IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MAIN STREET LEGAL SERVICES, INC., ***Plaintiff*,** **v.** **NATIONAL SECURITY COUNCIL,** ***Defendant*.**	**Civil Action No. 13-CV-00948** **Date of Service: May 24, 2013**

PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

INTRODUCTION **1**

FACTUAL BACKGROUND **1**

I. The National Security Council/National Security Staff **1**

II. Plaintiff's FOIA Requests **2**

SUPPLEMENTAL STANDARDS OF REVIEW **3**

ARGUMENT **4**

I. THE NSC IS AN AGENCY SUBJECT TO THE FOIA **4**

A. The FOIA Definition of "Agency" Expressly Includes the Executive Office of the President 4

B. Legislative History Confirms Congressional Intent that the NSC is an Agency 4

C. The Supreme Court Expressly Stated that the NSC was Subject to the FOIA 5

D. The NSC Has Admitted it is an Agency Subject to the FOIA 6

E. Defendant's Argument Conflicts with Other Laws 6

II. NSC'S CONSTITUTIONAL CONCERNS ARE ILLUSORY **7**

III. THE NSC IS AN AGENCY UNDER THE "SOLE FUNCTION" TEST **8**

A. The "Sole Function" Standard 9

B. The NSC Has Significant Functions Beyond Advising the President 10

C. NSC Statutory Authorities 12

D. Publicly-Available Presidential Directives, Executive Orders, and Regulations 14

E. Additional Nonpublic NSC Authorities in Defendant's Possession 18

IV. *ARMSTRONG* IS ERRONEOUS AND OUTDATED **19**

A. Armstrong Applied the Wrong Test and Applied it Incorrectly 21

B. *Armstrong is* Outdated and Applying it May Require Discovery 23

CONCLUSION **25**

TABLE OF AUTHORITIES

CASES

Alexander v. Federal Bureau of Investigation, 971 F. Supp. 603 (D.D.C. 1997) 7
Armstrong v. Exec. Office of the President, 877 F. Supp. 690 (D.D.C. 1995) 20
Armstrong v. Exec. Office of the President, Office of Admin.,
1 F.3d 1274, 1291 (D.C. Cir. 1993) 8
Armstrong v. Executive Office of the President, 90 F.3d 553 (D.C. Cir. 1996) .... passim
ATSI Commc'ns, Inc v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) 3
Citizens for Responsibility & Ethics in Wash. v. Office of Admin.,
2008 WL 7077787 (Feb. 11, 2008) 4, 19, 23
Dong v. Smithsonian Inst., 125 F.3d 877, 878 (D.C. Cir. 1997).. 6
Fowlkes v. Thomas, 667 F.3d 270 (2d Cir. 2012).. 4
Halperin v. Nat'l Sec. Council, 452 F. Supp. 47 (1978)... 6
Kamen v. American Tel. & Tel. Co., 791 F.2d 1006 (2d Cir. 1986).. 3
Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980) 3, 5, 9
L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 429 (2d Cir. 2011).. 3
Makarova v. U.S., 201 F.3d 110 (2000)... 3
Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993) 10, 20, 22, 23
Pac. Legal Found v. Council on Envtl. Quality, 636 F.2d 1259 (D.C. Cir. 1980) 14
Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).. passim
Willens v. Nat'l Sec. Council, 726 F. Supp. 325 (D.D.C. 1989).. 6

STATUTES

5 U.S.C. § 552... 1
5 U.S.C. § 552(f)(1) 4
5 U.S.C. § 552a(a)(1) 6
44 U.S.C. §§ 2201-2007 7
44 U.S.C. § 2204.. 8
50 U.S.C. § 3021 (formerly 50 U.S.C. § 402) 1
50 U.S.C. § 3021(a) (formerly 50 U.S.C. § 402(a)) 2
50 U.S.C. § 3021(b) (formerly 50 U.S.C. § 402(b)) 2, 12
50 U.S.C. § 3021(c) (formerly 50 U.S.C. § 402(c)) 2
50 U.S.C. § 3021(h) (formely 50 U.S.C. § 402(h)) 13
50 U.S.C. § 3021(i) (formerly 50 U.S.C. §402(i))... 2

RULES

Fed. R. Civ. P. 12(b)(1).. 3
Fed. R. Civ. P. 12(b)(6).. 3

REGULATIONS

32 C.F.R. pt. 2101 .... 2, 6, 7
32 C.F.R. pt. 2103 2
47 C.F.R. pt. 201- pt. 216 16
47 C.F.R. pt. 211 2
47 C.F.R. § 211.6(c) 17
47 C.F.R. § 211.6(g) 17
47 C.F.R. § 213.7(f) 17
47 C.F.R. § 213.7(g) 17
40 Fed. Reg. 3,612 (Jan. 23, 1975) 6
40 Fed. Reg. 40,794 (Sept. 3, 1975) 6
40 Fed. Reg. 7,316 (Feb. 19, 1975) 6
63 Fed. Reg. 25,736 (June 8, 1998) 6, 20

EXECUTIVE MATERIALS

Presidential Policy Directive-1 (Feb. 13, 2009) 2, 14, 15, 18
Reorganization Plan No. 4 of 1949, 14 Fed. Reg. 5227, 63 Stat. 1067 4
Exec. Order 12,829, 58 Fed. Reg. 3,479 (Jan. 6, 1993) 15
Exec. Order 13,587, 76 Fed. Reg. 63,811 (October 7, 2011) 16
Exec. Order No. 13,603, 77 Fed. Reg. 16,651 (Mar. 16, 2012) 16
Exec. Order No. 13,618, 77 Fed. Reg. 40,779 (July 6, 2012) 16
Exec. Order. 13,470, 73 Fed. Reg. 45,325 (July 30, 2008) 16
Dep't of Defense, Directive 3115.13, Dec. 9, 2010 11
U.S. Dep't of Justice, Office of Inspector Gen.,
A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq 17 (2008) 10
National Security Council-Agency Status Under FOIA, 2 Op. O.L.C. 197 (1978), *withdrawn*, Memorandum from Walter Dellinger to Alan J. Kreczko, Legal Adviser, NSC (Sept. 20, 1993) 5, 11
Applicability of the Privacy Act to the White House, 24 Op. O.L.C. 178 (2000) 7

