

FOIA MARKER

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Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Marvin Krislov

Subseries: Steve Neuwirth

OA/ID Number: 8192

FolderID:

Folder Title:

FOIA - National Service Office

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MEMORANDUM

TO: Marvin Krislov, Assistant Counsel to the President
FROM: Jeff Ross^{JR} and Adam L. Rosman^{ALR}
DATE: August 25, 1994
RE: Treatment of FOIA Requests Concerning The White House
Office of National Service

I. INTRODUCTION

This memorandum summarizes material pertinent to the question of whether the Freedom of Information Act ("FOIA") applies to the White House Office of National Service ("ONS").

II. DOJ STANDARD FOR EVALUATING THE FOIA STATUS OF OFFICES WITHIN THE EXECUTIVE OFFICE OF THE PRESIDENT.

In a memorandum dated November 3, 1993, Associate Attorney General Webster Hubbell set forth the procedures for FOIA consultation of agency files containing information originating from the White House. Webster L. Hubbell, White House Records or Information Found In Agency Files: FOIA Consultation Procedures, November 3, 1993 at 1 (Attachment A). He related that the FOIA applies to the Executive Office of the President, but does not "include either 'the President's immediate personal staff' or any part of the Executive Office of the President 'whose sole function is to advise and assist the President.'" Id. According to these definitions, the "parts of the Executive Office of the President that are known as the 'White House Office' are not subject to the FOIA, while certain other parts of the Executive Office of the President are" subject to its provisions. Id.

III. CASELAW

The controlling case on the issue is Soucie v. David, 448 F.2d 1067 (D.C.Cir 1971). As the Hubbell memorandum stated, Soucie established that if an organization's "sole function were to advise and assist the President," then FOIA did not apply. In 1993, the D.C. Court of Appeals held that courts should examine three factors to decide the Soucie ("sole function") test: (1) proximity of the organization to the President; (2) extent of delegation from President to the organization; and (3) whether the organization is a self-contained structure. Meyer v. Bush, 981 F.2d 1288, 1293 (D.C.Cir 1993). In short, the closer the organization is to the President, the less decision-making power delegated to it, and the less self-contained it is, the more likely the court will consider it part of the "White House Office," and not subject to FOIA. See also National Sec. Archive

v. Archivist of the United States, 909 F.2d 541, 545 (D.C.Cir. 1990) (White House Counsel's Office not a FOIA agency); Energy Research Foundation v. Defense Nuclear Safety Board, 917 F.2d 581 (D.C.Cir. 1990) (Defense Nuclear Safety Committee was FOIA agency) Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1041 (D.C.Cir.1985) (Council of Economic Advisors (CEA) not a FOIA agency); Pacific Legal Found. v. Council on Env'tl. Quality, 636 F.2d 1259 (D.C.Cir.1980) (Council on Environmental Quality (CEQ) was FOIA agency). These cases are Attachment B.

In the five cases listed above, a crucial factor in determining whether the organization was an "agency" for FOIA purposes was the extent to which the organization had the power to investigate and evaluate other agencies and/or the private sector. For example, in Soucie, the court said that the Office of Science and Technology did more than simply advise and assist the President because it "inherited from the National Science Foundation the function of evaluating federal programs." 448 F.2d at 1075. In Energy Research, the court concluded that "the Board does considerably more than merely offer advice . . . [i]t conducts investigations, which 'has long been recognized as an incident of legislative power' delegated to agencies by Congress." 917 F.2d at 584 (quoting Soucie, 448 F.2d at 1075 n.27). In contrast, in Rushforth, the court concluded that the Council of Economic Advisors was not a FOIA agency because, although it "appraised" some federal programs, it had "no regulatory power under the statute . . . [and could not] fund projects based on the appraisal . . . nor [could] it issue regulations for procedures based on the appraisals." Id. at 1043.

IV. THE STRUCTURE OF THE ONS

The ONS was "established" by President Bush on January 21, 1990 (the day after his inauguration). George Herbert Walker Bush, The Points of Light Movement: The President's Report to the Nation, January 8, 1993 at 25 (Attachment C). It was neither authorized by Executive Order nor created by statute. It appears to have been simply "created" through the President's executive authority within the White House. See George Herbert Walker Bush, Remarks at the Mississippi State University Commencement Ceremony, May 13, 1989 ("And that's why I created the Office of National Service"); George Herbert Walker Bush, Remarks at the Annual Congressional Fire Services Institute Dinner, April 12, 1989 ("I have opened at the White House the Office of National Service. This office is leading my administration's community and national service efforts") (See Bush Documents at Attachment D). From January 1989 to April 1991, ONS was headed by a Deputy Assistant to the President, and then, beginning in April 1991, an Assistant to the President. It appears that the DAP and AP reported to the President's Chief of Staff. See George Herbert Walker Bush, Remarks at a White House Luncheon for Business Leaders, February 3, 1989 ("But we've opened here now an Office of National Service. Gregg Petersmeyer, under the Chief of Staff,

has the lead on that. It will be in the White House."). On June 27, 1989, Gregg Petersmeyer, Director of ONS, commenting on the structure and mission of ONS, said "To see it as a 'program' is not to see it at all. This is a movement. The government is just a catalyst. The fuel is individual initiative." Wash. Post, June 26, 1989, at A10.

V. THE FUNCTION OF THE ONS: THE PRESIDENT'S REPORT TO THE NATION ON THE POINTS OF LIGHT MOVEMENT AND BUSH WHITE HOUSE DOCUMENTS CONCERNING ONS

A. The President's Report

In January 1993, President Bush released his report on the Points of Light Movement. The White House Office of National Service was one of four institutions created to implement the Points of Light Movement. George Herbert Walker Bush, The Points of Light Movement: The President's Report to the Nation, January 8, 1993 at 9 (hereinafter "President's Report"). The other three institutions were the (1) Points of Light Foundation; (2) Commission on National and Community Service; and (3) National Center for Community Risk Management and Insurance. Id. According to the President's Report, the ONS:

- Coordinates Presidential activities that highlight the value and rewards of voluntary community service
- Helps the President identify and recognize successful problem-solving leaders and initiatives
- Enlists Americans to contribute their leadership in the effort
- Calls for and supports new institutions and policy initiatives that build and strengthen the Points of Light movement

President's Report at 9-15.

The body of the President's Report further describes the Office as "the first ever established within the White House exclusively devoted to fostering direct and consequential voluntary service" and states its mission as "to use Presidential leadership to make community service national policy of the highest order." President's Report at 9.

B. Documents from the Bush Administration Concerning ONS

The Bush Presidential library provided a substantial number of documents concerning the Points of Light Initiative. In general, the documents describe ONS in language similar to the President's report. These documents report that the primary function of ONS was to:

- Advise the President on community service policy and strategy

- Communicate the President's community service strategy
- Propose ways for the President and other government officials to highlight outstanding community service leaders and initiatives
- Participate in the solution of problems
- Recommend government policy reforms
- Work with the Points of Light Foundation and other institutions to achieve the mission of making direct and consequential community service central of the life of every American

VI. PRELIMINARY ANALYSIS

The FOIA does not apply to ONS because ONS is within the "White House Office," and its sole function is to advise and assist the President. In short, ONS passes the three-part test outlined in Meyer v. Bush:

- (1) **The proximity of the organization to the President.** The ONS is solely "within" the White House. It was created by the President pursuant to his executive authority to manage and organize the Executive Office. As if to underscore Presidential control of the organization, ONS was created without Executive Order or statutory authority. The President simply "created" it. The Director of ONS, an Assistant to the President, reports directly to the Chief of Staff. There are no cabinet officers involved in the management of ONS.
- (2) **The extent of delegation from the President to the organization.** Similar to the Council of Economic advisors, ONS does not "possess any delegated regulatory authority to supervise agencies." Meyer at 1293. Although ONS may "evaluate" federal programs, it has no authority to act on its evaluations, or enforce its recommendations following evaluation. Although some of the language in the President's Report and documents concerning ONS could be construed to mean more than "advise and assist," it is a stretched reading. For example, the President's report says that ONS "enlists Americans to contribute their leadership" and "calls for and supports new institutions and policy initiatives that build and strengthen the Points of Light movement." This language could suggest that ONS coordinates and manages the Administration's efforts to promote community service, which might go beyond the pure "advise and assist." But Petermeyers'--the Director of the Office--own description of the organization as "not a program," undermines that reading of the language. More importantly, most descriptions of ONS are consistent with the "advise and consent" role (see e.g. "Coordinate Presidential

activities," "Helps the President identify" and "Advise the President.")

- (3) **Whether the organization is a self-contained structure.** Although ONS did have its own staff [need to confirm specifics], it was wholly within the "White House Office," as discussed above. It may have been "self-contained" in the sense that it had its own director and staff, but it was under the complete direction and control of the President and Chief of Staff.



AR

The Associate Attorney General

Washington, D.C. 20530

November 3, 1993

MEMORANDUM

TO: Freedom of Information Act Administrative
and Legal Contacts at All Federal Agencies

FROM: Webster L. Hubbell *WLS*
Associate Attorney General

SUBJECT: White House Records or Information Found In
Agency Files: FOIA Consultation Procedures

The purpose of this memorandum is to set forth the procedures to be followed by all federal agencies for the handling of any White House-originated record or information that is found responsive to an access request made under the Freedom of Information Act, 5 U.S.C. § 552 (1988).¹

In processing FOIA requests, agencies searching for responsive records occasionally find White House-originated records (or records containing White House-originated information) that are located in their files. These records raise special concerns, including questions of executive privilege, and require special handling--particularly in light of the White House's unique status under the FOIA.

By its terms, the FOIA applies to "the Executive Office of the President," 5 U.S.C. § 552(f), but this term does not include either "the President's immediate personal staff" or any part of the Executive Office of the President "whose sole function is to advise and assist the President." Meyer v. Bush, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993) (quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974)); see also, e.g., Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971). This means, among other things, that the parts of the Executive Office of the President that are known as the "White House Office" are not subject to the FOIA; certain other parts of the Executive Office of the President are.

In coordination with the Office of the Counsel to the President, the Department of Justice has determined that agencies should implement the following FOIA procedures regarding all

¹ This memorandum supersedes the Department of Justice's January 28, 1992 memorandum on this subject.

White House-related records or information found in their files. Please note that these procedures prescribe "consultations," which do not involve a transfer of administrative responsibility for responding to a FOIA request, as distinct from complete record "referrals."² In all instances involving White House records or information, your agency will be responsible for responding directly to the FOIA requester once the process of consultation is completed.

1. Records originating with any part of the "White House Office"³ should be forwarded to the Office of the Counsel to the President for any recommendation or comment it may wish to make, including any assertion of privilege, prior to your response to the FOIA requester. Please be sure to advise the White House Counsel's Office of any sensitivity that these records have from the perspective of your agency and whether you believe any FOIA exemption applies. If after considering the possibility of discretionary disclosure in accordance with the Attorney General's FOIA Memorandum of October 4, 1993 you believe that a FOIA exemption applies, you should mark each record accordingly to facilitate review by the Counsel's Office of your proposed response.

All such consultation communications should be forwarded to the White House Counsel's Office at the following address:

Office of the Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

² See FOIA Update, Summer 1991, at 3-4 ("OIP Guidance: Referral and Consultation Procedures") (further discussing differences between these two procedures).

³ The "White House Office" includes, among other components, the Offices of the President, ¹Cabinet Affairs, ²Chief of Staff, ³Communications, ⁴First Lady, ⁵Counsel to the President, ⁶Intergovernmental Affairs, ⁷Legislative Affairs, ⁸Management and Administration, ⁹Operations, ¹⁰Political Affairs, ¹¹Presidential Personnel, ¹²Public Liaison, ¹³Scheduling and Advance, ¹⁴Staff Secretary, ¹⁵Correspondence, ¹⁶Visitors, ¹⁷Policy Development, ¹⁸Domestic Policy Council, ¹⁹Environmental Policy, ²⁰Council of Economic Advisors, ²¹National Economic Council, ²²Assistant to the President for National Security Affairs and Deputy Assistant to the President for National Security Affairs, ²³Assistant to the President for Science and Technology, and the President's Foreign Intelligence Advisory Board. The White House Office also includes task forces and working groups created by the President or an official in the White House Office, and reporting to the President or an official in the White House Office, including, for instance, the National Performance Review.

Please note that many records originating with the White House Press Office, such as "Press Briefings" and "White House Talking Points" (unless they are marked as, or appear to be, drafts), are in the public domain and thus may be disclosed without consultation. Questions concerning records likely to be in the public domain should be referred to the White House Counsel's Office as well.

It is possible that a record originating in the White House Office (or in the Office of the Vice President--see below) will be one over which the White House Office (or the Office of the Vice President) has retained control, in which case it will not be an "agency record" subject to the FOIA even though it is located by a federal agency in response to a FOIA request. Accord, e.g., Goland v. CIA, 607 F.2d 339, 345-48 (D.C. Cir. 1978) (honoring "retention of control" by non-FOIA entity), cert. denied, 445 U.S. 927 (1980); see also Paisley v. CIA, 712 F.2d 686, 692-95 (D.C. Cir. 1983); Holy Spirit Ass'n v. CIA, 636 F.2d 838, 840-42 (D.C. Cir. 1981). Any such records should be identified for special handling.

2. Any record originating with the Office of the Vice President or any of its component offices, offices which likewise are not subject to the FOIA, should be forwarded for consultation purposes to the Office of the Counsel to the Vice President, Old Executive Office Building, Room 269, Washington, D.C. 20501.

3. All records originating with other offices within the Executive Office of the President (EOP)--including the Office of Administration; the Office of Management and Budget; the Office of Science, Technology and Space Policy; the Office of the U.S. Trade Representative; the Council on Environmental Quality; and the Office of National Drug Control Policy--should be forwarded to the FOIA officers of the relevant individual EOP offices. This, again, is for consultation purposes only; agencies remain responsible for responding directly to the FOIA requester once these EOP consultations have been completed. For your convenience, a contact list for these EOP offices is attached.

4. Responses to FOIA requests for any classified White House records or records originating with the National Security Council should be coordinated with Ms. Nancy V. Menan of the National Security Council at the following address:

Director of Information Disclosure
Office of Information Disclosure
National Security Council
Old Executive Office Building, Room 392
Washington, D.C. 20506

Records originating with the Assistant to the President for National Security Affairs or his deputy should continue to be

treated as records originating in the White House Office (see footnote 3 above).

If any question arises regarding these procedures, either generally or in any particular case, please do not hesitate to contact Margaret Ann Irving, Acting Deputy Director of the Justice Department's Office of Information and Privacy, at (202) 514-4251.

Attachment

cc: All Agency General Counsels

Executive Office of the President--Agencies Subject to the FOIA

Council on Environmental Quality
Deputy General Counsel
722 Jackson Place, N.W., Room 31
Washington, D.C. 20006

Office of Administration
Director, Administrative Services Division
Old Executive Office Building, Room 350
Washington, D.C. 20500

Office of Management and Budget
General Counsel
Old Executive Office Building, Room 262
Washington, D.C. 20503

Office of National Drug Control Policy
FOIA Officer
750 17th Street, N.W., 8th Floor
Washington, D.C. 20500

Office of Science, Technology and Space Policy
Executive Director
726 Jackson Place, N.W., Room 5013
Washington, D.C. 20500

Office of the U.S. Trade Representative
FOIA Officer
600 17th Street, N.W., Room 222
Washington, D.C. 20506

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guarded and tentative approach.⁵

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

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

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

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

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

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

It is so ordered.



Katherine Anne MEYER

v.

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

No. 92-5029.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 18, 1992.

Decided Jan. 8, 1993.

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

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

So ordered.

Wald, Circuit Judge, dissented and filed an opinion.

1. Records § 51

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

2. Records § 51

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

3. Administrative Law and Procedure § 701

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

4. Records § 51

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

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

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

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

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

Opinion for the Court filed by Circuit Judge SILBERMAN.

Dissenting opinion filed by Circuit Judge WALD.

SILBERMAN, Circuit Judge:

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

I.

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

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

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

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

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

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

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

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

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

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

document is not subject to this interlocutory appeal.

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. "If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency." *Soucie*, 448 F.2d at 1075.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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ship, thus, cuts against appellee's argument.

The Task Force's lack of a separate staff further indicates the absence of independent authority. In *Soucie*, we implied that structure and function, for purposes of defining agency, are interrelated. "If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a *separate* agency." *Soucie*, 448 F.2d at 1075 (emphasis added). FOIA, by declaring that only "establishments in the executive branch" are covered, 5 U.S.C. § 552(e), requires a definite structure for agency status. And just as the intended exemption for the President's personal staff leads us to believe that proximity to the President is relevant so, too, the exemption suggests the importance of structure. For another characteristic of the President's immediate staff is its lack of a firm structure.

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

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

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

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

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

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

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Louis Sullivan, we believe that form follows function.

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

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

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

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

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

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

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

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Frank E. VENNES, Jr., Plaintiff-Appellant,
v.

AN UNKNOWN NUMBER OF UNIDENTIFIED AGENTS OF THE UNITED STATES of America,
Defendants-Appellees.

No. 93-1737.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 17, 1993.

Decided June 16, 1994.

Plaintiff, who had pleaded not guilty and nolo contendere to money laundering, and firearm and drug offenses and served lengthy prison sentence, commenced Bivens action against unnamed federal agents seeking damages alleging violation of substantive due process rights. The United States District Court for the District of North Dakota, Patrick A. Conmy, J., dismissed claims against IRS agents and granted summary judgment in favor of remaining defendants. Plaintiff appealed. The Court of Appeals, Loken, Circuit Judge, held that: (1) plaintiff could not maintain Bivens action against undercover agents for violation of substantive due process rights based on alleged outrageous conduct of agents, and (2) plaintiff's remedies under

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plane or train ticket and told her to go." *Id.* at 880. In *Lattanzio v. United States*, 243 F.2d 801 (9th Cir.1957), the defendant lent a woman money to cover her transportation expenses. In each of these cases, it seems that the degree of direction and control exercised by the defendant really did amount to more than mere inducement; although the defendant did not physically transport the woman, it could fairly be said that he caused her to be transported interstate.

The case that most squarely conflates inducing someone to travel with causing her transportation is *Wagner v. United States*, 171 F.2d 354 (5th Cir.1948). The court in that case said that a sufficiently attractive offer could amount to "more than a mere inducement" if it is "the procuring, efficient, and, in fact, only cause of the unlawful transportation." *Id.* at 363. At the same time, the court apparently tried to preserve a role for § 2422 by distinguishing from lesser offers those that are so attractive as to overbear the free will of the offeree—the "offer you can't refuse"—which triggers the protective policy underlying § 2422. We find this reasoning unpersuasive. It undermines the assumption of free will that supports the concept of criminal responsibility; not surprisingly, therefore, it is contrary to ordinary usage, which does not treat an offer of money (or support services), made to a competent adult, as tantamount to coercion, regardless of how attractive its terms. We therefore decline to adopt the distinction drawn in *Wagner*; in our view, the activities of the business in which the appellant participated may have induced the escorts to travel interstate but did not cause them to be transported within the meaning of § 2421.

At oral argument, counsel for the Government conceded that the only reason this case was not brought under the inducement statute was that, at the relevant time, that statute made the use of a common carrier an element of the offense. With respect to the specific episodes charged, which were presumably the ones for which the Government thought it had the best evidence, that requirement could not be

satisfied. Now that the common carrier requirement has been eliminated from § 2422, however, affirming this conviction under § 2421 would give the Government complete discretion in charging future defendants under either § 2421 or § 2422. This result is not only unreasonable under the canons of statutory construction; in light of the complementary nature of the two provisions, it is also unnecessary.

IV. CONCLUSION

For the reasons discussed above, the appellants' convictions are

Reversed.



NATIONAL SECURITY
ARCHIVE, Appellant,

v.

ARCHIVIST OF THE
UNITED STATES.

No. 88-5218.

