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NEPA, which would otherwise limit FERC action, have already been removed from our consideration. In order to accept jurisdiction and step in to overturn this action of the Commission, we would have to ignore the ANGTA in precisely the type of situation where it most compellingly applies. This would produce exactly the result that Congress tried to prevent.

For instance, to require a separate EIS for the pipeline pressure issue would delay eventual construction by months and perhaps years. The interrelationship between issues, which is the foundation of complainants' argument, could make the delay even longer. Decisions on various design features of the pipeline must be made sequentially; e. g., final design of the pipeline must await approval of operating pressure, and financing arrangements are influenced by design specifics and their cost. Thus a delay in deciding on pipeline pressure can have ripple effects that upset planning certainty for financing purposes.²⁹

Such concerns underlie the Commission's decision to proceed with separate issues and Congress's decision to shield the decision-making process from judicial review when constitutionally permissible. Even with the ANGTA provision to expedite pipeline construction, it has already taken the Commission two years since the President's decision just to approve a pressure level for the pipeline. Final certificates and commencement of construction are still further in the future. In this light, if there is any shortcoming in the Commission proceedings, it is certainly not in a lack of deliberation or in denial of time and opportunity for interested parties to express their views.

Of course the questions before us in this case are quite narrow. But these broader considerations of congressional intent to expedite do drive home the importance of taking ANGTA's judicial review provisions seriously. We may not strain for a statutory interpretation that will circumvent con-

29. An increase in the approved pressure level can cause even greater delay. The Canadian National Energy Board rejected pressure levels above 1260 psig partly because the engineering

gressional intent by allowing delay to result from a complaint that goes only to the reasonableness and record support of FERC decisions. In this case complainants have not pointed to any Commission action or omission of the type Congress intended us to review. The complaint is therefore

Dismissed.



Tom W. RYAN, Jr., Missouri Public Interest Research Group, Appellants,

v.

DEPARTMENT OF JUSTICE.

Charles R. HALPERN, Judicial Selection Project, Dorothy J. Samuels, Committee for Public Justice, Appellants,

v.

DEPARTMENT OF JUSTICE.

* Nos. 79-1777, 79-1778.

United States Court of Appeals,
District of Columbia Circuit.

Argued 22 Oct. 1979.

Decided 7 Jan. 1980.

As Amended on Denial of Rehearing
Feb. 25, 1980.

Suit was instituted to obtain disclosure of documents under the Freedom of Information Act. The United States District Court for the District of Columbia, Parker, J., 474 F.Supp. 735, entered order granting summary judgment to defendant, and plaintiffs appealed. The Court of Appeals, Wilkey, Circuit Judge, held that: (1) documents in form of responses made by various senators to a questionnaire sent by the At-

studies and burst testing necessary to ensure the reliability of such new technology could delay the project by up to two years. See Joint Appendix at 87.

torney General inquiring about procedures employed by state nominating commissions for selecting and recommending persons to the President for appointment to new federal district court judgeships were "agency records" for purposes of the Freedom of Information Act where, aside from fact that documents were within exclusive control of the Attorney General, there was no basis for distinguishing between the Attorney General and the Department of Justice in such a way that the former was not an "agency" because he functioned in a purely advisory capacity to the President, and (2) documents were exempt from disclosure under Act as "inter-agency or intra-agency memorandums or letters" except for factual segments which did not reveal deliberative process and were not intertwined with policy-making process.

Vacated and remanded.

1. Records ⇐53

Standard for determining whether a document is an agency record, namely, whether under all facts of case document has passed from control of Congress and become property subject to free disposition of agency with which document resides, requires court to look at circumstances under which document was generated, whether it was generated by a nonagency, and how, and why, and to look at nonagency's intent in transferring document to agency. 5 U.S.C.A. § 552.

2. Records ⇐54

Documents in form of responses made by various senators to a questionnaire sent by the Attorney General inquiring about procedures employed by state nominating commissions for selecting and recommending persons to the President for appointment to new federal district court judgeships were "agency records" for purposes of the Freedom of Information Act where, aside from fact that documents were within exclusive control of the Attorney General, there was no basis for distinguishing between the Attorney General and the Department of Justice in such a way that the

former was not an "agency" because he functioned in a purely advisory capacity to the President. 5 U.S.C.A. § 552.

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

3. Federal Courts ⇐617

Though Court of Appeals did not normally give consideration to issues that were neither raised nor decided below, where issue with respect to applicability of an exemption under the Freedom of Information Act was raised and briefed in summary judgment motions before the district court, there was no doubt as to proper resolution of case, and delay by extensive further proceedings in district court could render plaintiffs' efforts futile, it was fully appropriate for Court of Appeals to proceed to exemption issue. 5 U.S.C.A. § 552(b)(5).

4. Records ⇐57

Exemption accorded in Freedom of Information Act to "inter-agency or intra-agency memorandums or letters" which would not be available by law to a party other than an agency in litigation with agency was created to protect deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers without fear of publicity. 5 U.S.C.A. § 552(b)(5).

5. Records ⇐55

A narrow interpretation must be given to an exemption in Freedom of Information Act. 5 U.S.C.A. § 552(b)(5).

6. Records ⇐57

In enacting statute affording an exemption to "inter-agency or intra-agency memorandums or letters" which would not be available by law to a party other than an agency in litigation with agency, Congress apparently did not intend "inter-agency" and "intra-agency" to be rigidly exclusive terms, but rather, to include any agency document that is part of deliberative process. 5 U.S.C.A. § 552(b)(5).

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

7. Records ⇐57

When an agency record is submitted by outside consultants as part of deliberative process, and it was solicited by agency, it is entirely reasonable to deem resulting document to be an "intra-agency" memorandum for purposes of determining applicability of statutory exemption. 5 U.S.C.A. § 552(b)(5).

8. Records ⇐57

Statute exempting "inter-agency or intra-agency memorandums or letters" which would not be available by law to a party other than an agency in litigation with agency protects only those memoranda which would not normally be discoverable in civil litigation against an agency. 5 U.S.C.A. § 552(b)(5).

9. Records ⇐54

Standard of what is discoverable in civil litigation against any agency, as interpreted by the Supreme Court, indicates that purely factual material which is severable from the policy advice contained in a document, and which would not compromise the confidential remainder of the document, must be disclosed. 5 U.S.C.A. § 552(b)(5).

10. Records ⇐53

Factual segments are protected from disclosure as not being purely factual if manner of selecting or presenting those facts would reveal deliberate process or if facts are "inextricably intertwined" with policy-making process. 5 U.S.C.A. § 552(b)(5).

11. Records ⇐57

Provision for "inter-agency or intra-agency memorandums or letters" which would not be available by law to a party other than an agency in litigation with agency does not apply to final actions of agencies, in sense of statements of policy and final opinions which have force of law or which explain actions an agency has already taken, but applies only to communications before adoption of an agency policy; communications that promulgate or implement an established policy are not privileged. 5 U.S.C.A. § 552(b)(5).

12. Records ⇐54

That an individual senator may have taken final action by deciding which individuals he would recommend to the President for appointment to the new federal district court judgeships was not material to whether the documents in form of responses to a questionnaire from the Attorney General constituted the final opinion or action of an agency. 5 U.S.C.A. § 552(b)(5).

13. Records ⇐54

Finality could not justify disclosure of documents in form of responses made by various senators to a questionnaire from the Attorney General respecting procedures adopted by state nominating commissions for selecting and recommending persons to the President for appointment to federal district court judgeships. 5 U.S.C.A. § 552(b)(5).

14. Records ⇐57

Responses by various senators to a questionnaire from the Attorney General respecting procedures adopted by state nominating commissions for selecting and recommending persons to the President for appointment to new federal district court judgeships were exempt from disclosure under Freedom of Information Act as "inter-agency or intra-agency memorandums or letters" except for factual segments which did not reveal deliberative process and were not intertwined with policy-making process. 5 U.S.C.A. § 552(b)(6).

15. Federal Courts ⇐612

Government was precluded from raising issue whether questioned documents were exempt from disclosure as "personnel and medical files and similar files" where government failed to raise that issue in original proceeding before district court. 5 U.S.C.A. § 552(b)(6).

16. Records ⇐66

Once the district court orders the government to disclose all purely factual material in the questioned documents and to identify those advisory segments protected by the statutory exemption, it may then be necessary for the district court to inspect

documents in camera to decide if individual segments properly fall within the exemption. 5 U.S.C.A. § 552(b)(6).

Appeal from the United States District Court for the District of Columbia. (D.C. Civil Nos. 79-1042 & 79-1043)

Girardeau A. Spann, Washington, D. C., with whom Alan B. Morrison and David C. Vladeck, Washington, D. C., were on brief, for appellants.

Joseph B. Scott, Atty., Dept. of Justice, Washington, D. C., with whom Carl S. Rauh, U. S. Atty. and Leonard Schaitman, Atty., Dept. of Justice, Washington, D. C., were on brief, for appellee.

Before McGOWAN and WILKEY, Circuit Judges, and GESELL*, United States District Judge for the District of Columbia.

Opinion for the Court filed by WILKEY, Circuit Judge.

WILKEY, Circuit Judge:

This case is an appeal from a district court order granting summary judgment to the Government in a Freedom of Information Act (FOIA) suit, on grounds that the requested documents were not "agency records" for FOIA purposes. We find on the basis of the undisputed facts that the documents are agency records; we therefore reverse with instructions to enter summary judgment for plaintiffs on this issue. We also consider the applicability of FOIA Exemption 5 to these documents, and remand for the district court to determine the extent to which that exemption bars disclosure.

I. FACTS

In order to guide the selection of new federal district court judges, President Carter issued "merit selection" guidelines in Executive Order 12097.¹ This Order charges the Attorney General with the duty to evaluate potential nominees, receive rec-

ommendations from others, evaluate selection processes, and recommend persons to the President for appointment. Included in this task is the obligation to consider whether an affirmative effort has been made to identify qualified candidates, including women and members of minority groups. In November 1978 the Attorney General sent to all Senators a questionnaire inquiring about their procedures for selecting and recommending potential nominees. By June 1979 the Attorney General had received more than fifty responses.

In early 1979 plaintiffs sought FOIA disclosure of questionnaire responses from the Department of Justice, as part of an effort to monitor federal judicial appointments and their inclusion of women, racial minorities, and "public interest" lawyers. The Department of Justice denied disclosure, claiming that the responses were not agency records within the scope of the FOIA and were exempt under FOIA Exemption 5 as pre-decisional advisory material.

Plaintiffs filed suit in United States District Court to compel disclosure. On 11 July 1979 the district court, ruling on cross-motions for summary judgment, granted judgment for the Government. The district court held the documents not to be agency records, and thus found it unnecessary to rule on the Exemption 5 issue, which had been briefed and argued. The court also conducted *in camera* inspection of five randomly selected questionnaire responses. Plaintiffs appealed to this court, and we have taken expedited action to resolve the case before the President's completion of the judicial selection process renders plaintiffs' action futile.

II. THE AGENCY RECORDS ISSUE

In several prior FOIA cases courts have been called upon to determine whether requested documents are "agency records." This issue commonly arises when the requested documents are in the possession of

* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

1. 3 C.F.R. § 254 (1978).

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an agency but were created by an entity not defined as an "agency" under the FOIA: Congress, federal courts, outside consultants not in corporations controlled by the government,² or the President's immediate personal staff and units in the Executive Office whose sole function is to advise and assist the President.³ For such cases the FOIA does not specify a test for determining what is an agency record.⁴

A. Standard as to What Is an Agency Record

The straightforward question of who has physical possession of documents has not sufficed, in cases before this court, to define whether documents are agency records.⁵ A simple possession standard would permit agencies to insulate their activities from FOIA disclosure by farming out operations to outside contractors. It would also create a severe problem whenever confidential congressional documents or materials from the President's immediate staff come into the possession of an agency, as may occur when Congress oversees and supervises an agency. A standard that automatically made such records subject to FOIA disclosure as soon as they are transferred to agency hands would seriously impair Congress's oversight role.⁶

[1] Recognizing these difficulties, this court has adopted a standard more consistent with the intent and general framework of the FOIA disclosure system. Our opinion in *Goland v. Central Intelligence Agency*⁷ examined this issue in the context of a

FOIA request for a congressional document that was in the hands of an agency. We adopted a standard of control rather than possession: "whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides."⁸ Under the *Goland* standard, the court looks at the circumstances under which the document was generated—whether it was generated by a non-agency, and how, and why—and at the non-agency's intent in transferring the document to the agency. In *Goland*, Congress's actions generating the document during an executive session of a committee, marking the document "Secret," and transferring it to the CIA solely for internal reference purposes, showed that Congress intended to refrain effective control while the document was in agency hands.⁹

Goland follows the structure and intent of the FOIA by determining what entity controls the document and deciding whether that entity is within the category of "agency" defined by the Act. An earlier decision of this court pursued a similar approach, inquiring whether the generation of a document by consultants of the Office of Science and Technology brought it within control of that Office so as to make it a "record," and whether that Office was an "agency" or rather a part of the President's staff.¹⁰ In a more recent case we have again examined whether an agency controlled the documents of an outside entity, in the sense of being involved in the "core planning or execution" of a program, such

2. See 5 U.S.C. § 552(e) (1976).

3. See S.Rep.No.1200, 93d Cong., 2d Sess. 15 (1974), U.S.Code Cong. & Admin.News 1974, p. 6267.

4. 44 U.S.C. § 3301 is the only statutory definition of "record," and it is not applicable to the FOIA. See *Goland v. Central Intelligence Agency*, 607 F.2d 339, 345 n.30 (D.C. Cir. 1978).

5. The Ninth Circuit has also rejected the possession standard. See *Warth v. Department of Justice*, 595 F.2d 521, 522-23 & n.7 (9th Cir. 1979).

6. See *Goland v. Central Intelligence Agency*, 607 F.2d at 346.

7. 607 F.2d 339 (D.C. Cir. 1978).

8. *Id.* at 346-47. See also *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968).

