

# FOIA IN THE EXECUTIVE OFFICE OF THE PRESIDENT

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## INTRODUCTION

Within the first year of the Trump Administration, the National Security Council underwent a series of drastic changes. The first Na-

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tional Security Advisor was asked to resign, and a new National Security Advisor was hired; a White House political advisor was added to the Council while the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff were removed from the Principals Committee.<sup>1</sup> The entire staff of the Council has already been reorganized twice.<sup>2</sup> How did all of this happen? What kinds of conversations happened inside the National Security Council while these changes were taking place? It is possible we will never know the official story—the National Security Council, as an entity within the Executive Office of the President, is not subject to the Freedom of Information Act (FOIA).

FOIA, a transparency measure that describes which documents from federal agencies can be made available to the public upon request, was passed in 1966 as an amendment to the Administrative Procedure Act (APA).<sup>3</sup> It allows the public the right to request access to records from federal agencies.<sup>4</sup> The amendment requires every agency to disclose records, with certain exemptions included in the statute to keep specific kinds of records private.<sup>5</sup> Although the APA initially did not define “agency,” the statute was amended in 1974 to include “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (*including the Executive Office of the President*), or any independent regulatory agency.”<sup>6</sup>

The Executive Office of the President (EOP) is an entity within the executive branch responsible for overseeing some of the President’s most significant tasks. President Roosevelt established the EOP in 1939,<sup>7</sup> under a reorganization plan approved by Congress.<sup>8</sup> The EOP was created to help coordinate the growing federal bureaucracy

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1. Peter Baker, *McMaster May Reorganize Trump’s Foreign Policy Team Once Again*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/hr-mcmaster-trump-foreign-policy.html>.

2. *Id.*; see also Vivian Salama, *Trump Removes Bannon from National Security Council*, AP (Apr. 5, 2017), <https://apnews.com/633fcec02f0748d4b23fc3df81d97000>.

3. See *FOIA Legislative History*, NAT’L SECURITY ARCHIVE, <https://nsarchive2.gwu.edu/nsa/foialeghistory/legistfoia.htm> (last visited Jan. 30, 2018).

4. *Frequently Asked Questions*, FOIA.GOV, <https://www.foia.gov/faq.html#thefoia> (last visited Jan. 30, 2018) (providing an overview of FOIA).

5. 5 U.S.C. § 552 (2012). There is separate case law about what is considered an “agency record,” which is not discussed in this Note.

6. *Id.* at § 552(f) (emphasis added).

7. HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-606 GOV, THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW 7–8 (2008).

8. Reorganization Plan No. 1 of 1939, 53 Stat. 813, *reprinted in* 5 U.S.C. app. at 86 (2012).

and serve as an effective management tool.<sup>9</sup> Shortly after Congress approved the reorganization plan, President Roosevelt issued his own plan, organizing the EOP into various components.<sup>10</sup> Since 1939, the EOP has continued to grow in size and scope, and many new components within the EOP have been created.<sup>11</sup> A plain reading of the FOIA language about the EOP would suggest that all of these components should be subject to its transparency requirements.

Yet, in a significant Supreme Court case, *Kissinger v. Reporters Committee for Freedom of the Press*, the Court held that records and notes of Henry Kissinger's telephone conversations when he served as Assistant to the President for National Security Affairs were not subject to FOIA.<sup>12</sup> Kissinger, for a period of time, had simultaneously served as the Secretary of State and the Assistant to the President for National Security Affairs. While it was clear that the State Department was a covered agency subject to FOIA, the Court determined that the requested documents were only related to Kissinger's time serving in the White House.<sup>13</sup> The Court noted that the legislative history was unambiguous that "Executive Office" in the FOIA amendments did not include the "Office of the President."<sup>14</sup> To argue that the legislative history unambiguously exempted the "Office of the President," the Court quoted language from the Conference Report for the 1974 FOIA Amendments that "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President"<sup>15</sup> are not included within the meaning of "agency" under FOIA.<sup>16</sup> Because the notes were from Kissinger's phone calls while he was acting in his capacity as a presidential advisor, they were not subject to FOIA.<sup>17</sup> The *Kissinger* case laid the groundwork for the idea that some entities within the EOP would be subject to FOIA and others would be exempt. Since then, the Court has continued to clarify which entities in the EOP are "agencies" and thus subject to FOIA, and which are not.

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9. See RELYEA, *supra* note 7, at 4.

10. See President Franklin D. Roosevelt, Message to Congress on the Reorganization Act (Apr. 25, 1939), <http://www.presidency.ucsb.edu/ws/?pid=15748>.

11. See RELYEA, *supra* note 7, at 12–28.

12. See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 155–57 (1980).

13. *Id.*

14. *Id.* at 156.

15. H.R. REP. NO. 93-1380, at 232 (1974) (Conf. Rep.).

16. See 445 U.S. at 155–57.

17. *Id.* at 156–57. Although at the time FOIA applied to the National Security Council (NSC), the Court also determined that this request did not implicate NSC records.

No current academic literature has documented the entire history of how each EOP entity has been treated by the courts, or examined whether the Court's analysis of FOIA in the EOP is sound.<sup>18</sup> Yet, how FOIA is applied to each EOP component has policy implications and real-world ramifications for what information is made public.<sup>19</sup> For example, a lawsuit was recently filed requesting visitor logs from the EOP entities that are subject to FOIA, since the Trump Administration declined to proactively release these visitor logs like the Obama Administration had done previously.<sup>20</sup>

The rationale in these cases has had an impact on how the EOP may be considered an "agency" in other contexts. For example, a recent Department of Justice Office of Legal Counsel (OLC) memo argued that President Trump is not barred from appointing his son-in-law, Jared Kushner, to a position in the White House Office, because "the White House is not an 'Executive agency' within the definition generally applicable to [the anti-nepotism statute]."<sup>21</sup> Conversely, a privacy rights group that challenged the voter data collection of the Trump Administration's recently disbanded Presidential Advisory Commission on Election Integrity argued that the Commission was an agency under the FOIA agency test.<sup>22</sup>

This paper seeks to fill this gap in the academic literature by describing the history of how courts have determined the FOIA status of each entity in the EOP, and suggesting that the test the courts have

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18. Some of this information probably exists in a memo somewhere in the EOP, but ironically, is itself probably not subject to FOIA.

19. See, e.g., Douglas Cox & Ramzi Kassem, *Off the Record: The National Security Council, Drone Killings, and Historical Accountability*, 31 YALE J. ON REG. 363 (2014) (discussing the lack of transparency about drone killings).

20. *Public Citizen Sues Trump Administration for Withholding Visitor Logs: Trump's Secret Service Is Violating Freedom of Information Act, Lawsuit Says*, PUB. CITIZEN (Aug. 17, 2017), <https://www.citizen.org/media/press-releases/public-citizen-sues-trump-administration-withholding-visitor-logs>; see also *White House Voluntary Disclosure Policy Visitor Access Records*, WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/VoluntaryDisclosure> (last visited Feb. 26, 2018).

21. Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office, 41 Op. O.L.C. 1, 1 (2017). Such employees are the President's "immediate personal staff" and work in close proximity to him. *Meyer v. Bush*, 981 F.2d 1288, 1293 & n.3 (D.C. Cir. 1993).

22. See Motion for Leave to File a Third Amended Complaint with Incorporated Memorandum of Points and Authorities at 15, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297 (D.D.C.), *aff'd on other grounds*, 878 F.3d 371 (D.C. Cir. 2017) (No. 17-1320) ("This admission of agency status is further confirmed by the concession that the Commission's activities are not, in fact, limited to the 'sole function' of advising the President." (quoting *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971))).

relied on does not accurately account for the complex nature of the EOP. Part I describes the test courts have adopted in assessing whether an office in the EOP is subject to FOIA and reviews how the courts have used the test so far for each office, explaining which factors made each office subject—or not subject—to FOIA. Part II discusses critiques of the test, focusing in particular on how the test has led courts to conduct a formal analysis of EOP entities when a functional analysis is what is needed. Part II also suggests possible alternatives that should be explored.

## I.

### HISTORY OF FOIA WITHIN THE EOP

#### A. *The Soucie Test for Determining Whether an EOP Component Is Subject to FOIA*

The legislative history cited in *Kissinger v. Reporters Committee for Freedom of the Press* was actually grounded in earlier court precedent. Before the 1974 FOIA amendments, the D.C. Circuit had determined in *Soucie v. David* that the Office of Science and Technology (OST) was a distinct entity within the EOP subject to FOIA.<sup>23</sup> Prior to the 1974 amendments, the APA did not have a precise definition of an “agency,” so the court determined that agency status should be conferred on “any administrative unit with substantial independent authority in the exercise of specific functions.”<sup>24</sup> The court went on to note that if OST’s “sole function were to advise and assist the President,” then that could be taken as a sign that it was not a separate agency.<sup>25</sup> When OST was established, however, it inherited the role of coordinating federal science policies and evaluating programs across the government; this was a job that had previously been delegated to the National Science Foundation (an undisputed “agency”). This role had been delegated by Congress as part of a “broad power of inquiry in order to improve the information on federal scientific programs available to the legislature.”<sup>26</sup> Thus, OST maintained an independent function of evaluating federal programs, which was distinct from the advice that it gave to the President on science and technology issues. Because of this, OST, in its entirety, was an agency under the APA and subject to FOIA.<sup>27</sup>

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23. 448 F.2d at 1073.

