OPENING THE GOVERNMENT'S ELECTRONIC MAIL: PUBLIC ACCESS TO NATIONAL SECURITY COUNCIL RECORDS

I. INTRODUCTION

History, despite its wrenching pain,
Cannot be unlived, but if faced
With courage, need not be lived again.[1]

Maya Angelou's poem, read at President Clinton's inauguration in January 1993, recognized the importance of confronting the past.[2] She made it clear that we must do so if we are to progress as a nation or as a people.[3] Four years earlier, on the eve of another inauguration, an important segment of our history was almost lost.[4] On January 19, 1989, the last day of the Reagan Administration, a group of journalists and non-profit organizations filed a lawsuit against the President and Vice President of the United States, the National Security Council ("NSC") and the Archivist of the United States, to prevent the destruction of electronic records on computer back-up tapes of the NSC and White House electronic mail systems.[5] The tapes were scheduled to be destroyed in preparation for the change in administration.[6] The plaintiffs later amended their complaint to prevent the destruction of Bush Administration electronic mail records as well.[7] While the lawsuit pre-

[1] Maya Angelou, *On the Pulse of Morning*, N.Y. TIMES, Jan. 21, 1993, at A14.

[2] *See id.*

[3] *See id.*

[4] Armstrong v. Executive Office of the President, 1 F.3d 1274, 1283–84 (D.C. Cir. 1993) [hereinafter *Armstrong II*] (describing the documents at issue in the case as an "entire set of substantive [electronic mail] documents generated by two administrations over a seven-year period"). Upholding the preservation of the documents, the United States Court of Appeals for the District of Columbia Circuit noted that "the substantive importance of these documents is demonstrated by the frequency with which they have been used in recent years." *Id.* at 1283 n.7.

[5] Complaint for Declaratory and Injunctive Relief at 1–2, Armstrong v. Bush, 721 F. Supp. 343 (D.D.C. 1989) (No. 89–142).

[6] *See id.* at 5.

[7] Amended Complaint at 11–13, Armstrong v. Bush, 721 F. Supp. 343 (D.D.C. 1989) (No. 89–142) ("WHEREFORE, plaintiffs pray this court: . . . 5. Declare that defendants may not destroy, erase, recycle, or in any way alter information recorded in the PROFS system, from now on, unless and until they comply with the requirements . . . .").

vented the physical destruction of those records, the risk that their release may be thwarted remains, at least for the foreseeable future.[8]

The ability of historians, journalists, biographers and researchers to access accurate information about governmental decisions and actions sustains an integral part of the American political system.[9] The First Amendment to the U.S. Constitution protects the press from governmental control, and in doing so, imposes a corresponding duty on the press to inform the public about the workings of government.[10] The right to publish and the duty to inform, however, mean nothing if the records of government are kept from those who would write about them.[11] Similarly, the people cannot be informed if the secrets of government have been destroyed.[12] Congress has recognized the importance of preserving our historical heritage and providing public access to it.[13] Through enactment of various statutes that protect governmental records and make them available to subsequent administrations and to the public in general, Congress has sought to strike a balance between the benefits of preservation and disclosure, and the risks that premature disclosure pose to the effective workings of gov-

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[8] *See id.*; *Armstrong II*, 1 F.3d at 1296 ("Moreover, cross-appellees suggest that the materials in question may not be subject to the [Freedom of Information Act (FOIA)] . . . because they are not 'official records' of the NSC."); Defendant's Memorandum of Points and Authorities In Support of Defendant's Motion to Dismiss on NSC Recordkeeping Claims at 1, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89-142) [hereinafter Defendant's March 25, 1994, Motion to Dismiss] (which asserts that all NSC records are presidential, and, therefore, NSC preservation guidelines are not subject to judicial review); *see also infra* notes 169–76 and 200–21 (explaining the restrictions on disclosure of federal (agency) records versus non-federal records).

[9] SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 1 (U.S. Gov't Printing Office 1974) [hereinafter SOURCE BOOK I] (quoting bill-signing statement of Lyndon B. Johnson: "This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits.").

[10] U.S. CONST. amend. I.; New York Times v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

[11] *See New York Times*, 403 U.S. at 717.

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. . . . The press was protected so that it could bare the secrets of government and inform the people. . . . And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people . . . .

Id. (Black, J., concurring).

[12] *See Armstrong II*, 1 F.3d at 1283.

[13] *See* 44 U.S.C. § 2902 (1988). The Federal Records Acts describe the objectives of records management as, "(1) Accurate and complete documentation of the policies and transactions of the Federal Government . . . (5) Judicious preservation and disposal of records." *Id.*; *see also* 5 U.S.C. § 552(a) (1988). FOIA provides in pertinent part, "Each agency shall make available to the public information as follows . . . ." 5 U.S.C. § 552(a).

ernment.[14] Recognizing the Government's built-in incentive to hide its mistakes or downplay unsuccessful policies, Congress created mandatory rules regarding what documents will be kept and who will have access to them.[15] Congress has also taken into account the interests of national security and a desire to encourage executive branch officials to give frank and honest information and advice to their superiors.[16] Thus, the records statutes have evolved in an environment of competing forces, some favoring disclosure, and others favoring continued restrictions on access.[17]

Congress's response to these tensions is embodied in a number of different statutes that divide all executive branch documents into three distinct categories: federal records, presidential records and non-records.[18] Because these categories are mutually exclusive, a record must be subject to either the Presidential Records Act ("PRA") or the Federal Records Acts ("FRA"), or to neither.[19] Federal records are those

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[14] H.R. REP. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* SOURCE BOOK I, *supra* note 9, at 27; S. REP. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* SOURCE BOOK I, *supra* note 9, at 41.

[15] H.R. REP. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* SOURCE BOOK I, *supra* note 9, at 27; S. REP. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* SOURCE BOOK I, *supra* note 9, at 40–41; *see also* American Friends Serv. Comm. v. Webster, 720 F.2d 29, 41 (D.C. Cir. 1983) ("Congress was certainly aware that agencies, left to themselves, have a built-in incentive to dispose of records relating to 'mistakes' or, less nefariously, just do not think about preserving 'information necessary to protect the legal and financial rights . . . of persons directly affected by agency's activities.'" (citing 44 U.S.C. § 3101)). For a discussion of congressional power to control presidential efforts at maintaining secrecy in the areas of national security and foreign affairs, see James R. Ferguson, *Government Secrecy After the Cold War: The Role of Congress*, which concludes that except in narrow circumstances that are protective of the First Amendment, Congress will not grant new secrecy powers to the President. 34 B.C. L. REV. 451, 455 (1993).

[16] *See* H.R. REP. No. 1487, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 5732, 5737; *see also* 44 U.S.C. § 2204(a)(5) (allowing the President to restrict access for 12 years to "confidential communications requesting or submitting advice, between the President and his advisors, or between such advisors").

[17] See *infra* notes 168–76, 200–21 and accompanying text for a discussion of access to presidential and federal records.

[18] The three categories are governed by the following statutes:

1) Federal Records (these statutes are known as the "Federal Records Acts" or "FRA"): Archival Administration, 44 U.S.C. §§ 2101–18 (1988); Records Management by the Archivist of the United States and by the Administrator of General Services, 44 U.S.C. §§ 2901–09 (1988); Records Management by Federal Agencies, 44 U.S.C. §§ 3101–07 (1988); Disposal of Records, 44 U.S.C. §§ 3301–24 (1988).

2) Presidential Records (the "Presidential Records Act" or "PRA"): 44 U.S.C. §§ 2201–07 (1988).

3) Non-records (materials exempted from the PRA and the FRA): *see* 44 U.S.C. § 2201(2)(B) (listing items exempt from the PRA); 44 U.S.C. § 3301 (defining federal record and listing items not included).

[19] 44 U.S.C. § 2201(2)(B). The PRA does not apply to any documents covered under the FRA. *Id.*; 44 U.S.C. § 3301.

records created or received by an "agency" of the United States Government which are "made or received by an agency of the United States Government under federal law or in connection with the transaction of public business."[20] In order to ensure maximum public access to those records, Congress passed the Freedom of Information Act ("FOIA"), which requires agencies to make their records available to the public.[21] Administrative decisions regarding the disposal and preservation of records under FOIA are subject to judicial review.[22] Thus, if the court finds that the the electronic mail in question are agency records, then researchers, journalists and historians may attempt to access those documents through FOIA.[23] In addition, if the requestor of a federal document disagrees with the administration's decision to release the document, he or she has the option of going to the courts for redress.[24]

In contrast to federal records, which are governed by the FRA and FOIA, presidential records are governed by the PRA.[25] The PRA applies to "the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President."[26] The PRA creates a system of preservation and access separate from the FRA and FOIA.[27] In addition, decisions regarding the "creation, management and disposal" of records under the PRA are not subject to judicial review.[28] A requestor who disagrees with the

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[20] 44 U.S.C. § 3301. To qualify as a federal record, the item must be "appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." *Id.*

[21] 5 U.S.C. § 552. FOIA applies to federal records immediately. *See id.* In contrast, presidential records that have not been restricted by the President are not subject to FOIA until five years after the Archivist obtains custody of the document. 44 U.S.C. § 2204(b)(2)(A).

[22] American Friends Serv. Comm. v. Webster, 720 F.2d 29, 45 (D.C. Cir. 1983) (holding that judicial review of records disposal and preservation is available); *accord* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150–51 (1980) (holding that the FRA does not contain an implied cause of action allowing private parties to bring suit to recover records that have been unlawfully removed from an agency); *cf.* Armstrong v. Bush, 924 F.2d 282, 292 (D.C. Cir. 1991) [hereinafter *Armstrong I*] ("Nothing in the Conference Report or the 1984 Amendments indicates a congressional intent to preclude ordinary judicial review of the adequacy of an agency's recordkeeping guidelines and directives."), *further proceedings sub nom.* Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993).

[23] *See* 5 U.S.C. § 552.

[24] *American Friends*, 720 F.2d at 45.

[25] *See* 44 U.S.C. § 2201.

[26] 44 U.S.C. § 2201(2).

[27] For a description of the presidential records preservation system see *infra* notes 164–76 and accompanying text.

[28] *Armstrong I*, 924 F.2d 282, 290–91 (D.C. Cir. 1991) ("We therefore hold that the PRA precludes judicial review of the President's recordkeeping practices and decisions."). The guide-

decision of the President or presidential library about the release of a presidential document has no recourse in the courts.[29] Although access to presidential records can also be obtained through FOIA, there is a delay of at least five years placed on their release, with the possibility of an additional seven-year delay in the event that the President decides that a document falls within one of the restricted categories.[30] Thus, a document's designation (federal, presidential, or non-record) carries with it a myriad of legal consequences regarding whether the document gets preserved, and if it does, the manner of that document's preservation, the likelihood of its timely release to the public, and the ability of an aggrieved citizen to seek help from the courts in obtaining access to a particular record.[31]

In August of 1993, in *Armstrong v. Executive Office of the President*, the United States Court of Appeals for the District of Columbia Circuit determined that certain electronic mail tapes at issue are in fact government records, rather than merely "extra copies" of which the Executive Office can dispose.[32] In finding that the tapes contain federal and presidential records, however, the court did not provide a way to decide into which category an individual record falls.[33] Instead, the court of appeals remanded the case to the district court, which asked the defendants to create guidelines to govern the disposal of the

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lines that define what will be treated as a presidential record, however, are judicially reviewable. *Armstrong II*, 1 F.3d 1274, 1294 (D.C. Cir. 1993) ("Thus, although the PRA impliedly precludes judicial review of the President's decisions concerning the creation, management, and disposal of presidential records during his term of office, [citing *Armstrong I*, 924 F.2d at 290-91], the courts may review guidelines outlining what is, and what is not, a 'presidential record' to ensure that materials that are not subject to the PRA are not treated as presidential records.").

[29] *See id.*

[30] 44 U.S.C. § 2204. These restricted categories cover documents that are: 1) classified (the classification must be both proper and authorized by specific criteria established pursuant to an Executive order); 2) related to appointments to federal office; 3) exempted from disclosure by statute (as long as the statute is specific about what material must be withheld, and there is no discretion in the statute regarding the disclosure); 4) trade and commercial secrets, or privileged financial information; 5) confidential communications requesting or submitting advice, between the President and his advisors, or between such advisors; or 6) personnel, medical, or other files, the disclosure of which would constitute a violation of privacy. 44 U.S.C. § 2204(a)(1)-(6).

[31] *See infra* notes 168-76, 200-21 and accompanying text.

[32] *See Armstrong II*, 1 F.3d at 1283 ("To qualify as a record under the FRA, a document must satisfy a two-pronged test. It must be (1) 'made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business' and (2) 'preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in [it]' . . . having established that the electronic communications systems contain preservable records . . . ." (citing 44 U.S.C. § 3301)). Thus, the Government's argument that the documents were non-records (extra copies) failed. *Id.*

[33] *See id.* at 1294-97.

records and distinguish between the two types of documents.[34] Once the court approves guidelines, they apply to the records at issue in the case.[35] If they are found to be federal records, the court can then move on to the plaintiff's FOIA claim.[36] If the documents are found to be presidential records, the Archivist will take control of them and the President will be able to place a twelve-year restriction on many of them.[37] Thus, at this juncture, the prospect that the plaintiffs will obtain the release of the documents within the next decade depends on the courts' answer to one question: are the NSC electronic mail documents at issue in the case "federal records" or "presidential records"?[38]

This Note argues that the NSC is really made up of three units, the National Security Advisor, the National Security Council and the staff of the National Security Council. Although the first two can be excluded from the FRA as non-agencies because they exist solely to advise and assist the President, the NSC Staff functions as an agency of the United States government, thereby creating agency records subject to all the provisions of the FRA and FOIA.[39] Section I of this Note examines the structure, creation and development of the Execu-

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[34] *Id.* at 1296–97; *see* Armstrong v. Executive Office of the President, 821 F. Supp. 761, 763 (D.D.C. 1993). Despite its earlier concession that the NSC creates both presidential and federal records, and despite the fact that the NSC has complied—at least in part—with FOIA since 1975, the government, in a brief submitted to the district court on March 25, 1994, argued that the NSC exists "solely" to advise and assist the President and therefore creates only presidential records; and that therefore, the NSC is not subject at all to the FRA. Defendant's March 25, 1994, Motion to Dismiss at 1, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89-142).

[35] *See Armstrong II*, 1 F.3d at 1296.

[36] *See id.*

[37] *See id.* The PRA permits a tewlve-year restriction on disclosure of documents deemed to be "confidential communications requesting or submitting advice, between the President and his advisors, or between such advisors." 44 U.S.C. § 2202(a)(5).

[38] See *infra* notes 449–66 and accompanying text for an analysis of this question.

[39] Courts have used the term "agency record" when describing documents subject to FOIA. *See, e.g.*, Forsham v. Harris, 445 U.S. 169, 171 (1980); Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980); Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1488 (D.C. Cir. 1984). When discussing documents subject to the FRA, courts have used the term "federal records." *See, e.g.*, *Armstrong II*, 1 F.3d at 1278; American Friends Serv. Comm. v. Webster, 720 F.2d 29, 35 (D.C. Cir. 1983). Because FOIA and the FRA cover documents created or received by an "agency," for the purposes of this Note there is no real distinction between "federal records" and "agency records." *See* 5 U.S.C. § 552; 44 U.S.C. § 3301. There is some indication, however, that FOIA may cover a larger set of records than are covered by the FRA. United States Dep't of Justice, FOIA Counselor: What is an 'Agency Record'?, FOIA Update, Fall 1980, at 5 ("'Records' is not a statutorily defined term in FOIA. In fact it appears that the only definition of this term in the U.S. Code is that in the Federal Records Act. . . . As used in FOIA the term [records] generally includes everything mentioned in [the FRA] definition.") For the purposes of this Note, it will be assumed that whatever documents are deemed to be federal records in the *Armstrong* case will also fall within the scope of FOIA.

tive Office of the President ("EOP"), the position of National Security Advisor ("NSA"), and the National Security Counsel and its staff.[40] Section II describes the language and legislative history of the various statutes that govern executive branch records and their management, preservation and treatment, including the PRA, the FRA and FOIA.[41] Section III looks to judicial handling of "agency" and "agency records" cases.[42] Section IV presents the facts and proceedings in *Armstrong* and the determinations made by the district and circuit courts.[43] Finally, Section V applies the statutes and cases, and their underlying policies, to the facts of *Armstrong* and concludes that the NSC records at issue in the case, and all future records created by and within the control of the NSC Staff, should be designated agency records, but those records created by the Council or the National Security Advisor should be considered presidential records.[44]

II. Development of the EOP, NSA and NSC

A. *Executive Office of the President and the National Security Advisor*

The executive branch of the United States government, created under Article II of the United States Constitution and headed by the President, currently employs over two million people.[45] The majority of those employees work in executive departments, such as the Department of Defense, the Department of Education or the Department of Labor.[46] At the head of this vast bureaucracy is an entity called the Executive Office of the President ("EOP").[47] The most important unit of the EOP is the White House Office, sometimes referred to as the

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[40] *See infra* notes 45–127 and accompanying text.