9. See *Goland v. Central Intelligence Agency*, 607 F.2d at 347.

10. See *Soucie v. David*, 145 U.S.App.D.C. 144, 150-53, 448 F.2d 1067, 1073-1076 (D.C. Cir. 1971).

as to make the documents agency records within the FOIA.¹¹

B. Control of the Records in this Case

In the present case, although the requested documents were in the possession of the Department of Justice, the district court concluded that the history and purpose of their generation showed them not to be agency records under the FOIA. The court found that the documents did not belong to and were not within the control of either the Attorney General who possessed them, the Senators who participated in their generation, the state nominating commissions about which they reported, or the President for whose ultimate benefit they were created. Rather, the court found, the documents were the "collective product and property" of all of these entities, none of which were agencies for FOIA purposes. The court concluded that the Attorney General was not an "agency" in this case because he was acting as "counsel and advisor to the President," in furtherance of the President's power to nominate federal judges.¹²

[2] We find, on the contrary, that the requested documents are in the control of the Attorney General and the Department of Justice which he heads. The Department possesses the documents; and while this factor is not conclusive on the crucial issue of control, it is certainly relevant. Unless there is evidence of control by some other entity, we must conclude that the Attorney General and his Department control these documents. We find no such evidence. Senators generated these materials at the specific request of the Attorney General, and they gave no indication that they wished to limit his use of them. There are no express or reasonably implied senatorial instructions concerning the Attorney General's disposition of these documents. The Senators gave no indication that their responses were to be treated as secret or

sensitive, and nothing in the Attorney General's questionnaire or other circumstances indicated that Senators would have the prerogative to maintain secrecy. On this record we cannot find control by the Senators. Nor have the nominating commissions exercised any degree of control over the documents.

Although the documents are for the ultimate benefit of the President in a nominating role that is exclusively his, we find that the Attorney General was acting as an independently controlling entity, and not a mere conduit. The questionnaires solicited responses from Senators at the request of the Attorney General, not the President. In his cover letter enclosed with the questionnaires, the Attorney General stated the independent role he was to play in this process: he was to consider certain factors before making his own recommendations to the President as to judicial nominees. This is an independent exercise of judgment that the Attorney General has traditionally taken in the judicial nomination process. The logical deduction from the facts is that the Attorney General was to control the questionnaire responses for the purpose of carrying out his independent duties. We have no evidence before us that the President in any way diminished the Attorney General's control over these documents; there is no indication that they will ever be transmitted to or seen by the President or his staff. By all indicia of ownership, the documents are within the exclusive control of the Attorney General.

C. The Attorney General as Advisor and as Administrator

We must next consider whether there is any basis in the FOIA for distinguishing between the Attorney General and the Department of Justice, in such a way that the former is not an "agency" where he func-

11. See *Forsham v. Califano*, 190 U.S.App.D.C. 231, 239, 587 F.2d 1128, 1136 n.19 (D.C. Cir. 1978), cert. granted, 441 U.S. 942, 99 S.Ct. 2159, 60 L.Ed.2d 1044 (1979). See also *Washington Research Project, Inc. v. Department of HEW*, 164 U.S.App.D.C. 169, 176-78, 504 F.2d

238, 245-48 (D.C. Cir. 1974), cert. denied, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975).

12. See *Ryan v. Department of Justice*, 474 F.Supp. 735, 738-39 (D.D.C.1979).

Attorney General's circumstances have the pre-

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tions in a purely advisory capacity to the President. Our analysis must start from the FOIA's definition of agency, which includes "any executive department."¹³ There is no basis in this definition or its legislative history to view the Attorney General as distinct from his department for FOIA purposes. On the contrary, it is only reasonable to consider him as much a part of the Department of Justice as any other official or employee in that Department.

Since the creation of the Department of Justice in 1870 the Attorney General has always had two roles: advisor to the President and administrator of the Department of Justice. The same dual role would be true, to a greater or lesser extent, of all other Cabinet officers. Whether these documents are agency records raises the question: can any meaningful distinction be made between documents generated and kept in the Department on the basis of the two different roles? And, if so, would the same distinction not apply in all Executive Departments?

The Government argues that the questionnaire responses are not agency records because they do not fall out of the sphere of the appointment process into Department of Justice business.¹⁴ The problem with this argument is that the appointment of federal judges has always been a regular business of the Attorney General and his Department. This responsibility was shifted in 1978 to the office of the Associate Attorney General.¹⁵ Shortly before we heard this case on appeal, it was shifted once again, so that responsibility now falls

directly on the Attorney General.¹⁶ Whatever the formal channels of responsibility, the task of receiving, processing, and clearing names of judicial nominees has long been a routine function of the Department of Justice.¹⁷ Whether the official responsibility falls directly on the Attorney General, or rather on one of his subordinates, makes no difference to the fact that this function is regular business of the agency.

Judicial nominations are by no means unique as an instance where normal agency functions involve some element of giving advice to the President. The entire Office of Legal Counsel, under an Assistant Attorney General, exists to assist the Attorney General in advising the President and Cabinet officers on major legal questions. Thus a substantial number of people, integral parts of the Department of Justice, are there to assist the Attorney General in performing his duty as advisor to the President on a variety of matters. If we broke out all documents connected with these functions as not being "agency records" under the FOIA, we would have a substantial percentage of Department of Justice records that were somehow transformed into the Attorney General's personal records as advisor to the President. This does not appear as either a realistic or intended distinction under the Freedom of Information Act.

This conclusion is underscored if we examine the likely results if the Government's theory, adopted by the trial court, were applied to other Executive Departments. For example, in the Department of State a huge portion of the Secretary's functions

tions of an agency. See 145 U.S.App.D.C. at 153, 448 F.2d at 1076. Cf. *Forsham v. Califano*, 190 U.S.App.D.C. 231, 239, 587 F.2d 1128, 1136 (D.C. Cir. 1978) (FOIA applies only to record created or obtained by agency "in the course of doing its work"), cert. granted, 441 U.S. 942, 99 S.Ct. 2159, 60 L.Ed.2d 1044 (1979). While there may be exceptional circumstances that render documents in an agency's possession not "records," this case presents no such situation. Cf. *SDC Dev. Corp. v. Mathews*, 542 F.2d 1116 (9th Cir. 1976) (agency reference library of medical writings stored in computer bank and available to public only under a set fee system, deemed not to be agency records).

13. 5 U.S.C. § 552(e) (1976).

14. Brief for Appellee at 12-19.

15. See Dept. of Justice Order No. 790-78, 43 Fed.Reg. 26,001, 26,002 (1978).

16. See Dept. of Justice Order No. 858-79, 44 Fed.Reg. 58,908 (1979).

17. As a matter of law we are not called upon to decide whether non-routine documents are outside the scope of the FOIA. But we note that our opinion in *Soucie v. David* did not purport to place any sharp limitation on the category of "records" when it defined them as materials made in the performance of the ordinary func-

could be described as advising the President on the conduct of foreign relations, his selection of ambassadors, and utilization of those ambassadors abroad. We could hardly say all the documents in the Department of State relating to the Secretary advising the President were not "agency records," although a substantial percentage of these agency records might well be protected from disclosure by one of the FOIA exemptions.

Turning to another argument of the Government to classify the Attorney General as a non-agency in this case, the appellee points to the rule that "agency" does not include the President's immediate personal staff or Executive Office units whose sole function is to advise the President. This rule was set forth in our opinion in *Soucie v. David*,¹⁸ and endorsed by the Conference Committee Report on the 1974 FOIA Amendments.¹⁹ As expounded in these two sources, however, the rule applies only to the initial decision of whether a unit falls within the category of "agency" for FOIA purposes. Neither *Soucie v. David*, nor the Committee Report implies that once a unit has been found to be an agency, one of its component parts can nevertheless be treated as a non-agency when engaged in presidential advisory functions.

Soucie found that the Office of Science and Technology was an agency, because the Office had functions in addition to advising the President.²⁰ But the opinion did not intimate that the Office 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 Office to be a non-agency in that specific context.²¹

The logical conclusion from the FOIA language and from *Soucie* is that, depending on its general nature and functions, a particular unit is either an agency or it is not. Once a unit is found to be an agency, this determination will not vary according to its specific function in each individual case. There is an obvious exception where private entities and their documents are controlled by agencies in limited circumstances; there the private entity certainly does not become a government agency irrevocably for all its activities.²² But we can see no basis for excepting the Attorney General and the Department of Justice; we find they are an agency without respect to their particular functions in individual cases.

The Government argues that nomination of judges is a purely presidential function; that had the President himself solicited this information from Senators, their responses to him would be exempt from the FOIA; and that the President's choice to draw the Attorney General into this presidential activity should not make the responses disclosable. Such an approach, defining "agency records" by the purpose for which they exist, would cut back severely on the FOIA's reach as interpreted by courts since its inception. Documents of the Central Intelligence Agency and the National Security Agency are compiled precisely for the function of advising the President in the solely presidential role of Commander-in-Chief. Yet in many FOIA encounters with NSA and CIA, we have never held or seriously considered that they might not be "agencies" when acting in this capacity.

As we indicated above, other departments—State, Defense—come quickly to mind as

18. 145 U.S.App.D.C. 144, 150-53, 448 F.2d 1067, 1073-76 (D.C. Cir. 1971).

19. See S.Rep.No.1200, 93d Cong., 2d Sess. 15 (1974). Failure to exempt presidential staff from the FOIA would raise a constitutional issue of separation of powers. See *Soucie v. David*, 145 U.S.App.D.C. at 157-58, 448 F.2d at 1080-81 (Wilkey, J., concurring).

20. See 145 U.S.App.D.C. at 150-53, 448 F.2d at 1073-76.

21. See *id.*, 145 U.S.App.D.C. at 152-155, 448 F.2d at 1075-76.

22. See *Forsham v. Califano*, 190 U.S.App.D.C. 231, 236-41, 587 F.2d 1128, 1133-38 (D.C. Cir. 1978), cert. granted, 441 U.S. 942, 99 S.Ct. 2159, 60 L.Ed.2d 1044 (1979).

examples where the Government's argument proves far too much. 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. The Government cites a district court case which held the Pardon Attorney of the Justice Department not to be an agency for FOIA purposes, because his sole function is to advise and assist the President.²³ Whatever the merits of this reasoning—yet to be determined in this court—we face an easier question in this case because the Attorney General has functions in addition to advising the President. Any unit or official that is part of an agency and has non-advisory functions cannot be considered a non-agency in selected contexts on a case-by-case basis.

It is certainly true, as the Government contends, that had the President's staff itself solicited these responses from Senators, the documents would not be agency records. In many different areas the President has a choice between using his staff to perform a function 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. To redraw this statutory line in a different manner, based on complex functional considerations, would strain the language of the Act and present much greater complexity in litigation.

III. THE APPLICABILITY OF FOIA EXEMPTION 5

[3] We proceed now to consider whether the requested documents fall within Ex-

emption 5 of the FOIA. The district court did not decide this issue, since it considered the agency records issue a sufficient basis on which to dispose of the case. An appellate court normally does not give consideration to issues that were neither raised nor decided below;²⁴ in this case, however, the Exemption 5 issue was raised and briefed in summary judgment motions before the district court. On those portions of the Exemption 5 issue that we decide today, we do not believe there is any doubt as to the proper resolution of the case, and the delay of extensive further proceedings in district court could render appellants' efforts futile. Thus it is fully appropriate for us to proceed to the Exemption 5 issue.²⁵

Exemption 5 applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."²⁶ Appellants argue that since the documents at issue here were submitted to the Department of Justice by Senators, who are not agencies within the meaning of the FOIA, the documents cannot be termed "inter-agency" or "intra-agency."

[4] When interpreted in light of its purpose, however, the language of Exemption 5 clearly embraces this situation. The exemption was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity.²⁷ In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit

23. See *Stassi v. Department of Justice*, No. 78-532 (D.D.C.1979).

24. See *Hormel v. Helvering*, 312 U.S. 552, 556-57, 61 S.Ct. 719, 85 L.Ed.2d 1037 (1941).

25. See *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).

26. 5 U.S.C. § 552(b)(5) (1976).

27. See H.R.Rep.No.1497, 89th Cong., 2d Sess. 10 (1966); S.Rep.No.813, 89th Cong., 1st Sess. 9 (1965), U.S.Code Cong. & Admin.News 1966, p. 2418.

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from the FOIA is that, depend- and functions, a agency or it is to be an agency, vary according each individual exception where documents are limited circum- entity certainly ment agency ir- ss.²² But we can g the Attorney it of Justice; we thout respect to s in individual

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190 U.S.App.D.C. 133-38 (D.C. Cir. S. 942, 99 S.Ct.

frank discussion of policy matters and likely impair the quality of decisions.

[5-7] We start from the proposition that FOIA exemptions are to be interpreted narrowly. The Senate Committee attempted to keep Exemption 5 as narrow as was "consistent with efficient Government operation."²⁸ Unquestionably, efficient government operation requires open discussions among all government policy-makers and advisors, whether those giving advice are officially part of the agency or are solicited to give advice only for specific projects. Congress apparently did not intend "inter-agency" and "intra-agency" to be rigidly exclusive terms, but rather to include any agency document that is part of the deliberative process. We cannot overlook the fact that the documents here were generated by an initiative from the Department of Justice, *i. e.*, the questionnaire sent out by the Department to the Senators. The Senators replied to the questionnaire. The questionnaire plus replies must correspond in origin and process to literally millions of documents and memoranda of various kinds on a myriad of subjects which repose in the files of the executive departments and independent agencies, *i. e.*, memoranda which were created by someone outside the executive branch but in response to an initiative from the executive branch.²⁹ When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting

document to be an "intra-agency" memorandum for purposes of determining the applicability of Exemption 5. This common sense interpretation of "intra-agency" to accommodate the realities of the typical agency deliberative process has been consistently followed by the courts.³⁰

[8-10] Exemption 5 protects only those memoranda which would not normally be discoverable in civil litigation against an agency.³¹ The standard of what is discoverable in civil litigation against an agency, as interpreted by the Supreme Court, indicates that purely factual material which is severable from the policy advice contained in a document, and which would not compromise the confidential remainder of the document, must be disclosed in an FOIA suit.³² This court has further elaborated the standard for determining which segments of an advisory document are disclosable under Exemption 5. We have held that factual segments are protected from disclosure as not being purely factual if the manner of selecting or presenting those facts would reveal the deliberate process,³³ or if the facts are "inextricably intertwined" with the policy-making process.³⁴ The Supreme Court has substantially endorsed this standard.³⁵

[11-13] As an additional ground, appellants argue that advisory material in the questionnaires should be disclosed if it represents a final decision rather than interim advice. Exemption 5 does not apply to final actions of agencies, in the sense of

28. S.Rep.No.813, 89th Cong., 1st Sess. 9 (1965).

29. For example, the Department of Agriculture must have bales of information in response to questionnaires.

30. See *Brockway v. Department of Air Force*, 518 F.2d 1184, 1191 (8th Cir. 1975) (statements of witnesses in a military aircraft safety investigation are within Exemption 5); *Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972) (statements of professors who were not agency employees deemed to be intra-agency memoranda), *cert. denied*, 410 U.S. 926, 93 S.Ct. 1352, 35 L.Ed.2d 586 (1973); *Soucie v. David*, 145 U.S.App.D.C. 144, 155, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971) (materials prepared for an agency by outside experts should be treated as intra-agency memoranda).