24. *Id.* at 1075.

25. *Id.*

26. *Id.*

27. *Id.*

The legislative history from the 1974 FOIA amendments demonstrates that Congress intended to codify the decision in *Soucie*: “With respect to the meaning of the term ‘Executive Office of the President’ the conferees intend the result reached in *Soucie v. David*. The term is not to be interpreted as including the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.”<sup>28</sup> Thus, in the subsequent case of *Kissinger v. Reporters Committee for Freedom of the Press*, the Supreme Court relied on the “sole function” language to reach its decision.<sup>29</sup>

Since *Soucie* was decided in 1971, courts have used this test and a derivation of this test (further elaborated on below, called the *Meyer* factors) numerous times in determining whether an EOP office is subject to FOIA.<sup>30</sup> Under the *Soucie* test, the courts have created a patchwork approach to FOIA within the EOP, with some entities subject to transparency, and others not.

### B. EOP Offices and Whether They Are Subject to FOIA

I will now detail how the courts have reviewed EOP offices and determined whether or not, under the *Soucie* test and its progeny, they are subject to FOIA.<sup>31</sup> This section proceeds chronologically, since a timeline of these cases illustrates how the courts’ analyses have built upon—or at times ignored—earlier precedent. I am not including OST (now referred to as the Office of Science and Technology Policy (OSTP)) because it was covered in Section I.A. Nearly all of the cases discussed are decided by the Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit”).<sup>32</sup> While other circuits have addressed FOIA cases in the EOP, and are not bound by the D.C.

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28. H.R. REP. NO. 93-1380, at 232 (1974) (Conf. Rep.).

29. 445 U.S. at 156.

30. To clarify, this means the court first decides whether an EOP entity is subject to FOIA. If the entity is subject to FOIA, then the court reviews the documents that are the subject of the litigation and determines whether those documents need to be disclosed or can be withheld under any of the standard FOIA exemptions.

31. This note does not cover what constitutes “agency records” within the EOP for purposes of federal recordkeeping, which is evaluated using a separate analysis.

32. The majority of FOIA cases are litigated in front of the D.C. Circuit because the agencies are situated in the District of Columbia. See 5 U.S.C. § 552 (a)(4)(B) (“On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.”); see also *In re Scott*, 709 F.2d 717, 720 (D.C. Cir. 1983) (recognizing the D.C. Circuit as an “all-purpose forum in FOIA cases”).

Circuit's tests, they still look to the D.C. Circuit for guidance because it has the most expertise in analyzing these issues.<sup>33</sup>

### 1. *Office of Management and Budget*

The D.C. Circuit Court held that the Office of Management and Budget (OMB) was considered an "agency" and was not exempt from FOIA in *Sierra Club v. Andrus*.<sup>34</sup> In that case, three environmental organizations brought a suit against the Secretary of the Interior and the Director of OMB seeking a declaratory judgment that the National Environmental Policy Act (NEPA) required an agency to prepare an environmental impact statement (EIS) to accompany the annual budget request for operation of a program having significant environmental consequences.<sup>35</sup> OMB argued that it was not an "agency" either within the meaning of the APA or under NEPA when acting as an advisor and staff assistant to the President in making the budget, and so OMB was not required to provide the EIS at this stage.<sup>36</sup>

The court turned to the debate over "agency" in the FOIA context to help understand the meaning of "agency" for NEPA purposes. Relying on *Soucie*, the court wrote that OMB had other duties beyond the sole function of advising and assisting the President on the budget.<sup>37</sup> While management, coordination, and administrative tasks were important functions of OMB, the office also had a statutory duty to prepare a budget, which aided Congress, not just the President. The court also suggested that Congress had signified OMB's importance "over and above its role as presidential advisor" when it provided by amendment in 1974 for Senate confirmation of the Director and Deputy Director of OMB.<sup>38</sup> With these facts, the court determined that OMB was not exempt from FOIA, and was also an "agency" for NEPA purposes.<sup>39</sup> While the Supreme Court later reversed the case, it did so on other grounds and did not even address the D.C. Circuit's FOIA analysis.<sup>40</sup>

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33. See, e.g., *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 547 (2d Cir. 2016) ("Before ourselves applying *Soucie* analysis to the NSC, we acknowledge the considerable experience of the Court of Appeals for the District of Columbia Circuit in applying this analysis to various units within the Executive Office of the President.").

34. 581 F.2d 895, 902 (D.C. Cir. 1978), *rev'd on other grounds*, 442 U.S. 347 (1979).

35. *Id.* at 898.

36. *Id.* at 901.

37. *Id.* at 902.

38. *Id.*

39. *Id.*

40. *Andrus v. Sierra Club*, 442 U.S. 347 (1979).

## 2. *Council on Environmental Quality*

In 1980, the D.C. Circuit Court heard a case regarding the Council of Environmental Quality's (CEQ) status as an "agency" for purposes of the Sunshine Act, and in its analysis, determined that CEQ was an agency subject to FOIA.<sup>41</sup> The Sunshine Act,<sup>42</sup> enacted in 1976, outlines procedures for federal agencies' public meetings. The Act relied on the term "agency" from section 552 of the APA, which had been added in 1974 along with the FOIA amendments. The Pacific Legal Foundation sued CEQ for failing to comply with the Sunshine Act because CEQ had, according to the Pacific Legal Foundation, acted in proceedings that constituted "meetings" under the Act, but had neither made the meetings public nor closed the meetings in accordance with the statutory requirements for such action.<sup>43</sup>

The court determined that CEQ was an "agency" under the APA.<sup>44</sup> It noted that like OST in *Soucie*, CEQ was independently authorized to evaluate federal programs; NEPA specifically authorized CEQ to review and appraise federal programs that affect the environment, to conduct environmental research, and to monitor environmental trends.<sup>45</sup> The court also noted that CEQ had adopted regulations under the Sunshine Act to determine when it was and was not appropriate to open its meetings. By promulgating its own regulations, CEQ had demonstrated that its sole function was not just to advise and assist the President.<sup>46</sup>

CEQ tried to rebut this argument by claiming that some legislative history of the Sunshine Act should preclude it from being an "agency," but the court rejected this argument.<sup>47</sup> CEQ could only point to floor statements by a single Senator regarding an earlier version of the bill with a definition of agency that would have precluded CEQ from being an agency.<sup>48</sup> CEQ also argued that, even though it generally might be considered an agency, it does not function in that capacity when it advises the President, and therefore when acting in that role it should not be subject to the Sunshine Act—which would have the same implications for FOIA purposes.<sup>49</sup> The court also re-

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41. Pacific Legal Found. v. Council on Env'tl. Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980).

42. Government in the Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241.

43. 636 F.2d at 1262.

44. *Id.* at 1263.

45. *Id.*

46. *Id.*

47. *Id.* at 1263-66.

48. *Id.* (discussing and rejecting the weight of Senator Javits's statement).

49. *Id.* at 1264.



jected this approach, saying that in *Soucie* it had implicitly rejected this kind of argument.<sup>50</sup> The court, quoting another D.C. Circuit FOIA case, *Ryan v. Department of Justice*, reiterated that “depending on its nature and functions, a particular unit is either an agency or it is not. Once a unit is found to be an agency, this determination will not vary according to its specific function in each individual case.”<sup>51</sup> *Pacific Legal Foundation v. Council on Environmental Quality* confirmed that CEQ was subject to FOIA, and that the *Soucie* test did not apply to specific cases or controversies, but to the agency as a whole. Even though the case dealt with the Sunshine Act, the holding and reasoning would apply to CEQ and its FOIA obligations. Once a determination was made on an EOP entity’s status, it was applicable in all future contexts of FOIA requests.

### 3. *Council of Economic Advisors*

In a victory for the government, the D.C. Court of Appeals found in *Rushforth v. Council of Economic Advisors* that the Council of Economic Advisors (CEA) was not an “agency” for FOIA purposes.<sup>52</sup> A Washington, D.C. attorney, Brent Rushforth, had submitted a request for copies of the Council’s internal regulations for implementing FOIA and the Sunshine Act. CEA refused to comply, claiming it was not subject to either law, and Rushforth sued.

Rushforth contended that CEA was subject to FOIA because of legislative history. He pointed to the House Report on the 1974 amendments to FOIA which stated that “[t]he term ‘establishment in the Executive Office of the President,’ as used in this amendment, means such functional entities as . . . the Council of Economic Advisors . . . .”<sup>53</sup> The court rejected this argument, finding that the Conference Report that had adopted the *Soucie* test was more controlling than the House Report.<sup>54</sup> Because the Conference Report only considered the *Soucie* test and did not adopt the language from the House Report, it was not clear that Congress intended for FOIA to cover the CEA.<sup>55</sup>

Therefore, the court independently evaluated the CEA under the *Soucie* test. The court distinguished CEA from OST, noting that al-

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50. *Id.*

51. 636 F.2d at 1264 (quoting *Ryan v. Dep’t of Justice*, 617 F.2d 781, 788 (D.C. Cir. 1980), *abrogated by* Nat’l Inst. of Military Justice v. Dep’t of Defense, No. 06-5242, U.S. App. LEXIS 16732 (D.C. Cir. Jan. 11, 2008)).