OTHER LEGISLATIVE MATERIALS

H.R. Rep. No. 876, 93d Cong., 2d Sess. (1974) 5
H.R. Rep. No. 93-1200, 93rd Cong. 2d sess. (1974) 5, 9
H.R. Rep. No. 1487, 95th Cong., 2d Sess. (1978) 7
U.S. Senate Armed Serv. Comm., *Inquiry into the Treatment of Detainees in U.S. Custody* (2008) 11
Intelligence Activities Relating to Iraq Conducted by the Policy Counterterrorism Evaluation Group and the Office of Special Plans within the Office of the Under Secretary of Defense for Policy, S. Select Comm. on Intelligence, 110th Cong. (2008) 13

OTHER AUTHORITIES

Cong. Research Serv., *National Security Council: An Organizational Assessment* (2011)......... 15

Decl. of Leon E. Panetta, Director, CIA, June. 8, 2009,
ACLU v. Dep't of Def. 04-CV-4151 (S.D.N.Y.).. 11

Dep't of Justice, Press Release, *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President*, Aug. 24, 2009.. 11

INTRODUCTION

This case arises from the National Security Council's ("NSC") improper withholding of records relating to the NSC's central role in the killing of U.S. citizens and others without judicial process, which Plaintiff requested pursuant to the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 552. Defendant now asks this Court to hold that the NSC is not an "agency" subject to the FOIA based on the conclusory factual assertion that the NSC "wields no substantial authority independent of the President" while failing to inform the Court of the full scope of the NSC's legal authorities and ignoring the overwhelming evidence that the NSC is an agency under the FOIA. The plain language of the FOIA, its legislative history, Supreme Court precedent, and decades during which the NSC had FOIA regulations and an active FOIA program all lead to the conclusion that the NSC is an agency under the statute. The Court should reject Defendant's invitation to adopt the erroneous and outdated analysis of *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996), which departed from the FOIA and rests on standards not recognized by this Circuit. Under controlling law, the NSC is, and should remain, an agency subject to the FOIA.

FACTUAL BACKGROUND

I. The National Security Council/National Security Staff

Congress created the NSC in the National Security Act of 1947, 61 Stat. 495 (codified at 50 U.S.C. § 3021 (formerly 50 U.S.C. § 402)).[1] The NSC includes the National Security Council proper, whose Congressionally delegated functions include advising the President "with respect to the integration of domestic, foreign, and military policies relating to the national

[1] The Office of Law Revision Counsel has announced an editorial reclassification of Title 50 of the U.S. Code, see http://uscode.house.gov/editorialreclassification/reclassification.html. For the avoidance of confusion, Plaintiff cites to both the current and former sections.

security," assessing and appraising the "objectives, commitments, and risks of the United States," and considering policies on matters of common interest" to agencies "concerned with the national security." *Id*. at § 3021(a)-(b) (§ 402(a)-(b)). Congress provided for a National Security Staff ("NSS"). *See id*. at § 3021(c) (§ 402(c)). Congress also established an NSC Committee on Foreign Intelligence, whose delegated functions include establishing policies relating to the conduct of U.S. intelligence activities, and an NSC Committee on Transnational Threats, which is tasked with "coordinat[ing] and direct[ing] the activities" of the U.S. Government relating to combating "transnational threats," *id*. at § 3021(h)-(i) (§ 402(h)-(i)). The President sits on neither of these Committees. *See id.* The President also establishes and delegates authorities to NSC committees including a Principals Committee, a Deputies Committee, and a latticework of Interagency Policy Committees. *See* Presidential Policy Directive-1 (Feb. 13, 2009). The President further delegates authority to the NSC/NSS through Executive Orders in areas such as intelligence, communications, and cyber-security, see *infra* Part III.D. An unknown number of other Presidential delegations of authority to the NSC/NSS are documented in nonpublic records in the control of the Defendant. The NSC also independently promulgates regulations. *See, e.g.*, 47 C.F.R. pt. 211 (NSC telecommunications regulations); 32 C.F.R. pt. 2101 (NSC Privacy Act regulations); 32 C.F.R. pt. 2103 (NSC Mandatory Declassification Review regulations).

II. Plaintiff's FOIA Requests

Plaintiff submitted a FOIA request to Defendant dated November 27, 2012 that requested two separate sets of records. Compl. ¶ 6. First, Plaintiff requested all records related to the killing of U.S. citizens and foreign nationals by drone strike. *Id.* Second, Plaintiff requested all NSC meeting minutes taken in the year 2011. *Id.* In a letter dated December 14, 2012, but

postmarked January 18, 2013, Defendant responded to Plaintiff's FOIA request by simply asserting that the NSC was not subject to the FOIA and withheld the requested records. *Id.* ¶¶ 7-8. The facts regarding Plaintiff's FOIA requests are undisputed. Def.'s Mot. Dismiss, at 1-2.

SUPPLEMENTAL STANDARDS OF REVIEW

Defendant moves to dismiss this action pursuant to Federal Rule Civil Procedure 12(b)(6) for "failure to state a claim on which relief can be granted." As Defendant notes, in reviewing a Rule 12(b)(6) motion, a court should accept as true factual statements alleged in the complaint and "draw all reasonable inferences" in plaintiff's favor. *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 429 (2d Cir. 2011). In addition to the complaint, the court must also consider "documents possessed by or known to the plaintiff and upon which it relied in bringing the suit." *ATSI Commc'ns, Inc v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

Defendant also alternatively requests dismissal pursuant to Rule 12(b)(1) for a lack of subject matter jurisdiction. Def.'s Mot. Dismiss, at 3 n.3. The alternative 12(b)(1) request acknowledges that Defendant's challenge is to the Plaintiff's fundamental *legal* assertions that the NSC is an agency under the FOIA and that the NSC is "improperly withholding" requested records. *Id*. (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) stating that federal jurisdiction under the FOIA depends upon a showing that an agency has (1) 'improperly'; (2) 'withheld' (3) 'agency records'"). In reviewing a 12(b)(1) challenge, a court should construe all ambiguities and draw all inferences in plaintiff's favor and may rely upon "evidence outside the pleadings." *Makarova v. U.S.*, 201 F.3d 110, 113 (2000). Courts have also "permitted discovery of facts demonstrating jurisdiction" by plaintiffs responding to Rule 12(b)(1) challenges, especially "where the facts are peculiarly within the knowledge of the opposing party," *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006 (2d Cir. 1986),

including in FOIA cases. *See, e.g., Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 2008 WL 7077787 (D.D.C. Feb. 11, 2008) (permitting discovery into facts relevant to whether defendant was an "agency" under the FOIA).