[41] *See infra* notes 128–221 and accompanying text.

[42] *See infra* notes 222–325 and accompanying text.

[43] *See infra* notes 326–77 and accompanying text.

[44] *See infra* notes 378–472 and accompanying text.

[45] U.S. Const. art. II, § 1 ("The executive Power shall be vested in the President of the United States of America"); Office of Management and Budget, Budget of the United States Government, Fiscal Year 1994, 39 [hereinafter Budget, Fiscal Year 1994] (Executive Branch Civilian Employment—All agencies except Postal Service and Postal Rate Commission, Actual as of September 30, 1992: 2,227,709).

[46] *Table: Federal Employment in the Executive Branch, in* Budget, Fiscal Year 1994, *supra* note 45, at 38. Another large component of executive branch employees work for independent establishments and government corporations, such as the Agency for International Development, the Equal Employment Opportunity Commission or the Federal Deposit Insurance Corporation. *Id.*; National Archives and Records Administration, The United States Government Manual 1993/1994, at 21 [hereinafter Government Manual].

[47] Government Manual, *supra* note 46, at 21. The Executive Office of the President (EOP) currently has 10 units:

"Staff of the President" because it consists of the President's closest administrators, counselors, assistants and deputy assistants, who serve the President in the "activities incident to his immediate office."[48] The Assistant to the President for National Security Affairs ("National Security Advisor" or "NSA") and his or her Deputy are members of the White House Office.[49] In fact, these two staff members make up a still smaller entity, a sub-unit of the White House Office, which is referred to as the Office for National Security Affairs.[50] The White House Office, however, is only one unit of the EOP.[51]

B. *The National Security Council*

1. Structure

Another unit of the EOP is the National Security Council, located in the Old Executive Office Building.[52] Structurally, the NSC has two units: the National Security Council itself ("the Council") and its permanent staff ("the Staff").[53] Currently, the Council has four members,

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White House Office
Office of Management and Budget
Council of Economic Advisors
National Security Council
Office of the United States Trade Representative
Council on Environmental Quality
Office of Science and Technology Policy
Office of National Drug Control Policy
National Critical Materials Council
Office of Administration

Id. at 91–104.

[48] *See id.* at 94. For a list of the members of the White House Office, see GOVERNMENT MANUAL, *supra* note 46, at 93–94.

[49] *Id.* at 93. The current NSA is Anthony Lake and his deputy is Samuel Berger. *Id.*

[50] *See* 1991 FEDERAL STAFF DIRECTORY 6 (Ann L. Brownson ed., 1991).

[51] GOVERNMENT MANUAL, *supra* note 46, at 91–104. Under the authority of the Reorganization Act of 1939, numerous agencies were transferred to the EOP. *Id.* at 91 (citing 5 U.S.C. § 133–133r, 133t note). This act was followed by an executive order that established the divisions of the Executive Office and defined their functions. *Id.* (citing Executive Order No. 8248, 5 C.F.R. 1303.2 (1939)).

[52] *Id.* at 98. The Council was placed in the EOP under the Reorganization Plan No. 4 of 1949. *Id.* at 98 (citing 5 U.S.C. app. § 903); 1991 FEDERAL STAFF DIRECTORY, *supra* note 50, at 20–21. During the Bush Administration, the NSA, Deputy NSA and their assistants, as well as the Executive Secretary and Deputy Executive Secretary of the NSC and their assistants, and the White House Situation Support Staff had their offices at the White House. *Id.* All other members of the NSC Staff had their offices at the Old Executive Office Building. *Id.* Although the NSC is a part of the EOP, it has a separate e-mail system from the other EOP units. *Armstrong II*, 1 F.3d 1274, 1279 & n.2 (D.C. Cir. 1993).

[53] *See* CHRISTOPHER C. SHOEMAKER, THE NSC STAFF: COUNSELING THE COUNCIL 23 (1991).

two statutory advisors, five standing participants and four officials.[54] The NSA is considered both a standing participant and an official of the NSC.[55] The statutory role of the Council is to advise the President with respect to the integration of domestic, foreign and military policies relating to national security, in order to increase the effectiveness of other governmental organizations in handling matters of national security.[56] The influence and importance of the Council waxes and wanes with each President and his desire to use the Council as a forum for national security deliberations and decisions.[57] All the members, advisors and participants of the Council serve on it by virtue of a position of responsibility they hold separate from the NSC itself.[58] Thus, the Council is only as strong as the persons serving on it and the President's desire to make use of it.[59]

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[54] GOVERNMENT MANUAL, *supra* note 46, at 98. The four current members of the Council are the President, Vice President, Secretary of State and Secretary of Defense. *Id.* The statutory advisors are the Director of Central Intelligence and the Chairman of the Joint Chiefs of Staff. *Id.* The standing participants are the Secretary of the Treasury, the U.S. Representative to the United Nations, the Chief of Staff to the President, the Assistant to the President for National Security Affairs (NSA), and the Assistant to the President for Economic Policy. *Id.* The officials of the NSC are the Assistant to the President for National Security Affairs, his deputy, the Special Assistant to the President and Staff Director, and the Executive Secretary. *Id.* Thus, the NSA is both a standing participant and an official of the NSC. GOVERNMENT MANUAL, *supra* note 46, at 98. He is the only person to hold two positions. *See id.*

Section 402 of Title 50 of the United States Code lays out the composition of the Council: the President, Vice President, Secretary of State, Secretary of Defense, Director for Mutual Security, and the Chairman of the National Security Resources Board. 50 U.S.C. § 402(a)(1)–(6) (1988). The statute provides that Secretaries and Under Secretaries of other executive departments and military departments may serve on the Council at the President's invitation. 50 U.S.C. § 402(a)(7). The statute further provides that the Chairman or Vice Chairman of the Joint Chiefs of Staff, the Director of National Drug Policy, and the Director of Central Intelligence may attend and participate in the meetings of the NSC at the direction of the President. 50 U.S.C.A. § 402(e)–(f), (h) (West 1991 & Supp. 1994).

[55] GOVERNMENT MANUAL, *supra* note 46, at 98.

[56] 50 U.S.C. § 402(a). The Tower Commission Report on the Iran-Contra Affair explains that the three tools available to the President in providing leadership and direction to the bureaucracies that execute national security policy are: 1) the National Security Council, 2) the National Security Advisor and 3) the National Security Staff. Tower Commission Report, *reprinted in* THE TOWER COMMISSION REPORT 87 (Bantam Books 1987).

[57] *See infra* notes 76–127 and accompanying text; *see also* SHOEMAKER, *supra* note 53, at 21. For a full discussion of NSC decision-making, see generally KARL F. INDERFURTH & LOCH K. JOHNSON, DECISIONS OF THE HIGHEST ORDER: PERSPECTIVES ON THE NATIONAL SECURITY COUNCIL (1988). *See also* CARNES LORD, THE PRESIDENCY AND THE MANAGEMENT OF NATIONAL SECURITY (1988).

[58] GOVERNMENT MANUAL, *supra* note 46, at 98. For example, the Secretary of State, Secretary of Defense and Secretary of the Treasury head their own executive departments. *Id.* at 428, 476, 484. The Chief of Staff, NSA and Assistant to the President for Economic Policy all serve on the President's staff in the White House Office. *Id.* at 93–94, 98.

[59] *See* SHOEMAKER, *supra* note 53, at 21.

In contrast, the NSC Staff has assumed increasing responsibilities over the past forty years.[60] The role of the Staff is more constant than that of the Council, and less dependent on the President's personality and decision making style; it is the Staff that guides and supports the Council in carrying out the performance of its functions (both primary and "additional").[61] These "additional" functions include assessing and appraising the country's objectives, commitments and risks in the area of national security, and evaluating their relation to our actual and potential military power, for the purpose of making recommendations to the President.[62] Although the Council may make the ultimate decision, the bulk of the oversight and evaluation is done by Staff members who prepare reports for those who serve on the Council.[63] The NSC, and thus, the NSC Staff, must also consider national policies that affect the "common interest" of the departments and agencies of the Government concerned with national security in order to provide the Council with the information necessary to make recommendations to the President.[64] In addition, the Staff assists the Council in meeting its duty to make whatever recommendations or produce whatever reports the President may request.[65] The statute creating the Council also provides for a civilian executive secretary to head the NSC Staff.[66] That person is appointed by the President, and is authorized, subject to the direction of the Council, to hire the personnel necessary to fulfill "such duties as may be prescribed by the Council in connection with the performance of its functions."[67]

The duties of the NSC Staff also require activity outside the confines of the NSC itself, for it is the responsibility of the NSC Staff to ensure that the President's and the Council's national security decisions are, in fact, implemented.[68] In addition, the Staff is charged with "coordinating" the operations of the agencies connected with national secu-

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[60] *Id.* at 21–23 ("The NSC Staff . . . is an institutional body that has assumed mounting importance over the past forty years. Unlike its parent organization, the Staff must perform several critical functions that are driven largely by the diverse nature of the international environment and are generally independent of the psychology of the President himself."). Shoemaker lists seven functional requisites of the NSC Staff: 1) administration, 2) policy coordination and integration, 3) policy supervision, 4) policy adjudication, 5) crisis management, 6) policy formulation and 7) policy advocacy. *Id.* at 22. He also notes that the degree of controversy varies with the function, with (1) being the least controversial and (7) being the most controversial. *Id.*

[61] *Id.* at 21–23; *see* 50 U.S.C. § 402(c).

[62] 50 U.S.C. § 402(b)(1).

[63] LORD, *supra* note 57, at 117; SHOEMAKER, *supra* note 53, at 20–22.

[64] 50 U.S.C. § 402(b)(2).

[65] 50 U.S.C. § 402(d).

[66] 50 U.S.C. § 402(c); INDERFURTH & JOHNSON, *supra* note 57, at 140.

[67] 50 U.S.C. § 402(c).

[68] Presidential Decision Directive 2, at 1 (Jan. 20, 1993) ("[T]he NSC shall be [the Presi-

rity.[69] There have even been instances in which the NSC Staff has engaged in the actual carrying out of covert operations, a role the Staff continues to retain.[70] That role, however, is limited by statutes that require a presidential finding and disclosure of the operation to Congress.[71]

The task of integrating United States national security policy spans four major areas of concern: defense policy, foreign policy, intelligence policy and economic policy.[72] The President's focus during any given period may shift from one of these areas to another.[73] However, the three instruments for ensuring implementation of the President's ideas have been in place for over three decades: the National Security Advisor, the National Security Council, and the NSC Staff.[74] In order to better understand their current role, it is essential to look at the development of these three entities, from their births in the beginning of this century to their roles as we move into the next.[75]

2. History

Prior to the end of World War II, the military treated the area of national security as its exclusive domain.[76] Lack of coordination among the different branches of the vast defense and foreign policy establishments demonstrated a need for a coordinating structure.[77] As early as World War I, various forces within the upper levels of government attempted to create a body that would guide foreign policy and provide for "political-military consultation" on foreign policy.[78] Precursors to the NSC included the Joint State-Navy Neutrality Board (1919), the

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dent's] principle means for coordinating executive departments and agencies in the development and implementation of national security policy."), *reprinted in* Defendants' Appendix of Exhibits in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment on the National Security Council Recordkeeping Claims, ex. 17, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89-142).

[69] *Id.*

[70] See *infra* notes 109-16 for a discussion of the Iran-Contra affair.

[71] *Id.*

[72] *See* SHOEMAKER, *supra* note 53, at 5; *see also* 50 U.S.C. § 402(a). Shoemaker provides the following definition for the term "National Security": "the protection of the United States from major threats to our territorial, political or economic well-being." SHOEMAKER, *supra* note 53, at 5.

[73] *See* SHOEMAKER, SUPRA *supra* note 53, at 76. For example, recent events in Eastern Europe and elsewhere have demonstrated the increased importance of economic policy to national security concerns. *Id.*

[74] *See* 50 U.S.C. § 402 (enacted in 1947); *see also* LORD, *supra* note 57, at 35.

[75] See *infra* notes 76-127 and accompanying text for a history of the NSC.

[76] *See* SHOEMAKER, *supra* note 53, at 4.

[77] INDERFURTH & JOHNSON, *supra* note 57, at 1.

[78] *Id.* at 2.

Standing Liaison Committee (1940) and the State-War-Navy Coordinating Committee (1945).[79] Each of these bodies ultimately failed due to a lack of authority to make policy decisions and an inability to examine questions not referred to it by other departments.[80]

In 1947, extensive negotiations between the military departments, the executive branch, and Congress, resulted in the enactment of the National Security Act.[81] The primary purpose of the National Security Act was to increase efficiency within the national security establishment.[82] Thus, one of the major achievements of the Act was the consolidation of the departments of the Army and Navy into a single unit, the Department of Defense.[83] Another achievement was the establishment of a permanent entity, known as the National Security Council, to coordinate all national security efforts within the various branches of the United States government.[84]

Although created in 1947, the NSC did not immediately assume a prominent role in national security affairs.[85] President Truman expressed skepticism of the NSC and its potential to undercut his authority and independence in foreign and military policy decision making.[86] In order to prevent the NSC from taking a commanding role in national security decisions, he rarely attended meetings.[87] Thus, in its formative years, the NSC served more as a forum for department heads to meet and find common ground than as a body to establish United States policy.[88]

President Eisenhower's military background led him to place more emphasis on formal decision-making processes, thereby creating a greater substantive role for the NSC in U.S. policy-making.[89] Eisenhower created the position of Assistant to the President for National Security Affairs (now known as the "National Security Advisor" or "NSA"), and appointed Robert Culter to the post.[90] Under Eisenhower,

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[79] Ernest R. May, *The Development of Political-Military Consultation in the United States*, *in* INDERFURTH & JOHNSON, *supra* note 57, at 8–14.

[80] *See id.* at 13.

[81] SHOEMAKER, *supra* note 53, at 8; Alfred D. Sander, *Truman and the National Security Council: 1945–1947*, *in* INDERFURTH & JOHNSON, *supra* note 57, at 24; *see also* 50 U.S.C. §§ 401–32.

[82] *See* 50 U.S.C. § 401.

[83] *See id.*; SHOEMAKER, *supra* note 53, at 8.

[84] *See* 50 U.S.C. § 402(a).

[85] *See* SHOEMAKER, *supra* note 53, at 10–16; Sander, *supra* note 81, at 27.

[86] SHOEMAKER, *supra* note 53, at 10; Sander, *supra* note 81, at 27.

[87] SHOEMAKER, *supra* note 53, at 10.

[88] *See id.*

[89] *Id.* at 11–13 ("[T]he President himself chaired more than 90 percent of the NSC meetings and made decisions at these meetings.").

[90] INDERFURTH & JOHNSON, *supra* note 57, at 140–41; SHOEMAKER, *supra* note 53, at 11–12.

the NSA served as the principle executive officer of the Council, handling the agenda, briefings and staff supervision.[91] The NSA was not a policy advocate.[92] In March, 1953, Culter established a plan for formalized decision making that increased the NSC's influence in policy creation and development.[93] In addition, President Eisenhower's attendance at over ninety percent of the NSC meetings "infused a new sense of purpose and importance in the NSC process."[94] The emphasis placed on consensus during the Eisenhower years, however, prompted criticism of the NSC as a forum in which watered down, compromise solutions to national security problems were adopted.[95]

Executive Secretaries:
  Truman Administration
    Sidney W. Souers, 1947–1950
    James S. Lay, Jr., 1950–1953
Assistants for National Security Affairs:
  Eisenhower Administration
    Robert Cutler, 1953–1955
    Dillon Anderson, 1955–1956
    William Jackson, 1956
    Robert Cutler, 1957–1958
    Gordon Gray, 1958–1961
  Kennedy and Johnson Administrations
    McGeorge Bundy, 1961–1966
    Walt W. Rostow, 1966–1969
  Nixon and Ford Administrations
    Henry A. Kissinger, 1969–1975
    Brent Scowcroft, 1975–1977
  Carter Administration
    Zbigniew Brzezinski, 1977–1981
  Reagan Administration
    Richard V. Allen, 1981–1982
    William P. Clark, 1982–1983
    Robert C. McFarlane, 1983–1985
    John M. Poindexter, 1985–1986
    Frank C. Carlucci, 1987
    Colin L. Powell, 1987–1988
  Bush Administration
    Brent Scowcroft, 1988–1993
  Clinton Administration
    Anthony Lake, 1993–1994

INDERFURTH & JOHNSON, *supra* note 57, at 141; 1991 FEDERAL STAFF DIRECTORY, *supra* note 50, at 20; GOVERNMENT MANUAL, *supra* note 46, at 98.

[91] Tower Commission Report, *supra* note 56, at 8.

[92] *Id.*

[93] SHOEMAKER, *supra* note 53, at 12–13.

[94] *Id.* at 13.

[95] Robert Cutler, *Early Years*, *in* INDERFURTH & JOHNSON, *supra* note 57, at 46.

