the hard copies preserved in the paper files would not necessarily contain all the important items retained in the electronic system. *See id.* ("A paper copy of the electronic material does not contain all of the information included in the electronic version."); *see also* Appellants' Brief at 22 ("[The defendant agencies] do not require that all information related to an electronic message be preserved, but only that information that is captured when the message screen is printed or incorporated into a written memorandum."). Specifically, data "regarding who has received the information and when the information was received" might well be omitted from the paper versions. 810 F.Supp. at 341; *see also id.* at 346-47 (discussing NSC guidance).

The court found a second flaw in the agencies' records management practices: they failed to provide for any supervision of agency employees' electronic recordkeeping practices. Noting that (1) the National Archives Records Management Handbook provided that only "records officers" should determine the status of FRA records and (2) the defendant agencies supervise staffers' management of paper, but not electronic, records, the court concluded that the defendants' failure to supervise employees' electronic recordkeeping practices was deficient because, *inter alia*, some instructions did

not tell staff how to save electronic records and did not differentiate between federal and presidential records. *See id.* at 344-46.

recordkeeping was arbitrary and capricious. *See id.* at 343; *see also id.* at 347 (discussing NSC guidance).³

Finally, the district court refused to adjudicate plaintiffs' claim that the NSC guidelines did not adequately distinguish between federal and presidential records. The court found that our holding in *Armstrong I* precluded judicial review of any guideline affecting the status of a presidential record. *See id.* 810 F.Supp. at 347-48.

To implement its decision, the district court issued a multi-part declaratory and injunctive order. The order, as amended, first declared that the defendant agencies' current guidelines were arbitrary and capricious and contrary to law. *See* Amended Order, *Armstrong v. Executive Office of the President*, 810 F.Supp. 335 (D.D.C. 1993). Second, it enjoined the Archivist to "seek the assistance of the Attorney General with notice to Congress, and take all necessary steps to preserve, without erasure, all electronic Federal Records generated at the defendant Agencies." *Id.* Finally, it enjoined all the defendants "from removing, deleting, or altering information on their electronic communications systems until such time as the Archivist takes action . . . to prevent the destruction of federal records, including those records saved on backup tapes." *Id.* In response to an emergency motion by the defendants, this court stayed this last requirement to the extent of allowing the agencies to "remove, delete, or alter" information so long as it was preserved elsewhere in identical form. *See Armstrong v. Executive Office of the President*, No. 93-5002 (D.C. Cir. Jan. 15, 1993).

On May 21, 1993, on petition of the plaintiffs, the district court found the defendants in civil contempt. *See Armstrong v. Executive Office of the President*, 821 F.Supp. 761 (D.D.C. 1993). First, it found that interim guidance issued by the defendants in the wake of the court's invalidation of their old guidelines was inadequate. Accordingly, the court reasoned, the defendants were in contempt for not substantially complying with its orders requiring the agencies to preserve all

not tell staff how to save electronic records and did not differentiate between federal and presidential records. *See* 810 F.Supp. at 344-46.

records. See *id.*, at 766-768. Second, the court held that the conditions surrounding the January 19, 1993, inauguration-eve transfer of backup tapes from the White House to the National Archives, as well as the Archivist's subsequent failure to recopy Reagan-era backup tapes nearing the end of their natural lifespan, violated the court's orders requiring preservation of the tapes. This treatment of the backup tapes, including the failure to recopy deteriorating tapes, thus furnished an additional basis for the contempt citation. See *id.* at 768-771. The court then set out a list of specific acts that the defendants were required to undertake by June 21, 1993 to purge themselves of contempt; if the defendants failed to accomplish them, fines of \$50,000 a day, to be doubled in subsequent weeks, would be imposed until the defendants cleansed themselves of their contempt. See *Order, Armstrong v. Executive Office of the President*, 821 F.Supp. 761 (D.D.C.1993).

Following oral argument on June 15, 1993, this court stayed the district court's contempt sanctions pending the outcome of this appeal. See *Armstrong v. Executive Office of the President*, No. 93-5002, et al. (D.C.Cir. June 15, 1993).

II. THE VALIDITY OF CURRENT

NSC AND EOP GUIDELINES

A. The Instruction to Print "Hard-Copy" Paper Versions

We first address appellants' contention that the district court erred in finding that their pre-January-order instruction to print on-screen information from electronic federal records was inconsistent with the FRA.⁴ This question implicates two parts of this case. First, if the agencies' policy of printing on-screen information did not result in "papering" all federal records material, then at

4. The appellants contend that the EOP is not a proper party to this action because it is the subparts of the EOP that are "agencies" under the APA. The appellants, however, never raised this argument in their briefs to the district court; accordingly, it has been waived. See, e.g., *Association of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 862 (D.C.Cir.1992).

5. Indeed, because we agree with the district court that federal records will be lost if only the paper documents are preserved, we need not

least some federal records will be permanently lost or destroyed unless the electronic backup records, currently being retained pursuant to the district court's orders, are preserved. This circumstance alone creates the predicate for an order requiring the Archivist and the relevant agency heads to take the statutorily prescribed steps to prevent the destruction of those tapes.⁵ Second, if this "print screen" policy—which was still in effect at the time the district court ruled in January—is inadequate under the FRA, then the district court appropriately issued a declaratory judgment invalidating its future use.

In proceeding to decision on this point, we adopt the district court's assumption, based on the appellants' submissions, that both the EOP and the NSC have consistently instructed employees, either orally or in writing, that when any electronic document meets the definition of a federal record, the employee should either print out the information that appears on her computer screen or incorporate that material into a written memorandum. See Appellants' Brief at 7-8; see also *id.* at 22. ("[The agencies] do not require that all information related to an electronic message be preserved, but only that information that is captured when the message screen is printed or incorporated into a written memorandum.")

[3]. Accepting appellants' factual predicate, however, does not lead us to their legal conclusion that such an approach satisfies the Act. Our analysis is a straightforward one. We begin with the apparently undisputed proposition that the EOP and NSC electronic communications systems can create, and have created, documents that constitute federal records under the FRA. The FRA contemplates that documents qualifying as records address the flaws that it identified in earlier EOP and NSC recordkeeping documents. The legal insufficiency of a mere instruction to print out on-screen material is enough to create a risk that federal records will be permanently destroyed if the backup tapes are not preserved. Thus, we need not decide if additional errors in these instructions would also require the Archivist and agency heads to take curative steps to fulfill their statutory duties.

ome federal records will be permanently lost or destroyed unless the electronic records, currently being retained pursuant to the district court's orders, are preserved. This circumstance alone creates a predicate for an order requiring the Archivist and the relevant agency heads to take statutorily prescribed steps to prevent destruction of those tapes.⁵ Second, if a "print screen" policy—which was still in effect at the time the district court ruled in *Armstrong*—is inadequate under the FRA, then the district court appropriately issued a declaratory judgment invalidating its future

proceeding to decision on this point, we reject the district court's assumption, based on the appellants' submissions, that both the Archivist and the NSC have consistently instructed employees, either orally or in writing, that any electronic document meets the definition of a federal record, the employee must either print out the information that appears on her computer screen or incorporate that material into a written memorandum. See Appellants' Brief at 7-8; see also Joint Statement ¶ 22 ("[The agencies] do not require that information related to an electronic message be preserved, but only that information is captured when the message screen is printed or incorporated into a written memorandum.")

Accepting appellants' factual predictions, however, does not lead us to their legal conclusion that such an approach satisfies the FRA.

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address the flaws that it identified in earlier EOP and NSC recordkeeping documents. The legal sufficiency of a mere instruction to print out screen material is enough to create a risk that federal records will be permanently destroyed if backup tapes are not preserved. Thus, we need not decide if additional errors in these instructions would also require the Archivist and agency heads to take curative steps to fulfill their statutory duties.

ords may be stripped of that status only if they are "extra copies of documents preserved only for convenience of reference." 44 U.S.C. § 3301. Applied to this case, that means that the mere existence of the paper printouts does not affect the record status of the electronic materials unless the paper versions include all significant material contained in the electronic records. Otherwise, the two documents cannot accurately be termed "copies"—identical twins—but are, at most, "kissing cousins." Since the record shows that the two versions of the documents may frequently be only cousins—perhaps distant ones at that—the electronic documents retain their status as federal records after the creation of the paper print-outs, and all of the FRA obligations concerning the management and preservation of records still apply. See, e.g., *id.* § 3105 (requiring agency heads to "establish safeguards against the removal or loss" of "records"); *id.* § 3314 (stating that "records" may only be "alienated or destroyed" in accordance with FRA provisions, i.e., with the approval of the Archivist).

[4] To qualify as a record under the FRA, a document must satisfy a two-pronged test. It must be (1) "made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business" and (2) "preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in [it]." *Id.* § 3301. The appellants do not contest the fact that many, if not all, of the communications relayed over the electronic system satisfy the "public transaction" element of this test. At oral argument, the government appeared to acknowledge that the "preserved or appropriate for pres-

ervation" criterion was satisfied as well for some documents on the system.⁶

[5] To the extent any question remains, we reject the appellants' argument, on brief, that agency heads have sweeping discretion to decide which documents are "appropriate for preservation" (since we reject this contention, we do not consider whether the disputed documents have also been "preserved"). The appellants have stipulated that the electronic communications systems "contain information on the organization, functions, policies, decisions, procedures, operations, and other activities" of the agencies. Joint Statement ¶ 64. Such documents could only fail to qualify as records if, despite their content, the agency has the inherent discretion to consider them *en masse* as not "appropriate for preservation . . . as evidence of [the government's] organization, functions, policies, decisions, procedures, operations or other activities," 44 U.S.C. § 3301 (emphasis added), an odd proposition to assert in this case since the agency heads admit that they have never surveyed the contents of the electronic systems. See Joint Statement ¶ 67 ("Neither the EOP nor the NSC ha[s] conducted any formal examination, inspection, or survey to determine the types of communications recorded on the system, or the amount of information on the organization, functions, policies, decisions, procedures or other activities of the EOP or NSC recorded in [electronic] files."); cf. *American Friends*, 720 F.2d at 65. In any case, while the agency undoubtedly does have some discretion to decide if a particular document satisfies the statutory definition of a record, see *Armstrong I*, 924 F.2d at 297 n. 14, the statute surely cannot be read to allow the agency by fiat to declare "inappropriate for preservation" an entire set of substantive e-mail documents generated by two administrations over a seven-year period.⁷ Cf. *American Friends*,

6. The following exchange took place at argument:

The Court: We agree . . . that this system has, in the past, created some things that qualify as federal records.

Appellants' Counsel: We agree.

7. We note that the substantive importance of these documents is demonstrated by the frequency with which they have been used in recent

years. They were used by the Tower Commission, congressional investigators and the Independent Counsel looking into the Iran-Contra affair, by the Department of Justice in connection with its prosecution of Manuel Noriega, and by the NSC's legal advisor in relation to the confirmation of Robert Gates as Director of the CIA. See Joint Statement ¶¶ 56-59.

720 F.2d at 41 ("Congress was certainly aware that agencies, left to themselves, have a built-in incentive to dispose of records relating to [their] 'mistakes' . . ."). Indeed, to conclude that agencies have broad discretion to exempt seven years of substantive documents from record status would flout our prior holding in *Armstrong I* that the FRA furnishes sufficient "law to apply" to permit judicial review of agency guidelines relating to the management of federal records. See *Armstrong I*, 924 F.2d at 293 (noting that the FRA contains a "detailed definition of the 'records' that agencies must preserve") (emphasis added); see also *id.* ("Although the FRA understandably leaves the details of records management to the discretion of individual agency heads, it does contain several specific requirements. . .").

[6]. Having established that the electronic communications systems contain preservable records, we turn finally to the question of whether the government has the discretion to convert only *part* of the electronic records to paper, and then manage only the partial paper records in accordance with the FRA and the Archivist's regulations. The question answers itself. Only one FRA provision exists that would even arguably sanction a document, once denominated a federal record, shedding that appellation at a later point. That provision states that "extra copies of documents preserved only for convenience of reference" are not "records." 44 U.S.C. § 3301. But it is too tight a fit for the government to shoehorn the electronic records at issue here into that exception. Even assuming, without of course deciding, that one set of parallel documents retained in a different records system in a different me-

8. Our discussion assumes that directories, distribution lists, etc., become part of an electronic record when they are incorporated in that record to specify senders and receivers of documents. We believe such an assumption is warranted as the most natural way of understanding the relation between the substance of a message and its origin and destination. See also *Appellants' Brief* at 22 (referring to the disputed material as "information related to an electronic message"). Nonetheless, our conclusion is in no way dependent upon this assumption. If these electronic directories, distribution lists, etc., are perceived to be separate electronic records, making the paper renderings of the substantive notes copies,

dium than another set may be classified as a "copy" under the FRA and thus subject to unobstructed destruction, the electronic records would still not qualify as "full reproduction[s] or transcription[s]; imitation[s] of a prototype; . . . duplicate[s]," WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 404 (2d ed. 1979), of the paper print-outs. This is because important information present in the e-mail system, such as who sent a document, who received it, and when that person received it, will not always appear on the computer screen and so will not be preserved on the paper print-out. See Joint Statement ¶ 46 ("When printed on paper, a[n] [e-mail] note will not always identify the sender(s) and recipient(s) of a note by name. Instead, the sender(s) or recipient(s) may be identified only by (a) userid [i.e., user identification]; (b) nickname; or (c) the title given to a distribution list identifying several individuals. Identifying the names of the sender(s) or recipient(s) for such notes requires reference to the distribution lists or directories maintained only in electronic form.") (emphasis added; record citations omitted); see also *id.* at ¶ 47 ("If requested, [the electronic communications system] will provide 'the sender of a note with a confirmation that it has been received, called an 'acknowledgement.' The acknowledgement records the date and time the addressee of the note opened his or her electronic mail. This information on the date and time the note is received does not appear on the paper copy of the note when it is printed-out.") (record citations omitted). Since employees had never been—at least until the time of the district court's January order—instructed to include these integral parts of the electronic record⁸

the paper records system maintained by the agencies would still fail to meet the Act's requirements since it would omit entirely a different class of documents that, as the Archivist acknowledges, are "appropriate for preservation" in situations like this one. See National Archives and Records Administration, *Disposition of Federal Records* 2 (1989) ("Sometimes papers normally considered nonrecord, such as transmittals or routing slips, acquire record status because they clarify the matter being documented.") (emphasis added); cf. 36 C.F.R. § 1222.38 ("Agency recordkeeping requirements shall prescribe the creation and maintenance of records of the transaction of agency business that are sufficient

another set may be classified as a under the FRA and thus subject to destruction, the electronic record still not qualify as "full reproduction[s]; imitation[s] of a ... duplicate[s]," WEBSTER'S NEW UNABRIDGED DICTIONARY 404 (2d ed.), of the paper print-outs. This is important information present in the system, such as who sent a document, received it, and when that person received it, will not always appear on the computer print-out and so will not be preserved on a paper print-out. See Joint Statement when printed on paper, a[n] [e-mail] will not always identify the sender(s) or recipient(s) of a note by name. Instead, sender(s) or recipient(s) may be identified by (a) userid (i.e., user identification) nickname; or (c) the title given to a distribution list identifying several individuals. Identifying the names of the sender(s) or recipient(s) for such notes requires referring to the distribution lists or directories maintained only in electronic form." (emphasis added; record citations omitted); see also at ¶ 47 ("If requested, [the electronic communications system] will provide the user of a note with a confirmation that it was received, called an 'acknowledgement'." The acknowledgement records the date and time the addressee of the note received his or her electronic mail. This information on the date and time the note is received does not appear on the paper copy of the note when it is printed-out.") (record citations omitted). Since employees had never received—at least until the time of the district court's January order—instructed to include integral parts of the electronic record in the paper records system maintained by the agencies would still fail to meet the Act's requirements since it would omit entirely a different set of documents that, as the Archivist acknowledges, are "appropriate for preservation purposes like this one. See National Archives Records Administration, *Disposition of Federal Records* 2 (1989) ("Sometimes papers not considered nonrecord, such as transmittal routing slips, acquire record status because they clarify the matter being documented.") (emphasis added); cf. 36 C.F.R. § 1222.38 ("Agency recordkeeping requirements shall prescribe the creation and maintenance of records of the transaction of agency business that are sufficient

in any paper print-out, there is no way we can conclude that the original electronic records are mere "extra copies" of the paper print-outs. Cf. National Archives and Records Administration, *Managing Electronic Records* 19 (1990) ("Most agencies have decided to meet their recordkeeping requirements for documents that are created using word processing or electronic mail or messaging by printing those documents in hard copy. The success of this approach depends upon a clear understanding by all employees of the obligation to print and file all record material.") (emphasis added).

Our refusal to agree with the government that electronic records are merely "extra copies" of the paper versions amounts to far more than judicial nitpicking. Without the missing information, the paper print-outs—akin to traditional memoranda with the "to" and "from" cut off and even the "received" stamp pruned away—are dismembered documents indeed.⁹ Texts alone may be of quite limited utility to researchers and investigators studying the formulation and dissemination of significant policy initiatives at the highest reaches of our government. See 810 F.Supp. at 341 (noting that the omitted information may be "of tremendous historical value in demonstrating what agency personnel were involved in making a particular policy decision and what officials knew, and when they knew it"). The "[t]omorrow, and tomorrow, and tomorrow" of government will be allowed to "creep in [their] petty pace from day to day" without benefit of the "last syllable of recorded time." WILLIAM SHAKESPEARE, *MACBETH*, Act V, scene v, line 19. In our view, as well as the district judge's, the practice of retaining only the amputated paper print-outs is flatly inconsistent with Congress' evident concern with preserving a complete record of government activity for

to: (e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all significant decisions and commitments reached orally (person to person, by telecommunications, or in conference).")

9. The appellants attempt to minimize this fact by noting that traditional letters, memoranda, and phone calls do not always leave behind a historical trail including such information. This observation is beside the point. The key facts here are

historical and other uses.¹⁰ See 44 U.S.C. § 2902(1) (listing first among Act's goals the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government"); see also *Armstrong I*, 924 F.2d at 288 (noting the "expressed statutory goal of preserving records for historical purposes"); *American Friends*, 720 F.2d at 57 (describing the FRA's legislative history as demonstrating that "Congress intended, expected, and positively desired private researchers ... to have access to the documentary history of the federal government"); cf. 36 C.F.R. § 1222.38 ("Agency recordkeeping requirements shall prescribe the creation and maintenance of records of the transaction of agency business that are sufficient to: ... (e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all significant decisions and commitments reached orally (person to person, by telecommunications, or in conference)."). Perhaps that is why, in this court, the appellants seem to have abandoned their former heavy reliance on this theory.

Before us they plead an alternative, related, but no more compelling theory of statutory compliance: "that the extra information that plaintiffs argue must be preserved is in fact not always 'appropriate for preservation' as evidence of an agency's essential transactions, and that printing the actual message text on the computer screen normally is sufficient for adequate documentation of the agency's business. Since the printed copy is identical to what is on the computer screen, the electronic version of the message that remains is a copy that is nonrecord within the meaning of the statute." Reply Brief for Appellants at 9. In other words, the appellants contend that given the broad discretion that this information is available on the electronic systems and that the defendant agencies have not taken any steps to retain it on their paper documents.

10. At the same time, for the reasons discussed *infra* at pages 1286–87, we do not believe that our conclusion on this point is inconsistent with the Act's desire to balance this interest against the need for efficient records management. See *Armstrong I*, 924 F.2d at 292.

vested in the agencies by the FRA, they may reasonably determine that some parts of a record document—the so-called “extra information”—are not “appropriate for preservation”; thus, after the creation of the paper records, the electronic version is a “copy” because the paper record contains all the material worth preserving from the electronic files.

[7] This appeal to discretion, however, relies in the main on snippets of language from different parts of the FRA pasted together in ways incompatible with the overall design of the Act. As noted above, the “appropriate for preservation” phrase in the definition of “records” at most allows the agency some discretion in deciding whether a document meets that definition in the first place. See 44 U.S.C. § 3301 (providing that federal “records” must be, *inter alia*, “preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them”). It does not, as appellants imply, grant agencies the discretion to automatically lop off a predesignated part of a whole series of documents that qualify as records (nor would it allow the wholesale destruction of the directories and similar materials if they were perceived to be independent records, see *supra* note 8). In substance, the appellants are claiming that it satisfies the Act to preserve a second version of a record that is an *approximation* of the first version if it includes all the material that, in their view, is “appropriate for preservation.” Even if this argument made sense with respect to a particular document, it cannot be accepted across the board for seven years of records documenting high-level government decision-making. Further, as our discussion above makes clear, it cannot be squared with the FRA’s “extra copies” provision. The Act explicitly provides an “out” of the system for a federal record only when a second version is identical to—i.e., an “extra copy” of—the first. There is no provision accepting abbreviated or summary versions of the original as

11. Further, the agencies’ assertion of unilateral discretion to discard part of a federal record is at odds with the FRA’s specific requirement that

the only record if the summary contains all material deemed “appropriate for preservation.”¹¹

[8] Equally unconvincing is the appellants’ suggestion that Congress’ directive to preserve “adequate documentation” of agencies’ “essential transactions” justifies their practice of retaining only the “substantive information” displayed on the computer screen. The phrases “adequate documentation” and “essential transactions” are lifted from 44 U.S.C. § 3101, which states: “The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.” The purpose of this provision, by its own terms, is to place a general obligation on agency leaders to create and then retain a baseline inventory of “essential” records. See *American Friends*, 720 F.2d at 54; see also *id.* at 56 (summarizing legislative history of this provision and concluding that it provided an enforceable “across-the-board requirement” that agencies retain certain types of records); S.REP. NO. 2140, 81st Cong., 2d Sess. 15 (1950) (this provision “provides a general declaration by the Congress [to maintain adequate records]”). Other parts of the FRA, however, go on to prescribe more particularized duties for agency heads that reach beyond their general obligation to “adequately document core agency functions. In particular, the Act includes (1) a separate definition of the term “records” that the appellants acknowledge sweeps in many of the electronic communications at issue here—whether or not preservation of those documents is necessary to maintain “adequate documentation” of “essential transactions”—and (2) other statutory provisions that mandate that *all* records—again, whether or not related to “adequate documentation” of “essential transactions”—be managed and retained in accordance with

federal records may be “alienated or destroyed only with the approval of the Archivist. See 44 U.S.C. §§ 3303a, 3314.

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ally unconvincing is the appellant's contention that Congress' directive to "adequate documentation" of agency "essential transactions" justifies their retaining only the "substantive" displayed on the computer. The phrases "adequate documentation" and "essential transactions" are lifted from 44 U.S.C. § 3101, which states: "The head of each Federal agency shall make and preserve records containing adequate and accurate documentation of the organization, policies, decisions, procedures and transactions of the agency and determine the information necessary to preserve the legal and financial rights of the Government and of persons directly affected by the agency's activities." The purpose of the Act, by its own terms, is to place a burden on agency leaders to create and then retain a baseline inventory of "records." See *American Friends of the Library*, 54 F.3d at 56 (summarizing the legislative history of this provision and concluding that it provided an enforceable "on-the-board requirement" that agencies retain types of records); S.REP. NO. 911, 81st Cong., 2d Sess. 15 (1950) (this "provides a general declaration by Congress [to maintain adequate records]. Other parts of the FRA, however, prescribe more particularized duties for agency heads that reach beyond their obligation to 'adequately document' agency functions. In particular, the Act (1) a separate definition of the term 'records' that the appellants acknowledge in many of the electronic communications issue here—whether or not preservation of those documents is necessary to maintain 'adequate documentation' of 'essential transactions'—and (2) other statutory provisions that mandate that all records—again, whether or not related to 'adequate documentation' of 'essential transactions'—be created and retained in accordance with the Act. Records may be 'alienated or destroyed' without the approval of the Archivist. See 44 U.S.C. §§ 3303a, 3314.

explicit statutory directives. See 44 U.S.C. § 3314 ("Records . . . may not be alienated or destroyed except under this chapter.") (emphasis added); see also *id.* § 3105 (agency heads must "establish safeguards against the removal or loss of records") (emphasis added). In sum, appellants' arguments fail to detour us from the analytical path we started down and now come close to finishing: (1) substantive e-mail communications satisfy the FRA definition of "records"; (2) the lone FRA provision for terminating their status as such requires that they be merely "extra copies" of other documents preserved elsewhere; and (3) since there are often fundamental and meaningful differences in content between the paper and electronic versions of these documents, the electronic versions do not lose their status as records and must be managed and preserved in accordance with the FRA.

[9, 10] Contrary to appellants' assertions, the conclusion that agencies must retain and manage these electronic documents in no way collides with Congress' oft-expressed intent to balance complete documentation with efficient, streamlined recordkeeping. See, e.g., S.REP. NO. 2140, 81st Cong., 2d Sess. 4 (1950) ("It is well to emphasize that records come into existence, or should do so, not in order to . . . satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them."). Our decision does not require that agencies, in appellants' words, save "every scrap of paper" they create. Not all scribbles and off-the-cuff comments will qualify as federal records. Nor do we saddle agencies with any new obligations to make additional documents in order to satisfy the needs of researchers or investigators. Cf. *Armstrong I*, 924 F.2d at 288 ("Plaintiffs do not seek the creation of any new records, but rather ask only that the records already created be appropriately classified and disposed of . . ."); S.REP. NO. 1326, 94th Cong., 2d Sess. 8 (1976), 1976 U.S.C.C.A.N. 6150, 6157 (emphasizing the need for economy in records creation because that is where 80% of total recordkeeping costs are incurred). Finally, our decision leaves undisturbed the agencies' ability to purge incidental electron-

ic records from their files by acting, with the Archivist's approval, to dispose of those documents that lack "sufficient administrative, legal, research, or other value to warrant their continued preservation." 44 U.S.C. § 3303a(a); see also 55 Fed.Reg. 19,216, 19,216 (1990) (Archivist notes that the burden of managing electronic records "can be reduced significantly by promptly scheduling all electronic records, thus limiting the application of [regulatory] requirements to the very small percentage of records that are scheduled as permanent").