52. 762 F.2d 1038, 1043 (D.C. Cir. 1985).

53. *Id.* at 1040 (quoting H.R. REP. NO. 93-876, at 8 (1974)).

54. *Id.* at 1040–41.

55. *Id.*

though they were similarly situated hierarchically in the EOP, their functional roles were not the same.<sup>56</sup> Turning to its analysis of CEQ, the court noted that the statutes establishing CEQ and CEA were nearly identical.<sup>57</sup> However, the court held that this was not determinative. While the two entities may have initially been formed in a similar manner, CEQ's functions had been expanded by a series of executive orders and was independently responsible for discrete tasks as delineated in *Pacific Legal Foundation*. In contrast, CEA's duties had not been expanded since its inception.<sup>58</sup> CEA's statutorily enumerated functions were only directed towards providing economic advice and assisting the President.<sup>59</sup>

The court also rejected a policy argument that Rushforth made that the President should not be allowed to manipulate an entity's "agency" status for FOIA purposes by the mere expedient of adding or eliminating duties. In a footnote, the court said: "If the President adds duties to an entity which bring it outside the sole-function test, Congress would want the entity to be covered. There is no reason why any other entity with a similarly worded organic statute should be dragged along with it."<sup>60</sup> However, the court did not address all of Rushforth's argument in the footnote; it did not elaborate on what would happen if the president functionally eliminated duties to try and circumvent FOIA status.

The court also rejected, without explanation, earlier reasoning that it had employed for OMB in *Sierra Club v. Andrus*, when it noted that appointment with advice and consent of the Senate suggested agency status.<sup>61</sup> In a footnote in *Rushforth*, the court said the fact that the CEA members are appointed with the advice and consent of the Senate, and are required to testify before the Congress, was irrelevant.<sup>62</sup> The nature of the appointment and the accompanying duty to testify before Congress did not speak to the *function* of the CEA—and function was determinative of agency status under *Soucie*. Due to its sole function of advising and assisting the President on economic matters, it was not considered an "agency" subject to FOIA.

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56. *Id.* at 1041.

57. *Id.*

58. *Id.* at 1042.

59. *Id.*

60. *Id.* at 1042 n.5.

61. 581 F.2d 895, 902 n.25 (D.C. Cir. 1978).

62. 762 F.2d at 1043 n.7 (D.C. Cir. 1985).

#### 4. *President Reagan's Task Force on Regulatory Relief*

The next case tested whether a Presidential task force within the EOP could be subject to FOIA—and the D.C. Circuit Court ruled it was not. In 1981, after his inauguration, President Reagan established a cabinet-level Task Force on Regulatory Relief in an effort to reduce regulatory burdens. The Vice President was the head of the task force, and it included: the Attorney General; the Secretaries of the Treasury, Commerce and Labor Departments; the Director of OMB; the Chairman of the CEA; and the Assistant to the President for Policy Planning.<sup>63</sup> The Administrator for Office of Information and Regulatory Affairs (OIRA) in OMB was named the Executive Director of the Task Force; the Task Force employed staff from OMB but operated through the Office of the Vice President.<sup>64</sup>

The task force was in operation from 1981 until 1983, and reviewed and assessed regulations from various agencies. After a three-year hiatus, the task force was reinstated in 1986 and existed throughout the remainder of the Reagan Administration. As a follow-up to the creation of the task force, President Reagan issued Executive Order 12291, which established the procedures agencies should use when enacting rules, including the use of cost-benefit analysis.<sup>65</sup> Cost-benefit analysis remains a part of the underpinnings of OIRA review to this day. The executive order also gave OMB the authority, subject to the task force's guidance: (1) to designate regulations as major rules; (2) to require agencies to seek additional information in connection with a regulation; (3) to require interagency consultation designed to reduce conflicting regulations; (4) to develop procedures for estimating the annual social costs and benefits of regulations; and (5) to prepare recommendations to the President for changes in agency statutes.<sup>66</sup>

In 1988, Katherine Meyer submitted a FOIA request for documents related to the Task Force on Regulatory Relief to the Office of the Vice President. The Task Force denied her request, and referred her to the OIRA Administrator, who also served as the Task Force's Executive Director.<sup>67</sup> OMB declined to produce the documents for Meyer's request, based on two arguments: first, that the documents had been "segregated" from OMB files, and so were not OMB documents subject to FOIA; and second, that neither the Vice President nor the Task Force on Regulatory Relief were "agencies" under FOIA, so

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63. *See Meyer v. Bush*, 981 F.2d 1288, 1289–90 (D.C. Cir. 1993).

64. *Id.* at 1290.

65. *See Exec. Order No. 12,291*, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

66. *Meyer*, 981 F.2d at 1290.

67. *See id.* at 1290–91.

the OMB documents were not subject to FOIA.<sup>68</sup> Meyer sued, and the D.C. Circuit Court ruled against her, finding that the Task Force on Regulatory Relief was not an “agency” under FOIA.<sup>69</sup>

The court first noted that the dispute over whether the Task Force on Regulatory Relief was an “agency” hinged on two questions from *Soucie*: (1) was the task force “substantially independent,” or (2) was its function “solely to advise and assist” the President? These questions would help the court evaluate “the *degree* of independence from the President the Task Force exercised in its relations with the rest of the executive branch.”<sup>70</sup> Recognizing that *Soucie* would not be easy to apply to a task force, the court developed a new set of three interrelated factors it felt would be helpful in resolving what *Soucie* was trying to ask. The factors were: (1) “how close operationally the group is to the President,” (2) “what the nature of its delegation from the President is,” and (3) “whether it has a self-contained structure.”<sup>71</sup> These would be applied in later cases as well, and they became known as the *Meyer* factors.<sup>72</sup> Proximity to the President would suggest that an entity be treated like a President’s “immediate personal staff,” which Congress had exempted from FOIA.<sup>73</sup> The greater the scope of delegation an entity had, the less the entity had interaction with the President in an advising and assisting capacity, and the more independence it would exert—like an agency.<sup>74</sup> Regarding the last factor, the court found *Soucie* instructive, saying that structure was closely tied to function.<sup>75</sup> A “characteristic of the President’s immediate staff is its lack of a firm structure,” the court noted.<sup>76</sup>

The court applied these three factors to the Task Force and determined it was not an “agency.” First, the Task Force was not actually delegated substantial authority via executive orders; rather, it advised the Director of OMB, who, in conjunction with the head of OIRA,

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68. *See id.*

69. *See id.* at 1298.

70. *Id.* at 1293.

71. *Id.*

72. *See, e.g.,* *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996) (using the three-factor *Meyer* test).

73. *Meyer*, 981 F.2d at 1293–94. The court also includes a noteworthy footnote here: “The President’s immediate personal staff, we assume, would encompass at least those approximately 400 individuals employed in the White House Office.” *Id.* at 1293 n. 3. This suggests that anyone who works in the White House Office (WHO) is automatically exempt from FOIA.

74. *Id.* at 1293.

75. *Id.* at 1296.

76. *Id.*

exercised regulatory authority over other agencies.<sup>77</sup> The Task Force itself did not have that authority—only OMB did. The court acknowledged that under this reading, the Task Force sat right between the OMB Director and the President, since they were the ones who ultimately provided the recommendations; that meant the Task Force was close operationally to the President.<sup>78</sup> Although Meyer tried to argue that having the Vice President chair the task force suggested it had independent authority from the President, the court suggested that this fact cut the other way, given the proximity of the Vice President to the President, and that Vice Presidents rarely express direction to the executive branch without the approval or endorsement of the President.<sup>79</sup> Lastly, the court examined the structure of the Task Force and noted that its lack of any independent staff (as noted, the staff were from OMB and processes were run through the Vice President’s office) was indicative of its lack of any independent authority. In summary, “the Task Force was simply a partial cabinet group. The President does not create an ‘establishment’ subject to FOIA every time he convenes a group of senior staff or departmental heads to work on a problem.”<sup>80</sup> President Reagan’s Task Force on Regulatory Relief was merely advising him on how to handle his regulatory agenda, and therefore was not an “agency” subject to FOIA.

### 5. *Executive Residence*

The Executive Residence was also found to not be an agency subject to FOIA. Rodney R. Sweetland III was an attorney for a former Assistant Chef in the Executive Residence kitchen. The chef had filed an employment discrimination suit arising out of his work in that position. Related to that suit, Sweetland had filed a FOIA request with the Executive Residence on information concerning the Residence’s kitchen staffing and budgets. When the Executive Residence responded saying it was not an agency subject to FOIA, Sweetland sued. At the time of the litigation, the Executive Residence was not technically a unit within the EOP, but the court treated it as such, since it

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77. *Id.* at 1294.

78. *See id.* (discussing that the Task Force was only a “hair’s breadth from the President”).

79. *Id.* at 1295.