President Kennedy reversed this trend toward formalized decision-making and expansion of the NSC's role.[96] The NSC fell into disuse for two reasons.[97] One was President Kennedy's preference for centralized, informal decision-making.[98] The other was the report of the Jackson Subcommittee on National Policy Machinery, which criticized the Eisenhower NSC for its failure to help resolve serious problems of national security.[99] In contrast to the Council's loss of stature, the NSA acquired the influential role of personal advisor to the President on national security affairs.[100] President Johnson, who held his major foreign policy meetings as an informal "Tuesday Luncheon Group" of trusted advisors, also chose not to make use of the NSC.[101]

The fortunes of the NSC again changed when President Nixon took office.[102] His National Security Advisor, Henry Kissinger, used the NSC as a mechanism to acquire virtually complete control of United States foreign policy.[103] Not only was Kissinger a policy advisor, but he also became a negotiator and spokesman for the Nixon Administration, duties traditionally performed by the State Department.[104] Gradually, Kissinger, and later Brzezinski under the Carter Administration, wrested power from the State Department and Department of Defense, and centralized it in the White House through the NSC.[105] Although Kissinger eventually held both the NSA position and the position of Secretary of State, he continued to use the NSC and its staff to carry out his policies and missions.[106] Thus, the NSC's elaborate bureaucratic mechanism sustained both Kissinger's and Brezinski's hold on power.[107] Under Kissinger, the NSC expanded in size to its all-time high of fifty professional and eighty support personnel.[108]

During the Reagan era, the NSC, while maintaining its size, expanded its activities.[109] Seeking to remain informed of covert opera-

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[96] SHOEMAKER, *supra* note 53, at 14.

[97] *Id.*

[98] *Id.*

[99] *Id.*; *see also* THE NATIONAL SECURITY COUNCIL: JACKSON SUBCOMMITTEE PAPERS ON POLICY-MAKING AT THE PRESIDENTIAL LEVEL 7–8 (Henry M. Jackson ed., 1965).

[100] Tower Commission Report, *supra* note 56, at 8.

[101] SHOEMAKER, *supra* note 53, at 15.

[102] *See id.* at 16.

[103] *See id.* at 17–18. For a full discussion of the NSC during the Nixon and Carter years, see generally GERRY ARGYRIS ANDRIANOPOULOS, KISSINGER AND BRZEZINSKI: THE NSC AND THE STRUGGLE FOR CONTROL OF US NATIONAL POLICY (1991).

[104] Tower Commission Report, *supra* note 56, at 9.

[105] SHOEMAKER, *supra* note 53, at 18.

[106] *Id.*

[107] *Id.*; McGeorge Bundy, *Transformation*, *in* INDERFURTH & JOHNSON, *supra* note 57, at 95–98.

[108] Bundy, *supra* note 107, at 94.

[109] *Id.* at 102.

tions, Congress, in 1974, adopted the Hughes-Ryan Amendment, which instructed the President to inform Congress, in a timely manner, of any covert intelligence activities.[110] Because the Reagan Administration interpreted the Hughes-Ryan Amendment to apply only to the CIA, the NSC under Reagan carried out its own covert actions, thereby avoiding the reporting requirement.[111] Thus, the NSC moved from policy-making, advocacy, coordination, and implementation, to active engagement in covert operations.[112] However, these covert activities violated a different law, the Boland Amendment, which forbade federal funding of the Nicaraguan Contras.[113] These covert funding activities eventually resulted in the Iran-Contra scandal.[114] As a result, the Administration quickly moved to reign in the NSC Staff.[115] In his March 31, 1987, National Security Decision, Directive Number 266, President Reagan asserted that since Iran-Contra, the NSC Staff had been "rebuilt" and "made subject to proper management discipline."[116]

Aware that executive orders can be changed at the will of the President, Congress codified many of the recommendations of the Senate and House committees that investigated the Iran-Contra scandal.[117] The new rules, part of the Intelligence Authorization Bill of 1991, prohibit the expenditure of federal funds on covert action by any entity of the executive branch without a signed, written finding by

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[110] 50 U.S.C. § 413 ("[T]he heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall—(1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives . . . fully and currently informed of all intelligence activities . . . (3) report in a timely fashion to the intelligence committees [of Congress] any illegal intelligence activity . . . .").

[111] *See* Tower Commission Report, *supra* note 56, app. H at 66 (Feb. 18, 1987, letter from Edwin Meese, Attorney General, to John Tower, President's Special Review Board, explaining his position on the Hughes-Ryan Amendment: if one assumes that the CIA assisted in the covert operations in question, and if one further assumes that the goal of the transfer was to influence a foreign government without public disclosure, then the Hughes-Ryan Amendment did apply to the transfer of arms to Iran that was the subject of the Iran-Contra scandal.); George Lardner, Jr., *Covert Acts Restricted Under Pact; Bill Would Codify 'Lessons Learned' From Iran Contra*, WASH. POST, July 27, 1991, at A1.

[112] Tower Commission Report, *supra* note 56, at 55–61.

[113] For a full discussion of the Boland Amendments, see generally Frank G. Colella, Note, *Beyond Institutional Competence: Congressional Efforts to Legislate United States Foreign Policy Toward Nicaragua—The Boland Amendments*, 54 BROOK. L. REV. 131 (1988).

[114] Tower Commission Report, *supra* note 56, at 1.

[115] PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN (United States Government Printing Office, Vol. No. 1, 1989) at 310–11 ("This directive mandates certain actions to put the National Security Council (NSC) process in better order and to avoid any recurrence of the deficiencies and abuses that the Special Review Board described. Many of these remedial measures—including the prohibition of NSC Staff engagement in covert activities—were implemented before the Special Review Board reported to me on February 26.").

[116] National Security Decision, Directive No. 266 (Mar. 31, 1987).

[117] 50 U.S.C.A. § 413–14 (West Supp. 1993); Lardner, *supra* note 111, at A1.

the President.[118] The new rules further require the President to notify Congress of any covert actions or findings within forty-eight hours of commencement, and prohibit the President from retroactively authorizing covert actions.[119] They also require the President to notify Congress when other countries or private individuals will be used to finance or engage in covert activity "in any significant way."[120] These new rules do not prevent the NSC from engaging in covert operations; they merely require presidential approval and congressional notification.[121]

Although it is too early to predict what influence the NSC will have during the Clinton Presidency, a recent profile of Clinton's National Security Advisor, Anthony Lake, gives some indication that the NSC will seek a cooperative, policy oversight role more akin to the NSC of the Eisenhower period than that of the Nixon or Reagan years.[122] In an interview with the Washington Post, Mr. Lake pointed out that unlike the Kissinger and Brzezinski eras, when the NSC battled with the Department of State and others for control over foreign policy, his NSC has worked in concert with the Department of State in recent missions to Europe regarding cooperation in the effort to stop the war in Bosnia-Herzegovina.[123] Thus, Clinton's NSA continues, in the tradition of its predecessors, to tailor its role to the style of the President and his conception of the proper role for an NSA.[124]

The history of the NSA, the National Security Council, and the NSC Staff demonstrate the fluidity of executive power.[125] It is virtually impossible to determine from one administration to the next what responsibilities the NSA will choose, or be asked to assume.[126] There is little doubt, however, that the NSC Staff will continue to fulfill its role of evaluating national security policy, coordinating its implementation,

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[118] 50 U.S.C.A. § 413b (West Supp. 1993). Covert action is defined as activity of the Government "to influence political, economic or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly . . . ." 50 U.S.C.A. § 413b(e). Traditional "counterintelligence activities," "diplomatic or military activities," and "law enforcement activities" are exempted. 50 U.S.C.A. § 413b(e)(1)–(3).

[119] 50 U.S.C.A. § 413b(a)(1)–(2).

[120] 50 U.S.C.A. § 413b(a)(4).

[121] *See* 50 U.S.C.A. § 413b.

[122] *See* Ruth Marcus, *Anthony Lake's Secretive Mission; He Wants to Help Shape U.S. Foreign Policy and Avoid the Spotlight. So Far, He's Succeeded*, WASH. POST, Dec. 20, 1993, at D1.

[123] *Id.*

[124] *See id.*

[125] LORD, *supra* note 57, at 148.

[126] *See id.*

and providing assistance, information, and guidance to the NSA and all the members of the Council.[127]

III. The Statutes Governing Government Records

A. *Presidential Records*

Historically, presidential papers were treated as the property of the President.[128] This private ownership principle hindered the completeness of presidential records collections and hampered the ability of the public to examine them.[129] It was not until President Franklin Roosevelt created the first presidential library that presidential papers were conserved and made accessible to the public in a comprehensive manner.[130] All presidents from Franklin Roosevelt to Ronald Reagan now have libraries dedicated to preserving their papers for historical and other purposes.[131] All these efforts, however, have been voluntary, and have depended on the good will of the individual President.[132]

1. The Presidential Records and Materials Preservation Act

It was a political crisis that brought about direct congressional involvement in the preservation of presidential records.[133] In 1975, the Watergate scandal erupted, when it became public knowledge that members of the Nixon Administration directed the burglary of the offices of the Democratic Party, located at the Watergate complex in Washington, D.C.[134] As the press followed the trail of knowledge up the ranks of the executive branch, President Nixon sought to cover up his

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[127] *See id.* at 147–49; *see also* SHOEMAKER, *supra* note 53, at 72.

[128] For a full discussion of the history of presidential papers, see Carl McGowan, *Presidents and Their Papers*, 68 MINN. L. REV. 409, 413 (1992).

[129] *Id.*

[130] *Id.* at 415.

[131] *Id.* at 414 & n.34. With the exception of the Nixon library, all presidential libraries are under the auspices of the National Archives and Records Administration.

[132] H.R. REP. No. 1487, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5732, 5733.

[133] *See* Presidential Recordings and Materials Preservation Act (PRMPA), Pub. L. No. 93–526, 1974 U.S.C.C.A.N. 1949, 1950, 88 Stat. 1695; H.R. REP. No. 1507, 93d Cong., 2d Sess. 2 (1974) ("[T]his information is necessary to . . . provide the American people with a complete and accurate account of 'Watergate.'").

[134] Lawrence Meyer, *The Prosecutors: From a "Third-Rate Burglary" to "The Saturday Night Massacre," in* THE FALL OF A PRESIDENT 66 (Washington Post ed., 1974). For a detailed chronology of Watergate, see generally WATERGATE: CHRONOLOGY OF A CRISIS (Congressional Quarterly, 1975).

involvement.[135] He fought to avoid surrendering the recordings of oval office conversations made by a voice activated recording system that he had installed.[136] When that effort failed, he devised an agreement with the Administrator of General Services which would have permitted the destruction or permanent suppression of the Watergate tapes.[137] This agreement led to the enactment of two pieces of legislation.[138] The first, the Presidential Recordings and Materials Preservation Act ("PRMPA") applied only to the Watergate tapes.[139] Under the PRMPA, Congress took control of approximately 42 million pages of documents and 880 tape recordings, which contained both personal and non-personal records.[140] The President challenged the constitutionality of the PRMPA, alleging that it violated separation of powers and the President's executive privilege.[141] The United States Supreme Court found the PRMPA to be constitutional.[142] Thus, the Supreme Court upheld Congress' right to remove control of presidential records from the President and provide for their preservation and management by another executive branch official.[143]

2. The Presidential Records Act

The second piece of legislation stemming from Watergate, the Presidential Records Act, sought to accomplish the same things as the PRMPA, but applied prospectively rather than retroactively.[144] The PRA had three major goals: (1) to define and declare public ownership of presidential records, (2) to create management procedures for those

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[135] Meyer, *supra* note 134, at 74. For a gripping account of the Watergate story, see generally BOB WOODWARD & CARL BERNSTEIN, ALL THE PRESIDENTS MEN (1974).

[136] *See* Nixon v. United States, 418 U.S. 683 (1974).

[137] *See* Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 331 (D.D.C. 1978), *aff'd*, 433 U.S. 425 (1978). For the full text of the agreement, see the Appendix to H.R. REP. No. 1507, 93d Cong., 2d Sess. 23–25 (1974).

[138] Pub. L. No. 93–526, 1974 U.S.C.C.A.N. 1949, 1950, 88 Stat. 1695; Presidential Records Act, 44 U.S.C. §§ 2201–07 (1988).

[139] Pub. L. No. 93–526, 1974 U.S.C.C.A.N. 1949, 1950, 88 Stat. 1695. The PRMPA applies to "all original tape recordings of conversations . . . recorded by any officer or employee of the Federal Government . . . in the White House or in the Office of the President . . . during the period beginning January 20, 1969, and ending August 9, 1974." *Id.* at § 101(a).

[140] Nixon v. Administrator of General Services, 433 U.S. 425, 430 (1977); *see also* Nixon v. United States, 978 F.2d 1269, 1270 (D.C. Cir. 1992) (which held that President Nixon is entitled to compensation for the "taking" of his property by Congress when it enacted the PRMPA).

[141] Nixon v. Administrator of Gen. Servs., 408 F. Supp. at 329.

[142] Nixon v. Administrator of Gen. Servs., 433 U.S. at 484.

[143] *See id.*

[144] The Presidential Records Act, Pub. L. No. 95–591, § 3 (codified at 44 U.S.C. § 2201) (effective January 20, 1981); H.R. REP. No. 1487, *supra* note 132, at 5734.

records both during and after a President's term, and (3) to create a system of public access to those records.[145] The first of these goals was met by an elaborate definition of what is, and what is not, a presidential record.[146]

a. *Definition of a Presidential Record*

The PRA applies to all "documentary materials"[147] created or received after January 20, 1981, by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, if those documents are created or received in the course of conducting activities that relate to or affect the carrying out of the duties of the President.[148] The PRA does not cover personal records.[149] Also excluded from its coverage are stocks of publications and stationery, or extra copies that are "produced only for convenience of reference" and clearly marked as such.[150] The PRA does not cover documentary materials that fall under the scope of the Federal Records Acts.[151]

Thus, to qualify for treatment under the PRA, a document must meet two criteria.[152] First, it must be created or received by an individual or entity covered by the Act.[153] These include the President, his immediate staff and units of the EOP that advise and assist the President.[154] Second, the document must be created or received for a purpose covered by the PRA.[155] Thus, documents created or received in the course of conducting activities that relate to or have an effect upon the carrying out of the constitutional, statutory, or other official duties

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[145] 44 U.S.C. § 2201.

[146] *Id.*

[147] 44 U.S.C. at §§ 2201–07. "The term 'documentary materials' means all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audio-visual, or other electronic or mechanical recordations." 44 U.S.C. § 2201(1).

[148] 44 U.S.C. § 2201(2).

[149] 44 U.S.C. § 2201(2)(B). "The term 'personal records' means all documentary materials, or any reasonably segregable portion thereof, of a purely private or non-public character which do not relate to or have an effect upon the carrying out of the duties of the President." 44 U.S.C. § 2201(3).

[150] 44 U.S.C. § 2201(2)(B) (stating exceptions to PRA).

[151] *Id.* The PRA "does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) of Title 5, United States Code)." *Id.*

[152] 44 U.S.C. § 2201(2).

[153] *Id.*

[154] *Id.*

[155] *Id.*

of the President fall within the scope of the PRA.[156] In addition, the PRA includes documents relating to the political activities of the President, if they also relate to the carrying out of his constitutional, statutory, or other official duties.[157]

Three groups of documents are excluded from the PRA.[158] First, records created for reasons other than the carrying out of the President's duties may be termed personal records and excluded from coverage under the PRA.[159] These "personal records" are those of a purely private or non-public character.[160] Second, "agency records" are excluded from the PRA because they are covered by the FRA.[161] Finally, stocks of publications and stationery, and extra copies of documents are excluded.[162] This third group of records is excluded from coverage because of a lack of informational or historical value.[163]

b. *Management of Presidential Records*

Having declared that presidential records belong to the United States and having defined what qualifies as a presidential record, the PRA then created a system of management of, and access to, those records.[164] Under the statute, when an incumbent President seeks to dispose of presidential records which no longer have "administrative, historical, informational, or evidentiary value," he or she must obtain the written views of the Archivist and assurances from the Archivist that he or she does not intend to take any action to prevent the destruction.[165] The President must then submit disposal schedules to Congress and wait sixty calendar days of continuous session before destroying

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[156] *Id.*

[157] 44 U.S.C. § 2201(2)(A).

[158] 44 U.S.C. § 2201(2)(B).

[159] 44 U.S.C. § 2201(3).

[160] *Id.* The statute describes some categories of personal records:

> (A) diaries, journals or other personal notes serving as the equivalent of a diary or journal, which are not used in conducting government business;
>
> (B) materials relating to private political associations, as long as they have no effect on the carrying out of presidential duties; and
>
> (C) materials relating to the President's own election to office or relating to the election of another individual, as long as they do not relate to the carrying out of the President's duties.

44 U.S.C. § 2201(3)(A)–(C).

[161] *See* 44 U.S.C. § 2201(2)(B)(i).

[162] 44 U.S.C. § 2201(2)(B)(iii)–(iv).

[163] *See id.*; 44 U.S.C. § 2201(d).

[164] 44 U.S.C. §§ 2201–04.