United States Court of Appeals,
District of Columbia Circuit.

Argued May 22, 1989.

Decided July 31, 1990.

Public interest institute brought action under Freedom of Information Act and Federal Advisory Committee Act, seeking access to documents relating to investigation by President's Special Review Board of Iran-Contra affair. The United States District Court for the District of Columbia, John Garrett Penn, J., entered summary judgment in favor of Counsel to the President and Office of Administration of the Executive Office of the President, 688 F.Supp. 29, and appeal was taken. The Court of Appeals held that: (1) Office of Administration did not "withhold" documents concerning investigation for pur-

poses of Act; (2) Counsel to the President was not an "agency" for purposes of Act; and (3) Federal Advisory Committee Act did not require President or Office of Administration to direct requests for documents to President's Special Review Board.

Affirmed.

1. Records ⇐63

In order to succeed in Freedom of Information Act action, party must show that agency has improperly withheld agency records. 5 U.S.C.A. § 552.

2. Records ⇐62

Agency must have possession or control over document before it may be deemed to be "withholding" it under Freedom of Information Act. 5 U.S.C.A. § 552.

3. Records ⇐62

Office of Administration did not "withhold" documents concerning President's Special Review Board's investigation of Iran-Contra affair for purposes of Freedom of Information Act, where Board had sole possession and control of documents until date of Board's expiration, at which point documents were transferred to Counsel to the President. 5 U.S.C.A. § 552.

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

4. Records ⇐51

Counsel to the President, as part of Office of the President, was not an "agency" for purposes of the Freedom of Information Act. 5 U.S.C.A. § 552.

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

5. Records ⇐62

Federal Advisory Committee Act did not require President or Office of Administration to direct requests for documents relating to investigation of Iran-Contra affair to the President's Special Review Board, before Board terminated its activi-

ties. Federal Advisory Committee Act, §§ 6, 6(b), 10, 10(b), 5 U.S.C.A.App. 2.

6. Records ⇐62

Federal Advisory Committee Act does not impose upon President or upon the Office of Administration special responsibility to guide document requests. Federal Advisory Committee Act, §§ 6, 6(b), 10, 10(b), 5 U.S.C.A.App. 2.

Appeal from the United States District Court for the District of Columbia.

Patti A. Goldman, with whom Alan B. Morrison and William B. Schultz, Washington, D.C., were on the brief, for appellant.

David L. Sobel, Washington, D.C., also entered an appearance, for appellant.

Freddi Lipstein, Atty., Dept. of Justice, with whom John R. Bolton, Asst. U.S. Atty., Jay B. Stephens, U.S. Atty., and Leonard Schaitman, Atty. Dept. of Justice, Washington, D.C., were on the brief, for appellee.

Before D.H. GINSBURG and SENTELLE, Circuit Judges, and ROBINSON, Senior Circuit Judge.

Opinion for the Court filed PER CURIAM.

PER CURIAM:

The National Security Archive (NSA) seeks access to documents relating to the investigation, by the President's Special Review Board (Tower Commission), of the involvement of the National Security Council staff in the sale of weapons to the Government of Iran and the diversion of profits therefrom to support the Contra insurgency in Nicaragua. The NSA submitted document requests, pursuant to the Freedom of Information Act (FOIA),¹ to the Office of Administration of the Executive Office of the President, and to the White House Counsel,² both of which denied the requests. The NSA then sued those two entities in the district court,

1. 5 U.S.C. § 552 (1988).

2. The Archivist of the United States has been substituted for the defendants below for the purposes of this appeal.

which granted the defendants' motion for summary judgment and denied the NSA's cross-motion for summary judgment. The court held that neither the FOIA nor the Federal Advisory Committee Act (FACA),³ requires the defendants to produce the requested documents.⁴ Finding no error, we affirm.

I. BACKGROUND

The President established the Tower Commission "in accordance with" the FACA on December 1, 1986, and charged it with reviewing the involvement of the NSC staff in the Iran-Contra affair.⁵ He also directed the Office of Administration, whose mandate is to "provide components of the Executive Office of the President with such administrative services as the President shall from time to time direct,"⁶ to furnish the Commission "with such administrative services, funds, facilities, staff, and other support services as may be necessary for the performance of its functions."⁷ The Executive Order establishing the Commission further provided that the Commission would go out of existence 30 days after submitting its report to the President.⁸

In four separate letters addressed to the Office of Administration, each dated March 13, 1987, appellant requested, "[p]ursuant to the Freedom of Information Act," a variety of documents relating to the Tower

Commission's probe.⁹ By four nearly identical letters dated March 17, 1987, the Office of Administration denied appellant's requests, stating that the Office did not "maintain" any of the requested documents.¹⁰ Thereupon, in a letter dated March 30, 1987, appellant redirected its requests to the Counsel to the President, stating that it was "requesting these records under the Freedom of Information Act and pursuant to President Reagan's undoubted discretionary authority to direct their release."¹¹ On April 28, 1987, the Counsel denied appellant's request, stating that "the White House Office, as an entity whose 'sole function is to advise and assist the President,' is not an 'agency' subject to the Freedom of Information Act," and that it would not "be appropriate to make discretionary release of these documents at this time."¹²

Appellant then filed suit in the district court seeking, under the FOIA and the FACA, to compel the Office of Administration and the White House Counsel to disclose the requested records. In granting the motion for summary judgment filed by the Executive Office of the President and the Counsel to the President, the district court found that:

The Commission submitted its report to the President on February 26, 1987 and terminated its activities thirty days later, on March 28, 1987. Following the termi-

sion; and the "notes taken by Dr. Alton Keel (acting deputy at the National Security Council) of [a] November 10, 1986 meeting." Letters to Nell Doering, Chief, Records & Pubs. Mgt. Branch, Exec. Office of the President (March 13, 1987) from appellant, J.App. 11-29. Appellant asserts that although some of these documents have since been released, it still seeks supporting documentation and the unreleased materials. Brief for Appellant at 10.

10. Letters to Glenn Baker, National Security Archive (March 17, 1987) from Nell Doering, Freedom of Information Officer, J.App. 31-34.

11. Letter to Arthur B. Culvahouse, Counsel to the President (March 30, 1987) from Quinlan Shea, Jr., National Security Archive, J.App. 35.

12. Letter to Quinlan Shea, Jr., National Security Archive (April 28, 1987) from Arthur B. Culvahouse, Jr., Counsel to the President, J.App. 36.

3. 5 U.S.C.A. app. 2 (Supp.1990).

4. *National Sec. Archive v. Executive Office of the President*, 688 F.Supp. 29 (D.D.C.1988), J.App. 51.

5. Exec.Order No. 12575, 51 Fed.Reg. 43,718 (1986).

6. Reorganization Plan No. 1 of 1977, 5 U.S.C.A. app. 1, § 2 (Supp.1990).

7. 51 Fed.Reg. at 43,718.

8. *Id.* at 43,719.

9. Appellant sought "all materials, documents, notes, memoranda, cables, and records used in the preparation of the fourteen [listed] case studies prepared for the [Tower Commission]"; the "complete texts of th[ose] fourteen case studies"; the "complete transcripts of [certain] interviews conducted by" the Tower Commis-

nation of the Commission's activities, its files were transferred to the Office of the Counsel to the President.¹³

The district court also found that the Tower Commission "did not avail itself of the records management capabilities of the Office of Administration made available to it" and that the Office did not "exercise any direction or control over the files and records compiled by the Commission."¹⁴ Accordingly, recognizing that a litigant seeking release of government documents under the FOIA must show that the agency had "custody [or] control"¹⁵ of the documents sought at the time the request was made, the court concluded that the Office of Administration had no obligation to search for or release the documents requested in the March 13 letters.¹⁶ The court also rejected appellant's "vague contention that the Office of Administration had a duty to forward the misdirected request to the Tower Commission."¹⁷ Finally, the court concluded that the April 28 request directed to the Counsel to the President was without effect; as a part of the Office of the President, the Counsel is not considered an "agency" under the FOIA, and is therefore not subject to the disclosure requirements of that Act.¹⁸

Rather than focusing upon the FOIA, appellant now asks us to look beyond the requirements of that statute by recognizing an additional obligation arising from the FACA, which allegedly required the Office of Administration and the Counsel to the President to redirect the FOIA requests to the appropriate authority. Ac-

cording to appellant, "[u]nder the FACA, the entity (an agency or the President) that establishes or utilizes an advisory committee has an obligation to ensure that the committee complies with the FACA."¹⁹ Appellant thus reasons that because the President in this case delegated his responsibilities to the director of the Office of Administration,²⁰ that office was obligated to guide misdirected requests for documents relating to the activities of the Tower Commission.²¹ Similarly, appellant urges that the Counsel to the President was obligated to respond to its request on the ground that, "[s]ince the President is responsible for ensuring that presidential advisory committees like the Tower Commission comply with the FACA, his counsel is not insulated from the FACA's dictates."²²

II. ANALYSIS

We discuss first whether the FOIA required the Office of Administration or the Counsel to the President to comply with the document requests; we then turn to consideration of whether the FACA imposed upon the defendants such an obligation.

A. The Freedom of Information Act

[1-3] As appellant may now recognize, we cannot disturb the district court's ruling if we look solely to the FOIA. In order to succeed in a FOIA action, a party must show "that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'"²³

13. *National Sec. Archive v. Executive Office of the President*, *supra* note 4, at 1-2, J.App. 51-52.

14. *Id.* at 5-6, J.App. 55-56.

15. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 151, 100 S.Ct. 960, 968-69, 63 L.Ed.2d 267 (1980).

16. *National Sec. Archive v. Executive Office of the President*, *supra* note 4, at 4-8, J.App. 54-58.

17. *Id.* at 5 n. 3, J.App. 55 n. 3.

18. *Id.* at 3 & n. 2, J.App. 53 & n. 2.

19. Brief for Appellant at 16.

20. Section 6 of the Commission's Charter provides that

the functions of the President under the Federal Advisory Committee Act, as amended, except that of reporting to the Congress, which are applicable to the Board, shall be performed by the Director of the Office of Administration, Executive Office of the President.

Charter, President's Special Review Board, J.App. 50.

21. Brief for Appellant at 16.

22. *Id.* at 19.

23. *Kissinger v. Reporters Comm.*, 445 U.S. at 150, 100 S.Ct. at 968; accord *Bureau of Nat'l*

under the FACA, the President) that an advisory committee ensure that the President the FACA." 19 that because the President delegated his responsibility of the Office of Administration was obligated to respond to requests for documents of the activities of the President. Similarly, appellant to the President to its request on the President is that presidential the Tower Commission FACA, his counsel the FACA's dic-

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Commission's Charter pro-

President under the Federal Act, as amended, to the Congress, the Board, shall be of the Office of the Office of the Presi-

cial Review Board,

6.

Comm., 445 U.S. at 150-55, 100 S.Ct. at 968-71.

Moreover, the agency must have "possession or control" over a document before it may be deemed to be "withholding" it.²⁴ Inasmuch as appellant has not attempted to overcome the district court's finding that the Tower Commission had sole possession and control of the requested documents until the date of the Commission's expiration, at which point they were transferred to the Counsel to the President, we perceive no basis for upsetting its conclusion that the Office of Administration did not withhold the documents.

[4] The subsequent request directed to the Counsel was equally without effect. The Supreme Court has made clear that the Office of the President is not an "agency" for purposes of the FOIA,²⁵ and appellant does not contend that the Counsel to the President, which is part of that office, is an exception to that principle. Inescapably then, the FOIA does not, at least by itself, require the Counsel to turn over the requested documents.

B. The Federal Advisory Committee Act

[5, 6] We also conclude that the FACA imposes no special "traffic-cop" responsibilities upon the President or his delegates that would permit us to ignore established rules governing disclosure of government documents. Section 10(b) of the FACA states:

Subject to section 552 of title 5, United States Code [the FOIA], the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.²⁶

Affairs v. United States Dep't of Justice, 742 F.2d 1484, 1488 (D.C.Cir.1984).

24. *Kissinger v. Reporters Comm.*, 445 U.S. at 150-55, 100 S.Ct. at 968-71.

25. *Id.* at 156, 100 S.Ct. at 971.

26. 5 U.S.C.A. app. 2, § 10(b) (Supp.1990).

Accordingly, Section 10(b) renders the disclosure provisions of the FOIA applicable to advisory committees and designates each committee as the appropriate repository for its own records. It does not, by any word or implication, impose upon the President or upon the Office of Administration a special responsibility to guide document requests. Nor does appellant point to anything in the legislative history of the FACA that suggests that Congress intended to create such an obligation.

It is true that the President is given certain specific responsibilities elsewhere in the FACA. Section 6 requires him to submit to Congress a report on "his proposals for action or his reasons for inaction, with respect to the recommendations" of an advisory committee, and an annual report "on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year." 27 In addition, section 10 makes the President generally responsible for deciding whether an advisory committee meeting will be open to public attendance and participation.²⁸ In contrast, no provision of the FACA could be read as burdening the President with the responsibility described by appellant.

Even if, as appellant argues, the FACA requires the President "to ensure that the advisory committee complies with the FACA,"²⁹ he would presumably do so by directing the committee to comply with a properly submitted document request. Since appellant did not, in this instance, submit its requests to the proper entity, the President cannot have failed in whatever responsibility he may have to enforce the requirements of the FACA.

We are also unpersuaded by appellant's reliance upon *Founding Church of Scientology, Inc. v. NSA*³⁰ for the proposition

27. *Id.* § 6(b), (c).

28. *Id.* § 10(a)(2), (d).

29. Brief for Appellant at 13.

30. 610 F.2d 824, 837 (D.C.Cir.1979).

that the FACA requires the Office of Administration "to make reasonable efforts" to satisfy document requests by forwarding them to the appropriate entity. In that case, we held that when an agency receives a document request under the FOIA, it must make a reasonable effort to identify and retrieve the requested material from its files. Nothing in our opinion can be read to require an entity that does not have "possession or control" of requested documents to forward a request to the appropriate entity.

Finally, appellant contends that the Office of Administration circumvented the FACA by engaging in a "shell game"³¹ with the documents sought, first by failing to direct its request to the custodian of the pertinent records, and then by transferring the records to the Counsel to the President when the Tower Commission terminated its activities.³² The Supreme Court, in *Kissinger v. Reporters Committee*, raised but did not decide whether the "possession or control" requirement "might be displaced in the event that it was shown that an agency official purposefully routed a document out of agency possession in order to circumvent a FOIA request."³³ The district court found it unnecessary to address this issue, having found that appellant never submitted a proper request for the documents sought.³⁴ Because we agree that appellant never directed any request to the appropriate entity, the Tower Commission, we need not consider whether the Government improperly transferred documents with the intent of evading a proper request or what the consequences of such a transfer would be.

III. CONCLUSION

For the foregoing reasons, we conclude that the district court properly granted the motion for summary judgment filed by the Counsel to the President and the Executive

Office of the President. The judgment is therefore

Affirmed.



**PUBLIC CITIZEN HEALTH
RESEARCH GROUP, et al.,
Appellees,**

v.

**Dr. Frank YOUNG, Commissioner,
Food and Drug Administration, et
al., Appellant.**

No. 89-5055.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 9, 1990.

Decided July 31, 1990.

In action to force Food and Drug Administration to require warning of Reye's Syndrome on aspirin labels, the United States District Court for the District of Columbia, John Garrett Penn, J., 70 F.Supp. 581, awarded plaintiff attorney fees after Food and Drug Administration (FDA) eventually imposed the requirement and government appealed. The Court of Appeals, Stephen F. Williams, Circuit Judge, held that: (1) plaintiff was a "prevailing party"; (2) district court used improper standard in finding that government's litigating position was not "substantially justified"; and (3) government's litigating position was substantially justified until pilot study had shown strong association between Reye's Syndrome and use of aspirin.

Affirmed in part, reversed in part and remanded.

31. Brief for Appellant at 1.

32. *Id.* at 19.

33. 445 U.S. at 155 n. 9, 100 S.Ct. at 971 n. 9.

34. *National Sec. Archive v. Executive Office of the President*, *supra* note 4, at 9, J.App. at 56.

SHEPARD'S (Rank 1 of 1)

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-----Analysis-----		-----Citation-----		Headnote No.
	Same Text	(	285 App.D.C. 302)	
SC	Same Case		688 F.Supp. 29	
			Cir. DC	
			981 F.2d 1288, 1293	4
J	Dissenting Opin		981 F.2d 1288, 1300	
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			760 F.Supp. 220, 222	
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			168 Ariz. 531, 541	
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			DC	
			299 App.D.C. at 91	4
J	Dissenting Opin		299 App.D.C. at 98	
			Ill	
			229 Ill.App.3d 459, 462	
			593 N.E.2d 141, 144	

the court's decision denying the suggestion of *en banc* review.



**ENERGY RESEARCH FOUNDATION,
et al., Appellants,**

v.

**DEFENSE NUCLEAR FACILITIES
SAFETY BOARD, Appellee.**

No. 90-5096.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 14, 1990.

Decided Oct. 26, 1990.

Two environmental organizations and individual brought action seeking declaratory and injunctive relief requiring Defense Nuclear Facilities Safety Board to comply with Government in the Sunshine Act and the Freedom of Information Act (FOIA). On Board's motion for summary judgment, the United States District Court for the District of Columbia, 734 F.Supp. 27, John Garrett Penn, J., ruled that neither Sunshine Act nor FOIA applied to the Board because it was not an "agency." On appeal, the Court of Appeals, Randolph, Circuit Judge, held that Board would be considered "agency" within meaning of the Sunshine Act and the FOIA.

Reversed and remanded.

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Records ⇨51

United States ⇨33

Defense Nuclear Facilities Safety Board would be considered "agency" within meaning of the Freedom of Information Act (FOIA) and the Government in the Sunshine Act, and therefore required to make its records available to public and to open its meetings, even though Board dealt with highly sensitive information concerning matters critical to nation's defense and to public health and safety; statute provides for Board to make its recommenda-

tions public after receipt by the Secretary of Energy, and Board argued it could be considered entity which advised the President, rather than "agency." 5 U.S.C.A. §§ 552, 552b; Atomic Energy Act of 1954, § 315(a), as amended, 42 U.S.C.A. § 2286d(a).

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

Appeal from the United States District Court for the District of Columbia (Civil Action No. 90-0530).

Eric R. Glitzenstein, with whom Dean Tousley, Washington, D.C., and Robert Guild, Jacksonville, Fla., were on the brief, for appellants.

Margaret S. Hewing, Atty., Dept. of Justice, with whom Stuart M. Gerson, Asst. Atty. Gen., Jay B. Stephens, U.S. Atty., and Douglas N. Letter, Atty., Dept. of Justice, and Richard Azzaro, Atty., Defense Nuclear Facilities Safety Board, Washington, D.C., were on the brief, for appellee.

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

Opinion for the court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

The Defense Nuclear Facilities Safety Board does not consider itself an "agency" subject to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), or the Government in the Sunshine Act, 5 U.S.C. § 552b. The Board therefore does not make its records available to the public under FOIA and it does not open its meetings pursuant to the Sunshine Act. Appellants are two organizations and an individual who wish to attend the Board's meetings and review its records. They sued for a declaratory judgment and an injunction requiring the Board to comply with these statutes. The district court ruled on summary judgment that neither FOIA nor the Sunshine Act applied to the Board because it is not an "agency." We reverse.

The Department of Energy operates plants and other facilities that produce

atomic weapons and conduct research and development in the military application of atomic energy. 42 U.S.C. § 2121(a)(1), (2). The mission of the Defense Nuclear Facilities Safety Board is to monitor these facilities with an eye toward promoting the public health and safety.