31. 5 U.S.C. § 552(b)(5) (1976).

32. See *Environmental Protection Agency v. Mink*, 410 U.S. 73, 91, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

33. See *Montrose Chem. Corp. v. Train*, 160 U.S.App.D.C. 270, 275, 491 F.2d 63, 68 (D.C. Cir. 1974).

34. See *Soucie v. David*, 145 U.S.App.D.C. at 155, 448 F.2d at 1078.

35. See *Environmental Protection Agency v. Mink*, 410 U.S. 73, 92, 93 S.Ct. 827, 838, 35 L.Ed.2d 119 (1973).

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statements of policy and final opinions which have the force of law or which explain actions an agency has already taken.³⁶ Further, Exemption 5 applies only to communications before the adoption of an agency policy; communications that promulgate or implement an established policy are not privileged.³⁷ In the present case, however, the communications all precede the adoption of any agency policy—i. e., the Attorney General's evaluation of selection processes and transmittal of his own recommendations to the President—and also precede the final action on nominations that can only be taken by the President with consent of the Senate. That an individual Senator may have taken final action by deciding which potential nominees he will recommend, as urged by appellants, is not material to whether the documents constitute a final opinion or action of an agency. Hence finality cannot justify disclosure of the questionnaire answers in this case.

[14] We conclude that the requested documents are exempt from FOIA disclosure under Exemption 5, except for factual segments which do not reveal the deliberative process and are not intertwined with the policy-making process. On remand the district court will determine which segments are disclosable under this standard. Because expedition is necessary in this case, we comment on those aspects of disclosability that are clear on the record before us.

The questionnaires sent by the Attorney General to the Senators asked for the following information:

1. Describe the effort which was made to identify qualified candidates.
2. Describe the process by which all persons identified and interested were considered?
3. How many persons were considered?
4. With respect to each person recommended, does he or she meet each of the standards set forth in Section 2 of the Executive Order?

36. See *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 153–54, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).

5. With respect to each person recommended, submit a copy of any questionnaire or resume of biographical information furnished by that person.

6. If a nominating commission was used:

- (a) how was the commission appointed?
- (b) how many persons were on the commission?
- (c) how many of the members were female?
- (d) how many of the members were of a minority race?
- (e) how many of the members were non-lawyers?

Some segments of Senators' responses to these questions will be factual, and disclosure of them will not reveal aspects of the deliberative process. Answers to questions 3 and 6 will clearly be of this nature. Expressions of personal views or recommendations of a Senator, on the other hand, are clearly exempt from disclosure. Other segments of responses may or may not be subject to disclosure, depending on circumstances to be evaluated on remand. Any biographical information of a routine, non-private nature, such as would commonly appear in *Who's Who* or similar reference works, is not inextricably intertwined with the protected deliberative process of making recommendations, and is thus subject to disclosure. Other more probing analysis of a candidate's background, on the other hand, might constitute a specific recommendation of the candidate on grounds of his qualifications and experience, and thus be exempt.

IV. EXEMPTION 6 ISSUE

[15] The Government claims on appeal that some portions of the Senators' responses to the Department questionnaire may be within FOIA Exemption 6, for "personnel

37. See *Jordan v. United States Department of Justice*, 192 U.S.App.D.C. 144, 165, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc).

and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,"³⁸ and that the Government should be allowed to raise this exemption upon remand to the district court. The Government did not raise Exemption 6, however, in the original proceedings before the district court.^{38a} This court has held that an agency must identify the specific statutory exemptions relied upon, and do so at least by the time of the district court proceedings.³⁹ This the Government has failed to do. The danger of permitting the Government to raise its FOIA exemption claims one at a time, at different stages of a district court proceeding, is especially apparent in this case, where any delay through this means could easily render the appellants' claim futile. We therefore hold, in accordance with our en banc decision in *Jordan v. U. S. Department of Justice*, that the Government may not raise FOIA Exemption 6 upon remand to the district court.

As we have noted in *Jordan*, there is a possible exception to this disqualification, under 28 U.S.C. § 2106, in that the appellate court has discretion to remand the case and "require such further proceedings to be had as may be just under the circumstances."⁴⁰ This could happen in the present case if sensitive, personal private information might be revealed. The Government may of course raise such a claim if warranted at the district court, but only if it can

show extraordinary circumstances. On the present record, the need to claim such extraordinary circumstances is diminished by the likelihood that sensitive material bearing on a potential nominee will be intertwined with advice based on his qualifications and experience, and thus come within Exemption 5.

V. CONCLUSION

[16] Since we find the requested documents to be agency records, we must order disclosure of all segments not within specific FOIA exemptions. On remand, the district court will, according to accepted procedures, order the Government to disclose all purely factual material in the responses and to identify those advisory segments protected by Exemption 5.⁴¹ It may then be necessary for the district court to inspect documents *in camera* to decide if individual segments do properly fall within Exemption 5. The judgment of the district court is vacated and the case remanded for further proceedings in accordance with this opinion.

So ordered.



38. 5 U.S.C. § 552(b) (1976).

38a. In its Petition for Rehearing, the Government points out that it did mention Exemption 6 in one sentence of a footnote to its Memorandum of Points and Authorities submitted to the district court. The purpose of this footnote was to inform the district court that the Government did not wish its assertion of Exemption 5 to be construed as waiving the possible applicability of remaining exemptions under section 552(b), for example Exemption 6. Our opinion in *Jordan v. United States Department of Justice*, however, requires that the agency raise the exemption by identifying it at the district court level and by demonstrating that the exemption applies to the documents in question. See 591 F.2d at 779. By simply stating that "for example" Exemption 6 might

apply, the Government did not meet its burden of demonstrating that the exemption applies. The Government did not assert Exemption 6 as a defense in a manner in which the district court could rule on the issue. Thus the government did not "raise" Exemption 6 at the district court level in the manner required by *Jordan*.

39. See *Jordan v. United States Department of Justice*, 192 U.S.App.D.C. at 170, 591 F.2d at 779.

40. *Id.* 192 U.S.App.D.C. at 171, 591 F.2d at 780 (quoting 28 U.S.C. § 2106 (1976)).

41. See *Vaughn v. Rosen*, 157 U.S.App.D.C. 340, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

Dec 6

THE WHITE HOUSE

WASHINGTON

December 2, 1993 2 P3:52

_____ S.Neuwirth

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_____ M.Krislov

_____ 1:00 pre-mtg.

_____ We are planning to have a FOIA meeting.

_____ Monday, December 6, at 2 p.m.

_____ schedule

To: John Podesta

Room: WW

From: Marvin Krislov

Room: 130, OEOB

Phone: X 7903

Rm
DOJ/3605



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

December 1, 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:

This letter follows up on our meeting of November 22, 1993, concerning the recordkeeping issues raised in correspondence between the parties regarding the NSC and OA drafts previously provided to you on October 26, 1993.

First, as agreed, defendants are here providing further revised drafts of recordkeeping guidance from NSC and OA, which are intended to reflect the points of agreement discussed in our letter of November 19, 1993 and at the November 22 meeting. See Tabs A & B. NSC and OA have devised language that specifically addresses plaintiffs' concerns regarding the definition of "record" and "nonrecord" materials under the Federal Records Act, as well as regarding preliminary drafts of documents shared by e-mail. Of course, both NSC and OA recognize that any nonrecord messages that are not exclusively personal may be subject to FOIA.

Second, attached at Tab C is a draft statement from NARA of basic principles embodied in the Armstrong settlement that NARA would be prepared to incorporate in subsequent proposed government-wide guidance to be issued for comment by affected agencies and the public.

Third, plaintiffs had a specific question regarding whether, with respect to the contemplated OA and NSC Records Management Systems, searches could be limited to designated "fields" or "segments," e.g., a search for a term appearing only in a subject heading of particular e-mail messages. We are informed that such searches would be possible on both systems.

Fourth, plaintiffs inquired whether it would be feasible and/or desirable to build in a second prompt on the future OA Records Management System, that would require individual users who

override the "record" default prompt to indicate whether particular e-mail nonrecord messages are designated as "personal." OA believes that building in this feature will necessitate undesirable delays in system implementation. However, OA and the other components intend to ensure appropriate designation through monitoring.

Fifth, defendants agreed to provide a list of designated high-level officials (other than in the NSC) whose electronic calendars, if determined to be federal records, would be subject to special disposition schedule(s) approved by NARA. The designees by EOP component are as follows:

Office of Administration: the Director and Assistant Director;

Office of Management and Budget: the Director and the two Deputy Directors;

Office of the U.S. Trade Representative: the Ambassador and the two Deputy Ambassadors;

Office of Science and Technology Policy: the Director and the four Associate Directors;

Office of National Drug Control Policy: the Director.

As we mentioned, NSC will be acquiring a new electronic communications system within the next nine months that will permit retention of acknowledgment data with a message. Until that new system is in place, NSC has determined that it will be a more efficient use of its resources to preserve acknowledgment data in hard copy with a hard copy of the associated message. When the new system is operational, it will be possible to create a "list" of stored messages in any one of several different ways. The NSC intends to organize the list by the name of the sender of a message. In addition, NSC intends to stream messages (for both its current and future systems) designated as nonrecord to a separate account in order to facilitate the monitoring of staff designations of nonrecord messages. There are no "group services" on either the CC:Mail or the All-in-One system used by the NSC.

In response to a question you raised, we have determined that NSC staff do not send or receive e-mail communications external to the government.

With respect to plaintiffs' suggestion that the guidance developed for e-mail should also cover word processing documents that can be accessed outside an electronic communications network, we recognize that NARA and the agencies will need to address this issue in terms of records responsibilities, but we believe that

specific guidance on this question is not appropriate in the context of this lawsuit. OA's and NSC's draft guidance reminds staff that drafts of documents may be records and includes NARA's current guidance on drafts for specific application of that principle. Beyond that, the technical differences between e-mail and word processing documents that can be accessed directly rather than sent via e-mail are far too complex to be resolved in generalities or in a case that involves electronic mail systems as NARA defined that term in its draft guidance of October 18, 1993, which excludes file transfer utilities.

Finally, we intend to respond to your draft of the Joint Status Report to Judge Richey by close of business today. We will also be sending you under separate cover (either later today or as soon as possible tomorrow) a response to your proposal concerning the FOIA and appraisal issues in this case. Once you have reviewed this material, please give us a call to schedule the meeting(s) you requested on (1) the draft guidance and (2) the FOIA issues.

Sincerely yours,



Mark I. Levy
Deputy Assistant Attorney General

Enclosures

A [

DRAFT

ACTION

MEMORANDUM FOR NSC STAFF

FROM: WILLIAM H. ITOH

SUBJECT: Electronic Communications Systems (Electronic Mail)

All National Security Council employees have ongoing responsibilities to create, maintain, and preserve records of their activities pursuant to the Federal Records Act (44 U.S.C., Chapters 29, 31, and 33) or the Presidential Records Act (44 U.S.C., sections 2201-2207). This memorandum provides guidance for fulfilling these obligations as they apply to records created on electronic communications systems.

The National Archives has defined electronic communications systems as electronic mail systems, electronic conferences, and comparable systems with similar e-mail capabilities that retain transmission data. Within the NSC, this definition (and the guidance in this memorandum) applies to the e-mail and calendar functions of the VAX All-in-One and CC:Mail systems (which includes All-in-1 word processing documents sent via e-mail) as well as the calendar function of the PROFS (OfficeVision) system.

The staff of the NSC create records electronically, including by the use of electronic communications systems. The NSC preserves electronic mail messages that are records by filing them electronically and transferring them to magnetic tape in a software-independent format for long term preservation. The NSC also preserves essential transmission data for these records electronically, including the name of the sender and each addressee, plus the date and exact time of transmission, which are recorded with the text of each message. "Read receipts" that identify when a message is "opened" by each addressee also are preserved whenever requested.

Successful implementation of this policy requires each NSC employee to do three things: (1) determine the record/nonrecord status of any e-mail message at the time of creation (or, for word processing documents, at the time of transmission), and (2) request read receipts whenever it is important to confirm the receipt of a message by a certain time, and (3) for the time being, ensure that read receipts are preserved by printing them, attaching them to the originating message, and sending them to Records Management for filing. All other tasks associated with the proper maintenance and disposition of e-mail records will be performed by the staff of Records Management and WHSSS or WHCA.

DETERMINING RECORD STATUS

Electronic mail documents in the NSC (like all other documentary materials) fall into one of two categories: records or nonrecord materials (which includes personal materials). The only records management judgment that NSC staff must make when using e-mail is to determine whether a message is record or nonrecord in nature. Traditionally, the NSC also has distinguished federal from Presidential records and filed them separately. The proper scope of that distinction is now in litigation. Until that question is resolved, we will retain copies of all record messages in a way that permits appropriate designation and filing of them at a later time by the staff of Records Management.

Federal or Presidential Records.

The Federal Records Act defines federal records as:

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 under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor 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. (44 U.S.C. 3301)

Under this definition, federal records are documentary materials that satisfy two tests. First, the materials must have been created or received by agency personnel in connection with their official duties. Second, they must be preserved or appropriate for preservation as evidence of the agency's activities or because they contain information of value.

Numeric, graphic, or text information that satisfies these two conditions are records, regardless of the medium on which they are recorded or the type of computer system on which the data are recorded or transmitted. Thus, electronic messages or documents transmitted via electronic mail that satisfy these two conditions are records. This includes:

- messages or documents containing information developed in preparing position papers, reports and studies;
- messages or documents reflecting official actions taken in the course of conducting agency business;
- messages or documents conveying information on NSC programs, policies, decisions, and essential transactions;

- messages or documents that convey statements of policy or the rationale for official decisions or actions;
- messages or documents memorializing oral exchanges, such as meetings or telephone conversations, during which policy was discussed or formulated or other activities of the NSC were planned, discussed, or transacted;
- preliminary drafts of final documents, if the drafts contain unique information, such as annotations or comments, that helps explain the formation and execution of basic policies, decisions, actions, or responsibilities, and if they were circulated or made available to employees other than the creator for the purpose of approval, comment, action, or to keep staff informed about NSC business.

