RESTORING FOIA’S REACH TO THE NATIONAL SECURITY COUNCIL

Andrew S. Yingling*

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.¹

Many may wonder who is at the center of decisions to kill U.S. citizens and foreign nationals in drone strikes in the war on terror. A legal clinic² affiliated with CUNY School of Law recently submitted a Freedom of Information Act (“FOIA”) request to the National Security Council (“NSC”) seeking this precise information.³ In a startling example of national secrecy and evasion of accountability, the government asserted that “records”⁴ of “U.S. officials debating whether to kill people, including U.S. citizens, outside of recognized battlefields and without judicial process, are categorically immune from the [FOIA].”⁵ The government argued further that the President of the United States has the unrestricted authority to destroy any such records.⁶ In denying the clinic’s request, District Court Judge Vitaliano relied specifically on the 1996 D.C. Circuit Court of Appeals case, Armstrong v. Executive Office of the

* Editor-in-Chief, CommLaw Conspicuous: Journal of Communications Law and Technology Policy, Volume 23. I.D. Candidate, May 2015, The Catholic University of America, Columbus School of Law; B.A., University of Massachusetts, Amherst, 2011. I would sincerely like to thank William Walsh for his expert advice and guidance for this Comment, as well as the Journal staff for their thoughtful edits. Additionally, I would like to thank my aunt, Monique Yingling, for her constant love and support every step of the way.

¹ Letter from James Madison to W.T. Barry (Aug. 4, 1822).
² Main Street Legal Services, Inc. is a non-profit law firm within the City University of New York School of Law, located at 2 Court Square in Queens, New York. Complaint for Injunctive Relief at 1, Main St. Legal Servs., Inc. v. Nat’l Sec. Council, No. 13-CV-00948, 2013 WL 4494712 (E.D.N.Y. Feb. 21, 2013).
³ Id. at 2. Plaintiff submitted a FOIA request to Defendant dated November 27, 2012 that requested . . . all records related to the killing of U.S. citizens and foreign nationals by drone strike . . . all NSC meeting minutes taken in the year 2011. In a letter dated December 14, 2012, but postmarked January 18, 2013, Defendant responded to Plaintiff’s FOIA request by simply asserting that the NSC was not subject to the FOIA and withheld the requested records. Id. at 2-3.
⁴ 5 U.S.C. § 552(f)(2)(A) (2012) (defining “record” as “any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format”).
⁶ Id.; see also Memorandum in Support of Defendant’s Motion to Dismiss for Failure to State a Claim at 4, Main St. Legal Servs., Inc. v. Nat’l Sec. Council, No. 13-CV-00948, 2013 WL 4494712 (E.D.N.Y. June 7, 2013) (arguing that the NSC is not subject to the FOIA).
President. Armstrong barred citizen access to documents generated by the NSC on the ground that the NSC is not an agency subject to the FOIA. In 1997, the Supreme Court denied Armstrong’s petition for certiorari, in what appeared to be the end of this debate until now. Armstrong is finally being challenged outside the D.C. Circuit after two decades of wars involving an institutionalized use of unmanned drones and a radical transformation in U.S. national security policy.

Under the rationale of Armstrong, substantial numbers of potentially significant documents surrounding the activities of the NSC may never be exposed. This is particularly troubling because the NSC is likely to expand its use of unmanned drones for extrajudicial killings. Moreover, by some estimates, the number of militants and civilians killed in the on-going drone campaign over the past decade will soon surpass 3,000, exceeding the number of people killed by al-Qaeda in the September 11 terrorist attacks. Currently, the government categorizes NSC records pursuant to the Presidential Records Act (“PRA”). This classification undercuts the public’s capability to evaluate and hold responsible government officials for policies such as the extrajudicial killing of

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7 Main St. Legal Servs. v. Nat’l Sec. Council, No. 13-CV-00948, 2013 WL 4494712, at *3–7 (E.D.N.Y. Aug. 7, 2013). As the District Court for the Eastern District of New York observed, “Current events have changed little, except perhaps to heighten the American government’s concern over (and awareness of) threats to national security interests.” Id. at *3. Concluding, the district court said, “The Court finds no reason to depart from Armstrong’s thoroughly persuasive and well-articulated reasoning.” Id. at *7.


11 Melvyn P. Leffler, 9/11 and the Past and Future of American Foreign Policy, 79 No. 5 INTERNATIONAL AFFAIRS 1045, 1046 (2003).


14 Miller, supra note 13.

U.S. citizens and citizens of other nations with unmanned drones.\textsuperscript{16} It hinders government officials in determining whether to continue the program and also hinders congressional decision-making.\textsuperscript{17} Further, it permits surreptitious members of an administration to shift functions from an agency subject to FOIA to the NSC, precluding transparency.\textsuperscript{18} \textit{Armstrong} is inconsistent with the fundamental purpose of the FOIA—“to ensure that the Government remains open and accessible to the American people and is always based not upon the ‘need to know’ but upon the fundamental ‘right to know.’”\textsuperscript{19} As President Obama stated, “The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.”\textsuperscript{20} This inclination towards disclosure should be applied to all decisions of the U.S. government, including the decisions of the NSC.\textsuperscript{21}

Despite the result in the district court, Main Street Legal Services is appealing to the Second Circuit.\textsuperscript{22} Considering the explosive expansion of NSC’s mandate to conduct activities independent of the President,\textsuperscript{23} the Second Circuit should overrule \textit{Armstrong} as outdated. If the Second Circuit disagrees with the \textit{Armstrong} ruling, then there will be a conflict in the circuits on a pressing social issue, affecting all, which should necessitate intervention by the Supreme Court.\textsuperscript{24}