Congress created the Board in 1988. The Board is independent of the Energy Department and is composed of five members with expertise in nuclear safety. 42 U.S.C. § 2286(a), (b)(1). Each is appointed by the President, with the advice and consent of the Senate. 42 U.S.C. § 2286(b)(1). The Board has three basic duties. ¹ It must review and evaluate "standards relating to the design, construction, operation, and decommissioning of defense nuclear facilities of the Department of Energy...." 42 U.S.C. § 2286a(1); *see also* 42 U.S.C. § 2286a(4). ² It must investigate practices or events at such facilities that may adversely affect public health and safety. 42 U.S.C. § 2286a(2); *see also* 42 U.S.C. § 2286a(3). ³ Finally, it must recommend measures to the Secretary of Energy that are, in the Board's view, "necessary to ensure adequate protection of public health and safety." 42 U.S.C. § 2286a(5).

The Board's recommendations are subject to an elaborate procedure. After receiving a Board recommendation, the Secretary must reply in writing. 42 U.S.C. § 2286d(b)(1). If the Secretary accepts the Board's recommendation, he must prepare a plan to implement it; if he rejects it, the Board must reconsider its recommendation. 42 U.S.C. § 2286d(d), (e). If the Board resubmits the same or a modified recommendation and the Secretary persists in rejecting it, he must explain why and transmit his explanation to the House and Senate. 42 U.S.C. § 2286d(d). The Board has no authority to enforce its recommendations. With certain exceptions, the Board's recommendations, the Secretary's responses, and the Secretary's explanations must be published in the Federal Register. 42 U.S.C. § 2286d(a), (b)(2), (d).

In performing its functions, the Board may conduct hearings, compel testimony, require the production of documents, hire

staff and assign them to any Energy Department nuclear facility, and obtain assistance from the Nuclear Regulatory Commission. 42 U.S.C. § 2286b(a), (f), (h). The Board is also empowered to promulgate its own regulations and to require the Secretary to report to it classified information and other information protected from disclosure. 42 U.S.C. § 2286b(c), (d).

As this recital indicates, the Board deals with highly sensitive information concerning matters critical to the nation's defense and to public health and safety. For this reason, the Board believes that even if it were subject to FOIA and the Sunshine Act, exceptions to these statutes would enable it to close its meetings and withhold its records. We express no opinion on the subject. If the Board is an "agency" it is covered by these statutes. That depends, not on the exemptions in FOIA or the Sunshine Act, but on the statutory meaning of the term "agency."

FOIA's definition of "agency," which the Sunshine Act adopts with a modification not here pertinent, 5 U.S.C. § 552b(a)(1), is as follows:

[T]he term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(f). The reference to § 551(1) is to the Administrative Procedure Act's definition of "agency"—namely, "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," except Congress, the judiciary and a few other select bodies. 5 U.S.C. § 551(1).

In creating the Board, Congress used the same terms contained in § 552(f)'s description of "agency." The Board's statute reads: "There is hereby established an independent *establishment in the executive branch*, to be known as the 'Defense Nuclear Facilities Safety Board'...." 42 U.S.C. § 2286(a) (emphasis added). It

would be a tall piece of statutory construction for a court to say that an "establishment in the executive branch" as used in § 2286(a) is not an "establishment in the executive branch" within the meaning of § 552(f). See Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 224 (1967) ("when Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things").

It is of course possible that identical phrases may carry different meanings in different statutes. "Oversight," for example, could mean watchful care or inadvertent error. Context can make the difference. But here Congress added the "establishment" language to § 552(f) in 1974 for the purpose of expanding FOIA's coverage. H.R.CONF.REP.NO. 1380, 93d Cong., 2d Sess. 14 (1974); see H.R.REP. NO. 876, 93d Cong., 2d Sess. 8 (1974); S.Rep. No. 854, 93d Cong., 2d Sess. 33 (1974), 1974 U.S.Code Cong. & Admin.News 6267. Through these words, Congress sought to encompass entities that might have eluded the APA's definition in § 551(1), which FOIA had incorporated by reference. At the time of the amendment, several federal entities had already come into existence through statutes proclaiming, as does the Board's, that there is hereby created "an establishment in the executive branch." See, e.g., 38 U.S.C. § 201 (Veterans' Administration); 39 U.S.C. § 201 (United States Postal Service); 39 U.S.C. § 3601(a) (Postal Rate Commission). The House Report on the 1974 FOIA amendment specifically mentioned the Postal Service as an example of an "establishment in the executive branch" which would now be included in the amended definition of "agency." H.R.Rep. No. 876, *supra*, at 8. Furthermore, the "establishment" language was not innovative. Before 1974, Congress had been using "establishment in the executive branch" to describe what it meant by "agency." See, e.g., 22 U.S.C. § 2552(b) (Arms Control and Disarmament Act); 40 U.S.C. § 472(a) (Federal Property and Administrative Services Act of 1949); 40 U.S.C. § 612(4) (Public Buildings Act); 42 U.S.C. § 2014(l) (Atomic Energy Act of 1954); 50 U.S.C. § 403a

(CIA Act of 1949); Federal Reports Act of 1942, Pub.L. No. 77-831, § 7(a), 56 Stat. 1078, 1079-80 (current version at 44 U.S.C. § 3502(1)). See also 5 U.S.C. § 104, defining "independent establishment" as "an establishment in the executive branch ... which is not an Executive department" for purposes of Title 5.

With respect to the Board's statute, we find nothing to indicate that Congress intended to excuse the Board from complying with FOIA or the Sunshine Act. In fact the Board's statute indirectly refers to FOIA. See 42 U.S.C. § 2286d(h)(2), citing to 42 U.S.C. § 2168, which authorizes the Secretary to prohibit the unauthorized dissemination of certain unclassified information so long as he does so in accordance with the FOIA exemption set forth in "section 552(b)(3) of Title 5."

The Board argues, however, that § 2286d(a) renders the Sunshine Act inapplicable to it. Section 2286d(a) requires the Board, "after receipt by the Secretary of Energy of any [Board] recommendations," "promptly" to make public its recommendations. The Board thinks this forbids it from revealing recommendations in public before the Secretary sees them. Thus, the Board believes it cannot hold open meetings to decide what to recommend.

Even if we were to accept the Board's reading of § 2286d(a), the Board's status as an "agency" would not be affected. The Board meets to consider matters other than recommendations to the Secretary. Its statute contemplates as much. See, e.g., 42 U.S.C. § 2286b(f), (g), (j). No provision comparable to § 2286d(a) applies to the subjects of such meetings. Under the Board's logic, it therefore would be an "agency" for those meetings, but not an "agency" when it met to consider recommendations. There is nothing in the Sunshine Act, and certainly nothing in FOIA, that would countenance such an odd result. Furthermore, even if the Board's governing statute directed it to close all its meetings, which it does not, the Board would be no less an "agency." The Sunshine Act contains exceptions to accommodate statutory directives inconsistent with the Act's public meeting requirements. 5 U.S.C. § 552b(c). As we have said, whether the

Board may successfully invoke those exceptions is simply not the issue here.

This ordinarily would be the end of the matter. The Board insists, however, that there is a gloss on FOIA's definition of "agency," a qualification not evident on the face of § 552(f). In the Board's view, the "sole function" test derived from *Soucie v. David*, 448 F.2d 1067 (D.C.Cir.1971), must be used to determine whether it is an "agency" within § 552(f). It was on this basis that the district court ruled in the Board's favor.

Soucie held that the Office of Science and Technology (OST) in the Executive Office of the President was an "agency" covered by FOIA. At the time of the court's decision, FOIA borrowed the definition of "agency" contained in § 551(1) of the APA, which we have quoted earlier. The court thought that if OST's "sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency." 448 F.2d at 1075. The court determined, however, that OST was an "agency" because it not only advised the President but also had the "independent function of evaluating federal programs...." *Id.* In a later decision, rendered prior to the 1974 amendment, we recognized that an entity outside the Executive Office of the President should be considered an "agency" if it had its own staff, had broad powers of investigation, had legal authority to make decisions, and conducted independent evaluations of federal programs. *Washington Research Project, Inc. v. Department of Health, Education and Welfare*, 504 F.2d 238, 246-48 (D.C.Cir.1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975).

After *Soucie*, Congress expanded FOIA's definition of "agency" to include any "other establishment in the executive branch of the Government (including the Executive Office of the President)." The Conference Report on the amendment, citing *Soucie*, stated that "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President" cannot be considered an "agency" under FOIA. H.R. CONF.REP. NO. 1380, *supra*, at 15. Relying

on this statement in the Report, the Supreme Court ruled that someone acting as a "Presidential adviser, only" could not be considered an "agency" subject to FOIA under § 552(f). *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156, 100 S.Ct. 960, 971, 63 L.Ed.2d 267 (1980).

Since the 1974 amendment, we have twice decided whether an entity within the Executive Office of the President is an "agency" under FOIA. In one case, we ruled that the Council on Environmental Quality is an "agency" because it not only advised the President, but also evaluated federal programs (*Pacific Legal Foundation v. Council on Environmental Quality*, 636 F.2d 1259, 1263 (D.C.Cir.1980)). In the other case, we determined that the Council of Economic Advisers is not an "agency" subject to FOIA because its duties simply facilitate providing advice to the President (*Rushforth v. Council of Economic Advisers*, 762 F.2d 1038, 1042-43 (D.C.Cir.1985)). Although we have decided two other cases interpreting § 552(f) since the 1974 amendment, neither involved entities within the Executive Office of the President and neither mentioned the sole function test. *Public Citizen Health Research Group v. Department of Health, Education and Welfare*, 668 F.2d 537 (D.C.Cir.1981); *Bocap v. Indiek*, 539 F.2d 174 (D.C.Cir.1976).

Even if we were inclined to evaluate the Board's status as an "agency" under the *Soucie* standard, which would place us in disagreement with *Crooker v. Office of Pardon Attorney*, 614 F.2d 825, 828 (2d Cir.1980), the Board still would not prevail. The Board does considerably more than merely offer advice. It conducts investigations, which "has long been recognized as an incident of legislative power" delegated to agencies by Congress. See *Soucie*, 448 F.2d at 1075 n. 27. It has at its disposal the full panoply of investigative powers commonly held by other agencies of government. The Board formally evaluates the Energy Department's standards relating to defense nuclear facilities and it forces public decisions about health and safety. Evaluation plus advice was enough to make the Office of Science and Technolo-

Is the 'sole function' of the org. to advise the POTUS? Is so, no FOIA.

so, if brd doesn't conduct investigations, its less likely to be an agency

ONS does not

gy an "agency" in *Soucie*. It also was enough in *Pacific Legal Foundation* to render the Council on Environmental Quality subject to FOIA. *Soucie* itself recognized that an entity in the federal government which "investigates, evaluates and recommends" is an "agency." *Soucie*, 448 F.2d at 1073 n. 15, 1075. The Board of course performs precisely these functions. It investigates, evaluates and recommends and it has the additional authority to impose reporting requirements on the Secretary of Energy, 42 U.S.C. § 2286b(d).

As a practical matter, we can perceive no reason why Congress would have wanted to shield the Board from the operation of FOIA and of the Sunshine Act. The Department of Energy, which provides sensitive information to the Board, 42 U.S.C. § 2286c(a), is itself subject to FOIA. See 10 C.F.R. § 1004.1 (1989). Congress may of course exclude the Board from FOIA or the Sunshine Act or both. But it has not yet done so and the Board therefore must be considered an "agency" within the meaning of both statutes.

Reversed and Remanded.



**TELECOMMUNICATIONS RESEARCH
AND ACTION CENTER, Petitioner,**

v.

**FEDERAL COMMUNICATIONS COM-
MISSION and United States of
America, Respondents,**

**National Broadcasting Company, Inc.,
and Oliver Productions, Inc.,
Intervenors.**

No. 89-1616.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 13, 1990.

Decided Oct. 26, 1990.

As Amended Oct. 2, 1990.

Party petitioned for review of order of
Federal Communications Commission

(FCC) holding that certain segments of television programs were bona fide newscasts, and thus exempt from requirements of equal time statute. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that party lacked standing to appeal where party had argued before Commission for end result which it was contesting on appeal, and thus had suffered no injury.

Petition denied.

Silberman, Circuit Judge, concurred and filed opinion.

Telecommunications ¶437

Party lacked standing to appeal Federal Communications Commission's (FCC's) application of "bona fide newscast" exemption to "equal time" statute where party had argued before Commission for end result which it was contesting on appeal, and thus had suffered no injury; party's disagreement with rationale employed by FCC to reach result it endorsed below did not constitute injury cognizable for standing purposes. Communications Act of 1934, § 315(a)(1), as amended, 47 U.S.C.A. § 315(a)(1).

Petition for Review of an Order of the
Federal Communications Commission.

Gigi B. Sohn, with whom Andrew Jay Schwartzman, Washington, D.C. was on the brief, for petitioner.

C. Grey Pash, Jr., Atty., F.C.C., with whom Daniel M. Armstrong, Associate Gen. Counsel, Washington, D.C., was on the brief, for respondents. Robert L. Petit, General Counsel, F.C.C., Catherine G. O'Sullivan, and Laura Heiser, Attys., U.S. Dept. of Justice, Washington, D.C., also entered appearances for respondents.

Richard E. Wiley, Lawrence W. Secrest, III and David E. Leibowitz, Washington, D.C. entered appearances for intervenor, Oliver Productions, Inc.

Molly Pauker, Washington, D.C. entered an appearance for intervenor, Nat. Broadcasting Corp., Inc.

SHEPARD'S (Rank 1 of 2)

CITATIONS TO: 917 F.2d 581

CITATOR: FEDERAL REPORTER CITATIONS

DIVISION: Federal Reporter 2nd

COVERAGE: First Shepard's volume through Aug. 1994 Supplement

-----Analysis-----	Citation-----	Headnote No.
Same Text	(286 App.D.C. 359)	
SC Same Case	734 F.Supp. 27	
CC Connected Case	969 F.2d 1249	
	DC	
CC Connected Case	297 App.D.C. 248	
	Cir. DC	
J Dissenting Opin	952 F.2d 446, 454	
	981 F.2d 1288, 1292	
J Dissenting Opin	981 F.2d 1288, 1301	
	822 F.Supp. 21, 25	
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	157 B.R. 151, 153	
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	293 App.D.C. at 98	
	299 App.D.C. at 90	
J Dissenting Opin	299 App.D.C. at 99	

SHEPARD'S PREVIEW

Citations to: 917 F.2d 581

Energy Research Foundation v. Defense Nuclear
Facilities Safety Bd., (C.A.D.C. 1990)

-----Citation-----

Cir. DC

26 F.3d 1139, 1142

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Brent N. RUSHFORTH, Appellant,

v.

**COUNCIL OF ECONOMIC
ADVISERS, et al.**

No. 84-5428.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 7, 1985.

Decided May 24, 1985.

Attorney brought suit under Freedom of Information Act and Government in the Sunshine Act seeking relief from failure of Council of Economic Advisers to comply with those two statutes. The United States District Court for the District of Columbia, Louis F. Oberdorfer, J., dismissed FOIA claim, and granted summary judgment in favor of CEA on Sunshine Act claim, and attorney appealed. The Court of Appeals, Starr, Circuit Judge, held that Council of Economic Advisers, whose sole function is to advise and assist President, is not an "agency" for purposes of Freedom of Information Act, and, under terms of Sunshine Act, is not subject to that statute either.

Affirmed.

1. Federal Civil Procedure ¶103.1

Attorney had standing to bring action under Sunshine Act seeking relief from failure of Council of Economic Advisers to comply with request for copies of Council's regulations implementing Act. 5 U.S.C.A. § 552b.

2. Records ¶63

Standing lies as a general matter where request is submitted under Freedom of Information Act for existing documents, as opposed to request that agency create materials which did not previously exist. 5 U.S.C.A. § 552.

3. Records ¶51

"Executive Office" does not include Office of the President, and President's

immediate personal staff or units in Executive Office whose sole function is to advise and assist President are not included within term "agency" under Freedom of Information Act. 5 U.S.C.A. § 552(e).

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

4. Records ¶51

Council of Economic Advisers, whose sole function is to advise and assist President, is not an "agency" for purposes of Freedom of Information Act, and, under terms of Sunshine Act, is not subject to that statute either. 5 U.S.C.A. §§ 552(e), 552b(a)(1).

5. Records ¶51

It is, at bottom, agency's function that determines its status for purposes of Freedom of Information Act. 5 U.S.C.A. § 552b.

6. United States ¶41

Council of Economic Advisers is not a collegial group subject to the Sunshine Act. 5 U.S.C.A. § 552b.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 83-02632).

Nicholas C. Yost, Washington, D.C., for appellant.

Andrea Newmark, Atty., Dept. of Justice, Washington, D.C., with whom Richard K. Willard, Acting Asst. Atty. Gen., Dept. of Justice, Joseph E. diGenova, U.S. Atty. and Leonard Schaitman, Atty., Dept. of Justice, Washington, D.C., were on brief, for appellees.

Before WRIGHT, BORK and STARR, Circuit Judges.

Opinion for the Court filed by Circuit Judge STARR.

STARR, Circuit Judge.

This action was brought under the Freedom of Information Act, 5 U.S.C. § 552 (1982), and the Government in the Sunshine

Act, 5 U.S.C. § 552b (1982), seeking relief from the failure of the Council of Economic Advisers ("CEA" or "Council") to comply with those two statutes. The District Court dismissed the Freedom of Information Act ("FOIA") claim, but also opined that summary judgment for CEA would be warranted in any event. In addition, the trial court granted summary judgment in favor of the CEA on the Government in the Sunshine Act ("Sunshine Act") claim. We affirm.

I

Brent Rushforth, a Washington, D.C. attorney, submitted an FOIA request to CEA for copies of the Council's regulations implementing both FOIA and the Sunshine Act. In its response to Mr. Rushforth's inquiry, the CEA advanced the position that the Council is not an "agency" for purposes of FOIA and is thus not required to comply with the Act. Appellant thereupon brought suit in the United States District Court for the District of Columbia, seeking "declaratory, mandatory, and injunctive relief from CEA's total failure to comply with either the Government in the Sunshine Act ... or with [FOIA]." Complaint at 1, *reprinted in* Joint Appendix at 6, 6. Specifically, appellant asked the District Court to declare CEA in violation of both statutes, to require CEA to adopt regulations implementing both Acts, to enjoin future violations of either Act, and to "issue such other and further relief as may be appropriate." Complaint at 7-8, Joint Appendix at 12-13. Appellant moved for summary judgment; CEA moved for dismissal or, alternatively, for summary judgment.

After the cross-motions for summary judgment were filed, Mr. Rushforth submitted to CEA a second FOIA request. He

requested all documents falling into any of eight categories. When no response was received within ten working days,¹ appellant filed a "Supplemental Complaint" in the already pending litigation. In that pleading, appellant averred that he had requested information with respect to studies, reports, and other documents from CEA and had received no response from the Council within ten working days. He also attached a copy of the FOIA request. When CEA eventually did respond through administrative channels, the Council again maintained that its records were not agency records subject to FOIA; while turning over voluntarily certain materials to appellant,² the CEA withheld some of the requested documents.

[1, 2] Defendants moved to dismiss the supplemental complaint or, alternatively, for summary judgment. The District Court in due course entered an order and memorandum opinion dismissing appellant's FOIA claim and granting summary judgment in favor of CEA on the Government in the Sunshine Act claim. With regard to the FOIA claim, the court held, first, that plaintiff lacked standing. In the court's view, Mr. Rushforth had not in the first instance requested a disclosure of *existing* documents, and the court lacked authority under FOIA to order the CEA to adopt and then release implementing regulations. The court went on to hold, moreover, that even if plaintiff had standing in light of his second FOIA request, CEA would be entitled to summary judgment inasmuch as the Council is not an "agency" within the meaning of FOIA. As to the Sunshine Act claim, the court held that the Act did not apply to CEA inasmuch as the Council is not a collegial body.³ This appeal followed.

1. An FOIA request not answered within 10 working days may be treated as denied. See 5 U.S.C. §§ 552(a)(6)(A)(i), 552(a)(6)(C).