In sum, we find that the district court was fully justified in concluding that appellants' recordkeeping guidance was not in conformity with the Act.

B. Supervision of Electronic Recordkeeping Practices

[11] Appellants also dispute the district court's finding that their records management practices were arbitrary and capricious in failing to provide for supervision or auditing of employees' electronic recordkeeping practices by knowledgeable records management personnel. Specifically, appellants contend that they reasonably discharged their obligation to "safeguard" federal records by assigning records managers the task of providing oral and written guidance to agency personnel and making those recordkeeping experts available for resolution of specific problems.

The FRA explicitly requires each agency head to establish such safeguards against the removal or loss of federal records as she "determines to be necessary and required by regulations of the Archivist." 44 U.S.C. § 3105; see also 36 C.F.R. § 1220.2 ("Federal agency records management programs must be in compliance with regulations promulgated by [the Archivist]."). In this case, the agency heads clearly failed to discharge this obligation.

The Archivist's regulations provide:

The head of each Federal agency shall ensure that the management of electronic records incorporates the following elements:

(l) Reviewing electronic records systems periodically for conformance to established agency procedures, standards, and policies. . . . The review should determine if the records have been properly identified and described, and whether the schedule descriptions and retention periods reflect the current informational content and use. . . .

Id. § 1234.10 (emphasis added). The Archivist has defined an "electronic records system" as "any information system that produces, manipulates, or stores Federal records by using a computer." *Id.* § 1234.2 (emphasis added). As previously discussed, the electronic communication systems used by the EOP and the NSC do produce federal records, and it follows that agencies have an obligation under the Archivist's guidelines to undertake periodic reviews to assure that "established agency procedures, standards, and policies," including instructions as to what constitutes a record, are being adhered to. Moreover, the relevant regulations make clear that they apply to all electronic systems used by agency employees to create electronic records, not just, as appellants suggest, to "official" agency electronic records systems. See *id.* § 1234.1 ("Unless otherwise noted, [this section's] requirements apply to all electronic records systems, whether on microcomputers, minicomputers, or mainframe computers, regardless of storage media, in network or stand-alone configurations."); cf. *id.* § 1234.22 (listing specific requirements for electronic records systems "that maintain the official file copy of text documents on electronic media"). Moreover, to the extent there is any residual doubt on this question,

12. We also reject the appellants' contention that the district court's injunctive order sweeps too broadly. First, they argue that the court's order requiring the Archivist immediately to seek the assistance of the Attorney General and notify Congress of that action ignores *Armstrong I*'s statements that the Archivist and agency heads could discharge their statutory obligations through informal, intra-agency mechanisms. See 924 F.2d at 296 n. 12. In this case, the Archivist had failed to take any actions—formal or informal—necessary to prevent the statutory violations. See Joint Statement ¶ 237 (acknowledging that although Archivist's regulations require her to "periodically evaluate agency records management programs," the Archivist has never performed such an evaluation for the NSC and the

we think that the agencies' own action in undertaking some review of employees' paper records before those employees exit government service and the common sense insight that an adequate program for ensuring records preservation must include some ongoing inspections and evaluations tip the balance against the government and lead to the conclusion that oversight is necessary as part of "an agencywide program for the management of all records created, received, maintained, used or stored on electronic media." *Id.* § 1234.10(a).

On that basis, we affirm the district court's holding that the defendant agencies must undertake some periodic review of their employees' electronic recordkeeping practices.¹²

III. THE DISTRICT COURT'S CIVIL CONTEMPT ORDER

[12] Next, the appellants appeal from the district court's May 21, 1993 civil contempt order. The district court found the appellants "in contempt of this Court's Orders of January 6 and 11, 1993, and the Order of the United States Court of Appeals for the District of Columbia dated January 15, 1993" in two respects: (1) "for failing to promulgate new, appropriate, and proper recordkeeping regulations for electronic federal records to replace those regulations struck down by this Court on January 6, 1993" and (2) "because the transfer of 5,839 tapes from the Defendant agencies to the Archivist has adversely affected the condition of the tapes and the information stored therein" which was "contrary to this Court's Orders to preserve the tapes and federal records contained on

EOP, has never reviewed their recordkeeping guidelines, and has never surveyed or inspected their e-mail systems). Given that circumstance, the district court did not abuse its discretion in ordering the Archivist to take the specific actions provided for in the statute. Similarly unpersuasive is the appellants' argument that the district court should not have enjoined the defendant agencies from destroying any electronic records until new guidelines were in place. Because these systems continue to produce federal records, the district court used its discretion appropriately in insisting upon a full-scale method for preventing the records' destruction until the agencies came up with new, adequate records management guidelines to replace the ones voided by the district court's declaratory order.

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On that basis, we affirm the district court's finding that the defendant agencies must make some periodic review of their electronic recordkeeping practices.

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these tapes." The appellants argue that they have never reviewed their recordkeeping systems, and has never surveyed or inspected e-mail systems. Given that circumstance, the district court did not abuse its discretion in finding the Archivist to take the specific actions set forth in the statute. Similarly unpersuasive is the appellants' argument that the district court should not have enjoined the defendant agencies from destroying any electronic records until new guidelines were in place. Because the agencies continue to produce federal records, the district court used its discretion appropriately in insisting upon a full-scale method for managing the records' destruction until the agencies came up with new, adequate record management guidelines to replace the ones voided by the district court's declaratory order.

them." Order, *Armstrong v. Executive Office of the President*, 821 F.Supp. 761 (D.D.C. 1993). The court further ordered that, unless the appellants should "purge themselves of this finding of contempt" by "tak[ing] appropriate action by 4:00 p.m. on June 21, 1993," they would be subject to a fine of \$50,000 for each day of noncompliance during the first week, to be doubled to \$100,000 per day the second week and \$200,000 per day the third week, "with increases in such sanctions reserved thereafter for any further noncompliance with Court Orders." *Id.* at 2-3. The appellants assert that the contempt finding must be reversed because, *inter alia*, the district court's first ground, the failure to promulgate new regulations, was not a violation of the cited orders and therefore cannot support civil contempt. "The standard of review on an appeal from a finding of contempt is whether the District Court abused its discretion." *International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines, Inc.*, 849 F.2d 1481, 1486 (D.C. Cir. 1988). We agree with the appellants that the contempt finding, as articulated, was an abuse of discretion because it rests in part on an impermissible ground.

[13] As a preliminary matter, we reject the appellees' jurisdictional argument that the May 21, 1993 order is not an appealable one because it "imposes only a conditional sanction for failure to comply with a preexisting order." See Appellees' Contempt Brief at 13. As both the Eleventh Circuit and the Second Circuit have concluded, "Being placed under the threat of future sanction is a present sanction" and an order so threatening "imposes a present remedy and hence is appealable." *United States v. O'Rourke*, 943 F.2d 180, 186 (2d Cir.1991) (quoting *Sizzler Family Steak Houses v. Western Sizzlin Steak House, Inc.*, 793 F.2d 1529, 1533 n. 2 (11th Cir.1986)) (emphasis in original). We agree and therefore proceed to the merits of the contempt appeal.

[14, 15] "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622 (1966). Nevertheless, "civil contempt

will lie only if the putative contemnor has violated an order that is clear and unambiguous," *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir.1991), and the violation must be proved by "clear and convincing" evidence. *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 626 F.2d 1029, 1031 (D.C. Cir.1980). The district court's first ground for its contempt finding, however, did not involve violation of any court order. The district court's January 11, 1993 order did not expressly direct the appellants to promulgate new regulations, but merely issued "a Declaratory Judgment that the guidelines issued by and at the direction of the Defendant Agencies are inadequate and not reasonable and are arbitrary and capricious and contrary to law in that they permit the destruction of records contrary to the Federal Records Act." Amended Order, *Armstrong v. Bush*, 810 F.Supp. 335 (D.D.C. 1993). As the Supreme Court has observed: "[E]ven though a declaratory judgment has 'the force and effect of a final judgment,' 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; non-compliance with it may be inappropriate, but is not contempt." *Steffel v. Thompson*, 415 U.S. 452, 471, 94 S.Ct. 1209, 1221, 39 L.Ed.2d 505 (1974) (quoting *Perez v. Ledesma*, 401 U.S. 82, 125-26, 91 S.Ct. 674, 697, 27 L.Ed.2d 701 (1971) (Brennan, J., concurring)). Thus, because the appellants were never directly ordered to promulgate new regulations, we must reverse the district court's contempt finding which was based in part on their failure to do so. Cf. *Spallone v. United States*, 493 U.S. 265, 276-77, 110 S.Ct. 625, 632-33, 107 L.Ed.2d 644 (1990) (reversing contempt finding against individual city councilmembers for city's violation of consent decree where "the individual city councilmembers . . . were not parties to the action" and "although the injunctive portion of that decree was directed not only to the city but to its officers, agents, employees, successors and all persons in active concert with any of them," the remaining parts of the decree ordering affirmative steps were directed only to the city"); *International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76, 88 S.Ct. 201,

208, 19 L.Ed.2d 236 (1967) (reversing opinion upholding contempt finding for violating order that "did not state in 'specific . . . terms' the acts that it required or prohibited") (quoting FED.R.Civ.P. 65(d)). Accordingly, we vacate the contempt order and remand to the district court to consider whether its second ground, the failure to preserve the tapes, by itself, justifies a finding of contempt, taking into account all efforts that have or will then have been made to assure the tapes' integrity.¹³

IV. REVIEWABILITY OF EOP AND NSC GUIDELINES DEFINING PRESIDENTIAL RECORDS

Finally, the plaintiffs-appellees cross-appeal the district court's conclusion that it did not have jurisdiction to review the EOP recordkeeping guidelines regarding presidential records. As cross-appellants, they assert that the guidelines improperly instruct NSC and OSTP staff to treat as presidential records materials that are, in fact, agency records subject to the FRA. We have jurisdiction to hear the cross-appeal under 28 U.S.C. § 1292(b) because it challenges aspects of the same interlocutory order that is the subject of the main appeal. See *Armstrong I*, 924 F.2d at 296 n. 13.

[16] The district court erred in declining to review the EOP guidelines defining presidential records. The PRA delineates those records over which the President may exercise "virtually complete control" during his term of office, *id.* at 290, and the courts may not restrict that control by reviewing the President's recordkeeping practices and decisions. *Id.* at 291. But the courts are accorded the power to review guidelines outlining what is, and what is not, a "presidential record" under the terms of the PRA. The PRA does not bestow on the President the power to assert sweeping authority over whatever materials he chooses to designate as presidential records without any possibility of judicial review. Rather, it provides that all materials that were subject to the FOIA,

13. In light of this disposition, we need not address the appellants' challenge to the second contempt ground or its claim of sovereign immunity from contempt fines. See *Spallone*, 493 U.S.

5 U.S.C. § 552, prior to the passage of the PRA remain subject to the FOIA and do not qualify as "presidential records." Thus, the court may review the EOP guidelines for the limited purpose of ensuring that they do not encompass within their operational definition of presidential records materials properly subject to the FOIA. We therefore reverse and remand to the district court for proceedings consistent with this opinion.

A. Background

The FRA and the PRA apply to distinct categories of documentary materials. As restated more fully, *supra* pages 1278-79, the FRA defines the "records" subject to the Act as all

documentary materials . . . made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation as evidence of the activities of the Government or because of the informational value of data in them.

44 U.S.C. § 3301. ("Records" subject to the FRA are referred to hereinafter as "federal records.") The PRA defines "presidential records" as

documentary materials . . . created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. § 2201(2). The definition goes on to exclude specifically "any documentary materials that are . . . official records of an agency," as the term "agency" is defined in the FOIA, 5 U.S.C. § 552(f). *Id.* § 2201(2)(B)(i).

[17] Whereas federal records are subject to a strict document management regime at 274, 110 S.Ct. at 631 (finding it unnecessary to reach alternative first amendment and legislative immunity arguments after reversing contempt finding against city councilmembers on merits).

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110 S.Ct. at 631 (finding it unnecessary to alter the first amendment and legislative arguments after reversing contempt against city councilmembers on merits).

supervised by the Archivist, *see supra* pages 1278-79, the PRA "accords the President virtually complete control over his records during his term of office." *Armstrong I*, 924 F.2d at 290. Neither the Archivist nor an agency head can initiate any action through the Attorney General to effect recovery or ensure preservation of presidential records. Compare 44 U.S.C. § 3106 (requiring agency heads to notify the Archivist of unlawful removal or destruction of federal records and to seek legal action through the Attorney General to recover or preserve the records); *id.* § 2905(a) (directing the Archivist to assist the agency head in initiating an action through the Attorney General for the recovery of wrongfully removed federal records or for other legal redress, and requiring the Archivist to make her own request to the Attorney General if the agency head is recalcitrant). Furthermore, the President may designate a period, not to exceed twelve years after the completion of his presidency, during which his presidential records shall not be accessible under the FOIA or otherwise. *Id.* § 2204.

The Archivist can request congressional advice regarding the President's intention to dispose of presidential records if the Archivist believes that the records may be of special interest to Congress or that consultation is in the public interest. 44 U.S.C. § 2203(e), and she can also cause the President to submit a disposal schedule at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. *Id.* § 2203(d). But "neither the Archivist nor the Congress has the authority to veto the President's disposal decision." *Armstrong I*, 924 F.2d at 290 (citation omitted).

The EOP guidelines in question classify broad categories of NSC records as federal records, but also provide that NSC records "are [p]residential records if they were received or created for the President, the [National Security Adviser] or his Deputy, or a member of the White House staff independently of any meeting or policy and staff actions of the NSC or its various groups." Joint Statement ¶ 157(c). The analogous guidelines for the OSTP provide that OSTP

records are federal records, but "records produced or received by the Director of OSTP in his role as Science Advisor to the President are [p]residential records and should be segregated as such." *Id.* ¶ 157(d).

Relying in large part on our decision in *Armstrong I*, the district court held that "the NSC is entitled to segregate presidential and federal records.... [T]his Court has no power to review actions taken by the President to ensure that presidential records are maintained." *Armstrong*, 810 F.Supp. at 347, 348 (citations omitted). The district court also stated that our decision in *Armstrong I*

provided the methodology for separating the FRA and the PRA as it applies here:

EOP components whose sole responsibility is to advise the President are subject to the PRA and create presidential records. Similarly, the components of the EOP that have statutory responsibility are subject to the FRA.

Id. 810 F.Supp. at 349 (citing *Armstrong I*, 924 F.2d at 286 n. 2). The district court further understood *Armstrong I* to have found that the NSC advises the President and has statutory obligations, and to have applied the foregoing "methodology" to determine that the NSC "produces both presidential and federal records." *Id.* 810 F.Supp. at 347-48 (citing *Armstrong I*, 924 F.2d at 286 n. 2).

In light of its interpretation of *Armstrong I*, the district court concluded that its order to take all necessary steps to preserve electronic federal records applied only to those agencies

that have statutory responsibility and not those that solely advise the President....

The Defendants shall not be required to preserve material[s] which are presidential records produced by components whose sole responsibility is to advise the President. However, in components that produce both types of records, this Court does have the jurisdiction to authorize the preservation of these materials until the Archivist can ensure that federal records are not destroyed.

Id. 810 F.Supp. at 349. Thus, although the district court concluded that it could not re-

view the presidential records guidelines, it nonetheless ordered the NSC—and other EOP components who do not have the sole responsibility of advising the President—to preserve *all* records, both federal and presidential, “until the Archivist can ensure that federal records are not destroyed.” *Id.*

B. Reviewability of the Guidelines

As we have already stated, *supra* page 1290, the PRA defines “presidential records” as

documentary materials . . . created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. § 2201(2). In addition, Congress explicitly provided that presidential records do not include “any documentary materials that are . . . official records of an agency,” as the term “agency” is defined in the FOIA, 5 U.S.C. § 552(f). 44 U.S.C. § 2201(2)(B)(i). The legislative history explains this limitation on the definition of “presidential records” as follows:

The term “presidential records” is intended . . . to encompass all White House and [EOP] records . . . which . . . fall outside the scope of the FOIA because they are not agency records. In other words, that which is now subject to FOIA would remain so and that which is [not] now subject to FOIA would be subject to the [PRA], including those provisions of the [PRA] which in specified circumstances specially apply FOIA to these non-agency records after a President leaves office.

H.R. REP. NO. 1487, 95th Cong., 2d Sess. 11 (1978), 1978 U.S.C.C.A.N. 5732, 5742; see also *id.* at 3.

[18] Thus, Congress perceived the potential definitional overlap between agency records under the FOIA and presidential records under the PRA, and explicitly provided that the PRA would apply only to records that “fall outside the scope of FOIA because

they are not agency records.” Put another way, the PRA provides that the definition of “agency” records in the FOIA trumps the definition of “presidential records” in the PRA. Congress was “keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President’s daily operations,” and thus sought “to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President’s term of office.” *Armstrong I*, 924 F.2d at 290. At the same time, however, Congress sought to provide a clear limitation on just which materials the President could legitimately assert control over and to preserve the pre-existing body of FOIA law governing the disclosure of government agency records.

[19] The PRA exclusion of records subject to the FOIA from the class of materials that may be treated as presidential records averts a clash in the role of judicial review under the two statutory schemes. Judicial review plays an indispensable role in ensuring proper government disclosure under the FOIA. 5 U.S.C. § 552(a)(4)(B); *Truitt v. Department of State*, 897 F.2d 540, 547 (D.C.Cir.1990); *Senate of Puerto Rico v. U.S. Department of Justice*, 823 F.2d 574, 587 (D.C.Cir.1987); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C.Cir.1983); *Ray v. Turner*, 587 F.2d 1187, 1190-95 (D.C.Cir.1978). At the same time, judicial review of the President’s management of admittedly presidential records is impliedly precluded by the PRA. *Armstrong I*, 924 F.2d at 289; see *infra* pages 1293-94. Congress preserved the critical role of judicial review under the FOIA, and avoided a conflict between the PRA and the FOIA, by explicitly exempting records subject to the FOIA from the scope of the PRA and allowing judicial review of guidelines defining presidential records under the rubric of substantive FOIA law.

This narrow, clearly defined limitation on the scope of the PRA is absolutely essential to preventing the PRA from becoming a potential presidential *carte blanche* to shield materials from the reach of the FOIA. Of

not agency records." Put another way, the PRA provides that the definition of records in the FOIA trumps the definition of "presidential records" in the FRA. Congress was "keenly aware of the importance of powers concerns that were imbedded in legislation regulating the conduct of the President's daily operations," and thus sought to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term of office." *Armstrong I*, 924 F.2d at 290. At the same time, Congress sought to provide a clear line on just which materials the President could legitimately assert control over to preserve the pre-existing body of law governing the disclosure of government agency records.

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The narrow, clearly defined limitation on the scope of the PRA is absolutely essential in preventing the PRA from becoming a presidential *carte blanche* to shield records from the reach of the FOIA. Of

course, we presume that executive officials will act in good faith. But if guidelines that purport to implement the PRA were not reviewable for compliance with the statute's definition of presidential records, non-presidential materials that would otherwise be immediately subject to the FOIA would be shielded from its provisions, whether wittingly or unwittingly, if they were managed as presidential records. See 44 U.S.C. § 2204(a), (b) (President may designate a period, not to exceed twelve years after the completion of his presidency, during which his presidential records shall not be accessible under the FOIA or otherwise); *id.* § 2204(c)(1) (presidential records shall be administered under the FOIA after the expiration of any limitations on access imposed under subsections 2204(a) and (b)). Moreover, in light of the fact that disposal decisions under the PRA are unreviewable, *Armstrong I*, 924 F.2d at 290, a non-presidential document subject to the FOIA could be forever removed from that statute's provisions if it were improperly classified as a presidential record and destroyed.

For example, imagine a guideline defining "presidential records" as "all records produced or received by, or in the possession or under the control of, any government agency or employee of the United States." This definition would sweep all, or virtually all, federal records—and many documentary materials that are neither federal nor presidential records—within the ambit of the PRA, and outside the scope of the FOIA. Reading the PRA to forbid judicial review of such a guideline for conformity with the PRA definition of presidential records would be tantamount to allowing the PRA to functionally render the FOIA a nullity. As we have already stated, *supra* pages 1292-93, Congress avoided this problem by excluding records subject to the FOIA from the scope of the PRA, thereby preserving FOIA law intact and maintaining the integral role of judicial review.

Our holding today is also consonant with the relationship between the FRA and the PRA. The FRA defines a class of materials that are federal records subject to its provisions, and the PRA describes another, mutu-

ally exclusive set of materials that are subject to a different and less rigorous regime. In other words, no individual record can be subject to both statutes because their provisions are inconsistent. If guidelines that purport to define presidential records were not reviewable, the cross-appellees could effectively shield all federal records not only from the FOIA, but also from the provisions of the FRA—thus evading this court's holding in *Armstrong I*, 924 F.2d at 293, that the courts have jurisdiction to decide whether the NSC's recordkeeping guidelines adequately describe the material subject to the FRA.

We held in *Armstrong I* that "the PRA precludes review of the President's record-keeping practices and decisions." *Armstrong I*, 924 F.2d at 289. The cross-appellees urge the court to give this language the broadest possible reading, holding in effect that we may not review any guidelines that purport to implement the PRA or deal with asserted presidential records. Thus, argue the cross-appellees, the district court correctly held that the guidelines for determining which materials are presidential records are not subject to judicial review. We disagree. The *Armstrong I* opinion does not stand for the unequivocal proposition that all decisions made pursuant to the PRA are immune from judicial review. The *Armstrong I* opinion addressed the question whether the courts could review the decision to erase materials designated by the government as presidential records within the meaning of the PRA. See *id.* at 284, 291. We held that judicial review was not available to monitor disposal and emphasized that Congress drafted the PRA in a manner that would "ensure executive branch control over presidential records during the President's term of office." *Id.* at 290 (emphasis added). Thus, we held that those decisions that involve materials that are truly presidential records are immune from judicial review. We did not hold in *Armstrong I* that the President could designate any material he wishes as presidential records, and thereby exercise "virtually complete control" over it, *id.* at 290, notwithstanding the fact that the

material does not meet the definition of "presidential records" in the PRA.

The cross-appellees point to individual phrases and sentences in our *Armstrong I* opinion which they contend dictate the broad result they urge upon this court. However, as we have just said, this language must be read in the context of the issue before the court in *Armstrong I*. In any case, the language seized upon by the cross-appellees is entirely consistent with the result we reach today. We stated in *Armstrong I* that the PRA "require[s] the President to maintain records documenting the policies, activities, and decisions of his administration, but leav[es] the implementation of such a requirement in the President's hands." *Id.* However, the discussion that immediately follows this statement makes clear that the *Armstrong I* court was not addressing the initial classification of existing materials. The *Armstrong I* court discusses only the "creation, management, and disposal decisions" described in the provisions of 44 U.S.C. § 2203. *See id.* at 290, 291. None of these decisions encompasses the initial classification of materials as presidential records.

[30] A "creation" decision refers to the determination to *make* a record documenting presidential activities. *See* 44 U.S.C. § 2203(a). Thus, the courts may not review any decisions regarding *whether to create* a documentary presidential record. "Management decisions" describes the day-to-day process by which presidential records are maintained. *See id.* § 2204(a), (b). The courts may likewise not review these particulars of the presidential records management system. *Armstrong I*, 924 F.2d at 290. Finally, "disposal decisions" describes the process outlined in 44 U.S.C. § 2203(c)-(e) for disposing of presidential records. Judicial review of the President's action under these provisions is also unavailable. But guidelines describing which *existing* materials will be treated as presidential records in the first place are subject to judicial review.

Thus, although the PRA impliedly precludes judicial review of the President's decisions concerning the creation, management, and disposal of presidential records during his term of office, *Armstrong I*, 924 F.2d at

291, the courts may review guidelines outlining what is, and what is not, a "presidential record" to ensure that materials that are not subject to the PRA are not treated as presidential records. We remand to the district court to conduct this inquiry.

C. The PRA Definition of Presidential Records

Having held that the recordkeeping guidelines defining presidential records are subject to judicial review, and having remanded to the district court for that purpose, it remains for us to discuss the definition of "presidential records" to be applied on remand. As our previous discussion of the PRA, *supra* pages 1290, 1292-93, has undoubtedly indicated, we must turn again to the PRA provision exempting from its scope any materials that are official records of an agency, as "agency" is defined in the FOIA, 5 U.S.C. § 552(f). 44 U.S.C. § 2201(2)(A)(i). Congress expressly intended when it passed the PRA to preserve unchanged the coherent body of law that had been developed under the FOIA, and it is that body of law that provides the basis for our limited review of the definition of presidential records provided in the guidelines. The guidelines violate the PRA to the extent that they classify as presidential records materials that would otherwise be subject to the FOIA.

The FOIA definition of "agency" invoked in the PRA raises a clear but somewhat intricate set of references and cross-references. The FOIA provision mentioned in the PRA, 5 U.S.C. § 552(f), incorporates the definition of "agency" provided at 5 U.S.C. § 551(1): "agency means each authority of the Government of the United States, whether or not it is subject to review by another agency, but does not include . . . the Congress . . . [or] the courts of the United States." 5 U.S.C. § 551(1). Section 552(f) itself adds an additional proviso:

[A]gency . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the Presi-

courts may review guidelines outlining, and what is not, a "presidential" to ensure that materials that are not to the PRA are not treated as presidential records. We remand to the district court to conduct this inquiry.

PRA Definition of Presidential Records

The court held that the recordkeeping guidelines governing presidential records are subject to judicial review, and having remanded to the district court for that purpose, it requires us to discuss the definition of "presidential records" to be applied on remand. As our previous discussion of the guidelines on pages 1290, 1292-93, has indicated, we must turn again to the provision exempting from its scope materials that are official records of an agency as "agency" is defined in the FOIA, 5 U.S.C. § 552(f). 44 U.S.C. § 2201(2)(A)(i). It is expressly intended when it passed to preserve unchanged the coherent body of law that had been developed under the PRA, and it is that body of law that is the basis for our limited review of the definition of presidential records provided in the guidelines. The guidelines violate the PRA to the extent that they classify as presidential records materials that would not be subject to the FOIA.