[165] 44 U.S.C. § 2203(c)(1)–(2).

the documents.[166] If the Archivist determines that the records to be destroyed are of particular interest to Congress, or that congressional consultation is in the public interest, then the Archivist must request the advice of numerous congressional committees regarding the disposal.[167]

c. *Access to Presidential Records*

Finally, the PRA provides for access to the records.[168] Once a President has left office, all presidential records created during his or her term are turned over to the National Archives and placed in presidential libraries.[169] The function of the presidential libraries is to make records available to researchers, upon request and on an "impartial basis."[170] Once the Archivist has taken control, he or she, exclusively, may make disposal decisions, provided that disposal schedules are printed in the Federal Register at least sixty days before the proposed disposal date.[171] Significant control remains, however, with the President's ability to prevent release of any record for a period of twelve years if he or she deems the record to fall into one of the exempted categories.[172]

Thus, Congress met its goals of preservation and access, but did so in a way inoffensive to separation of powers.[173] The Archivist is an executive branch official appointed by the President, so Congress left control of the records within the power of the executive branch.[174] The PRA was merely an addition to an already extensive set of statutes that governed the records created by entities within the White House.[175]

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[166] 44 U.S.C. § 2203(d).

[167] 44 U.S.C. § 2203(e).

[168] 44 U.S.C. § 2204.

[169] *See* 44 U.S.C. § 2203(f).

[170] H.R. Rep. No. 1487, *supra* note 132, at 3.

[171] 44 U.S.C. § 2203(f)(3).

[172] 44 U.S.C. § 2204 (allows the President to restrict access to any record for up to twelve years if the records relate to appointments, are classified, contain trade secrets or contain "confidential communications requesting or submitting advice, between the President and his advisors").

[173] Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 444–46 (1977); *see also* Carl Bretscher, Note, *The President and Judicial Review Under the Records Acts*, 60 Geo. Wash. L. Rev. 1477, 1483 (1992).

[174] Bretscher, *supra* note 173, at 1483.

[175] See *infra* notes 178–221 for a discussion of the Federal Records Acts ("FRA").

The vast majority of White House records were already covered under the Federal Records Acts.[176]

B. *Federal (Agency) Records*

1. The Federal Records Acts

While President Franklin Roosevelt was addressing concerns about presidential records by creating the first presidential library, Congress acted to protect the records of the Federal Government in general.[177] As the size and scope of the executive branch expanded, so did the quantity of federal records.[178] Between 1957 and 1979, the quantity of federal records rose steadily, from 23.5 million cubic feet in 1957 to 35.7 million cubic feet in 1979.[179] Concerns about institutional memory, as well as the importance of the nation's historical legacy, led Congress to enact the 1943 Disposal of Records Act and the Federal Records Act of 1950.[180] Congress later amended these statutes, now referred to as the Federal Records Acts.[181] The FRA's purpose is to provide for efficient government and to allow private researchers and those whose rights may have been affected by actions of government to access federal records.[182]

Similar to the PRA, the FRA sets up methods of managing, preserving and disposing of federal records, as necessary to achieve its

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[176] *Id.*

[177] *Id.*

[178] McGowan, *supra* note 128, at 414; GENERAL SERVICES ADMINISTRATION, NATIONAL ARCHIVES AND RECORDS SERVICE, Pub. No. 7610-01-055-8704; RECORDS MANAGEMENT HANDBOOK, DISPOSITION OF FEDERAL RECORDS, Figure 2, at 3 (1981) (on file with the *Boston College Law Review*).

[179] DISPOSITION OF FEDERAL RECORDS, *supra* note 178, at 3.

[180] Pub. L. No. 754-849, 64 Stat. 583 (1951); Pub. L. No. 115-192 (1943).

[181] *See supra* note 18. For purposes of the FRA, the term "records" is defined to include:

> all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, function, policies, decisions, procedures, operation, or other activities of the Government or because of the informational value of the data in them.

44 U.S.C. § 3301. The definition excludes "extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents." *Id.*

[182] *See* American Friends Serv. Comm. v. Webster, 720 F.2d 29, 52-53 (D.C. Cir. 1983) (explicitly rejecting the *Kissinger* Court's holding that the purpose of the FRA was "solely" to benefit agencies and the Federal Government); *Armstrong I*, 924 F.2d 282, 287-88 (D.C. Cir. 1991).

goals.[183] To administer the mountain of federal records, Congress created the National Archives and Records Administration ("NARA") as an "independent" agency within the executive branch.[184] The Archivist is appointed by the President, with the advice and consent of the Senate.[185] Although the President may remove the Archivist from office, he or she must "communicate the reasons" for the removal to each house of Congress.[186] Thus, the President does not enjoy plenary power with regard to the appointment and removal of the Archivist.[187] In addition, Congress instructed that the President select the Archivist based solely on "professional qualifications" and without regard to political affiliation.[188] The provision is designed to ensure that the Archivist's decisions regarding preservation and access to historical materials and records are based not on political or personal considerations, but on unbiased professional judgment.[189]

The Archivist possesses clearly enumerated powers over federal records.[190] For example, the Archivist may promulgate regulations necessary to "ensure adequate and proper documentation of the policies and transactions of the Federal Government and ensuring proper record disposition."[191] In addition, the Archivist may "conduct inspections or surveys of the records and the records management programs and practices within and between the Federal Agencies."[192] The Archivist may also oversee the disposal of records by establishing standards for the "selective retention of records of continuing value" and by assisting the federal agencies in applying those standards.[193] When the Archivist has knowledge or believes that records are unlawfully threatened (e.g. with removal or destruction), he or she must notify the head of the agency in question and "assist the head of the agency in initiating action through the Attorney General."[194] If the head of the agency fails to initiate an action, the Archivist must then contact the Attorney

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183 *See infra* notes 184–99 and accompanying text.

184 44 U.S.C. § 2102.

185 44 U.S.C. § 2103(a).

186 *Id.*

187 *See id.*

188 *Id.*

189 *See* S. REP. No. 373, 98th Cong., 2d Sess. 13 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3865, 3877; H.R. CONF. REP. No. 1124, 98th Cong., 2d Sess. 20 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3894, 3895.

190 *See* 44 U.S.C. §§ 2108–11, 2904.

191 44 U.S.C. § 2904(a).

192 44 U.S.C. § 2904(c)(7).

193 44 U.S.C. § 2905(a).

194 *Id.*

General directly to request that it be done and notify Congress that such a request has been made.[195]

Thus, any document created or received by the executive branch must be either a record (presidential or federal) or a non-record.[196] Congress has constructed elaborate mechanisms for ensuring that all presidential and federal records are either retained or disposed of in a judicious manner.[197] The narrow scope of the exclusions for personal records and extra copies underscores congressional desire that the substantive materials created by the Government be preserved (or properly disposed of) through the official records administration system.[198] Similar to its provision for access to presidential records, Congress had already provided for even greater access to federal records.[199]

2. The Freedom of Information Act

Knowledge will forever govern ignorance: And the people who mean to be their own Governors, must arm themselves with the power, which knowledge gives.[200]

After its first attempt at providing public access to government records failed, Congress, in 1974, passed the Freedom of Information Act.[201] Congress recognized that the broad language of FOIA's predecessor had been used as a means of withholding, rather than releasing information, because it allowed agencies to withhold any information for "good cause found."[202] Thus, Congress drafted much stricter language for FOIA.[203] Under FOIA, each agency must make its records available to the public, unless the records fall into one of nine ex-

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[195] 44 U.S.C. § 2905(a).

[196] *See* 44 U.S.C. §§ 2201, 3301.

[197] *See* 44 U.S.C. §§ 2101–18, 2201–07, 2901–09, 3101–07, 3301–24.

[198] *See* 44 U.S.C. §§ 2201, 3301.

[199] *See* 44 U.S.C. §§ 2202–06; 5 U.S.C. § 552 (1988).

[200] SOURCE BOOK I, *supra* note 9, at 6 (citing Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* THE COMPLETE MADISON 337 (Padover 1953)).

[201] 5 U.S.C. § 552. This first attempt at public access to federal records was the "Public Information" section of the Administrative Procedures Act (APA). SOURCE BOOK I, *supra* note 9, at 24. The APA, which was adopted in 1946, was a broad statute designed to "bring some order out of the growing chaos of Government regulation." *Id.* The APA set uniform standards for the thousands of government administrative actions affecting the public, codified the common law that allowed citizens to seek redress in the courts from wrongful government actions, and provided for public participation in agency rule-making. *Id.* Under the APA, an individual could only access records if he or she were "properly and directly concerned" with the records. *Id.* at 22. FOIA abolished this requirement. *Id.*

[202] 5 U.S.C. § 1002 (repealed); SOURCE BOOK I, *supra* note 9, at 26.

[203] *See* SOURCE BOOK I, *supra* note 9, at 22.

empted categories.[204] Those nine exemptions are: 1) information specifically authorized and properly classified under an executive order, to be kept secret for national security reasons; 2) information solely related to internal personnel rules and practices of an agency; 3) information exempted from disclosure by other statutes; 4) trade secrets; 5) inter-agency or intra-agency memoranda that would not be available by law to a party other than an agency in litigation with another agency; 6) information exempted under FOIA for privacy reasons; 7) law enforcement records, which if released could interfere with law enforcement of a person's right to a fair trial; 8) records related to the regulation and supervision of financial institutions; and 9) geological information concerning wells.[205] Thus, in pursuit of its disclosure goals, the statute takes full account of governmental needs for confidentiality and individuals' rights to privacy.[206]

In order to ensure that the records subject to FOIA would actually get to the public, Congress required that the agencies promulgate regulations setting forth the procedures for obtaining documents and the fees applicable to the processing of requests.[207] It also strictly limited the fees.[208] In addition, Congress mandated that requests be processed within ten days.[209] Finally, Congress provided for judicial review of the denial of FOIA requests.[210] Thus, Congress made every effort to remove discretion from the individual agencies and thereby increase the amount of information that would be released.[211]

In 1974, in an effort to broaden the definition of agency, Congress amended FOIA.[212] The 1974 amendments expanded and elaborated on the agency definition adopted by the Administrative Procedures Act ("APA"), in order to eliminate ambiguity that had created confusion

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204 *Id.*; *see* 5 U.S.C. § 552(b)(1)–(9). Under the APA, an agency is defined as, "each authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . ." 5 U.S.C. § 551(1). The Act specifically excludes, however, certain entities such as Congress and the courts of the United States. 5 U.S.C. § 551(1)(A)–(B). Thus, the term "agency" was not limited to executive branch entities, but also applied to legislative and judicial branch entities other than those exempted. *See id.*

205 5 U.S.C. § 551(A)–(B). For a detailed analysis of FOIA and how to obtain documents under it, see LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT (Allan Adler ed., 1992).

206 SOURCE BOOK I, *supra* note 9, at 27.

207 5 U.S.C. § 552(a)(4).

208 5 U.S.C. § 552(a)(4)(A)(ii)(II).

209 5 U.S.C. § 552(a)(6).

210 5 U.S.C. § 552(a)(4)(B).

211 *See* 5 U.S.C. § 552; SOURCE BOOK I, *supra* note 9, at 40–41.

212 S. REP. No. 1200, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6293.

in the courts.[213] Currently, under FOIA, an agency is any entity that qualifies as such under § 551(1) of the APA, and in addition, any executive or military department, any government or government-controlled corporation, any establishment in the executive branch of Government (including the Executive Office of the President), and any independent agency.[214] Although FOIA does not specify exactly which establishments within the EOP would be included, discussions surrounding § 552(f) of FOIA did list specific EOP entities.[215] Most importantly for the purposes of this Note, the legislative history indicates that Congress intended that the National Security Council, as a unit of the EOP, be considered an agency for purposes of FOIA.[216] In contrast, the legislative history indicates that 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 in the term agency.[217] Thus, the White House Office is not an agency for FOIA purposes.[218]

Congress evidently recognized the difficulty of drawing clear lines between agencies and non-agencies, especially in the part of the ex-

[213] 5 U.S.C. § 552(f); *see* Washington Research Project, Inc. v. Department of HEW, 504 F.2d 238, 245–46 (D.C. Cir. 1974) ("[R]ecent cases have made it clear that any general definition can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of governments done.") (citations omitted), *cert. denied*, 421 U.S. 963 (1975).

[214] 5 U.S.C. §§ 552(1), 552(f).

[215] H.R. REP. NO. 876, 93d Cong., 2d Sess. 8 (1974), *reprinted in* COMMITTEE OF THE JUDICIARY OF THE U.S. SENATE, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, Pub. L. No. 93-502, 128, 94th Cong., 1st Sess. (U.S. Government Printing Office 1975) [hereinafter SOURCE BOOK II].

[216] *Id.* This intention is clear from the legislative history of the 1974 amendments to FOIA, which explains that "[t]he term 'establishment in the Executive Office of the President,' as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisors, the National Security Council, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order." *Id.* at 128 (emphasis added). This portion of the legislative history, however, has not been deemed conclusive. Rushforth v. Council of Economic Advisors, 762 F.2d 1038 (D.C. Cir. 1985) (court held that the CEA is not an agency, despite the House Report's statement that it is a unit of the EOP intended to be included in FOIA, because the Conference Report's decision to use the "advise and assist" test for determining agency status, rather than a specific list of entities, "undercut" the House Report). The Conference Report's flexible test, however, need not be construed as a rejection of the House Report's list of entities covered by FOIA. Rather, it supports the notion that Congress intended FOIA to apply broadly to many types of entities, including, but not limited to, those originally enumerated.

[217] H.R. CONF. REP. NO. 1200, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6285, 6293.

[218] *See id.*; Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (transcripts of telephone conversations deemed not to be agency records made at Kissinger's "White House Office").

ecutive branch that works closely with the President.[219] Because each President can create new entities within the EOP to serve his or her needs and goals, and because each newly created entity will have a distinct form and role, the courts will undoubtedly have to perform this examination again.[220] The next section surveys a number of cases in which courts have interpreted the term "agency."[221]

IV. Cases Interpreting the Records Statutes

Although Congress sought clarity when it amended the Freedom of Information Act in 1974, it may not have anticipated the challenge presented to a court when reviewing a FOIA request for NSC records.[222] The circumstances of the NSC create a particularly difficult dilemma, because the NSC was specifically designed to create a bridge between the President and other, larger entities.[223] The PRA focuses on entities and individuals who advise and assist the President.[224] The FRA applies to most other government entities.[225] If the NSC is an agency, then the records it generates, uses and controls will likely be "agency records," which fall under the FRA and are immediately subject to FOIA.[226] If the NSC is not an agency, then its records are subject to the PRA, which would delay FOIA access for at least five years and which would permit even greater discretion for withholding information for longer periods.[227] If the NSC is part agency and part advisory, then a line will have to be drawn that will allow records officials at the NSC to distinguish between agency records and presidential records and treat them accordingly.[228]

A. *What is an agency?*

An analysis of whether a set of documents are "agency records" must begin by establishing whether two threshold requirements are met.[229] First, the documents must be records.[230] Second, the documents

[219] H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974), *reprinted in* Source Book II, *supra* note 215, at 232.

[220] *See infra* notes 378–466 and accompanying text.

[221] *See infra* notes 222–304 and accompanying text.

[222] *See Kissinger*, 445 U.S. at 156; *Armstrong II*, 1 F.3d 1274, 1296 (D.C. Cir. 1993).

[223] *See* 50 U.S.C. § 402; Shoemaker, *supra* note 53, at 4–5.

[224] 44 U.S.C. § 2201 (1988).

[225] *Id.*

[226] *See id.*

[227] 44 U.S.C. §§ 2201–04.

[228] *See Armstrong II*, 1 F.3d 1274, 1296 (D.C. Cir. 1993).

[229] *See* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980).

[230] Because the court in *Armstrong* determined that the e-mail documents in question are

must be within the control of an agency.[231] As a preliminary matter, therefore, an examination of the cases interpreting the definition of "agency" is appropriate.[232]

1. Entities within the Executive Office of the President

The group of cases with the most similarities to the NSC involve other entities within the EOP.[233] In 1970, in *Soucie v. David*, the first case involving the determination of whether or not an EOP entity was an agency, the United States Court of Appeals for the District of Columbia Circuit held that the Office of Science Technology ("OST") is an agency for purposes of FOIA.[234] The OST was created in 1962 to fulfill two functions: (1) to evaluate federal scientific research programs, and (2) to advise and assist the President in achieving coordinated federal policies in science and technology.[235]

The plaintiffs in *Soucie* sued the OST under FOIA to obtain a document known as the "Garwin Report," which evaluated the Federal Government's program for development of a supersonic aircraft.[236] The OST denied plaintiff's request for the document, asserting that the Report was a presidential document not within OST's control and alternatively, that it fell within FOIA's exemption for inter- and intra-agency memoranda containing "opinions, conclusions and recommendations prepared for the advice of the President."[237] The court disagreed with OST's reasoning, finding that the executive authorization plan creating the OST envisioned the office as a "distinct entity" separate from the President's staff.[238] The court held that the OST's "independent" function of evaluating federal programs made it an agency, and thus, the Garwin Report was a federal record created by a federal agency subject to FOIA.[239] Although the court implied that it might have come to a different conclusion had the OST's "sole function" been to advise and assist the President, the fact that an independent

"records," this Note will not address that topic. For a full discussion of that requirement, see Comment, *What is a Record? Two Approaches to the Freedom of Information Act's Threshold Requirement*, 1978 B.Y.U. L. Rev. 40.