2. Several of the requested documents had, independently of appellant's FOIA request and this litigation, been made public by the Council and had already been made available to appellant's counsel.

3. Mr. Rushforth clearly had standing as to the Sunshine Act action. See 5 U.S.C. § 552b(g) ("Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations within the time period specified herein."). With regard to the FOIA action, it is undisputed that appellant, in his second request, did ask for existing documents. Stand-

II

[3] The first issue before us is whether the CEA is an "agency" within the meaning of FOIA. The operative statutory provision sets forth the following definition of that term: "For purposes of this section, the term agency . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(e). Plaintiff's argument is simple and straightforward: since the CEA is an establishment in the Executive Office of the President, it is subject to FOIA. But the issue is not so easily resolved. As the Supreme Court has made clear, "Executive Office does not include the Office of the President . . . [, and] 'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President' are not included within the term 'agency' under the FOIA." *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156, 100 S.Ct. 960, 971, 63 L.Ed.2d 267 (1980) (quoting H.R.Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974)).

While not all units within the Executive Office of the President are subject to FOIA, appellant seeks to buttress his position by repairing to the legislative history, specifically the House Report on the 1974 amendments to FOIA. That Report states that the definition of "agency" was being expanded from that which previously obtained.⁴ The Report further states that "[t]he term 'establishment in the Executive Office of the President,' as used in this amendment, means such functional entities as . . . the Council of Economic Advis-

ing does, of course, lie as a general matter where a request is submitted under FOIA for existing documents, as opposed to a request that the agency create materials which did not previously exist.

4. The House Report states that "the definition of 'agency' has been expanded to include those entities which may not be considered agencies under section 551(1) of title 5, U.S.Code, but

ers. . . ." H.R.Rep. No. 876, 93d Cong., 2d Sess. 8 (1974), U.S.Code Cong. & Admin. News 1974, 6267, 6274. It is thus clear, as appellant argues, that the House version of the 1974 amendments contemplated that the CEA would be subject to FOIA.

But the House report does not stand alone. The subsequent Conference Report directly undercuts the House Report's otherwise clear expression; while observing that "[t]he conference substitute follows the House bill," the Report goes on to say: "[W]ith 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." H.R.Rep. No. 1380, 93d Cong., 2d Sess. 14-15 (1974); see also S.Rep. No. 1200, 93d Cong., 2d Sess. 15 (1974) (identical language), U.S.Code Cong. & Admin. News 1974, 6293. Thus, the Conference Report speaks to the precise issue of the meaning of the phrase "Executive Office of the President" and specifically states an intent to follow the result in *Soucie*, namely determining whether the sole function of the entity within the Executive Office is to advise and assist the President. Where, as here, the specific mention of the CEA in the House Report was dropped and a specific, judicially formulated test was adopted by the Conference Committee for determining the FOIA status of such entities, the House Report is entitled to little weight in this respect. Manifestly, the Conference elected to embrace a test to be substituted for a listing of the entities to be included; the outcome of the case before us should, accordingly,

which perform governmental functions and control information of interest to the public." H.R.Rep. No. 876, 93d Cong., 2d Sess. 8 (1974), U.S.Code Cong. & Admin. News 1974, 6274. Now included were "Government corporations, Government controlled corporations [and] other establishments within the executive branch, such as the U.S. Postal Service." *Id.*

turn on an examination of *Soucie* and the sole-function test enunciated in that case.

In *Soucie*, the issue was whether the Office of Science and Technology ("OST"), an entity in the Executive Office of the President, was an agency within the meaning of FOIA. Concluding that OST was indeed a FOIA-covered agency, the *Soucie* court began by observing OST's genesis as the creature of an Executive Branch reorganization plan. That plan transferred the functions of the National Science Foundation ("NSF" or "the Foundation") to the OST, an "administrative unit outside the White House, but in the Executive Office of the President on roughly the same basis as ... the Council of Economic Advisers...." *Soucie*, *supra*, 448 F.2d at 1074. However, while this reorganization resulted in an administrative unit located, hierarchically, in the same position as CEA, there is no indication that the functional roles of CEA and OST were the same; and, **critically, it was the functional role of the agency on which *Soucie* turned.**

In *Soucie*, the court concluded that "[b]y virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act." *Id.* at 1075. The court reached this conclusion only after expressly taking into account the fact that OST had assumed the functions of the National Science Foundation; moreover, the court observed that OST was specifically authorized to evaluate the scientific research programs of federal agencies. The court stated: "If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency." It was, rather, the existence of the NSF functions, now vested in OST pursuant to the reorganization, that turned the tide. Those functions included the initiation and support of research, awarding scholarships, fostering the interchange of information and evaluating the status of the sciences in correlating the research and education programs undertaken by the Foundation. See 42 U.S.C. § 1482 (1982). Those functions clearly go

beyond advice and assistance. In a word, OST could take direct action and thus was deemed to be an administrative agency. As we will discuss *infra*, the activities of the CEA and OST differ to the point that the status of CEA is not controlled by *Soucie*; but at the same time, the test formulated by *Soucie* is plainly the standard to be applied to determine the Council's status.

The second case from which appellant seeks to draw support is *Pacific Legal Foundation v. Council on Environmental Quality*, 636 F.2d 1259 (D.C.Cir.1980). There, the Council on Environmental Quality ("CEQ") was held to be an agency for FOIA and Sunshine Act purposes. Since the statutes organizing CEA and CEQ are, for all practical purposes, identical, *compare* 15 U.S.C. § 1023 (1982) *with* 42 U.S.C. §§ 4342-45 (1982), appellant argues that *Pacific Legal Foundation's* conclusion must carry over and apply to the CEA. However, while the statutes are the same, the functions performed by the two entities differ markedly. The court in *Pacific Legal Foundation* specifically observed that CEQ's functions had been expanded by several executive orders, that CEQ coordinated federal environmental regulatory programs, issued guidelines for preparing environmental impact statements, and promulgated regulations for implementing the procedural provisions of the National Environmental Policy Act, Pub.L. No. 91-190, 83 Stat. 852 (1970). *Pacific Legal Foundation*, *supra*, 636 F.2d at 1262. Furthermore, in that litigation the CEQ actually admitted that it was an agency; it contended more narrowly that it was not an agency at those times when it was advising the President and that the Sunshine Act did not apply to its advisory function. This court rejected the CEQ's proffered on again-off again definition and held that "[o]nce an entity is found to be an agency, this determination will not vary according to its specific function in each individual case." *Id.* at 1264 (quoting *Ryan v. Dept. of Justice*, 617 F.2d 781, 788 (D.C.Cir.1980)).

Pacific Legal Foundation's conclusion—that CEQ is an agency—simply does not, on analysis, carry over to the case at hand. The expanded duties of the CEQ clearly took that body out of the realm of entities the sole function of which is to advise and assist the President. CEA's duties, in contrast, have not similarly been expanded. CEA simply has no independent

authority such as that enjoyed either by CEQ or OST.⁵

[4] Our task, then, is to apply *Soucie's* sole-function test to the role of CEA. Doing so leads ineluctably to the conclusion that its sole function is to advise and assist the President. Each one of the CEA's enumerated statutory duties is directed at providing such advice and assistance to the President.⁶ While appellant emphasizes

5. Noting the near identity of the statutes creating CEQ and CEA, appellant mounts a policy argument that the President should not be allowed to take an entity out of, or place an entity in, FOIA agency status by the mere expedient of adding or eliminating duties. This argument is unavailing. Congress' intent would appear to have been to require entities having authority and the ability to act, but not those whose sole function was to render advice and assistance to the President, to be subject to FOIA. If the President adds duties to an entity which bring it outside the sole-function test, Congress would want the entity to be covered. There is no reason why any other entity with a similarly worded organic statute should be dragged along with it.

6. § 1023. Council of Economic Advisers

(a) Creation; composition; qualifications; selection of chairman and vice chairman

There is created in the Executive Office of the President a Council of Economic Advisers (hereinafter called the "Council"). The Council shall be composed of three members who shall be appointed by the President by and with the advice and consent of the Senate, and each of whom shall be a person who, as a result of his training, experience, and attainments, is exceptionally qualified to analyze and interpret economic developments, to appraise programs and activities of the Government in the light of the policy declared in section 1021 of this title, and to formulate and recommend national economic policy to promote full employment, production, and purchasing power under free competitive enterprise. The President shall designate one of the members of the Council as chairman and one as vice chairman, who shall act as chairman in the absence of the chairman.

(b) Employment of specialists, experts, and other personnel

The Council is authorized to employ, and fix the compensation of, such specialists and other experts as may be necessary for the carrying out of its functions under this chapter, without regard to the civil-service laws, and is authorized, subject to the civil-service laws, to employ such other officers and employees as may be necessary for carrying out its functions under this chapter, and fix their

compensation in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(c) Duties

It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Economic Report;

(2) to gather timely and authoritative information concerning economic developments and economic trends, both current and prospective, to analyze and interpret such information in the light of the policy declared in section 1021 of this title for the purpose of determining whether such developments and trends are interfering, or are likely to interfere, with the achievement of such policy, and to compile and submit to the President studies relating to such developments and trends;

(3) to appraise the various programs and activities of the Federal Government in the light of the policy declared in section 1021 of this title for the purpose of determining the extent to which they are contributing, and the extent to which they are not contributing, to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national economic policies to foster and promote free competitive enterprise including small and larger business, to avoid economic fluctuations or to diminish the effects thereof, and to maintain full employment, production, and purchasing power;

(5) to make and furnish such studies, reports thereon, and recommendations with respect to matters of Federal economic policy and legislation as the President may request.

(d) Annual report

The Council shall make an annual report to the President in December of each year.

(e) Consultation with other groups and agencies; utilization of Governmental services and private research agencies

In exercising its powers, functions and duties under this chapter—

(1) the Council may constitute such advisory committees and may consult with such representatives of industry, agriculture, labor, consumers, State and local government, and other groups, as it deems advisable, and shall consult with the board or boards established under section 1022f of this title;

Cite as 762 F.2d 1038 (1985)

that in each instance the language "to the President" appears as part of a conjunction, that fact does not affect the conclusion fairly to be drawn. For example, the CEA is directed to appraise federal programs relative to a particular statutory policy and make recommendations to the President in that regard. 15 U.S.C. § 1023(c)(3). The duty to appraise is directly connected to the Council's duty to make recommendations. CEA has no regulatory power under the statute. It cannot fund projects based on the appraisal, as OST might, nor can it issue regulations for procedures based on the appraisals, as CEQ might.

[5] We can discern no basis in the statute for concluding that CEA has any function save that of advising and assisting the President. Nor has any evidence been brought forward to show that some other function in fact exists. The various acts of CEA members, as enumerated by appellant, do not evidence any independent authority or power;⁷ in consequence, we agree with Judge Oberdorfer's conclusion that CEA should not be considered an agency for purposes of the FOIA.

III

Inasmuch as the Council of Economic Advisers is not an agency for FOIA purposes, it follows of necessity that the CEA is, under the terms of the Sunshine Act, not subject to that statute either. The reason is that the Sunshine Act expressly incorporates the FOIA definition of agency. See 5 U.S.C. § 552b(a)(1) ("the term 'agen-

cy' means any agency as defined in section 552(e) ..."). Furthermore, even if CEA were an agency within the meaning of FOIA, the Council would still not fall within the scope of the Sunshine Act. The pertinent definition, set forth in section 552b, continues as follows: An agency for purposes of section 552b is one "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such positions by the President with the advice and consent of the Senate..." *Id.* The District Court held that CEA is not a collegial body. If that conclusion is correct, CEA is not subject to the Act.

First, the District Court determined, based on the declaration of then-CEA Chairman Martin Feldstein, that the CEA does not in fact operate collegially. That declaration is un rebutted; hence, to the extent that the question is one of fact, the Feldstein declaration would be fully adequate to support the court's grant of summary judgment in favor of the Council. However, if the CEA is legally constituted as a collegial body, its actual mode of operation might weigh less heavily in our analysis.

By its terms, the organic statute creating the CEA appears to envision a collegial group. After all, the statute creates a "Council" of advisers. The Council consists of three members confirmed by the Senate, with one member later being designated by the President as chairman. This structure might reasonably be construed to suggest roughly co-equal status among the

(2) the Council shall, to the fullest extent possible, utilize the services, facilities, and information (including statistical information) of other Government agencies as well as of private research agencies, in order that duplication of effort and expense may be avoided.

In its work under this chapter and the Full Employment and Balanced Growth Act of 1978 [15 U.S.C. §§ 3101 *et seq.* (1982)] the Council is authorized and directed to seek and obtain the cooperation of the various executive and independent agencies in the development of specialized studies essential to its responsibilities.

(f) Appropriations

To enable the Council to exercise its powers, functions, and duties under this chapter, there are authorized to be appropriated such sums as may be necessary.

15 U.S.C. § 1023 (1982).

7. Appellant argues that the fact that the members of CEA are appointed with the advice and consent of the Senate and are required to testify before the Congress should carry important weight. Neither the nature of the appointment nor the accompanying duty to testify before Congress, however, speaks to the function of the CEA; it is, at bottom, its function that determines an entity's status for FOIA purposes.

only
does it do
this

three members. The statute also speaks of various activities of the "Council" and does little or nothing to separate out the chairman.⁸

The CEA was reorganized in 1953, and administration of the Council was centralized in the chairman. See Reorganization Plan No. 9 of 1953, 18 Fed.Reg. 4543, 67 Stat. 644 (1953). However, it is not clear that the plan negated any collegiality that might otherwise be reflected by the statute. The increased responsibility enunciated in the 1953 Reorganization Plan spoke primarily to management of the Council's staff. The duty to report to the President was also vested in the chairman, rather than the Council. Appellant argues from all this that the fact that the chairman is to report on the *activities of the Council* indicates that the entity's action is joint and collegial. We are unpersuaded. Any head of a multi-member entity could, of course, be instructed to report on the activities of his or her agency. Such an instruction simply does not translate into a requirement that he or she run the agency collegially.

[6] While there is language in the statute (that may or may not be weakened by the Reorganization Plan) evoking notions of collegiality, we can discern no requirement in the statute that the CEA must be so run. Absent such a requirement, and given the unrefuted factual averment that the Council is not and has not been run collegially, we conclude that the CEA is not a collegial group subject to the Sunshine Act.

Appellant argues that this conclusion would be contrary to *Pacific Legal Foundation, supra*, but his argument rests, at bottom, on the near identity of the statutes creating CEA and CEQ. Since the two entities have in time evolved differently in their functions and would appear in actual practice to operate quite differently, see *Pacific Legal Foundation, supra*, 636 F.2d at 1265-66 (indicating that at least some CEQ business requires an affirmative

vote of two members), the status of those two entities under the Sunshine Act simply need not be the same.

IV

The judgment of the District Court as to both the FOIA and Sunshine Act claims is, for the foregoing reasons,

Affirmed.



CALIFORNIA HUMAN DEVELOPMENT CORPORATION, et al., Appellants,

v.

William E. BROCK, Secretary,
Department of Labor.

No. 84-5321.

United States Court of Appeals,
District of Columbia Circuit.

Argued Dec. 11, 1984.

Decided May 28, 1985.

Suit was brought challenging Department of Labor's method of allocating funds under Job Training Partnership Act among the states to support program servicing migrant and seasonal farm workers. The United States District Court for the District of Columbia, Harold H. Greene, J., granted summary judgment in favor of the Department, and appeal was taken. The Court of Appeals, Bazelon, Senior Circuit Judge, held that Department of Labor's formula for allocating funds under the Job Training Partnership Act, which was based on 1980 Census occupational data rather than social security data, conformed to the relevant statutes and to the agency's own regulations and therefore was valid.

8. See *supra* note 6.

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-----Analysis-----		-----Citation-----		Headnote
Same Text		(246 App.D.C. 59)		No.
		Cir. DC		
J	Dissenting Opin	815 F.2d 1527, 1539		
		869 F.2d 1541, 1548		
		917 F.2d 581, 584		3
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F	Followed	981 F.2d 1288, 1293		4
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		851 F.2d 839, 840		2
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		F.Info.Disclo.(2) s 4.02		
S	Anno Sup	68 A.L.R.Fed. at 842		
N	Anno	82 A.L.R.Fed. at 265		
N	Anno	84 A.L.R.Fed. at 256		

prove to be necessary, must be made on the basis of a record more fully developed than the one presently available to us. Moreover, EPA should be allowed an opportunity to consult with other agencies that may be affected by a decision on this important issue before being required to take a position. Remand to the District Court will allow these consultations to take place and the court's decision will be informed by the government's considered position on the matter.

III.

Although we agree with the District Court's decision insofar as it rejected the Companies' challenges to the modified settlement agreement, we conclude that these cases must be remanded to the District Court for consideration of the question whether the modified settlement agreement impermissibly infringes on the discretion Congress committed to the Administrator to make certain decisions under the statute.

Affirmed and remanded.



PACIFIC LEGAL FOUNDATION,
Petitioner,

v.

**The COUNCIL ON ENVIRONMENTAL
QUALITY, Respondent.**

PACIFIC LEGAL FOUNDATION,
Appellant,

v.

**The COUNCIL ON ENVIRONMENTAL
QUALITY et al., Appellees.**

Nos. 79-1689, 79-1846.

United States Court of Appeals,
District of Columbia Circuit.

Argued June 13, 1980.

Decided Oct. 27, 1980.

solidated on appeal from the United States District Court for the District of Columbia, Thomas A. Flannery, J., the Court of Appeals, Friedman, Chief Judge, sitting by designation, held that: (1) Council was "agency" for purposes of Government in the Sunshine Act, and did not cease to be "agency" for such purposes while functioning in capacity as advisor to president; (2) in view of statutory provisions that meetings may be closed only on individual and particularized basis and in view of broad sweep of general requirement of open meetings, and of statutory provisions imposing numerous requirements to be observed when meeting is closed, agency could not by regulation exempt entire category of its business from open-meeting requirements; (3) where agency could perhaps avoid possible constitutional problems under Government in the Sunshine Act by closing certain meetings, court in answering agency's contention that it could by regulation exempt from open-meeting requirement an entire category of its business would apply rule that federal courts will not anticipate question of constitutional law in advance of necessity of deciding it; and (4) in view of statutory test of "meeting" for purposes of Government in the Sunshine Act, Council could not by regulations limit open meetings to those where affirmative vote of two members is required by statute, regulation, executive order or internal council procedures.

Regulations set aside in part; District Court judgment vacated and case remanded with instructions to dismiss complaint.

1. Statutes $\Rightarrow$ 216

Remarks of single legislator, even sponsor, are not controlling in analyzing legislative history. 5 U.S.C.A. §§ 551, 551(1), 552(e).

2. Health and Environment $\Rightarrow$ 25.5(9)

Council on Environmental Quality was "agency" for purposes of Freedom of Infor-

On petition for review of an order of the Council on Environmental Quality, con-

mation Act and for purposes of Government in the Sunshine Act, did not cease to be "agency" while functioning in capacity as advisor to president. 5 U.S.C.A. §§ 551, 551(1), 552(e), 552b; National Environmental Policy Act of 1969, §§ 202-209, 42 U.S.C.A. §§ 4342-4347; Environmental Quality Improvement Act of 1970, §§ 202-205, 42 U.S.C.A. §§ 4371-4374.

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

3. Administrative Law and Procedure ⇌124

In view of Government in the Sunshine Act provisions that meetings may be closed only on individual and particularized basis and in view of broad sweep of general requirement of open meetings, and of provisions of Act imposing numerous requirements to be observed when meeting is closed, agency could not by regulation exempt entire category of its business from open-meeting requirements. 5 U.S.C.A. §§ 552, 552(e), 552b, 552b(a)(1, 2), (b-g), (d)(1), (e)(1), (h)(1); U.S.C.A.Const. Art. 2, § 2, cl. 1.