ARGUMENT

I. THE NSC IS AN AGENCY SUBJECT TO THE FOIA

Defendant's Motion to Dismiss rests upon a bald assertion that the NSC is not an "agency" under the FOIA. However, the text of the FOIA, its legislative history, Supreme Court precedent, and past and current NSC regulations and practices all establish that the NSC is an agency subject to the FOIA.

A. The FOIA Definition of "Agency" Expressly Includes the Executive Office of the President

The FOIA by its plain language applies to establishments within the Executive Office of the President, which includes the NSC. *See* Reorganization Plan No. 4 of 1949, 14 Fed. Reg. 5227, 63 Stat. 1067. The FOIA defines "agency" to include "any executive department…or other establishment in the executive branch of the Government (including the Executive Office of the President)." 5 U.S.C. § 552(f)(1). Where, as here, the text of the statute is unambiguous, no further inquiry is required. *See Fowlkes v. Thomas,* 667 F.3d 270, 272 (2d Cir. 2012) ("Where the words of a statute are unambiguous, our inquiry is generally confined to the text itself").

B. Legislative History Confirms Congressional Intent that the NSC is an Agency

Even if consideration of the FOIA's legislative history were deemed necessary, notwithstanding its clear language, it would confirm that Congress intended the NSC to be an "agency" under the FOIA. When Congress created the current definition of "agency" in the 1974 FOIA amendments, the House committee that drafted the language stated that

"Establishment in the Executive Office of the President, as used in this amendment, includes such functional entities as…the National Security Council." H.R. Rep. No. 876, 93d Cong., 2d Sess. 8 (1974).

When the 1974 bill went to a House and Senate conference, the conference report noted that the House definition of "agency" was broader than the Senate version and that "*the conference substitute follows the House bill*," H.R. Rep. No. 93-1380, 93rd Cong. 2d sess. 14 (1974) (emphasis added). Moreover, the report noted that by using "Executive Office of the President" the intent was "the result reached" in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), which held that the White House Office of Science and Technology was an agency subject to FOIA because its "*sole* function" was not to advise and assist the President. As discussed below, the current legal authorities of the NSC provides overwhelming evidence that the NSC remains an "agency" under the *Soucie* "sole function" standard, Part III *infra*.

C. The Supreme Court Expressly Stated that the NSC was Subject to the FOIA

Moreover, the Supreme Court has stated that "the National Security Council is an executive agency to which FOIA applies." *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 156 (1980); *see also id.* at 146 (stating that the NSC is "an agency to which the FOIA *does* apply") (emphasis in original). The *Kissinger* court, citing the 1974 legislative history's reference to the *Soucie* "sole function" test, held that records created by Henry Kissinger while acting solely in the capacity of a Presidential adviser were not subject to the FOIA. While attempting to rely upon *Kissinger* as support for excluding the NSC from the FOIA, Def.'s Mot. Dismiss, at 5-6, Defendant ignores that *Kissinger* explicitly distinguished the FOIA request for Kissinger's individual records, to which FOIA did not apply, from a FOIA request

for NSC records to which FOIA would apply. *See id.* at 156 (distinguishing the FOIA request at issue from a request for "National Security Council records").

D. The NSC Has Admitted it is an Agency Subject to the FOIA

In addition, the *Defendant* previously interpreted "agency" under the FOIA to include the NSC. A month after the 1974 FOIA amendments, the NSC issued proposed FOIA regulations. *See* 40 Fed. Reg. 3,612 (Jan. 23, 1975) ("These regulations are proposed under the [FOIA], as amended by [the 1974 FOIA Amendments]"). A month later, the NSC promulgated final FOIA regulations. *See* 40 Fed. Reg. 7,316 (Feb. 19, 1975). Thereafter, the NSC ran an active FOIA program and was a defendant in multiple FOIA lawsuits in which the NSC did not argue that it was categorically exempt from the FOIA. *See, e.g.*, *Willens v. Nat'l Sec. Council*, 726 F. Supp. 325 (D.D.C. 1989) (FOIA request for NSC records); *Halperin v. Nat'l Sec. Council*, 452 F. Supp. 47 (1978) (same). While the NSC removed its FOIA regulations in 1998, 63 Fed. Reg. 25,736 (June 8, 1998), the NSC's initial interpretation of the FOIA "lends additional support to the conclusion" that it is an agency. *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971).

E. Defendant's Argument Conflicts with Other Laws

The NSC's argument that it is not an agency under the FOIA also conflicts with the fact that the NSC has current Privacy Act regulations, 32 C.F.R. pt. 2101. This is relevant to the issue before this Court because the Privacy Act applies only to an "agency" and expressly incorporates the FOIA's definition of agency. *See* 5 U.S.C. § 552a(a)(1) ("the term 'agency' means agency as defined" in the FOIA); *see also Dong v. Smithsonian Inst.*, 125 F.3d 877, 878 (D.C. Cir. 1997) (stating the Privacy Act "borrows the definition of 'agency' found in FOIA"). In response to the passage of the Privacy Act in 1974, the NSC first proposed regulations "to implement the provisions of the Privacy Act," 40 Fed. Reg. 40,794 (Sept. 3, 1975), and

thereafter promulgated final Privacy Act regulations, 40 Fed. Reg. 47,746 (Oct. 9, 1975), which the NSC continues to maintain, 32 C.F.R. pt. 2101.[2]

Moreover, Defendant's treatment of NSC records as Presidential records rather than agency records subject to the FOIA is inconsistent with the text and legislative history of the Presidential Records Act of 1978 (the "PRA"). 44 U.S.C. §§ 2201-2007. When Congress passed the PRA in 1978, it was aware that the NSC was subject to FOIA because the NSC had adopted FOIA regulations and had an active FOIA program. In passing the PRA, Congress expressly stated that any agency that "is now subject to FOIA shall remain so." H.R.Rep. No. 1487, 95th Cong., 2d Sess. 11 (1978). The PRA itself also explicitly excludes from its coverage records of an agency subject to the FOIA. *See* 44 U.S.C. § 2201(2)(B). Defendant's position that its records are Presidential records not subject to the FOIA runs directly counter to the PRA's text and the intentions of its "framers." *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 575 (D.C. Cir. 1996) (Tatel, J., dissenting).