The FOIA definition of "agency" invoked in the PRA raises a clear but somewhat unsettled set of references and cross-references. The FOIA provision mentioned in the U.S.C. § 552(f), incorporates the definition of agency provided at 5 U.S.C. § 551(1): "agency means each authority or instrumentality of the Government of the United States, whether or not it is subject to review by another agency, but does not include ... the Congress ... [or] the courts of the United States." 5 U.S.C. § 551(1). Section 552(f) adds an additional proviso:

"The term 'agency' ... includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

dent), or any independent regulatory agency.

5 U.S.C. § 552(f). The Supreme Court has added still another layer of complexity, holding that for FOIA purposes, the EOP does not include the Office of the President. "[T]he President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President" are not included within the term "agency" under the FOIA. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156, 100 S.Ct. 960, 971, 63 L.Ed.2d 267 (1980) (quoting H.R.CONF.REP. No. 1380, 93d Cong., 2d Sess. 15 (1974)), 1974 U.S.C.C.A.N. 6267.

[21] The Supreme Court test adopted in *Kissinger* for determining which entities within the EOP are agencies subject to the FOIA was originally developed by this court in *Soucie v. David*, 448 F.2d 1067 (1971). In *Soucie*, this court held that only entities whose "sole function [is] to advise and assist the President" are not separate agencies subject to the FOIA. *Id.* at 1075. Thus, the court concluded that the Office of Science and Technology ("OST")—the precursor of the OSTP, one of the agencies whose guidelines are at issue in this appeal—was an agency subject to the FOIA because its duties went beyond advising the President and included evaluating federal scientific programs. *Id.*

The legislative history of the PRA could not be clearer in indicating congressional intent to adopt the test articulated in *Soucie* to determine what entities are "agencies" subject to the FOIA:

The [PRA] does not modify the applicability of the [FOIA] to White House and [EOP] records. ... That is, it does not redefine the term agency to include entities not now covered by the FOIA. The Conference Report for the 1974 Freedom of Information Act amendments stated that "[w]ith respect to the meaning of the term [EOP], the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 [(D.C.Cir.1971)]". The term is not interpreted as including the President's immediate staff or units in the [EOP]

whose sole function is to advise and assist the President."

H.R.REP. No. 1487, 95th Cong., 2d Sess. 11 (1978) (quoting H.R.CONF.REP. No. 1380, 93d Cong., 2d Sess. 13 (1974)), reprinted in 1978 U.S.C.C.A.N. 5732, 5742. The FOIA Conference Report quoted in the PRA legislative history is the same report upon which the Supreme Court relied in *Kissinger*, 445 U.S. at 156, 100 S.Ct. at 971.

This court has consistently applied the "sole function" test developed in *Soucie* and adopted in *Kissinger* in its subsequent decisions. In *Ryan v. Department of Justice*, 617 F.2d 781 (D.C.Cir.1980), we rejected the argument that certain records of the Attorney General regarding judicial nominations were not subject to the FOIA because the Attorney General was acting in his independent capacity as an advisor to the President when he prepared the records in question. *Id.* at 788. The Court explained that

Soucie did not intimate that the [OST] might be an agency only when performing its non-advisory functions, and still be a presidential staff component, or non-agency, when performing its other function of advising the President. In fact, the reports under consideration in *Soucie* were requested by the President precisely for advisory purposes, but we did not deem the [OST] to be a non-agency in that specific context.

Id. (citing *Soucie*, 448 F.2d at 1075-76). See also *Pacific Legal Foundation v. Council on Environmental Equality*, 636 F.2d 1259 (D.C.Cir.1980) (holding that the Council on Environmental Equality ("CEQ") is a FOIA agency because, in addition to advising the President, the CEQ coordinated federal environmental regulatory programs, issued guidelines for preparing environmental impact statements, and promulgated regulations for implementing the procedural provisions of the National Environmental Policy Act); *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038 (D.C.Cir.1985) (holding that the Council of Economic Advisers is not an agency under the FOIA because its sole function is to advise and assist the President); *Meyer v. Bush*, 981 F.2d 1288 (D.C.Cir.1993) (holding that the President's

Task Force on Regulatory Relief "[falls] within the *Soucie* test as an entity whose sole function is to advise and assist the President").

We hasten to add that our opinion in *Armstrong I* did not hold as a matter of law that the NSC "produces both presidential and federal records" because the NSC "advises the President and has statutory obligations." See *Armstrong*, 810 F.Supp. at 347-48, 349 (citing *Armstrong I*, 924 F.2d at 286 n. 2.). The passage on which the district court relied appears as a footnote in the "background" section of our *Armstrong I* opinion, without any of the legal exposition that would be expected to accompany a holding announcing the resolution of a previously unsettled legal question. See *Maggard v. O'Connell*, 703 F.2d 1284, 1290-91 (D.C.Cir.1983) (statements in the background discussion of an opinion should not be construed as deciding unresolved legal issues, especially where the court was only reviewing and reversing a grant of summary judgment). The footnote appears to be nothing more than a description of the position of the defendants-appellants as embodied in the EOP regulations. See Joint Statement ¶ 157 ("The records of the [NSC] staff are federal records if they were received or created in connection with the work of the statutorily-created [NSC].... The records of the NSC staff are presidential records if they were received or created for the President, the Assistant to the President for National Security, his Deputy, or a member of the White House staff independently of any meeting or policy and staff actions of the NSC or its various groups."). Consequently, *Armstrong I* did not provide the legal basis for distinguishing federal and presidential records nor decide the legal status of various NSC materials.

[22] Although we hold in accordance with the PRA that materials subject to the FOIA are not presidential records, we are unable to ascertain on the record before us whether the guidelines defining presidential records inappropriately classify certain materials. We cannot determine with certainty whether materials that the guidelines classify as presidential records are in fact official records of an agency subject to the FOIA. The NSC

appears to have routinely conceded its status as an "agency" subject to the FOIA in litigation regarding specific FOIA requests to the NSC. See, e.g., *Lisee v. CIA*, 741 F.Supp. 988 (D.D.C.1990) (NSC made requisite showing of exceptional circumstances and exercise of due diligence in processing FOIA request to justify stay of further proceedings); *Wilens v. NSC*, 726 F.Supp. 325 (D.D.C.1989) (requested NSC documents were within the FOIA exemption for documents authorized to be kept secret in the interest of national defense or foreign policy); *Halperin v. NSC*, 452 F.Supp. 47 (D.D.C.1978) (same). The Supreme Court also appears to have assumed, without deciding the issue, that the NSC is a FOIA agency. See *Kissinger*, 445 U.S. at 156, 100 S.Ct. at 971 (stating that the FOIA requesters argued that certain documents which related to the [NSC] "may have been [NSC] records and therefore subject to the [FOIA]". See H.R.REP. No. [876, 93d Cong., 2d Sess. 8 (1974), 1974 U.S.C.C.A.N. 6274], indicating that the [NSC] is an executive agency to which the FOIA applies."). But the issue has never been definitively resolved, and the record before us does not contain sufficient facts for us to make the determination.

Moreover, the cross-appellees suggest that the materials in question may not be subject to the FOIA—even if the NSC is an "agency" under the FOIA—because they are not "official records" of the NSC. See Brief for Cross-Appellees at 44-48. The factual record is also insufficient to resolve this issue on appeal. Thus, we remand to the district court for further proceedings to determine whether the guidelines under review inappropriately classify as presidential records materials that would otherwise be subject to the FOIA.

CONCLUSION

To recap: We affirm the district court's decision that the EOP and NSC electronic records management guidelines violate the FRA, reverse the district court's civil contempt finding, and remand to allow the district court to determine whether the challenged NSC and OSTP guidelines inaccurate-

have routinely conceded its status "subject to the FOIA in litigation specific FOIA requests to the NSC, e.g., *Lisee v. CIA*, 741 F.Supp. 1190 (NSC made requisite show of special circumstances and exercise of discretion in processing FOIA request stay of further proceedings); *Wil- son v. CIA*, 726 F.Supp. 325 (D.D.C.1989).

NSC documents were within the purview for documents authorized to be withheld in the interest of national security (foreign policy); *Halperin v. NSC*, 477 F.Supp. 47 (D.D.C.1978) (same). The Court also appears to have assumed without deciding the issue, that the NSC is a FOIA agency. See *Kissinger*, 445 U.S. 100 S.Ct. at 971 (stating that the appellants argued that certain documents related to the [NSC] "may have been withheld and therefore subject to FOIA"). See H.R. REP. NO. 876, 93d Cong. 1st Sess. 8 (1974), 1974 U.S.C.A.N. 111, n.1 (stating that the [NSC] is an executive agency to which the FOIA applies). The issue has never been definitively resolved and the record before us does not contain sufficient facts for us to make the determination.

Finally, the cross-appellees suggest that the documents in question may not be subject to FOIA—even if the NSC is an "agency" under the FOIA—because they are not "records" of the NSC. See Brief for Cross-Appellees at 44-48. The factual record is insufficient to resolve this issue on remand, we remand to the district court for further proceedings to determine whether the guidelines under review inapplicable as presidential records materials would otherwise be subject to the FOIA.

CONCLUSION

We affirm the district court's judgment that the EOP and NSC electronic management guidelines violate the FOIA, and remand to allow the district court to determine whether the guidelines and OSTP guidelines inaccurate-

ly classify some documents as presidential records.

So ordered.



William C. WARDLAW, Appellant,

v.

William R. PICKETT, Deputy United States Marshal, et al., Appellees.

No. 91-5070.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 8, 1993.

Decided Sept. 10, 1993.

Appellant, who had rushed downstairs shouting at United States marshals not to hurt uncooperative spectator who marshals were removing from courthouse, brought *Bivens* action, alleging that marshals violated his constitutional rights by using excessive force, falsely arresting him and wrongfully prosecuting him. The United States District Court for the District of Columbia, Oliver Gasch, J., entered summary judgment for marshals, and appeal was taken. The Court of Appeals, Karen LeCraft Henderson, Circuit Judge, held that: (1) "objective reasonableness" standard provided test for evaluating both scope of officers' qualified immunity as well as arrestee's claim of excessive force under Fourth Amendment; (2) marshal's use of force against arrestee was not so excessive that no reasonable officer could have believed it to be lawful for purposes of qualified immunity; and (3) privilege to intervene in arrest may not be used as sword to impose liability on officer who allegedly uses excessive force against intervenor.

Affirmed.

1. Federal Courts — 802

Court of Appeals would review facts in the record and all reasonable inferences derived therefrom in light most favorable to plaintiff, where Court was reviewing grant of summary judgment in favor of defendants.

2. Officers and Public Employees — 114

Qualified immunity protects government official from suits for damages if official's conduct did not violate clearly established rights of which reasonable person would have known.

3. Assault and Battery — 14, 68

Elimination of right to intervene to prevent illegal arrest is based on recognition that arrestee's liberty interest is protected by safeguards which did not exist at common law, including prompt arraignment, reasonable bail, appointment of counsel, exclusionary rule and right to speedy trial.

4. Assault and Battery — 14, 68

Privilege to intervene in arrest is applied to exempt from liability intervenor who reasonably attempts to save another from real danger and this rationale for application of privilege supports its use as defense against criminal or civil liability, but does not justify using privilege to impose liability on arresting officers.

5. Arrest — 68(2)

Assault and Battery — 10, 13, 14

Whatever the circumstances prompting law enforcement officers to use force, whether it be self-defense, defense of another or resistance to arrest, when Fourth Amendment violation is alleged, inquiry remains whether force applied was reasonable and determining whether force was reasonable requires court to balance intrusion on rights of individual against government interests at stake. U.S.C.A. Const. Amend. 4.

6. Arrest — 68(2)

Objective reasonableness of force used by police officer must be judged from perspective of reasonable officer on scene, rather than with 20/20 vision of hindsight, and accordingly, not every push or shove, even if it may later seem unnecessary in peace of

APPENDIX—Continued

the Commission will continue its investigation of FPE circuit breakers if further information warrants.

The Commission advises consumers to take certain safety precautions with all circuit breakers and fuses. Consumers should:

- Know your electrical circuit. Know which outlets and products are connected to each circuit.
- Never overload any electrical circuit by connecting too many products to the circuit. Be particularly careful not to connect several products that demand high current (such as heating appliances) to a low amperage circuit.
- Comply with local building codes in wiring or adding electrical circuits. Make sure the wiring and devices used in the circuit are connected to a circuit breaker or fuse of the proper size.
- Immediately disconnect any electrical product if problems develop. Have the product examined by a competent repair person.
- Investigate to determine why a fuse blows or circuit breaker trips. Do not simply replace the fuse or reset the breaker. If a fuse blows or breaker trips, it is often a warning that the circuit is overloaded. Check the circuit for causes of overloading (for example, too many appliances plugged in, a malfunctioning product, a short circuit). When in doubt, consult a licensed electrician.

Consumers who have questions concerning circuit breakers, or who wish to report information relating to their safety, may call the U.S. Consumer Product Safety Commission's toll-free safety hotline at 800-638-CPSC, teletypewriter for the hearing impaired at 800-638-8270 (Maryland only 800-492-8104).



Scott ARMSTRONG, et al., Appellees,

v.

George BUSH, et al., Appellants.

No. 90-5173.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 8, 1990.

Decided Jan. 25, 1991.

Action was brought challenging proposed destruction of records. The United States District for the District of Columbia, Charles R. Richey, J., 721 F.Supp. 343, denied motion of government officials to dismiss or for summary judgment, and certified order for interlocutory appeal. The Court of Appeals, Wald, Circuit Judge, held that: (1) private researchers and historians had standing to sue under the Federal Records Act and the Presidential Records Act; (2) President is not an "agency" for purposes of the Administrative Procedure Act; (3) Presidential Records Act impliedly precludes judicial review; (4) Federal Records Act does not preclude judicial review; and (5) establishment of guidelines and directives defining records under the Federal Records Act is not committed to agency discretions.

Affirmed in part and reversed in part, and remanded.

1. Records ⇐3, 30

One of the reasons the Congress mandated creation and preservation of federal and presidential records was to ensure that private researchers and historians would have access to the documentary history of the federal government. 44 U.S.C.A. §§ 2101-2118, 2201 et seq., 2901-2910, 3101-3107, 3301-3324.

2. Records ⇐22

Private researchers and historians had standing to sue under the Presidential Records Act and Federal Records Act to challenge proposed destruction of records.

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44 U.S.C.A. §§ 2101-2118, 2201 et seq., 2901-2910, 3101-3107, 3301-3324.

U.S.C.A. §§ 2101-2118, 2901-2910, 3101-3107, 3301-3324.

3. Administrative Law and Procedure ¶5

Congress did not intend to subject the President to the Administrative Procedure Act, and the President is not an "agency" for purposes of the Act. 5 U.S.C.A. § 701(b)(1).

See publication Words and Phrases for other judicial constructions and definitions.

4. Records ¶3

Presidential Records Act impliedly precludes judicial review. 5 U.S.C.A. § 701(a)(1); 44 U.S.C.A. § 2201 et seq.

5. Records ¶22

Federal Records Act does not impliedly preclude judicial review and court may entertain a claim that recordkeeping guidelines and directives are inadequate because they permit the destruction of records which must be preserved under the terms of the Act. 44 U.S.C.A. §§ 2201-2118, 2901-2910, 3101-3107, 3301-3324.

6. Records ¶3

Amendment of the Federal Records Act to require the Archivist to ask the Attorney General to sue and notify Congress if agency head has failed to make a similar request of the Attorney General was not intended to preclude ordinary judicial review of the adequacy of the agency's recordkeeping guidelines and directives. 44 U.S.C.A. §§ 2905(a), 3106.

7. Records ¶3

Establishment of guidelines and directives defining records for purposes of the Federal Records Act is not committed to agency discretion by law, and is subject to judicial review. 5 U.S.C.A. § 701(a)(2); 44 U.S.C.A. §§ 2101-2118, 2901-2910, 3101-3107, 3301-3324.

8. Records ¶3, 22

Private litigants may not sue directly to enjoin agency actions in violation of agency guidelines with respect to maintenance of records under the Federal Records Act. 5 U.S.C.A. § 701(a)(2); 44

9. Records ¶3

Judicial review is available under the Federal Records Act with respect to agency head's or the Archivist's refusal to seek initiation of an enforcement action by the Attorney General. 5 U.S.C.A. § 701(a)(2); 44 U.S.C.A. §§ 2101-2118, 2901-2910, 3101-3107, 3301-3324.

10. Federal Courts ¶617

Claim that the Archivist violated the Federal Records Act by failing to request the Attorney General to initiate action to prevent the National Security Council from destroying records in contravention of NSC guidelines was preserved for review by allegation that Archivist had acquiesced in the intention to destroy the bulk of certain records in violation of his responsibilities under the Act. 44 U.S.C.A. §§ 2101-2118, 2901-2910, 3101-3107, 3301-3324.

11. Records ¶21, 22

Decision to seek initiation of an enforcement action under the Federal Records Act to prevent the destruction and removal of records is not committed by law to the discretion of agency heads or Archivist and the decision is not immune from judicial review. 5 U.S.C.A. § 701(a)(2); 44 U.S.C.A. §§ 2101-2118, 2901-2910, 3101-3107, 3301-3324.

12. Records ¶22

Archivist and agency head need not initially attempt to prevent unlawful action with respect to destruction of records by seeking the initiation of legal action; agency head and the Archivist may proceed first by invoking the agency's safeguards against the removal or loss of records and taking such intraagency actions as disciplining the staff involved, increasing oversight, or threatening legal action. 44 U.S.C.A. §§ 2905(a), 3105.

13. Federal Courts ¶660.35

Issue of whether record was adequate for summary judgment was preserved by petition for permission to take an interlocutory appeal which stated that, assuming that district court review of agency action

was available, it was limited to a determination of whether agency action was arbitrary and capricious and that the district court erred in finding a disputed issue of material fact.

14. Federal Courts ⇐660.35

Because interlocutory appeal is from an order of the district court and not from a particular question that the district court found controlling, court has jurisdiction to review the entire order, not merely the question certified as controlling. 28 U.S.C.A. § 1292(b).

15. Records ⇐22

Fact that some record material may have been destroyed on the basis of innocent mistake does not compel a finding that Federal Records Act guidelines of the agency are arbitrary and capricious. 44 U.S.C.A. §§ 3105(a), 3303(a).

Appeal from the United States District Court for the District of Columbia (Civil Action No. 89-CV-00142).

Patricia M. Bryan, Deputy Asst. Atty. Gen., with whom Stuart M. Gerson, Asst. Atty. Gen., Jay B. Stephens, U.S. Atty., Leonard Schaitman, Freddi Lipstein and Matthew M. Collette, Attys., Dept. of Justice, were on the brief, for appellants.

Alan B. Morrison, with whom Michael E. Tankersley, Patti A. Goldman and Kate Martin were on the brief, for appellees.

Before WALD, D.H. GINSBURG and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

Plaintiffs-appellees, journalist Scott Armstrong, the National Security Archive, and several other individuals and organizations, brought suit to prohibit defendants-appel-

lants President George Bush, Archivist of the United States Don Wilson, and the National Security Council ("NSC") from erasing any material stored on the NSC computer system during the last two weeks of the Reagan Administration. Appellees allege that some of these materials are "records" within the meaning of the Presidential Records Act ("PRA"), 44 U.S.C. §§ 2201 *et seq.*, and the Federal Records Act ("FRA"), 44 U.S.C. §§ 2101-2118, 2901-2910, 3101-3107, and 3301-3324, and, therefore, cannot be erased without the approval of the Archivist. The district court held that § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, authorized review of the President's and NSC's compliance with the PRA and the FRA and that there are unresolved factual issues regarding whether the appellants have complied with the recordkeeping statutes. *Armstrong v. Bush*, 721 F.Supp. 343 (D.D.C.1989). Accordingly, the district court denied appellants' motion to dismiss the complaint or, in the alternative, for summary judgment.

The district court subsequently certified its order for interlocutory appeal under 28 U.S.C. § 1292(b), and this court granted appellants' petition for permission to take an interlocutory appeal. We now reverse in part, affirm in part, and remand to the district court for proceedings consistent with this opinion.

I. BACKGROUND

A. The Statutory Framework

1. The Federal Records Act

The FRA governs the creation, management and disposal of federal records.¹ In enacting the FRA, Congress sought to ensure *inter alia*: (1) "efficient and effective records management"; (2) "[a]ccurate and complete documentation of the policies and transactions of the Federal Government"; and (3) "[j]udicious preservation and dispos-

1. The FRA is actually a series of statutes, which originated with the Federal Records Act of 1950, ch. 849, 64 Stat. 583, and the 1943 Disposal of Records Act, ch. 192, 57 Stat. 380. These acts were subsequently amended by the Government Records Disposal Amendments of 1970, 84 Stat.

320, the Federal Records Management Amendments of 1976, 90 Stat. 2723, and the National Archives and Records Administration Act of 1984, 98 Stat. 2280. See 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.*

al of records." 44 U.S.C. § 2902. Accordingly, the FRA requires "[t]he head of each Federal agency [to] make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency..." *Id.* § 3101. Each agency head shall also "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," *id.* § 3102, and "shall establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Archivist." *Id.* § 3105.

The FRA also mandates that "[t]he Archivist shall provide guidance and assistance to Federal agencies," 44 U.S.C. § 2904(a), shall "promulgate standards, procedures, and guidelines with respect to records management," *id.* § 2904(c)(1), and shall "conduct inspections or surveys of the records and records management programs and practices within and between Federal agencies." *Id.* § 2904(c)(7). If the Archivist discovers that any provision of the FRA

has been or is being violated, the Archivist shall (1) inform in writing the head of the agency concerned of the violation and make recommendations for its corrections; and (2) unless satisfactory corrective measures are inaugurated within a reasonable time, submit a written report of the matter to the President and Congress.

Id. § 2115(b).

The FRA similarly regulates the disposal of "records," which it defines to include all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency ... as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Govern-

ment or because of the informational value of the data in them.

44 U.S.C. § 3301. No records may be "alienated or destroyed" except pursuant to the disposal provisions of the FRA. *Id.* § 3314. The Archivist plays a key role in the disposal of records. Upon the request of an agency head, the Archivist may authorize the disposal of records that are no longer needed by the agency and that do not have "sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government..." *Id.* § 3303a. In addition, the Archivist

shall notify the head of a Federal agency of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency that shall come to his attention, and assist the head of the agency in initiating action through the Attorney General for the recovery of records wrongfully removed and for other redress provided by law.

Id. § 2905(a); see also *id.* § 3106 (providing that each agency head shall notify the Archivist of any unlawful removal or destruction of records and shall initiate, through the Attorney General, an action to recover the records). If, however, the agency head does not initiate an action, the Archivist "shall request the Attorney General to initiate such action, and shall notify the Congress when such a request has been made." *Id.* § 2905(a).

2. The Presidential Records Act

The PRA directs the President to "take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records..." 44 U.S.C. § 2203. The statute defines "Presidential records" as

documentary materials ... created or received by the President, his immediate staff, or a unit or individual in the Executive Office of the President whose function is to advise and assist the President,

in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

Id. § 2201(2).

Like the FRA, the PRA also regulates the disposal of presidential records. "During his term of office, the President may dispose of those of his Presidential records that no longer have administrative, historical, informational, or evidentiary value." *Id.* § 2203(c). If the Archivist thinks it advisable, he may notify Congress of the President's intent to dispose of the records; and if the Archivist notifies Congress, the President must submit the disposal schedules to the appropriate congressional committees and wait sixty days before destroying the records. *Id.* §§ 2203(c), 2203(d). The PRA gives neither the Archivist nor the Congress the authority to veto the President's decision to destroy the records.

Somewhat different disposal provisions apply after the President has left office. Upon the conclusion of the President's term of office, the Archivist assumes control of the presidential records and, after giving notice in the Federal Register, may dispose of the records that have "insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation." 44 U.S.C. §§ 2203(f)(1), (f)(3). "Publication of such notice shall constitute a final agency action" for purposes of judicial review under the APA. *Id.* § 2203(f)(3).

B. This Action

Plaintiffs-appellees allege that defendants-appellants intend to delete material from the White House computer systems in violation of the FRA and the PRA.² Several components of the Executive Office of

the President ("EOP"), including the NSC, utilize the "PROFS" computer system, "an inter-computer communications system marketed by the IBM Corporation." *Armstrong*, 721 F.Supp. at 345. EOP and NSC staff use the PROFS system to create and send to other staff connected to the system three types of documents: "(1) short 'notes' or 'mail'; (2) larger documents, which the recipients can revise; and (3) individual calendars." *Id.* Both the sender and recipient can make a hard-copy printout of a PROFS document or delete the document from their PROFS files. If both the sender and recipient delete the document from their PROFS files, the document is deleted from the PROFS system; unless a hard-copy printout was made, "it is possible that no record would exist of its ever having been created." *Id.*

The disputed material in this case consists of computer "backup" tapes compiled pursuant to the normal EOP and NSC backup procedure. Each Saturday night the NSC makes a backup tape that records all the information on the PROFS system at the time the tape is made. The NSC keeps these backup tapes for two weeks before erasing their contents and recycling them. *Id.* Other components of the EOP make nightly backup tapes and keep the tapes for two to six weeks before recycling. *Id.*

On January 19, 1989—the last day of the Reagan Administration—the National Security Archive filed three Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requests for copies of all information stored on the PROFS computer system in the EOP and NSC from its date of installation in 1985 until the end of the Reagan Administration. *Armstrong*, 721 F.Supp. at 347. Later that day, plaintiffs sued the President, the Vice President,³ the NSC,

on Environmental Quality) are subject to the FRA and create "federal records." Because NSC advises the President and has statutory obligations, it creates both presidential and federal records.