4. Constitutional Law ⇌46(1)

Where agency could perhaps avoid possible constitutional problems under Government in the Sunshine Act by closing certain meetings, court in answering agency's contention that it could by regulation exempt from open-meeting requirement an entire category of its business would apply rule that federal courts will not anticipate question of constitutional law in advance of necessity of deciding it. 5 U.S.C.A. §§ 552(b), 552b(a)(1, 2).

5. Health and Environment ⇌25.5(9)

In view of statutory test of "meeting" for purposes of Government in the Sunshine Act, Council on Environmental Quality could not by regulations limit open meetings to those where affirmative vote of two members is required by statute, regulation, executive order or internal council procedures. 5 U.S.C.A. §§ 551, 551(1), 552(e), 552b, 552b(b).

* Sitting by designation pursuant to 28 U.S.C. § 293(a).

6. Administrative Law and Procedure ⇌124

Government in the Sunshine Act does not require agency to hold meetings in order to function, but where deliberations and discussions among agency members in fact determine or result in joint conduct or disposition of official agency business they are "meetings" to which open-meeting rule applies, no matter how agency may characterize them for its own internal purposes. 5 U.S.C.A. §§ 551, 551(1), 552(e), 552b, 552b(b).

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

Petition for Review of an Order of the Council on Environmental Quality Consolidated with Appeal from the District Court for the District of Columbia. (D.C. Civil Action No. 79-116).

Sam Kazman, Washington, D. C., with whom Ronald A. Zumbun, Sacramento, Cal. and Raymond M. Momboisse, Washington, D. C., were on brief, for petitioner-appellant.

Frank A. Rosenfeld, Atty., Dept. of Justice, Washington, D. C., with whom Alice Daniel, Asst. Atty. Gen., Charles F. C. Ruff, U. S. Atty., Leonard Schaitman and Joseph B. Scott, Attys., Dept. of Justice, Washington, D. C., were on brief, for respondent-appellee and appellees.

Lawton Chiles, Washington, D. C., filed an amicus curiae brief pro se.

Before McGOWAN and EDWARDS, Circuit Judges, and DANIEL M. FRIEDMAN,* Chief Judge, United States Court of Claims.

Opinion for the Court filed by Chief Judge FRIEDMAN, United States Court of Claims.

FRIEDMAN, Chief Judge:

These consolidated cases challenge regulations of the Council on Environmental Quality (Council) that make the Govern-

ment in the Sunshine Act (Sunshine Act), 5 U.S.C. § 552b, inapplicable to two types of Council action: (1) advising the President and (2) other actions on which the Council is not required to take a formal vote. No. 79-1689 is a petition to review the portion of the Council's Sunshine Act regulations that thus limit the applicability of the Act. No. 79-1846 is an appeal from a decision of the United States District Court for the District of Columbia dismissing a complaint charging that the Council's practices prior to adopting those regulations violated the Sunshine Act.¹

We hold in No. 79-1689 that the Council's regulations are invalid insofar as they limit the applicability of the Sunshine Act in those two respects, and we therefore set aside those portions of the regulations. In light of that ruling, we find it unnecessary to decide the merits of No. 79-1846.

I.

A. *The Government in the Sunshine Act*

The Sunshine Act, enacted in 1976, Pub. L.No. 94-409 (90 Stat. 1241), generally requires that meetings of government agencies be public. The Act reflects the policy, as stated in its Declaration of Policy, that "the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government." Pub.L.No. 94-409, § 2. To accomplish this objective, the Act directs that "every portion of every meeting" of a multi-member agency must "be open to public observation." 5 U.S.C. § 552b(b). It also requires that in most cases the time, place, and subject of meetings be announced at least one week before the meeting. 5 U.S.C. § 552b(e)(1).

The Act defines "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency busi-

ness" 5 U.S.C. § 552b(a)(2). It defines "agency" as any agency as defined in the Freedom of Information Act, 5 U.S.C. § 552(e), that is "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. § 552b(a)(1).

The Act contains ten exceptions to the open-meeting requirement of section 552b(b). 5 U.S.C. § 552b(c). Those exceptions, based upon the subject matter to be considered, permit but do not require an agency to close a meeting. Many of the exceptions closely parallel and are based upon the exceptions from disclosure in the Freedom of Information Act, 5 U.S.C. § 552(b). H.R.Rep.No.94-880, Part II, 94th Cong., 2d Sess. 15 (1976), *reprinted in* [1976] U.S.Code, Cong. & Ad.News pp. 2212, 2224. An agency is required to take a formal vote to close a meeting. 5 U.S.C. § 552b(d). If the meeting is closed, then the agency must make a recording, transcript, or minutes of the meeting from which the nonexempted portions of the meeting can be excerpted and made public. 5 U.S.C. § 552b(f).

Subsection (g) requires each agency subject to the Act to promulgate regulations to "implement" the foregoing requirements.

The Act gives this court jurisdiction to review those regulations, set aside those not in conformity with the Act, and require agencies to publish regulations in accord with the Act's requirements. 5 U.S.C. § 552b(g). Additionally, the district courts are given jurisdiction to enforce agency compliance with the Act. 5 U.S.C. § 552b(h)(1).

B. *The Council on Environmental Quality*

The Council, a unit within the Executive Office of the President, consists of three members appointed by the President with

1. The complaint also charged that the Council had conducted its business without a quorum, in violation of a "common law quorum rule."

Plaintiff, however, has not pursued that issue on the appeal, which is limited to the issues under the Sunshine Act.

Senate approval, one of whom he designates as chairman. 42 U.S.C. § 4342. The Council was created by Title II of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4342-47, enacted in 1969. Pursuant to the Environmental Quality Improvement Act, 42 U.S.C. §§ 4371-74, the Chairman also serves as Director of the Office of Environmental Quality.

NEPA directs the Council to assist and advise the President in preparing the President's annual Environmental Quality Report, to prepare and submit to the President studies regarding environmental conditions and trends, to review and appraise federal programs that affect the environment and to make recommendations to the President thereon, and to recommend national environmental policies to the President. NEPA also directs the Council generally to conduct environmental research and to monitor environmental trends. 42 U.S.C. § 4344.

Several executive orders have expanded the Council's functions by assigning it responsibilities for overseeing activities of federal agencies. Executive Order No. 11514 (March 5, 1970) directs the Council to coordinate federal programs related to environmental quality and to issue guidelines to federal agencies for the preparation of environmental impact statements. Section 3(f), (h), 3 C.F.R. 902, 904 (1966-1970 compilation). Executive Order No. 11991 (May 24, 1977) amplifies this authority by directing the Council to issue regulations to federal agencies for implementing all of the procedural provisions of NEPA. Section 1, 3 C.F.R. 123, 124 (1978). Under Executive Order No. 11735 (August 3, 1973), the Council publishes and periodically revises the national contingency plan for the removal of oil and hazardous substances from navigable waters. Section 4, 3 C.F.R. 793, 795 (1971-1975 compilation).

C. *This Litigation and the Council's Regulations*

In January 1979, Pacific Legal Foundation (Pacific), a nonprofit, tax-exempt pub-

lic interest organization, filed a suit in the district court against the Council, its members and its general counsel, seeking declaratory and injunctive relief. The complaint alleged that since June 8, 1977 the Council had not complied with the Sunshine Act and the Council's implementing regulations because it had acted in proceedings that constituted "meetings" under the Act but had neither made the meetings public nor closed the meetings in accordance with the statutory requirements for such action.

In June 1979, the district court granted the defendants' motion for summary judgment and dismissed the suit. Based upon the "sparse legislative history relevant to this issue," the court concluded that "the formulation and presentation of advice to the President on environmental matters, which is the CEQ's primary responsibility, is [not] 'official agency business' subject to the requirements of the Act." 13 E.R.C. 1273, 1276 (D.D.C.1979). The appeal in No. 79-1846 is from that dismissal of the complaint.

The day before the district court dismissed Pacific's suit, the Council adopted the amended Sunshine regulations that Pacific challenges in 79-1689.² As noted, the Act defines "meeting" as the "deliberations" of agency members that "determine or result in the joint conduct or disposition of official agency business." 5 U.S.C. § 552b(a)(2). The amended regulations define "official agency business" as "official collegial Council business," 40 C.F.R. § 1517.2(b), which is in turn defined as "any Council action which by statute, regulation, Executive Order, or internal Council procedures requires an affirmative vote of at least two Council members in order to be taken on behalf of the Council." 40 C.F.R. § 1517.2(c).

The regulations further provide that official agency business includes "the adoption of regulations" but does not include "advice to the President [or] actions taken by the

2. The Council promulgated its original Sunshine regulations in April 1977. See 42 Fed. Reg. 20818 (1977).

Chairman acting as Director of the Office of Environmental Quality under the Environmental Quality Improvement Act of 1970." *Id.* In addition, the regulations state that the term "[m]eeting" shall not be construed to prevent Council members from considering Council business that is circulated to them individually in writing." 40 C.F.R. § 1517.2(b).

II.

No. 79-1689

A. The Council recognizes that it is an "agency" under the Act. Indeed, it could hardly do otherwise in view of the statutory definition of that term. The Act incorporates by reference the definition of "agency" in the Freedom of Information Act, 5 U.S.C. § 552(e). Under that definition, agency includes "any . . . establishment in the executive branch of the Government (including the Executive Office of the President)." The Council is a part of the Executive Office.

The situation before us here is similar to that in *Soucie v. David*, 145 U.S.App.D.C. 144, 448 F.2d 1067 (1971). That was a Freedom of Information Act case in which we held that the Office of Science and Technology, which also was in the Executive Office of the President, was an "agency" under that Act. We noted that the Office of Science and Technology not only advised the President, but, like the Council, was also independently authorized to evaluate federal programs. The Conference Committee's Report on the 1974 Amendments to the Freedom of Information Act stated: "With respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in *Soucie v. David*" H.R.Rep.No.93-1380, S.Rep.No.93-1200 (conference reports), 93d Cong., 2d Sess. 14 (1974), reprinted in [1974] U.S.Code, Cong. & Ad.News pp. 6285, 6293; see also S.Rep.No.93-854, 93d Cong., 2d Sess. 33 (1974).

3. See H.R.Rep.No. 91-378, 91st Cong., 1st Sess. 9 (1969), reprinted in [1969] U.S.Code, Cong. &

The Council's recognition that it is an agency under the Sunshine Act is further shown by the implementing regulations it adopted under that Act, which refer to the Act as the authority for the regulations. 40 C.F.R. Part 1517 (heading). The Council's preface to its original regulations stated that "the Sunshine Act . . . requires the Council to open its meetings to public observation unless the Council decides to close its meeting pursuant to a Sunshine Act exemption." 42 Fed.Reg. 20818 (1977). Those regulations virtually tracked the language of the original Sunshine Act, including the ten specific exemptions in subsection (c). 40 C.F.R. § 1517.4.

Despite its admission that it is an "agency," the Council relies on two items in the legislative history of the Sunshine Act which, if given the meaning and significance the Council ascribes to them, would show that the Council is not an agency under the Act. First, the Council relies, as did the district court in No. 79-1846, upon a statement of Senator Javits made during Senate debate on the bill. Senator Javits stated that the bill would not cover agencies whose essential function is to "make policy," which "would include the National Security Council and the Council of Economic Advisers." 121 Cong.Rec. 35324 col. 1 (1975). The Council claims that since the Council on Environmental Quality was modeled after the Council of Economic Advisers,³ Senator Javits' interpretation also applies to it.

Senator Javits' statement, however, dealt with the Senate bill, which contained a different definition of agency than the Act finally enacted. The Senate bill used the definition of agency in the Administrative Procedure Act, 5 U.S.C. § 551(1), which is "each authority of the Government of the United States" (with exceptions not pertinent here). The Act, however, adopts the definition in the Freedom of Information Act, 5 U.S.C. § 552(e), which expressly in-

Ad.News, pp. 2751, 2759 (reporting NEPA).

cludes any "establishment in the Executive Office of the President."⁴

[1] Senator Javits was not a sponsor of the bill, its floor manager, a member of the committee that considered it, or even a major supporter or opponent of the bill. The "remarks of the single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S.Ct. 1705, 1722, 60 L.Ed.2d 208 (1979). Senator Javits made his statement while speaking in support of his proposed amendment, which would have excepted the Federal Reserve Board from the Act. His amendment was defeated. See 121 Cong.Rec. 35329 (1975).

Considering all the circumstances, Senator Javits' statement cannot be viewed as reflecting any indication of the views of Congress about the applicability of the Act to the Council on Environmental Quality.

The Council also notes that the Senate Committee Report on the bill contained a list of agencies the committee deemed the bill to cover, which did not include the Council. The Committee Report indicates, however, that the list was intended to be illustrative and advisory rather than definitive. The Committee stated that "[i]n the final analysis . . . the wording [of the Act], rather than the list, must govern." S.Rep. No. 94-354, 94th Cong., 1st Sess. 15 (1975). Similarly, the House Committee Report, which reprinted the Senate Committee's list, cautioned that the list was intended only "to indicate the potential coverage of the bill." H.R.Rep.No. 94-880, Part II, 94th Cong., 2d Sess. 13 (1976), reprinted in [1976] U.S.Code, Cong. & Ad.News, pp. 2212, 2222. Indeed, the House Committee rejected a provision that would have definitively listed the agencies the Act covered. See H.R. Rep.No. 94-880, Part I, 94th Cong., 2d Sess. 35 (1976), reprinted in [1976] U.S.Code, Cong. & Ad.News, pp. 2183, 2208 (additional views of Rep. Horton).

4. Indeed, the House Committee Report on this section of the Freedom of Information Act stated that "[t]he term 'establishment in the Executive Office of the President' . . . means such

[2-4] Finally, the Council suggests that although it is an agency generally, it does not function in that capacity when it advises the President, so that in that role it is not subject to the Act. We rejected a similar argument implicitly in *Soucie, supra*, (the Office of Science and Technology both advises the President and performs other functions) and explicitly in *Ryan v. Department of Justice*, 199 U.S.App.D.C. —, 617 F.2d 781 (1980). ←

Ryan was a Freedom of Information Act case in which disclosure was sought of responses by Senators to a questionnaire from the Attorney General regarding their procedures for selecting and recommending potential judicial nominees. The court refused to distinguish between the Attorney General in his capacity as an adviser to the President on judicial appointments, and in his capacity as the head of the Department of Justice, which concededly was an agency under the Freedom of Information Act. We stated that "depending on its 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." 199 U.S.App.D.C. at —, 617 F.2d at 788. ↓

B. The Council's main contention is that, even if it is an agency, the open-meeting requirements of the Act were not intended to apply to its primary responsibility of advising the President. Although it suggests that giving such advice is not part of its official business, the statutory description of its duties (see *supra*, pp. 1261-1262) demonstrates that the rendering of such advice is one of its principal responsibilities. If this is not part of the "official agency business" of the Council, it is difficult to see what actions could be so described.

As we have previously explained, the legislative history does not support the Council's view that the Act permits an exception

functional entities as . . . the Council of Economic Advisers." H.R.Rep.No. 93-876, 93d Cong., 2d Sess. 8 (1974), reprinted in [1974] U.S.Code, Cong. & Ad.News, pp. 6267, 6274.

to the open-meeting requirement for formulating and rendering advice to the President. As we now show, neither the language nor the structure of the Act justifies the exception.

The Act provides that "every portion of every meeting of an agency shall be open to public observation." 5 U.S.C. § 552b(b). This language is sweeping, unqualified, and mandatory. It does not authorize an agency to create exceptions for particular categories or kinds of agency action.

Congress recognized that there are agency actions for which general public scrutiny may not be appropriate. It noted the need for "protecting the rights of individuals and the ability of the Government to carry out its responsibilities." Pub.L.No. 94-409, § 2. The means Congress chose to accomplish this objective, however, was to permit an agency to close a particular meeting on an individual basis because of the adverse impact public proceedings would be likely to have upon the rights of individuals and the ability of the government to function properly. Congress limited these exceptions from the open-meeting requirement to "discussion of several narrowly defined areas." H.R.Rep.No. 94-880, Part I, 94th Cong., 2d Sess. 2 (1976), reprinted in [1976] U.S.Code, Cong. & Ad.News 2183, 2184.

As we have noted (*supra*, p. 1261), under the Act numerous requirements must be observed when a meeting is closed. Among others, "[a] separate vote of agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public" 5 U.S.C. § 552b(d)(1).

The congressional insistence that meetings may be closed only on an individual and particularized basis, coupled with the broad sweep of the general requirement of open meetings, is inconsistent with the Council's position that by regulation it may exempt from the open-meeting requirements an entire category of its business.

There may be instances in which a particular meeting at which the Council discusses and formulates advice to the President should be closed to the public. There is no

occasion here, however, to consider the propriety or basis of such limited closing, since the Council has not attempted to do so. We hold only that insofar as the Council's regulations exempt from the open-meeting requirement meetings involving advice to the President, they are invalid because the Act does not authorize that action.

The Council contends, however, that if the Act is construed to cover its rendition of advice to the President, such application would violate the separation of powers and impair the President's authority under article II, § 2, cl. 1 of the Constitution to require the opinion of executive branch officers. It therefore urges us to construe the Act as inapplicable to that function in accordance with the settled rule that, where possible, a statute should be interpreted so as to avoid constitutional defects. See, e.g., *International Association of Machinists v. Street*, 367 U.S. 740, 749-50, 81 S.Ct. 1784, 1789, 6 L.Ed.2d 1141 (1961).

For the reasons previously given, we do not think the Sunshine Act properly may be construed as inapplicable to the Council in its function of advising the President. Furthermore, as noted, the Council has not thus far sought to close particular meetings at which such advice is to be deliberated, but has instead sought totally to exempt such meetings from the Act. The constitutional issues thus are posed in an abstract context that is inappropriate for their adjudication. It may be that by closing certain meetings, the Council could avoid possible constitutional problems. We apply the settled rule that federal courts "will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander v. TVA*, 297 U.S. 288, 346, 56 S.Ct. 466, 482, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

[5] C. The Council's attempt by regulation to limit open meetings to those where an affirmative vote of two members is required by statute, regulation, executive order, or internal Council procedures, stands on no stronger foundation. Much of what we have said in discussing the Council's

attempt to create an exception for advice to the President is equally applicable here. In addition, the statutory definition of "meeting" is inconsistent with the Council's action.

The Act defines "meeting" as the deliberations of at least the number of agency members required for agency action (*i. e.*, a quorum), where the deliberations "determine or result in the joint conduct or disposition of official agency business." There is nothing in this definition that justifies the gloss the Council has put upon it to restrict it to those meetings where an affirmative vote of two members is required to take action on behalf of the Council.

The statutory test is whether the deliberations "determine or result in the joint conduct or disposition of official agency business." If they have that effect, the deliberations constitute a "meeting," whether or not a formal vote is taken, and if it is taken, whether or not the vote is "required" for there to be agency action. By adding the required-vote standard to the statutory definition of "meeting," the Council improperly has limited the reach of the broad open-meeting mandate that Congress has specified.

[6] The Council, of course, has broad discretion to determine the procedures by which it conducts its business. The Sunshine Act does not require an agency to hold meetings in order to function. *Cf. Communications Systems, Inc. v. FCC*, 193 U.S.App.D.C. 412, 595 F.2d 797 (1979), where we noted that Congress intended to permit agencies to consider and act on agency business by circulating written proposals for sequential approval by individual agency members without formal meetings. See S.Rep.No. 94-1178, H.R.Rep.No. 94-1441 (conference reports), 94th Cong., 2d Sess. 11 (1976), reprinted in [1976] U.S.Code, Cong. & Ad.News, pp. 224, 2247. But where the deliberations and discussions among agency members in fact "determine or result in the joint conduct or disposition

of official agency business," they are meetings to which the Sunshine Act's open-meeting rule applies, no matter how the agency may characterize them for its own internal purposes.

III.