II. NSC'S CONSTITUTIONAL CONCERNS ARE ILLUSORY

Defendant also attempts to escape the FOIA's plain language and clear precedent by suggesting that complying with the FOIA would raise separation of powers problems, risk "interference with the President's core constitutional functions," or endanger the President's "right to confidential communications." Def.'s Mot. Dismiss, at 5-6. These concerns are illusory. First, Defendant ignores the fact that pre-*Armstrong*, the NSC administered its FOIA

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[2] While one District Court opinion held that "agency" could be interpreted differently for the FOIA than for the Privacy Act, *Alexander v. Federal Bureau of Investigation*, 971 F. Supp. 603 (D.D.C. 1997), the Department of Justice ("DOJ") Office of Legal Counsel ("OLC") has rejected this interpretation. *See Applicability of the Privacy Act to the White House*, 24 Op. O.L.C. 178, 181-82 (2000) (stating the "Privacy Act language conclusively bars an interpretation that would attach different meanings to" the term "agency" in the Privacy Act as opposed to the FOIA).

program using a dual filing system in which *purely* Presidential records within the NSC's custody, which were not subject to the FOIA, were segregated from NSC's institutional agency records, which were subject to the FOIA. *See Armstrong v. Exec. Office of the President, Office of Admin.*, 1 F.3d 1274, 1291 (D.C. Cir. 1993). Defendant's implication that treating the NSC as an agency would result in FOIA plaintiffs rifling through Presidential communications is unfounded and underestimates the flexibility of the options available to this Court. Second, as Defendant is well aware, the FOIA provides robust and extensive exemptions such that "applying FOIA to the NSC presents little risk of improper intrusion into the President's exercise of his constitutional responsibilities." *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 579 (Tatel, J., dissenting) (describing relevant FOIA exemptions).

Third, in suggesting that "[s]imply knowing" that their "communications **could** be subject to disclosure" will chill the "candor" of advisers to the President, Def.'s Mot. Dismiss, at 6 (emphasis in original), Defendant ignores the fact that not only can those communications be disclosed, but they will be disclosed pursuant the PRA beginning only five years after the end of the relevant administration. 44 U.S.C. § 2204. Finally, Presidents presumably received "candid" advice from their advisers in earlier administrations during which the NSC complied with the FOIA, just as the current Executive presumably receives candid advice from his advisers in the Office of Management and Budget, the Office of Science and Technology Policy, and other Executive Office of the President entities, whose responsibilities include advising the President, but which are nevertheless subject to the FOIA.

III. THE NSC IS AN AGENCY UNDER THE "SOLE FUNCTION" TEST

Plaintiff respectfully submits that the unambiguous language of the FOIA, the NSC's past FOIA program, and the Supreme Court in *Kissinger v. Reporters Comm. for Freedom of the*

Press, 445 U.S. 136 (1980), are sufficient for this Court to find, as a matter of law, that the NSC is an agency under the FOIA. The Court may nevertheless conclude that it is necessary to assess independently the NSC's authorities in accordance with the "sole function" test.

A. The "Sole Function" Standard

The relevance of the "sole function" test derives from language in the FOIA's legislative history stating that by using "Executive Office of the President" Congress intended "the result reached" in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), that is, the "term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose *sole function* is to advise and assist the President." H.R. Rep. No. 93-1380, 93rd Cong. 2d sess. 14 (1974) (emphasis added).

Congress' endorsement of the "sole function" test as applied in *Soucie* illustrates that Congress intended a low hurdle for agency status. The *Soucie* court, in applying the Administrative Procedures Act definition of "agency," stated that if an entity's "*sole* function were to advise and assist the President" that might indicate that the entity "is part of the President's staff and not a separate agency." *Id.* at 1075 (emphasis added). If, on the other hand, an "administrative unit" has "substantial independent authority in the exercise of specific functions" this would confer "agency status." *Id.* at 1073.

Applying this standard, *Soucie* held that the White House Office of Science and Technology ("OST") was an agency subject to the FOIA simply on the basis that its statutory mandate included a *single* additional authority – "to evaluate scientific research programs of the various federal agencies" – that extended beyond its primary function "to advise and assist the President in achieving coordinated federal policies in science and technology." *Id.* at 1073-74. On the basis of this one authority, which the court noted indicated that Congress was

"delegating some of its own broad power of inquiry" the *Soucie* court concluded that the "OST's sole function" was not simply "to advise and assist the President," and therefore the OST was an agency. *Id.* [3]

As described in detail below, that the NSC is vested with broad, non-advisory functions and authorities and is therefore an agency is amply illustrated by its sprawling structure, its numerous delegated authorities from Congress and the Executive, and its intimate involvement in some of the most troubling assertions of government power, including drone killings and brutal interrogation techniques.

B. The NSC Has Significant Functions Beyond Advising the President

While Defendant attempts to characterize the NSC as a small group of cabinet officials directly advising the President with a few "staff" members, this is far from the truth. The NSC is an organizational behemoth, consisting of hierarchies of committees engaged in substantive policy formation and decision-making.[4] NSC authorities extend far beyond simply advising the President and it has significant independent authority delegated by Congress and the President.

[3] Further illuminating the "sole function" test, the *Soucie* court found that the OST record at issue, the so-called "Garwin Report," was an "agency record" subject to the FOIA despite the fact the OST created it *based on an explicit request from the President* to the OST to evaluate a federal program and despite the fact it "contained opinions, conclusions and recommendations *prepared for the advice of the President*." 448 F.2d at 1071.

[4] For example, an investigation into detainee interrogations noted that an NSC Policy Coordinating Committee (PCC) led by NSC staff and including agency representatives served as the primary forum for policy decision-making for detention issues. U.S. Dep't of Justice, Off. of Inspector Gen., *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* 17 (2008). Issues the PCC could not resolve were "bumped up" to the NSC Deputies Committee and if the Deputies were unable to decide, it was "raised to the [NSC] 'Principals'" Committee. *Id.* Authority is thus exercised at each level independent of the President. *See Meyer v. Bush*, 981 F.2d 1288, 1308 (J. Wald dissenting) (D.C. Cir. 1993) ("The President's delegation to the to Task Force of the authority to keep an issue from even reaching his desk is a clear indication of the Task Force's significant authority to deal independently with regulatory issues").