2. Because the various components of the Executive Office of the President ("EOP") perform different functions, they create different kinds of records. The President, the Office of Vice President, and the components of the EOP whose sole responsibility is to advise the President are subject to the PRA and create "presidential records." The components of the EOP that have statutory responsibility (such as the Office of Management and Budget and Council

3. Plaintiffs initially sued Ronald Reagan in his capacity as President and George Bush in his capacity as Vice President and President-elect. Complaint for Declaratory and Injunctive Relief

and the Archivist seeking a declaration that many of the documents stored in the PROFS system at the close of the Administration are federal and presidential records.

Id. Plaintiffs also sought an injunction prohibiting the destruction of these documents and directing the President and NSC to classify and preserve the documents as required by the FRA and PRA. *Id.* Finally, plaintiffs sought an order requiring the Archivist to carry out his responsibilities under the two statutes. *Id.*

The district court initially issued a Temporary Restraining Order, enjoining defendants-appellants from destroying or altering the PROFS computer tapes or backup files. Appellants agreed to preserve the backup tapes pending resolution of this case and moved to dismiss the complaint or, in the alternative, for summary judgment. *Id.* at 348. The district court denied both motions, holding that: (1) although the PRA does not expressly provide for judicial review of the President's implementation of the statute, the plaintiffs may obtain judicial review under the APA because the President is an "agency" within the meaning of 5 U.S.C. § 701(b)(1); (2) presidential action under the PRA is not "committed to agency discretion by law" under § 701(a)(2) of the APA; and (3) there exists a genuine dispute of material fact about whether the material on the PROFS tapes qualifies as presidential or agency records and whether defendants' implementation of the FRA and PRA was "arbitrary and capricious" under § 706(2) of the APA. *Id.*

Appellants challenge each of these holdings. They also argue against the justiciability of the action, contending that: (1) plaintiffs do not have standing because they are not within the zone of interests of the records creation provisions of the FRA and PRA; (2) the PRA claims are not reviewable under the APA because the PRA precludes judicial review; and (3) the FRA claims are not reviewable under the APA because the FRA precludes judicial review of an agency's records creation decisions

9-10. Plaintiffs subsequently amended their complaint, dropping their claim against President Reagan and naming George Bush in his

and the question of what constitutes a record is committed to agency discretion by law. We address each of these issues in turn.

II. STANDING

[1,2] In order to have standing under the APA, plaintiffs must satisfy the "zone of interests" test. That is, "the interest sought to be protected by the [plaintiffs must be] arguably within the zone of interests to be regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970); see also *Clarke v. Securities Industry Association*, 479 U.S. 388, 396, 107 S.Ct. 750, 755, 93 L.Ed.2d 757 (1987). In this case, appellants contend that the plaintiffs are not within the zone of interests of the records creation and management provisions of the PRA and FRA. We disagree. We find that the statutory language and legislative history of both statutes indicate that one of the reasons that Congress mandated the creation and preservation of federal and presidential records was to ensure that private researchers and historians would have access to the documentary history of the federal government.

Congress enacted the PRA "to insure the preservation of and public access to the official records of the President." Presidential Records Act of 1978, Pub.L. No. 95-591, 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.); see also H.Rep. No. 95-1487, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5732, 5733. The FRA, enacted to ensure the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government," 44 U.S.C. § 2902(1), evinces a similar congressional intent. As we concluded in *American Friends Service Committee v. Webster*, 720 F.2d 29, 57 (D.C. Cir. 1983), "the legislative history of the [FRA] supports a finding that Congress

capacity as President. Amended Complaint for Declaratory and Injunctive Relief ¶ 11.

intended, expected, and positively desired private researchers and private parties whose rights may have been affected by government actions to have access to the documentary history of the federal government."

Appellants attempt to distinguish *American Friends*, in which private researchers were held to be within the zone of interests of the records disposal provisions of the FRA, on the ground that plaintiffs in this case seek to create, rather than to prevent the destruction of, records. Although appellants concede the inclusion of plaintiffs within the zone of interests of the FRA disposal provisions, they argue that plaintiffs are outside the zone of interests of the records creation provisions of the FRA. We do not find this difference compelling. First, plaintiffs do not seek the creation of any new records, but rather ask only that the records already created be appropriately classified and disposed of pursuant to disposal schedules approved by the Archivist. Additionally, we note that the distinction between records "creation" and records "disposal" in a computer system like PROFS is not as clear as appellants claim. There is little practical difference between an agency official's decision to delete, and thus destroy, a PROFS note because he believes it is not a "record" for purposes of the FRA and his decision to delete a PROFS note that he believes is a "record" without first obtaining the permission of the Archivist. In either case, the note will be lost forever to history. On the basis of the expressed statutory goal of preserving records for historical purposes and our previous decision in *American Friends*, we now hold that because plaintiffs are researchers and historians who make extensive use of government documents, they are within the zone of inter-

ests of the records creation and management provisions of the PRA and FRA.⁴

III. THE PRESIDENTIAL RECORDS ACT

Appellants argue that the APA does not provide a cause of action for judicial review of the President's compliance with the PRA because the President is not an "agency" within the meaning of the APA. Furthermore, even if the APA applies to the President, appellants argue that the PRA precludes judicial review. For the reasons discussed below, we agree with both arguments⁵ and reverse the district court's holdings to the contrary.

A. The APA Definition of "Agency"

[3] The APA defines an "agency" as: each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia;....

5 U.S.C. § 701(b)(1) (definition for judicial review provisions); see also *id.* § 551(1) (definition for subchapter on administrative procedure). Because this definition expressly excludes Congress and the courts but not the President, plaintiffs argue that the plain language should be read as implying that the President is an agency. See, e.g., *De Rieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1322 n. 13 (Temp. Emer. Ct. App.) (suggesting in dicta that the President is an agency under the APA), *cert. denied sub nom., Five Smiths, Inc. v. Holloway*, 419 U.S. 896, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974); *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337

precludes judicial review, 5 U.S.C. § 701(a)(1), and additionally the President's recordkeeping decisions are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). Because we hold that the PRA precludes judicial review, we need not decide whether the President's recordkeeping decisions are committed to agency discretion by law.

4. However, plaintiff Gaylord Nelson is not within the zone of interests of the PRA and FRA because he has not established that he is a researcher or historian who uses government documents. This observation does not affect the outcome of the case, however, because the researcher plaintiffs have standing.

5. Appellants argue that plaintiffs may not obtain judicial review under the APA because the PRA

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F.Supp. 737, 761 (D.D.C.1971) (three-judge panel) (same). We find, however, that the textual silence, when read against the backdrop of the legislative history of the APA and the canons of construction applicable to statutes that implicate the separation of powers, points in the opposite direction—i.e., that Congress did not intend to subject the President to the APA.

The legislative history of the APA indicates that Congress wanted to avoid a formalistic definition of "agency" that might exclude any authority within the executive branch that should appropriately be subject to the requirements of the APA. For this reason, Congress thought it "necessary to define agency as 'authority' rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or 'divisions' to have final authority." Senate Judiciary Committee Print, *reprinted in* Legislative History of the Administrative Procedure Act, S.Doc. No. 248, 79th Cong., 2d Sess. 13 (1946) [hereinafter "S.Doc. No. 248"]; see also H.Rep. No. 1980, 79th Cong. 2d Sess. (1946), *reprinted in* S.Doc. No. 248 at 253. But we find no expression whatsoever in the legislative history that Congress used the broader term in order to subject the President to the requirements of the APA.

A conclusion that the President is not an "agency" under the APA is also supported by the longstanding practice of the executive branch. Even though the APA rulemaking provisions contain substantially the same "agency" definition as the judicial review provisions, the President has never been thought to have to comply with APA rulemaking procedures when issuing executive orders. Given the lack of any express legislative intent to the contrary, we are reluctant to hold that this longstanding presidential practice is contrary to the APA. Cf. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, 67 S.Ct. 1129, 1132, 91 L.Ed. 1375 (1947) (even though statute does not expressly grant the President the authority to create a new agency, the fact that the President has consistently construed the statute as con-

ferring such authority is entitled to "great weight").

When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear. The Supreme Court has recognized that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in decision." *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971). Although the "clear statement" rule was originally articulated to guide interpretation of statutes that significantly alter the federal-state balance, there are similar compelling reasons to apply the rule to statutes that significantly alter the balance between Congress and the President.

Legislation regulating presidential action, no less than legislation altering the federal-state balance, raises "serious" practical, political, and constitutional questions that warrant careful congressional and presidential consideration. See *id.* at 350, 92 S.Ct. at 523. The answer to whether the APA should apply to the President depends on an analysis of several factors, including the President's "constitutional powers, the multifarious responsibilities of his office, and his direct political accountability as the only elected official with a national constituency." Bruff, *Judicial Review and the President's Statutory Powers*, 68 Va.L. Rev. 1, 22 (1982). In the absence of any affirmative evidence that these issues were considered in the legislative process and that Congress passed the APA with the understanding that it would regulate presidential as well as other executive branch action, we refuse to hold that the President is an "agency" within the meaning of the APA.

B. Implied Preclusion of Judicial Review

[4] Appellants also argue that the court cannot review the President's and NSC's compliance with the PRA because the PRA precludes judicial review, 5 U.S.C.

We will not second-guess that decision or upset the political compromises it entailed. Allowing judicial review of the President's general compliance with the PRA at the behest of private litigants would substantially upset Congress' carefully crafted balance of presidential control of records creation, management, and disposal during the President's term of office and public ownership and access to the records after the expiration of the President's term. We therefore hold that the PRA precludes judicial review of the President's recordkeeping practices and decisions.

IV. THE FEDERAL RECORDS ACT

Appellants similarly contend that the district court may not consider plaintiffs' claims under the FRA because the FRA precludes judicial review and records creation and management decisions are committed to agency discretion by law. A statute may, of course, provide for judicial review of some agency action but not others, so it is important to distinguish between plaintiffs' separate claims, i.e.: (1) the NSC's recordkeeping guidelines and directives are inadequate because they fail to provide NSC staff with sufficient guidance about what material constitutes "records"; and (2) some NSC staff members are destroying records in contravention of the NSC's and Archivist's recordkeeping guidelines and directives.⁶ For the reasons discussed below, we find that there is APA review of the NSC's recordkeeping guidelines and instructions, but only limited APA review of claims that records are being destroyed in violation of such guidelines. We therefore affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

A. Judicial Review of the Recordkeeping Guidelines

1. Implied Preclusion of Judicial Review

[5] Like the PRA, the FRA contains no express preclusion of judicial review. Ap-

6. Plaintiffs' complaint alleged primarily that appellants are destroying information on the PROFS system in violation of the FRA. As the litigation progressed in the district court, however, the parties focused on two issues: the adequacy of the recordkeeping guidelines, and

pellants here repeat their argument that the statute impliedly precludes judicial review. They point out that the FRA expressly provides for judicial review only in an action, initiated by the Attorney General at the request of the Archivist or an agency head, to prevent the unlawful removal or destruction of documents. 44 U.S.C. §§ 2905(a), 3106. All other review, they argue, is precluded because Congress chose to ensure compliance with the FRA through administrative enforcement and congressional oversight rather than judicial review. We do not find, however, in the FRA the "clear and convincing evidence" necessary to overcome the presumption in favor of judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). We thus reject appellants' argument for implied preclusion and hold that the district court on remand may entertain plaintiffs' claim that appellants' recordkeeping guidelines and directives to the NSC staff are inadequate because they permit the destruction of "records" that must be preserved under the FRA.

First, the fact the FRA expressly provides for judicial review in an action brought by the Attorney General to prevent the destruction or removal of records does not of itself mean that all other judicial review is precluded. It is well-established law that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Laboratories*, 387 U.S. at 141, 87 S.Ct. at 1511 (quoting *Jaffe, Judicial Control of Administrative Action* 357 (1965)).

Similarly, the fact that Congress retains some direct oversight over agencies' com-

the extent of agency compliance with them. The district court also considered these two issues separately in ruling on appellants' motion for summary judgment. See *Armstrong*, 721 F.Supp. at 353-54.

pliance with the FRA does not necessarily indicate an intent to preclude judicial review. Indeed, in *American Friends* we rejected this argument as overbroad because it "would create an enormous exception to judicial review: Congress exercises oversight over all agencies, gets reports from many, and is often consulted by the executive branch before specific actions are taken." 720 F.2d at 44. Accordingly, the fact that the Archivist must submit to Congress annual reports evaluating the agencies' records management practices, 44 U.S.C. §§ 2106, 2904(c)(8), and notify Congress of violations of the FRA, *id.* §§ 2115(b), 2905(a), is insufficient evidence to overcome the presumption in favor of judicial review.⁷

[6] Appellants additionally argue that Congress, by amending the FRA in 1984 to enhance the enforcement authority and responsibilities of the Archivist, reinforced its intent to supplant all judicial review. We view the 1984 amendments, however, as not intended to bar judicial review, but instead as a direct response to the Supreme Court's decision in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980). In *Kissinger*, the Supreme Court held that the FRA does not contain an implied cause of action allowing private parties to bring suit to recover records that have been unlawfully removed from an agency. Recognizing that this created "the anomalous situation . . . whereby an agency head has a duty to initiate action to recover records which he himself has removed," Congress amended the FRA to require the Archivist to ask the Attorney General to sue and to notify Congress if the agency head failed to make a similar request of the Attorney General. H.R. Conf. Rep. No. 98-1124, 98th Cong. 2d Sess. 28 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3865, 3894, 3903; see

7. *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984) (en banc), on which appellants primarily rely, is not contrary to this conclusion. In *Banzhaf*, we held that the Ethics in Government Act, 28 U.S.C. § 591 *et seq.*, precluded private actions. Under the Ethics in Government Act, Congress' role was specifically prescribed: Congress was empowered to seek the appointment

also 44 U.S.C. § 2905(a) (Archivist's enforcement authority), § 3106 (agency head's enforcement authority). Nothing in the Conference Report or the 1984 amendments indicates a congressional intent to preclude ordinary judicial review of the adequacy of an agency's recordkeeping guidelines and directives. The more natural reading is that Congress intended only to eliminate the *Kissinger* loophole and establish a more effective administrative enforcement process to prevent the unlawful destruction or removal of records by agency officials.

In sum, neither the statutory scheme nor the legislative history evinces a congressional intent to preclude judicial review of the adequacy of the NSC's recordkeeping guidelines and directives. In this respect, we note that the legislative history and statutory scheme of the FRA differ significantly from the PRA. In drafting the FRA, Congress did not have to worry about the stark separation of powers questions implicated by legislation regulating the conduct of the President's daily operations. The congressional intent, evident in the PRA, to minimize outside interference with the President's recordkeeping practices is lacking in the FRA, with its more detailed and comprehensive agency recordkeeping provisions. Instead, the FRA reflects a congressional intent to ensure that agencies adequately document their policies and decisions, S.Rep. No. 2140, 81st Cong., 2d Sess. 2 (1950), and that their records management programs strike a balance "between developing efficient and effective records management, and the substantive need for Federal records." S.Rep. No. 94-1326, 94th Cong., 2d Sess. 2 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6150, 6150-51; see also 44 U.S.C. § 2902. Allowing judicial review of the adequacy of an agency's recordkeeping

of independent counsel when the Attorney General refused to do so. In contrast, the FRA merely requires the Archivist to report violations of the Act to Congress. What Congress will then do is not specified. The FRA's reporting requirement is not the sort of "explicit provision of congressional oversight" we found controlling in *Banzhaf*, 737 F.2d at 1169.

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guidelines will frustrate neither the intent of Congress nor the FRA statutory scheme designed to implement that intent. Accordingly, we hold that the district court was authorized to hear plaintiffs' APA claim that the NSC's recordkeeping guidelines and directives do not adequately describe the material that must be retained as "records" under the FRA.

2. Committed to Agency Discretion by Law

[7] Appellants claim that even if the FRA does not preclude judicial review, the establishment of guidelines and directives defining "records" under the FRA is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Because we find that there is "law to apply" and the factors that courts point to as weighing against judicial review are not present in this instance, we reject appellants' argument.

Under the classic formulation, agency action is committed to agency discretion by law if the statute authorizing the agency action is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971) (internal quotations omitted). The FRA clearly provides sufficiently detailed standards regarding what material the agencies must retain. For example, the FRA contains a detailed definition of the "records" that agencies must preserve. 44 U.S.C. §§ 2901(1), 3301. It also mandates that the head of each agency "shall establish and maintain" a records management program, 44 U.S.C. § 3102, and "shall establish safeguards against the removal or loss of records," 44 U.S.C. § 3105. Although the FRA understandably leaves the details of records management to the discretion of individual agency heads, it does contain several specific requirements, including the requirement that each agency head shall cooperate with the Archivist and develop a program that is

consistent with the Archivist's regulations.⁸ See 44 U.S.C. § 3102. We thus have no difficulty in concluding that the FRA provides sufficient law to apply in evaluating the adequacy of appellants' guidelines and directives.

In determining whether agency decisions are committed to agency discretion by law, courts have also considered several pragmatic considerations that may militate for or against judicial review of appellants' guidelines and directives. These factors include: "(1) the need for judicial supervision to safeguard the interests of the plaintiffs; (2) the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and (3) the appropriateness of the issues raised for judicial review." *American Friends*, 720 F.2d at 41 (internal quotations omitted).

In this case, none of these considerations suggests that preclusion of review is appropriate. First, judicial review of the appellants' recordkeeping guidelines and directives is necessary to protect plaintiffs' interests because, if the guidelines are both inadequate and unreviewed, documents that plaintiffs would otherwise be able to study will be destroyed. Second, judicial review of the guidelines and directives will not impede the "effectiveness of the agency in carrying out its congressionally assigned role." See *id.* at 44. Appellants' concerns that allowing judicial review of their guidelines will "unduly interfere with agency functioning" by requiring agency staff to save "every scrap of paper" pending a judicial determination of whether it is a record are unfounded. As we recognized in *American Friends*, even if a court may review the adequacy of an agency's guidelines, agency personnel will implement the guidelines on a daily basis. 720 F.2d at 41. Thus agency personnel, not the court, will actually decide whether specific documents—whether they be scraps of paper or PROFS notes—constitute "records" un-

8. We note, moreover, that the Archivist has recently promulgated new regulations defining federal records, 36 C.F.R. § 1222.12, detailing the agencies' responsibilities in developing records management programs, *id.* §§ 1222.20,

1222.32, and identifying distinguishing characteristics of federal records, *id.* § 1222.34, and personal papers, *id.* § 1222.36. See 55 Fed.Reg. at 27,422-25 (1990).

der the guidelines. Third, and most importantly, the only issue a court would be asked to consider, *i.e.*, the adequacy of appellants' recordkeeping guidelines and directives, is clearly appropriate for judicial review. Courts review the adequacy and conformity of agency regulations and guidelines with statutory directives every day.

In sum, none of the practical factors prompting against review applies in this case. The FRA provides sufficient law to apply, and we find no reason to conclude that Congress intended to commit the development of recordkeeping guidelines and directives to the agencies' complete discretion.

B. *Judicial Review of Compliance with the Guidelines*

1. Preclusion of Judicial Review

[8] Plaintiffs also allege that even if the NSC's guidelines are found to be reasonable, some NSC officials and staff are not complying with the guidelines and the APA authorizes the district court to entertain their challenges and grant relief. Here we part company with the plaintiffs and the district court. We believe that the FRA contains a prescribed method of action in such cases: it requires the agency head, in the first instance, and then the Archivist to request that the Attorney General initiate an action to prevent the destruction of documents, thereby precluding private litigants from suing directly to enjoin agency actions in contravention of agency guidelines.

In reaching this result, we rely on the rationale of the Supreme Court in *Kissinger*. In rejecting the claim that the FRA contained an implied right of action for private litigants to prevent the removal of records, the Court stated that "the Federal Records Act establishes only one remedy for the improper removal of a 'record' from the agency": the agency head, in conjunction with the Archivist, is required to request the Attorney General to initiate an action to recover records unlawfully removed from the agency. *Kissinger*, 445 U.S. at 148, 100 S.Ct. at 967; *see also* 44

U.S.C. § 3106. After briefly analyzing the legislative history of the FRA, the Court concluded that "Congress expressly recognized the need for devising adequate statutory safeguards against the unauthorized removal of agency records, and opted in favor of a system of administrative standards and enforcement." *Id.* at 149, 100 S.Ct. at 968.

The 1984 amendments to the FRA support the reasoning of *Kissinger* and indicate that Congress again decided to rely on administrative enforcement, rather than judicial review at the behest of private litigants, to prevent the destruction or removal of records. After the *Kissinger* case, Congress recognized that the FRA administrative enforcement mechanism needed to be strengthened "[b]ecause of the frequency of incidents of removal or destruction of records in recent years." H.R. Conf. Rep. No. 98-1124 at 28, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3903. Therefore, Congress enhanced the Archivist's authority to prevent the unlawful removal or destruction of records by requiring the Archivist to notify Congress and independently request that the Attorney General initiate an action if the agency head refused to do so. *See id.* at 27, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3902; 44 U.S.C. § 2905(a).

Thus the conferees, "mindful of the protracted private litigation" involved in the *Kissinger* case, chose to strengthen the administrative enforcement mechanism rather than explicitly sanctioning litigation at the behest of private citizens. *See* H.R. Conf. Rep. No. 98-1124 at 28, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3903. We will not second-guess that decision. Because it would clearly contravene this system of administrative enforcement to authorize private litigants to invoke federal courts to prevent an agency official from improperly destroying or removing records, we hold that the FRA precludes judicial review of such actions. *Cf. Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 104 S.Ct. 2450, 2455, 81 L.Ed.2d 270 (1984) ("When a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular

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persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded."').⁹

[9, 10] We do conclude, however, that it would not be inconsistent with *Kissinger* or the FRA to permit judicial review of the agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General.¹⁰ Nothing in the legislative history suggests that Congress intended to preclude judicial review of either the agency head's or the Archivist's failure to take enforcement action. Indeed, judicial review of the agency head's and Archivist's failure to take enforcement action reinforces the FRA scheme by ensuring that the administrative enforcement and congressional oversight provisions will operate as Congress intended. Unless the Archivist notifies the agency head (and, if necessary, Congress) and requests the Attorney General to initiate legal action, the administrative enforcement and congressional oversight provisions will not be triggered, and there will be no effective way to prevent the destruction or removal of records. Thus, if the agency head or Archivist does nothing while an agency official destroys or removes records in contravention of agency guidelines and directives, private litigants may bring suit to require the agency head and Archivist to fulfill their statutory duty to notify Congress and

ask the Attorney General to initiate legal action.

2. Committed to Agency Discretion by Law

[11] Finally, we hold that the decision to seek the initiation of an enforcement action to prevent the destruction or removal of records is not committed by law to the agency head's or Archivist's discretion.¹¹ Although there is a presumption that an agency's decision not to take enforcement action is immune from judicial review under 5 U.S.C. § 701(a)(2), "Congress may limit an agency's exercise of enforcement power ... [and overcome the presumption] by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Heckler v. Chaney*, 470 U.S. 821, 833, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985). Because the FRA enforcement provisions leave no discretion to determine which cases to pursue, the agency head's and Archivist's enforcement decisions are not committed to agency discretion by law.

[12] In contrast to a statute that merely *authorizes* an agency to take enforcement action as it deems necessary, the FRA *requires* the agency head and Archivist to take enforcement action. Cf. *Heckler*, 470 U.S. at 835, 105 S.Ct. at 1657

9. *American Friends* is not contrary to this holding. In that case, we held that the APA authorized judicial review of the adequacy of the FBI's record disposal schedules, which had been approved by the National Archives and Records Service. We went on to hold that two of the disposal schedules were "arbitrary and capricious" because they failed to provide a "reasoned justification explaining why certain types or categories of investigative data should be destroyed" and because the disposal instructions they contained were "broad enough to justify wholesale destruction or selective, standardless retention [of records] on the basis of 'administrative needs.'" 720 F.2d at 65-66. Thus *American Friends* decided only that the APA authorized judicial review of the adequacy of an agency's records disposal schedules and system; it did not decide whether the APA authorized a court, at the behest of private litigants, to enjoin individual agency officials from destroying records in contravention of the agency's and Archivist's established recordkeeping guidelines and disposal schedules.

10. Plaintiffs' complaint did not specifically allege that the Archivist violated the FRA by failing to request that the Attorney General initiate an action to prevent the NSC staff from destroying records in contravention of the NSC's guidelines. Plaintiffs did allege, however, that the Archivist "has acquiesced in the other defendants' intention to destroy the bulk of information generated by the PROFS system in the normal course of business, in violation of his responsibilities" under the FRA. Amended Complaint for Declaratory and Injunctive Relief ¶ 32. We therefore believe that the plaintiffs have preserved the issue, and the district court on remand may allow plaintiffs to amend their complaint accordingly.

11. Because the Attorney General is not a defendant in this case, we do not decide whether the Attorney General's decision not to initiate an enforcement action at the request of the Archivist or an agency head is immune from judicial review under 5 U.S.C. § 701(a)(2).

(FDA's decision not to take enforcement action is unreviewable under 5 U.S.C. § 701(a)(2) because the Federal Food, Drug, and Cosmetic Act's enforcement provision "provides only that '[t]he Secretary is authorized to conduct examinations and investigations ...'" (emphasis in original). Once the Archivist becomes aware of "any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records," the Archivist "shall notify the head of [the] Federal agency" involved and "assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law." 44 U.S.C. § 2905(a) (emphasis added). Similarly, once the agency head becomes aware of "any actual, impending, or threatened unlawful, removal, defacing, alteration, or destruction of records," the agency head "shall notify the Archivist" and "with the assistance of the Archivist shall initiate action through the Attorney General." *Id.* § 3106 (emphasis added).¹² If, however, the agency head does not initiate an enforcement action "within a reasonable period of time," the Archivist "shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made." *Id.* (emphasis added). On the basis of such clear statutory language man-

12. We emphasize the mandatory statutory language because it indicates that the agency head and Archivist are required to take action to prevent the unlawful destruction or removal of records and, if they do not, private litigants may sue under the APA to require them to do so. We do not mean to imply, however, that the Archivist and agency head must initially attempt to prevent the unlawful action by seeking the initiation of legal action. Instead, the FRA contemplates that the agency head and Archivist may proceed first by invoking the agency's "safeguards against the removal or loss of records," 44 U.S.C. § 3105, and taking such intra-agency actions as disciplining the staff involved in the unlawful action, increasing oversight by higher agency officials, or threatening legal action.