No. 79-1846

At oral argument counsel for Pacific Legal Foundation stated that if it prevailed in No. 79-1689, it would receive all the practically significant relief it seeks by its appeal from the district court decision in No. 79-1846. In view of our decision in No. 79-1689, there is no occasion for us to decide No. 79-1846. Accordingly, we vacate the district court judgment in the latter case.

CONCLUSION

In No. 79-1689, the regulations of the Council on Environmental Quality are set aside to the extent that they (1) exclude from the definition of "official agency business" the formulation or rendering of advice to the President, and (2) limit "official agency action" to Council action that by statute, regulation, executive order, or internal Council procedures requires an affirmative vote of at least two Council members in order to be taken on behalf of the Council. In No. 79-1846 the judgment of the district court is vacated, and the case is remanded to the court with instructions to dismiss the complaint.

So ordered.



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J	Dissenting Opin	299 App.D.C. at 98		
		Envir.Protec. s 2.58A		
		Envir.Protec. s 2.58A		
		Envir.Protec.(s) s 2.58A		
		F.Info.Disclo. s 15.18		
		F.Info.Disclo.(2) s 23.02		
S	Anno Sup	38 A.L.R.3d at 1070		
N	Anno	68 A.L.R.Fed. at 844		
N	Anno	82 A.L.R.Fed. at 473		
N	Anno	82 A.L.R.Fed. at 474		

Gary A. SOUCIE et al., Appellants
v.
Edward E. DAVID, Jr., Director, Office
of Science and Technology, et al.
No. 24573.

United States Court of Appeals,
District of Columbia Circuit.

Argued Dec. 7, 1970.

Decided April 13, 1971.

Suit by citizens against Director of Office of Science and Technology for injunctive relief under Freedom of Information Act to compel the director to release to them a certain document. The United States District Court for the District of Columbia, John H. Pratt, J., dismissed the suit and the citizens appealed. The Court of Appeals, Bazelon, Chief Judge, held that where Office of Science and Technology had independent function of evaluating federal scientific programs, the office was "agency" subject to the Administrative Procedure Act and the Freedom of Information Act. The court further held that the "Garwin Report" which evaluates the federal government's program for development of supersonic transport aircraft was a record of the agency and ordered remand for determination of whether the report was within any of the statutory exemptions.

Reversed and remanded with directions.

Wilkey, Circuit Judge, concurred and filed opinion.

1. Records ⇐14

Where doctrine of executive privilege was not expressly invoked by the government as defense to citizens' suit under Freedom of Information Act to acquire copy of report by Office of Science and Technology concerning feasibility of supersonic transport program, the privilege was not properly before the court and was not available as basis for dismissal of the suit. 5 U.S.C.A. §§ 552,

913; Federal Aviation Act of 1958, § 312 (c), 49 U.S.C.A. § 1353(c); Department of Transportation Act, § 6(c) (1), 49 U.S.C.A. § 1655(c) (1); 28 U.S.C.A. § 291(a).

2. Constitutional Law ⇐76

Doctrine of executive privilege is inherent in constitutional requirement of separation of powers.

3. Records ⇐14

The power of Congress to compel disclosure of agency records to the public is no greater than its power to compel disclosure to Congress itself. 5 U.S.C.A. § 2954; 31 U.S.C.A. § 1002.

4. Constitutional Law ⇐46(1)

As serious constitutional questions would be presented by claim of executive privilege as defense to suit under Freedom of Information Act, the court should avoid unnecessary decision of constitutional questions. 5 U.S.C.A. § 552 (a) (3).

5. Constitutional Law ⇐67

Judicial power extends to resolution of questions of separation of powers raised by constitutional claim of executive privilege as defense to suit under the Freedom of Information Act. 5 U.S.C.A. § 552(a) (3).

6. Constitutional Law ⇐67

The courts have power to compel subordinate executive officials to disobey illegal presidential commands.

7. Injunction ⇐75

If nondisclosure by Office of Science and Technology of scientific report was not supported by statutory exemption or constitutional executive privilege, Freedom of Information Act required issuance of injunction to compel the office to release the report to citizens, regardless of whether refusal to disclose was attributable to the office or to the President. 5 U.S.C.A. §§ 552, 913; Federal Aviation Act of 1958, § 312(c), 49 U.S.C.A. § 1353(c); Department of Transportation Act, § 6(c) (1), 49 U.S.C.A. § 1655(c) (1); 28 U.S.C.A. § 291(a).

8. Injunction ⇨114(3)

The President was not indispensable party to citizens' suit under Freedom of Information Act to compel Office of Science and Technology to release report on feasibility of supersonic transport program. 5 U.S.C.A. §§ 552, 913; Federal Aviation Act of 1958, § 312(c), 49 U.S.C.A. § 1353(c); Department of Transportation Act, § 6(c) (1), 49 U.S.C.A. § 1655(c) (1); 28 U.S.C.A. § 291(a).

9. Administrative Law and Procedure

⇨103

Records ⇨14

While primary purpose of Administrative Procedure Act is to regulate the processes of rule making and adjudication, administrative entities that perform neither function are nevertheless "agencies" and therefore subject to the public information provisions of the Act. 5 U.S.C.A. § 551(1).

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

10. Constitutional Law ⇨50

The power of investigation is an incident of legislative power necessary to enactment and effective enforcement of wise laws.

11. United States ⇨23(2)

The chief limitation on congressional inquiry is that it must be exercised for valid legislative purposes and not in derogation of fundamental personal liberties.

12. Administrative Law and Procedure

⇨5

Records ⇨14

Where Office of Science and Technology had independent function of evaluating federal scientific programs, office was "agency" subject to the Administrative Procedure Act and the Freedom of Information Act. 5 U.S.C.A. §§ 552, 913; Federal Aviation Act of 1958, § 312(c), 49 U.S.C.A. § 1353(c); Department of Transportation Act, § 6(c) (1), 49 U.S.C.A. § 1655(c) (1); 28 U.S.C.A. § 291(a).

13. Records ⇨14

The "Garwin Report", prepared by the Office of Science and Technology as an evaluation of feasibility of supersonic transports, was record of the office under the Freedom of Information Act. 5 U.S.C.A. §§ 552, 913; Federal Aviation Act of 1958, § 312(c), 49 U.S.C.A. § 1353(c); Department of Transportation Act, § 6(c) (1), 49 U.S.C.A. § 1655(c) (1); 28 U.S.C.A. § 291(a).

14. Records ⇨14

Any report prepared by the Office of Science and Technology or its consultants in fulfillment of its function to evaluate federal scientific programs is a record of the agency for purposes of Freedom of Information Act. 5 U.S.C.A. § 552(a) (3).

15. Records ⇨14

Fact that President requested that Office of Science and Technology prepare assessment of supersonic transport program did not deprive the office's report of its character as record of study made in performance of ordinary functions of the agency, although a request might bring the document within a statutory or constitutional exemption from the disclosure requirements of the Freedom of Information Act. 5 U.S.C.A. § 552(a) (3).

16. Constitutional Law ⇨50

Congress has power to eliminate ordinary discretionary barriers to injunctive relief against a federal agency.

17. Records ⇨14

Chief purpose of Freedom of Information Act is to increase public access to governmental records by substituting limited categories of privileged material for the standards of agency discretion and to provide effective judicial remedy. 5 U.S.C.A. §§ 552, 552(c).

18. Records ⇨14

The district courts do not have general power to deny relief under Freedom of Information Act on equitable grounds apart from the exemptions in the Act itself. 5 U.S.C.A. §§ 552, 552(c).

19. Records ⇨14

Exemption within the Freedom of Information Act of "inter-agency or intra-agency memorandums or letters" was intended to encourage free exchange of ideas during process of deliberation and policy-making and to protect internal communications consisting of advice, recommendations, opinions and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports; factual information may be protected only if it is inextricably intertwined with policy-making processes. 5 U.S.C.A. § 552(b) (5).

20. Records ⇨14

The government may have special need for opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity, therefore Freedom of Information Act exemption for internal communications is available in connection with reports prepared for an agency by outside experts. 5 U.S.C.A. § 552(b) (4, 6, 8).

21. Records ⇨14

Exemption within Freedom of Information Act of "trade secrets and commercial or financial information obtained from a person and privileged or confidential" is intended to encourage individuals to provide confidential information to the government, and it must be read narrowly in accordance with that purpose. 5 U.S.C.A. § 552(b) (4, 6, 8).

22. Records ⇨14

Exemption within Freedom of Information Act of investigatory files compiled for law enforcement purposes covers files prepared for both civil and criminal law enforcement. 5 U.S.C.A. § 552(b), (4, 6, 8).

23. Records ⇨14

Exemption of confidential information within Freedom of Information Act is available only with respect to information received by the government from sources outside the government. 5 U.S.C.A. § 552(b) (4, 6, 8).

24. Records ⇨14

In order to qualify for Freedom of Information Act exemption of matters specifically required by executive order to be kept secret in interest of national defense or foreign policy, government need only show that the record is specifically required to be kept secret pursuant to an executive order; review of the propriety of keeping it secret is limited to determining that the administrative decision was not arbitrary and capricious. 5 U.S.C.A. § 552(a) (3), (b) (1).

25. Courts ⇨406.9(10)

On remand, district court would be required to expedite proceedings to determine whether report by the Office of Science and Technology to the President on the feasibility of the supersonic transport program was protected by statutory exemption or constitutional privilege; such statutory de novo evaluation would be most effectively undertaken by examination of report in camera. 5 U.S.C.A. § 552(a) (3), (b) (1).

26. Records ⇨14

The touchstone of any proceeding under the Freedom of Information Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests; the policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly. 5 U.S.C.A. § 552.

Mr. Peter L. Koff, Boston, Mass., with whom Messrs. Lawrence Speiser and Melvin L. Wulf, Washington, D. C., were on the brief, for appellants. Mrs. Hope Eastman, Washington, D. C., also entered an appearance for appellants.

Mr. Jeffrey F. Axelrad, Atty., Department of Justice, with whom Messrs. Thomas A. Flannery, U. S. Atty., Robert V. Zener and Harland F. Leathers, Attys., Department of Justice, were on the brief, for appellees. Mr. Morton Hol-

lander, Atty., Department of Justice, also entered an appearance for appellees.

Mr. Peter L. Koff, Asst. Corporation Counsel for the City of Boston, Massachusetts, filed a brief on behalf of the City of Boston as *amicus curiae*.

Before BAZELON, Chief Judge, VAN DUSEN,* Circuit Judge, U. S. Court of Appeals for the Third Circuit, and WILKEY, Circuit Judge.

BAZELON, Chief Judge:

This is an appeal from the dismissal of a suit for injunctive relief under the Freedom of Information Act.¹ Two citizens seek to compel the Director of the Office of Science and Technology (OST)² to release to them a document, known as the Garwin Report, which evaluates the Federal Government's program for development of a supersonic transport aircraft (SST).³

*Sitting by designation pursuant to 28 U.S.C. § 291(a) (1964).

1. Pub.L.No.89-487, 80 Stat. 250 (1966), amending Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946), 5 U.S.C. § 1002 (1964). Pub.L.No.89-487 was repealed, but its substantive provisions enacted into the United States Code, by Pub.L.No.90-23, 81 Stat. 54 (1967), 5 U.S.C. § 552 (Supp. V, 1970).
2. The OST was established in the Executive Office of the President by Reorganization Plan No. 2 of 1962, Pt. I, 3 C.F.R. 879 (1959-63 Compilation), set out following 5 U.S.C. § 133z-15 (1964), at 247. Section 133z-15 has been replaced by 5 U.S.C. § 913 (Supp. V, 1970).
3. The statutory basis for the SST program is a provision in the Federal Aviation Act of 1958 authorizing the Administrator of the Federal Aviation Agency to undertake research and development in aviation. Pub.L.No.85-726, Tit. III, § 312(c), 72 Stat. 752 (1958), 49 U.S.C. § 1353(c) (1964). This function was transferred to the Secretary of Transportation, to be exercised by the Federal Aviation Administrator, by the Department of Transportation Act. Pub.L.No. 89-670, § 6(c) (1), 80 Stat. 938 (1966), 49 U.S.C. § 1655(c) (1) (Supp. V, 1970).
4. Dr. Edward E. David, Jr. has replaced Dr. DuBridge as Director of the OST and as a party to this litigation.

The Report originated in the following manner. The President asked the Director of the OST, then Dr. Lee A. DuBridge,⁴ to provide him with an "independent assessment" of the SST program. Dr. DuBridge convened a panel of experts, headed by Dr. Richard L. Garwin, to assist him. When the President learned of the panel, he asked to see its report. Dr. DuBridge subsequently transmitted the Garwin Report, along with his own evaluation, to the President.⁵

When appellants inquired about the Garwin Report, the OST indicated that it would not release the Report to members of the public because the Report was a Presidential document over which the OST had no control, and was "in the nature of inter- and intra-agency memoranda which contained opinions, conclusions and recommendations prepared for the advice of the President."⁶ Appel-

5. These uncontroverted facts are set forth in the record in statements of Dr. DuBridge. Affidavit of Dr. Lee A. DuBridge, Appendix at 14-16; Letter of April 3, 1970 from Dr. Lee A. DuBridge to The Honorable Henry S. Reuss, Member of the United States House of Representatives, Appendix at 8-9.
6. Letter of May 20, 1970 from Mr. John D. Ehrlichman, Assistant to the President for Domestic Affairs, to The Honorable Henry S. Reuss, Member of the United States House of Representatives, Appendix at 11. In two letters to Dr. DuBridge, Mr. Reuss had tried to obtain the Garwin Report. Appendix at 6-7. Dr. DuBridge sent two letters in reply, the second of which referred Mr. Reuss' request to the Counsel to the President. Appendix at 8-10. Then Mr. Ehrlichman declined to release the Report to Mr. Reuss for the reason quoted in text above. When appellants' attorney Koff asked the OST about the availability of the Report, the Special Assistant to the Director told him that the OST "was without authority to make available to a member of the public the report of Dr. Garwin, since this matter involved a Presidential document over which the [OST] had no control, and that the [OST] would abide by the ruling of John D. Ehrlichman." * * * as contained in his May 20, 1970 letter to The Honorable Henry S. Reuss * * * if a request for said report was made by

lants brought suit under the Freedom of Information Act to compel disclosure of the Report.⁷ The District Court dismissed the complaint with a brief order stating that the Report is a Presidential document, and consequently, that the court has neither authority to compel its release nor jurisdiction over a suit to obtain that relief. At the hearing, the trial judge discussed the basis for his ruling. He stated that the OST is not an "agency" for the purposes of the Freedom of Information Act, but rather a part of the Office of the President, and that the Garwin Report is protected from compulsory disclosure by the doctrine of executive privilege.

In Part I of this opinion we review the origin and functions of the OST and conclude that the OST is an agency, and that the Garwin Report is an agency record. Consequently, subject to any

constitutional issues which may be raised, the complaint states a cause of action under the Freedom of Information Act, and the District Court erred in dismissing the suit. The case must be remanded for that court to consider whether the document is protected, in whole or in part, by any of the specific exemptions enumerated in the Act. In Part II of this opinion we indicate some of the considerations that will be relevant to that determination.

[1-8] While the District Court referred to the doctrine of executive privilege in support of its decision, the privilege was not expressly invoked by the Government, and therefore, it was not properly before the court.⁸ Serious constitutional questions would be presented by a claim of executive privilege as a defense to a suit under the Freedom of Information Act,⁹ and the court should

a member of the public." Affidavit of Peter L. Koff, Appendix at 12-13.

This chain of events provided ample basis for appellants to bypass as futile the step of filing a written request for the document, as ordinarily required by the OST, 32 Fed.Reg. 11,060 (1967). See generally 3 K. Davis, Administrative Law Treatise §§ 20.07-20.08 (1958, Supp. 1970); L. Jaffe, Judicial Control of Administrative Action 425-437, 446-449 (1965). The OST's refusal to disclose the Report to Mr. Reuss is especially significant, for while his right as a citizen to obtain the Report under the Act is equal to that of appellants, his right as a Congressman is presumably greater. See H.R.Rep.No.1497, 89th Cong., 2d Sess. 11-12 (1966).

7. The Act provides:

[E]ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint [sic]. In such a case the court shall determine

the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee * * *.

5 U.S.C. § 552(a) (3) (Supp. V, 1970).

8. See *United States v. Reynolds*, 345 U.S. 1, 7-8, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953):

The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. [footnotes omitted.]

See also *General Services Administration v. Benson*, 415 F.2d 878, 879 (9th Cir. 1969).

9. The doctrine of executive privilege is to some degree inherent in the constitutional requirement of separation of powers. See, e. g., *Berger, Executive Privilege V. Congressional Inquiry* (Pts. I & II), 12 U.C.L.A.L.Rev. 1043, 1287 (1965); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 Yale L.J. 477 (1957); Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi.L.Rev. 761, 763-765 (1967). As the concurring opinion points out, the power of Congress to compel disclosure

avoid the unnecessary decision of those questions.¹⁰ Accordingly, whether or not the Government makes a claim of privilege on remand, the court should first consider whether the Report falls within any statutory exemption.¹¹ Only if the Act seems to require disclosure, and if the Government makes an express claim of executive privilege, will it be neces-

sary for the court to consider whether the disclosure provisions of the Act exceed the constitutional power of Congress to control the actions of the executive branch.¹²

I

Congress passed the Freedom of Information Act in 1966 to strengthen the

of agency records to the public is no greater than its power to compel disclosure to Congress itself. Since 1789, Congress has frequently exercised the latter power in statutes requiring executive officers to transmit information to Congress. *See, e. g.*, Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, as amended, 31 U.S.C. § 1002 (Supp. V, 1970) (Sec'y of Treasury must give certain information to either house of Congress on request); Act of May 29, 1928, ch. 901, § 2, 45 Stat. 996, as amended, 5 U.S.C. § 2954 (Supp. V, 1970) (each executive agency must disclose certain information to Gov't Operations Committees of House and Senate on request). However, courts have never been asked to rule on the scope of executive privilege in the context of a congressional command to disclose information. They have considered the scope of the privilege only in ruling on a litigant's request for discovery of information held by the Government, both in litigation with the Government, *e. g.*, *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), and in litigation between private parties, *e. g.*, *Carl Zeiss Stiftung v. V. E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C.1966), *aff'd per curiam*, 128 U.S. App.D.C. 10, 384 F.2d 979, cert. denied, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967).

10. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

11. If the Government asserts a constitutional privilege on remand, the court will not thereby be deprived of jurisdiction, for the judicial power extends to resolving the questions of separation of powers raised by the constitutional claim. *See Powell v. McCormack*, 395 U.S. 486, 512-522, 548-549, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); *Baker v. Carr*, 369 U.S. 186, 198-204, 208-237, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *cf. Berger* (Pt.

II), *supra* note 9, at 1349-1360. The precise limits of legislative authority over the executive branch are not clear. In discussing the President's power to remove officers, the Supreme Court has drawn an uncertain distinction between officers who exercise purely executive functions, and those whose functions are quasi-legislative or quasi-judicial; only the former are removable at the will of the President in spite of a contrary congressional enactment. *Compare Wiener v. United States*, 357 U.S. 349, 78 S.Ct. 1275, 2 L.Ed.2d 1377 (1958), and *Humphrey's Ex'r v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), with *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926). *See also Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610, 612-613, 9 L.Ed. 1181 (1838).

12. The fact that the President may have ordered the Director of the OST not to release the Garwin Report does not leave the courts without power to review the legality of withholding the Report, for courts have power to compel subordinate executive officials to disobey illegal Presidential commands. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). If nondisclosure of the Garwin Report is not supported by a statutory exemption or a constitutional executive privilege, the Freedom of Information Act requires issuance of an injunction to compel the OST to release the Report, whether the refusal to disclose is attributable to the OST or to the President. The President is not an indispensable party, because a "decree granting the relief sought will [not] require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him," and because "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." *Williams v. Fanning*, 332 U.S. 490, 493, 494, 68 S.Ct. 188, 189, 92 L.Ed. 95 (1947).