The significance of NSC authorities is highlighted by the gravity of their subject matter. It was "NSC officials," for example, who created the Special Access Program for the CIA's detention and "enhanced interrogation" program. Decl. of Leon E. Panetta, Director, CIA, ¶ 30, June. 8, 2009, ACLU v. Dep't of Def. 04-CV-4151 (S.D.N.Y.) (stating also that CIA is responsible for limiting access "in accordance with the NSC's direction"). NSC officials also *approved* the interrogation program that utilized torture and cruel, inhumane, and degrading treatment. *See, e.g.*, U.S. Senate Armed Serv. Comm., *Inquiry into the Treatment of Detainees in U.S. Custody* 16 (2008) ("[I]n the spring of 2002, CIA sought policy approval from the National Security Council").[5] The NSC created the charter for, and currently oversees, the High-Value Detainee Interrogation Group. *See* Dep't of Def., Directive 3115.13, Dec. 9, 2010 Encl. 1 (citing "National Security Council, 'Charter for Operations of Interagency High-Value Detainee Interrogation Group,' April 19, 2010").[6]

The Executive has also officially acknowledged that the NSC is at the center of the decisions to kill U.S. citizens and foreign nationals in drone strikes without judicial process. *See* John Brennan, Answers to Questions for the Record from Senate Select Committee on Intelligence 5 ["Brennan Responses"] (confirming central role of NSC in the "process of deciding to take such an extraordinary act");[7] Letter from Eric Holder, U.S. Attorney Gen., to Patrick J. Leahy, U.S. Congress, May 22, 2013 (acknowledging the killing of four U.S. citizens

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[5] See also the Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on the CIA's Detention and Interrogation Program 7 (2009), *available at* www.intelligence.senate.gov/pdfs/olcopinion.pdf (noting that the NSC "reaffirmed" in 2003 that the CIA interrogation program was "lawful and reflected administration policy").

[6] See also Dep't of Justice, Press Release, *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President*, Aug. 24, 2009.

[7] Available at http://www.intelligence.senate.gov/130207/posthearing.pdf.

in drone strikes). The Executive has officially acknowledged the responsibility of an NSC Committee on which the President does not sit. *See* Brennan Answers, at 5 (citing the NSC Principals Committee). Even if, as the press has stated, the President ultimately approves lists of individuals "nominated" for drone killing, there can be no more significant authority than the NSC compiling the list, culling names, and deciding who will and *who will not* be included.

C. NSC Statutory Authorities

In addition to advising the President, 50 U.S.C. § 3021(a) (formerly § 402(a)), Congress has expressly empowered the NSC with "additional functions" that include the "duty" to "*assess and appraise* the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security," and to "consider policies on matters of common interest to the departments and agencies of the Government concerned with the national security." 50 U.S.C. § 3021(b) (§ 402(b)) (emphasis added). This is precisely the type of inquiry power the *Soucie* court found satisfied the "sole function" test, but for the NSC this authority is just the tip of the iceberg.[8] *See* 448 F.2d at 1075.

Congress also established a Committee on Foreign Intelligence within the NSC that is tasked with "identifying the intelligence required to address the national security interests of the United States;" "establishing priorities (including funding priorities) among the programs, projects, and activities that address such interests and requirements;" and "*establishing policies* relating to the conduct of intelligence activities of the United States, including appropriate

[8] While these NSC authorities are "subject to the direction of the President" and the NSC is directed to "make recommendations to the President," that does not diminish the significance of Congress' direct delegation of power to the NSC to "assess and appraise" national security "objectives, commitments, and risks" in the same way that in *Soucie* the authority of the OST to evaluate federal scientific programs was sufficient to make the OST an agency even if, as with the "Garwin Report" at issue, the authority may be exercised at the direction of the President and indeed for the very purpose of advising the President. 448 F.2d at 1071.

roles and missions for the elements of the intelligence community and appropriate targets of intelligence collection activities." 50 U.S.C. § 3021(h) (§ 402(h)) (emphasis added).[9]

Moreover, Congress mandated that the NSC's Committee on Foreign Intelligence conduct annual reviews regarding U.S. national security and intelligence-gathering. 50 U.S.C. § 3021(h)(4) (402(h)(4)). The independent nature of these duties is underscored by the requirement that this NSC Committee report annually not only within the NSC, but also to an outside official, the Director for National Intelligence. 50 U.S.C. § 3021(h)(5) (402(h)(5)).

Congress further established an NSC Committee on Transnational Threats, whose broad mandate is "to coordinate *and direct* the activities" of the U.S. government relating to combating "transnational threats," and which Congress expressly directed to "identify transnational threats," "develop strategies to enable the United States Government to respond to [such] transnational threats," "*monitor implementation* of such strategies," "assist in the resolution of operational and policy differences among Federal departments and agencies in their response to transnational threats," "*develop policies and procedures* to ensure the effective sharing of information about transnational threats among Federal departments and agencies," and "*develop guidelines* to enhance and improve coordination of activities of

[9] As just one illustration of the substantial independent authority this provides to the NSC, the Senate Select Intelligence Committee found in 2008 that the authorization for conducting specific intelligence activities involving Department of Defense employees traveling to Rome to meet with Iranian intelligence officials to obtain evidence to support the 2003 invasion of Iraq came from the "broad authority" of the "National Security Council (*through the Committee on Foreign Intelligence*)" to "establish policies relating to the conduct of intelligence activities," "'including appropriate roles and missions for the elements of the intelligence community and appropriate targets of intelligence collection activities,'" which, the Senate Committee expressly noted were "specified authorities that were separate from and "*in addition to* 'performing such other functions as the President may direct." *Intelligence Activities Relating to Iraq Conducted by the Policy Counterterrorism Evaluation Group and the Office of Special Plans within the Office of the Under Secretary of Defense for Policy, S. Select Comm. on Intelligence*, 110th Cong. 9 (2008) (quoting National Security Act) (emphasis added).

Federal law enforcement agencies and elements of the intelligence community outside the United States with respect to transnational threats." 50 U.S.C. § 3021(i) (402(i)) (emphasis added). Congress has therefore delegated to this NSC Committee precisely the type of authorities the Defendant identifies – "coordinat[ing] federal programs and issu[ing] guidelines" – as sufficient to constitute substantial independent authority and to confer agency status. *See* Def.'s Mot. Dismiss, at 7-8 (citing *Pac. Legal Found v. Council on Envtl. Quality*, 636 F.2d 1259 (D.C. Cir. 1980) (holding the Council on Environmental Quality to be an agency subject to the FOIA)).