80. *Id.* at 1296.

was “analogous to an EOP unit for purposes of a FOIA analysis.”<sup>81</sup> Currently, the Executive Residence is considered a part of the EOP.<sup>82</sup>

The D.C. Circuit Court briefly reviewed its precedent of FOIA in the EOP, and determined that under that precedent, the Executive Residence lacked any of the independent authority that had been critical in earlier findings of EOP entities subject to FOIA.<sup>83</sup> The Residence staff is exclusively dedicated to assisting the President in maintaining the actual home of the White House, and carrying out various ceremonial duties.<sup>84</sup> The court found that even though Congress had imposed certain duties on the Executive Residence with respect to the public property and furniture in the White House, these duties were not independent from the Residence’s job to assist the President.<sup>85</sup> Rather, the Congressional mandates do not “empower the Executive Residence staff to manage the President’s home without regard to the President’s wishes”; if anything, the Congressional mandates tie the Residence more closely to the President.<sup>86</sup>

Setting the functional argument aside, Sweetland made a policy argument that exempting the Executive Residence from FOIA would “frustrate the public policy objectives of FOIA without providing any offsetting benefits.”<sup>87</sup> The court also disagreed with this policy argument. It noted that FOIA was enacted to inform citizens about how they are governed, and to understand the operations and activities of government. The Executive Residence fell outside of this goal. The court could not presume “Congress intended to impose on members of the President’s personal staff so unseemly a duty as revealing the intimate details of the management of his home, particularly when those details will often be closely connected to his duties as head of State as well as head of Government.”<sup>88</sup> Again, as in *Rushforth*, the court rejected a policy argument about transparency in favor of a formal approach to its understanding of the EOP. Ruling against Sweetland, the court found that the Executive Residence was not an entity subject to FOIA.<sup>89</sup>

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81. *Sweetland v. Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995).

82. *See The Administration*, WHITE HOUSE, <https://www.whitehouse.gov/administration/eop> (last visited Jan. 29, 2018) (listing the Executive Residence as an entity within the EOP).

83. *Sweetland*, 60 F.3d at 854.

84. *See id.*

85. *See id.*

86. *See id.*

87. *Id.* at 855.

88. *Id.*

89. *See id.*

## 6. *National Security Council*

The National Security Council (NSC) has been analyzed twice for FOIA purposes—once by the D.C. Circuit Court of Appeals, and once by the Second Circuit Court of Appeals.<sup>90</sup> While they both look to *Soucie*, their analyses are different. In both cases, the courts ruled that the NSC was not subject to FOIA.

### a. *National Security Council as Reviewed by the D.C. Circuit Court of Appeals*

The National Security Archive, a research institute, and Scott Armstrong, a journalist affiliated with the institute, brought an action against the NSC after it refused a FOIA request. In January 1989, Armstrong made a request under FOIA for all documents stored in the EOP and the NSC electronic communications systems since their installation in the mid-1980s. During these proceedings, the OLC rendered an opinion that the NSC was not subject to FOIA, concluding that the authorizing statute of the NSC did not “contemplate the NSC performing any functions other than those associated with advising and assisting the President,” in line with the language from *Soucie*.<sup>91</sup> This reversed the position the OLC had taken on this issue since 1978. President Clinton adopted the OLC’s new position and instructed that the NSC should only “voluntarily disclose ‘appropriate’ records.”<sup>92</sup> The Executive Secretary of the NSC therefore withdrew the earlier FOIA guidelines. When this happened, Armstrong took the case to court.<sup>93</sup>

The court found it appropriate to use the three-factor test from *Meyer* to address the “sole function” and the “substantial independent authority” criteria. It noted that the *Meyer* analysis was “designed succinctly to capture the court’s prior learning on the subject,” suggesting it was the best synthesis and formulation of all of the EOP FOIA cases to date.<sup>94</sup> However, the court decided to first take up the question of

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90. The analysis of the National Security Council’s agency status for FOIA purposes has been included in this Note’s chronological ordering based on when the D.C. Circuit Court of Appeals heard the case. I have included analyses from both courts here, as it is easier to compare and contrast each court’s approach one after the other.

91. See Memorandum from Walter Dellinger, Acting Assistant Attorney Gen., Off. of Legal Counsel, to Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the Nat’l Sec. Council (Sept. 20, 1993), <https://www.justice.gov/olc/page/file/936176/download>.

92. See *id.*; see also *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 557 (D.C. Cir. 1996).

93. See *Armstrong*, 90 F.3d at 557.

94. *Id.* at 558.

the structure of the NSC, suggesting that this question alone could be indicative of a final outcome.<sup>95</sup> The court expressed doubt that an entity without a self-contained structure could ever exercise independent authority, so this would serve as a threshold question.

In an in-depth analysis, the *Armstrong* court determined that the NSC structure was self-contained.<sup>96</sup> Relying on organizational charts, the court explained that the NSC had an elaborate, self-contained bureaucracy of more than 150 staff that was neatly organized into a system of working groups and committees.<sup>97</sup> Within the NSC, there were separate offices that had responsibilities for different geographic regions or functional areas, with clear lines of authority and hierarchy across these offices.<sup>98</sup> While President Clinton's National Security Advisor, Anthony Lake, had submitted a declaration to the district court arguing that many of the NSC and White House Office (WHO) staff were intertwined, the court rejected this argument because the several points of overlap between the two staffs did not "obscure the line of perforation between the NSC and other units in the EOP."<sup>99</sup> The dual-hatted positions were mainly in communications jobs, which the court did not find problematic.<sup>100</sup> Having met this threshold factor of *Meyer*, the court next looked to the other two factors.

The court quickly dispensed with the proximity factor, noting that even *Armstrong* conceded that the NSC is proximate to the President.<sup>101</sup> The President controls the statutorily-created NSC (which includes the President and Cabinet-level officials), and the National Security Advisor works under the direct supervision of the President.<sup>102</sup> Interestingly, the court determined that this factor should be given significantly more weight than the "structure" factor—but did not explain why.<sup>103</sup>

The court then looked to the last factor, the nature of the authority delegated to the NSC, to resolve the issue. Although *Meyer* had asked "what the nature of its delegation from the President is,"<sup>104</sup> the court expanded the question to look at congressional delegation as

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95. *See id.* at 559.

96. *See id.* at 559–60.

97. *See id.* at 560.

98. *See id.*

99. *Id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *Id.*

104. *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993).



well as presidential delegation.<sup>105</sup> Looking to the National Security Act, which authorized the NSC, the court determined that Congress had only delegated advisory functions to the NSC.<sup>106</sup> The trickier question was whether the NSC had been delegated additional, non-advisory authority by the President through Executive Orders and National Security Decision Directives (NSDDs).<sup>107</sup> The court reviewed a series of national security issues that Armstrong contended the NSC has discrete control over via Executive Orders and NSDDs: (1) protection of national security information, (2) telecommunications policy, (3) emergency preparedness, (4) non-proliferation, and (5) public diplomacy.<sup>108</sup> Although the court acknowledged that with regard to these issues, the NSC exerts a great deal of control, expertise, and power relative to the traditional national security agencies, the NSC was still engaging in these behaviors directly on behalf of the President: “Insofar as the staff has been delegated authority to make policy recommendations for approval by the President, his NSA [National Security Advisor], or the statutory Council, the staff’s functions are, of course, quintessentially advisory.”<sup>109</sup> Even though, unlike some of the other EOP entities, the NSC wielded a great deal of authority, it was still always at the direction of the President. Since the authority was still on behalf of the President, it was not substantially independent.

Lastly, the court considered an argument that instead of following the *Meyer* factors, it should instead look to the NSC’s past statements and conduct that suggested it was an agency. This argument was derived from language in *Soucie*, where the court had used OST’s interpretation of its own charter to bolster the decision that it was a separate entity.<sup>110</sup> Armstrong cited past statements, such as an NSC Executive Secretary memo from 1993 that had suggested the NSC was an agency.<sup>111</sup> The court found that this memo was not persuasive, since it was not binding, and was written to comply with the OLC memo that was reversed a few months later.<sup>112</sup> More broadly, it rejected the idea from *Soucie* that the NSC’s past statements could be informative: “NSC’s prior references to itself as an agency are not

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105. See *Armstrong*, 90 F.3d at 560.

106. See *id.*

107. The NSDDs were the guidance documents of the NSC during the Clinton Administration.

108. See *Armstrong*, 90 F.3d at 561–65.

109. *Id.* at 561.

110. *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (“Moreover, the OST’s interpretation of its own charter in 1967 lends additional support to the conclusion that it is a separate administrative entity.” (citations omitted)).

111. See *Armstrong*, 90 F.3d at 565.

112. See *id.*

probative on the question before the court—whether the NSC is indeed an agency within the meaning of the FOIA.”<sup>113</sup> Thus, all that was relevant was the court’s own analysis, not internal EOP deliberations of agency status. In light of these findings, the court announced that the NSC was not an “agency,” and would no longer be subject to FOIA.