[231] *See Kissinger*, 445 U.S. at 156.

[232] *See infra* notes 233–304 and accompanying text.

[233] *See* Government Manual, *supra* note 46, at 91–105.

[234] 448 F.2d 1067, 1071 (D.C. Cir. 1971).

[235] *Id.* at 1073–74.

[236] *Id.* at 1070.

[237] *Id.*

[238] *Id.* at 1074.

[239] *Soucie*, 448 F.2d at 1075.

function existed precluded that conclusion.[240] Thus, the OST's "substantial independent authority in the exercise of specific functions" determined its status as an agency.[241]

Three other entities within the Executive Office of the President have been evaluated for their status as agency or non-agency.[242] In 1978, in *Sierra Club v. Andrus*, the United States Court of Appeals for the District of Columbia Circuit held that the Office of Management and Budget ("OMB") is an agency.[243] As a factor in its decision, the court noted that the OMB's main duty, preparing the President's budget proposal for submission to Congress, gave it policy-making control.[244] The court pointed to the OMB's "management, coordination and administrative functions" as well, and noted that the Director of the OMB is confirmed by the Senate, signifying the importance of OMB's functions.[245]

In 1980, in *Pacific Legal Foundation v. Council on Environmental Quality*, the District of Columbia Circuit held that the Council on Environmental Quality ("CEQ") is an agency.[246] The CEQ has three members, each of whom is appointed by the President with the advice and consent of the Senate.[247] The President designates one of the three as chairperson.[248] In determining that the CEQ is an agency, the court noted the similarities between the CEQ and the OST.[249] For example, like the OST, the CEQ has the role of "overseeing" the activities of

[240] *Id.* The examination as to whether an entity's sole purpose is to advise and assist the President is limited to those entities within the EOP. Crooker v. Office of the Pardon Attorney, 614 F.2d 825, 828 (2d Cir. 1980) ("The 'advise and assist the President' language applies as a limitation upon FOIA coverage only within the Executive Office of the President."). Consequently, entities outside the EOP whose sole function is to advise and assist the President are subject to FOIA. *See id.* at 827–28.

[241] *See Soucie*, 448 F.2d at 1073. It should be noted that the legislative history of the 1974 FOIA amendments clearly shows that Congress intended to incorporate the *Soucie* "agency" test into the FOIA statute. Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (citing H.R. CONF. REP. NO. 1380, 93d Cong., 2d Sess. (1974), *reprinted in* Source Book II, *supra* note 215, at 232); H.R. CONF. REP. NO. 1200, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6285, 6293.

[242] Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1043 (D.C. Cir. 1985); Pacific Legal Found. v. Council on Envtl. Quality, 636 F.2d 1259, 1264 (D.C. Cir. 1980) (explicitly rejecting the argument that an entity can be an agency generally, but not when it is advising the President).

[243] 581 F.2d 895, 902 (D.C. Cir. 1978).

[244] *Id.*

[245] *Id.*

[246] 636 F.2d at 1263.

[247] *Id.* at 1261–62 (citing 42 U.S.C. § 4342).

[248] *Id.* at 1262.

[249] *Id.* at 1263.

federal agencies.[250] Also similar to the OST, the CEQ is independently authorized to "evaluate" federal programs.[251] In addition to advising and assisting the President, the CEQ issues regulations used by federal agencies in implementing the National Environmental Policy Act.[252]

Five years after declaring the CEQ to be an agency, in 1985, in *Rushforth v. Council of Economic Advisors*, the District of Columbia Circuit held that the Council of Economic Advisors ("CEA") is not an agency.[253] Although the statutes creating the CEA and the CEQ are identical, the court reasoned that its prior holding that the CEQ was an agency did not govern the case, due to crucial differences between the CEQ and the CEA.[254] The court distinguished the CEA from the CEQ by pointing to executive orders expanding the role of CEQ beyond its statutory powers.[255] No such executive orders have expanded the CEA's role.[256] The court in *Rushforth* also distinguished the CEA from the OST, which was examined in *Soucie*.[257] According to the court, the CEA is different from the OST in that the OST can take "direct action" and the CEA cannot.[258] Thus, because its sole function is to advise and assist the President, the CEA was found not to be an agency.[259]

Although the United States Supreme Court has never ruled on whether or not the NSC is an agency, it came close to doing so in 1980 in *Kissinger v. Reporters Committee for Freedom of the Press*.[260] In *Kissinger*,

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[250] *Id.* at 1262.

[251] *Pacific*, 636 F.2d at 1263.

[252] *Id.* at 1262.

[253] 762 F.2d 1038, 1043 (D.C. Cir. 1985).

[254] *Id.* at 1042; *Pacific*, 636 F.2d at 1262. The statute creating the CEA enumerates various duties: 1) assist and advise the President in the preparation of the Economic Report, 2) gather information, analyze and interpret information in light of established policies, and compile and submit studies, 3) appraise various programs and activities of the Federal Government and make recommendations to the President, 4) develop and recommend to the President national economic policies, 5) make and furnish studies, and 6) submit an annual report. *Rushforth*, 762 F.2d at 1042 n.6 (citing 15 U.S.C. § 1023). In fulfilling its duties, the Council may consult with representatives of the private sector and governments. *Id.*

[255] *Rushforth*, 762 F.2d at 1041. These executive orders gave the CEQ the power to coordinate federal environmental regulatory programs, issue guidelines for preparing environmental impact statements, and promulgate regulations for implementing the procedural provisions of the National Environmental Policy Act. *Id.*

[256] *Id.* at 1042.

[257] *See id.*

[258] *Id.* The court noted that the OST had the power to initiate and support research, award scholarships, foster the interchange of information, and evaluate the status of the sciences in correlating the research and education programs of the Foundation. *Id.*

[259] *Id.* at 1043.

[260] *See* 445 U.S. 136, 156 (1980). An opinion issued by the Office of the Legal Counsel of the Department of Justice in 1978 addresses the issue of whether or not the NSC is an agency.

the Court held that the Executive Office of the President is an agency subject to FOIA, but 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 FOIA.[261] Mr. Kissinger served as Assistant to the President for National Security Affairs from 1969 to 1975 and as Secretary of State from 1973 to 1977.[262] Columnist William Safire sued Mr. Kissinger, asking the court to enforce FOIA requests covering documents, created by Mr. Kissinger, that had been taken from the White House office to the State Department, where they resided at the time the request was made, which Kissinger then removed to a private estate and later donated to the Library of Congress under an agreement restricting access to them.[263] The Court reasoned that because the relevant request referred only to Mr. Kissinger's White House office, and made no reference to the NSC, the request sought records of conversations in which Mr. Kissinger "acted in his capacity as presidential advisor, only."[264] Thus, as records of the Office of the President, which is not an agency, the requested items were not subject to FOIA.[265] The *Kissinger* Court assumed that the NSC is an agency subject to FOIA.[266] The court based its assumption on the legislative history of the statute, which indicates that the NSC is an establishment in the Executive Office of the President to which FOIA applies.[267] The Court never ruled on the issue of the NSC's or its Staff's legal status, however, because the *Kissinger* Court

National Security Council—Agency Status Under FOIA, 2 Op. Off. Legal Counsel 197 (1978). The opinion concludes that the NSC is an agency because it has functions other than merely advising and assisting the President. *Id.* at 204–05. The opinion states, however, that only some NSC documents are agency records and that other documents could be protected by a claim of "executive privilege." *Id.*

[261] 445 U.S. at 156 (citing H.R. CONF. REP. No. 1380, 93d Cong., 2d Sess. 15 (1974), *reprinted in* SOURCE BOOK II, *supra* note 215, at 232).

[262] *Id.* at 139–40.

[263] *Id.* at 139–44. The agreement provided that public access to the collection would not begin until 25 years after the time of transfer or five years after his death, whichever was later. *Id.* at 141. The *Kissinger* case involved two other plaintiffs, the Military Audit Project and the Reporters Committee for Freedom of the Press. *Id.* at 143. The court found against these two plaintiffs on different grounds, holding that they were not entitled to see the documents because at the time their request was made, the State Department no longer had the documents in its possession. *Id.* at 155. Thus, the State Department did not "withhold" the documents in violation of FOIA. *Id.*

[264] *Id.* at 156.

[265] *See id.*

[266] *Kissinger*, 445 U.S. at 156; *see also Armstrong II*, 1 F.3d 1274, 1296 (D.C. Cir. 1993) ("The Supreme Court appears to have assumed, without deciding the issue, that the NSC is a FOIA agency.").

[267] *See* 445 U.S. at 156.

found that Kissinger created the documents in question in his capacity as presidential advisor only and as a part of the White House Office.[268]

The most recent judicial determination regarding what is and what is not an agency under FOIA occurred in 1993, in *Meyer v. Bush*, where the United States Court of Appeals for the District of Columbia Circuit held that the Task Force on Regulatory Relief was not an agency.[269] The court articulated numerous factors relevant to its decision, such as how close operationally the entity is to the President, the nature of the entity's delegation from the President, and whether the agency has a self-contained structure.[270] Generally, the court asserted, those units whose characteristics closely resemble those of the President's personal staff would be exempt from FOIA.[271] In determining that the Task Force was not an agency, the court noted that the Task Force has no separate staff, and no independent authority to direct executive branch members.[272] Rather, the members of the Task Force derived their authority from their positions as department heads, not from the Task Force as an entity.[273] The court in *Meyer* distinguished the Task Force from the OMB, which was found to be an agency in *Sierra*, stating that the OMB is permanent, and has a significant staff with broadly delegated powers whereas the Task Force did not.[274]

2. Entities Outside the Executive Office of the President

Also relevant to an analysis of a set of documents which may or may not be "agency records" are cases examining entities outside the EOP to determine whether or not they are agencies.[275] Courts have used the *Soucie* factors in determining whether these entities constitute agencies.[276] In doing so, courts have elaborated on the tests laid out in

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[268] *See id.* The court has had the opportunity to explicitly state that the White House Office is not an agency. In 1990, in *National Security Archive v. Archivist of the United States*, the United States Court of Appeals for the District of Columbia Circuit held that White House Counsel's Office is not an agency for purposes of FOIA, reasoning that senior White House officials close to the President may give "ad hoc" direction to executive branch members, but it is assumed that they are passing on the President's wishes. 909 F.2d 541, 545 (D.C. Cir. 1990).

[269] 981 F.2d 1288, 1298 (D.C. Cir. 1993). In her dissent, Judge Wald argued that the Task Force is an agency because it is a functional entity sufficiently independent of the President to fall within the scope of FOIA. *Id.* at 1300–03 (Wald, J., dissenting).

[270] *Id.* at 1293.

[271] *Id.*

[272] *Id.* at 1296. The court emphasized that without a staff, one can hardly have independent authority. *Id.* The court noted that "the typical officer in the executive branch is virtually powerless without a staff." *Id.*

[273] *Id.* at 1294.

[274] *Meyer*, 981 F.2d at 1294.

[275] *See infra* notes 278–304 and accompanying text.

[276] Energy Research Found. v. Defense Nuclear Facilities Safety Bd., 917 F.2d 581, 584–85

Soucie.[277] For example, in 1973 in *Grumman Aircraft Engineering Corporation v. Renegotiation Board*, the United States Court of Appeals for the District of Columbia Circuit held that Regional Renegotiation Boards were agencies.[278] A group of contractors sought to obtain copies of Regional Board Reports compiled by Regional Renegotiation Boards, which are sub-units of the National Renegotiation Board, whose role it is to renegotiate federal contracts.[279] The court reasoned that the Regional Boards had "substantial independent authority."[280] The court pointed to the Regional Boards' investigation and negotiation personnel, the formal recommendations made by the Regional Boards, and the fact that the Regional Boards can make final decisions that are not subject to review by the National Board.[281] Thus, in finding that the Regional Boards are agencies, the court again demonstrated that *Soucie* is the controlling test, but that under the *Soucie* test, each entity will be examined separately to determine whether its unique characteristics qualify it to be an agency.[282]

Similarly, in 1980, in *Crooker v. Office of the Pardon Attorney*, the United States Court of Appeals for the Second Circuit found the Office of the Pardon Attorney to be an agency.[283] In *Crooker*, a federal offender sought to gain access to all records connected to his petition for executive clemency.[284] In finding that the Office is an agency and thus that he could access its files through FOIA, the court noted that the Office is authorized to perform "any other duties assigned by the Attorney General or the Deputy Attorney General."[285] Thus, the fact that the statute provided for expansion of the unit's duties became significant to the determination that it is an agency.[286]

Also in 1980, in another case involving the Department of Justice, *Ryan v. Department of Justice*, the United States District Court for the District of Columbia Circuit rejected plaintiff's argument that the Attorney General was subject to FOIA in his capacity as head of the

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(D.C. Cir. 1990); Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., 482 F.2d 710, 715 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975). *But see* Crooker v. Office of the Pardon Attorney, 614 F.2d 825 (2d Cir. 1980) (finding that the *Soucie* test does not apply to a unit of the Department of Justice whose sole function is to advise and assist the President because it is not within the Executive Office of the President).

[277] *See infra* notes 278–304 and accompanying text.

[278] 482 F.2d at 716.

[279] *Id.* at 711.

[280] *Id.* at 715 (quoting Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971)).

[281] *Id.*

[282] *See id.* at 713–14.

[283] 614 F.2d 825, 827 (2d Cir. 1980).

[284] *Id.*

[285] *Id.* (quoting 28 C.F.R § 0.35 (1979)).

[286] *See id.*

Department of Justice, and not subject to FOIA in his capacity as advisor and assistant to the President for other purposes.[287] The court held that, "[o]nce a unit is found to be an agency, this determination will not vary according to its specific function in each individual case."[288] Thus, for entities outside the EOP, some courts have made it clear that an entity is either an agency or not, it cannot have some agency functions and some "advisory" functions.[289] Courts have rejected the idea of a hybrid that produces some presidential records and some federal records.[290]

In 1990, in *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, the District of Columbia Circuit determined that the Defense Nuclear Facilities Safety Board (the "Safety Board") is an agency for purposes of FOIA.[291] In 1988 Congress created the Safety Board, composed of five members appointed by the President with the advice and consent of the Senate, to fulfill three functions: (1) to review and evaluate safety standards, (2) to investigate practices or events at Department of Energy facilities that may be hazardous to public health, and (3) to recommend safety and health protection measures to the Secretary of Energy.[292] Although the Secretary of Energy must respond to the Safety Board's recommendations, the Safety Board has no power to enforce its recommendations.[293] The Board does have other powers.[294] For example, it can conduct hearings, compel testimony, require production of documents, hire staff, promulgate its own regulations and require the Secretary to report to it classified information.[295] In *Crooker*, the court indicated it would not apply *Soucie* to entities outside the EOP.[296] In *Energy Research Foundation*, however, the court analogized to its decision in *Soucie*, stating that the Safety Board was similar to the OST in that it "investigates, evaluates, recommends," and thus, it is an agency.[297]

In other cases, courts have examined entities outside the Executive Office of the President and determined that they are not agencies

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[287] 617 F.2d 781, 788 (D.C. Cir. 1980).
[288] *Id.*
[289] *See id.*
[290] *See id.*
[291] 917 F.2d 581, 585 (D.C. Cir. 1990).
[292] *Id.* at 582.
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *See supra* note 277.
[297] *See Energy Research*, 917 F.2d at 583 (citing Soucie v. David, 448 F.2d 1067, 1073 n.15 (D.C. Cir. 1971)).

for purposes of FOIA.[298] For example, in 1974, in *Washington Research Project v. Department of Health, Education and Welfare*, the District of Columbia Circuit held that "initial review groups" (IRGs) set up by the National Institute of Mental Health to review grant applications were not agencies within the meaning of the APA.[299] The court reasoned that the IRGs do not have "authority in law to make decisions," and thus, cannot be considered "authorities" of the United States.[300] Because the APA describes agencies as "each authority of the Government of the United States," the IRGs cannot be agencies.[301]

In their examination of whether or not an entity is an agency, courts generally apply a flexible test that allows them to pick and choose among a variety of factors including how closely related the entity is to the President, the size of the organization, its duties, responsibilities and power.[302] In addition, the way an agency was created and its structure may all affect courts' ultimate decisions.[303] A final factor that courts consider is the actual record the plaintiff is trying to obtain, because in many cases, and in the *Armstrong* case in particular, whether the entity that created or controls the record is deemed to be an agency is inextricably linked to what the record says or what import it has.[304]

B. *What is an agency record?*

For a document to be subject to FOIA disclosure, it must be an "agency record."[305] The fact that it was generated by, is, or was once in the possession of an entity determined to be an agency does not automatically subject it to FOIA.[306] Numerous agencies have challenged assertions that documents generated by or transferred to non-agencies are agency records.[307] Although possession of the record by an agency

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[298] *See infra* notes 300–06 and accompanying text.