Further illustrating the breadth of the NSC's scope of non-advisory responsibilities, there are additional statutory examples of independent authorities and duties delegated by Congress to the NSC. *See, e.g.*, 50 U.S.C. § 3021(g) (formerly 402(g)) (establishing within the NSC a Board for Low Intensity Conflict directly empowered by Congress to "coordinate the policies of the United States for low intensity conflict"); 50 App. U.S.C. § 454(d)(3)(g) (Congress directing the NSC to advise the Director of the Selective Service System and mandating factors to be considered by the NSC in "the performance of its duties under this subsection").

D. Publicly-Available Presidential Directives, Executive Orders, and Regulations

The President has also delegated authority to the NSC/NSS. Under Presidential Policy Directive-1, "Organization of the National Security Council System," Feb. 13, 2009, for example, the President delegates significant independent responsibilities to the NSC/NSS.

The President establishes that the NSC Principals Committee, on which the President does not sit, shall be the "senior interagency forum for consideration of policy issues affecting national security" which shall record its "conclusions and decisions." *Id*. at 2-3. The President also delegates significant authority to the NSC Deputies Committee which shall "review and

monitor" the work of the NSC interagency process." *Id*. at 3 (emphasis added).[10] The President also directs that the NSC Deputies Committee shall focus on "policy *implementation*," shall conduct "[p]eriodic reviews of the Administration's major foreign policy initiatives." *Id*. at 3 (emphasis added). The President also delegates to the NSC Deputies Committee the significant authority of being "responsible for day-to-day crisis management" and that in doing so it will report not to the President, but to the NSC. *Id*. at 3-4. The delegation of power to the NSC Deputies Committee to draw "conclusions" and make "decisions" is also express. *Id*.

Finally, the NSC Deputies Committee is delegated the authority to establish NSC Interagency Policy Committees (IPC) to which the President assigns authority to "*[m]anage[]* the development and *implementation* of national security policies by multiple agencies of the United States Government." *Id*. at 4-5 (emphasis added). IPCs are the "main day-to-day fora for interagency coordination of national security" and have the authority to "*review and coordinate* the implementation of Presidential decisions in their policy areas." *Id*. at 5 (emphasis added).

Additional significant independent authority in a variety of areas is delegated to the NSC/NSS by Executive Order. The President has delegated to the NSC authority for "overall policy direction" for the National Industrial Security Program. Exec. Order 12,829, 58 Fed. Reg. 3,479 (Jan. 6, 1993); *see also id.* at §102(b)(1) (stating that the promulgation of directives binding on other agencies are "subject to the approval of the [NSC]"); *id.* at § 102(b)(3) (noting that decisions requiring changes to regulations "may be appealed to the [NSC]"); *id.* at § 102(b)(4) (authorizing the NSC to deny individuals access to classified information).

[10] The Congressional Research Service suggests that the use of "monitor" in President Obama's Directive is significant in that it "may indicate a determination to enhance the NSC's ability to oversee implementation of presidential decisions on national security issues." Cong. Research Serv., *National Security Council: An Organizational Assessment* (2011).

In the area of cyber-security, the President has established a Senior Steering Committee (with NSS representatives as co-chairs) to which he delegated authority to "exercise overall responsibility" for the "implementation of policies and standards" for safeguarding classified information on computer networks and provided that any "policy or compliance issues" that the Steering Committee could not resolve would be referred to the Deputies Committee of the NSC. Exec. Order 13,587, 76 Fed. Reg. 63,811 (Oct. 7, 2011).

The President has also delegated authority in the areas of intelligence and covert action, Exec. Order. 13,470, 73 Fed. Reg. 45,325 (July 30, 2008) (NSC authority to conduct periodic reviews of "ongoing covert action activities" including assessments of the "effectiveness and consistency with current national policy" and "applicable legal requirements" of such activities and to "review proposals for other sensitive intelligence operations"); national defense resource preparedness, Exec. Order No. 13,603, 77 Fed. Reg. 16,651 (Mar. 16, 2012) (NSC authority to *formulate* national defense resource preparedness policy); and emergency communications, Exec. Order No. 13,618, 77 Fed. Reg. 40,779 (July 6, 2012) (NSC authority for "[p]olicy coordination, guidance, dispute resolution, and periodic in-progress reviews" for security and emergency preparedness communications to the NSC/NSS system organized by the President's Policy Directive No. 1).

Moreover, the NSC and the OST jointly promulgated regulations relating to telecommunications, 47 C.F.R. pt. 201- pt.216, which the dissent in *Armstrong* found to be a "classic example of substantial independent authority." *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 572 (D.C. Cir. 1996) (Tatel, J., dissenting). The regulations provide, among other things, that the NSC has oversight and final decision-making responsibilities for certain government and public telecommunications systems. *See, e.g.,* 47 C.F.R. § 213.7(f)

(stating that unresolved issues related to allegations of federal government misuse of certain telecommunications systems will be referred to the NSC "for decision"); 47 C.F.R. § 213.7(g) (providing that the authority to revise decisions regarding allocation of certain communications channels under certain circumstances "is reserved to" the NSC); 47 C.F.R. § 211.6(c) (stating that the assignment of certain communications priority requests will require in certain circumstances "the approval of" the NSC); 47 C.F.R. § 211.6(g) (identifying responsibilities that are "subject to review and modification" by the NSC).

Based upon the above publicly available delegations of power to the NSC/NSS, Defendant's argument that the function of the NSC is "purely advisory" is unsustainable. Many of the authorities described above may individually be sufficient to prove that the NSC is an agency; the cumulative effect is overwhelming. The authorities include some of the same factors, such as evaluating and coordinating federal programs, issuing guidelines and promulgating regulations, that Defendant points to as sufficient to constitute an agency. Moreover, the conclusion that the NSC is an agency under *Soucie*'s "sole function" test is supported by two additional details.

First, *Soucie* itself draws a parallel between the status of the OST and the NSC. As the *Soucie* court noted, the President determined that it was necessary to elevate responsibilities of the National Science Foundation ("NSF") to an entity better suited to "coordinate Federal science policies or evaluate programs of other agencies" and therefore transferred the NSF's functions to an "administrative unit" – the OST – that was "'outside the White House Office, but in the Executive Office of the President on roughly the same basis as the . . . *National Security Council*.'" *Id.* at 1074 (quoting Congressional testimony) (emphasis added).