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disclosure requirements of the Administrative Procedure Act (APA). Each federal agency subject to the APA must now make its records, with certain specific exceptions, available to "any person" who requests them; district courts have jurisdiction to order the production of any "identifiable record" which is "improperly withheld," and "the burden is on the agency to sustain its action."

[9] Under the APA, an agency is any "authority of the Government of the United States, whether or not it is within or subject to review by another agency."¹³ The statutory definition of "agency" is not entirely clear, but the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions.¹⁴ While the primary purpose of the APA is to regulate the processes of rule making and adjudication, administrative entities that perform neither function are nevertheless agencies, and therefore subject to the public

information provisions of the APA, *i. e.*, the Freedom of Information Act.¹⁵

The District Court ruled that the OST is not an agency, but merely staff to the President.¹⁶ On that theory, the only "authority" controlling the Garwin Report is the President, and the trial court held that the President is not subject to the disclosure provisions of the APA. We need not determine whether Congress intended the APA to apply to the President,¹⁷ and whether the Constitution would permit Congress to require disclosure of his records,¹⁸ for we have concluded that the OST is a separate agency, subject to the requirements of the Freedom of Information Act, and that the Garwin Report is a record of that agency.

The OST, created in 1962 by an executive reorganization plan, is authorized (1) to evaluate the scientific research programs of the various federal agencies, and (2) to advise and assist the President in achieving coordinated federal

13. 5 U.S.C. § 551(1) (Supp. V, 1970).

14. See H.R.Rep.No.1980, 79th Cong., 2d Sess. 19 (1946); S.Rep.No.752, 79th Cong., 1st Sess. 10 (1945); Staff of Senate Comm. on the Judiciary, 79th Cong., 1st Sess., Report on the Administrative Procedure Act 2 (Comm. Print 1945); Attorney General's Comm. on Administrative Procedure, Final Report, Administrative Procedure in Government Agencies, S.Doc.No.8, 77th Cong., 1st Sess. 7 (1941); Attorney General's Manual on the Administrative Procedure Act 9-10 (1947). See generally Freedman, Administrative Procedure and the Control of Foreign Direct Investment, 119 U.Pa. L.Rev. 1, 4-18 (1970).

15. See H.R.Rep.No.1980, 79th Cong., 2d Sess. 19 (1946); Staff of Senate Comm. on the Judiciary, 79th Cong., 1st Sess., Report on the Administrative Procedure Act 2 (Comm. Print 1945); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 4 (1967). For example, the APA's definition of agency apparently includes the U. S. Commission on Civil Rights, which investigates, evaluates and recommends, but does not adjudicate. Civil Rights Act of 1957, Pub.L. No. 85-315, Pt. I, 71 Stat. 635, as amended, 42

U.S.C. § 1975c (Supp. V, 1970); Larche v. Hannah, 176 F.Supp. 791, 796 & n. 15 (W.D.La.1959) (Comm'n is an agency and subject to APA's adjudication provisions), adopted in 177 F.Supp. 816, 819 n. 5 (W.D.La.1959) (three-judge court), rev'd on other grounds, 363 U.S. 420, 441, 452-453, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960) (Comm'n is not subject to APA's adjudication provisions). See also Exec. Order No. 11,236, 3 C.F.R. 329 (1964-1965 Compilation); Skolnick v. Parsons, 397 F.2d 523 (7th Cir. 1968) (President's Comm'n on Law Enforcement & Admin. of Justice).

16. Compare International Paper Co. v. F.P.C., Civ. No. 69-5169 (S.D.N.Y., May 15, 1970) (typewritten opinion at 12-13) (staff of FPC is not a separate agency) (unreported; typewritten opinion filed in this action in the District Court, Civ. No. 1571-70, D.D.C.).

17. The statutory definition of "agency" specifically excludes Congress and the courts of the United States, but does not specifically exclude the President. 5 U.S.C. § 551(1) (Supp. V, 1970).

18. See Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 499-501 18 L.Ed. 437 (1867).

policies in science and technology.¹⁹ Its functions had previously been assigned to the National Science Foundation,²⁰ but the President found that arrangement unsatisfactory:²¹

[T]he Foundation, being at the same organizational level as other agencies, cannot satisfactorily coordinate Federal science policies or evaluate programs of other agencies. Science policies, transcending agency lines, need to be coordinated and shaped at the level of the Executive Office of the President drawing upon many resources both within and outside of government. Similarly, staff efforts at that higher level are required for the evaluation of Government programs in science and technology.

The President therefore proposed a reorganization plan that transferred certain functions to an administrative unit "outside the White House Office, but in the Executive Office of the President on roughly the same basis as the Budget Bureau, the Council of Economic Advi-

sors, the National Security Council, and the Office of Emergency Planning."²²

A reorganization plan proposed by the President can take effect only if both houses of Congress acquiesce, *i. e.*, if neither house passes a resolution disapproving the plan within a fixed period of time.²³ The congressional understanding of a proposed plan is therefore entitled to considerable weight in determining its effect. The one house of Congress that explicitly considered the plan creating the OST²⁴ clearly contemplated that the OST would function as a distinct entity and not merely as part of the President's staff. The House Committee on Government Operations stated:²⁵

Heretofore, the Congress has not been able to obtain adequate information on Government-wide science matters because the President's Special Assistant for Science has been unavailable for questioning by congressional committees due to his confidential relationship with the President. We express no opinion here on the merits

19. Reorganization Plan No. 2 of 1962, Pt. I, § 3, 3 C.F.R. 879, 879-80 (1959-63 Compilation), set out following 5 U.S.C. § 133z-15 (1964), at 247.

20. National Science Foundation Act of 1950, ch. 171, § 3(a) (1) & (6), 64 Stat. 149, as amended, 42 U.S.C. § 1862(a) (1) & (6) (1964); see Exec. Order No. 10,521, 3 C.F.R. 183 (1954-58 Compilation), 42 U.S.C. § 1862 (1964), as amended by Exec. Order No. 10,807, § 6(b), 3 C.F.R. 329, 331 (1959-63 Compilation), 42 U.S.C. § 1862 (1964).

21. Message from the President of the United States Transmitting Reorganization Plan No. 2 of 1962, Providing for Certain Reorganizations in the Field of Science and Technology, H.R.Doc.No.372, 87th Cong., 2d Sess. (1962), reproduced in 108 Cong.Rec. 5439-5440, 5456-5457 (1962). See also H.R.Rep.No.34, 90th Cong., 1st Sess. 6 (1967); S.Rep.No. 1137, 90th Cong., 2d Sess. 7 (1968).

22. H.R.Rep.No.1635, 87th Cong., 2d Sess. 9 (1962), quoting Hearings on Reorganization Plan No. 2 of 1962 Before the Subcomm. on Executive and Legislative Reorganization of the House Comm. on Gov't Operations, 87th Cong., 2d Sess. 11

(1962) (statement of Elmer B. Staats, Deputy Director, Bureau of the Budget). See also 108 Cong.Rec. 8469, 8471-8472 (1962) (remarks of Reps. Anderson and Monagan). In 1968, the National Science Foundation Act of 1950 was amended to reflect the new distribution of functions. Pub.L.No. 90-407, 82 Stat. 360 (1968), 42 U.S.C. § 1862(a) (5) & (d) (Supp. V, 1970); see H.R.Rep.No.34, 90th Cong., 1st Sess. 6, 21 (1967); S.Rep.No.1137, 90th Cong., 2d Sess. 7, 16 (1968). The Director of the OST was also expected to replace the President's Special Assistant for Science and Technology in the capacity of personal adviser to the President on scientific matters. See H.R.Rep.No. 1635, *supra*, at 5; Hearings, *supra*, at 10-11, 13-15.

23. Reorganization Act of 1949, ch. 226, § 6, 63 Stat. 205, as amended, 5 U.S.C. § 906 (Supp. V, 1970).

24. A resolution disapproving the plan which created the OST was introduced in the House of Representatives, but did not pass. H.R.Res. 595, 87th Cong., 2d Sess. (1962); 108 Cong.Rec. 8473 (1962).

25. H.R.Rep.No.1635, 87th Cong., 2d Sess. 9 (1962).

of this reasoning but this committee's position on excessive invocation of executive privilege is well known. With the creation of the new office the Director will become available to Congress and provide us with more information than we now obtain.

A Congressman commenting on the plan emphasized the same point:²⁶

With an Office established by the reorganization plan, and a Director and Deputy Director to head it, congressional committees will be able to deal with this organization on the same basis as they do with the Bureau of the Budget and the Council of Economic Advisers. We will have a responsible officer to whom we can direct inquiries, and whom we can summon to committees to give testimony on subjects of the greatest national importance.

[10-12] If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. In addition to that function, however, the OST inherited from the National Science Foundation the function of evaluating federal programs. When Congress initially imposed that duty on the Foundation, it was delegating some of its own broad power of inquiry²⁷ in order to improve

the information on federal scientific programs available to the legislature. When the responsibility for program evaluation was transferred to the OST, both the executive branch and members of Congress contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President—a relation that might result in the use of such information as a basis for advice to the President.²⁸ By virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act.

Moreover, the OST's interpretation of its own charter in 1967 lends additional support to the conclusion that it is a separate administrative entity.²⁹ At that time, the OST apparently considered itself an agency subject to the APA, for it published a notice in the Federal Register describing the information available to the public from the OST under the new Freedom of Information Act, and setting forth procedures for obtaining that information.³⁰

[13-15] Having concluded that the OST is an agency, we think it clear that the Garwin Report is a record of that agency for purposes of a suit under the Freedom of Information Act. The function of the OST is to evaluate feder-

26. 108 Cong.Rec. 8473 (1962) (statement of Rep. Holifield). See also *id.* at 8472 ("I think the very fact that this makes the scientific program more answerable to the Congress in itself justifies the establishment of this Office * * *"). (remarks of Rep. Holifield).

27. The power of investigation has long been recognized as an incident of legislative power necessary to the enactment and effective enforcement of wise laws. See, e. g., *McCrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927). The chief limitation on congressional inquiry is that it must be exercised for valid legislative purposes and not in derogation of fundamental personal liberties. See, e. g., *Watkins v. United States*, 354 U.S. 178, 187, 198, 77 S.Ct. 1173, 1 L.Ed.2d 1273

(1957). Congress has often delegated portions of its investigatory power to administrative agencies. See 1 K. Davis, *Administrative Law Treatise* §§ 3.01-3.14 (1958, Supp.1970).

28. See Hearings, *supra* note 22, at 13-14 (remarks of Elmer B. Staats, Deputy Director, Bureau of the Budget, and of Reps. Anderson and Holifield).

29. See *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965): When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

30. 32 Fed.Reg. 11,060 (1967).

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al scientific programs.³¹ Consequently, any report prepared by the agency or its consultants in fulfillment of that function must be regarded as a record of the agency. It is true that the SST program was selected for evaluation because the President had requested an assessment of it. That request may bring the document within a statutory or constitutional exemption from the disclosure requirements of the Act.³² But the request does not deprive the Garwin Report of its character as the record of a study made in the performance of the ordinary functions of the agency.

II

The conclusion that the Garwin Report is an agency record is only the beginning of the inquiry required under the Freedom of Information Act. The Act enumerates nine specific exemptions to its general requirement of disclosure.³³ On remand, the trial court must determine whether any of those exemptions is applicable.

[16] It has been argued that courts may recognize other grounds for non-disclosure, apart from the statutory exemptions. At least one court has held that the Act's grant of "jurisdiction to enjoin" improper withholding of agency records leaves district courts with discretion to deny relief on general equitable grounds, even when no exemption is applicable.³⁴ But Congress clearly has the power to eliminate ordinary discretionary barriers to injunctive relief, and we believe that Congress intended to do so here.³⁵

[17, 18] Prior to the Freedom of Information Act, the disclosure provisions of the APA allowed the agencies to withhold information "in the public interest," or "for good cause shown," or on the ground that the person seeking the record was not "properly and directly concerned."³⁶ The chief purpose of the new Act was to increase public access to governmental records by substituting limited categories of privileged material for these discretionary standards, and providing an effective judicial remedy.³⁷

31. The Garwin Report is precisely the sort of evaluation the OST is authorized to undertake, *i. e.*, an evaluation of another agency's scientific program involving technological developments and applications. The National Science Foundation, focusing its effort on basic science, had not gathered much information on technological applications and developments, nor had it studied agency programs. The Foundation's function of evaluating federal programs was transferred to the OST to improve performance in these very respects. See Message From the President of the United States Transmitting Reorganization Plan No. 2 of 1962, Providing for Certain Reorganizations in the Field of Science and Technology, H.R.Doc.No. 372, 87th Cong., 2d Sess. (1962), reproduced in 108 Cong.Rec. 5439-5440, 5456-5457 (1962); H.R.Rep.No.1635, 87th Cong., 2d Sess. 7-8 (1962).

32. See pp. 1077-1078 *infra*.

33. 5 U.S.C. § 552(b) (1)-(9) (Supp. V, 1970).

34. Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 806-808 (S.D.N.Y.1969); see General Services Administration v. Ben-

son, 415 F.2d 878, 880 (9th Cir. 1969). See generally 1 K. Davis, Administrative Law Treatise § 3A.6 (Supp.1970).

35. Compare United Steelworkers v. United States, 361 U.S. 39, 55-59, 80 S.Ct. 1, 4 L.Ed.2d 12 (1959) (Frankfurter, J., concurring) (80-day injunction against strike causing national emergency is mandatory), with Hecht Co. v. Bowles, 321 U.S. 321, 326-331, 64 S.Ct. 587, 88 L.Ed. 754 (1944) (injunction against violation of Emergency Price Control Act is discretionary). See Note, Judicial Discretion and the Freedom of Information Act: Disclosure Denied: Consumers Union v. Veterans Administration, 45 Ind.L.J. 421 (1970). It is well established that Congress may modify the usually strict standards for equitable relief in providing for injunctions in aid of important federal policies. See, *e. g.*, Virginia Ry. v. System Fed'n. No. 40, 300 U.S. 515, 552, 57 S.Ct. 592, 81 L.Ed. 789 (1937).

36. 5 U.S.C. § 1002 (1964).

37. 5 U.S.C. § 552 (Supp. V, 1970); see Bristol-Myers Co. v. FTC, 138 U.S.App. D.C. 22, 25, 424 F.2d 935, 938 (1970); American Mail Line, Ltd. v. Gulick, 133

The Act rejects the usual principle of deference to administrative determinations by requiring a trial "de novo" in the district court. By directing disclosure to any person, the Act precludes consideration of the interests of the party seeking relief. Most significantly, the Act expressly limits the grounds for non-disclosure to those specified in the exemptions.³⁸ Through the general disclosure requirement and specific exemptions, the Act thus strikes a balance among factors which would ordinarily be deemed relevant to the exercise of equitable discretion, *i. e.*, the public interest in freedom of information and countervailing public and private interests in secrecy. Since judicial use of traditional equitable principles to prevent disclosure would upset this legislative resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself.³⁹ There may be exceptional circumstances in which a court could fairly conclude that

Congress intended to leave room for the operation of limited judicial discretion, but no such circumstance appears in the present record of this case.

Thus, unless the Government on remand makes a valid claim of constitutional privilege, it will be able to prevent disclosure only by showing that the Garwin Report falls within one or more of the statutory exemptions.

[19] On the basis of the present record, the exemption which seems most likely to be relevant is the fifth, protecting "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."⁴⁰ That exemption was intended to encourage the free exchange of ideas during the process of deliberation and policy-making; accordingly, it has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports.⁴¹ Factual information may be

U.S.App.D.C. 382, 385, 411 F.2d 696, 699 (1969); H.R.Rep.No.1497, 89th Cong., 2d Sess. 1-2, 5-6, 8-9, 11 (1966); S.Rep.No.813, 89th Cong., 1st Sess. 3-6, 8, 10 (1965).

38. This section does not authorize withholding information or limit the availability of records to the public, except as specifically stated in this section. 5 U.S.C. § 552(c) (Supp. V, 1970); see *Epstein v. Resor*, 421 F.2d 930, 932 (9th Cir.), cert. denied, 398 U.S. 965, 90 S.Ct. 2176, 26 L.Ed.2d 549 (1970).

39. One statement in the report of the Senate Committee on the Judiciary specifically supports the conclusion that Congress intended to eliminate equitable discretion. S.Rep.No.813, 89th Cong., 1st Sess. 3 (1965) ("It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies.") (emphasis added). The report of the House Committee on Government Operations contains language indicating that district courts do have discretion. H.R.Rep.No.1497, 89th Cong., 2d Sess. 9 (1966) ("The Court will have authority whenever it considers such action equitable and appropriate to enjoin

the agency from withholding its records and to order the production of agency records improperly withheld.") (Emphasis added.) However, the House report was published after the Senate had passed its bill. Since only the Senate report was considered by both houses of Congress, the Senate Committee's reading of the Act is a better indication of legislative intent when the two reports conflict. See *Consumers Union of the United States, Inc. v. Veterans Administration*, 301 F.Supp. 796, 801 (S.D.N.Y.1966); *Benson v. General Services Administration*, 289 F.Supp. 590, 595 (W.D.Wash. 1968), aff'd on other grounds, 415 F.2d 878 (9th Cir. 1969); 1 K. Davis, *Administrative Law Treatise* § 3A.2 (Supp. 1970).

40. 5 U.S.C. § 552(b) (5) (Supp. V, 1970).

41. See *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 138 U.S.App.D.C. 147, 151, 425 F.2d 578, 582 (1970); *Bristol-Myers Co. v. F.T.C.*, 138 U.S.App.D.C. 22, 26, 424 F.2d 935, 939 (1970); see H.R. Rep.No.1497, 89th Cong., 2d Sess. 10 (1966); S.Rep.No.813, 89th Cong., 2d Sess. 9 (1965). See also *Freeman v. Seligson*, 132 U.S.App.D.C. 56, 68-69, 405

protected only if it is inextricably intertwined with policy-making processes.⁴² Thus, for example, the exemption might include a factual report prepared in response to specific questions of an executive officer, because its disclosure would expose his deliberative processes to undue public scrutiny. But courts must beware of "the inevitable temptation of a governmental litigant to give [this exemption] an expansive interpretation in relation to the particular records in issue."⁴³

[20] The OST is specifically authorized by Congress to evaluate federal scientific programs in order to provide Congress and the President with better information. Its evaluations may be useful to the President, the Congress, and other agencies with the power to make science policy. Nevertheless, the evaluations themselves may not reflect the internal policy deliberations that the "internal communications" privilege is designed to protect. The Garwin Report may con-

tain some policy advice and recommendations which are protected by the statutory exemption.⁴⁴ In the present record, however, there is no evidence to indicate that releasing the factual information in the Garwin Report will expose the decisional processes of the President or other executive officers with policy-making functions. Unless the Government introduces such evidence on remand, the factual information in the Report will not be protected by the exemption for internal communications.

[21-23] Another statutory exemption which may be applicable to the Garwin Report is the fourth, protecting "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁴⁵ This exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government, and it must be read narrowly in accordance with that purpose.⁴⁶ If the Garwin Report contains material protected by

F.2d 1326, 1338-1339 (1968); *Machin v. Zuckert*, 114 U.S.App.D.C. 335, 338-340, 316 F.2d 336, 339-341 (1962), cert. denied, 375 U.S. 896, 84 S.Ct. 172, 11 L.Ed. 2d 124 (1963); *Boeing Airplane Co. v. Coggeshall*, 108 U.S.App.D.C. 106, 112, 280 F.2d 654, 660 (1960); note 42 *infra*.

42. *Cf. United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941); *Morgan v. United States*, 304 U.S. 1, 18, 58 S.Ct. 773, 82 L.Ed. 1129 (1938); *Carl Zeiss Stifting v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325-326 (D.D.C.1966), *aff'd per curiam*, 128 U.S.App.D.C. 10, 384 F.2d 979, cert. denied, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967).