*b. National Security Council as Reviewed by the Second Circuit Court of Appeals*

In 2012, Main Street Legal Services, Inc. (“Main Street”), a non-profit law firm within the City University of New York School of Law, submitted a FOIA request to the NSC for records related to killing and attempted killing by drone strikes of U.S. citizens and foreign nationals. When the NSC denied this request, stating that the Council was not subject to FOIA, Main Street sued in the Eastern District of New York.<sup>114</sup> The case reached the appellate court,<sup>115</sup> which agreed with the D.C. Circuit that the NSC was not subject to FOIA.

First, the Second Circuit reiterated that *Kissinger* required it to look beyond the plain text of the FOIA statute, and decide whether the NSC is a unit within the EOP whose “sole function” is to advise and assist the President.<sup>116</sup> Main Street argued that the Supreme Court’s jurisprudence on statutory interpretation had changed since *Kissinger*, and the Court’s reliance on legislative history would now likely be called into question; however, the appellate court rejected this argument. In a footnote, it explained, “as to that statutory text, we remain bound by *Kissinger* until that decision is overruled by the Supreme Court.”<sup>117</sup>

The court then turned to the *Soucie* test, as it had been reaffirmed in *Kissinger*. It read *Soucie* as a two-pronged test to determine whether or not it was subject to FOIA: assessing the (1) sole function and (2) substantial independent authority of the entity.<sup>118</sup> The court recognized the “benefit of the D.C. Circuit’s experience,” but noted it was not bound by the three-factor approach from *Meyer* or any of its predecessors.<sup>119</sup> It then went on to conduct its own analysis. It looked

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113. *Id.*

114. Although the D.C. Circuit had already determined that the NSC was not subject to FOIA, the Second Circuit had not ruled on the issue when this case was initiated.

115. *See* Main St. Legal Servs., Inc. v. Nat’l Sec. Council, 811 F.3d 542 (2d Cir. 2016).

116. *Id.* at 546.

117. *Id.* at 547 n.5.

118. *Id.* at 547.

119. *Id.* at 548–49.

at the NSC at two different levels: first, the statutorily created NSC, and then the broader “NSC system,” including the NSC staff.

First, the court reviewed the authorizing statute of the NSC, and found that its sole statutory function was to advise and assist the President. The legislation’s first section begins by stating that the “function of the Council shall be to advise the President.”<sup>120</sup> The court explained that individual council members, such as Cabinet Secretaries, may head independent agencies themselves, but in this context, their advice is sought for the integration of various national security priorities for the President.<sup>121</sup>

Although the authorizing statute has an “additional functions” subsection,<sup>122</sup> which imposes duties on the council “[i]n addition to performing such other functions as the President may direct,”<sup>123</sup> the court rejected the argument that these additional functions should change its analysis. The court argued that this subsection should be read in light of the rest of the statutory section describing the functions of the council, which are all advisory in nature. The court deemed it unlikely that Congress would convey independent authority through this subsection; rather, the subsection just serves as a catch-all, allowing the President to delegate additional advisory and coordinating measures to the council.<sup>124</sup>

The court rejected *Main Street*’s citations to the various times since 1974 that the government had referred to the NSC as an agency.<sup>125</sup> When all of these references were made, the NSC was statutorily authorized to direct the Central Intelligence Agency (CIA)—an

120. *Id.* at 549.

121. *Id.*

122. The court includes the whole section in a footnote: “Section 3021(b) states as follows:

In addition to performing such other functions as the President may direct, for the purpose of more effectively coordinating the policies and functions of the departments and agencies of the Government relating to the national security, it shall, subject to the direction of the President, be the duty of the Council—

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

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

50 U.S.C.A. § 3021(b).”

*Id.* at 550 n.11 (emphasis in original).

123. War and National Security Defense Act, 50 U.S.C.A. § 3021(b) (2017).

124. *Main Street*, 811 F.3d at 551.

125. *Id.* at 552.

agency itself subject to FOIA.<sup>126</sup> The national security agencies had since been reorganized,<sup>127</sup> and the NSC no longer directed the CIA. Therefore, none of those references spoke to how the NSC currently functioned.<sup>128</sup>

Relying on these three findings, the court determined that the NSC was not subject to FOIA under *Soucie*. Next, the court turned to the NSC system as a whole and evaluated whether it was subject to FOIA.

Again, the court began by looking at the statute that authorized the creation of the NSC staff, and concluded that the staff had no independent authority from the President. It was hard to imagine that the NSC staff could be conferred more authority than the NSC itself, given that the staff exists to “advise, or to assist in advising or assisting.”<sup>129</sup> The court further elaborated that the relevant inquiry from *Soucie* is not

[W]hether an entity enjoys a measure of . . . independence, in how it provides advice or assistance. That is true to some degree of most advisers and assistants. Rather, *Soucie* asks whether an entity does more than render advice or assistance to the President—whether it exercises authority independent of the President, particularly with respect to individuals or other parts of government.<sup>130</sup>

Even if NSC staff operated independently from the principals of the statutory NSC on a day-to-day basis, they were still always in service of advising the council, and ultimately, the President.

Next, the court turned to whether the President, through his own organization and delegations of the NSC system, had granted the NSC staff any independent authority. The court began by clarifying that separation of powers concerns suggested judicial caution in assessing the degree and extent of a President’s conveyance of his authority to a person or an entity.<sup>131</sup> At the outset, the court was skeptical as to whether the President could ever delegate authority to such a degree that the NSC would be truly independent of him. Ultimately, the court concluded that in this case, it did not need to decide whether a presidential grant of authority might allow an executive entity to exercise

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126. Many CIA records are not subject to FOIA due to a national security exception. See 5 U.S.C. § 552(b) (2012).

127. See Intelligence Organization Act, Pub. L. No. 102-496, § 704, 106 Stat. 3188, 3189 (1992); see also Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108-458, § 1011, 118 Stat. 3643, 3643–62 (2004).

128. See *Main Street*, 811 F.3d at 552.

129. *Id.* at 554.

130. *Id.*

131. *Id.* at 557.

power independent of the President so as to render it an agency subject to FOIA in this case.<sup>132</sup> Rather, the court determined that such a conclusion was not warranted in the case of the NSC system.<sup>133</sup>

The court reached this conclusion by reviewing the President's Policy Directives (PPDs) organizing the NSC system. The language in the PPDs did not indicate any intent to transfer independent authority to the NSC, and instead emphasized the role of the NSC system in assisting the President in his national security matters.<sup>134</sup> Similarly, executive orders outlining either the functions of the NSC or new initiatives the NSC system would undertake also conveyed no independence.<sup>135</sup> While the presidential directives also set up a structure of decision-making fora (ranking from lowest to highest in hierarchy) within the NSC—the interagency policy committee, the deputies committee, and the principals committee<sup>136</sup>—none of these entities exert independent authority. While each of these groups may reach “conclusions” or “decisions,” they are still acting in furtherance of assisting the President.<sup>137</sup>

Finally, Main Street pointed to the NSC's promulgation of regulations as indicative of its agency status, which the court in *Pacific Legal* had relied on as a rationale for finding CEQ an agency subject to FOIA. But the court rejected this argument because the regulations had been promulgated over two decades ago and “under circumstances that will not admit an inference that the NSC presently exercises any authority independent of the President.”<sup>138</sup> And, the court added, the regulations themselves imposed no restrictions or duties on private persons or government entities, which is usually indicative of independent government authority.<sup>139</sup> For all of these reasons, the Second Circuit agreed with the D.C. Circuit, and found the NSC was not subject to FOIA.

## 7. *Office of Administration*

In *Citizens for Responsibility and Ethics in Washington v. Office of Administration*, the D.C. Circuit Court found that the Office of Administration (OA) was not an agency subject to FOIA.<sup>140</sup> Citizens for

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132. *Id.* at 558.

133. *Id.*

134. *Id.*

135. *Id.* at 561–62.

136. *Id.* at 559–62.

137. *Id.* at 559.

138. *Id.* at 563.

139. *Id.*

140. 566 F.3d 219, 226 (D.C. Cir. 2009).

Responsibility and Ethics in Washington (CREW) had alleged that the OA, an entity within the EOP responsible for the administrative and business needs of the EOP and its staff,<sup>141</sup> had discovered in 2005 that entities in the EOP had lost records of millions of White House emails. In April 2007, CREW submitted a FOIA request to OA to obtain more information about the missing emails. When OA did not meet the requisite FOIA deadlines, CREW sued OA. In June 2007, CREW and OA agreed to a timeline for producing the records, but within a few weeks OA changed its position and announced that, despite longstanding practice that suggested otherwise, it was not covered by FOIA because it provided administrative support and services directly to the President and the staff in the EOP, such that it was not an “agency” subject to FOIA.<sup>142</sup>

While acknowledging that the proper test for analyzing OA’s agency status was derived from *Soucie*, and now *Meyer*, the court also noted the significant relevance of *Sweetland* to this case. OA was akin to the Executive Residence, because both provided operational and administrative support within the EOP.<sup>143</sup> The court noted that OA’s functions included personnel management, financial management, data processing, library, records, and information services—all of which were entirely operational and administrative in nature.<sup>144</sup> The historical record, including an executive order from President Carter that established the role of OA, and its current mission statement, was also indicative of its operational and administrative functions in service of the President.<sup>145</sup> While OA supported non-EOP entities on the White House complex, such as the Navy, Secret Service, and General Services Administration (GSA), this was only done because these entities were present on the complex in service of the President as well.<sup>146</sup>

Citing *Armstrong*, the court also rejected the argument that the OA’s compliance with FOIA for nearly thirty years was relevant to determining its agency status.<sup>147</sup> The fact that OA had issued regulations governing the process for producing records under the FOIA

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141. See *About the Office of Administration*, WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/administration/eop/oa> (last visited Feb 1, 2018).