The Presidential Records Act defines Presidential records as:

documentary materials, or any reasonably segregable portion thereof, 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. (44 U.S.C. 2201(2))

Under this definition, Presidential records are documentary materials that meet three tests. First, the materials must have been created or received by the President, his immediate staff, or a unit or individuals in the EOP whose function it is to advise and assist the President. Second, the materials must relate to or have an effect upon the carrying out of the President's constitutional, statutory, or other official or ceremonial duties. Third, they must not be federal records, which are specifically excluded from coverage by the Presidential Records Act.

Nonrecord or Personal Materials.

Certain types of documentary materials created within the NSC are considered "nonrecord" because they do not meet the conditions of record status as explained above or because they are excluded from the status of records by statute. For this reason, some electronic messages and documents do not need to be filed systematically and preserved. Typically, this includes:

- reminders about meetings and appointments that contain no substantive information about such events;
- telephone messages (unless the message contains substantive information);

- announcements of personnel departures or retirements and invitations to unofficial social functions during office hours;
- preliminary drafts that do not contain unique information or were not circulated to other staff;
- notes about exclusively personal matters, such as private political or professional activities.

Monitoring Record Status Designations

To assist the NSC staff in making proper record status determinations, the staff of Records Management will periodically examine a sample of all electronic mail messages and electronic calendars, including those designated as nonrecord materials. The purpose of the examination is to identify any problems in interpreting the official guidance for distinguishing between record and nonrecord materials. The first of these sample inspections will take place within the next month. The staff of Records Management will report their findings to me and recommend any needed changes in current guidance or procedures.

No copies of electronic mail documents (either electronic or paper) may be removed from the NSC unless they are determined to be exclusively personal materials. If a departing staff member wishes to retain such documents, the staff of the Information Management and Disclosure Office must review the documents before authorizing their removal.

PRESERVING ELECTRONIC MAIL MESSAGES

To facilitate the preservation of e-mail messages that are records, you are asked to indicate whether the message is Record (R) or Nonrecord (N) each time you create a message. (For All-in-1 word processing documents, you must indicate (R) or (N) when you send the document.) You should make that determination by following the guidelines in this memorandum for identifying federal records, Presidential records, nonrecord materials, and personal materials (a personal message should be labeled nonrecord (N)). When in doubt, designate a message as a record.

If you designate a message as a record, a copy automatically will be routed to Records Management for incorporation into the appropriate records system. Also, any response to a record message automatically will be labeled a record. All messages in individual e-mail accounts will be purged from the All-in-One and CC:Mail systems after one month, with the exception of extra copies placed in your "personal folder" because they need to be retained more than one month for personal convenience.

Transmission and Receipt Data

All electronic mail messages contain certain "transmission data" regarding the sender, addressee(s), and transmission (date and exact time) of a document. Whenever you designate a message as a record, it is necessary to capture and preserve such transmission data and associate it with the appropriate message. All e-mail messages routed to Records Management as records will be filed electronically with the following transmission data included: the name of the sender and all recipients and the date and time of transmission.

Additionally, if you request a read receipt for an electronic mail record, the read receipt is also a record and must be preserved with the message. You should request read receipts whenever it is necessary to confirm that an addressee has read a message by a certain time, such as when you assign tasks with a deadline or need concurrence by a definite time. To the extent feasible, WHSSS will reprogram All-in-1 to capture such read receipts electronically. However, until further notice, and as previously instructed in Will Itoh's 5/27/93 memorandum, you should print out read receipts whenever requested, attach them to the originating message, and forward such materials to Records Management for filing.

PRESERVING CALENDARS

Calendars created on the NSC's e-mail systems (except those of the APNSA, DAPNSA, Staff Secretary, Executive Secretary, the Deputy Executive Secretary, and Senior Directors) are either personal materials or temporary records. Calendars are personal materials when they are shared only with a secretary. They are temporary records when they are shared more widely with other members of the NSC staff.

Personal calendars and shared calendars that contain no substantive information about NSC activities do not need to be printed and filed, and they should be deleted from your e-mail environment when no longer needed. Shared calendars that do contain substantive information about NSC activities must be printed out monthly, retained for two years, and then destroyed. The electronic calendars of the APNSA, the DAPNSA, the Staff Director, the Executive Secretary, the Deputy Executive Secretary, and Senior Directors must be printed out monthly and forwarded to Records Management for preservation. When printing calendars for preservation also print and file (or forward to Records Management) a list of the individuals who had access to each calendar for the previous month.

This memorandum supersedes all previous guidance on electronic mail issued prior to January 6, 1993, as well as the instructions

on Electronic Federal Records on page 6 of the May 8, 1993 memo on "Federal Records." I cannot emphasize too strongly the importance of staff compliance with this guidance in order to ensure that the NSC fulfills its legal obligations regarding the creation and preservation of federal and/or Presidential records. If you have any questions about this guidance, please contact the Records Management Staff (7356) or the Office of the Legal Adviser (3854).

DRAFT

ACTION

MEMORANDUM FOR [WHSSS]

FROM: WILLIAM H. ITOH

SUBJECT: Electronic Mail Modifications

By [a specific date] you should begin to implement all procedures necessary to preserve all record e-mail messages on the NSC's electronic mail systems (All-in-1 and CC:Mail) electronically. Since all record e-mail messages for the Clinton Administration have been retained online, I assume that these procedures can be implemented within a few days, with one exception. I understand that capturing read receipts electronically in association with the originating message may require several months of additional reprogramming.

All e-mail users will continue to designate messages (including documents created on the All-in-1 word processing module) as records (R) or nonrecords (N), and all messages designated as records will continue to be routed electronically to Records Management. (The R/N designation must be forced for any response to a nonrecord message.) Any such data determined to be federal records will be proposed for permanent retention by the National Archives. Any such data determined to be Presidential records will be preserved permanently at the appropriate Presidential Library. To preserve the record messages and related data electronically, we need to accomplish the following for All-in-1 and CC:Mail:

1. Stream the messages to separate online accounts in Records Management for (1) all record messages and (2) all nonrecord messages. A statistical sample will be selected from each account for monitoring purposes. The nonrecord messages should be deleted as soon as the statistical sample has been selected and printed.
2. Enable Records Management staff to designate the record messages as either federal or Presidential.
3. Retain EASY access to the sorted federal or Presidential record messages in Information Management and Disclosure only, until the end of an administration. This access may be achieved by retaining the data online, or on easily useable optical disks, whichever is more practicable for you. In either case, it is my understanding that Records Management staff will be able to conduct keyword searches of all record messages.

4. At the end of an administration transfer the sorted record messages to separate magnetic tapes for federal or Presidential records and make one duplicate set of the federal tapes. These magnetic tapes must contain all transmission data associated with the messages as described below in No. 5, and they must conform to the requirements of NARA regulations at 36 CFR 1228.188 (copy attached at Tab I). One set of the federal tapes will be retained for the NSC's administrative use and one set will be stored and maintained for transfer to NARA according to the provisions of an approved records schedule. Each tape also should include a listing, by user, of all unclassified messages and an identical listing for all classified messages.

5. Each record message must include the name of the sender and all addressees and the subject, plus the date and exact time of creation and transmission. Additionally, for the new e-mail system now being designed, we must develop a plan for preserving read receipt data electronically whenever it is requested by the sender. This read receipt data must be preserved in a way that easily associates the receipt information with the appropriate originating message. CC:Mail users will continue to print read receipts when requested as instructed in Will Itoh's 5/27/93 memorandum, since that system cannot be reconfigured to associate such data with the originating message electronically. All-in-1 users also will continue to follow those instructions until we implement procedures for capturing such read receipt data electronically.

6. Since we are preserving transmittal data in association with each record message for All-in-1, including the name of the sender and all addressees, the date and time of transmission, and read receipt data whenever requested, plus a listing of all messages stored on tape, it is not necessary to preserve user directories, distribution lists, or logs (indices) of messages on the magnetic tapes. Records Management has drafted a records schedule provision that would authorize the deletion when no longer needed of any such data determined to be federal records. Since CC:Mail does not always print all addressee names on a distribution list, for that system you also must preserve all distribution lists so that the name of all addressees for record messages will be readily available.

7. All e-mail messages that are not routed to Records Management should be deleted after one month, with the exception of any messages filed in an individual user's "Personal" folder. These latter messages, which are nonrecord copies maintained solely for personal convenience, should be deleted whenever the staffer departs the NSC.

8. For the calendar function, you should delete all data whenever the staffer departs the NSC. For any such data

determined to be federal records, their deletion is authorized by the provisions of GRS 23, Item 5.

9. For the cable traffic on All-in-1, Records Management has drafted a records schedule provision that would authorize the permanent retention of all cables directed to the attention of a specified NSC staffer. The draft schedule also would authorize the deletion "when no longer needed" of the remaining cable traffic in GESCAN. The newswires in GESCAN that are purchased from a commercial vendor constitute a nonrecord reference library, which should be deleted when no longer needed. Until NARA has approved our draft schedule, you should continue retaining a complete backup of all cable traffic sent to All-in-1.

10. User Set-Up Functions, which include changes in passwords, work locations, work hours, lock keyboard data, calendar and date formats, and log-in/log-out data, should be deleted when no longer needed for system administration. To the extent that any such data are determined to be federal records, their deletion is authorized by the provisions of GRS 20, Item 1c.

Records Management has drafted a records schedule for submission to the National Archives that would, for all data determined to be federal records, authorize the deletion of (1) data in individual e-mail accounts after one month or, in the case of data retained in personal folders, when the staffer departs the NSC; (2) user directories, distribution lists (for All-in-1 only), and logs of messages; and (3) calendar data. However, until we have a final determination about which NSC records are federal, you must continue the current practice of preserving backup tapes of the entire system.

If you have any questions, please contact Neal Wolin in the Legal Adviser's office at 3854.

Attachment

Tab I NARA Regulations

DRAFT

ACTION

MEMORANDUM FOR WILLIAM H. LEARY

FROM: WILLIAM H. ITOH

SUBJECT: Monitoring Electronic Mail

In order to identify and correct any problems in the NSC staff's identification of e-mail records, you should institute the following plan for monitoring a sample of electronic mail and electronic calendars.

1. The staff of Records Management should examine a sample once annually. The first examination should be completed within one month following the issuance of written guidance to all staff.
2. The initial sample and the scope of the subsequent samples should be determined by the Director of Records Management.
3. The selected staff should be notified prior to beginning the inspection that you will examine a sample of their previously created e-mail stored on the backup tapes.
4. WHSSS should print out the designated messages and calendars to facilitate the review by Records Management.
5. Records Management should tabulate the total number of messages examined in each account, the number of incorrect record designations, and the reasons for the incorrect designations. For calendars, you should determine what type of information is recorded and whether current disposition recommendations are appropriate. Records Management should prepare a report for the Executive Secretary summarizing and analyzing the findings and recommending any needed modifications in the guidance to staff. That report should be submitted to me within two months after issuance of written guidance to all staff.

DRAFT

(Proposed records schedule to be submitted to NARA regarding any records determined to be federal)

1. Electronic Mail, 1993--. Messages created and exchanged by the NSC staff electronically. The content of the messages ranges from the routine and personal to substantive exchanges about policy matters. The NSC e-mail systems require the user to designate messages that are records before sending a message. All messages designated as records are automatically routed to the Office of Records Management with related transmittal data for segregation into one of two categories: permanent federal records or permanent presidential records.

a. Substantive Messages. Messages, and related transmittal data, providing substantive information about agency activities such as the development of policy papers, interagency meetings, internal administrative matters, and legal cases. (For CC-Mail only, the related transmittal data must include all distribution lists, and updates, which provide the names of all addressees of record messages.)

Disposition. Permanent. Retain in an accessible electronic format until the end of an administration, then copy to tape. Transfer tapes to the National Archives 20 years after the end of the administration that created them.

b. Processing Files. Backup tapes and all other copies of all data on the e-mail system, including substantive and nonrecord messages; user directories, distribution lists (except for CC:Mail), and user logs (indices) of messages; and user set-up functions comparable to those authorized for disposal under GRS 20, Item 1c.

Disposition. Destroy when no longer needed.

2. Electronic Cables and Newswires, 1989--. An electronic library of daily newswires and cables related to world events. The newswires consist of a standard commercial package furnished by AP, UPI, and Reuters, which constitutes a nonrecord reference library. No information is recorded about who looks at these newswires or when. The incoming cables originate with the Department of State, DoD, the CIA and the NSA. They are sent to the Situation Room for the attention of either (1) the President and his assistants in the West Wing, or (2) the NSC staff generally. Those created and received by the President, the APNSA, and the DAPNSA are retained permanently as Presidential records. The dispositions listed below apply to the remaining incoming cables that are sent electronically to All-in-1 for subsequent electronic distribution to the NSC staff and to the outgoing cables sent in the name of a member of the NSC staff.

a. Cables Sent to or From Specified Staff. A certain percentage of all incoming cable traffic is sent electronically to designated NSC staff according to predetermined subject criteria, and a small number of cables are sent from the Situation Room in the name of an NSC staff member. All such cables identify the sender and recipient(s) and the date of electronic submission.

Disposition. Permanent. Retain in an accessible electronic format until the end of an administration, then copy to tape. Transfer to the National Archives 20 years after the end of the administration that created them.

b. GESCAN Cables. Those cables not designated for an individual staffer, plus copies of the cables sent to a specified staffer (with the exception of a few highly sensitive cables) are stored in a database (GESCAN) that may be accessed by anyone on the NSC staff. No information is recorded about who looks at what data or when.

Disposition. Destroy when no longer needed.

3. Electronic Calendars of High-Level Officials. Electronic calendars containing substantive information documenting meetings, appointments, telephone calls, trips, visits, and other activities by the Staff Secretary, Executive Secretary, Deputy Executive Secretary, and Senior Directors within the NSC.

Disposition. Permanent. Print all data monthly and transfer paper copies to Records Management for preservation along with a listing of all staff granted access to the data for that month. Transfer to National Archives 20 years after end of the administration in which they were created. After printing paper copies for transfer to Records Management, destroy electronic data when no longer needed.