43. *Ackerly v. Ley*, 137 U.S.App.D.C. 133, 138, 420 F.2d 1336, 1341 (1969).

44. The rationale of the exemption for internal communications indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency

memorandum of the agency which solicited it.

45. 5 U.S.C. § 552(b) (4) (Supp. V, 1970). Other statutory exemptions also protect information that might be communicated to the Government on a confidential basis. The Act exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." *Id.*, § 552(b) (6) & (8). The Act also exempts "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." *Id.*, § 552(b) (7). This exemption covers files prepared for both civil and criminal law enforcement. *See Clement Bros. v. N. L. R. B.*, 282 F. Supp. 540, 542 (N.D.Ga.1968).

46. *See H.R.Rep.No.1497*, 89th Cong., 2d Sess., 10 (1966); *S.Rep.No.813*, 89th Cong., 1st Sess. 9 (1965); *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 138 U.S.App.D.C. 147, 151, 425 F.2d 578, 582 (1970); *Bristol-Myers Co. v. F. T. C.*, 138 U.S.App.D.C. 22, 25-26, 424 F.2d 935, 938-939 (1970); *Consumers Union*

this exemption, then that material should be deleted before disclosure of the remainder may be required.⁴⁷

[24] Finally, the trial court on remand may be called upon to consider the first exemption for matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."⁴⁸

[25] Under the Freedom of Information Act, the District Court is required to expedite the proceedings on remand to determine whether the Garwin Report is protected by any statutory exemption or constitutional privilege.⁴⁹ The court can

most effectively undertake the statutory de novo evaluation of the Government's claim by examining the Report *in camera*. Since the record indicates that the Report is an evaluation of the federal program for development of the SST, it seems likely that the Report contains factual information on the SST and on the Government's activities with respect to it. If the Government asserts a specific privilege on remand, inspection of the Report will enable the court to delete any privileged matter, so that the remainder may be disclosed in accordance with the policies of the Act.⁵⁰ Even

of the United States, Inc. v. Veterans Administration, 301 F.Supp. 796, 802-804 (S.D.N.Y.1969). See also *Roviano v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (identity of informers); *In re Quarles & Butler*, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080 (1895); *Vogel v. Gruaz*, 110 U.S. 311, 4 S.Ct. 12, 28 L.Ed. 158 (1884); *Freeman v. Seligson*, 132 U.S.App.D.C. 56, 69-70, 405 F.2d 1326, 1339-1340 (1968); *Westinghouse Elec. Corp. v. City of Burlington*, 122 U.S.App.D.C. 65, 70-74, 351 F.2d 762, 767-771 (1965); *Boeing Airplane Co. v. Coggeshall*, 108 U.S.App.D.C. 106, 113, 280 F.2d 654, 661 (1960); *Arnstein v. United States*, 54 App.D.C. 199, 203-204, 296 F. 946, 950-951 (1924).

limited to determining that the administrative decision was not arbitrary and capricious. See *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir.), cert. denied, 398 U.S. 965, 90 S.Ct. 2176, 26 L.Ed.2d 549 (1970). See also *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953); *Totten v. United States*, 92 U.S. 105, 23 L.Ed. 605 (1875); cf. *Dayton v. Dulles*, 102 U.S.App.D.C. 372, 378, 254 F.2d 71, 77 (1957), rev'd on other grounds, 357 U.S. 144, 78 S.Ct. 1127, 2 L.Ed.2d 1221 (1958).

47. The exemption for confidential information is available only with respect to information received from sources outside the Government. The Garwin panel's Report is therefore eligible for this exemption only to the extent it contains private information given confidentially by panel members or information obtained from nongovernmental parties on a confidential basis. See *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 138 U.S.App.D.C. 147, 151, 425 F.2d 578, 582 (1970); *Consumers Union of the United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 802-804 (S.D.N.Y.1969).

48. 5 U.S.C. § 552(b) (1) (Supp. V, 1970). The other exemptions require a de novo determination of whether the record the Government seeks to withhold contains information of the class protected by an exemption. But to qualify for the first exemption, the Government need show only that the record is "specifically required * * * to be kept secret" pursuant to an Executive order; review of the propriety of keeping it secret is then

49. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

5 U.S.C. § 552(a) (3) (Supp. V, 1970).

50. See *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 138 U.S.App.D.C. 147, 150, 425 F.2d 578, 581 (1970). See also *Boeing Airplane Co. v. Coggeshall*, 108 U.S.App.D.C. 106, 114, 280 F.2d 654, 662 (1960):

In the present case, where no military or state secrets are involved, and where the generally meritorious basis of the subpoena—including necessity—has been established, we think it proper for the District Judge to examine *in camera* the individual papers which are alleged to be privileged, and direct exclusions or excisions in a manner deemed lawful and appropriate, keeping in mind the issues of the case, the nature and importance of the interests supporting the claim of privilege, and the fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy. [citations omitted]

if the Government asserts that public disclosure would be harmful to the national defense or foreign policy, *in camera* inspection may be necessary. In such a case, however, the court need not inspect the Report if the Government describes its relevant features sufficiently to satisfy the court that the claim of privilege is justified.⁵¹

III

[26] Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly.

The public's need for information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effects on our lives. The OST itself was created to help alleviate this problem; Congress intended that the OST would provide better information and coordination with respect to federal activities in the scientific field. It would defeat the purposes of the OST, as well as the purposes of the Act, to withhold from the public factual information on a

federal scientific program whose future is at the center of public debate.

Reversed and remanded for further proceedings in accordance with this opinion.

WILKEY, Circuit Judge (concurring):

I concur in the result reached and in the court's opinion, except on the point of equitable discretion discussed below.

I.

It is necessary to remand this matter to the trial court, because the trial court did err in not holding the Garwin Report a record of an agency subject to the Freedom of Information Act, and therefore quite logically did not proceed to consider the exemptions under that Act.

II.

Conceivably on remand the trial court may also reach a question of constitutional privilege.¹ To put this question in perspective, it must be understood that the privilege against disclosure of the decision-making process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the legislative and judicial branches as well as for the executive. It arises from two sources, one common law and the other constitutional.

Historically, and apart from the Constitution, the privilege against public disclosure or disclosure to other coequal branches of the Government arises from the common sense-common law principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the

51. See *United States v. Reynolds*, 345 U.S. 1, 8-10, 73 S.Ct. 528, 97 L.Ed. 727 (1953); *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir.), cert. denied, 398 U.S. 965, 90 S.Ct. 2176, 26 L.Ed.2d 549 (1970).

1. Although the trial court cited this as a second ground of its ruling, this issue has not been raised by the Government.

advice received and the exchange of views may not be as frank and honest as the public good requires.

No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a Congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, Government could not function if it was permissible to go behind judicial, legislative or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility.²

Insofar as the executive branch is concerned, most, if not all, of the information protected by this common law privilege is now covered by the fifth exemption to the Freedom of Information Act which exempts from disclosure "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."³

The constitutional part of the privilege arises from the principle of the separation of powers among the legislative, executive and judicial branches of our Government. This at first glance may not seem relevant here, where the appellants are private citizens relying on the Freedom of Information Act, but it puts the matter in a different focus to

know that originally Congressman Henry S. Reuss had sought to obtain this Report over a period of months. Whatever justification lies behind the refusal of his request has a bearing on appellants' rights here. Only after both Dr. DuBridge and Mr. Ehrlichman, Assistant to the President, had declined to accede to the Congressman's request—on the ground that "the report was in the nature of inter- and intra-agency memoranda which contained opinions, conclusions and recommendations prepared for the advice of the President"—did the appellants make their request.

Appellants invoked the Freedom of Information Act in support of their request, but as the court's opinion points out—without deciding whether the refusal of the Assistant to the President was justified or not—" * * * while his [Mr. Reuss'] right as a citizen to obtain the Report under the Act is equal to that of appellants, his right as a Congressman is presumably greater" (footnote 6). Obviously Congress could not surmount constitutional barriers—if such exist in this or any other given case—by conferring upon any member of the general public a right which Congress, neither individually nor collectively, possesses. Water does not naturally rise higher than its source.

Recognition of the necessity, on both grounds cited above, of preserving the confidentiality of certain papers and deliberations has come from all three branches of our Government. A few examples demonstrate the universality and antiquity of the principles involved here.

While the constitutional privilege has been asserted most frequently in our history by the executive against the demands of the legislature, yet the Congress itself has always recognized a privilege for its own private papers and deliberations. Not only is there no provision or procedure for a demand by a

2. Rogers, The Right to Know Government Business From the Viewpoint of the Government Official, 40 Marq.L.Rev. 83, 89 (1956). See generally, Kramer and

Marcuse, Executive Privilege—A Study of the Period 1953-1960, 29 Geo.Wash. L.Rev. 623 (1961).

3. 5 U.S.C. § 552(b) (5) (Supp. V, 1970).

private citizen for access to any papers deemed confidential, but no court subpoena is complied with by the Congress or its committees without a vote of the house concerned to turn over the documents willingly in response to the request of the court, thus properly preserving the co-equal separate status of that branch of the Government. For example,

[N]o evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission.⁴

The judiciary, as perhaps inherently the weakest of the three branches, has most frequently reiterated the principle of separation of powers, the classic expression being in *Kilbourn v. Thompson*:

It is * * * essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.⁵

The reason for the separation of powers was well put by Mr. Justice Brandeis:

The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid

friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments to save the people from autocracy.⁶

When President Washington first declined to furnish the House of Representatives with a document requested by it, he gave as his reason for refusal,

[I]t is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.⁷

These examples of recognition by all three branches of a constitutional privilege to withhold certain documents under given circumstances not only show the tripartite nature of the constitutional privilege, but are relevant here, where the appellants are private citizens, because the original request for the Garwin Report stemmed from a Congressman and was denied by the executive on grounds the validity of which is not yet finally determined. But it would be an absurdity to contend that a Congressman—who is both citizen and Member of the House of Representatives—could not have access to a document in the executive branch, and yet another citizen could gain access on the strength of a statute enacted by Congress. Thus, if the exemptions to the Freedom of Information Act are found not to permit withholding of the information sought here, the execu-

4. H.R.Res. 427, 81st Cong., 2d Sess., 96 Cong.Rec. 565-66 (1950); see H.R.Res. 460, 81st Cong., 2d Sess., 96 Cong.Rec. 1400 (1950); H.R.Res. 465, 81st Cong., 2d Sess., 96 Cong.Rec. 1695 (1950); H.R.Res. 469, 81st Cong., 2d Sess., 96 Cong.Rec. 1735 (1950). Only recently, in a situation substantially the inverse of the present case, *i. e.*, a suit to suppress publication of congressional documents, the House indicated its displeasure with, and asserted its independence from what it deemed an intrusion by the ju-

diciary into its prerogatives with respect to its own documents. See *Hentoff v. Ichord*, 318 F.Supp. 1175 (D.D.C.1970), and H.R.Res. 1306, 91st Cong., 2d Sess., 116 Cong.Rec. II 11606, 11625 (daily ed. 14 Dec. 1970).

5. 103 U.S. 168, 191, 26 L.Ed. 377 (1880).

6. *Myers v. United States*, 272 U.S. 52, 293, 47 S.Ct. 21, 81, 71 L.Ed. 160 (1926) (dissenting opinion).

7. 1 Richardson, Messages and Papers of the Presidents 196 (1896).

utive may still assert a constitutional privilege on the ground that Congress may not compel by statute disclosure of information which it would not be entitled to receive directly upon request.

Part II of the court's opinion also expresses the view that Congress, in providing for *de novo* court review of agency refusals to disclose information, intended to *require* the courts to enjoin withholding of any agency record not exempted by the Act and not protected by a constitutional privilege. Congress, the opinion states, "did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself." This quoted statement and related discussion relate to an issue which is not presented for decision in this case and is not likely to face the trial court on remand. There is no suggestion in the record that the District Court here denied relief on equitable grounds, nor is it likely that such grounds could be presented in the context of this case. It has been suggested that a court may, on equitable grounds, decline to require disclosure of records not covered by a specific exemption in the Act, where to order disclosure would irreparably invade personal privacy or cause the Government to violate an agreement with a private party that non-commercial and non-financial⁸ information provided by him

will be kept confidential.⁹ There do not appear to be such equitable grounds for non-disclosure present in the instant case and I would not therefore reach the difficult question of statutory construction of the District Court's power in such circumstances.

The Act itself merely provides: "On complaint, the district court * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."¹⁰ It does not in terms require that such jurisdiction be exercised in all cases. The legislative history pulls in opposite directions on this question; the Senate Report states:

It is the purpose of this [Act] to * * * establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language. * * * It is essential that agency personnel, and the courts as well, be given definite guidelines in setting information policies. Standards such as "for good cause" are certainly not sufficient.¹¹

The House Report, on the other hand, relates that under the Act:

The Court will have authority *when- ever it considers such action equitable and appropriate* to enjoin the agency from withholding its records and to

8. The fourth exemption of the Freedom of Information Act exempts from disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552 (b) (4) (Supp. V, 1970).

9. Davis, The Information Act: A Preliminary Analysis, 34 U.Chi.L.Rev. 761, 767, 787, 791, 802 (1967).

10. 5 U.S.C. 552(a) (3) (1967). In *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944), the statute involved directed that upon complaint of the administrator of the Emergency Price Control Act an injunction "*shall be granted*." Nevertheless the Supreme Court held that the District Court could decline to issue an injunction if equitable considerations indicated that to be the appropriate result. Contrarily, in *United Steelwork-*

ers v. United States, 361 U.S. 39, 80 S.Ct. 1, 4 L.Ed.2d 12 (1959), the Court impliedly held that under a statute which provided that the District Court "*shall have jurisdiction*" to enjoin an industry-wide strike causing a national emergency, the trial judge had no equitable discretion to refuse to issue an injunction. (That conclusion was made explicit in the concurring opinion of Justices Frankfurter and Harlan.) The accommodation of these two precedents and their application to the statutory scheme of the Freedom of Information Act are, in my view, best accomplished in the context of a case where the issue is presented by the facts and argued by the parties.

11. S.Rep.No.813, 89th Cong., 1st Sess. 3 (1965).

order the production of agency records improperly withheld.¹²

And a noted commentator has expressed the view that the denial of relief on equitable grounds is an appropriate course in certain circumstances.¹³

There is, no doubt, force to the majority's opinion that the thrust of the Act is to limit the grounds for agency withholding to the exemptions therein stated, and that the discretion of the court in enforcing the Act should thus be similarly curtailed. Nevertheless, because of the conflicting legislative history and the difficulty in determining congressional intent on this matter, I believe that pursuant to sound principles of judicial decision making, decision of this issue can and should await the case where it is squarely raised. I therefore express no view as to the correctness of the majority's suggestion that the courts are generally without equitable power to decline to order production of agency records in cases not specifically covered by exemption.

III.

Part III of the court's opinion is a summary of the laudable objectives of the Freedom of Information Act of assuring public access to information necessary to making informed decisions on public issues, but I respectfully suggest it is nevertheless unessential to our decision here. Since it forms part of the court's opinion, however, I think it should be made clear that neither the public nor the Congress is being denied *the facts* here in regard to the supersonic transport, and therefore recourse to legal action under the Freedom of Infor-

mation Act as a practical matter was simply unnecessary.

Each of the persons who were asked by Dr. DuBridge to form the *ad hoc* panel to prepare the Report for the President could be called before the appropriate congressional committee and asked for his views on any aspect of the SST program. There is no reason why the views of these scientists and engineers cannot be made available to the Congress and to the public. The only matter about which they should not be asked is exactly what advice they gave the President. Furthermore, almost two years have gone by since they expressed their views to the President, and the opinions which they might now give to the Congress or to the public, in the light of additional information obtained, might be somewhat different from their best advice at the time they helped formulate the Garwin Report. Even without an appearance before a congressional committee any one of several of these scientists or engineers could be interviewed by the press or on TV, invited to write an article for a magazine or newspaper, or participate in public discussion in any form, in order to enlighten the public. There would be nothing improper in a public expression of individual opinion, so long as exactly what the person advised the President was not explicated.

As a matter of recorded fact, Dr. Richard Garwin, who chaired the panel, has done just that. He has appeared before *three* different congressional committees,¹⁴ and has been publicly reported as stating that he had "said everything I have to say" in lengthy critical testimony about the SST before the three committees, although he appears to have

12. H.R.Rep.No.1497, 89th Cong., 2d Sess. 9 (1966).

13. Davis, *supra*, note 9.

14. Hearings on H.R. 17755 Before the Subcomm. of the Senate Committee on Appropriations, 91st Cong., 2d Sess., pt. 2, at 1621 (1970); Hearings on Supersonic Transport Development Before the Subcomm. on Economy in Government

of the Joint Economic Comm., 91st Cong., 2d Sess., pt. 4, at 904, 908 (1970); Hearings on Department of Transportation Appropriations Before the Subcomm. on Dept. of Transportation and Related Agencies Appropriations of the House Comm. on Appropriations, 91st Cong., 2d Sess., pt. 3 (Testimony of Members of Congress and Interested Individuals and Organizations) at 980 (1970).

Cite as 448 F.2d 1085 (1971)

carefully refrained from discussing the Garwin Report itself.¹⁵

Thus it appears that alternate means of obtaining the facts in regard to the SST, other than a lawsuit to compel production of the Garwin Report, are available both to the public and to Congress.¹⁶ This hints at the possibility that what the appellants are seeking here is really the *advice* given the President of the United States by his subordinates, rather than the *facts* in regard to the SST program on which the public and the Congress can form an intelligent judgment. Viewed in this light, the issues may take on a different aspect from those framed by the appellants.



UNITED STATES of America

v.

Wilkin D. LUMPKIN, Appellant.
No. 24410.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 14, 1971.

Decided June 21, 1971.

Defendant was convicted in the United States District Court for the District of Columbia, John H. Pratt, J., of armed robbery and assault with a dangerous weapon, and he appealed.

15. Dr. Garwin, at least, was interviewed by the Saturday Review, The Washington Post, and very likely a number of other media representatives. See Sutton, Is the SST Really Necessary, Saturday Review, 15 Aug. 1970, at 14; Washington Post, 21 Dec. 1970, § A, at 2. According to the latter report:

Garwin said he still did not feel free to discuss the study [made by the *ad hoc* panel at the request of the OST] itself, but he emphasized that he "said everything I have to say" about the SST in the course of critical testimony this year before three congressional committees.

The Court of Appeals, MacKinnon, Circuit Judge, held that evidence that defendant and two other men entered store together, that they conversed together until other customers left the store, that defendant did not lie on the floor when one of the codefendants, with a gun, announced a "stick-up" and said "To the floor.", and that defendant moved from near the door to near the cash register after a codefendant ordered store employee to open it was sufficient to support defendant's conviction for armed robbery and assault with a dangerous weapon, and conflicting testimony of defendant and his codefendants whereby they all sought to establish that defendant and one of his codefendants were innocent bystanders did not destroy the permissible inference of defendant's guilt.

Affirmed.

Bazelon, Chief Judge, concurred in the result.

1. Criminal Law §59(5)

Mere presence at scene of crime is not sufficient to convict one of aiding and abetting; what is required is evidence that the accused knowingly associated himself in some way with the criminal venture, that he participated in it as something that he wished to bring about, and that he sought by his action to make it succeed. D.C.C.E. § 22-105.

2. Assault and Battery §92

Robbery §24(1)

Evidence that, *inter alia*, defendant and two other men entered store togeth-

These reports of Dr. Garwin's interviews with the press were quoted and discussed on the Senate Floor. See 116 Cong.Rec. S 20921, S 20932 (daily ed. 21 Dec. 1970).

16. Of course these considerations would not apply to personal advisors to the President such as members of the White House staff, who traditionally do not appear before Congress. But, as the court's opinion indicates, Dr. Garwin and his confreres, operating under the direction of the OST, are not thus restricted.