13. In affirming the district court's decision not to grant summary judgment, we obviously hold that the issue is properly before this court. Plaintiffs argued that appellants failed to raise the issue because their petition for permission to take an interlocutory appeal presented only the question whether the "arbitrary and capri-

dating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head's and Archivist's enforcement actions are subject to judicial review.

V. STANDARD OF REVIEW AND PROCEEDINGS ON REMAND

[13, 14] Although the district court correctly held that the APA authorized judicial review of appellants' recordkeeping guidelines and directives, it denied appellants' motion for summary judgment, pending further development of the record, on the grounds that "a reasonable factfinder, surveying the record in the light most favorable to the plaintiffs, would [not] necessarily conclude that the guidelines are adequate." *Armstrong*, 721 F.Supp. at 354. Appellants challenge this denial of summary judgment. Because we agree that the present record is inadequate to determine the reasonableness of the guidelines, we remand for further proceedings on the merits of the adequacy of the guidelines.¹³

At the time summary judgment was denied, the record contained copies of several documents informing the NSC staff of their obligation to create and maintain hard copy "records" before erasing the PROFS tapes—e.g., the White House Office Staff Manual, the EOP Records Management

cious" test was the proper scope of judicial review of the NSC and EOP guidelines. We reject this argument because appellants presented the same arguments in their petition for permission to take an interlocutory appeal as in their opening brief in this court, i.e., that, if available, APA review must be limited to a determination of whether the guidelines are arbitrary and capricious or otherwise not in accordance with law and that the district court erred by misreading the guidelines and finding a disputed issue of material fact that warranted further discovery. In addition, under 28 U.S.C. § 1292(b), "the appeal is from an order of the district court, not from the particular question that the district court found controlling." *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n. 2 (D.C.Cir.1986) (emphasis in original), cert. denied, 482 U.S. 915, 107 S.Ct. 3188, 96 L.Ed.2d 677 (1987). We therefore have jurisdiction to review the entire order, not just the questions certified as controlling. See *Wright, Miller & Cooper*, 16 FEDERAL PRACTICE AND PROCEDURE § 3929 at 144.

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Program manual, and other memoranda concerning records management. It is not clear from the record, however, whether these documents comprise the total "guidance" given to NSC staff regarding their recordkeeping responsibilities or whether, as plaintiffs asked in interrogatories, there are other informal, supplementary guidance. For example, how did appellants respond to questions about whether particular documents or types of documents constitute records that must be maintained? Was any additional guidance provided in staff meetings in which recordkeeping responsibilities were discussed? Did appellants consistently advise their staff that particular types of documents—such as PROFS notes or calendars—are or are not records?

[15] With answers to such questions, which can be obtained "either through affidavits or testimony," the record should contain sufficient information for the district court to determine whether the NSC recordkeeping guidelines and directives satisfy the NSC's statutory obligations to "make and preserve records" documenting the "functions, policies, decisions, procedures, and essential transactions" of the NSC, 44 U.S.C. § 3101, and to ensure that these records are destroyed only pursuant to disposal schedules approved by the Archivist, *id.* §§ 3105(a), 3303a. *Cf. Camp v. Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). On remand, therefore, the district court should determine whether the NSC's guidelines and directives are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), because they permit the destruction of record material that should be maintained.¹⁴

VI. CONCLUSION

We hold first that plaintiffs are within the zone of interests of the PRA and FRA

14. We recognize, of course, that the determination of whether a variety of particular documents or computer entries are, in fact, records must be made by agency staff on a daily basis, and some innocent mistakes are bound to occur. Consequently, the fact that some record material may have been destroyed does not

and, therefore, have standing to bring this action. Second, we reverse the district court's decision that the APA authorizes judicial review of the President's compliance with the PRA. The APA does not authorize judicial review of the President's compliance with the PRA because the President is not an "agency" within the meaning of the APA and because the PRA precludes judicial review of the President's record creation and management decisions.

Third, we affirm the district court's decision that the APA authorizes judicial review of plaintiffs' claim that the NSC's recordkeeping guidelines and directives are arbitrary and capricious. Fourth, we hold that the FRA precludes direct private actions to require that agency staff comply with the agency's recordkeeping guidelines. Instead, the APA authorizes the district court to entertain a properly pleaded claim that the Archivist or an agency head has breached the statutory duty to take enforcement action to prevent an agency official from destroying records in contravention of the agency's recordkeeping guidelines or to recover records unlawfully removed from an agency.

Finally, we affirm the district court's decision to deny appellants' motion for summary judgment because the record is not yet adequate to determine whether the NSC's guidelines are arbitrary or capricious.

It is so ordered.



compel a finding that the guidelines are arbitrary and capricious. Instead, the guidelines should be evaluated on the basis of whether they adequately explain the factors that agency staff should consider in deciding whether specific documents or computer entries are records.

guarded and tentative approach.⁵

Even if we were to regard the "hardship" issue before the court and Board as essentially the same, however, we would have cause to doubt whether, under the regime of the NLRA, a district court finding in a section 10(j) auxiliary proceeding would later bind the NLRB when ruling, definitively, on the unfair labor practice charge and the remedy appropriate thereto. As counsel for Coronet acknowledged at oral argument, case law under the NLRA appears to include no instance of the Board having been bound in the manner Coronet urges. We note, in this regard, that section 10(f) of the NLRA, 29 U.S.C. § 160(f), anticipates court review, not preview, of the Board's first instance decisions as primary adjudicator of unfair labor practices; the Act instructs courts that Board adjudications, if supported by substantial evidence, are conclusive.

[2] *B. Abuse of Discretion.* Coronet, we stress, bears the burden of production and persuasion on the hardship defense it asserts. See, e.g., *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 957-58 (D.C.Cir.1988) (where a closing has been found retaliatory, the Board generally may order restoration unless "*the Company ... [can] show that compliance with the order is unduly economically burdensome*") (emphasis added), *cert. denied*, 490 U.S. 1065, 109 S.Ct. 2063, 104 L.Ed.2d 628 (1989). Coronet utterly failed to carry that burden. Even if Coronet could be excused for failing initially to produce hardship evidence before the ALJ, the ALJ's decision alerted Coronet to the need for proof in the administrative record. Nevertheless, the company failed to petition the Board to reopen the record. Moreover, as the Board observed, Coronet still has an opportunity to show current hardship as cause for modification of the remedy at the compliance

5. The district court expressly acknowledged the need to preserve the feasibility of "any final order" and—to that end—ordered Coronet to refrain from disposing of the trucking department's assets. See *supra* p. 1286.

Coronet cites as precedent in support of its "same issue" argument *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir.1987). The

stage. In short, it was no abuse of discretion for the Board to decline to assume itself a proof burden properly assigned to the company, and Coronet is not without means to achieve relief if its hardship plea remains genuine.

For the reasons stated, we deny Coronet's petition for review and enforce the Board's order in full.

It is so ordered.



Katherine Anne MEYER

v.

George BUSH, Chairman, Task Force on Regulatory Relief, et al., Appellants.

No. 92-5029.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 18, 1992.

Decided Jan. 8, 1993.

Plaintiff brought action challenging adequacy of search conducted in response to her Freedom of Information Act (FOIA) request for documents held by the President's Task Force on Regulatory Relief. The United States District Court for the District of Columbia, Joyce Hens Green, J., denied the government's motion for summary judgment, found that Task Force was "agency" for purposes of FOIA, and, upon government's motion, certified interlocutory appeal. The Court of Appeals, Silberman, Circuit Judge, held that Task Force was not "agency" subject to FOIA.

two cases, however, are not comparable. The district court finding in *Donna-Lee Sportswear* was made in an independent, definitive ERISA action, see *id.* at 33 n. 1, not in an auxiliary proceeding for interim relief. In substance as well as in name, the issue of "contract formation" in *Donna-Lee Sportswear* was identical in court and Board cases. See *id.* at 34.

So ordered.

Wald, Circuit Judge, dissented and filed an opinion.

1. Records § 51

In determining whether group within executive branch of federal government is "agency" for purposes of Freedom of Information Act (FOIA), Court of Appeals considers how close operationally group is to President, what nature of group's delegation from President is, and whether group has self-contained structure; units exempted from FOIA because they "advise and assist the President" would be those whose characteristics are similar to President's personal staff. 5 U.S.C.A. §§ 551(1), 552(b)(5), 552(e).

2. Records § 51

Office of Management and Budget (OMB) is "agency" for purposes of Freedom of Information Act (FOIA); OMB is permanent agency with significant staff and broadly delegated powers. 5 U.S.C.A. §§ 551(1), 552(b)(5), 552(e).

3. Administrative Law and Procedure § 701

Executive order devoted solely to internal management of executive branch, and one which does not create any private rights, is not subject to judicial review.

4. Records § 51

Task Force on Regulatory Relief created by President of United States, headed by Vice President, and composed of certain cabinet members, was not "agency" subject to Freedom of Information Act (FOIA); Task Force was not body with "substantial independent authority" to direct executive branch officials, and although its members were unquestionably officers who wielded great authority as heads of their departments, there was no indication that, when acting as "Task Force," they were to exercise such authority. 5 U.S.C.A. §§ 551(1), 552(b)(5), 552(e); Executive Order No. 12291, § 1 et seq., 5 U.S.C.A. § 601 note.

Appeal from the United States District Court for the District of Columbia (88cv03112).

Douglas Letter, Atty., Dept. of Justice, with whom Stuart M. Gerson, Asst. Atty. Gen., Jay B. Stephens, U.S. Atty., and Matthew M. Collette, Atty., Dept. of Justice, Washington, DC, were on the brief, for appellants.

Theresa A. Amato, with whom Alan B. Morrison and David C. Vladeck, Washington, DC, were on the brief, for appellee.

Before: WALD, SILBERMAN, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Dissenting opinion filed by Circuit Judge WALD.

SILBERMAN, Circuit Judge:

The district court, at the behest of the government, certified to us on interlocutory appeal the question whether President Reagan's Task Force on Regulatory Relief, headed by then-Vice President Bush and composed of certain cabinet members, is an "agency" for purposes of the Freedom of Information Act, 5 U.S.C. § 552. Appellee seeks certain Task Force documents under the Act. We reverse the district court's determination and hold that the Task Force was not an "agency."

I.

Soon after his inauguration in 1981, President Reagan embarked on an effort to reduce regulatory burdens on the economy. As part of that program, the President established a cabinet-level Task Force on Regulatory Relief which included the Vice President, the Attorney General, the Secretaries of the Treasury, Commerce and Labor Departments, the Director of the Office of Management and Budget (OMB), the Chairman of the Council of Economic Advisers, and the President's Assistant for Policy Planning. President Reagan directed the Task Force to "review pending regulations, study past regulations with an eye towards revising them and recommend ap-

appropriate legislative remedies." As head of the Task Force, Vice President Bush named the Administrator for OMB's Office of Information and Regulatory Affairs (OIRA) as the Executive Director of the Task Force and a Special Assistant to the President as the Associate Director. Using staff from OMB, the Task Force operated from the Office of the Vice President.

President Reagan followed up the creation of the Task Force with Executive Order 12,291, which details the procedures for developing regulations and requires agencies to use cost/benefit analysis when making decisions. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981). Agencies must issue a Regulatory Impact Analysis (RIA) for any regulations that have a significant effect on the economy—defined as "major rules" in the Executive Order. Subject to the direction of the Task Force, the OMB Director has the authority to review RIAs and to issue guidelines both for filing the RIAs and for identifying major rules. The Order also gives the OMB Director—subject to the Task Force's guidance—the authority, among other things: (1) to designate regulations as major rules; (2) to require agencies to seek additional information in connection with a regulation; (3) to require interagency consultation designed to reduce conflicting regulations; (4) to develop procedures for estimating the annual social costs and benefits of regulations; and (5) to prepare recommendations to the President for changes in agency statutes. Exec. Order No. 12,291, § 6. If any disagreements arise between an agency and OMB, the Task Force "shall resolve any issues raised under this Order or ensure that they are presented to the President." *Id.* § 3(e)(1).

Thus, the Order authorized OMB, under Task Force guidance, to provide policy advice, to require agencies to seek interagency coordination, and even to delay regulatory proposals. But it did not confer any power to prevent an agency from carrying out its legal duty. The Order cautioned that the agencies must follow its provisions only "to the extent permitted by law." *Id.* § 2. And § 8 exempts "[a]ny regulation for which consideration or re-

consideration . . . would conflict with deadlines imposed by statute or by judicial order." Moreover, in § 9, the President directed that the Order "is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States."

The Task Force was in operation for two periods during the Reagan Administration. From 1981 to its initial termination in 1983, the Task Force reviewed and assessed regulations. In its "final report," the Task Force stated that it had "designated a total of 119 of the most questionable [existing] rules and regulatory programs for high-priority agency reconsideration," 76 of which the Administration took final action, "to revise or eliminate," and 27 of which received "partial action or formal proposals for change." Under the Executive Order, OMB had reviewed 6,701 proposed and final regulations, including 89 final, and 53 proposed, "major" regulations. After a hiatus of three years, President Reagan reactivated the Task Force on December 15, 1986, and gave it much the same mission it had before. The Task Force was phased out after the transition to the Bush Administration.

On June 29, 1988, appellee submitted her FOIA request for documents held by "the Task Force on Regulatory Relief, Vice President George Bush, who Chairs the Task Force, or any other member of the Task Force." Appellee sought three types of documents: "(1) [a]ll reports, which have been issued since February, 1981, concerning the accomplishments of the Task Force; (2) [a]ll reports, which have been issued, since February, 1981, which list or identify the regulations that the Task Force has reviewed; and (3) all reports, memoranda, correspondence, or other written documents transmitted to or from the Task Force or any of its members since January 1, 1985, concerning the Task Force's review of or involvement in regulations that were or still are under consideration by the Environmental Protection Agency, the Food and Drug Administration, or the Occupational

Safety and Health Administration." After denying appellee's request, attorneys of the Vice President's office referred her to the OIRA Administrator, who also served as Executive Director of the Task Force.

Upon receiving appellee's renewed request, OMB officials conducted a search of publicly available reports and press releases, copies of Task Force documents located at OMB, and OMB's own files for records related to the Task Force. OMB did not conduct a search of the Vice President's files, which the government claimed were exempt from FOIA. In response to appellee's first two requests, OMB released only publicly available documents in its files. OMB identified eight "documents" covered by appellee's third request, but declined to provide them to appellee. The first seven documents are pages from briefing books prepared for the Vice President and other members of the Task Force (in 1987-88) for use during Task Force deliberations. They discuss agency regulations, the Task Force's staff analysis of those regulations, and policy recommendations to the Task Force. Copies of the briefing books were kept in "Task Force files" in the office of the OIRA Administrator, who, as it will be recalled, was also Executive Director of the Task Force. Although located at OMB, the files were segregated from OMB files. The government declined to produce these documents on the grounds that neither the Vice President nor the Task Force are "agencies" under FOIA.

The eighth document, a letter sent by the OIRA Administrator to Health and Human Services Secretary Bowen, contains "recommendations and guidance to be incorporated in future administrative and legislative proposals to improve the [FDA's investigational new drug] approval process," according to OMB officials. OMB withheld the letter under exemption 5 of FOIA, 5 U.S.C. § 552(b)(5), as a pre-decisional memorandum. The government concedes that the letter is an OMB—not a Task Force—document and that OMB is an agency within the meaning of FOIA. Thus, the eighth

document is not subject to this interlocutory appeal.

Appellee brought suit in the district court challenging the adequacy of the document search, the government's specific refusal to search the Vice President's files, and the withholding of the eight documents. On a motion for summary judgment, the government claimed that the first seven documents were not "agency" documents, that the eighth was exempt, and that the search was adequate. Denying the motion, the district court held that the documents were Task Force documents, not the Vice President's, and that the Task Force was an agency under FOIA. See *Meyer v. Bush*, Civil Action No. 88-3122, Mem. Op., 1991 WL 212215 (D.D.C. Sept. 30, 1991). According to the court, "the Task Force was not formed simply to advise and assist the President," but rather "had substantial, independent, directorial authority." *Id.* The court did not decide whether the government was obliged to search the Vice President's files, and, upon the government's motion, certified as appropriate for an interlocutory appeal the question whether the Task Force is an agency under FOIA.

II.

The district court applied the correct governing law in determining whether a body within the Executive Office of the President is a FOIA "agency." As amended in 1974, the Act defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(e) (emphasis added).

As clearly shown by the legislative history, however, Congress intended to codify our earlier decision (interpreting more general predecessor language) in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).¹ In

1. "With respect to the meaning of the term 'Executive Office of the President' the conferees

intend the result reached in *Soucie v. David*. The term is not to be interpreted as including

that case, we held that the Office of Science and Technology (OST), a distinct entity within the Executive Office of the President, was a FOIA "agency." Although we acknowledged that OST advised and assisted the President, we emphasized that OST also had inherited from the National Science Foundation "substantial independent authority," such as evaluating federal programs, initiating and supporting research, and awarding scholarships. *Id.* at 1073-75 (emphasis added); see also *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038, 1041 (D.C.Cir.1985). OST was a FOIA agency precisely because it could act directly and independently beyond advising and assisting the President. "By virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act." *Soucie*, 448 F.2d at 1075. In *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980), the Supreme Court followed the legislative history and held that the Act did not cover "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." *Id.* at 156, 100 S.Ct. at 971 (quoting H.R. CONF. REP. NO. 1380, 93d Cong., 2d Sess. 14 (1974)) (emphasis added).

Shortly after *Kissinger*, in *Pacific Legal Found. v. Council on Env'tl. Quality*, 636 F.2d 1259 (D.C.Cir.1980), we decided that the Council on Environmental Quality (CEQ), an entity within the Executive Office of the President, was a FOIA agency. But subsequently in *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038 (D.C.Cir.1985), we distinguished the Council of Economic Advisers (CEA) from the CEQ and exempted it from FOIA. We did

the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. CONF. REP. NO. 1380, 93d Cong., 2d Sess. 14 (1974) (citation omitted).

Before the 1974 Amendments, FOIA simply had adopted the APA's definition of agency: "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1).

so even though the House Report (on which the dissent relies, dissent at 1298) explicitly listed the CEA as an agency under FOIA.² We concluded that the subsequent Conference Report's adoption of the *Soucie* test directly had undercut the House Report. We conceded that "the statutes organizing CEA and CEQ are, for all practical purposes, identical." *Id.* at 1041. Both organizations, moreover, performed duties, enumerated by statute, directed at providing advice and assistance to the President.³ CEQ differed, however, because several executive orders had given it the power to coordinate federal environmental programs and to issue guidelines to federal agencies for preparing environmental impact statements. *Id.* CEQ also had the authority to promulgate regulations—legally binding on the agencies—implementing the procedural provisions of the National Environmental Policy Act, 83 Stat. 852 (1970).² See also *Energy Research Found. v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581, 584-85 (D.C.Cir.1990). CEA had no similar power to issue formal, legally authoritative commands to entities or persons within or outside the executive branch. As we observed: "CEA is directed to appraise federal programs relative to a particular statutory policy and make recommendations to the President in that regard." *Rushforth*, 762 F.2d at 1043. But the "CEA has no regulatory power under [its] statute. It cannot fund projects based on [its] appraisal, as OST might, nor can it issue regulations for procedures based on the appraisals, as CEQ might." *Id.*

Appellee argues that the Task Force bore a closer resemblance to the CEQ than the CEA because it evaluated agency regulatory efforts and had authority to provide some direction over agency rulemaking. In other words, appellee focuses not on the

2. CEQ also admitted in litigation that it was an "agency," but not when it acted in its capacity of advising and assisting the President. *Pacific Legal Foundation*, 636 F.2d at 1263. We rejected this on-again, off-again approach to FOIA in *Ryan v. Department of Justice*, 617 F.2d 781, 788-89 (D.C.Cir.1980).

Task Force's advice or recommendation responsibilities to the President, but rather on its interaction with the agencies. The government responds that the directions given to the agencies merely "assisted" the President because the President himself cannot issue every specific order to the departments and agencies. According to the government, appellee's argument would read "assist" out of *Soucie* and *Kissinger*'s "advise and assist" test, and would limit its exemption to bodies that only advise the President. The government also contends that the Task Force did not exercise sufficient independent authority—independent from the President—to qualify as an "agency" under the Act. It was no different than several presidential assistants acting together or than the President's cabinet. And the government emphasizes that the Vice President—a separate constitutional officer who could not be thought of as an "agency"—headed the Task Force. Finally, the government distinguishes our prior cases because, unlike the OST, the CEQ, or even the CEA, the Task Force never received any delegated authority from Congress.

The core of the dispute between the parties, then, turns on the *degree* of independence from the President the Task Force exercised in its relations with the rest of the executive branch. Was the Task Force, in *Soucie*'s words, "substantially independent," or was its function "solely to advise and assist" the President? The latter phrase is not easy to apply literally. Every action taken by any executive branch official can be described as "assisting" the President. On the other hand, the line cannot be drawn to include all those who direct others in the executive branch because, contrary to the legislative history and *Kissinger*, under that approach the White House staff would be an agency. We can assume, however, that Congress

intended the phrase "solely to advise and assist" the President to refer to entities whose characteristics and functions were similar to those of the President's immediate personal staff.

[1] Thus, when we apply *Soucie* to those who help the President supervise others in the executive branch, we think it is necessary to focus on three interrelated factors. 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. Proximity to the President, in the sense of continuing interaction, is surely in part what Congress had in mind when it exempted the President's "immediate personal staff" without requiring a careful examination of its function.³ See H.R.REP. No. 1380, 93d Cong. 2d Sess. 14 (1974). Therefore, the other units in the Executive Office, which are exempted because they "advise and assist the President," would be those whose characteristics are similar to the White House staff—one of which is proximity to the President.⁴

Closely related to the proximity factor is the nature of the delegation. The greater the scope of the delegation—which also usually implies less continuing interaction with the President—the more independence an entity will exercise. Thus, *Rushforth* held that the CEA was not an agency because, unlike CEQ, CEA did not possess any delegated regulatory authority to supervise agencies. Similarly, we recently determined that the White House Counsel's Office is not a FOIA agency. *National Sec. Archive v. Archivist of the United States*, 909 F.2d 541, 545 (D.C.Cir.1990). Unquestionably, the Chairman and members of the CEA and the White House counsel, like other senior White House officials close to the President, often give *ad hoc* directions to executive branch person-

3. The President's immediate personal staff, we assume, would encompass at least those approximately 400 individuals employed in the White House Office. See Reorganization Plan No. 1 of 1977, 5 U.S.C.App. 1, § 2. But as we recognized in *Rushforth*, the sole function test must be applied to other units in the Executive Office of the President.

4. "If 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." *Soucie*, 448 F.2d at 1075.

nel. But when it occurs, it is assumed that they merely are passing on the President's wishes.

[2] In this case, appellee contends that the Task Force exercised regulatory authority over executive branch agencies. That is not accurate. Executive Order 12,291 did not authorize either the Vice President or the Task Force, *qua* Task Force, to give directions to the executive branch. Instead, the OMB Director took up that responsibility under the Executive Order. For example, the Order says the Director of OMB shall have the authority to designate major rules "subject to the direction of the Task Force." Exec. Order No. 12,291, § 3(b). The Director's other powers of review are only "subject to the direction of the Task Force." *Id.* § 3(e)(1), § 3(i), § 5(b), § 6(a), § 6(b). The Associate Director of OMB for OIRA also served as Executive Director of the Task Force, but the government does not even claim that his (or the Director's), written policy instructions to the agencies were "Task Force" documents. As the government concedes, those documents, like document eight, are OMB records subject to FOIA. Insofar as appellee is correct in arguing that the body which provided direction to the executive branch is an agency under FOIA, that body is OMB, not the Task Force.

A careful reading of the Executive Order—which, of course, is the most important indication of the Task Force's role—reveals that whatever significant authority the President delegated he gave to the Director of OMB. Although the appellee and the dissent blend together the responsibilities of both OMB and the Task Force, they are analytically quite distinct. The dissent's list of the "Task Force's" responsibilities, dissent at 1294, is, therefore—like Homer's catalogue of ships—exhaustive but quite beside the point. Also irrelevant, at least to this case, is the dissent's concern that OMB's directives implementing the Executive Order should be exposed, *see*

5. It is interesting to note that in the beginning of the dissent OMB and the Task Force are mentioned together, but gradually OMB fades

dissent at 1313 n. 26. Despite OMB's closeness to the President, it is a permanent agency with a significant staff and broadly delegated powers, and so it unquestionably falls under FOIA.

It remains to be determined, however, whether the Task Force's role, vis-a-vis the OMB Director and cabinet or agency heads, made the Task Force a FOIA agency. The Executive Order did give the Task Force the responsibility for providing "guidance" and "direction" to the OMB Director, and the authority to resolve disputes between agencies and OMB "or [to] ensure that they are presented to the President." Exec. Order No. 12,291, § 3(e)(1). In that respect, however, the Task Force theoretically was positioned between the OMB Director and the President, placing the Task Force only a hair's breadth from the President. After all, the OMB Director, whose duties include aiding the President in managing the entire executive branch, is (as the dissent recognizes at 1307) the cabinet officer functionally, if not actually, closest to the President. The cabinet members serving on the Task Force, therefore, were acting not so much as the heads of their departments, but rather as the functional equivalents of assistants to the President ("immediate personal staff" are, it will be recalled, exempt from FOIA coverage). Furthermore, notwithstanding appellee's proffer of press releases—which is not reliable evidence—we see no indication that the Task Force, *qua* Task Force, directed anyone, including OMB, to do anything.⁵ When the Task Force wished directions given to the executive branch, it found it necessary to advise the President to put such instructions in another Executive Order. (*See* Executive Order No. 12,498 § 1(d)). If the Task Force exercised all the powers which the dissent attributes to it, we would expect the Task Force to have generated more than only the seven documents that fell within appellee's FOIA request.