Second, in 1978 the DOJ OLC specifically concluded that the NSC was an agency under the *Soucie* test. The OLC considered two NSC committees at the time, the Policy Review Committee and the Special Coordination Committee, which the President had empowered via an Executive Order and which were "legally permitted to act without Presidential *participation*" and found them alone sufficient to "prevent the NSC from being viewed as solely advisory and without legal authority to exercise specific governmental functions." *National Security Council-Agency Status Under FOIA*, 2 Op. O.L.C. 197, 204 (1978) (emphasis added).[11]

For all of these reasons, under controlling precedent, the NSC is an agency under FOIA.

E. Additional Nonpublic NSC Authorities in Defendant's Possession

The list of NSC functions and authorities described above, however, is far from complete. Defendant possesses additional nonpublic information relevant to the authorities of NSC entities. This includes, but is not limited to, records describing the authorities and duties of specific NSC Interagency Policy Committees created by the NSC Deputies Committee pursuant to Presidential Policy Directive-1, at 4-5; relevant nonpublic Presidential Policy Directives, Presidential Study Directives, "Presidential Policy Guidance,"[12] and other nonpublic legal instruments delegating authority to NSC/NSS entities.

Despite the relevance of such nonpublic legal authorities to this Court's determination of whether the NSC properly constitutes an "agency" under the law, Defendant has not offered to disclose such authorities, even if only to the Court *in camera*, in order to provide this Court

[11] The OLC withdrew the 1978 opinion in 1993, Memorandum from Walter Dellinger to Alan J. Kreczko, Legal Adviser, NSC (Sept. 20, 1993).

[12] *See* President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (referring to "Presidential Policy Guidance" signed on May 22, 2013 relating to the drone killing program).

with legal background relevant to deciding Defendant's motion. Instead, Defendant merely asserts (in contrast to the substantial authorities set out above) that NSC's functions are "advisory in nature" and makes sweeping statements that "[n]othing about the NSC's responsibilities and duties has changed that would lead to a finding of **greater** independent authority" since the August 1996 decision in *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir.1996), which is demonstrably inaccurate.

While Plaintiff believes that the Court can conclude that the NSC is an agency subject to the FOIA based solely upon the publicly available legal authorities cited above, should this Court conclude otherwise, Plaintiff requests discovery with respect to the complete scope of Defendant's current powers and responsibilities. Such discovery is appropriate precisely in cases in which a government entity asserts that it does not constitute an agency under the FOIA. *See, e.g., Citizens for Responsibility & Ethics in Washington v. Office of Administration*, 2008 WL 7077787 (D.D.C. Feb. 11, 2008) (holding that it was necessary to allow a FOIA plaintiff to take discovery relevant to whether the White House Office of Administration is an "agency" under the FOIA). Indeed Armstrong itself involved extensive discovery. *See Armstrong v. Exec. Office of the President*, 877 F. Supp. 690 (D.D.C. 1995) (referencing deposition testimony and responses to admissions).

IV. *ARMSTRONG* IS ERRONEOUS AND OUTDATED

Given the authorities delegated to the NSC by Congress and the President, the only way to avoid the conclusion that the NSC is an agency would be to dismiss all these authorities by reading "assist" in "sole function is to advise and assist the President" so broadly as to mean that any delegated authority within the Executive branch, regardless of how substantial, is nevertheless meant to "assist" the President. This is precisely what the D.C. Circuit did in

Armstrong and what Defendant attempts to foist upon this Court. *See Armstrong v. Executive Office of the President*, 90 F.3d 553, 569 (D.C. Cir.1996) (Tatel, J., dissenting) (stating that while the court had previously held that it "must not allow the 'advise and assist' exception to swallow the FOIA rule" that "is exactly what I fear the court has done today").

A full appreciation of the unique errors of *Armstrong* requires placing it in context. As described above, following the 1974 FOIA amendments, the NSC promulgated FOIA regulations and began a FOIA program. It was only in 1994, during litigation meant to prevent the destruction of NSC records, that the Executive branch suddenly reversed course, withdrew the 1978 DOJ OLC opinion, and asserted that the NSC was exempt from FOIA and subject only to the Presidential Records Act. The District Court thoroughly rejected the NSC's arguments as "contrary to law" and "without any reasoned explanation." *Armstrong v. Exec. Office of the President*, 877 F. Supp. 690, 697 (D.D.C. 1995). The sharply divided D.C. Circuit in *Armstrong*, applying standards unique to the D.C. Circuit, reversed. *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996). On the basis of Armstrong alone, the NSC removed its FOIA regulations and began refusing FOIA requests. 63 Fed. Reg. 25,736 (June 8, 1998).

Armstrong's analysis is based on a three-factor test alien to the Second Circuit that is inconsistent with the FOIA, its legislative history, and the "sole function" test in *Soucie*. The three factors are (1) whether the entity has a "self-contained structure," (2) its "operational proximity" to the President, and (3) the nature of its delegated powers. *Armstrong* derived these factors from an earlier, also divided, D.C. Circuit in *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993), which held that a Presidential Task Force did not constitute an agency under

the FOIA. The dissent in *Meyer* noted that the first two factors were "entirely creatures of the majority's own making." *Meyer*, 981 F.2d at 1312 (Wald, J., dissenting).

A. Armstrong Applied the Wrong Test and Applied it Incorrectly

An examination of *Armstrong*'s application of its three-factor test illustrates why this Court should reject Defendant's attempt to expand *Armstrong* to this Circuit.

The first factor applied by *Armstrong* was whether the NSC has a "self-contained" structure. 90 F.3d at 559. This factor need not detain this Court given that even the *Armstrong* majority held that the NSC satisfied it. 90 F.3d at 560 (noting that the "NSC staff is not an amorphous assembly" that is "convened periodically by the President" but rather a "professional corps" with significant employees "organized into a complex system of committees and working groups" with "separate offices" and "with clearly established lines of authority both among and within the offices").

The second factor is the "operational proximity" of the NSC to the President. Judge Wald in dissent in *Meyer* called the "proximity" test a "fundamental error" resulting from a "strained" and "illogical" conflation of the language in the FOIA legislative history indicating the intent to exclude the President's "immediate personal staff" with the language excluding units whose "sole function" was to advise and assist the President, rather than treating these two phrases separately. *Armstrong* illustrates the point. The majority in *Armstrong* concluded not only that the NSC was "proximate" to the President, but also that this proximity should have the effect of raising the bar for any assertion that the NSC exercised any independent authority as part of the "sole function" test. *See Armstrong* 90 F.3d 553, 560 (stating that due to the NSC's proximity the plaintiffs "must make a strong showing indeed"); *id* at 567 (stating

that due to the NSC's proximity, the plaintiffs showing of delegated authority must be "compelling" to "prevail").