[299] 504 F.2d 238, 241–42, 246 (D.C. Cir. 1974).

[300] *Id.* at 248.

[301] *Id.*; *see* 5 U.S.C. § 551(a) (1988).

[302] *See, e.g.*, Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980); Meyer v. Bush, 981 F.2d 1288, 1288 (D.C. Cir. 1993); Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971); *see also supra* notes 234–301 and accompanying text.

[303] *See, e.g.*, *Kissinger*, 445 U.S. at 156; Meyer v. Bush, 981 F.2d 1288, 1288 (D.C. Cir. 1993); Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971); *see also supra* notes 234–301 and accompanying text.

[304] *See infra* notes 305–25 and accompanying text.

[305] Forsham v. Harris, 445 U.S. 169, 178 n.8 (1980) ("since the enforcement provision of the Act . . . refers only to 'agency records' it is certain that the disclosure obligations imposed . . . were only to extend to agency records").

[306] *Id.*

[307] *See, e.g.*, *Forsham*, 445 U.S. at 171; *Kissinger*, 445 U.S. at 156; Wolfe v. Department of Health and Human Services, 711 F.2d 1077, 1078 (D.C. Cir. 1983).

seems to be a threshold to whether it can be deemed an agency record, mere possession of a record by an agency is not sufficient.[308] Furthermore, some documents, although possessed by an agency, can never become agency records.[309] Thus, some courts have required that there be a sufficient nexus between the "agency" and the "records" for the records to be deemed agency records.[310] Although courts seem to have declined to base agency record status on a record's origin, and instead favor a test that looks to whether the agency "controls" the record, they have never clearly defined "control."[311]

In 1980, in *Forsham v. Harris*, the United States Supreme Court held that records produced in connection with federal grant research and retained by the private grantee were not agency records.[312] While stating that it was possible for records of a non-agency to become agency records, the Court reasoned that a record cannot be an agency record within the meaning of FOIA unless the agency created or obtained the record.[313] Furthermore, an agency must not only have a legal right to obtain a record, but must have actually obtained the record for it to be considered an agency record.[314] Thus, possession is a requirement for agency record status, but may not be sufficient to create it.[315] Possession plus a high degree of agency use, however, may create "agency record" status.[316]

In 1983, in *Wolfe v. Department of Health and Human Services*, the United States District Court for the District of Columbia held that although the Department of Health and Human Services ("HHS") had access to certain reports, they were not agency records.[317] The case

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308 *Kissinger*, 445 U.S. at 157 (physical location does not make items not subject to FOIA subject to it).

309 *See, e.g.*, Lindsey v. United States Bureau of Prisons, 736 F.2d 1462, 1467 (11th Cir. 1984) (pre-sentence reports in possession of Bureau of Prisons remain court records); United States v. Charmer Indus., 711 F.2d 1164, 1170 n.6 (2d Cir. 1983) (pre-sentence report created by the U.S. Probation Service and in possession of the Arizona Attorney General not an "agency record"); Warth v. Department of Justice, 595 F.2d 521, 523 (9th Cir. 1979) (court document not "agency record" even when held and used by the Department of Justice).

310 *Wolfe*, 711 F.2d at 1080 (courts look for some "nexus" between the agency and the documents).

311 *See* Carson v. United States Dep't of Justice, 631 F.2d 1008, 1010–11 (D.C. Cir. 1980).

312 445 U.S. at 171.

313 *Forsham*, 445 U.S. at 181–82.

314 *Id.* at 186.

315 *Id.*

316 *See id.*; *Carson*, 631 F.2d at 1015 (D.C. Cir. 1980) (holding that pre-sentence reports used by the Parole Commission and not subject to restrictions by their originator are "agency records"); Lykins v. United States Dep't of Justice, 725 F.2d 1455 (D.C. Cir. 1984) (affirming *Carson*).

317 711 F.2d at 1081–82; *see also*, Illinois Institute For Continuing Legal Educ. v. U.S. Dep't of Labor, 545 F.Supp. 1229, 1235 (N.D. Ill. 1982).

involved a report by President-elect Reagan's transition team evaluating HHS.[318] The court articulated two approaches to the control test: (1) focus on the intent of the document creator to retain control, or (2) focus on the control exercised by the agency to whom the FOIA request is addressed.[319] In *Wolfe*, the court chose the latter, finding that because HHS did not use or rely upon the report and because it was not integrated into HHS files, it did not become an "agency record."[320]

In sum, like the definition of "agency," the definition of "agency record" is fluid.[321] A record's ultimate designation depends on who created the document, who has control of it, and what it has been or is being used for.[322] The lack of clarity in the definition of "agency record" created a risk that agencies will manipulate the term to avoid disclosure.[323] As the two approaches to the "control" test articulated in *Wolfe* demonstrate, by choosing whether to focus on the intent of the originator versus the actions of the possessing agency, courts have tremendous freedom to choose which test to use, and can effectively choose the result they prefer.[324] Because the nature of electronic mail is also fluid, in that it can easily be sent from one entity (the NSA) to another (an NSC Staff member), the court in *Armstrong* will undoubtedly face difficulties of classifying records that have come from one entity into the hands of another.[325]

V. The *Armstrong* Case

A. *Facts*

During the Reagan Administration and part of the Bush Administration, the Executive Office of the President used numerous electronic mail ("e-mail") systems.[326] The EOP and the NSC had separate

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[318] *Wolfe*, 711 F.2d at 1078.

[319] *Id.* at 1081 n.7 (citing cases).

[320] *Id.* at 1080–82. The court relied on *Kissinger v. Reporters Committee for Freedom of the Press*, which held that records transferred by Kissinger to the Department of State after he became Secretary of State, but which were not generated by, in the control of, or relied upon by the State Department, did not become agency records merely because of their location at the State Department. 445 U.S. 136, 156 (1980).

[321] *See supra* notes 305–20 and accompanying text.

[322] *See supra* notes 305–20 and accompanying text.

[323] McGehee v. CIA, 697 F.2d 1095, 1109, *modified in other respects*, 711 F.2d 1076 (D.C. Cir. 1983).

[324] *See, e.g.*, *Wolfe*, 711 F.2d at 1081 n.7; Carson v. United States Dep't of Justice, 631 F.2d 1008, 1008 (D.C. Cir. 1980); Warth v. Department of Justice, 595 F.2d 521, 523 (9th Cir. 1979).

[325] *See infra* notes 449-66 and accompanying text.

[326] *Armstrong II*, 1 F.3d 1274, 1279 & n.2 (D.C. Cir. 1993). The EOP has used various

systems.[327] These systems permit employees to communicate with each other via electronic "notes" that can be sent from one computer to another.[328] The systems were periodically "backed-up" onto computer tapes.[329] The back-up is the equivalent of a "snapshot" of all the material in the computer at that moment, and is created for use in the event of a computer failure.[330] The EOP system was backed up nightly, and the tapes were recycled after a number of weeks.[331] The NSC system was backed up each Saturday evening, and the tapes were recycled after two weeks.[332] In addition, the Administration preserved certain e-mail back-up tapes as a result of the investigation into the Iran-Contra scandal.[333] Thus, at any given time, the Administration possessed a series of back-ups a few weeks old.[334] In addition to the tapes existing on January 19, 1989, which were covered by the original complaint, and as a result of the amendment to the complaint in this case, all Bush and Clinton Administration e-mail has been preserved.[335]

B. *The Litigation*

The Reagan Administration's plan to dispose of all its remaining computer back-up tapes before turning the computer system over to the Bush Administration came to the attention of Scott Armstrong, founder of the non-profit research institute called the National Secu-

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electronic mail systems during the period of this litigation. These include: "PROFS" (an abbreviation for the IBM computer program called "Professional Office Systems") used from April, 1985 through the first half of 1992; "A1" (an abbreviation for the "All-in-One" program) used from 1985 to the present; and "OASIS," installed in 1989. Joint Statement of Facts at 1, *Armstrong II*, 1 F.3d at 1274 (No. 89–142).

[327] *Armstrong II*, 1 F.3d at 1279 & n.7.

[328] *Id.* at 1279–80.

[329] *Id.* at 1280.

[330] *Id.*

[331] *Armstrong I*, 924 F.2d 282, 286 (D.C. Cir. 1991).

[332] *Id.* For purposes of this Note, any reference to the EOP is meant to apply to EOP entities other than the NSC, which is referred to separately.

[333] *See Armstrong II*, 1 F.3d at 1283 n.7. The court of appeals has acknowledged the substantive nature of these e-mail documents. *Id.* at 1279, 1283 n.7.

> The 1,300 federal employees with access to the EOP and NSC electronic mail systems can, and apparently do, utilize them to relay lengthy substantive—even classified—"notes" that, in content, are often indistinguishable from letters or memoranda. But, in contrast to its paper cousin, e-mail can be delivered nearly instantaneously at any time of the day or week. Additionally, in contrast to telephone conversation, e-mail automatically creates a complete record of the exact information users send and receive.

Id.

[334] *See Armstrong I*, 924 F.2d at 286.

[335] *See supra* notes 344–78 and accompanying text.

rity Archives.[336] Armstrong and others filed a complaint against the President, Vice President, NSC and National Archivist, alleging that the tapes contained valuable presidential and federal records that risked destruction in violation of the Presidential Records Act and the Federal Records Acts.[337] The historical importance of documents created using the e-mail systems is without question.[338] NSC e-mail records (called "PROFS notes" because of the computer software that the NSC uses) have been used by the Tower Commission, congressional investigators and the Independent Counsel in his investigations of the Iran-Contra affair.[339] PROFS notes have also been used in the prosecution of Manuel Noriega and the inquiry into the confirmation of Robert Gates as Director of the Central Intelligence Agency.[340] Although the substantial importance of the documents is now clear, their status as presidential or federal records remains unresolved.[341]

C. Armstrong I

After the district court denied their motion to dismiss or for summary judgment, the defendants filed a motion for interlocutory appeal, which was granted.[342] In 1991, in *Armstrong v. Bush* ("*Armstrong I*"), the District of Columbia Circuit held that it could not review presidential compliance with the PRA because the President is not an agency for purposes of the APA. Thus, indirect judicial review of the President's records creation and management decisions via the APA is not permitted.[343] In addition, direct review under the PRA is also precluded.[344] The court of appeals reasoned that the textual silence of the APA on the issue of the President as an agency, coupled with the longstanding practice of the executive branch of not complying with

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[336] Affidavit of R. Scott Armstrong at 7, Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89-142).

[337] Complaint for Declaratory and Injunctive Reliev at 5, Armstrong v. Bush, 721 F. Supp. 343 (D.D.C. 1989) (No. 89-142).

[338] *See Armstrong II*, 1 F.3d at 1283 n.7.

[339] *Id.*

[340] *Id.*

[341] *Id.* at 1296.

[342] Armstrong v. Bush, 721 F. Supp. 343, 354 (D.D.C. 1989); Order of J. Richey, Dec. 21, 1989 at 1, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1994) (No. 89-142).

[343] *Id.*

[344] *Armstrong I*, 924 F.2d at 289. The court of appeals also settled other issues, holding that the plaintiffs had standing under the PRA and the FRA, that the Presidential Records Act precludes judicial review of the "creation, management and disposal" of presidential records, and that the establishment of guidelines and directives defining records under the Federal Records Act is subject to judicial review. *Id.* at 288, 290, 294.

FOIA, precluded the President from being considered an agency despite the broad definition in the statute.[345]

In a footnote in its background section, the court of appeals stated that, because the NSC "advises the President" and has "statutory obligations," it creates both presidential and federal records.[346] Thus, the court seems to have taken the position that the NSC is both a presidential advisory body and an agency, because only those who "advise and assist the President" can create presidential records, and only agencies can create federal records.[347] Another indication that the court held the NSC to fall within the statutory definition of agency is its statement that the APA authorizes judicial review of the NSC's recordkeeping guidelines and directives.[348] Based on its findings, the court of appeals denied the defendant's motion for summary judgment, enabling the district court to proceed to a determination of whether the NSC's recordkeeping guidelines were arbitrary and capricious.[349]

D. *Further Action in District Court*

With regard to the NSC's e-mail, the district court's mandate was to review the NSC document preservation guidelines, using the standards set out in the APA, to determine if those guidelines complied with the FRA.[350] The district court found that the NSC guidelines governing document preservation were arbitrary and capricious because they provided no "reasonable" method of ensuring compliance with the FRA, and because they did not distinguish between presidential and federal records.[351] The district court based its finding on the District of Columbia Circuit's apparent acceptance of the defendant's assertion that the NSC creates both presidential and federal records.[352] The district court, however, also stated that the PRA's specific inclusion of "units or individuals in the Executive Office of the President the

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[345] *Id.* at 288–89 (referring to 5 U.S.C. § 701(b)(1), which defines "agency" as "any authority of the Government of the United States, whether or not it is within or subject to review by another agency").

[346] *Id.* at 286 n.2.

[347] *See id.*

[348] *Id.* at 297. If the NSC was not an agency, the APA could not authorize such a review, since the APA applies only to agencies. *See id.*

[349] *Armstrong I*, 924 F.2d at 297.

[350] *Id.*

[351] Armstrong v. Executive Office of the President, 810 F. Supp. 335, 344 (D.D.C. 1993).

[352] *Id.* at 347–48.

function of which is to advise and assist the President," encompasses the NSC.[353]

In addition, the district court stated that "[t]he clear language of the PRA and the history of this statute clearly demonstrate that the NSC is entitled to segregate presidential and federal records."[354] Because it found that its power of review extended only to federal records, the court ordered that any unit of the EOP, other than those whose sole function is to advise and assist the President, must preserve all records to ensure that no federal records are destroyed.[355] Thus, the district court seemed to treat the NSC as a hybrid entity, one which advises and assists the President, but also has agency functions.[356] The district court found that it had power only to the extent that it could require the preservation of federal records against destruction, where the preservation guidelines had been inadequate.[357] The court stated that guidelines describing presidential records were beyond its control.[358] The court provided no further guidance to the parties as to how the federal records would be distinguished from the presidential records, and instead remanded the case to the Archivist to take immediate action to preserve the federal records in question, and instructed the parties to process the FOIA request with all deliberate speed.[359]

E. Armstrong II

After the district court found the defendants in contempt for not complying with its January 1993 orders, the court of appeals again took up the *Armstrong* case on an interlocutory appeal.[360] Addressing the district court's assertion that it had no power over presidential records preservation, the court of appeals stated, "We did not hold in [*Armstrong I*] that the President could designate any material he wishes as presidential records. . . ."[361] The court of appeals held that guidelines

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[353] *Id.* at 347 (quoting 44 U.S.C. § 2203(b)). In holding that the NSC is subject to both the Presidential and Federal Records Acts, the court also noted that the manner in which the President maintains presidential records and the guidelines used in keeping the presidential records were not before the court because they are not subject to judicial review. *Id.* at 348; *Armstrong I*, 924 F.2d at 291.

[354] Armstrong v. Executive Office of the President, 810 F. Supp. at 347.

[355] *Id.* at 349.

[356] *See id.*

[357] *Id.* at 349-50 (holding that EOP and NSC records keeping practices violate the Federal Records Acts and are arbitrary and capricious).

[358] *Id.* at 349.

[359] Armstrong v. Executive Office of the President, 810 F. Supp. at 350.

[360] *Armstrong II*, 1 F.3d 1274, 1277 (D.C. Cir. 1993).

[361] *Id.* at 1293.

describing which existing materials will be treated as presidential records are subject to judicial review, because of their inextricable link to guidelines describing which materials will be treated as federal records.[362] The court of appeals found that guidelines describing which existing materials will be treated as presidential records are distinct from the presidential record "creation, management and disposal decisions" that the court precluded from judicial review in *Armstrong I*.[363]

Addressing the issue of the NSC's status as agency or non-agency, the court of appeals stated that its footnote in the background section of its *Armstrong I* opinion, which declared that the NSC creates both presidential and federal records, was not a holding.[364] The court of appeals admonished the district court for relying on a background section footnote for a decision of legal significance.[365] The court noted, however, that the "sole function" test in *Soucie* has been consistently used by courts engaging in an agency/non-agency determination.[366] In addition, the court pointed out that the NSC has routinely conceded its status as an agency.[367] The court of appeals, however, remanded the matter to the district court, stating that the record did not contain sufficient facts to decide the issue.[368] Thus, the court of appeals revoked its implication that the NSC creates both federal and presidential records, leaving open the possibility that it does, or that all its records fall entirely in one or the other category.[369] In addition, the court gave little guidance as to how the determination of the NSC's status should be made.[370] Finally, the court never reached the issue of which NSC records would be "agency records" and which would be "presidential records," since that distinction can only come once the NSC has been determined to be, at least in part, an agency.[371]

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[362] *See id.* at 1294.

[363] *Id.*

[364] *Id.* at 1296.