Nor does the dispute resolution mechanism of the Executive Order indicate that

behind the "curtain" (*see* dissent at 1309 n. 18), and by the end of the opinion the Task Force emerges alone.

the Task Force, in dealing with the OMB Director (or the agency heads), acted with *substantial* independence. Despite the option granted to the Task Force to resolve disputes or bring them to the President, it is rather hard to imagine that the OMB Director, or any other head of a department or agency who *reports directly* to the President, would acquiesce in a Task Force decision that was thought not to represent directly and precisely the President's opinion. It seems implicit that the Vice President and the other members of the Task Force were not expected to resolve disputes themselves, *without presenting those disputes to the President*, unless they already knew the President's views on the exact issue. This, of course, means the Task Force was not expected to act with significant independence. Not surprisingly, there is no documented example of an agency appealing an OMB decision to the Task Force.⁶

Appellee suggests, however, that the Vice President's chairmanship of the Task Force gave the Task Force added clout and independent authority. The government responds that the Vice President's role made the Task Force even less plausible an agency under FOIA. Because of his constitutional position, according to the government, we must treat the Vice President and his staff in the same manner as the President and his staff. Indeed, appellee conceded at oral argument that if the Vice President alone held the exact duties of the Task Force, the Vice President would not be an agency for purposes of FOIA. *See*

Armstrong v. Bush, 924 F.2d 282, 286 n. 2 (D.C. Cir. 1991) (President and Vice President subject only to Presidential Records Act, not Federal Records Act).⁷

In any event, despite the Vice President's rank, we do not believe his status as Chairman lent the Task Force any authority independent of the President. The Vice President is the only senior official in the executive branch totally protected from the President's removal power. *See Bowsher v. Synar*, 478 U.S. 714, 721-27, 106 S.Ct. 3181, 3185-88, 92 L.Ed.2d 583 (1986) (presidential power to remove executive branch officials crucial to presidential control). Presidents are, for that reason, reluctant to delegate real supervisory authority over the executive branch to the Vice President. As Professor Rossiter has observed, it is dangerous for the President to give the Vice President administrative responsibilities "because the Vice President is not subject to removal" and so could become "a dagger aimed constantly at the precious unity of the executive power." C. ROSSITER, *THE AMERICAN PRESIDENCY* 140 (2d ed. 1960); *see also Report of the Task Force in A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY* 64-66 (1988). No matter how close the personal and functional relationship between a Vice President and President, the former, mindful of traditional presidential concerns, presumably will not express direction to others in the executive branch unless his view is shared by the President. The Vice President's chairman-

AFL-CIO claimed that the Task Force had intervened in an OMB-OSHA dispute to uphold OSHA's position. Nonetheless, the representative then conceded that "none of the intergovernmental exchanges ... are documented." *Hearings on OMB Control of OSHA Rulemaking: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 97th Cong., 2d Sess. 22 (1982). In discussing the OMB-OSHA conflict, the head of OMB at the time merely noted that the Task Force had reviewed the matter but made no mention of an alleged appeal or a resolution of a dispute. *Id.* at 318.

7. We do not have to decide whether the Vice President could ever be the head of a FOIA agency.

6. The dissent cites an article in an obscure law review (not in the record) as evidence that the Task Force actually exercised the power to resolve a dispute between OMB and OSHA. Dissent at 1308-09 n. 17. The law review article claims that the Task Force's dispute resolution authority was rarely invoked and that the OSHA example was the only publicly known example of its exercise. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VAJ. NATURAL RESOURCES L. 1, 44 & n. 210 (1984). But close examination of the law review article's sources shows that it is unlikely any such incident took place. At hearings on OMB's authority under Exec. Order 12,291, the representative of the

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ship, thus, cuts against appellee's argument.

The Task Force's lack of a separate staff further indicates the absence of independent authority. In *Soucie*, we implied that structure and function, for purposes of defining agency, are interrelated. "If 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." *Soucie*, 448 F.2d at 1075 (emphasis added). FOIA, by declaring that only "establishments in the executive branch" are covered, 5 U.S.C. § 552(e), requires a definite structure for agency status. And just as the intended exemption for the President's personal staff leads us to believe that proximity to the President is relevant so, too, the exemption suggests the importance of structure. For another characteristic of the President's immediate staff is its lack of a firm structure.

It could be said that, in one sense, the President "established" the Task Force, albeit by informal presidential direction, and then later delegated to it certain functions under Executive Order 12,291. But the Task Force was simply a partial cabinet group. The President does not create an "establishment" subject to FOIA every time he convenes a group of senior staff or departmental heads to work on a problem. Furthermore, the Task Force operated out of the Vice President's office without a separate staff, borrowing OMB personnel as needed. We doubt that any individual or group, within the Office of the President, without a separate staff, can be regarded as an "establishment" with independent authority. Veterans of bureaucratic wars will insist that the typical officer in

the executive branch is virtually powerless without a staff. And it is often said that presidential appointees are captured relatively quickly by their staffs—in other words, they are weaned away from presidential influence and made, in that sense, more independent. Whether these maxims are true or not, the Task Force's lack of a separate staff is a strong indicator that it was neither an "establishment" nor an independent actor in the executive branch.

The dissent at 1312 n. 24 suggests that the Executive Order might distinguish this case from one in which the President merely instructs several cabinet officers, or a group of White House assistants (or perhaps the Chief of Staff), to perform the same duties. But that distinction appears inconsistent with the dissent's insistence that the crucial factor is the *function* performed by the entity in question. As we understand our colleague's reasoning, if the President had set up this exact structure by memorandum, or even by oral direction, the Task Force would still be a FOIA agency. So the Executive Order is, according to the dissent's logic, mere surplusage. See dissent at 1303 n. 9; see also dissent at 1301.

[3] We do not think much should turn on whether the President delegates authority to a White House group by memorandum or by Executive Order.⁸ Otherwise, of course, a future President could avoid creating an agency under FOIA by informally delegating authority to an "establishment" in the Executive Office. As we have indicated, however, the structure of the group is important in determining its relative independence from the President. Function is crucial, but, like the architect

8. The Executive Order carefully stated that its purpose was only for internal management and that it created no private rights. As such, it is doubtful that it had any legal significance. An Executive Order devoted solely to the internal management of the executive branch—and one which does not create any private rights—is not, for instance, subject to judicial review. *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir.1986); *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235-36 (8th Cir.1975), cert. denied, 424 U.S. 966, 96 S.Ct. 1461, 47 L.Ed.2d 733 (1976). The

Order seems no different than a presidential memorandum delegating certain tasks to the Vice President and to some cabinet officers or to the President's own staff. If agency heads appealed directly to the President over a disagreement with OMB (or the Task Force) on regulatory matters—without giving the Task Force its opportunity to resolve disputes—it surely would not have been thought "illegal." Certainly, the President, if he wished, could have ignored his own Task Force.

which is virtually powerless. As it is often said that in the executive branch, their staffs—in other words, they are captured and weaned away from presidential power and made, in that sense, presidential. Whether these maxims are the Task Force's lack of a strong indicator that it is an "establishment" nor an indicator in the executive branch. 1312 n. 24 suggests that the President might distinguish this from which the President merely cabinet officers, or a group of House assistants (or perhaps Staff), to perform the task. That distinction appears in the dissent's insistence that the function in question is the function of the President. As we see from the colleague's reasoning, if we set up this exact structure, or even by oral direction, the Task Force would still be a part of the Executive Order, and the dissent's logic, mere surmise. 1303 n. 9; see also

think much should turn on whether the President delegates authority to a group by memorandum or by Executive Order.⁸ Otherwise, the President could avoid FOIA by informing the group under FOIA by informing the Executive Office. As we see, however, the structure of the Task Force is important in determining its relationship to the President. It is, but, like the architect

different than a presidential staff in delegating certain tasks to the President. If agency heads are to be given the President over a decision (or the Task Force) on a matter—without giving the Task Force the authority to resolve disputes—it has been thought "illegal." The dissent, if he wished, could have a Task Force.

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Louis Sullivan, we believe that form follows function.

[4] The dissent acknowledges that the President has a constitutional duty to see that the laws are faithfully executed, and, therefore, a duty to oversee the regulatory policies produced by the departments and agencies. See *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981); *Public Citizen v. Burke*, 843 F.2d 1473, 1477-78 (D.C. Cir. 1988). Nonetheless, the dissent insists that the choice the President makes between various techniques to perform this task can have enormous consequences under FOIA. If he performs this role alone, meeting with his cabinet officers and agency heads "face to face," as our colleague puts it, he may keep the discussion entirely confidential (so long as the agency rule is justified by the record), *Sierra Club* at 657 F.2d at 407. But should he use a group of cabinet officers and perhaps White House staff in some sort of committee like the Task Force to screen the regulatory issues, he risks creating a FOIA agency. That approach empties the word "assist" in the *Soucie* test of all meaning.

The dissent does not dispute, however, dissent at 1311-12 & n. 23, that if the President used *only* White House staff in this manner, he would avoid FOIA altogether. In other words, if the President had set up this exact Task Force structure (including OMB's role) in this exact fashion (by Executive Order), but used senior White House staff personnel as his Task Force members, FOIA would not apply. If, on the other hand, a President employed his entire cabinet as his Task Force, the dissent insists that FOIA would apply. To be sure, the dissent does doubt that a President would ever delegate true independent authority to his cabinet.⁹ In light of that sound observation, however, it is difficult to understand why the dissent strains to construe the Executive Order as granting "substantial independent" authority to a partial cabinet group. And the dissent's

9. The old story about President Lincoln overruling his entire cabinet is instructive. After receiving the unanimous vote of his cabinet against a certain decision, Lincoln announced:

position leaves open the obvious question: how would we treat an analogous Task Force composed partially of senior White House staff and cabinet officers?

The dissent appears to recognize that the structure employed at least bears on the question whether the President has delegated independent authority. Dissent at 1311 n. 22. It would appear, then, that the line the dissent draws in this case is governed more by fortuitous history than by a logical principle. The dissent asserts over and over that in this case—structure aside—the Task Force was given "substantial independent" authority. But it is unclear just what factors distinguish this case from a multitude of similar arrangements that a President could use to accomplish the exact same ends—arrangements that the dissent is unwilling to categorize as covered by FOIA or not. See dissent at 1311 n. 23. As for our dissenting colleague's concerns about the President's ability to "shroud [the Task Force's] actions in absolute secrecy," dissent at 1313, it is worth noting that when a President openly discloses exactly how he will review regulations—as, for example, by a Task Force mechanism—it might well be thought more forthright than the behind-the-scenes *ad hoc* approach sanctioned in *Sierra Club*.

In sum, the Task Force was not a body with "substantial independent authority" to direct executive branch officials. The various cabinet members of the Task Force were unquestionably officers who wielded great authority as heads of their departments. But there is no indication that when acting as the Task Force they were to exercise substantial independent authority, nor in fact, did they do so. Put another way, the whole does not appear to equal the sum of its parts. The cabinet officers were acting, in truth, just as would senior White House staffers. We think the dissent's characterization, moreover, of the Task Force as the "people" behind the scenes [or curtain?] "who call the shots" is

"The vote has been taken. Seven noes, one aye—the ayes have it." See R. FENNO, *THE PRESIDENT'S CABINET* 29 (1963).

not supported by the record in this case. The Task Force seems to have been merely a committee which convened periodically both to bring together the views of various cabinet department heads concerning significant proposed regulations, and to shape for the President's decision intra-agency disputes which, in truth, only he can resolve. As such, the Task Force fell within the *Soucie* test as an entity "whose sole function is to advise and assist" the President.

Accordingly, for the reasons stated, we conclude that the Task Force was not an agency under FOIA. Having decided the issue certified to us, we remand the case to the district court.

It is so ordered.

WALD, Circuit Judge, dissenting:

A close examination of the Freedom of Information Act ("FOIA" or "the Act") and its legislative history, the governing FOIA precedent, and the record of the Task Force's creation and functions demonstrates that the Task Force falls within the Act's definition of an "agency." The majority opinion does not give due weight either to the applicable law or to the actual role the Task Force played in the President's regulatory reform program. Accordingly, I dissent.

I. BACKGROUND

A. Legislative History

Congress in 1974 amended the Freedom of Information Act to broaden the definition of "agency" to encompass more entities "which perform governmental functions and control information of interest to the public," H.R.REP. No. 876, 93d Cong., 2d Sess. 8 (1974), U.S.Code Cong. & Admin.News 1974, 6267, 6274, *reprinted in* FOIA SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, COMMITTEE ON GOVERNMENT OPERATIONS, U.S. HOUSE OF REPRESENTATIVES 121, 128 (1975) [hereinafter FOIA SOURCE BOOK]. These amendments expanded the definition of an "agen-

cy" expressly to include an "establishment ... in the Executive Office of the President." 5 U.S.C. § 552(e). As the majority points out, the House/Senate conference committee, citing this court's decision in *Soucie v. David*, 448 F.2d 1067 (D.C.Cir. 1971), clarified that "Executive Office of the President ... is not to be interpreted as including 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. 1380, 93d Cong., 2d Sess. 14 (1974), *reprinted in* FOIA SOURCE BOOK 219, 233 [hereinafter Conference Report]. What the majority overlooks, however, is the additional and quite specific guidance Congress provided for determining when an establishment in the Executive Office of the President is an "agency" for FOIA purposes.

Most significantly, Congress contemplated that "agency" would encompass entities, like the Task Force, which are created solely by executive order. The statutory language expanding the definition of an agency originated in the House bill, H.R. 12471. In its report accompanying that legislation, the House Committee on Government Operations stated:

For the purposes of this section, the definition of "agency" has been expanded to include those entities which may not be considered agencies under [the APA, 5 U.S.C. § 551(1)], but which perform governmental functions and control information of interest to the public. The bill expands the definition of agency for purposes of [FOIA]....

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

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H.R. REP. No. 876, 93d Cong., 2d Sess. 8 (1974), U.S. Code Cong. & Admin. News 1974, 6274, reprinted in FOIA SOURCE BOOK 121, 128 (emphases added).¹

Additionally, the legislative history indicates that in focusing on "functional entities" within the Executive Office of the President, Congress intended to exclude from the FOIA the President's own records. An exchange during the floor debate on H.R. 12471 between Representative Moorhead, chair of the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations, and Representative Erlenborn, the ranking minority member of that committee, illustrates this:

Rep. Erlenborn: The question has been asked by Members on this side of the aisle as to the meaning of two definitions of agencies to include the Executive Office of the President.

I want to ask the gentleman if it is not correct, as it states in the report of the committee, that the term "establishment in the Executive Office of the President" as it is contained in this bill means functional entities, such as the Office of Telecommunications Policy, the Office of Manager of [sic] the Budget, the Council of Economic Advisers and so forth; that it does not mean the public has a right to run through the private papers of the President himself?

1. Although this court has subsequently concluded that one of the House's illustrative examples of a "functional entity," the Council of Economic Advisors, falls within the *Soucie* exception for units whose "sole function" is to advise and assist the President, *Rushforth v. Council of Economic Advisors*, 762 F.2d 1038 (D.C. Cir. 1985), this does not undercut the congressional determination that entities created by executive orders can be "agencies" under the FOIA. After expressly providing that its substitute "follow[ed] the House bill"—the bill that defined "agency" to include establishments within the Executive Office of the President—the Conference Report merely imposed the additional requirement that this term be "interpreted" according to the *Soucie* test. CONF. REP. at 13, 14 (emphasis added).

2. It is worth noting that while the Senate bill did not expressly refer to entities within the

Rep. Moorhead: No, definitely not. I think the report is crystal clear on that. I thank the gentleman for bringing it up. 120 CONG. REC. 6806 (1974), reprinted in FOIA SOURCE BOOK at 241 (emphasis added).

From the foregoing, we can surmise congressional intent on the definition of an agency to the following extent: It includes establishments within the Executive Office of the President, excepting only the President's "immediate personal staff" or units whose "sole function" is to advise and assist the President.² It encompasses entities created by executive orders, with no requirement that the entity receive direct congressional approval or appropriations. And it shields the President's own records.

B. Precedent

In the oft-cited case of *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), this court interpreted the APA and the FOIA to confer agency status "on any administrative unit with substantial independent authority in the exercise of specific functions." *Id.* at 1073 (emphasis added). We determined that the Office of Science and Technology ("OST") satisfied this test "[b]y virtue of its independent function of evaluating federal programs...." *Id.* at 1075.

This court has applied the *Soucie* "sole function" test three times to entities within the Executive Office of the President; two of the three entities were found to be

Executive Office of the President, the Senate Committee on Government Operations contemplated that they would be included as "agencies" under the *Soucie* test:

Section 3 expands on the definition of agency as provided in section 551(1) of title 5 [the APA]. That section defines "agency" as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia." This definition has been broadly interpreted by the courts as including "any administrative unit with the substantial independent authority in the exercise of specific functions," which in one case was held to include the Office of Science and Technology. *Soucie v. David*, 448 F.2d 1067, 1073 ([D.C. Cir.] 1971).

S. REP. No. 854, 93d Cong., 2d Sess. 32 (1974), reprinted in FOIA SOURCE BOOK at 153, 185.

"agencies."³ In its first application of the *Soucie* test, this court held that the Office of Management and Budget ("OMB"), an entity within the Executive Office of the President,⁴ was an "agency" under the Administrative Procedure Act, 5 U.S.C. § 551(1) and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. *Sierra Club v. Andrus*, 581 F.2d 895 (D.C.Cir.1978).⁵ The court held that, although the OMB's primary statutory duty was to prepare the President's budget proposal for submission to Congress, it was an agency under the "sole function" test. *Id.* at 902. The court noted that the preparation of the budget was "an aid to Congress as well as an instrument of presidential and policymaking control over the executive bureaucracy," and that the OMB had other "management, coordination, and administrative functions." *Id.* The court also found that Congress "signified the importance of OMB's function, over and above its role as presidential advisor," when it provided for Senate confirmation of the OMB's director and deputy director. *Id.*

In 1980, this court applied the *Soucie* test to determine that the Council on Environmental Quality ("CEQ"), a unit within the Executive Office of the President, was an "agency" for purposes of the Government in the Sunshine Act, 5 U.S.C. § 552b(b), which adopted the FOIA definition of an agency. *Pacific Legal Foundation v. Council on Environmental Quality*, 636 F.2d 1259 (D.C.Cir.1980). The CEQ was created by the NEPA, which authorized it to advise the President in preparing his annual environmental policy report; prepare studies on environmental conditions and trends for the President; review

and appraise federal programs that affect the environment and make recommendations to the President about those programs; and recommend national environmental policies to the President. 42 U.S.C. § 4344. The CEQ's mission was later expanded by several executive orders, which made it responsible for overseeing activities of federal agencies; for coordinating federal programs related to environmental quality and for issuing guidelines to federal agencies for preparing Environmental Impact Statements; for issuing regulations to federal agencies for implementing the procedural requirements of the NEPA; and for publishing and revising the national contingency plan for removing oil and hazardous substances from navigable waters. *Pacific Legal Foundation*, 636 F.2d at 1262. Relying on the Supreme Court's determination in *Soucie* that the OST's authority to evaluate federal programs was sufficient to qualify it as an agency, this court looked to the CEQ's executive order authority to evaluate federal programs and likewise found it sufficient to qualify the CEQ as an agency. *Id.* at 1263.

The only entity within the Executive Office of the President that this court has found *not* to be an agency under the "sole function" test is the President's Council of Economic Advisors ("CEA"). *Rushforth v. Council of Economic Advisors*, 762 F.2d 1038 (D.C.Cir.1985). The CEA was created by statute, housed in the Executive Office of the President, and authorized to, among other things, advise and assist the President in formulating his economic policies; gather information concerning economic developments and trends; and appraise federal programs and activities in light of

3. We did not apply the *Soucie* "sole function" test to the White House Counsel, but instead treated it as part of the President's "immediate personal staff." See *National Security Archive v. Archivist of the United States*, 909 F.2d 541, 545 (D.C.Cir.1990).

4. The OMB itself was a presidential creation. See Reorganization Plan No. 2 of 1970, 35 FED. REG. 7959 (1970), reprinted in 31 U.S.C. § 501 note (1988).

5. The APA defines agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another

agency." 5 U.S.C. § 551(1). Although the *Sierra Club* court was determining agency status under the APA, and not under the FOIA, its application of the *Soucie* test is nonetheless instructive here. Obviously, it applies the appropriate test, and moreover, since the FOIA definition is an expansion of the APA definition, see H.R.REP. NO. 1380, 93d Cong., 2d Sess. 13 (1974), reprinted in FOIA SOURCE BOOK at 219, 231, any entity determined to be an agency under the APA should easily qualify as an agency under the FOIA.

Cite as 981 F.2d 1288 (D.C. Cir. 1993)

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U.S.C. § 1023. The court noted that the
CEA and the CEQ, which the court had
earlier determined to be an agency, were
created by statutes that were "for all prac-
tical purposes, identical." *Rushforth*, 762
F.2d at 1041. Nonetheless, Judge Starr,
writing for the panel, distinguished the
CEA from the CEQ on the ground that the
latter's statutory functions had been ex-
panded under several executive orders. *Id.*
These expanded—and apparently disposi-
tive—functions included coordinating feder-
al regulatory policy, issuing guidelines for
agencies to prepare required statements,
and promulgating regulations for imple-
menting the procedural provisions of a key
environmental law. *Id.* *See also id.* at
1042 (the CEQ's "expanded duties ... took
[it] out of the realm of entities the sole
function of which is to advise and assist the
President"). Judge Starr also distin-
guished the CEA from the OST, found in
Soucie to be an agency, by the OST's abili-
ty to "take direct action." *Id.* at 1041.

This court most recently applied the *Sou-
cie* test not to an entity within the Execu-
tive Office of the President, but to the
Defense Nuclear Facilities Safety Board,
an "independent establishment in the exec-
utive branch." 42 U.S.C. § 2286(a). In
*Energy Research Foundation v. Defense
Nuclear Facilities Safety Board*, 917 F.2d
581 (D.C.Cir.1990), we held that the Board
was an agency under the *Soucie* test,
based on four functions demonstrating that
the Board did "considerably more than
merely offer advice": it conducted investi-
gations; formally evaluated the Energy
Department's standards relating to defense
nuclear facilities; "force[d] public decisions
about health and safety"; and possessed
the authority to impose reporting require-
ments on the Secretary of Energy. *Id.* at
584-85. The court found that, since
"[e]valuation plus advice was enough to
make the Office of Science and Technology
an 'agency' in *Soucie*," and the CEQ an
agency in *Pacific Legal Foundation*, the
Board's evaluation and other functions
more than fulfilled the *Soucie* test. *Id.*

These cases teach us that whether an
establishment is an "agency" for FOIA

purposes hinges primarily on its functions.
See, e.g., Rushforth, 762 F.2d at 1043 n. 7
("it is, at bottom, its function that deter-
mines an entity's status for FOIA pur-
poses"); *see also Ryan v. Department of
Justice*, 617 F.2d 781, 788 (D.C.Cir.1980)
(agency status depends on "general nature
and functions" of a particular unit). Spe-
cifically, agency status does not depend on
where within the Executive Office of the
President (but outside the Office of the
President, *see infra* 1309-10, 1311 n. 23)
the establishment is located, *see Rush-
forth*, 762 F.2d at 1041 (while the CEA and
the OST were "located, hierarchically, in
the same position ... there [was] no indi-
cation that [their] functional roles ... were
the same; and critically, it was the func-
tional role of the agency on which *Soucie*
turned") (emphasis added), nor on congres-
sionally granted authority, *see id.* (CEA
and CEQ had virtually identical authorizing
statutes). Thus, determining whether the
Task Force is an agency requires a careful
examination of both its authorized and ac-
tual functions.

II. APPLICATION OF THE LAW TO THE TASK FORCE

Turning now to the Task Force, it is
obvious that both its structure and its au-
thorized and actual functions satisfy all
statutory and case law requirements of an
agency under the FOIA.

A. The Task Force as an Establishment

First, the Task Force was an "establi-
ment" within the Executive Office of the
President. The legislative history of the
FOIA's expanded definition of "agency"
makes clear that entities created by execu-
tive order are sufficiently "established" to
fall within its ambit. H.R.REP. No. 876, 93d
Cong., 2d Sess. 8 (1974), U.S.Code Cong. &
Admin.News 1974, 6274, *reprinted in*
FOIA SOURCE BOOK at 121, 128. The major-
ity, however, in its inquiry into the nature
of the delegation of authority to the Task
Force, completely overlooks the formality
and authority of the delegation provided by
Executive Order No. 12,291, saying that

the President established the Task Force by "informal presidential direction" and suggesting that it lacked a sufficiently "definite structure" to qualify for agency status. Majority opinion ("Maj. op.") at 1296. Although the President announced the formation of the Task Force before he issued Executive Order No. 12,291, it was the Executive Order that spelled out the Task Force's mission, responsibilities and relationship to other entities in the executive branch, including those within the Executive Office of the President. Short of a

6. The government acknowledges that an executive order remains in effect until formally rescinded. Letter from Appellant to Clerk of Court, October 2, 1992, at 4. See *Feliciano v. United States*, 297 F.Supp. 1356, 1358, 1359 (D.P.R.1969), *aff'd*, 422 F.2d 943 (1st Cir.), *cert. denied*, 400 U.S. 823, 91 S.Ct. 44, 27 L.Ed.2d 51 (1970). An executive order is, for many purposes, a form of presidential "law." See, e.g., *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974) (managerial executive order lacking specific statutory authority can be "relevant federal law" for purposes of Supremacy Clause); *In re Neagle*, 135 U.S. 1, 10 S.Ct. 658, 34 L.Ed. 55 (1890) (executive directive issued by the Attorney General was a "law of the United States" under the habeas corpus statute). See generally John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX.L.REV. 837, 839 (1981) (executive orders are "the most important type of 'Presidential legislation'").