December 1, 1993

--- D R A F T ---

B

OFFICE OF ADMINISTRATION DIRECTIVE

SUBJECT: The OASIS ALL-IN-1 Electronic Communication System and
Federal Records Procedures

Introduction

1. **Purpose.** To establish records management objectives and responsibilities for the creation, maintenance, use, and disposition of Federal records on the OASIS ALL-IN-1 system.
2. **Personnel Concerned.** All OASIS ALL-IN-1 users with Federal records responsibilities.
3. **Directive or Bulletin Cancelled.** None; paragraph 7.b of LRS Directive .04-0, "Records Management Program," is replaced by this Directive.
4. **Authority.** 44 U.S.C. Chapters 21, 29, 31, and 33; 36 CFR Parts 1220, 1222, 1228, and 1234.
5. **Originator.** Information Management Division
6. **Review.** Annually, whenever substantive modifications to the OASIS ALL-IN-1 system are contemplated, before any new electronic mail systems are accessed by EOP agency users, and any new electronic records management systems are implemented.

[Director of the Office of Administration signature and date]

OVERVIEW

1. Purpose.

To establish policy, responsibilities, guidelines, requirements, and procedures for the preservation of Federal records created and transmitted on the OASIS ALL-IN-1 system within the Federal agencies of the Executive Office of the President.

This directive supersedes previous records management instructions on Federal records on electronic mail (e-mail) systems, in accordance with recent court opinions and orders.

The following guidance does not apply to Presidential records. Each EOP component that creates Presidential records has a continuing obligation to identify and separately maintain Presidential and Federal records. Memoranda providing guidance on Presidential records and Federal records were issued to White House and EOP staff by the White House on May 5, 1993.

2. Definitions.

Basic records management terms are defined in OA Directive LRS.04-0 (44 U.S.C. 3301). The definitions listed below are specific to the purpose of this directive.

- a. **Electronic Mail.** The process or result of sending and receiving messages in electronic form via remote computer terminals. (Federal Records Management Glossary, 1993, 2nd ed.)
- b. **Electronic Records.** This term includes numeric, graphic, and text information, which may be recorded on any medium capable of being read by a computer and which satisfies the definition of a Federal record in 44 U.S.C. 3301. This includes, but is not limited to, magnetic media, such as tapes and disks, and optical disks. (36 CFR 1234.1)
- c. **Electronic Records System.** This term means any information system that produces, manipulates, or stores Federal records by using a computer. (36 CFR 1234)
- d. **Electronic Mail System.** As used in this directive, the application available on OASIS ALL-IN-1 that allows users to send electronic mail (e-mail) or messages (including attachments) to one or more individuals. E-mail systems do not include data systems that are

used primarily to collect and process data which have been organized into data files or databases on either networked personal computers or mainframe computers.

- e. **Federal Records.** As defined in the law (44 U.S.C. 3301), Federal records are:

[A]ll 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 under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor 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.

The phrase "regardless of physical form or characteristics" means that the records may be paper, film, disk, or any other physical type or form; and that the method used to record information may be manual, mechanical, photographic, electronic, or any combination of these or other technologies.

Documentary materials are Federal records when they meet both of the following conditions:

- (1) They are made or received by an agency of the United States Government under Federal law or in connection with the transaction of agency business; and
- (2) They are preserved or are appropriate for preservation as evidence of agency organization and activities or because of the value of the information they contain. (36 CFR 1222.34)

- f. **Presidential Records.** Documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the EOP 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 USC 2201)

- g. **Temporary Record.** Any record which has been determined by the Archivist of the United States to have insufficient value (on basis of current standards) to warrant its preservation in the National Archives of the United States. This determination may take the form of:
- (1) A series of records designated as disposable in an agency records disposition schedule approved by NARA (Standard Form 115, Request for Records Disposition Authority); or
 - (2) A series of records designated as disposable in a General Records Schedule. (36 CFR 1220.14)
- h. **Permanent Record.** Any Federal record that has been determined by NARA to have sufficient value to warrant its preservation in the National Archives. (36 CFR 1220.14)
- i. **Nonrecord Material.** U.S. Government-owned documentary materials, other than Presidential records, that do not meet the statutory definition of Federal records (44 U.S.C. 3301), or that have been excluded from coverage by the definition. Excluded materials are:
- (1) Extra copies of documents preserved only for convenience of reference.
 - (2) Stocks of publications and of processed documents. However, each agency must create and maintain records sets of processed documents and publications, including annual and special reports, directives, special studies, brochures, pamphlets, books, handbooks, manuals, and posters.
 - (3) Library and museum materials made or acquired and preserved solely for reference or exhibition purposes.
- j. **Records Management.** The planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operation. (36 CFR 1220.14)

- k. **Records Schedule.** A document describing and providing instructions for the disposition of Federal records. It consists of one of the following:
- (1) An SF 115, Request for Records Disposition Authority, that has been approved by NARA to authorize the disposition of Federal records;
 - (2) A General Records Schedule (GRS) issued by NARA; or
 - (3) A printed agency manual or directive containing the records descriptions and disposition instructions approved by NARA on one or more SF-115s or issued by NARA in the GRS. (36 CFR 1220.14)
- l. **General Records Schedules.** Schedules authorizing the disposal, after the lapse of specified periods of time, of records of a specified form or character common to several or all agencies if such records will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their further preservation by the United States Government. (44 U.S.C. 3303a(d))
- m. **Transmission and Receipt Data.**
- (1) **Transmission Data.** Information in e-mail systems regarding the identities of sender and addressee(s), date and time messages were sent.
 - (2) **Receipt Data.** Information in e-mail systems regarding date and time of receipt of a message, and acknowledgement of receipt and/or access by addressee(s).
- n. **System Backups.** Copies on off-line media of software and data stored on direct access storage devices in a computer system to provide a means of recreating a system and its data in the event of unintentional loss of data or software.
- o. **Records Liaison.** Individual designated to oversee records management procedures for the agency.
- p. **High-level officials.** Heads of independent agencies; their deputies and assistants; the heads of program offices and staff offices; staff assistants to those aforementioned officials, such as special assistants,

confidential assistants, and administrative assistants; and career Federal employees, political appointees, and officers of the Armed Forces serving in equivalent or comparable positions. (GRS 23, item 5.a., as applied to positions within the EOP)

THE ELECTRONIC MESSAGING (E-MAIL) SYSTEM

3. Policy.

Currently, the official medium for maintaining Federal records created on the OASIS ALL-IN-1 system in EOP agencies is hardcopy (paper). The Office of Administration is developing a records management system which will support electronic storage, retrieval and disposition of OASIS ALL-IN-1 electronic messages that are determined to be Federal records, and will segregate Presidential records from Federal records. In the interim, agencies should continue to maintain in hard copy any electronic messages that are considered Federal records. Until certain programming, policy, and procedural matters are resolved, all users should follow the steps listed below to ensure that all e-mail messages that meet the definition of Federal records are printed according to these instructions and incorporated into official paper files.

4. Identifying E-Mail Messages That Are Federal Records.

- o E-mail messages (internal messages and external X.400 and INTERNET messages and any attachments transmitted through e-mail) are Federal records when they meet two conditions. They are made or received by an agency of the United States Government under Federal law or in connection with the transaction of agency business; and they are preserved or are appropriate for preservation as evidence of agency organization and activities or because of the value of the information they contain. (36 CFR 1222.34)
- o When determining whether e-mail messages are Federal records, keep in mind that multiple copies of messages or messages incorporated into other electronic messages may all be records if they are used for different purposes in the conduct of official business or filed in different files. More than one office may take action or otherwise use copies of a message. The copy would be a record in each of those offices, and would be subject to NARA-approved disposition schedules.

5. Preserving E-Mail Messages That Are Federal Records.

When the user determines that an incoming or outgoing e-mail message or FAX transmitted by the OASIS ALL-IN-1 system meets the criteria for Federal records, the user will:

- o Print the message and all attachments. The printed message shows the identity of the sender and the addressee(s), and the date and time the message was sent. The identity of remote addressees that are not otherwise evident (outside of OASIS) should be identified by annotating the message or attaching a list of addressees.
- o If the sender requested a "read receipt," he/she will either print the receipt and attach it to the printed message or annotate the printed message with the date and time each recipient accessed the message. Read receipts should be requested when it is necessary to confirm that an addressee has read a message by a certain time, such as when you assign tasks with a deadline or need concurrence by a definite time.
- o Print the successful FAX confirmation message and attach it to the official file copy of the message that was sent. Annotate the confirmation message with the names of recipients.
- o Forward the printed message or file copy of the message that was FAXED to the appropriate individual for inclusion in the EOP agency's system of official files.

These actions must be taken even if the user chooses to copy or move messages for inclusion in personal paper or electronic files.

Indices to folders, such as the inbox and outbox, are dynamically changing lists and will be scheduled for disposition with NARA.

Users should also be aware that draft materials such as working papers, drafts and notes may also be records if they were circulated for comment, approval, action or follow-up and they contain substantive comments that adds to the understanding of agency policies, decisions, actions or responsibilities. (36 CFR 1222.34)

Federal record material created on the e-mail system may contain routine, transitory information disposable according to the GRS or unique, substantive information that must be scheduled for disposition. Some examples of messages (including attachments) that are Federal records on the e-mail system are:

- o Messages containing information developed in preparing position papers, reports and studies;
- o Messages reflecting official actions taken in the course of conducting agency business;
- o Messages conveying information on programs, policies, decisions, and essential transactions;
- o Messages concerning statements of policy or the rationale for official decisions or actions;
- o Messages documenting oral exchanges, such as meetings or telephone conversations, during which policy was discussed or formulated or other agency activities were planned, discussed, or transacted;
- o Messages documenting the use of leave, agency procurement activities, personnel actions, or official agency financial actions.

6. Nonrecord e-mail messages. Messages created on the e-mail system may contain information that either fails to meet the general conditions of record status or is covered by the statutory definition of nonrecord material. Such nonrecord materials may be deleted by the user when no longer needed for reference.

Examples of nonrecord messages on e-mail typically include:

- o Reminders of meeting and appointments that contain no substantive information about such events;
- o Telephone messages (unless the message contains substantive information);
- o Duplicate copies of records retained elsewhere in electronic format, if the copies are saved only for convenience of reference;
- o Preliminary drafts that were not circulated or that do not contain unique or substantive information;

- o Information copies of messages and other documents on which no administrative action is recorded or taken;
- o Personal notes that relate solely to an individual's personal and private affairs or are used exclusively for that individual's convenience;
- o Announcements of personnel departures or retirement and invitations to office social functions.

If users choose to retain nonrecord and personal material in the OASIS ALL-IN-1 system, it should not be commingled and it must be filed in separate folders. For additional guidance on personal papers employees should refer to the NARA Guide on Personal Papers of Executive Branch Officials.

OASIS ALL-IN-1 FEATURES

7. Calendars.

The ALL-IN-1 system offers a calendar option to users as part of the Desk Management function. The calendar function allows users to schedule meetings with other users including recurring meetings, as well as to maintain their own official record of meetings, events, and other activities. Calendars may be displayed and printed by the day, week, or month. This function also provides users with the capability of maintaining a task or "to do" list.

Calendars and task lists created using this system may be Federal records if they meet the criteria explained in paragraphs 2d and 4 of this directive.

- o Calendars that are used only as personal schedules may not be records, even if some of the entries listed are events or meetings that relate to official duties. If the calendar was created solely for the personal convenience of the official (and is not shared with anyone beyond one's secretary or executive assistant) and his or her important meetings or scheduled activities are recorded elsewhere, the ALL-IN-1 calendar may be considered nonrecord, and may be updated, changed or deleted at the individual's discretion. However, the calendars of high-level officials that are determined to be records shall be printed according to the instructions of paragraph 16 below.

- o NARA has authorized disposal of calendars determined by the creating agency to be Federal records according to the following conditions:
 - If the calendars contain substantive information relating to official activities, the substance of which has not been incorporated into official files, they must be kept for two years. However, the calendars of high-level officials and shared calendars must be scheduled for disposition with NARA.
 - If the calendars document routine activities or any substantive information in them is also included in organized files, the user may change or delete information when it is no longer needed. (GRS 23, item 5)

8. Personnel Directories. The user directory provides a short-cut for entering the recipient's name on the "TO" line of the message. In addition, users have access to an EOP Directory that contains names of individuals, their organization affiliation, room number, and telephone numbers. These directories will be subject to NARA-approved disposition schedules. There is also a separate feature that allows users to create their own personal address/telephone lists for ready reference and not for circulation. These personal directories are nonrecord.

9. Desk Management provides access to a calculator and displays the current time at locations throughout the world (World-Wide Time). This information is nonrecord reference material.

10. Telephone messaging and paging are available to users through either the electronic messaging or Desk Management menus. Just as with paper message slips, users should ensure that they produce official records documenting the substance of important messages or conversations for inclusion in agency files. The messages themselves are ordinarily not Federal Records.

11. Information Management displays commercial and other non-agency informational materials such as the news and weather. This information is nonrecord reference material.

12. The Bulletin Board broadcasts special announcements to OASIS users, such as a schedule of classroom training, blood donation drives, and health insurance open seasons. The Suggestion Box allows users to recommend changes that would better meet user needs. These materials are subject to NARA-approved disposition schedules.

C

NARA Settlement Principles For Adoption in Government-Wide Guidance
Reference: Defs.' Letter of Nov. 19, 1993

Definitions:

1. The Federal Records Act applies to records in all media, in accordance with the definition of 44 U.S.C. 3301 ("documentary materials of any physical type").
2. The definition of a federal record in the statute establishes two conditions that must be met for a document to be a record. The first condition is that the document must be made or received by the government in the course of public business. The second condition is that it has been preserved or is appropriate for preservation as evidence of government business or because of the information it contains. "Preserved" in this context refers to the deliberate act of systematically maintaining a record for future agency use; "appropriate for preservation" means the record has usefulness for the agency but it has not yet been systematically maintained.

Records Management Responsibilities:

3. An agency's records management responsibilities, which include creating and maintaining appropriate records, apply to the management of electronic mail records.
4. An electronic mail message may be a temporary record, a permanent record or nonrecord.
5. Agency guidance must provide sufficient information for users to distinguish messages that are federal records from messages that are nonrecord material.
6. All features of existing electronic communications systems (including but not limited to maintenance of electronic calendars; directories and distribution lists; transmission of word processing documents over e-mail; links to external communications systems) deserve consideration in agency guidance as potentially including records within the scope of an agency's records management responsibilities.
7. Agencies must take adequate measures to protect records in e-mail systems, including ensuring that e-mail records are deleted only in accordance with authorized records schedules, and allowing for regular backups to guard against system failures or loss through inadvertent erasures.
8. Agencies must ensure that all employees are familiar with the legal requirements for creation, maintenance, and disposition of e-mail federal records. Each agency must provide training to employees regarding e-mail, and must take additional steps to ensure that the implementation of guidance concerning e-mail is carried out (e.g., monitoring or reviewing specified percentages of all e-mail; conducting periodic staff interviews; and internal records management evaluations).