The "proximity" test presents several problems. First, if proximity to the President were properly a factor "virtually every person or entity within the Executive Office of the President would be excluded from the FOIA, contrary to the statute's express inclusion of the Executive Office of the President in its definition of agency." *Meyer*, 981 F.2d at 1309-10 (Wald, J., dissenting); *see also id* at 1310-11 ("When the statute expressly includes establishments within the Executive Office of the President, while the accompanying report language excludes only 'immediate personal staff' and those whose 'sole function' is to advise and assist the President, I have to read the report language to qualify, not obliterate, the statutory directive").

Second, the *Armstrong* majority wrongly emphasized the fact that the President heads the NSC proper. 90 F.3d at 560; *see also id.* at 567 (Tatel, J., dissenting) ("With all due respect, I fear the President's membership on the NSC has obscured from my colleagues the extent to which the NSC actually exercises independent authority"). While Congress placed the President at the head of the core NSC, the NSC/NSS system, as described above, consists of multiple layers of entities of decreasing proximity to the President performing policy formation and decision-making in the absence of, and independently from, the President.

The last factor *Armstrong* applied was the "nature of the authorities" delegated to the NSC. While in principle this factor appears similar to the "sole factor" test in *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971) it is impossible to read *Armstrong*'s analysis as consistent with *Soucie*. In *Soucie*, the court identified a single independent authority of the OST and found it sufficient to satisfy the standard for agency under FOIA, despite the fact that the records at issue in *Soucie* were created for the benefit of the President and at his request. *Id.*

In contrast, the *Armstrong* majority declared that in order for the NSC's authority to be independent it must be able to act "without the consent of the president." *Armstrong*, 90 F.3d at 563. Such a test is "highly unrealistic" and were this the bar for independent authority many agencies now subject to FOIA would be exempted. *Armstrong*, 90 F.3d at 569 (Tatel, J., dissenting). By this definition only "renegades or freelancers who ignored or disregarded the President's orders would be seen to 'act independently.'" *Meyer*, 981 F.2d at 1308-09 (Wald, J., dissenting) (objecting to majority's position that entity would not be acting "independently" even if it were simply to resolve disputes "according to the President's known wishes").

Moreover, even when the *Armstrong* plaintiffs identified "classic examples of agency action performed without the personal involvement of the President" that illustrated that the NSC's "sole function" was not to advise and assist the President, and should "subject an entity to FOIA," 90 F.3d at 575 (Tatel, J., dissenting), the *Armstrong* majority moved the goal posts and rejected the authorities because the plaintiffs failed to provide *factual* evidence that the NSC had *actually utilized* the delegated authority. 90 F.3d at 562 ("We are reluctant to consider the mere formality of a delegation of authority").

B. *Armstrong is* Outdated and Applying it May Require Discovery

The *Armstrong* standard the Defendant seeks this Court to adopt requires not only an assessment of the NSC's legal authorities, but also requires a factual examination into whether and how the NSC has exercised them. *Id.* As other courts within the D.C. Circuit have acknowledged post-*Armstrong* this may require discovery. *See, e.g., Citizens for Responsibility & Ethics in Washington v. Office of Administration*, 2008 WL 7077787 (D.D.C. Feb. 11, 2008). Moreover, the analysis in *Armstrong* is no longer current. That is, even assuming arguendo that *Armstrong* used the proper standard, and even further assuming that *Armstrong*

properly applied that standard to the NSC's legal authorities in August 1996, *Armstrong* is demonstrably outdated by virtue of the NSC's expanded role and legal authorities.

As just one example, only months after the *Armstrong* decision, Congress created the NSC Committee on Foreign Intelligence, whose authority arguably meets even *Armstrong*'s high barrier for independent action. 50 U.S.C. § 3021(h) (formerly 402(h)). First, Congress empowered it with authority that extends far beyond advising the President, including a direct reporting requirement to an entity outside of the NSC and the White House. Id. at § 3021(h)(5) (402(h)(5)). Second, not only is this authority broad enough to act "without the consent of the President" it is also relevant that Congress created this committee *over the express objection of the President*.[13] Finally, that this broad independent authority of this NSC committee that is "*in addition to* 'performing such other functions as the President may direct" was *actually* exercised has already been established by Congressional investigation.[14]

Lastly, while acknowledging that this Circuit has not adopted *Armstrong*, Defendant nevertheless attempts to inflate the significance of *Armstrong* by suggesting that the D.C. Circuit opinion should be given greater weight simply because it is the D.C. Circuit and that post-*Armstrong* amendments to the FOIA that did not correct it should be treated as tacit approval. Such arguments conflict with the ongoing inconsistency of NSC regulations as well as Defendant's representations to the Supreme Court in 1997 in successfully opposing the

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[13] *See* Presidential Statement on Signing the Intelligence Authorization Act for Fiscal Year 1997 2 Pub. Papers 1813 (Oct. 11, 1996) ("Although I am signing this Act, I have concerns about the provisions that purport to direct the creation of two new National Security Council (NSC) committees").

[14] *See Intelligence Activities Relating to Iraq Conducted by the Policy Counterterrorism Evaluation Group and the Office of Special Plans within the Office of the Under Secretary of Defense for Policy, S. Select Comm. on Intelligence*, 110th Cong. 9 (2008) (emphasis added).

Armstrong plaintiffs' petition for the writ of certiorari. Then Defendant argued that Supreme Court intervention was unnecessary by emphasizing the limited impact of *Armstrong* based on the absence of a Circuit split and suggesting that some day in the future the issue could arise "in the context of the [National Security] Council withholding records requested under FOIA, "which might lead to litigation in a court in another circuit that could "decline[] to follow the D.C. Circuit's ruling" in *Armstrong*.[15] Respectfully, that day has come.

CONCLUSION

For all the foregoing reasons, the Court should reject the NSC's Motion to Dismiss.

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Respectfully submitted,

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[15] Respondents Br. In Opp. To Pet. For Writ of Certiorari, *Armstrong v. Exec. Office of the President*, 520 U.S. 1239 (1997).