While an executive order that merely implements a personal policy of the President may not be enforceable in a private civil action, *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir.1975), *cert. denied*, 424 U.S. 966, 96 S.Ct. 1461, 47 L.Ed.2d 733 (1976); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 452 (D.C.Cir.1965), *cert. denied*, 382 U.S. 978, 86 S.Ct. 548, 15 L.Ed.2d 469 (1966), at least one commentator has concluded that Executive Order No. 12,291 nonetheless binds the agencies under the doctrine of the unitary executive, which makes the rule of the executive the rule of the agency, and the doctrine that agencies must follow those rules that go beyond mere regulation of internal housekeeping. Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Executive Order 12,291*, 1983 DUKE L.J. 285.

7. At least one entity outside of the Executive Office of the President that was created without statutory or executive order authority has been determined an agency for FOIA purposes. See *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 969 n. 2 (7th Cir.1977) (Watergate Special Prosecution Force, whose authority was delegated by the Attorney General through a formal Department of Justice regulation, was an

reorganization plan requiring congressional approval, the executive order offers the most formal means available to the President to create or assign responsibility to an entity within the Executive Office of the President.⁶ Without deciding whether an entity in the Executive Office of the President without executive order authority can ever be an agency,⁷ it seems clear that an entity whose role is established by an executive order is a sufficient "establishment" to qualify as an agency, provided it passes *Soucie*'s "sole function" test.⁸ The majority

agency under FOIA because it "exercised the requisite independent authority in exercising specific functions").

8. To the extent that the majority's assertion that the FOIA requires a "definite structure," Maj. op. at 1296, suggests that the statute requires a specific form or structure, I must disagree. The choice of the word "establishment," in lieu of board, division, office or some other term, makes the FOIA applicable to a broad range of structures. See *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C.Cir.1991) (in the APA, "Congress thought it 'necessary to define agency as 'authority' rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or 'divisions' to have final authority'" (quoting Senate Judiciary Committee Print, *reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT*, S. Doc. No. 248, 79th Cong., 2d Sess. 13 (1946)). Therefore, I believe that while the general structure of an entity is relevant to whether it satisfies the statutory requirement of an "establishment," its specific form or structure is not dispositive of its agency status.

No less novel or puzzling is the majority's requirement that a FOIA agency have a "self-contained structure." Maj. op. at 1293. Does this suggest that no interagency task force, even if created by statute, heavily staffed, and armed with significant independent authority, could ever be a FOIA agency? Or is it intended to exclude any entity that relies on another body for staff or other support services? Whatever the majority intends, this requirement appears incompatible both with the legislative intent to expand the definition of agency and with this court's heretofore largely functional inquiry under *Soucie*.

Perhaps most curious is the majority's analogy to the structure of the White House Office, or the President's "immediate personal staff." The majority first observes that the President's "immediate personal staff," which has been exempt from FOIA, lacks a "definite structure." (I'll assume for purposes of argument that this is true.) It then suggests that, because the White

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ity is surely correct that the President "does not create an 'establishment' subject to FOIA every time he convenes a group of senior staff or departmental heads to work on a problem." Maj. op. at 1296. This is not, however, a question of the President calling in his chief of staff and the Director of OMB, or yet his entire cabinet, for a strategy session. Instead, it is a matter of the creation of a separate functional entity to which the President—by an executive order—delegated significant independent authority to act on a continuing basis without his ongoing involvement. *See infra* at 1304-07.

The potential importance of executive order authority is evident in our opinion in *Rushforth*.⁹ There we determined that the President's delegation of authority, through an executive order, was alone enough to make an entity an "agency":

[A]ppellant mounts a policy argument that the President should not be allowed to take an entity out of, or place an entity in, FOIA agency status by the mere expedient of adding or eliminating duties. This argument is unavailing. Congress' intent would appear to have been to require entities having authority and the ability to act, but not those whose sole function was to render advice and assistance to the President, to be subject to FOIA. If the President adds duties to an entity which bring it outside the sole-function test, Congress would want the entity covered.

House staff possesses this characteristic, this characteristic is relevant to the FOIA inquiry. Maj. op. at 1296. By this same reasoning, the majority could claim that, because the White House Office has upwards of 400 employees, then only entities that have 400 employees can be agencies under FOIA. The majority does not explain how or why such fortuitous characteristics of the President's "immediate personal staff" can or should become relevant to our "sole function" inquiry.

9. Of course, *how* a President delegates to an entity is not as important as *what* he delegates. Here, he delegated significant authority to act independently. While *Rushforth* demonstrates that delegation by an executive order can, in some circumstances, be *sufficient* to establish an agency, we are not called on here to decide if

Rushforth, 762 F.2d at 1042 n. 5. This confirms that the "independent" authority that takes an agency outside the sole function test can be granted by the President, as well as the Congress. *See also id.* at 1042 (CEA lacked the "independent" authority enjoyed by the CEQ—authority granted by an executive order); *id.* at 1041-43 (emphasizing that the inquiry is on an entity's functions, not its genesis).¹⁰

The majority also expresses its "doubt that any individual or group, within the Office of the President, without a separate staff can be regarded as an 'establishment' with independent authority." Maj. op. at 1296. This new "requirement" of the majority that an agency have a separate staff is at odds with our precedent focusing on how an entity functions, not where it gets the resources to perform those functions. See *Rushforth*, 762 F.2d at 1041 ("critically, it was the functional role of the agency on which *Soucie* turned"); *id.* at 1043 n. 7 (Senate confirmation of CEA members not given great weight, as "the nature of the appointment" did not "speak[] to the function of the CEA"). Nor does this staff "requirement" appear anywhere in the FOIA's language or legislative history. Indeed, when Congress indicated that an entity created by an executive order could be a FOIA agency, it had to have contemplated that the President might exercise his broad powers to structure the Executive Office of the President to staff the new entity as he saw fit, whether by transferring staff to it or by designating personnel of other Executive Offices to provide needed support. It

such authority is *necessary*, and it bears repeating that I have nowhere suggested that it is. Cf. Maj. op. at 1296. In this regard, I agree with the majority that a President should not be able to avoid FOIA merely by delegating authority informally. Maj. op. at 1297. In this particular case, however, Executive Order No. 12,291 happens to provide relevant evidence for both parts of our inquiry: first, whether the Task Force was an "establishment," and second, how it functioned. In another case, however, an entity without executive order authority might well be deemed a FOIA agency.

10. In light of the foregoing discussion, I am puzzled by the majority's assertion that I view Executive Order No. 12,291 as mere "surplusage." Maj. op. at 1296.

is clear that, by permitting FOIA agencies to be formed by executive order, Congress foreswore any requirement that an agency's staff appear on a separate line in an authorization or appropriation bill.

Even in case law under the APA, whose definition of "agency" is less expansive than the FOIA's, there is no such "separate staff" requirement. Instead, the APA inquiry into agency status is much like the FOIA inquiry: focused on the functions of the entity, and flexible enough to encompass the "myriad organizational arrangements for getting the business of government done." *Washington Research Proj., Inc. v. HEW*, 504 F.2d 238, 246 (D.C.Cir. 1974) (citations omitted), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975). See also *Lee Constr. Co. v. Fed. Reserve Bank of Richmond*, 558 F.Supp. 165, 173 (D.Md.1982) ("The authority to act with the sanction of government behind it determines whether or not a governmental agency exists.") (quoting *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984, 991 (9th Cir.1949)).

Staff capabilities may, of course, be relevant indicia of an entity's ability to take substantial independent action, see *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 482 F.2d 710, 715 (D.C.Cir. 1973), *rev'd on other grounds*, 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975), but ready access to staff support or, as in the case of the Task Force, direct delegation of authority effectively to direct OMB staff is the functional equivalent of a separate staff, as this case illustrates. In any event, it is clear, the majority's claims aside, that the Task Force was not "virtually powerless" without a separate staff. Maj. op. at 1296. Through its authority to direct the OMB Director and through the

service of the OIRA Administrator as Executive Director of the Task Force (reinforced by the political suasion of its high-powered membership), the Task Force had the staff of a powerful and effective agency at its disposal.¹¹

B. The Task Force's Functions

Turning to the second part of our inquiry, the Task Force clearly had functions beyond "advising and assisting the President," as this term has been construed in our case law. As the majority acknowledges, Executive Order No. 12,291 "is the most important indication of the Task Force's role..." Maj. op. at 1294. This Executive Order gave the Task Force "substantial independent authority," *Soucie*, 448 F.2d at 1073, charging it with the "direction" of a far-reaching regulatory reform program. The Task Force's "directions were to be carried out by the Director of the OMB. Exec. Order No. 12,291 §§ 3(b), 3(e)(1), 3(i), 5(b), 6(a), 6(b), 7(c), 7(g) and 8(b). The Task Force was to "direct" the OMB Director in performing the following functions: reviewing preliminary and final Regulatory Impact Analyses ("RIAs"), notices of proposed rulemaking, or final rules based on the requirements of the order, § 3(e)(1); monitoring agency compliance with the order, § 6(a)(8); designating a proposed or currently effective rule as a "major" rule subject to additional review and reporting requirements, §§ 3(b), 6(a), 7(c)(2); requiring reconsideration of major rules, § 7(c)(1); identifying duplicative, overlapping and conflicting rules and requiring interagency consultation to eliminate such duplication, overlap or conflict, § 6(a)(5); preparing and promulgating uniform standards for the identification of major rules and the development of RIAs, § 6(a)(2); establishing schedules for re-

11. Moreover, any "veteran of bureaucratic wars," see Maj. op. at 1296, is certainly familiar with the common practices of "assigning" and "detailing" top staff members from one agency to another, particularly to the White House, see, e.g., S. REP. NO. 353, 102d Cong., 2d Sess. 52 (1992) (supporting "White House efforts to reduce its reliance on detailees"), and with the existence in the Executive Office of the President of a separate unit, the Office of Administra-

tion, which is directed "to provide components of the Executive Office of the President with such administrative services as the President shall from time to time direct." Reorganization Plan No. 1 of 1977, 5 U.S.C.App. 1, § 2. Thus, there is little cause to worry that any high-level establishment within the Executive Office of the President will be a toothless tiger without its own independent staff.

views of RIAs, § 3(i); developing procedures for estimating annual costs and benefits of agency regulations, § 6(a)(6); developing procedures for the performance of his own functions under the order, § 6(b); requiring agencies to provide and evaluate additional information in connection with regulations or with their regulatory agendas, §§ 5(b), 6(a)(3); requiring the publication of regulatory agendas in a prescribed form, § 5(b)(2); waiving the requirements of the order with respect to any existing or proposed major rule, § 6(a)(4); and preparing, in consultation with the agency, recommendations for changes in the agency's statutes, § 6(a)(7). The Task Force was also entrusted with resolving any issues raised under the order or ensuring that they were presented to the President. See § 3(e)(1). One need not "strain" to construe this Executive Order as granting the Task Force substantial independent authority. See Maj. op. at 1297.

Additional evidence in the record reveals that the President intended, and the Task Force provided, an active and independent force for regulatory reform. The President instructed the Chair of the Task Force to "take clear, constructive, and decisive action to restrain Federal regulation and to improve the regulatory process." Memorandum for the Heads of Executive Departments and Agencies, Office of the Vice President, Mar. 25, 1981; Press Release, Office of the Vice President's Press Secretary, Mar. 25, 1981 (Task Force "was instructed by the President to take action, not write reports"). By the Administration's own accounts, the Task Force exercised its powers to the fullest, undertaking the final review of regulations of "truly major consequence," Press Release, Office of the Vice President, Feb. 17, 1981; Press Release, Office of the White House Press Secretary, Feb. 18, 1981; "direct[ing]" federal agencies to propose new rules, Press Release, Office of the Press Secretary to the Vice President, Mar. 10, 1987; Press Release, Office of the Press Secretary to the Vice President, Jan. 29, 1988; "recommend[ing]" that federal agencies propose certain rules, Press Release, Office of the Vice President, July 14, 1987; "conven[ing]"

working groups representing key agencies to develop appropriate legislative proposals and responses," Press Release, Office of the Vice President, Feb. 17, 1981; Press Release, Office of the Vice President, April 10, 1987; "designat[ing]" rules and regulatory programs for high-priority agency consideration," PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF, REAGAN ADMINISTRATION REGULATORY ACHIEVEMENTS, Aug. 11, 1983, at 5; *id.* at 78; Press Release, Office of the White House Press Secretary, Feb. 4, 1982; making "decisions" and taking "actions" to address the submissions it receives. Remarks of Vice President George Bush at the Presidential Task Force on Regulatory Relief Briefing, Aug. 12, 1981; and "target[ing]" existing regulations for in-depth agency consideration, *id.*

The Task Force was directly involved not only with other executive agencies but with Congress and with the public. It "work[ed]" actively with those in the Congress to achieve legislative change in the regulatory area," Press Release, Office of the Vice President's Press Secretary, June 13, 1981. It also "formally request[ed]" private sector comments to itself and to the agencies, Press Release, Office of the Vice President, March 25, 1981, and its counsel advised business leaders: "If you go to the agency first, don't be too pessimistic if they can't solve the problem there. If they don't, that is what the Task Force is for." C. Boyden Gray, Remarks at Transcription of Hall of Flags Regulatory Reform Briefing (Apr. 10, 1981), *reprinted in Role of OMB in Regulation: Hearings of the Oversight and Investigations Subcomm. of the House Comm. on Energy & Commerce*, 97th Cong., 1st Sess. 92 (1981), *cited in* Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VAJ.NAT.RES.L. 1, 56 n. 283 (1984).

These functions equal or surpass those of every entity determined to date to be a FOIA agency and satisfy every judicial articulation of the *Soucie* "sole function"

test.¹² Like the OST in *Soucie*, 448 F.2d at 1075, the CEQ in *Pacific Legal Foundation*, 636 F.2d at 1263, and the Defense Nuclear Facilities Board in *Energy Research Foundation*, 917 F.2d at 584, the Task Force evaluated federal programs. Instead of evaluating only scientific, technological or environmental programs, however, the Task Force evaluated regulatory programs across the spectrum of executive agencies. See Press Release, Office of the Vice President, Feb. 17, 1981 (Task Force was "in charge of the President's overall regulatory reform program"). Its evaluation functions included: identification of duplicative, overlapping and conflicting rules; the final review of regulations of "truly major consequence"; identifying specific areas where it believed reporting and paperwork requirements could be reduced and, in coordination with the OMB, reviewing these requirements in order to reduce them; reviewing agencies' legislative recommendations; and reassessing federal regulations and paperwork requirements. It is significant that the Task Force's evaluation functions were geared not just toward counseling the President, but toward guiding its own interactions with the OMB and other executive agencies. Although the CEA's functions included evaluation, see *Rushforth*, 762 F.2d at 1042 n. 6, Judge Randolph later pointed out that all of its duties "simply facilitate[d] providing advice to the President." *Ener-*

gy Research Foundation v. Defense Nuclear Facilities Safety Board, 917 F.2d at 584. By contrast, the Task Force's evaluation function shaped its decisions and actions directed toward executive regulatory agencies.

Like the Defense Nuclear Facilities Board, see *Energy Research Foundation*, 917 F.2d at 585, the Task Force imposed reporting requirements on federal agencies. Under Executive Order No. 12,291 the Task Force could direct the head of the OMB to require agencies to provide additional information in connection with their regulations or regulatory agendas; determine the standards for and the form in which agencies filed their RIAs and agendas; and, by designating rules as major rules, sharply increase the reporting requirements incident to the rules. The Task Force also satisfies *Rushforth*'s requirement of ability to take "direct action." *Rushforth*, 762 F.2d at 1041. The President instructed the Task Force to "take action," Press Release, Office of the Vice President, Mar. 25, 1981, and the Task Force claimed to have followed those instructions. It announced that, after formally requesting private sector comments about governmental regulation directed to itself and to the agencies, it made "decisions" and took "actions" to address these submissions. For example, the Task Force announced the EPA's "bubble" rule as one of the "actions taken" by the Task Force.

12. It is worth noting that the Task Force also possessed certain characteristics that this court has found relevant, if not required, in determining agency status. In *Sierra Club v. Andrus*, we noted that Congress had signalled the "importance of the OMB's power and function, over and above its role as presidential adviser," when it provided for Senate confirmation of the OMB's director and deputy director. 581 F.2d at 902. Congress has similarly required the Senate's advice and consent in the selection of the head of OIRA, who serves as the Executive Director of the Task Force. 44 U.S.C. § 3503(b) (1988). And to the extent that it is relevant that the OST assumed the functions of an entity that was itself an agency, the National Science Foundation, see Maj. op. at 1291, the Task Force assumed many functions previously exercised exclusively by the OMB. Under President Ford, for example, the OMB by itself evaluated agencies' Inflation Impact Statements and set criteria for determining which rules had to be ac-

companied by these statements. Exec. Order No. 11,821, 3A C.F.R. § 926 (1971-1975 Compilation), modified by Exec. Order No. 11,949, 3 C.F.R. § 161 (1976). Under President Carter, the OMB by itself guided agencies in performing the detailed regulatory analyses required under Executive Order No. 12,044. Exec. Order No. 12,044, 3 C.F.R. § 152 (1978). Executive Order No. 12,291, of course, goes farther than either of its predecessors in asserting central presidential control over the regulatory process. See Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 549 (1989) ("The Reagan administration's program for oversight of regulation is the most ambitious to date."); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 185 (1986) (Executive Order 12,291 and Executive Order 12,498 represent the "most dramatic steps" in asserting presidential authority over the regulatory process).

Foundation v. Defense Nuclear Safety Board, 917 F.2d at 584-85, the Task Force's evaluation of its decisions and approval of executive regulatory

defense Nuclear Facilities Energy Research Foundation, the Task Force imposed requirements on federal agencies. Executive Order No. 12,291 could direct the head of the agencies to provide additional information in connection with their regulatory agendas; determine the form in which they filed their RIAs and agencies designating rules as major rules to increase the reporting requirements to the rules. The Task Force satisfies *Rushforth's* requirement to take "direct action." 762 F.2d at 1041. The President directed the Task Force to "take release, Office of the Vice President, 25, 1981, and the Task Force to have followed those instructions. It announced that, after following private sector comments on regulation directed to the agencies, it made "decisions" to address these. For example, the Task Force rejected the PA's "bubble" rule as one taken by the Task Force.

These statements. Exec. Order No. 12,291, § 926 (1971-1975 Compilation by Exec. Order No. 11,949, § 76). Under President Carter, the Task Force guided agencies in performing regulatory analyses required under Executive Order No. 12,044. Exec. Order No. 12,291, § 152 (1978). Executive Order No. 12,291, § 152 (1978), goes farther than either of the others in asserting central presidential regulatory process. See Harold Koh, *Presidential Management of Agency Rulemaking*, 53 WASH.L.REV. 533, 549 (1989). The administration's program for rulemaking is the most ambitious to date. See Strauss & Cass R. Sunstein, *The President and OMB in Informal Rulemaking*, 181, 185 (1986) (Executive Order No. 12,498 and Executive Order 12,498 are the most dramatic steps in asserting presidential authority over the regulatory process).

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Again like the Defense Nuclear Facilities Board, which "force[d] public decisions about health and safety," *Energy Research Foundation*, 917 F.2d at 584-85, the Task Force "directed" the Department of Health and Human Services and the Food and Drug Administration to make certain drugs available to AIDS patients, and claimed credit for regulations on the use of alternative fuels, as well as the "bubble" rule.

Finally, the Task Force exercised two of the three functions—coordinating regulatory programs, issuing guidelines and promulgating regulations—by which this court distinguished the CEA, which was not an agency, from the CEQ, which was. *Rushforth*, 762 F.2d at 1041. While the CEQ coordinated only environmental regulatory policy, the Task Force was "in charge of the President's overall regulatory reform program." The Task Force issued guidelines for all regulatory agencies on the preparation of the mandatory RIAs. And while it may not have published regulations in the *Federal Register*, its guidelines were, nonetheless, binding on federal regulatory agencies. See Exec. Order No. 12,498, § 1(d), 3 C.F.R. § 323 (1986), reprinted in 5 U.S.C. § 601 note (1988). Moreover, it had far-reaching authority to shape the regulations of all regulatory agencies, through the final review of regulations of major consequence, the direction to federal agencies to propose new rules, the selection of rules for special scrutiny or for reconsideration, and the scheduling of the centralized review of all major regulations. Thus, it is easily distinguished from the CEA, which, as the *Rushforth* court noted, "ha[d] no regulatory power." *Rushforth*, 762 F.2d at 1043 (emphasis added). To the contrary, the Task Force's functions beyond advising and assisting the President equaled or exceeded those of the CEQ, and

clearly sufficed to distinguish it from the CEA and to qualify it as an agency.

In assessing the Task Force's functions, the majority makes three fundamental errors. The first goes to the scope of the delegation of authority to the Task Force. The majority asserts that Executive Order No. 12,291 did not authorize "the Task Force, *qua* Task Force, to give directions to the executive branch." Maj. op. at 1293. To the contrary, the Executive Order expressly authorized the Task Force to give effective direction to the OMB,¹³ and through the OMB, to other executive agencies. In so doing, the Task Force directed what is "often called the most powerful agency in the United States Government." J. PARRIS, CONGRESSIONAL RESEARCH SERVICE, THE OFFICE OF MANAGEMENT AND BUDGET: BACKGROUND, RESPONSIBILITIES, RECENT ISSUES i (1978), cited in Olson, *supra*, at 5. The Task Force's authority to direct other executive agencies was only fortified by Executive Order No. 12,498, which made the Task Force's regulatory policy guidelines binding on the agencies. See Exec. Order No. 12,498, § 1(d), reprinted at 5 U.S.C. § 601 note. Curiously, the majority cites this increase in the Task Force's direct authority over the agencies as a sign that the Task Force didn't "direct[] anyone ... to do anything." Maj. op. at 1294. In Executive Order No. 12,498, however, the President didn't just say to the agencies, "do as I say," but instead, "do as the Task Force says." Thus, the President in Executive Order No. 12,498 underscored his delegation to the Task Force of the authority to direct the agencies through the issuance of binding policy guidelines.¹⁴

The majority's description of the scope of the President's delegation to the Task Force comes not from the terms of the

13. The Executive Order by its own terms recognizes the OMB as an executive agency. Exec. Order No. 12,291, § 1(d).

14. Of course, even before the issuance of Executive Order No. 12,498, federal agency compliance with other Task Force and OMB directives under Executive Order No. 12,291 was hardly optional. See Exec. Order No. 12,291 § 2 (agencies "shall" adhere to order's cost-benefit requirements; regulatory action "shall not be undertaken" unless costs outweigh benefits); *id.* § 3(f)(1) (agency "shall" consult with the OMB Director at his request and "shall" refrain from publishing regulatory analyses or notice of rule-making until his review is complete); *id.* § 5(b) (OMB Director, subject to the direction of the Task Force, may "require" agencies to provide additional information and "require" publication of regulatory agendas in a particular form).

Executive Order itself or the Task Force's own account of the authority it exercised (which the majority rejects as "not reliable evidence," Maj. op. at 1294), but instead principally from its own conjecture and surmise. For example, the majority would measure the Task Force's "independent authority" by the extent to which its actions are not dependent on "continuing interaction with the President." Maj. op. at 1293. There is no evidence in the record that the Task Force had *any* continuing interaction with the President, and ample evidence, as discussed above, that it was authorized to act, and indeed acted, on its own. The majority surmises, nonetheless, that the Task Force, which was chaired by the Vice President, did not exercise any significant independent authority in part because "Presidents are ... reluctant to delegate real supervisory authority over the executive branch to the Vice President" who is not subject to the President's removal power.¹⁵ Maj. op. at 1295. The majority relies on this general hypothesis about presidential behavior instead of on the Administration's own statements that Executive Order No. 12,291 did in fact constitute a delegation of the President's supervisory authority. See, e.g., Press Release, Office of the Vice President, Mar. 25, 1981 (Task Force to "take action"); Office of Legal Counsel, Memorandum on Proposed Executive Order Entitled "Federal Regulation" (Jan. 28, 1981), reprinted in 5 O.P.OFF. LEGAL COUNSEL 59, 63 (1981) (President through Executive Order No. 12,291 "authoriz[ed] the Task Force and OMB Director to supervise agency rulemaking"); *id.* at 64 (Task Force

and OMB Director "authorized to require an agency to defer rulemaking"). Only by "screening out" the Executive Order's and the Administration's descriptions of the Task Force's substantial independent authority can the majority conclude that the Task Force was merely "screen[ing] the regulatory issues" for the President's review. Maj. op. at 1297.¹⁶

For example, the majority cavalierly dismisses, Maj. op. at 1294, the President's explicit delegation to the Task Force of the authority either to resolve disputes arising under the order or to determine when a dispute required the President's personal attention. The President's delegation to the Task Force of the authority to keep an issue from even reaching his desk is a clear indication of the Task Force's significant authority to deal independently with regulatory issues. The majority's statement that it "seems implicit" that the Task Force would not on its own resolve disputes without presenting them to the President is directly contradicted by the express language of the Executive Order, and by the Vice President's own assertion that the Task Force presented disputes to the President only "if necessary," see Press Release, Office of the Vice President, Feb. 17, 1981 (the "most sensitive questions" arising under Executive Order No. 12,291 "will be brought in timely fashion to the Presidential Task Force (and, if necessary to the President himself)"; "regulations of truly major consequence are brought before the Presidential Task Force (and the President, if necessary) for final review").¹⁷ The ma-

15. Ironically, after noting the dangers of a presidential delegation to an independent Vice President, the majority is willing to assume that the Vice President, in the exercise of his Task Force leadership, "presumably will not express direction to others in the executive branch unless his view is shared by the President." Maj. op. at 1295. Thus, the majority seems to believe that the court should assume the Vice President's loyalty to the President where it would be "dangerous" for his own President to do so.