142. *Citizens for Responsibility*, 566 F.3d at 221.

143. *Id.* at 223.

144. *Id.* at 224.

145. *Id.*

146. *Id.*

147. *Id.* at 224–25.

statute was not relevant to the court's inquiry.<sup>148</sup> Just as the historical actions of the NSC were not relevant in *Armstrong*, the historical actions of OA were not relevant for the court here. Thus, OA did not need to comply with CREW's request, since it was not subject to FOIA.<sup>149</sup>

#### 8. *Other Cases*

There are a series of other cases related to the EOP and FOIA that are briefly worth mentioning. None of these cases used the *Soucie* test in evaluating an EOP entity's FOIA status, for one of three reasons: (1) the FOIA status of the EOP entity was assumed; (2) the case discussed offices or staff members within WHO, who make up the President's closest staff and are not subject to FOIA<sup>150</sup>; or (3) the case dealt with officials outside of the EOP. However, these cases are useful to include here because they provide more detail of the confines of FOIA in the EOP.

The D.C. Circuit has assumed the status of the Office of the United States Trade Representative (USTR) as an agency subject to FOIA without delving into any sort of analysis of this status.<sup>151</sup> Congress also specifically granted USTR authority to enforce trade agreements.<sup>152</sup> This would suggest that even under *Soucie*, USTR exerts independent authority and would be subject to FOIA.

The D.C. Circuit has continued to apply the holding of the Supreme Court case *Kissinger* to staff members that work in WHO, such as the White House Counsel, and has found that they are not subject to FOIA.<sup>153</sup> This holding not only applies to individuals who work in WHO, but also to specific offices that exist underneath the WHO um-

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148. *Id.* at 225.

149. *Id.* at 226.

150. *See Nat'l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990) (explaining that the White House Office (referenced in the case as the Office of the President) is not subject to FOIA).

151. *See Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 718 F.3d 899, 899 (D.C. Cir. 2013) (discussing only the exemptions from FOIA, not the question of whether USTR is actually subject to FOIA as an agency).

152. *Actions by United States Trade Representative Act*, 19 U.S.C.A. § 2411(c) (2016).

153. *See Nat'l Sec. Archive*, 909 F.2d at 545 ("The Supreme Court has made clear that the Office of the President is not an 'agency' for purposes of the FOIA, and appellant does not contend that the Counsel to the President, which is part of that office, is an exception to that principle. Inescapably then, the FOIA does not, at least by itself, require the Counsel to turn over the requested documents." (citations omitted)).

brella, such as the “White House Counsel’s Office.”<sup>154</sup> The “Office of the President” staff that is not subject to FOIA also includes the Office of the Vice President (OVP), and the Vice President.<sup>155</sup>

In *Ryan v. Department of Justice*, discussed briefly in Section I.B.2, the court held that certain records of the Attorney General, even when acting in an advisory role to the President, would still be considered Department of Justice records subject to FOIA.<sup>156</sup> The court concluded that “[m]any cabinet officers, like the Attorney General, . . . act as advisors to the President for many of their important functions; yet they are not members of the presidential staff or exclusively presidential advisors, and are thus not exempt from FOIA requirements.”<sup>157</sup>

### C. Summary of the Current Status of the EOP and FOIA

As a result of these cases, and the current posture of the EOP regarding entities that have not litigated their agency status,<sup>158</sup> the following entities within the EOP are “agencies” subject to FOIA in the D.C. Circuit: CEQ, OMB, the Office of National Drug Control Policy (ONDCP), OSTP, and USTR; and the following entities are not “agencies” subject to FOIA: CEA, the Executive Residence, NSC, OA, OVP, the President’s Intelligence Advisory Board (PIAB), and WHO.<sup>159</sup> Also, while the Task Force on Regulatory Relief no longer

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154. *Taitz v. Ruemmler*, No. 11-5306, 2012 WL 1922284, at \*1 (D.C. Cir. May 25, 2012) (“The district court correctly determined that the White House Counsel’s Office is not an ‘agency.’”).

155. *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 216 (D.C. Cir. 2013). It is still left open whether the Vice President could ever lead a group subject to FOIA. *See Meyer v. Bush*, 981 F.2d 1288, 1295 n.7 (D.C. Cir. 1993) (“We do not have to decide whether the Vice President could ever be the head of a FOIA agency.”).

156. *Ryan v. Dep’t of Justice*, 617 F.2d 781, 792 (D.C. Cir. 1980), *abrogated by Nat’l Inst. of Military Justice v. Dep’t of Defense*, No. 06-5242, U.S. App. LEXIS 16732 (D.C. Cir. Jan. 11, 2008).

157. *Id.* at 789.

158. This includes the Office of National Drug Control Policy and the President’s Intelligence Advisory Board. Additionally, sometimes the Office of Policy Development, the Domestic Policy Council, the Office of National AIDS Policy, and the National Economic Council are considered separate entities from WHO within the “Office of the President,” and sometimes they are considered a part of WHO. *Compare The Administration*, WHITE HOUSE, <https://www.whitehouse.gov/administration/eop> (last visited Jan. 29, 2018), with *Office of Administration—FOIA*, WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/administration/eop/oa/foia/> (last visited Feb 1, 2018). Either way, it is unlikely that they would be subject to FOIA because they are all a part of the immediate “Office of the President.” For this paper, I will consider them a part of WHO.

159. Notably, the following entities are included within WHO: Domestic Policy Council, National Economic Council, Office of Cabinet Affairs, Office of the Chief of Staff, Office of Communications, Office of the Press Secretary, Office of Digital Strategy, Office of the First Lady, Office of Legislative Affairs, Office of Manage-



exists, similarly constructed task forces established by the President would also presumably not be subject to FOIA.<sup>160</sup>

## II.

### PROBLEMS WITH THE *SoucIE* TEST AND POSSIBLE ALTERNATIVES

While courts have continuously employed the *SoucIE* test, and the three-factor approach of *Meyer* as a newer iteration of *SoucIE*, the test has unfortunately led them to a different result than perhaps what was originally intended by the language in the FOIA statute. As the court in *Ryan v. Department of Justice* noted, the determination of whether an entity within the EOP should be subject to FOIA requires an analysis of “complex functional considerations,”<sup>161</sup> yet courts have relied on the framing from *SoucIE* and *Meyer* to make broad, formal generalizations about how entities within the EOP work. Because of the complex nature of the EOP, this formalistic approach is misguided. The court is faced with institutional incompetence when addressing this issue, which has led to a series of problems—including bad incentives about staffing and policymaking—that I outline below. I will then discuss possible alternatives to the current approach by the courts: Congress revising the FOIA statutes, or, if Congress does not act, the Supreme Court revisiting FOIA in the EOP.

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ment and Administration, Oval Office Operations, Office of Presidential Personnel, Office of Public Engagement and Intergovernmental Affairs, Office of Scheduling and Advance, Office of the Staff Secretary, and Office of the White House Counsel. See *The Administration*, *supra* note 158.

160. For example, President Trump established Regulatory Reform Task Forces inside federal agencies. Exec. Order 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017). These are situated in agencies, and therefore subject to FOIA, but it is possible a broader regulatory reform task force could be established within the EOP. More recently, President Trump established an Office of Trade and Manufacturing Policy. Exec. Order No. 13,797, 82 Fed. Reg. 20,821 (Apr. 29, 2017). While it is housed within WHO, like NEC and DPC, the office may have some functions that are separate from advising the President. The Executive Order says the office should help improve the performance of the executive branch’s domestic procurement and hiring policies—which is normally an OMB or agency matter. See *id.* And, a separate Executive Order involves the Director of this new office in the evaluation of existing trade agreements, which may encroach on the role of USTR. Exec. Order 13,796, 82 Fed. Reg. 20,819 (Apr. 29, 2017). For a general timeline of how frequently and what entities have been created in the EOP, see RELYEA, *supra* note 7.

161. *Ryan v. Dep’t of Justice*, 617 F.2d 781, 789 (D.C. Cir. 1980), *abrogated by* Nat’l Inst. of Military Justice v. Dep’t of Defense, No. 06-5242, U.S. App. LEXIS 16732 (D.C. Cir. Jan. 11, 2008).