Storage and Disposition:

9. E-mail determined to be Federal records must be scheduled for disposition in accordance with statute and regulations.

10. E-mail materials that are records require the capture of some transmission data (i.e., identity of sender and addressee(s), date and time sent) to be intelligible; when necessary transmission data is not part of the record itself, agencies must ensure that both the record and any necessary transmission data are maintained in designated recordkeeping systems for the same retention period.

11. Receipt data (i.e., the date and time of receipt of e-mail, and/or acknowledgements of receipt), where necessary for adequate and proper documentation of agency activities, must also be maintained for the same retention period as the associated e-mail record.

12. Agency retention of e-mail records in an off-line electronic storage format is consistent with good records management and offers certain advantages, including ease of search and retrieval.

13. NARA will work closely with agencies to determine the appropriate disposition of their e-mail records and to ensure that agencies are aware that future use of e-mail records may be enhanced by preservation in an electronic storage system.

14. Any electronic recordkeeping systems for e-mail should be designed to allow segregation of permanent and temporary records and must be adequate to maintain projected volumes of records for their authorized retention periods; e-mail stored off-line must be stored on a reliable medium under appropriate conditions, which allow records to be retrieved and read.

15. E-mail constituting permanent records must be maintained in a way that not only allows for agency use, but permits transfer to the National Archives.

16. Tapes generated for system backups are not normally suitable as recordkeeping systems.

Miscellaneous:

17. Draft materials are often circulated on e-mail systems. Preliminary drafts are records where they are circulated or made available to persons other than the creator for the purpose of approval, comment, action, recommendation, follow-up, or to inform others of the contents of the draft, and where the draft contains unique information, including substantive annotations or comments included therein, on the formulation and execution of agency policies, decisions, actions, or responsibilities. Preliminary drafts are nonrecord material where they are not circulated to others or contain no information on agency deliberations, rationale, or actions that is not contained in the final version of the document.

Because drafts in electronic form may be records, the record status of electronically created and shared drafts must be re-evaluated as changes are made. Substantive updates to such electronic drafts may constitute records while minor changes do not. If the draft qualifies as a record, a copy of the draft must be saved before the information in the draft is deleted or altered in order to create the final document or updated draft.

18. Calendars: An e-mail system may provide calendars and task lists for users. Agencies should advise users that calendars, indexes of events, and task lists are Federal records if they meet record status criteria specified in the law. Calendars, whether individual or shared, regardless of the level of the individual to whom they relate, may be Federal records or they may be personal. The NARA publication Personal Papers of Executive Officials: A Management Guide provides specific guidance on record status of calendars. That guidance notes that the Freedom of Information Act case law that has developed regarding "agency records" is the most pertinent guidance for determining the record status of calendars.

For high-level officials, calendars determined to be Federal records must be maintained in the appropriate recordkeeping system, and scheduled for disposition to permit NARA appraisal of their value. For other staff, calendars and related documents determined to be Federal records are disposable under General Records Schedule 23, Records Common to Most Offices, Item 5, Schedules of Daily Activities. Calendars determined to be nonrecord may be deleted when no longer needed.

19. The specific records management options which EOP agency components adopted as part of a settlement of the Armstrong litigation will be addressed in NARA guidance as options for the rest of government to consider. These options include but would not be limited to:

- a) the advantages of setting up of electronic recordkeeping storage systems which capture all electronic records generated or received on e-mail (with corresponding transmission and receipt data).
- b) front-end tagging by e-mail users of the record designations of each e-mail message sent (including consideration of appropriate "defaults" to be built into the system).
- c) adopting one or more specific EOP approaches to monitoring a representative sampling of e-mail for the purpose of meeting agency records management responsibilities.



93 75 2 03 53
Washington, D.C. 20530

CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
FAX TRANSMITTAL COVER SHEET



DATE: 12/2/93

TO: Marvin Krislov

FAX NUMBER: 456-1647

FROM: Jason Brown

FAX NUMBER(S) ROOM 1000
COMMERCIAL: 202-616-8470
CONFIRMATION NO.: 202-616-8474

THERE ARE A TOTAL OF 12 PAGES INCLUDING THIS COVER PAGE IN
THIS TRANSMITTAL



EAP:jrb
145-1-2062

Washington, D.C. 20530 Telephone:
202 (514-4336)

December 1, 1993

BY TELEFACSIMILE

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 Michael:

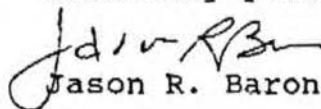
This is in response to your letter to Mark Levy of November 29, 1993, which enclosed a draft of a Joint Status Report and proposed internal working schedule for defendants' consideration.

We believe the thrust of plaintiffs' proposed Joint Status Report is acceptable, and have attempted to make only minor alterations in the wording of the proposal and in the precise schedule for completion of some aspects of this complex case. Defendants believe that a December 21 deadline for the FOIA and appraisal portions of the case is feasible for reaching a working agreement among the parties. However, we believe that the finalization of recordkeeping guidance for all components of the EOP, and resolution of the presidential/federal issues involving primarily the NSC, may take somewhat longer than the schedule you have proposed. Nevertheless, you can see by both the revised Joint Status Report and the working schedule that defendants agree to work toward settling all matters no later than the first week of February 1994. This represents a tremendous commitment on the part of the staffs of NARA and EOP components.

We have also made suggested modifications to plaintiffs' proposed internal working schedule, including provision for a further stipulation on recordkeeping issues to be agreed to by the parties prior to final settlement (also referenced in the Joint Status Report).

I trust that you will get back to me as soon as possible with any comments or proposed changes on the revised status report and schedule.

Sincerely yours,


Jason R. Baron

Enclosures
cc: Mark I. Levy

Armstrong v. Executive Office of the President
Defendants' Proposed Schedule:

Thu. 12/2/93 Defendants provide full response to plaintiffs
11/19/93 proposal on FOIA and appraisal issues

Fri. 12/3/93 Parties file Joint Status Report

Mon. 12/6/93 Meeting concerning FOIA and appraisal issues

Wed. 12/8/93 Plaintiffs provide comments on revised
drafts of agency guidelines (provided
by defendants on 12/1/93)

Thu. 12/9/93 Plaintiffs provide draft stipulation on FOIA
and appraisal issues

Fri. 12/10/93 Defendants provide counterproposal re: NSC
standards for identifying Presidential/federal
records

Wed. 12/15/93 Defendants provide response to draft stip-
ulation on FOIA and appraisal issues.

Wed. 12/15/93 Plaintiffs respond to counterproposal on NSC
standards for identifying Presidential records

Tue. 12/21/93 Stipulation on FOIA and appraisal issues
finalized and filed

Tue. 1/4/94 Final drafts of NSC and OA record/nonrecord
instructions provided to plaintiffs

Wed. 1/19/94 Final drafts of remaining EOP components' record/
nonrecord instructions provided to plaintiffs

Tue. 1/25/94 Defendants provide stipulation on all
recordkeeping issues, including presidential/
federal issues

Fri. 1/28/94 Plaintiffs respond to stipulation

Tue. 2/1/94 NARA publication of standards in Federal
Register

Fri. 2/4/94 Report on implementation of record/nonrecord
instructions and Presidential/Federal issues
filed with Court; Stipulation filed with Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT ARMSTRONG, et al.,

Plaintiffs,

v.

EXECUTIVE OFFICE OF THE PRESIDENT,
et al.,

Defendants.

Civil Action No.
89-0142 (CRR)

JOINT STATUS REPORT

Plaintiffs and defendants hereby present their Joint Status Report on the parties' efforts to prepare this case for final disposition. Since the last status conference before this Court on October 28, 1993, the parties have continued the discussions described in the Stipulation And Order Re: Procedure For Resolving And/Or Narrowing of Contested Issues In Litigation, approved by this Court on September 30, 1993. Those discussions have covered four general categories of issues: (i) Freedom of Information Act ("FOIA") issues relating to Count I of plaintiffs' Third Amended Complaint (ii) the preservation of electronic Federal records generated at the defendant agencies to date, including those stored on backup tapes pursuant to the two Temporary Restraining Orders and this Court's Orders of January 6 and 11, 1993; (iii) the content of new instructions on the management and safeguarding of Federal records; and (iv) the standards for distinguishing Presidential and Federal records. Our report addresses each of these areas in turn.

I. FOIA Issues. As the Court is aware, Count I concerns plaintiffs' request for materials under the FOIA, some of which

exist only in electronic format, and some of which are in printed format. With respect to materials in electronic format, defendants filed a Motion for Summary Judgment on July 2, 1992, which this Court determined should be stayed pending resolution of the issues that were then before the Court of Appeals. See Order of July 19, 1993. With respect to those in paper format, on September 3, 1993, this Court ordered defendants to search the material printed out pursuant to subpoena in United States v. Weinberger for documents responsive to plaintiffs' FOIA request, and to prepare a Vaughn index of materials withheld. The schedule for completing the Vaughn index for these remaining printed materials has been deferred by this Court in light of the discussions between the parties on a general plan for narrowing or resolving the issues with respect the Freedom of Information Act Count and other aspects of this action. See Order of Oct. 8, 1993.

The parties are currently working on the details of an agreement that will narrow the FOIA issues with respect to both the electronic and paper materials. The agreement will, if reached, limit the number of records at issue in Count I, establish a schedule for completing processing of both the electronic materials and the remaining Weinberger materials in accordance with the FOIA, and provide for procedures to expedite and narrow issues concerning the preparation of Vaughn entries for materials that are withheld. The agreement would also be expected to provide for the withdrawal of the unresolved July 2, 1992 Motion for Summary Judgment by defendants, so that it will not be necessary for the Court to

decide that Motion.

The agreement, including proposals for resolving any remaining issues, will be presented to the Court in the form of a stipulation and order. The parties expect to complete work on this agreement and to file it with the Court no later than December 21, 1993.

II. Preservation of Records on Backup Tapes and Hard Drives.
Pursuant to the two Temporary Restraining Orders entered in this action and this Court's Orders of January 6 and 11, 1993, defendants have retained backup tapes and hard drives containing materials created during the Reagan, Bush and Clinton administrations.¹ Most of the backup tapes from the Reagan and Bush administrations, and computer hard-drives containing electronic materials created during these administrations, were transferred to the custody of the Archivist at the end of the Bush Administration. See Armstrong v. Executive Office of the President, 821 F. Supp. 761 (D.D.C.), vacated and remanded, 1 F.3d 1274 (D.C. Cir. 1993).

The parties are currently working on the details of an agreement that will address issues concerning the care and maintenance of these magnetic media (including storage, repair, and preservation copying), and procedures for processing the electronic Federal records stored on these media in accordance with the

¹ On September 30, 1993, this Court amended the January 11, 1993 Order to permit defendants to preserve information from the electronic communications systems on backup tapes that faithfully replicate all information on the original system, including message logs and user directories, as had been permitted under the limited stay granted by the Court of Appeals on January 15, 1993.

Federal Records Act. The parties hope that this agreement will resolve, or at least narrow, issues concerning compliance with this Court's mandate that the Federal records contained on the backup tapes and hard drives be preserved.

The parties expect to complete work on this agreement, including proposals for resolving any remaining issues, by December 21, 1993, and to present it to the Court as part of the same stipulation and order addressing the FOIA issues.

III. New Instructions on Management and Safeguarding of Federal Records on Electronic Communications Systems. Since September 24, 1993, defendants have shared with plaintiffs several drafts of recordkeeping instructions intended to replace those held to be inadequate by this Court. Plaintiffs have provided defendants with detailed comments on the drafts which have resulted in revisions to the draft instructions. Defendants' most recent revised drafts of proposed recordkeeping instructions for one or more EOP components were provided to plaintiffs for review and comment on December 1, 1993.

The defendant agencies intend to complete this exchange of drafts and comments and promulgate new recordkeeping instructions for defendant National Security Council and Office of Administration, as named defendant components of the EOP, by January 11, 1994, with additional components of the EOP completing the drafting and promulgation of recordkeeping guidance by no later than January 26, 1994. Defendants have also informed plaintiffs that some aspects of one or more of the EOP's components new

recordkeeping programs will require computer modifications that due to fiscal and administrative resources cannot be implemented before February 1, 1994, at the earliest. All recordkeeping instructions shall be provided to plaintiffs at least seven days in advance of their being issued by defendants, as provided by this Court's Order of September 30, 1993. If plaintiffs are satisfied that the recordkeeping instructions for a particular system are adequate, plaintiffs will not object to defendants recycling backup tapes generated after the instructions are implemented.

The Archivist will also promulgate government-wide guidance under the Federal Records Act addressing issues raised in this action, including the identification of electronic mail materials that qualify as records, the need to preserve as records the data on when e-mail communications were received and who received them, the agencies' obligations to supervise electronic mail recordkeeping practices, and the need for disposition of e-mail records in accordance with NARA-approved schedules. This guidance will be noticed in the Federal Register for comment by interested parties, and stated in general terms applicable to all federal agencies. NARA intends that the above guidance be submitted to the Office of the Federal Register by February 1, 1994 for publication.

IV. Distinguishing Presidential and Federal Records. Under the Court of Appeals' decision, defendants' guidelines on distinguishing Presidential and Federal records are subject to judicial review, and the case was remanded to this Court to determine whether the defendants' guidelines "inaccurately classify

some documents as presidential records." Armstrong v. Executive Office of the President, 1 F.3d at 1296-97. The parties are currently in the midst of discussions exploring whether this issue can be resolved without further litigation, but these discussions have not yet reached any resolution. Moreover, a resolution that would avoid further litigation on this issue may require consultation with nonparties.

The parties believe that, by the first week of February, 1994, they will be able to report to the Court on whether it will be possible to resolve this issue without further litigation. Accordingly, the parties propose that, in addition to the Stipulation and Order discussed above, the parties would submit to the Court, by 4:00 p.m. on February 4, 1994, a report concerning the promulgation of new instructions on management and safeguarding of Federal records; the results of the parties' efforts to resolve disputes concerning the classification of Presidential Records without further litigation; and a further Stipulation and Order as worked out by the parties. If the parties have determined that particular issues cannot be resolved by mutual agreement, the parties shall provide proposed schedules for preparing these issues for final resolution with their report.