16. If the Task Force were merely reviewing or "screening" issues for the President's consideration and action, without more, it would not differ significantly from the Council of Economic Advisers, which we determined was not an agency. See *Rushforth*, 762 F.2d at 1043 (CEA's

review of federal programs was connected to its function of making recommendations to the President); see also *Defense Nuclear Facilities Board*, 917 F.2d at 584 (CEA's duties "simply facilitate[d] providing advice to the President"). The evidence indicates, however, that the Task Force had significantly more independence than does the CEA.

17. In determining how an agency functions, we have previously relied on its *authorized* functions, not merely its *exercised* functions. See *Rushforth*, 762 F.2d at 1041 (distinguishing the CEQ from the CEA by the executive order authority that had been delegated to the former). Thus, we have read *Soucie* to declare that the OST was an agency because "it could take direct

majority further suggests that, should the Task Force itself resolve disputes according to the President's known wishes, it would not be acting "independently." See Maj. op. at 1294-95. By this definition, virtually no loyal government body would be sufficiently "independent" to qualify as an agency. Only renegades or freelancers who ignored or disregarded the President's orders would be seen to "act independently."

The majority's resort to a thirty-year-old treatise about the presidency, Maj. op. at 1296, "maxims" about staff capture, Maj. op. at 1296, and the supposed beliefs of "veterans of bureaucratic wars," Maj. op. at 1296, to determine how the Task Force actually functioned, and its dismissal of the Task Force's Executive Order authority as "beside the point," Maj. op. at 1294, is troubling, to say the least.¹⁸ It discredits the two best and most reliable indications of the Task Force's role: the authority granted by the express terms of the Execu-

tion," *Rushforth*, 762 F.2d at 1041 (emphasis added), not because it *did* take that action. This is certainly the correct reading of *Soucie*, in which we inquired into the functions that had been delegated to the OST, rather than those that it had exercised. See *Soucie*, 448 F.2d at 1075 (examining functions that were "transferred" to or "inherited" by the OST).

Furthermore, it would be unreasonable to require FOIA plaintiffs to "document," see Maj. op. at 1294, a putative agency's actual exercise of each of its delegated functions, since the entity's very denial of its agency status under the FOIA deprives the plaintiffs of the necessary documentation. In cases such as this one, where delegated authority may be exercised informally, there will often be no more than second-hand accounts of its exercise. See, e.g., Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VAJ.NAT.RES.L. 1, 44 n. 210 (1984) (citing *Hearings on OMB Control of OSHA Rulemaking: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 97th Cong., 2d Sess. 4-5, 20-26, 55, 316-19 (1982)) (account of the Task Force's actual exercise of its power to resolve a dispute between OMB and OSHA).

In any event, whether or not the Task Force actually exercised its delegated dispute resolution function should not be dispositive of its agency status. The record amply demonstrates that the Task Force both possessed and exercised sufficient other functions to put it within the realm of FOIA agencies. And its authority

to resolve disputes—whether or not ever exercised—only enhanced its position in the executive branch and reinforced its other express delegations of authority to direct the regulatory efforts of federal agencies.

Of course, this does not mean that an entity's actual exercise of unauthorized functions could not subject it to agency status under the FOIA. To hold otherwise would be to permit irregular organizations or activities to escape disclosure. Instead, the inquiry should extend to functions that were either authorized or exercised, not just those that were authorized and exercised.

18. Disregarding the record evidence of the Task Force's active involvement in regulatory reform, the majority paints a picture of a "virtually powerless" group that was not an "independent actor" in the executive branch. Maj. op. at 1296. The real power, they suggest, resided not with this Cabinet-level Task Force chaired by the Vice President, but with the OMB. Frankly, this conjures up visions of the OMB as a looming, booming, electronic Wizard of Oz, exhorting us to "pay no attention to that man behind the curtain." Where, as here, the "man behind the curtain" is undertaking functions that are legally significant to our inquiry, we cannot and must not disregard them.

19. I see little point in pursuing an inquiry into the scope of or the congressional intent behind the "immediate personal staff" exemption, as this case calls on us to construe only the "sole function" exemption.

The Conference Report, of course, said that the definition of "agency" to include establishments in the Executive Office of the President was to be interpreted to exclude "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." CONF.REP. at 13 (emphasis added). We and the Supreme Court have interpreted "immediate personal staff" to refer to the staff of the Office of the President, also known as the White House Office, one of the fourteen units within the Executive Office of the President,²⁰ and accordingly have granted FOIA exemptions to persons or offices within the White House Office without applying the "sole function" test. See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156, 100 S.Ct. 960, 971, 63 L.Ed.2d 267 (1980) ("The FOIA does render the 'Executive Office of the President' an agency subject to the Act. 5 U.S.C. § 552(e). The legislative history is unambiguous, however, in explaining that the 'Executive Office' does not include the Office of the President."); *National Security Archive v. Archivist of the United States*, 909 F.2d 541, 545 (D.C.Cir.1990) (noting that the Supreme Court "ha[d] made clear that the Office of the President is not an 'agency' for purposes of the FOIA" and that the Office of Legal Counsel was part of that Office) (citing *Kissinger*, *supra*). The majority correctly "assumes" that the President's "immediate personal staff" encompasses "at least those approximately 400 individuals employed in the White House Office," Maj. op. at 1293 n. 3 (emphasis added), but then attempts to extend its "operational proximity" concept beyond the confines of the White House Office and to incorporate it into the "sole function" test.

This is not only an illogical reading of the two tests established in the legislative his-

tory, it is also at odds with our "sole function" precedent. We made clear in *Ryan*, 617 F.2d at 789, that regardless of an entity's close proximity to or continuing interaction with a President, it is a FOIA agency unless its *sole function* is to advise and assist the President. Thus, to the extent that we focus on how closely the entity works with the President, the "sole function" test, and not "operational proximity," is the proper inquiry.

Furthermore, by the majority's broad definition of "proximity," virtually every person or entity within the Executive Office of the President would be excluded from the FOIA, contrary to the statute's express inclusion of the Executive Office of the President in its definition of agency. For example, under the majority's "operational proximity" test, the Director of the OMB, determined by the majority to be the cabinet officer "functionally . . . closest to the President," Maj. op. at 1294, would, on the basis of that proximity, be a shoo-in for exclusion from the FOIA, but no one disputes that the OMB, along with its director, is subject to the FOIA.

The OMB's recognized operational proximity to the President, see Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN.L.REV. 181, 185 (1986) (OMB "acts in some respects as the President's personal staff"); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV.L.REV. 1075, 1083 (1986) (OMB's role "is to serve as the eyes and ears of the president and to advance" the President's policies), does not negate the fact that the OMB is an establishment within the Executive Office of the President whose functions go beyond advising and assisting the President. When the statute expressly includes establishments within the Executive Office of the Presi-

20. See Reorganization Plan No. 1 of 1977, 5 U.S.C.App. 1. The White House Office, which has roughly 400 employees, "concentrates on close personal support including policy and political advice and administrative and operational services." *Id.* (Message of the President). Other units within the Executive Office of the President, which has over 1800 employees, include the Office of Management and Budget, the National Security Council, the Council of Eco-

omic Advisers, the Office of Policy Development and the Office of the Special Representative for Trade Negotiations. See Charles R. Babcock, *Hard to Pin Down What Taxpayers Give at Top Office*, WASH. POST, Oct. 19, 1992, at A19; H.R.REP. No. 618, 102d Cong., 2d Sess. (1992) (accompanying the bill appropriating funds for the Executive Office of the President); H.R.REP. No. 919, 102 Cong., 2d Sess. (1992) (same).

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dent, while the accompanying report lan-
guage excludes only "immediate personal
staff" and those whose "sole function" is
to advise and assist the President, I have to
read the report language to qualify, not
obliterate, the statutory directive.

Finally, on the question of proximity to
the President, it is important to note that
the plaintiff does not seek records of the
President, of the Vice President, nor yet of
the Office of the Vice President.²¹ Instead,
she seeks the records of a separate func-
tional entity operating partly out of the
Office of the Vice President and partly out
of the Office of Management and Budget.

The majority's third fundamental error in
assessing the Task Force's agency status is

21. The plaintiff requested not records of the
Vice President "in his capacity as adviser to the
President," but those "that were received or gen-
erated by the Task Force which he chairs." The
district court below, having no evidence on
whether the Office of the Vice President kept
Task Force documents, withheld judgment as to
whether the defendants would have to search
there, too. Thus, the propriety of searching
records of the Office of the Vice President is not
before us.

22. Nor would the basic inquiry under *Soucie* be
different if the Task Force's members included
the entire cabinet. It would be unprecedented
for a President to turn his cabinet loose to take
substantial independent actions on its own and
without his ongoing involvement and direction;
I know of no instance of the President's delegat-
ing to the cabinet "qua cabinet" substantial inde-
pendent authority. The President's cabinet tra-
ditionally has existed solely to advise and assist
the President in the exercise of his own retained
authority. The majority's own anecdote, in
which President Lincoln participates in and
overrules the decision of his cabinet, see Maj.
op. at 1297 n. 9, underscores that the President
had not delegated any of his authority to the
cabinet. Nonetheless, should a President ever
exercise his power to delegate substantial inde-
pendent authority to the cabinet (or to an entity
that included all of the cabinet members), there
would be no barrier to our applying the *Soucie*
"sole function" test to determine if the cabinet's
(or this entity's) new and enlarged powers quali-
fied it as a FOIA agency.

I do recognize that, in applying the *Soucie* test
where the delegation of authority is informal,
implicit or otherwise ambiguous, the structure
employed might provide some indication of
whether the President had, in fact, delegated
substantial independent authority. See Maj. op.
at 1297. In this case, however, the Task Force's
substantial independent authority is expressly

to confuse its *composition* or its *structure*
with its *functions*. It finds inordinate sig-
nificance in the fact that the members of
the Task Force also served in other capaci-
ties as agency heads and members of the
President's cabinet. That the President se-
lected cabinet members to serve on the
Task Force is not dispositive of its agency
status²² for a very simple reason: The
relevant inquiry is whether there is a sepa-
rate establishment within the Executive Of-
fice of the President with substantial au-
thority to act independently, and not the
status of the individual members who make
up the entity.²³

Although the majority professes to sub-
scribe to the view that "form follows func-

and unambiguously delegated in Executive Or-
der No. 12,291 and amply confirmed through
the Administration's own statements. It cannot
be negated merely by reference to the Task
Force's structure or composition.

23. Although this *Soucie* "sole function" test is
the proper test for establishments elsewhere in
the Executive Office of the President, we have
not applied it to persons or offices within the
Office of the President, or White House Office.
See *Kissinger*, 445 U.S. at 156, 100 S.Ct. at 971;
National Security Archive, 909 F.2d at 545; see
also *Ryan*, 617 F.2d at 789 (members of the
presidential staff are exempt from FOIA). I
recognize, therefore, that we would face a dif-
ferent question were we to consider the FOIA
status of an entity comprised entirely of White
House personnel, who have been exempt from
FOIA in their traditional roles as the President's
personal staff, but who now had stepped outside
their traditional staff roles and were acting in-
stead as principals to whom the President had
delegated substantial independent authority.
Since that question is not before this court, I do
not address it. Since I do not address the ques-
tion, I neither "dispute," see Maj. op. at 1297,
nor endorse any conclusion as to its answer.

It does bear noting, however, that my recogni-
tion that an entity wholly within the White
House Office presents a different case than the
one before us is not "governed by fortuitous
history," as the majority charges, Maj. op. at
1297, but by *Kissinger* and *National Security*
Archive, which in turn were governed by the
legislative history of the FOIA. My opinion also
leaves open, as the majority correctly notes,
Maj. op. at 1297, the question of the agency
status of a hypothetical entity "composed par-
tially of senior White House staff and cabinet
officers." Maj. op. at 1297. Since that question,
like the one involving White House staff alone,
is not before the court, I do not reach it, either.

tion," Maj. op. at 1297, its reasoning is closer to "form dictates function." That is, it is willing to disregard a wealth of record evidence about the Task Force's actual and authorized independent functions because the structure of the Task Force—as a "partial cabinet group" with the Vice President at the helm—raises questions in the majority's eyes as to the Task Force's "real" independence. Maj. op. at 1295.²⁴

The majority's focus on the composition of the Task Force is particularly puzzling in light of the majority's own identification of the three factors relevant under *Soucie* to determine whether entities like the Task Force are agencies: operational proximity, a self-contained structure (including an independent staff), and the scope and nature of the delegation from the President. Maj. op. at 1293, 1296. Although I disagree with the majority about the first two—which are entirely creatures of the majority's own making—the scope and nature of the President's delegation of authority is certainly the primary relevant inquiry. The majority, however, departs from its own inquiry into *what* the President delegated, that is, the degree of independent authority he gave the entity, and asks instead *to whom* he delegated this authority, that is, what other roles the members of the entity happen to play in the Administration. This inquiry is clearly inconsistent with the functional inquiry this court has applied in FOIA cases for twenty years.

III. CONCLUSION

This case does not question the President's authority to supervise the oversight

Finally, in regard to White House staff, I question the majority's characterization of the Task Force as the "functional equivalent[] of assistants to the President," or senior White House staff. Maj. op. at 1294. The White House staff presumably advises and assists the President in the conduct of all his responsibilities, and without incurring FOIA responsibilities. There are two key distinctions, however. First, White House staff members presumably assist *the President* in his review of regulations, while the Task Force independently exercised the President's delegated authority to review those regulations. Second, as discussed above,

of federal regulations. The President's authority to "supervise and guide" subordinate executive officers in order to "secure th[e] unitary and uniform execution of the laws" is well-established. *Myers v. United States*, 272 U.S. 52, 135, 47 S.Ct. 21, 31, 71 L.Ed. 160 (1926). More specifically, we have acknowledged the President's need and authority to coordinate federal regulatory policy:

The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House staff advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under the Constitution, after all, is not shared—it rests exclusively with the President.

Sierra Club v. Costle, 657 F.2d 298, 405 (1981); see also *In re Permanent Surface Mining Reg. Litigation*, 13 ENV'T REP. CAS. (BNA) 1586, 1597 (D.D.C.1979) (consultation between the President's advisers and other entities in the executive branch permissible). To exercise that power, the President and his close advisers must be able to communicate freely, and, in some cases, without public scrutiny. See *Sierra Club*, 657 F.2d at 406 ("Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive."). This case, however, unlike *Sierra Club*, does not involve face-to-face strategy sessions be-

even if the Task Force were functioning in a manner equivalent to White House staff, the relevant FOIA inquiry differs for White House staff and for other establishments within the Executive Office of the President.

24. Even if, as the majority urges, an entity's structure were to be given this overwhelming significance, I fail to see how the structure of the Task Force, which was headed by the "only senior official in the executive branch totally protected from the President's removal power," Maj. op. at 1295, would belie the executive order's express delegation of substantial independent authority.

tween the President and his policymakers. Rather, it involves a separate functional establishment within the Executive Office of the President to which the President delegated some of his executive powers. We have a clear expression of congressional intent that the records of such establishments are generally subject to the FOIA. Cf. *Sierra Club*, 657 F.2d at 407 (determining lawfulness of undocketed meeting with the President "in the absence of any further Congressional requirements" on docking). Because the Presidential Task Force on Regulatory Relief does not fall within the *Soucie* exception to FOIA coverage, it must, consistent with the directives and exemptions of the FOIA, make its records available to those who request them.

Nor does this case question the President's authority to establish any kind of high-level structure—or no structure—within the Executive Office of the President to direct the regulatory reform effort. The President can choose to accomplish his regulatory objectives through his own actions, through an establishment created pursuant to his executive order authority, through an entity created through a congressionally-approved reorganization plan, or simply through rump sessions with his cabinet members. But the President must live with the consequences of his choice, one of which may be the requirements of the FOIA. We recognized this indisputable fact in *Ryan v. Department of Justice*, 617 F.2d 781, 789 (D.C. Cir. 1980): "In many different areas the President has a choice between using his staff to perform a func-

tion and using an agency to perform it. While not always substantively significant, these choices are often unavoidably significant for FOIA purposes, because the Act defines agencies as subject to disclosure and presidential staff as exempt."²⁵ The majority, nonetheless, chafes at these consequences, see Maj. op. at 1297, apparently concerned that the cloak of presidential privilege does not and cannot extend as far as the President's delegated authority. It is one thing, however, to say that the President's conversations with his closest advisers, here the Task Force members, are confidential. It is quite another to say that when the Task Force goes forth to exercise substantial independent authority, the President's consultative privilege extends not only to the Task Force in its communications to those whose work they direct, such as the Administrator of the OMB's OIRA, who served as the Task Force's Executive Director, but even to communications between the Task Force and representatives of regulated industries. I am perplexed as to how the majority could label such an approach "forthright." Maj. op. at 1297. The most the President can be said to have "openly disclose[d]," Maj. op. at 1297, is a review mechanism by which the substance of and the outside participants in the review can remain cloaked in secrecy.

Instead of addressing the Task Force's authority to direct the President's regulatory reform efforts, this case questions its authority to shroud its actions in absolute secrecy.²⁶ Similarly tasked entities within

25. My colleagues find it "unclear just what factors" would lead me to distinguish this arrangement from similar arrangements that would not require FOIA disclosure. Maj. op. at 1297. I had hoped that my opinion made clear that the factors are, first, those that determine whether the "arrangement" creates an agency under FOIA; and second, if there is an agency, those factors that determine whether any particular communications with the agency can be kept confidential under a FOIA exception.

26. Many commentators have decried the impenetrable veil of secrecy surrounding presidential intervention in rulemaking. See, e.g., Kenneth C. Davis, *Presidential Control of Rulemaking*, 56 *TUL. L. REV.* 849, 850-51 (1982) (the "harmful element" of secrecy in White House intervention

under Executive Order No. 12,291 results in unfair procedure and impaired accountability); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 *HARV. L. REV.* 1059, 1064 (1986) ("the entire process [of review under Executive Order No. 12,291] operates in an atmosphere of secrecy and insulation from public debate that makes a mockery of the system of open participation embodied in the Administrative Procedure Act (APA)"); Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 *VAJ. NAT. RES. L.* 1, 14 (1984) (OMB's "propensity for secrecy . . . tends to undercut the value of OMB review"); Steven T. Kargman, *Note, OMB Intervention in Agency Rulemaking: The Case for Broadened Record Review*, 95 *YALE L.J.* 1789,

the Executive Office of the President, most notably the OMB, operate without such a cloak. Shortly after the enactment of Executive Order No. 12,291, the Office of Legal Counsel advised the OMB that certain substantive communications from the OMB to rulemaking agencies or from outside parties to the OMB pursuant to the order should be disclosed in the administrative record. (The OLC exempted substantive communications from the OMB that formed part of the agency's deliberative process.) Office of Legal Counsel, Contacts Between the Office of Management and Budget and Executive Branch Agencies Under Executive Order No. 12,291 (Apr. 24, 1981), *reprinted in* 5 OP. OFF. LEGAL COUNSEL 107, 110-12 (1981). The OMB itself expanded on this disclosure policy in 1986 under a directive issued by Wendy Gramm, then the Administrator of the OMB's Office of Regulatory Affairs. OMB, Memorandum for the Heads of Departments and Agencies Subject to Executive Orders 12,291 and 12,498 (June 13, 1986), *reprinted in* OMB, REGULATORY PROGRAMS OF THE UNITED STATES GOVERNMENT, APRIL 1, 1988—MARCH 31, 1989 (1988), app. III, at 529-31. Even supporters of a strong presidential role in supervising the regulatory process stress the importance of public disclosure of most OMB communications under Executive Order Nos. 12,291 and 12,498. *See, e.g.,* Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*,

1793 (1986) (Undisclosed OMB intervention results in "two different 'records': one reflecting what happened during the agency's public rulemaking proceedings, and the other reflecting what happened between the agency and OMB."); Ann Rosenfield, *Note, Presidential Policy Management of Agency Rules Under Reagan Order 12,498*, 38 ADMIN.L.REV. 63, 93 (1986) (because OMB regulatory review takes place "wholly in secret, it is hard to see how review of rulemaking has led to [the promised advantages of] the appearance of open government and increased agency accountability to the public"); *Note, Executive Orders 12,291 and 12,498: Usurpation of Legislative Power or Blueprint for Legislative Reform?*, 54 GEO.WASH.L.REV. 512, 530 (1986) ("secret presentations" to OMB "allow[] OMB to circumvent two related tenets of the APA: the requirement for giving interested parties the opportunity to submit materials into the rulemaking record, and the ban on ex parte commu-

38 ADMIN.L.REV. 181, 188-90, 192 (1986). In fact, one Administrator of OIRA testified that "the very purpose of [Executive Order 12,291] is to make regulatory decisions more transparent and accessible." Statement of Christopher DeMuth, OIRA Administrator, Before the Subcommittee on Administrative Law & Governmental Relations of the House Judiciary Comm. (July 28, 1983), *reprinted in Regulatory Reform Act: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 895, 922 (1983).

Given the *Realpolitik* of the workings of the Executive Office of the President, it is candidly hard to see how disclosure of the same genre of communications by and to the Task Force, which worked hand-in-glove with the OMB, sharing its staff, records, and responsibilities under Executive Order No. 12,291, would pose any significant potential for disruption of the President's valid oversight functions. In fact, it would seem that the objectives of the OIRA disclosure procedures—and FOIA itself—would be thwarted if comments sent to the OMB or the OIRA are subject to public access, while similar comments on the very same matter directed to the Task Force are never revealed.²⁷

The majority's approach thus creates two tracks: The Task Force, which is charged with the "overall direction" of the President's regulatory reform program, is shielded from disclosure laws, while the

communications") (citations omitted). *See also* H.REP. No. 919, 102d Cong., 2d Sess. 49 (1992) (expressing conferees' concerns about the lack of a public record of the regulatory review conducted by the Council of Competitiveness "or such other similar reviewing agency established within the Executive Office of the President").

27. The 1986 OIRA disclosure procedures themselves were a response to congressional pressure to open up the OMB's processes, under a threat of defunding the OIRA. *See Oversight of the Office of Management and Budget Regulatory Review and Planning Process: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 99th Cong., 2d Sess. 56-58, 97-98 (1986); *see also* Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO.WASH.L.REV. 533, 582 (1989).

OMB, which operates under the Task Force's direction, is not. This clearly maps out the formula for getting around disclosure laws in the Executive Office of the President: First, put a small unit of decisionmakers atop a larger establishment of persons who carry out those decisions, and insist that because only the implementers have a staff, only they form the "agency." Second, when necessary, maintain that the "significant authority" resides only with the implementers, *see* Maj. op. at 1294, and that the "whole" of the decisionmaking unit is less than the sum of its parts. *See* Maj. op. at 1298. That is, if you sever the "brains" of an organization from the "body," the people who call the shots are never in the public's sights.²⁸

Subjecting the Task Force, as well as the OMB, to the FOIA would not compromise either the President's legitimate oversight authority or his undisputed need for confidential policy deliberations, as the FOIA's exemption 5 expressly provides for a deliberative process privilege. In fact, the Administration invoked this privilege to shield certain documents requested by the plaintiff in this case. To the extent that the President or his close advisers need to protect sensitive policy discussions, they can more appropriately do so through the FOIA exemption, which protects particular records from disclosure, rather than through the FOIA agency determination, which bars *all* records from disclosure. *See Pacific Legal Foundation*, 636 F.2d at 1265 (where concern was protecting confidential advice to the President, court was unwilling to close all meetings, rather than those meetings in which such confidential advice was to be deliberated).

It is not enough to say, as the majority does, that the Task Force or its Chair is a "hair's breadth" or a "heartbeat" away from the President. This court has previously declined to exempt the President's closest advisers, his Cabinet members, from the FOIA: "Many Cabinet officers, like the Attorney General or the Office of

Legal Counsel under him, act as advisors to the President for many of their important functions; yet they are not members of the presidential staff or exclusively presidential advisors, and are thus not exempt from FOIA requirements." *Ryan v. Department of Justice*, 617 F.2d 781, 789 (D.C. Cir. 1980). *See also Soucie*, 448 F.2d at 1074 n. 22 (director of OST expected to replace the President's Special Assistant for Science and Technology in the capacity of personal adviser to the President on scientific matters). Nor is it enough to say that the Task Force operated at the highest levels of the White House. *Soucie* itself involved an agency created in the Executive Office of the President to provide "higher level" coordination of the nation's science policies. *Soucie*, 448 F.2d at 1074. Finally, it is not enough to say that the Task Force created the records at issue in its role of advising the President. The report at issue in *Soucie* was "requested by the President precisely for advisory purposes," *Ryan*, 617 F.2d at 788, as was the information the Attorney General had gathered in *Ryan*. *Id.*

Instead, the proper inquiry, as the district court noted, must center on the "functions and responsibilities of the Task Force, not the title of its Chairman or his other office," and on the evidence that the Task Force was not formed simply to advise and assist the President, but rather had "substantial, independent, directorial authority." The majority recognizes, as it must, that the district court "applied the correct governing law...." Maj. op. at 1291. As the extensive prior discussion demonstrates, and as the district court found as well, such an inquiry leads ineluctably to a recognition that the Task Force is an "agency" under the FOIA test. Accordingly, I would affirm the district court's judgment, and dissent from my colleagues' contrary conclusion.



hollow gesture if the key records both influencing and documenting the actions taken by the OMB are funnelled only through the Task Force.

28. The majority thus misapprehends what it terms my concern about exposing OMB directives. *See* Maj. op. at 1294. I understand full well that the OMB is subject to disclosure, but I recognize that such disclosure is indeed a