### A. *Problems with the Soucie Test*

Because the lower courts have had to adopt the binary framework from *Kissinger*, that some entities within the EOP are subject to FOIA and others are not, they have used the *Soucie* test to create an inconsistent divide within the EOP that may create bad incentives for staffing and policy decision-making. In *Ryan v. Department of Justice*, the court explained that “[i]n many different areas the President has a choice between using his staff to perform a function and using an agency to perform it. While not always substantively significant, these choices are often unavoidably significant for FOIA purposes.”<sup>162</sup> For example, whether the President’s staff develops a new policy proposal on minimum wage, or the Department of Labor does, will impact what information about that development process is could become public. Yet, the approach from *Soucie* creates this problem *within* the EOP as well. For example, during the 2008 transition, when President Obama announced the new members of his energy and environment team, in addition to announcing a new CEQ chair, he also announced two senior staff who would lead a new White House Office of Energy and Climate Change.<sup>163</sup> The new office was not housed within CEQ, but instead, was its own office housed in WHO. While there may have been other reasons for having the Office of Energy and Climate Change housed within WHO (many saw this as a signal of the importance of energy and climate change issues to the Obama administration), implicitly this also meant the new office was shielded from FOIA. When the office was later disbanded in 2011, the remaining staff folded into the Domestic Policy Council, rather than CEQ, meaning that energy and climate change policy would continue to be run through WHO. Although emails back and forth between agencies and the Office of Energy and Climate Change were still subject to FOIA (since they would be captured in FOIA requests to the agencies), this staffing decision nonetheless shielded internal EOP emails on energy and climate change from FOIA’s reach.

This example highlights an odd anomaly that results from the current approach used by the D.C. Circuit: similar actions would be subject to FOIA if taken at an agency but might be exempt if taken in the EOP. Many different individuals and entities in the executive

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162. *Id.*

163. See Press Release, Office of the Press Sec’y, The White House: President Barack Obama, Executive Order 12859—Further Amendments to Executive Order 12859, Establishment of the Domestic Policy Council (Feb. 5, 2009), <https://obama.whitehouse.archives.gov/the-press-office/executive-order-further-amendments-executive-order-12859establishment-domestic-poli>.

branch “assist” the President in carrying out his agenda. It is highly unlikely that a Cabinet member would announce a major rule, or take a significant executive action, without the President being aware of it and signing off on it. Yet, the court treats this kind of “assistance” of the President’s agenda as different than the “assistance” entities in the EOP may provide. And while the FOIA statutes treat an agency as subject to FOIA at all levels of government (meaning, FOIA is applicable not only to the chief of staff to a Cabinet Secretary, but also to a federal employee who works in a branch office outside of Washington, D.C., and is disconnected from policymaking), the *Soucie* and *Meyer* tests look at proximity, which, functionally, can vary depending on the staff level being analyzed. As an example, the chief of staff of the Department of Defense is likely more proximate to the President than a junior research assistant in CEA—yet the chief of staff is subject to FOIA, but the junior staffer is not. Even within the EOP, there are discrepancies that do not square up. Arguably, the OMB Director is proximately just as “close” to the President as the National Security Advisor—national security affairs and the oversight of the federal budget and federal regulations both have an outsize impact on how the President is perceived by the public, and how the President can carry out his priorities.<sup>164</sup> Consider that in the aftermath of the Great Recession, the Chair of the CEA played an outsized role in developing the policies and plans for the economically-focused Cabinet agencies.<sup>165</sup> Yet again, for FOIA purposes, the Chair of the CEA is treated differently than the OMB Director.<sup>166</sup>

Additionally, because the courts are not institutionally competent to assess the functional nature of EOP entities, they instead rely on a formalistic view that can lead to a misunderstanding about what authority the EOP entity actually wields.<sup>167</sup> In his *Armstrong* dissent, Judge Tatel wrote: “I fear the President’s membership on the NSC has obscured from my colleagues the extent to which the NSC actually exercises independent authority.”<sup>168</sup> Rather than treating the President’s chairing of the NSC as only a portion of the proximity analysis

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164. Two of the issues that Gallup tracked in the 2016 Presidential election as important to voters were national security and the federal debt. *Presidential Election 2016: Key Indicators*, GALLUP NEWS, <http://news.gallup.com/poll/189299/presidential-election-2016-key-indicators.aspx> (last visited Feb. 1, 2018).

165. See Ryan Lizza, *Inside the Crisis*, NEW YORKER, Oct. 12, 2009, at 80.

166. *Compare* *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038 (D.C. Cir. 1985), with *Sierra Club v. Andrus*, 581 F.2d 895 (D.C. Cir. 1978), *rev’d on other grounds*, 442 U.S. 347 (1979).

167. *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 568 (D.C. Cir. 1996) (Tatel, J., dissenting).

168. *Id.*

under *Meyer*, the court treated it as the definitive answer regarding proximity. The court also used this reasoning as a supporting rationale under its delegation analysis, arguing that staff of the NSC are always acting on behalf of the President.<sup>169</sup> Yet, national security affairs are so broad that NSC staff carry out responsibilities without Presidential knowledge or direction all the time, even if they are still under the larger framing of Administration objectives.

This is not how delegation authority was analyzed in *Armstrong*. Its analysis of the congressional authority delegated to the NSC focused on a portion of the National Security Act that provided for the Director of Central Intelligence (DCI) to act under the direction of the NSC.<sup>170</sup> The court determined that this did not delegate independent authority to the NSC, but merely to the President and the statutory Council headed by the President.<sup>171</sup> In its reasoning, the court wrote: “[i]ndeed, we find it inconceivable that the DCI, who himself sits on the Principals Committee . . . would take direction from a member of the NSC staff acting on his or her own behalf.”<sup>172</sup> However, anecdotes from former government officials suggest that this is factually inaccurate, and there are times where senior officials in Cabinet agencies have to take direction from members of the NSC staff acting on their own authority.<sup>173</sup> Leon Panetta, the former CIA director and Defense Secretary described this phenomenon:

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169. *Id.*

170. *Id.* at 560 (majority opinion). It should also be noted that these statutory provisions have since been altered when the intelligence agencies were reorganized following recommendations from the 9/11 Commission.

171. *Id.*

172. *Id.* at 561.

173. *See, e.g.*, Bob Woodward, *Robert Gates, Former Defense Secretary, Offers Harsh Critique of Obama's Leadership in 'Duty'*, WASH. POST (Jan. 7, 2014), [https://www.washingtonpost.com/world/national-security/robert-gates-former-defense-secretary-offers-harsh-critique-of-obamas-leadership-in-duty/2014/01/07/6a6915b2-77cb-11e3-b1c5-739e63e9c9a7\\_story.html?utm\\_term=.c8cdc0d36d6f](https://www.washingtonpost.com/world/national-security/robert-gates-former-defense-secretary-offers-harsh-critique-of-obamas-leadership-in-duty/2014/01/07/6a6915b2-77cb-11e3-b1c5-739e63e9c9a7_story.html?utm_term=.c8cdc0d36d6f) (“Gates says his instructions to the Pentagon were: ‘Don’t give the White House staff and [national security staff] too much information on the military options. They don’t understand it, and “experts” like Samantha Power will decide when we should move militarily.’ Power, then on the national security staff and now U.S. ambassador to the United Nations, has been a strong advocate for humanitarian intervention.”). Steve Bannon was temporarily a sitting member of the National Security Council (despite being a WHO employee) and seemed to exert a great deal of authority over national security policies. *See, e.g.*, Yochi Dreazen, *Steve Bannon Now Gets to Help Decide War and Peace*, VOX (Jan. 31, 2017), <https://www.vox.com/policy-and-politics/2017/1/31/14447394/steve-bannon-ns-c-trump-white-house-flynn-terrorism-iran-islam-yemen> (“This means that a political operative with zero national security or foreign policy experience will now have the same status as the heads of the Pentagon and State Department—and will in some ways outrank the nation’s top military officer and the head of the entire intelligence community.”).

There were staff people who put themselves in a position where they kind of assumed where the president's head was on a particular issue, and they thought their job was not to go through this open process of having people present all these different options, but to try to force the process to where they thought the president wanted to be.<sup>174</sup>

The problem is that this functional approach is harder to document and cite to, in comparison to the neatness of an Executive Order, or a NSDD. There is a “[r]ealpolitik . . . [to] the workings of the Executive Office of the President” that is hard to crystallize for a court.<sup>175</sup> Yet, the functional analysis still speaks to the true nature of EOP entities, perhaps more so than an Executive Order.

The court in *Ryan* acknowledged the constraints it faced in trying to address the functional nuances: “[t]o redraw this statutory line [between exempt and non-exempt entities] in a different manner, based on complex functional considerations, would strain the language of the Act and present much greater complexity in litigation.”<sup>176</sup> Even though the court in *Ryan* was trying to make a determination about records of the Attorney General, the functional constraint the court faced is applicable in the EOP FOIA context as well. Courts have often glossed over these complex functional considerations in the EOP—which has led them to create inconsistencies in the formal approach.

There are many examples of these inconsistencies in the formal approach of the courts to deciding whether EOP entities are subject to FOIA. As discussed in Part I, whether or not the head of an EOP entity is subject to Senate confirmation seemed to be an important

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174. The full quote is worth reviewing:

“There were staff people who put themselves in a position where they kind of assumed where the president's head was on a particular issue, and they thought their job was not to go through this open process of having people present all these different options, but to try to force the process to where they thought the president wanted to be,” he says. “They'd say, ‘Well, this is where we want you to come out.’ And I'd say ‘[expletive], that's not the way it works. We'll present a plan, and then the president can make a decision.’ I mean, Jesus Christ, it is the president of the United States, you're making some big decisions here, he ought to be entitled to hear all of those viewpoints and not to be driven down a certain path.”