[365] *See Armstrong II*, 1 F.3d at 1296.

[366] *Id.* at 1295.

[367] *Id.* at 1296.

[368] *Id.* The issue of the NSC's legal status was briefed in May 1993, prior to oral argument and the subsequent opinion of the court of appeals. *See* Government's Opposition and Reply Brief at 37–49, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89-142) ("Our argument is not that the NSC ceases at any time to be an agency under the FRA. Our argument is instead that the presidential records at issue here, though generated by the NSC *Staff*, are not records *of the NSC*.") (citations omitted) (emphasis in original).

[369] *See Armstrong II*, 1 F.3d at 1296–97.

[370] *See id.*

[371] *See infra* notes 378–448 and accompanying text.

F. *Recent Activity*

On March 25, 1994, the Government submitted a brief to the district court that reversed all of its previous concessions with regard to the NSC's status, and argues that the NSC is not an agency at all, but exists solely to advise and assist the President.[372] The Government asserts that the NSC's FOIA guidelines were promulgated and followed not because the NSC creates any agency records, but instead because the Government "chose" to handle the documents in that manner.[373] In its brief, the Government explains that although it will process the plaintiff's FOIA request pursuant to the district court's order, the NSC Executive Secretary has directed the Office of Records and Access Management at the NSC to revoke current NSC FOIA regulations and to simultaneously issue voluntary disclosure guidelines.[374] Thus, the Government seeks to have all NSC records declared presidential, thereby shielding them from FOIA, and from the eyes of the public, until at least five years after the President has left office.[375] The plaintiffs have expressed their disagreement with the Government's change of heart, and have derided the Government's proposed voluntary disclosure guidelines, calling them a "trust-me FOIA."[376] Motions have been filed on both sides, and oral argument on these issues is likely to be set for late fall of 1994; whatever the district court's decision, the case is likely to again find its way to the court of appeals, as it has twice before.[377]

VI. Towards a Definitive Resolution of the Status of the National Security Council's Records

In *Armstrong v. Executive Office of the President* ("*Armstrong II*"), the United States Court of Appeals for the District of Columbia Circuit tried to balance its duty to review agency action against its need to show deference to presidential discretion and privacy.[378] Absent a clear determination of which records, if any, are agency records and which are not, the employees at the NSC, and the researchers seeking to write about the organization, will remain unsure about what documents fall under which statutes and how those documents should be treated. It

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[372] Defendant's March 25, 1994 Motion to Dismiss, *supra* note 8, at 1.
[373] *Id.* at 26.
[374] *Id.* at 32 & n.26.
[375] *See supra* notes 168–76 and accompanying text.
[376] Jim McGee, *Clinton Tries to Limit Access to NSC Data*, WASH. POST, Mar. 26, 1994, at A7.
[377] Interview with Sheryl Walters, Staff Member, *National Security Archives* (August, 1994).
[378] *See Armstrong II*, 1 F.3d at 1296–99.

is therefore essential, both for the plaintiffs in this case and for all future parties who may seek NSC documents, that a decision be made regarding the status of the NSC and its documents, and that a rational system of document designation and access be put in place.

The court in this case has four options. First, the court could determine that the NSC is not an agency, and thus, its records are subject only to the PRA. To do this, the court would have to find that the NSC is entirely "presidential" and thus has no agency functions whatsoever.[379] The NSC Staff have demonstrated, however, that their role goes well beyond mere "advising and assisting the President."[380] The argument that the NSC Staff exists solely to advise and assist is untenable, given the defendants' concession during the first five years of the litigation that the NSC Staff engages in some "agency functions," and given the history of the NSC Staff in general.

Second, the court could declare that the NSC is a hybrid entity that is part agency and thus only partly subject to the FRA. *Soucie*, however, precludes such a decision, because it establishes an either/or test with no middle ground. If an entity *solely* advises and assists the President, it is presidential. If it has *any* agency functions, it is an agency and everything it creates is subject to the FRA.

A third option available to the court is to declare that the NSC is, in its entirety, an agency, and thus, all its records fall within the FRA. This would, in turn, make the records generated by it and within its control "agency records" immediately subject to FOIA.[381] This option presents two major problems. First, records of the National Security Advisor, in his or her capacity as chief of the NSC, would be subject to the FRA. Due to the *Kissinger* case, however, the NSA would not be subject to the FRA in his capacity of advisor to the President.[382] Thus, some sort of delineation between the NSA's "presidential" documents and the NSC's "federal" documents would have to be made.[383] Even if this difficulty were solved, separation of powers problems also arise. By passing the PRA, Congress clearly demonstrated its intent to maintain an area of presidential authority in which the Chief Executive has increased control over his records and those of his immediate advisors, thereby reducing separation of powers concerns. In addition, Congress articulated a concern for the President's ability to receive confidential

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[379] Defendant's March 25, 1994, Motion to Dismiss, *supra* note 8, at 1.

[380] SHOEMAKER, *supra* note 53, at 22–47 (describing seven functions performed by NSC Staff).

[381] *See* 5 U.S.C. § 552 (1988).

[382] *See* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980).

[383] *See* Brief for Appellees at 42, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89–142).

and frank advice from top advisors.[384] The composition of the courts has changed significantly since the *Nixon* case was decided. The present Supreme Court may be more responsive to the presidential assertions that Congress has violated the separation of powers doctrine by exerting too much control over the President's ability to effectively carry out his executive functions.[385]

A fourth option exists that may go further towards balancing these conflicting interests than the other three. This Note argues that the NSC should not be regarded as one entity, but rather, as three: the Office for National Security Affairs (located at the White House and composed of the NSA, the Deputy NSA and their assistants), the NSC (whose members meet periodically to make recommendations to the President) and the NSC Staff (who carry out presidential national security policy on a daily basis). Thus, under the *Soucie* test, the Office for National Security Affairs would be an entity subject only to the PRA, because it serves solely to advise and assist the President.[386] Similarly, the Council would be an entity subject to the PRA because it also serves to advise and assist. Both these entities work in very close proximity to the President.[387] In contrast, the NSC Staff would be an entity subject to the FRA because it serves both to guide and to implement presidential national security policy.[388] In addition, the NSC Staff is further removed from the President than either the NSA or the Council, and the Staff is much larger.[389] By viewing the NSC as three entities rather than one, the court would provide a well-defined structure under which document designation guidelines can be established.

A. *The NSC Staff Operates as an Agency*

The defendants in the *Armstrong* case originally conceded that for some purposes, the NSC is an agency and thus creates federal records.[390] They also argued, however, that for other purposes, the NSC

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[384] Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971). See *supra* notes 234–42 and accompanying text for a discussion of *Soucie*, and notes 128–221 and accompanying text for a discussion of congressional intent in passing the records acts.

[385] Franklin v. Massachusetts, 112 S. Ct. 2767 (1992); Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2143 (1992); Nixon v. Fitzgerald, 457 U.S. 731, 741 (1982).

[386] Federal Staff Directory, *supra* note 50, at 20–22. See *supra* notes 45–75 and accompanying text for a discussion of the difference between the NSA and the NSC Staff.

[387] *See* Defendant's March 25, 1994, Motion to Dismiss, *supra* note 8, at 40 ("the President himself serves on and presides over the NSC").

[388] *See* 50 U.S.C. § 402 (outlining functions of the NSC and its Staff).

[389] *Id.*

[390] Defendant's Statement of Material Facts as to Which There is no Genuine Issue at 3–4, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89–142) [hereinafter Defendant's Statement of

serves to "advise and assist the President" and therefore is not an agency.[391] No court has ever held that one agency can create both federal and presidential records.[392] In *Ryan v. Department of Justice*, the United States Court of Appeals for the District of Columbia Circuit specifically stated that an entity is either an agency or it is not.[393] Once an entity is found to have agency functions, and thereby create agency records, the determination on whether the rest of the entity is also an agency will not vary according to the specific function for which an individual record was created.[394] Thus, the NSC Staff should be found to be an agency because some of its functions are agency functions.[395]

The court in *Armstrong* should examine the NSC Staff under the test traditionally used to determine whether an EOP unit is an agency. That test, from *Soucie*, is commonly referred to as the "sole function" test.[396] Under the "sole function" test, if the NSC Staff has any functions other than that of advising and assisting the President, it fails the test and must be considered an agency.[397] Both past and current NSC Staffs have performed, and continue to perform, functions similar to those of entities found to be agencies under *Soucie* and its progeny.[398]

In *Soucie*, the court found that the OST is an agency, because it is a "distinct entity" with "substantial independent authority," which

Material Facts] ("The National Security Council (NSC) staff also has a dual role in the EOP. . . . These responsibilities fall into two areas: (1) management of the interagency process for national security affairs . . . and (2) provision of advice to the President on national security matters. . . . Documents constituting records generated or received by the NSC, therefore, may be either agency or presidential records."); *Armstrong II*, 1 F.3d at 1296 (citing cases).

[391] Defendant's Statement of Material Facts, *supra* note 390, at 3–4.

[392] *See Armstrong II*, 1 F.3d at 1296; *see also* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (finding that one person, serving in two distinct capacities (NSA and Secretary of State), could create both federal and presidential records). The reason one agency cannot create both federal and presidential records is that the *Soucie* test, which Congress chose to incorporate into FOIA, dictates that once the entity has been found to have any function other than "advising and assisting" the President, it falls within the definition of agency and the FRA requires that all its records be subject to the act. *See* 44 U.S.C. § 3301 (1988). The FRA makes no provision for hybrids, and thus the courts have properly made none. *See id.*; *Armstrong II*, 1 F.3d at 1296.

[393] 617 F.2d 781, 788 (D.C. Cir. 1980).

[394] *Id.*

[395] Although the EOP could be considered one unit of the executive, there has never been any doubt that different parts of the EOP may be treated differently. *See supra* notes 234–59 and accompanying text. Therefore, if the NSA, NSC Staff and the Council are viewed as distinct units within the EOP, there should be no reason why they cannot be viewed as separate entities to be treated independently for purposes of the records acts.

[396] Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971).

[397] *See id.*

[398] See *supra* notes 229–77 and accompanying text for a description of EOP units examined for agency status.

"evaluates federal programs."[399] These exact words describe the NSC Staff. It is a distinct entity, housed separately from the Office for National Security Affairs, which has been granted independent authority to ensure that the President's national security decisions are, in fact, implemented.[400] The OST's purpose was twofold.[401] It was created in 1962 to evaluate programs and advise and assist the President in achieving coordinated federal policies.[402] Similarly, the NSC Staff plays a "coordinating" and "oversight" role, ensuring that United States national security efforts are both consistent and efficient.[403] Thus, the court should find that the NSC Staff is also an agency.

Finding that the NSC Staff is an agency comports with the cases following *Soucie*.[404] For example, the NSC Staff, like the CEQ, which was held to be an agency in *Pacific Legal Foundation v. Council on Environmental Quality*, has the authority to "oversee federal agencies."[405] Also similar to the CEQ, the NSC Staff is comprised of members who are appointed by the President with the advice and consent of the Senate.[406] Thus, the structure of the NSC is similar to that of an entity determined to be an agency. Defendants assert that the NSC should instead be equated with the CEA, which was held not to be an agency.[407] The CEA, however, was examined under and passed the *Soucie* "sole function" test, whereas the NSC could not do so.[408] The court reasoned that the CEA could take no direct action; thus, it was not an "authority" of the government.[409] The same cannot be said of the NSC.[410] Even before the Iran-Contra scandal, when NSC Staff engaged in actual covert operations, the Staff has routinely taken direct action when fulfilling its mandate to implement presidential policy.[411] Thus, the

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[399] *Soucie*, 448 F.2d at 1073–75.

[400] Presidential Decision Directive 2, at 1 (Jan. 20, 1993) ("[T]he NSC shall be [the President's] principle means for coordinating executive departments and agencies in the development and implementation of national security policy."), *reprinted in* Defendant's Appendix of Exhibits in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment on the National Security Council Recordkeeping Claims, at ex. 17, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89-142).

[401] *Soucie*, 448 F.2d at 1073–74.

[402] *Id.*

[403] See *supra* notes 50–126 and accompanying text for a discussion of the NSC Staff's role.

[404] *See Soucie*, 448 F.2d at 1075.

[405] 636 F.2d 1259, 1264 (D.C. Cir. 1980).

[406] *Id.*; *see* 50 U.S.C. § 402.

[407] *See* Defendant's March 25, 1994, Motion to Dismiss, *supra* note 8, at 35–36.

[408] Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1043 (D.C. Cir. 1985).

[409] *See id.*

[410] *See* SHOEMAKER, *supra* note 53, at 19–22.

[411] *Id.*

NSC and the CEA differ in a crucial aspect and should not be given the same legal status.[412] In addition, the NSC's apparent "lack of enforcement ability" should not serve as a bar to agency status. In *Energy Research Foundation v. Defense Nuclear Facilities Safety Board,* the District of Columbia Circuit held that despite a lack of power to enforce its recommendations, the Defense Nuclear Facilities Board was an agency.[413]

Perhaps the only case that supports the proposition that the NSC may be a non-agency is *Meyer v. Bush,* which involved the President's Task Force on Regulatory Relief.[414] In that case, the District of Columbia Circuit found that, because the task force consisted of persons who derived their authority from their positions as department heads, not from the Task Force, it was not an agency.[415] In addition, the court pointed to the Task Force's total lack of authority to direct anyone in the executive branch.[416] A comparison used by the court, however, makes it abundantly clear that *Meyer* cannot support the notion that the NSC Staff is a non-agency.[417] In contrasting the Task Force to the OMB, which is an agency, the court cited the fact that the OMB is permanent, and that it has a significant staff with broadly delegated powers.[418] There can be little doubt that the NSC is permanent and that its staff is significant.[419] Although one could argue that the NSC Staff's powers are not "broadly delegated," experience has demonstrated that the NSC Staff exercises significant power to direct members of the executive branch.[420]

In sum, if the NSC has any functions other than "advising and assisting" the President, it must be considered a separate agency.[421]

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[412] The NSC's fluid role may also present an argument for it to be given non-agency status. The courts, however, have consistently looked to the statutory powers of an entity when making the agency determination. To reevaluate the NSC's status every four years depending on the particular use to which a President is putting the agency would create a great deal of confusion.

[413] 917 F.2d 581, 585 (D.C. Cir. 1990).

[414] 981 F.2d 1288, 1289 (D.C. Cir. 1993).

[415] *Id.* at 1244.

[416] *Id.*

[417] *See id.*

[418] *Id.*

[419] *See* FEDERAL STAFF DIRECTORY, *supra* note 50, at 20–22.

[420] *Meyer,* 981 F.2d at 1294; *see* SHOEMAKER, *supra* note 53, at 21–22.

[421] Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971). Where there is the possibility of misdesignating a record, the court's holding should ensure that error is made on the side of making it a federal record, rather than a presidential one. This is because judicial review is available under the FRA and not under the PRA. See *supra* notes 22 and 28 and accompanying text for a discussion of judicial review under the records acts. If the initial error is made on the side of presidential records designation, there is little chance it will be remedied, since no independent body can review presidential records designation. *Id.*

Although this determination may seem complicated by the fact that each President uses the NSC in a distinct manner, this dilemma can be resolved if one looks at the specific role of the NSC Staff in the effectuation of United States national security policy. As the United States District Court for the District of Columbia made clear in *Rushforth v. Council of Economic Advisors*, when it determined that despite identical statutes the CEQ and CEA were not both agencies, one must look beyond the words of the statute creating an entity when determining if it is an agency.[422]

Even under its new argument, that the NSC is not an agency at all, the defendants concede that from the time FOIA took effect in 1975 until the present, the NSC treated at least some of its records as agency records.[423] Thus, the court has ample evidence that some of the NSC's functions led numerous administrations to believe that FOIA applied to it.[424] It is therefore appropriate for the court to closely examine those functions and compare them with other entities that have been determined to be agencies, and in doing so, the court will find that the NSC Staff does not pass the *Soucie* "sole function" test and is therefore not an entity that exists solely to advise and assist the President.[425] Thus, the District of Columbia Circuit should require that NSC Staff comply with FOIA.

A finding that the NSC Staff operates as an agency subject to the FRA and FOIA would facilitate NSC recordkeeping and access without causing any danger to United States security, because under FOIA, documents can be properly withheld through clearly outlined exceptions.[426] In addition, such a decision would not hinder the NSA's ability to freely communicate with and advise the President; records generated by the NSA at his White House office, and that remain within the control of the White House, would not fall within the purview of the NSC Staff and would therefore not be subject to immediate FOIA scrutiny. They would instead receive the discretion available under the PRA.[427] A determination that the NSC's records are agency records follows from the determination that the NSC is an agency.

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[422] 762 F. Supp. 1038, 1041 (D.D.C. 1985).

[423] *See* Defendant's March 25, 1994, Motion to Dismiss, *supra* note 8, at 26 ("The NSC's past practice in responding to FOIA requests can be traced to the promulgation of FOIA regulations in February 1975 . . . .").

[424] *See id.* at 26–27.

[425] *See Soucie*, 448 F.2d at 1075.