In light of the substantial progress which the parties have made in attempting to narrow and/or resolve each of the aspects of the litigation, the parties believe that no need presently exists for the status hearing previously scheduled at plaintiffs' request for 9 a.m., Tuesday, December 7, 1993. The parties will continue

to keep the Court apprised of any issues arising in the course of ongoing negotiations which are properly directed to the Court's attention. A proposed Order postponing the scheduled status hearing is attached.

JASON R. BARON
Department of Justice
Civil Division, Room 1040
901 E Street, N.W.
Washington, D.C. 20530
(202) 514-4336

December 3, 1993

MICHAEL E. TANKERSLEY
Public Citizen Litigation
Group
2000 P Street, N.W.
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(202) 833-3000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT ARMSTRONG, et al.,

Plaintiffs,

v.

EXECUTIVE OFFICE OF THE PRESIDENT,
et al.,

Defendants.

Civil Action No.
89-0142 (CRR)

ORDER

Now before the Court is a Joint Status Report submitted by the parties on their efforts to prepare this case for final disposition. The parties have asked that the status hearing scheduled for December 7, 1993 be postponed, pending the submission of further filings on December 23, 1993 and February 5, 1994, as contemplated in the Joint Status Report. Upon consideration of this request of the parties, and for good cause shown, it is hereby, this ____ day of _____, 1993,

ORDERED that the hearing scheduled for 9 a.m. on December 7, 1993, will be rescheduled as directed by further Order of this Court.

CHARLES R. RICHEY,
UNITED STATES DISTRICT JUDGE

DATED: _____

Copies to:

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THE WHITE HOUSE
WASHINGTON

DATE: 11-8-93

TO:

03 NOV 8 12:54
John Podesta

FROM:

Martin K. Low
White House Counsel
Room 128, OEOB, x7900 *7903*

☒ FYI

☐ Appropriate Action

☐ Let's Discuss

☐ Per Our Conversation

☐ Per Your Request

☐ Please Return

☐ Other



U.S. Department of Justice
Civil Division

Washington, D.C. 20530

CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
FAX TRANSMITTAL COVER STREET



DATE: 11.8.93

TO: Marvin Krislov

FAX NUMBER: 456-2146

FROM: Jason Baron
FAX NUMBER(S) ROOM 1000
COMMERCIAL: 202-616-8470
CONFIRMATION NO.: 202-616-8474

THERE ARE A TOTAL OF 18 PAGES INCLUDING THIS COVER PAGE IN
THIS TRANSMITTAL

Marvin - 3 letters - FYI

Please call.

Jason



U.S. Department of Justice
Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

November 5, 1993

BY FACSIMILE

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 parties' agreement at the last settlement meeting held on October 27, this letter will address defendants' position regarding appraisal of materials on the backup tapes. Enclosed is NARA's draft settlement proposal, entitled "Criteria for Segregation and Appraisal of Federal Records Contained in Disks and Backup Tapes Transferred to NARA."

As you will see, the NARA draft proposes criteria governing segregation of federal records on the Reagan- and Bush-era materials that were transferred to NARA in January 1993. NARA seeks to ensure continued preservation of historically valuable federal records consistent with the orders entered in the Armstrong litigation and the government's responsibilities under the Federal Records Act. Given the volume of materials, this is a considerable undertaking. NARA intends to accomplish this by a reasonable segregation and appraisal process that contemplates the disposition of nonrecord and temporary record materials not deemed appropriate for permanent accession into the National Archives.

There are a number of matters that will need to be discussed by the parties and therefore necessarily have been left open in the present draft of the plan. For instance, because the costs of restoring all the tapes are prohibitive (in the millions of dollars), the attached proposal sets forth a process for determining a manageable and representative sample of the materials to be restored for the purposes of further appraisal. The costs of restoration and sampling depend upon the amount of material involved. Similarly, developing specific time tables will depend upon the parties' agreement. And there may be some areas, such as the precise sampling scheme to be employed, where it is not feasible for NARA to specify with precision the procedures it will follow in advance of beginning its work with an independent expert

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and/or beginning the appraisal process itself.

We are committed to working with the plaintiffs in good faith to refine this proposal and to minimize the time frames required to complete this process. As soon as the parties have agreed to the process for identifying the universe of materials that will be restored and sampled, NARA and the Executive Office of the President will move forward expeditiously to implement this process. For present purposes, the critical objective is to reach an agreement in principle on the appraisal approach, including where possible the identification of the key issues and the objectives and concerns of each side. Finally, once the appraisal principles outlined above have been established for the tapes in NARA's custody, similar principles can be applied to the tapes in the custody of Executive Office of the President components.

There also is the issue that you have raised regarding preservation of presidential "e-mail," including on the preserved backup tapes. While presidential management of what are conceded by all to be presidential materials is not properly within the scope of the Armstrong litigation, see Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991), the Administration certainly recognizes your concerns on this subject. This Administration has made clear in prior guidance (issued in May 1993 and submitted as part of the record of this case) that presidential e-mail can constitute presidential records. Thus, we are committed to ensuring that Clinton Administration presidential e-mail on existing electronic communications systems (and backup tapes from those systems) will be managed and disposed of in accordance with guidelines established under the Presidential Records Act, 44 U.S.C. 2203(b) and (c). With respect to the preserved backup tapes from prior Administrations now in the custody of NARA, it is the position of the present Acting Archivist that she does not intend to initiate any action which would cause the destruction of historically significant presidential materials on those tapes.

I look forward to hearing plaintiffs' reaction to NARA's proposal and to our continued further discussions.

Sincerely yours,



Mark I. Levy
Deputy Assistant Attorney General

Enclosure

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November 5, 1993

CRITERIA FOR SEGREGATION AND APPRAISAL OF FEDERAL RECORDS
CONTAINED IN DISKS AND BACKUP TAPES TRANSFERRED TO NARA

I. Objective

This document articulates criteria for segregating Presidential materials and nonrecord material from the Federal records and for appraising the Federal records contained in the computer storage media transferred to NARA from the National Security Council (NSC) and Executive Office of the President (EOP). These criteria are intended to incorporate and implement court decisions regarding the government's obligations and responsibilities under the Federal Records Act.

II. Scope

Tapes and disks from NSC and EOP Office of Administration (EOP/OA) computer systems from the Reagan and Bush Administrations. Specifically, these are the materials transferred to NARA's custody in January and February 1993 as identified at Attachment A (List to be attached).

III. Coverage

These criteria apply to end user files, such as electronic mail, text documents, and calendars, created using the Digital Equipment Corporation All-in-One and IBM PROFS systems in WHCA, the NSC and the EOP/OA and to similar applications on the PC hard disks transferred to NARA from the NSC. They also apply to data related to such files, such as directories identifying system users and addressees and data about transmission and receipt of electronic mail.

The media transferred to NARA generally contain all of the data recorded on the system when each media volume (i.e., disk or backup tape) was written. Individual volumes may also include Federal records other than files related to electronic communications. Such records may consist of databases and office automation files, which are not electronic mail and calendars.

The disposition of all Federal records contained on these media will be in accordance with laws and regulations governing the disposition of Federal records.

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November 5, 1993

IV. Goals

- A. Ensure the preservation of historically valuable Federal records.
- B. Comply with legal requirements, and honor agreements that accompanied the transfer of the tapes and computer disks in a manner that is consistent with legal requirements concerning Presidential materials and Federal records.
- C. Segregate Federal records and Presidential materials.
- D. Dispose of any nonrecord materials and any Federal records which are authorized for disposal under the General Records Schedules, agency records disposition schedules, or records disposition authorities developed specifically for these materials.

V. Segregation of Federal Records

NARA will use the following criteria for determining whether a record is Federal or Presidential: (1) office of origin, and (2) use/distribution of record. In some cases, any one of these criteria may be determinative; in others, all three may be needed in order to make the determination of the status of a record.

(1) Office of origin: Certain components of the EOP (such as the Office of Administration, Office of Management and Budget, Office of the U.S. Trade Representative, Office of National Drug Control Policy, and Council on Environmental Quality), will be presumed to create only Federal records. The White House Office and the Office of Policy Development create only Presidential records.

Messages originating with the components that create only Federal records will be treated as Federal records and no additional criteria need be considered.

Messages originating in the WHO or OPD are Presidential. Copies of WHO or OPD messages received in EOP components that create Federal records will be treated as Federal records.

Messages sent to 5 or more recipients on the EOP/OA All-in-One system are only stored by that system as one copy. For any message sent to fewer than 5 addressees, this system creates a copy for each addressee in each of those employees' electronic "mail box." Thus, if a WHO or OPD employee sent a message to 1 to 4 Federal agency employees, copies would exist in each of those employees' mail boxes and NARA will treat such received messages as Federal records. If a WHO or OPD employee sent a

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message to 5 or more recipients, NARA will treat the message as a Federal record if receipt of the message or file by any of the addressees would constitute a Federal record.

The National Security Council and Office of Science and Technology Policy create both Presidential and Federal records. The delineations for determining the status of records at those components will be determined by the parties to this litigation and attached at Attachment B.

(2) Use/Distribution: Messages that were broadly disseminated throughout the EOP, such as "to all employees," will be treated as Federal, regardless of office of origin or position of sender.

VI. Separation of Nonrecord Materials from Federal Records

The statutory definition of Federal records will be applied in order to separate Federal records from other materials stored on these tapes and disks.

VII. Appraisal of Federal Records

A. General Principle

Those materials determined to be Federal records will be appraised as either permanent or temporary according to the guidelines listed below. Permanent records will be retained in the format described under VIII.C below; temporary records will be disposed of according to approved schedules. Appraisal determinations will be based on NARA regulations and on the handbook, Disposition of Federal Records, published by NARA.

B. Appraisal Guidelines

NARA will appraise the Federal records on these tapes and disks according to their provenance and the subject matter of the records. Based on these principles, some records will be obviously permanent, some obviously temporary, and some will require further analysis. Permanent record categories will more likely consist of records created or received by higher-level officials and will concern policy development or implementation. Temporary record categories will more likely consist of records created or received by lower-level employees and will not concern policy development or implementation. The final appraisal of the value of records is the statutory responsibility of the Archivist of the United States. The categories being described here are proposals, and not final determinations.

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November 5, 1993

VIII. Processes

A. Restoration.

Most of the media volumes transferred to NARA consist of backup tapes. The backup tapes contain copies of the data stored on random access storage devices. The arrangement of the data on these tapes mirrors the physical order of the data on the original device. This physical order may scatter any given file randomly. In order to access the logical files (documents, messages, calendars, etc.) it is necessary as a first step to "restore" the data to a device which organizes the data in the same physical order as the original device.

1. General Principle

Consistent with available resources, NARA will use its best efforts to ensure the preservation of federal records and Presidential materials that are historically valuable on the backup tapes.

2. Specific Guidelines

a. Deletion Cycles

Certain systems automatically deleted user files or data only on a cyclical basis. For such systems, only the last backup created within the cycle before the deletion will be restored. In this manner, all the records saved on the system during the cycle will be restored, but only once.

b. Physical Duplication

When there is a sequential series of backup tapes, the first tape in the series will be restored. Subsequent tapes in that series will be compared to the first tape to determine if there are any physical blocks of data that are different from the data on the tape that precedes it in the series. When this can be done efficiently, only the unique parts of the subsequent tapes will be restored and appraised.

c. Statistical sample of media

A subset of the computer tapes that were in existence when the first and second Temporary Restraining Orders went into effect will be restored. A statistical sample of the Reagan-era tapes, and the Bush-era tapes created after the second TRO, will be restored, in order to identify historically significant topics that might be the subjects of messages or documents stored on the tapes. If no such topics are discovered, no additional files

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November 5, 1993

will be restored or preserved. If significant topics are found, other tapes will be restored and messages and files related to significant topics will be preserved.¹

B. Analysis of Content

NARA will employ appropriate analytical techniques, including statistical sampling or full-text indexing, to characterize either the historically valuable records or the disposable information stored on a tape or set of tapes. The characteristics to be analyzed will include such relevant parameters as author, recipient, subject, and content. These characteristics will then be used to distinguish the permanent records from the disposable materials. Any sampling strategy will be designed by an independent expert in statistical methods.

The following examples illustrate how the analysis would be conducted:

(1) Examination of the contents of a sequence of backup tapes, for a two-week period, may reveal a highly consistent pattern of use, such as certain users create messages which have historical value, whereas other users only send messages about transitory or personal matters. NARA would sample subsequent tapes in this sequence in order to determine if this pattern persists. If this sampling indicated, with a very high level of confidence, that certain users did not create or receive any e-mail with lasting significance, then no messages from those users during the period for which this assertion is valid would be preserved.

(2) If historically significant topics appear among the messages at some time in the period covered, then the series of tapes in which such messages were found would be searched in order to find and preserve all the messages related to those topics.

(3) If analysis of a set of tapes showed that all messages which are less than 80 characters long and contain the words, "lunch" or "tennis", are not records, NARA will sample additional tapes to determine if this generalization can be extended. If so, these attributes will be used as a basis for deleting such messages.

¹ All Bush-era tapes and disks which are of interest to the Office of the Independent Counsel will be retained at least as long as the Independent Counsel's investigation of matters related to the last Presidential election continues.

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November 5, 1993

C. Format for Preservation

In conformance with 36 CFR 1234, NARA will endeavor as much as possible to retain records in a transportable format; that is, an electronic form which is independent of particular hardware or software, but which retains all of the real world data contained in the original format. "Real world data" is data which refers to something other than the configuration or operation of the computer system.

NARA will retain transmission and receipt data, and data identifying users or correspondents related to any records it retains. NARA may elect to incorporate such data with related messages or to retain the data separately, but in a form which enables it to be linked to the related messages.

D. Disposal

NARA will preserve permanent Federal records. Items that are duplicates, nonrecord materials or records authorized for disposal will not be preserved unless eliminating them would prove too burdensome. Options for eliminating disposable items include, but are not limited to

- not restoring backup tapes, or portions of backup tapes determined to be duplicative or to contain no records of continuing value;

- not creating a transportable copy of a disposable file; and
- deleting during archival processing.

Once all backup tapes and disks have been processed in accordance with these guidelines, NARA will make preservation copies of historically valuable records.