David Samuels, *The Aspiring Novelist Who Became Obama's Foreign-Policy Guru*, N.Y. TIMES (May 5, 2016), <http://www.nytimes.com/2016/05/08/magazine/the-aspiring-novelist-who-became-obamas-foreign-policy-guru.html>.

175. *Meyer v. Bush*, 981 F.2d 1288, 1314 (D.C. Cir. 1993) (Wald, J., dissenting).

176. *Ryan v. Dep't of Justice*, 617 F.2d 781, 789 (D.C. Cir. 1980), *abrogated by Nat'l Inst. of Military Justice v. Dep't of Defense*, No. 06-5242, U.S. App. LEXIS 16732 (D.C. Cir. Jan. 11, 2008).

factor for why OMB was subject to FOIA, but then didn't matter for the CEA.<sup>177</sup> When the court applied the *Meyer* factors to the NSC, the court did not explain why it gave one factor more weight than another, even though the factors were treated equally in *Meyer*.<sup>178</sup> And in *Meyer*, the court did not look to any NSC statements or actions suggesting it was an agency as controlling, finding instead that the court's own analysis was all that mattered—but in *Pacific Legal*, the fact that CEQ promulgated internal regulations was treated as relevant to the analysis.<sup>179</sup> It seems like the courts recognize that these components have functional differences, but do not know how to address that. Instead, they act inconsistently in applying their formal approach, with little explanation for why.

Additionally, the formal approach also neglects the changing nature of EOP entities, which might impact how the entities are evaluated under *Soucie* and *Meyer*. When *Pacific Legal* was decided in 1980, it was before OMB had established OIRA,<sup>180</sup> responsible for advising and assisting agencies with regulatory review. Similarly, the size, structure, and managerial approaches of the NSC have fluctuated over time.<sup>181</sup> It is unclear under the formal approach how this would or should have an impact on a court's analysis. *Armstrong* and *Main Street* came out the same way, but they looked at snapshots of the NSC during different administrations, and during different touchstones in national security affairs.<sup>182</sup> *Main Street* specifically cites to the policy directives of the Obama Administration to justify its advisory nature.<sup>183</sup> Would it make a difference if the Trump Administration (or any future President) changed how it structured the NSC?<sup>184</sup>

177. See *supra* Sections I.B.1–3.

178. See *supra* Part I.

179. See *supra* Part I.

180. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981). OIRA was formally created as part of the Office of Management and Budget by Executive Order 12,866. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sep. 30, 1993). Executive Order 12,291 provided for the first procedure of regulatory review that would be later conducted by OIRA.

181. Karen DeYoung, *Rice Favors 'Mean but Lean' National Security Council*, WASH. POST (Jan. 17, 2017), [https://www.washingtonpost.com/world/national-security/rice-favors-mean-but-lean-national-security-council/2017/01/16/6244aa3c-dc49-11e6-ad42-f3375f271c9c\\_story.html?utm\\_term=.db5314f7fc67](https://www.washingtonpost.com/world/national-security/rice-favors-mean-but-lean-national-security-council/2017/01/16/6244aa3c-dc49-11e6-ad42-f3375f271c9c_story.html?utm_term=.db5314f7fc67).

182. These cases were decided twenty years apart: *Armstrong* was decided in 1996 and *Main Street* was decided in 2016.

183. *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 543–44 & 551 (2d Cir. 2016) (analyzing and citing to “the current presidential directive organizing the National Security Council System (‘NSC System’)”).

184. For example, at times, the NSC has been reorganized to also include the Homeland Security Council, and at other times, they have been considered separate entities. See *Baker*, *supra* note 1. At the beginning of the Trump Administration, the NSC and

Would this allow a litigant to raise its agency status again? The courts never address these kinds of issues.

### B. Possible Alternatives

Given the multitude of problems with the formal test when evaluating the EOP, a functional approach that appreciates the nuances of the EOP is needed to decide whether an EOP component is exerting independent authority or merely advising and assisting the President. However, it is unclear that courts are in the best position to undertake that analysis. Even if courts were to try and adopt a more functional approach, as described above, these are complex considerations that may be better-suited for a political branch.

Perhaps the courts could engage in a more nuanced understanding of the functional issues, and have chosen not to, because they have determined that if Congress disapproves of the state of FOIA, it is up to Congress to act on this. For example, the courts often stay out of the way of sensitive national security decisions,<sup>185</sup> and leaving an entity like the NSC alone in regard to FOIA may be an extension of that.

The concurrence in *Main Street*, the most recent case to speak on this issue, summarized the argument that Congress should be the decision-maker on FOIA in the EOP:

For over twenty years, the Executive Branch and the Court of Appeals that most frequently interacts with FOIA as applied to the chief offices of government have concluded that the NSC is one of those exempt units, and as noted above, that conclusion apparently has been accepted by the Congress without much controversy. Whether that conclusion is wise policy, or whether it accurately captures the intent of the Congress in adopting the FOIA amendments, is best considered a political issue for Congress and the President, not for this Court.<sup>186</sup>

Congress should revisit this issue, since it is better equipped to respond to the functional nature of the EOP. If an EOP component changes over time, Congress will be cognizant of it because it will

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Homeland Security Council were considered separate entities primarily to “diminish the power of . . . Michael T. Flynn.” *Id.* The NSC has since been reorganized, *see generally* Vivian Salama, *Trump Removes Bannon from National Security Council*, AP NEWS (Apr. 5, 2017), <https://apnews.com/633fcec02f0748d4b23fc3df81d97000>.

185. *See, e.g.*, Ganesh Sitaraman & Ingrid Wuerth, *National Security Exceptionalism and the Travel Ban Litigation*, LAWFARE (Oct. 12, 2017, 3:00 PM), <https://www.lawfareblog.com/national-security-exceptionalism-and-travel-ban-litigation> (“[C]ourts and commentators sometimes reason that in all national security cases, courts should defer to the executive branch because the courts lack expertise in the field of national security, or because national security issues are uniquely important, and so on.”).

186. *Main Street*, 811 F.3d at 569 (Wesley, J., concurring).

either (1) have made the changes itself through statute, or (2) be kept aware of these changes through its oversight function. And shifting this issue to Congress, rather than leaving it to the courts, will also allow for greater public dialogue about what information in the EOP the public has the right to know.<sup>187</sup>

Unfortunately, Congress has not spoken on this issue since the 1974 amendments. The most recent change to FOIA, the FOIA Improvement Act of 2016,<sup>188</sup> responded to criticisms of FOIA,<sup>189</sup> but did not address the status of the EOP. So, what can be done in the meantime? Since the Supreme Court has not spoken on this issue since *Kissinger*, it seems appropriate for the Court to revisit it. *Kissinger*, which had relied on *Soucie*, is what set courts on their current path. As the Second Circuit Court of Appeals noted in *Main Street*, the Court's reliance on legislative history in *Kissinger* would likely be called into question given the lesser weight that legislative history tends to hold in contemporary jurisprudence, and the plain meaning of the statute clearly says that FOIA applies to executive branch entities, "including the Executive Office of the President."<sup>190</sup> While subjecting the entirety of the EOP to FOIA would unquestionably frustrate some of the operations of the EOP, and, the Supreme Court would face the same competency issues that the lower courts face, perhaps backlash caused by such frustration would force Congress to address the issue. And, as a stop-gap measure, there would still be a recourse for the EOP if it was concerned about a particular document being disclosed: FOIA has nine exemptions, and included among them are exemptions for documents that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order"; "related solely to the internal personnel rules and practices of an agency"; and "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency."<sup>191</sup> These exemptions, along with the six others, would do a lot of work towards covering the most sensitive materials the EOP entities handle, and the ones that are most

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187. Presumably, Congress would hold hearings on this issue, and receive feedback from advocacy organizations as well.

188. FOIA Improvement Act of 2016, 5 U.S.C.A. § 552 (2016).

189. The bill, for example, required federal agencies to make their disclosable records and documents available for public inspection in an electronic format.

190. 5 U.S.C. § 552(f) (2012).

191. *Id.* § 552(b).



proximate to the President.<sup>192</sup> Any such exemption can be challenged in court, and ultimately a judge can decide what the appropriate recourse should be. The courts may do a better job at handling the validity of a FOIA exemption in a specific case rather than exempting the

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192. It is worth including all of the exemptions here to show how much the EOP could refrain from disclosing by relying on all of the exemptions:

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

*Id.*

EOP altogether, since they have much more experience with this type of FOIA litigation.

These alternatives are certainly not exhaustive, but can perhaps begin a conversation about how to handle the unique nature of the EOP while still meeting the important transparency goals of FOIA.

#### CONCLUSION

This note documented courts' determinations about how entities within the EOP should be treated for purposes of FOIA. The *Soucie* test has created a patchwork approach to FOIA within the EOP. This is because the courts have reviewed EOP entities using a formal approach, when a functional approach is what is needed. Since the courts are not well equipped to understand the nuances of how the EOP functions, this may be an issue better addressed through Congress. If Congress does not step in to resolve the issue, the Supreme Court should revisit how FOIA is treated in the EOP.