[426] See *supra* notes 201–06 and accompanying text for a discussion of FOIA exceptions.

[427] *See* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980).

When comparing the NSC to those entities that have or have not been found to be agencies, the court should follow the *Soucie* model, drawing the clearest possible line between what is and what is not an agency or an agency record, so that those maintaining the records system and those trying to use it to obtain documents can be spared from vague rules that send them to the courts for clarification at every turn.Separation of the NSA and Council documents can occur as each unit has distinct functions. The Council meeting minutes and other Council documents could be kept apart from the documents used and generated by the Staff and lower level committees. For example, the pleadings demonstrate that the NSC uses a separate e-mail system from other units of the EOP.[428] Distinguishing NSA documents from NSC Staff documents, though a challenging task, is no more difficult than distinguishing CEA "presidential" documents from the federal documents created by related agencies. The Court in *Soucie v. David*, by articulating the "sole function" test, and Congress, by choosing to incorporate that test into FOIA, sought a clear distinction between agencies and non-agencies, so that records preservation, management and access could be as efficient as possible. Because of the overlap in responsibilities between agencies and presidential advisors, that task is not as easy as it seems.

B. *The NSC Staff Is Not a Hybrid*

Were the District of Columbia Circuit to declare that the NSC, including the NSC Staff, is a "hybrid" entity, and thus, some of its records are presidential and some are federal (agency) records, the decision would directly controvert *Soucie*. In addition, it would create a need for records segregation of a different type. It would require a segregation mechanism even more complex because the line would not be drawn between the NSA, the Council and the Staff. Instead each

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[428] Anna K. Nelson, *Foreign Policy Records and Papers: A Case Study of the Preservation and Accessibility of One Group of Documents*, 21–22 (1977) (on file with the *Boston College Law Review*).

> [The Staff Secretary of the NSC] noted that there were two separate security files. The institutional Files "contain all National Security Study Memoranda and Decision Memoranda and all reports and recommendations prepared for the Council. These files all include minutes of NSC sub-group meetings, briefing papers, and material related to NSC organizations." In addition to these files there are non-institutional files maintained by NSC Staff. [The Staff Secretary of the NSC] described these as materials used to brief the President, records of negotiations with foreign governments, correspondence with foreign heads of state, etc. These papers, regarded as presidential papers, are filed separately and will leave the White House with the President.

Id.; *see Armstrong II*, 1 F.3d 1274, 1279 n.2 (D.C. Cir. 1993).

record would be evaluated to determine if it was created in furtherance of one of the NSC's "statutory" (agency) functions or "advisory" functions, and then would be designated as an agency record in the former case and a presidential record in the latter.[429] Such a decision leaves too much discretion in the hands of the records officers at the NSC and creates a situation similar to that found unacceptable by Congress under the original APA, where administrations used the records legislation more to withhold than to disclose.[430] The court should not find that the NSC is a hybrid, which creates both federal and presidential records, for that would create the impossible task of determining which records fall into which category.

In the past, defendants have asserted that the NSC employees have sufficient information to enable them to distinguish presidential from federal records.[431] NSC records officials are instructed to decide, document by document, whether an employee created a document in connection with the "work of the . . . NSC" or rather, whether it was created for the President, the NSA, or the Deputy NSA "independently" of the meetings, policy and staff actions of the NSC.[432] If an NSC staff member creates a document, it is difficult to imagine how it could be considered "independent" of the NSC. Similarly, if the Council creates a document, it is clearly not "independent" of the meetings, policies and staff actions of the NSC.[433] A close examination of the guidelines reveals that they are virtually meaningless because they provide no helpful way to distinguish between presidential and federal records.[434] In addition, as Congress acknowledged when passing FOIA, a strong incentive exists for each individual employee to designate all records as presidential, since the PRA provides for such limited

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[429] *See* WHITE HOUSE OFFICE STAFF MANUAL E-1 (1988).

[430] See *supra* notes 202–03 and accompanying text for a discussion of the APA and its legislative history.

[431] WHITE HOUSE OFFICE STAFF MANUAL, *supra* note 429, at E-1. The White House Office Staff Manual's only instructions on the issue of presidential versus federal records are as follows. The records of the National Security Council staff are federal records if they were received or created in connection with the work of the statutorily-created National Security Council (including any interagency groups included under National Security Council auspices). *Id.* Additionally, the NSC's internal administrative records are federal records. *Id.* The records of the National Security Council staff are presidential records if they were received or created for the President, the Assistant to the President for National Security, his Deputy or a member of the White House staff independently of any meeting or policy and staff actions of the NSC or its various groups. *Id.*

[432] *Id.*

[433] *See id.*

[434] *See id.*

public access (when compared with the FRA and FOIA).[435] Thus, the court should require that the guidelines be clear, and that the line between federal and presidential records be established along some solid line, rather than along amorphous clauses such as "in connection with" versus "independent of," which in effect leave total discretion to the records designation officials and provide no guarantee of access to the public.[436]

C. *The NSC Staff Is Not Merely an "Advisory" Body*

The District of Columbia Circuit should also reject the option of holding that no part of the NSC is an agency, and thus that its records are covered by the PRA, not the FRA.[437] Although this solution might seem the simplest, the court's duty is not to find the simplest or most politically expedient solution, but rather, to find the fairest, most correct, yet feasible interpretation of the statute.[438] To find that the NSC creates no federal records would controvert both the clear language of FOIA and the PRA, and the intent of all the records statutes to provide a maximum of access to the public within the limits of national security and presidential power.[439] The court in *Soucie*, however, rejected the idea that an entity that exists to "advise and assist" the President is only partially exempt from the FRA.[440] Thus, the fact that the President directs the NSC in its functions and seeks advice from it does not preclude it from being an agency.[441] In *Meyer v. Bush*, the court reasoned that one can describe any executive branch entity as "assisting" the President, because he is the Chief Executive.[442] Con-

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[435] See *supra* notes 168–76 and accompanying text for a discussion of access to records under the Presidential Records Act.

[436] *See* WHITE HOUSE OFFICE STAFF MANUAL, *supra* note 429, at E-1.

[437] This is the path proposed by the defendants. *See* Defendant's March 25, 1994, Motion to Dismiss, *supra* note 8, at 1.

[438] Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987) ("[W]e should act under the assumption that Congress intended its enactment to have a meaningful effect and must, accordingly, construe it so as to give it such effect.") (citing cases).

[439] *See* 5 U.S.C. § 552 (1988) (directing that agency records be made available to the public); § 552(f) (defining an agency as any "authority" of the U.S. government, including entities within the EOP, and excluding only the "immediate" staff of the President); 44 U.S.C. § 2201 (1988) (directing that only records created by those who advise and assist the President be presidential records).

[440] *See* Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971).

[441] *See id.*

[442] 981 F.2d 1288, 1293 (D.C. Cir. 1993).

> Every action taken by an executive branch official can be described as "assisting" the President. On the other hand, the line cannot be drawn to include all those [as agencies] who direct others in the executive branch because, contrary to the

sequently, to extend non-agency status to the NSC would stretch the PRA beyond any logical boundary.[443]

The defendants' argument, in fact, proves too much. They assert that the NSC, in its entirety, is an "arm" of the President because he has the power to direct it.[444] They assert that because the Council is made up of the President's top advisors, the Staff cannot be considered an agency.[445] In the same breath, they assert that carrying out presidential responsibilities is an NSC function.[446] The flaw in these arguments is that they apply not only to every entity within the EOP, but also to many executive branch departments, such as the Department of State, which is indisputably subject to FOIA.[447] Recent Clinton Administration memoranda, which assert that the NSC is merely advisory, pale in comparison to the NSC's forty years of history and nearly twenty years of partial FOIA compliance.[448]

D. *The E-mail Documents on the NSC System Contain Agency Records*

Defendants would prefer that the court use a "control" test, which would make a record presidential if it is generated by the NSC Staff but controlled by the NSA.[449] Thus, the defendants would have the origination of the document be irrelevant to its status as "agency record" or presidential record.[450] Though there is support for use of "control" as a factor in determining whether a record is an agency record, in this instance, using "control" as the single determining factor would create an enormous incentive for NSC staffers to send any "embarrassing" document over to the NSA to prevent its disclo-

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> legislative history and *Kissinger*, under that approach the White House staff would be an agency.

Id.

[443] *See id.*

[444] Defendant's March 25, 1994, Motion to Dismiss, *supra* note 8, at 23.

[445] *Id.*

[446] *Id.*

[447] Afsher v. Department of State, 702 F.2d 1225, 1228–29 (D.C. Cir. 1983).

[448] Memorandum from William Itoh, Executive Secretary, NATIONAL SECURITY COUNCIL (Mar. 25, 1994) (stating that the NSC is not subject to FOIA and revoking the NSC's existing FOIA guidelines), *in* Defendant's March 25, 1994, Motion to Dismiss, *supra* note 8, at ex. 22.

[449] Government's Opposition and Reply at 37–49, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89–142). Under the defendant's analysis, the NSC's "unique institutional structure" requires that records generated by NSC Staff, in the performance of their advisory function, be controlled by the National Security Advisor, an official who is outside the NSC and whose sole function is to advise and assist the President. Thus, defendants conclude, "records controlled by non-agency entities [the National Security Advisor] are not agency records even when they were initially generated by agency [NSC] staff." *Id.*

[450] *See* WHITE HOUSE MANUAL, *supra* note 429, at E-1.

sure.[451] FOIA's broad scope and specific, delineated, exceptions were designed to eliminate such loopholes.[452]

Where communications pass between the White House office and the NSC, the documents should be considered federal records if they come into the control of, or are relied upon by, the NSC or its Staff. Thus, the NSA communications with the President, which would not be communicated to or relied upon by the NSC or its Staff, would remain under the PRA. This would comport with the intent of the FRA and FOIA.[453] Those statutes sought to provide for public access to records used in the agency decision-making process.[454] Thus, it is logical to require that documents relied upon by the agency members also be available to the public.

The Supreme Court held in *Kissinger* that certain documents generated by the National Security Advisor which remained within his control and were not relied upon by the NSC Staff were presidential records.[455] Had the telephone logs at issue in that case been in the possession of, or even "related to" the NSC, the Court indicated that it might have come to a different conclusion.[456] Thus, the Court has indicated that it is inclined to draw the line between records generated by and within the control of the NSA, and those generated by and relied upon by the statutorily created NSC.[457] Such a distinction is the simplest and clearest to make among a host of less-than-perfect options. There are cases in which non-agency records become agency records by virtue of their use by an agency.[458] The court should, however, avoid the quagmire it would enter were it to try to find a way to distinguish between one NSC Staff record and another.

The *Armstrong* case was prompted by the Iran-Contra scandal.[459] Were it not for Oliver North's escapades, and the attention drawn by them to the electronic mail system, this litigation might never have

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[451] See *supra* notes 305–25 and accompanying text for a discussion of the definition of an agency record.

[452] See *supra* notes 200–21 and accompanying text for a discussion of congressional intent in passing FOIA.

[453] *Id.*

[454] *Id.*

[455] *See* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 155–56 (1980).

[456] *See id.* at 156.

[457] *See id.*

[458] See *supra* notes 305–25 and accompanying text for a discussion of such cases. In *Kissinger*, the Court held that once agency records have been removed from the agency to whom the FOIA request was made, they cannot be retrieved pursuant to a FOIA request. 445 U.S. at 156–57. In this case, the e-mail is still within the control of a federal agency (the National Archives), and the National Archives was named in the FOIA request. Amended Complaint at 1, Armstrong v. Bush, 721 F. Supp. 343 (D.D.C. 1989) (No. 98–142).

[459] See *supra* notes 326–77 and accompanying text for a discussion of the *Armstrong* litigation.

been brought.[460] It could be argued, then, that this entire issue is a red herring. The NSC has been reined in and will no longer be conducting covert operations, so the treatment of its records as presidential or federal is of little consequence. This argument does not acknowledge, however, that the NSC plays an essential role in the formulation of United States foreign policy. Furthermore, as the complexity of national security issues increases, the NSC and its Staff, as the filter for high-level national security policy deliberations and implementation, are likely to take on an even greater role in the direction of the nation.[461] Consequently, public access to NSC records is likely to take on greater importance as well.

At the heart of our democracy is the notion that unchecked power will be abused, so we should be vigilant and "submit ourselves to rulers if only under rules."[462] The facts of *Armstrong* again demonstrate that records, particularly unflattering ones, will not be preserved or disclosed voluntarily. The defendants in *Armstrong* assert that "active oversight" by the Archivist, combined with completely voluntary disclosure rules, should be the "principle enforcement mechanism" of records preservation at the NSC.[463] In her declaration to the court, however, Deputy Archivist Claudine Weiher stated that the National Archives and Records Administration has "no role in the determination of whether a particular document is a 'record.'"[464] She also stated that it is not the Archive's function to "maintain documents in any particular physical form."[465] Thus, the Archivist has not demonstrated an ability to ensure preservation and disclosure of NSC documents.[466] If democratic principles of government by the people are to be upheld, the courts must intercede and enforce statutes passed by the legislature that ensure that the people know how they are being governed.

E. *Broader Concerns About the Treatment of Electronic Data Both Now and in the Future*

The *Armstrong* case raises one further area of concern for those creating and seeking access to government records. Although the analysis of this Note has focused on one specific legal issue in the area

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460 *See Armstrong II*, 1 F.3d at 1283 n.7.

461 SHOEMAKER, *supra* note 53, at 21–27.

462 Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

463 Appellant's Brief at 39, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89-142).

464 Declaration of Claudine Weiher at 3, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89-142).

465 *Id.*

466 *See id.*

of records preservation, there is cause for much broader attention to the efforts at preservation of our historical heritage. This case provides only an isolated example of how those responsible for records preservation have not addressed electronic mail and the electronic media in general. The electronic age has brought with it a host of problems related to record keeping.[467] Although Congress, when enacting the Federal and Presidential Records Acts, intended to provide for situations involving the most modern methods of records creation and preservation, as well as for those that had not yet been created, the statutes are, nonetheless, showing their age.[468]

For example, the District of Columbia Circuit's opinion in *Armstrong II* indicates that if the electronic mail systems at the EOP are reconfigured to print out all the information regarding a specific electronic document, then the paper copy would be adequate and the electronic copy could be disposed of as an "extra copy."[469] Most people who are familiar with electronic data, however, would agree that a paper "copy" of an electronic document is not a copy at all. For historians, researchers and librarians, printing out a copy of an electronic record for research purposes is much like translating a document from standard English into Braille.[470] As is evidenced by the searches already performed on the e-mail tapes for the benefit of Casper Weinberger and others who sought information from them, electronic records are most useful in their electronic form.[471] Historians and other researchers should have access to records in the same form in which they were created and used by those who made history.

The fact that the Archivist at the time of this litigation did not even have a machine capable of reading the e-mail tapes is an indication of the lack of attention this area has received.[472] How can the Archivist meet the goals of the PRA, FRA and FOIA if he or she cannot even read the records? Those who control the information about our government can control what we know about how we are governed. The seemingly endless growth in bureaucracy compounds the chal-

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[467] *See Armstrong II*, 1 F.3d at 1283 & n.7.

[468] 44 U.S.C. §§ 2201, 3301 (1988).

[469] *See Armstrong II*, 1 F.3d at 1283 (implying that if "the paper versions include all significant material contained in the electronic records," the electronic version could be treated as an extra copy and destroyed).

[470] Interview with Anthony Farley, Professor, Boston College Law School, Newton, Mass. (Nov. 1993).

[471] Armstrong v. Executive Office of the President, 830 F. Supp. 19, 21 (D.D.C. 1993).

[472] Defendant's Response to Interrogatories at 6, *Armstrong II*, 1 F.3d 1274 (D.C. Cir. 1993) (No. 89-142).

lenges facing those who would examine and inform us of our history. If we ever truly hope to receive answers to the recurring questions "Who knew what and when?" or "Why did this happen?" we will have to pay closer attention to the changing realities of information creation, dissemination and preservation in an electronic age.

VII. Conclusion

Our democracy is founded on the notion that the public has a right to know, within reason, what its government is doing and how decisions are being made that will affect the lives of the nation's citizens. The attempt by the Reagan, Bush and Clinton Administrations to avert public disclosure of NSC documents runs counter to that concept, and to the intent of Congress in upholding and affirmatively protecting that principle through the FRA, PRA and FOIA. Furthermore, presidential interests in maintaining secrecy are not sufficiently justified by national security concerns, which are met by FOIA exemptions, nor by separation of powers issues, to warrant a judicial grant of total discretion to the President in this area. Therefore, the court should fulfill its duty to the Congress, to the President, and to the public, by finding that the NSC Staff operates as an agency so that its records are subject to FOIA, but that the NSA and the Council operate solely to advise the President, and are thus subject only to the PRA. Such a finding would provide the President with ample protection for confidential advice, and would ensure that the NSA, the NSC and the NSC Staff remain useful tools for the President and the nation in implementing our foreign policy. At the same time, such a finding would afford an appropriate level of accountability to the American people for decisions made and actions taken on their behalf.

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