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,

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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

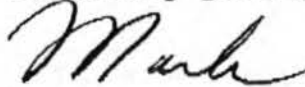
- 3 -

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,



Mark I. Levy
Deputy Assistant Attorney General

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DOCUMENTS ACCOMPANYING PLAINTIFFS' NOV. 1, 1993 LETTER

NO.	DATE	DESCRIPTION	NSC TREATMENT	
			CURRENT	PROPOSED
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.		

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

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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.

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14. 02/18/87 Note Elaine M. Mitsler to NSDBK, P P
Subject: Reminder
- 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 P P
Keel; Subject: Crazy Going Ons In
Colombia
- 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 F P
Powell Forwarding 12/31/86 Note from Ken
DeGraffenreid to DAPNSA Colin Powell;
Subject: Serious Espionage Case At
Embassy Moscow
- 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.

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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.



U.S. Department of Justice
Civil Division

Washington, D.C. 20530

EAP:jrb:ajc
145-1-2062

November 5, 1993
Tel: (202) 514-4336

BY FACSIMILE

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

Dear Michael:

This letter is in further response to your letter of October 1, 1993. The one outstanding issue raised in your letter concerns the treatment of the Reagan-era NSC PROFS tapes containing "systems" information. You expressed concern "that NARA has excluded from its preservation activities a large number of tapes containing 'system' information that may include the documentation necessary to restore and retrieve data from the backup tapes."

Your concern with respect to the preservation of these tapes has been addressed by NARA. The physical condition of the PROFS non-record systems tapes has been assessed by NARA according to the same standards and procedures applied to tapes containing record information. Three (3) of the PROFS systems tapes were found to have physical problems and will be referred to the National Media Lab for reconditioning.

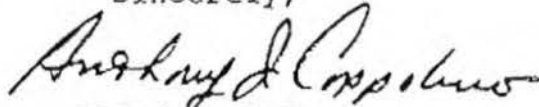
In addition, as you are aware from the status reports we have produced in discovery, NARA has already copied the majority of the PROFS non-record systems tapes. At present, only 11 non-record systems tapes have yet to be copied. In order to resolve remaining contempt issues in this case, NARA will include these remaining 11 tapes in the copying process.

We regard your related concern as to whether the systems tapes constitute necessary documentation to undertake restoration as distinct from the preservation copying issue raised in contempt proceedings. NARA advises us that current, off-the-shelf, versions of both systems software and applications software are capable of restoring and reading the files on the Reagan-era PROFS tapes. Thus, the systems information needed for restoration may be obtained through means other than the backup tapes at NARA. If the PROFS systems backup tapes were deemed necessary for restoration, these tapes have undergone NARA's preservation activities and multiple copies are available.

- 2 -

Given NARA's actions to date and commitment to copying all remaining Reagan-era tapes, we believe the parties are in a position to enter into a stipulation resolving the contempt issues on remand, in furtherance of the more general stipulation endorsed by the Court on September 30. Please advise us of the plaintiffs' views on entering into such a stipulation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Anthony J. Coppolino".

JASON R. BARON
ANTHONY J. COPPOLINO
Trial Attorneys
Federal Programs Branch
Civil Division

NATIONAL SECURITY COUNCIL

WASHINGTON, D.C. 20506

October 7, 1993

33 OCT 12 P3:14

To John P
per our
discussion
ms

ACTION

MEMORANDUM FOR ANTHONY LAKE

FROM: ALAN KRECZKO/^{AK}NEAL^{ngw} WOLIN

SUBJECT: Status of the NSC

Attached is a draft memorandum to the President explaining that we would assert in the next round of the Armstrong litigation that the NSC is not a federal agency for purposes of FOIA, but instead only creates Presidential records. The memo briefly lays out the reasons we would adopt that position.

We have cleared the memo with Bernie Nussbaum, who concurs that the NSC should take the position that, forced to choose one or the other by the Court of Appeals, the NSC creates only presidential records.

John Podesta, however, does not agree. He believes that the NSC (which does not include you and Sandy) should concede that it creates solely federal records. He believes that asserting we are Presidential will cost the President politically, both in terms of negative press and potentially on the Hill. He thinks such a decision would fly in the face of all the President's open government initiatives and undo the goodwill created by them.

We believe that while our recommended course of action may have negative political effects in the short-term, there are steps (outlined in the memorandum to the President) that can be taken to ameliorate such effects. Moreover, taking the opposite position -- that the NSC is a FOIA agency and that all of its records are federal records -- will create administrative and political burdens for all NSC's, including ours, into the foreseeable future. Finally, it will not be possible to neatly distinguish between you and Sandy and the rest of the NSC. Currently, NSC staff receive copies of memos prepared for you to send to the President, after you sign off on them. Those memos, which are clearly Presidential because they run from you to the President, would become "federal" as soon as received by NSC staff. The same would be true of any other documents you provide to us, (or notes we make of conversations with you). Therefore, we would need to change dramatically the flow of information between you and the NSC staff in order to protect the Presidential nature of your work if we concede that the rest of the NSC is federal.

John has alternatively suggested that we restructure the NSC, attaching those who do presidential work directly to you, and leaving the "federal" portion assigned to Will Itoh. This is completely impractical.

You (or Sandy), Podesta and Nussbaum need to have a brief discussion on these matters in order to be able to inform the President of an agreed position. The issue needs to be resolved as soon as possible, preferably by early next week.

RECOMMENDATION

That you discuss the issue of the status of NSC records with John Podesta and Bernie Nussbaum as soon as possible with a view to sending the memorandum at Tab I to the President informing him that we will assert in the Armstrong case that the NSC only creates presidential records.

Attachments

Tab I Memorandum for the President

THE WHITE HOUSE
WASHINGTON

INFORMATION

MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD NUSSBAUM
ANTHONY LAKE
JOHN PODESTA

SUBJECT: NSC Status

Armstrong v. Executive Office of the President is a long-standing suit brought by National Security Archives and others to gain access under the Freedom of Information Act (FOIA) to E-mail and other records generated by the NSC during the Reagan and Bush administrations.

The litigation has expanded over time to include the entire EOP, current E-mail, and the guidance provided employees concerning the use of E-mail to create and preserve federal or presidential records.

The most recent stage of the litigation has added a new issue -- the status of the NSC. For decades, the NSC has taken the position that most of its records are presidential because they are created to provide advice to you, through the National Security Adviser. The NSC has, however, also taken the position that certain categories of its documents are federal records (e.g., administrative files, intelligence oversight records, and documents relating to its inter-agency coordination function) which are subject to FOIA. A recent ruling by the Court of Appeals suggests that the NSC will no longer be able to claim that it creates both federal and presidential records. Citing a string of recent opinions, the court has suggested that the NSC cannot protect any of its records as presidential unless it claims that all of its records are presidential. Otherwise, the court suggested that all of the NSC records be considered federal records.

The status of the NSC's documents affects important presidential prerogatives. Presidential records remain subject to your control for up to 12 years and are not subject to FOIA until that time; federal records can be immediately disclosed by a succeeding Administration. Such disclosures can be used to reveal the deliberations of the preceding Administration in order to serve partisan interests.

Viewing the NSC as presidential is consistent with the status of the CEA, which has been sustained by the courts as presidential,

cc: Vice President
Chief of Staff

and with the view we take of the NEC and the DPC. It would be anomalous, given the special responsibilities the Constitution accords to the President for national security matters, for the NSC to be considered less presidential than its counterpart domestic entities.

The Carter Administration Justice Department opined that the NSC was a federal agency for purposes of FOIA. Recently the Justice Department has reviewed carefully that opinion in light of statutory changes and subsequent case law and believes it no longer correct.

Accordingly, we intend to argue at the next stage of the litigation that the NSC only creates presidential records. While we believe this position is correct, it will attract media criticism. Plaintiffs (who include Scott Armstrong, formerly of the Washington Post) will attempt to portray this as an effort to shroud the NSC in "even more secrecy than sought by the Nixon NSC." We would intend to offset this criticism by:

- noting that all NSCs have asserted that they create primarily presidential material and that we are taking the position that the NSC is solely presidential only because the court has indicated we must either be presidential or federal;
- indicating that we will, as a matter of policy, continue to review public requests for those categories of NSC records traditionally treated as federal; and
- pointing to the other administration efforts underway to reduce government secrecy.

Washington, D.C. 20530

6 SEP 1978

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

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

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).

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.

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.

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. 7/ (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

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

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

"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.

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/

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)

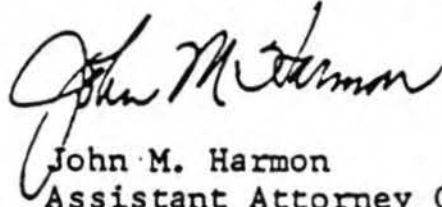
Conclusion

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 § 21.01 (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.

THE WHITE HOUSE
WASHINGTON

93 OCT 18 17:00
October 13, 1993

File
Hemstray
SRB -
your show?
DZ

NOTE FOR TONY LAKE
SANDY BERGER
NANCY SODERBERG

I think that Alan and Neal's cover memo completely misstates my position on this issue and I'll let Bernie speak for himself, but I think it misstates his too.

I'm trying to find a practical way of essentially preserving the system we currently have in place. I've had numerous conversations with Neal about this. I've talked to Alan but I can't seem to get through to him.

I think we should discuss this matter directly.

10/18
John Podesta:
Let's discuss this.
Please give me a
call.
Sandy


John Podesta

NATIONAL SECURITY COUNCIL

WASHINGTON, D.C. 20506

October 7, 1993

3:12 P3:14

To John P
per our
discussion
W

ACTION

MEMORANDUM FOR ANTHONY LAKE

FROM: ALAN KRECZKO/^{AK}NEAL^W WOLIN

SUBJECT: Status of the NSC

Attached is a draft memorandum to the President explaining that we would assert in the next round of the Armstrong litigation that the NSC is not a federal agency for purposes of FOIA, but instead only creates Presidential records. The memo briefly lays out the reasons we would adopt that position.

We have cleared the memo with Bernie Nussbaum, who concurs that the NSC should take the position that, forced to choose one or the other by the Court of Appeals, the NSC creates only presidential records.

John Podesta, however, does not agree. He believes that the NSC (which does not include you and Sandy) should concede that it creates solely federal records. He believes that asserting we are Presidential will cost the President politically, both in terms of negative press and potentially on the Hill. He thinks such a decision would fly in the face of all the President's open government initiatives and undo the goodwill created by them.

We believe that while our recommended course of action may have negative political effects in the short-term, there are steps (outlined in the memorandum to the President) that can be taken to ameliorate such effects. Moreover, taking the opposite position -- that the NSC is a FOIA agency and that all of its records are federal records -- will create administrative and political burdens for all NSC's, including ours, into the foreseeable future. Finally, it will not be possible to neatly distinguish between you and Sandy and the rest of the NSC. Currently, NSC staff receive copies of memos prepared for you to send to the President, after you sign off on them. Those memos, which are clearly Presidential because they run from you to the President, would become "federal" as soon as received by NSC staff. The same would be true of any other documents you provide to us, (or notes we make of conversations with you). Therefore, we would need to change dramatically the flow of information between you and the NSC staff in order to protect the Presidential nature of your work if we concede that the rest of the NSC is federal.

John has alternatively suggested that we restructure the NSC, attaching those who do presidential work directly to you, and leaving the "federal" portion assigned to Will Itoh. This is completely impractical.

You (or Sandy), Podesta and Nussbaum need to have a brief discussion on these matters in order to be able to inform the President of an agreed position. The issue needs to be resolved as soon as possible, preferably by early next week.

RECOMMENDATION

That you discuss the issue of the status of NSC records with John Podesta and Bernie Nussbaum as soon as possible with a view to sending the memorandum at Tab I to the President informing him that we will assert in the Armstrong case that the NSC only creates presidential records.

Attachments

Tab I Memorandum for the President

THE WHITE HOUSE
WASHINGTON

INFORMATION

MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD NUSSBAUM
ANTHONY LAKE
JOHN PODESTA

SUBJECT: NSC Status

Armstrong v. Executive Office of the President is a long-standing suit brought by National Security Archives and others to gain access under the Freedom of Information Act (FOIA) to E-mail and other records generated by the NSC during the Reagan and Bush administrations.

The litigation has expanded over time to include the entire EOP, current E-mail, and the guidance provided employees concerning the use of E-mail to create and preserve federal or presidential records.

The most recent stage of the litigation has added a new issue -- the status of the NSC. For decades, the NSC has taken the position that most of its records are presidential because they are created to provide advice to you, through the National Security Adviser. The NSC has, however, also taken the position that certain categories of its documents are federal records (e.g., administrative files, intelligence oversight records, and documents relating to its inter-agency coordination function) which are subject to FOIA. A recent ruling by the Court of Appeals suggests that the NSC will no longer be able to claim that it creates both federal and presidential records. Citing a string of recent opinions, the court has suggested that the NSC cannot protect any of its records as presidential unless it claims that all of its records are presidential. Otherwise, the court suggested that all of the NSC records be considered federal records.

The status of the NSC's documents affects important presidential prerogatives. Presidential records remain subject to your control for up to 12 years and are not subject to FOIA until that time; federal records can be immediately disclosed by a succeeding Administration. Such disclosures can be used to reveal the deliberations of the preceding Administration in order to serve partisan interests.

Viewing the NSC as presidential is consistent with the status of the CEA, which has been sustained by the courts as presidential,

cc: Vice President
Chief of Staff

and with the view we take of the NEC and the DPC. It would be anomalous, given the special responsibilities the Constitution accords to the President for national security matters, for the NSC to be considered less presidential than its counterpart domestic entities.

The Carter Administration Justice Department opined that the NSC was a federal agency for purposes of FOIA. Recently the Justice Department has reviewed carefully that opinion in light of statutory changes and subsequent case law and believes it no longer correct.

Accordingly, we intend to argue at the next stage of the litigation that the NSC only creates presidential records. While we believe this position is correct, it will attract media criticism. Plaintiffs (who include Scott Armstrong, formerly of the Washington Post) will attempt to portray this as an effort to shroud the NSC in "even more secrecy than sought by the Nixon NSC." We would intend to offset this criticism by:

- noting that all NSCs have asserted that they create primarily presidential material and that we are taking the position that the NSC is solely presidential only because the court has indicated we must either be presidential or federal;
- indicating that we will, as a matter of policy, continue to review public requests for those categories of NSC records traditionally treated as federal; and
- pointing to the other administration efforts underway to reduce government secrecy.