This Comment discusses the need for courts to revisit and overrule \textit{Armstrong}; its analysis is outdated and should be reexamined in light of the ever-widening activities of the NSC. The Comment begins by discussing the relevant information access laws and their impact on federal government entities’ status as agencies; Part II provides a historical overview of the NSC; Part III explains the lengthy and complex legal controversy over the preservation and disclosure of NSC records leading up to the decision in \textit{Armstrong}; Part IV critically dissects the D.C. Circuit’s decision in \textit{Armstrong}; Part V argues the

\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Bailey, \textit{supra} note 12, at 1489.
\textsuperscript{20} Memorandum from President Barack Obama for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 26, 2009).
\textsuperscript{21} Id.
\textsuperscript{23} Miller, \textit{supra} note 13.
D.C. Circuit’s analysis in *Armstrong* is outdated because the NSC’s role has expanded in recent years to the point that the NSC exercises significant independent authority of the President; Part VI explains why the government’s arguments are insufficient, and in light of the NSC’s expansive authorities, should be rejected. Finally, this Comment concludes that the NSC exercises sufficient authority independent of the President to satisfy the requirements of the FOIA definition of “agency.”

I. INFORMATION ACCESS LAWS

Before examining the ominous legacy of *Armstrong*, it is essential to distinguish the relevant information access statutes.25 The FOIA, discussed in greater detail below, requires document production.26 The Federal Records Act (“FRA”)27 is coextensive with the FOIA; documents covered by the FRA are subject to direct production under FOIA.28 Before an agency can destroy a federal record, it must secure approval from the Archivist.29 On the other side of the spectrum, the Presidential Records Act of 1978 (“PRA”)30 gives nearly unrestricted discretion to the President over documents created during his term of office.31 The PRA also applies to Departments of the Executive Branch, because their duties have been held to be indistinct from those of the President.32 The President is permitted to restrict access to records regarding confidential communications between the President and his advisors.33 In a political system centered on accountability, it is essential to properly categorize documents; it

29 See 44 U.S.C. § 3303(a) (2006). The Archivist will disapprove of disposal if the record has “sufficient administrative, legal, research, or other value to warrant continued preservation.” Id. As the *Armstrong* court observed, “To dispose of a Federal Record, an agency must first garner the approval of the Archivist . . . Consequently, documents that qualify as a Federal Record are subject to specific guidelines and procedures in their management and disposal.” *Armstrong*, 877 F. Supp. at 698 (citations omitted).
32 Bailey, supra note 12, at 1479. One writer stated that the “Archivist is required to release Presidential Records ‘as rapidly and completely as possible;’ however, the Archivist also has the option to dispose of those Presidential Records which she determines ‘have insufficient administrative, historical, informational, or evidentiary value.’” Id.
33 § 2204(a)(5).
averts needless government secrecy, and allows for a knowledgeable and informed electorate, which is necessary for a thriving democracy. 34

A. The Freedom of Information Act (FOIA)

The FOIA provides that any person has a right to obtain access to federal agency records. 35 The United States Supreme Court has explained that “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” 36 The Court further defined the FOIA “as a means for citizens to know what their Government is up to.” 37 “This phrase should not be dismissed as a convenient formalism.” 38 That phrase “defines a structural necessity in a real democracy.” 39 In a 2009 Presidential Memorandum addressing the FOIA, President Obama stated “a democracy requires accountability, and accountability requires transparency.” 40 The FOIA “encourages accountability through transparency.” 41

The FOIA imposes a presumption in favor of disclosure on federal agencies, unless a record is specifically exempt from disclosure or the Act’s coverage. 42 Section 552(a)(3) requires agencies to provide the requested records in

34 ROBERT M. PALLITTO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 5 (2007). Authors Pallitto and Weaver observed: Secrecy imposes tremendous costs on elective government; it is capable of destroying or undermining the legal, political, and cultural traditions that undergird our political system. The most obvious cost of secrecy is a reduction in executive accountability. To the extent that the executive branch becomes impervious to observation, mechanisms designed to keep presidents and their administrators honest become useless. Whatever remains secret ultimately need not be justified to anyone other than the President. Id. The people’s right to know is considered vital to the health of our democracy, and openness benefits us all; therefore, it is essential that government take steps to preserve and keep accessible the information that it has. See DAVID BANISAR, GOVERNMENT SECRECY: DECISIONS WITHOUT DEMOCRACY 1, 9, 31 (2007).

35 What is FOIA?, FOIA.gov (last visited Feb. 4, 2014) (“[FOIA] . . . is a law that gives you the right to access information from the federal government. It is often described as the law that keeps citizens in the know about their government.”). FOIA is codified at § 552. See generally 5 U.S.C. § 552 (2006).


38 Id. at 172.

39 Id.


41 Id.

42 Id. (discussing the presumption in favor of disclosure); see also 5 U.S.C. § 552(b) (imposing certain limitations on FOIA’s disclosure obligations). Under § 552(b), documents need not be disclosed if exempted for one of the following reasons:

1) classified as relating to national defense or foreign policy;
the form or format requested if the records are “readily reproducible” in the form or format.\textsuperscript{43} Each agency is required to “make reasonable efforts to search for the records in electronic form or format,” unless those efforts would “significantly interfere” with the “automated information system” of the agency.\textsuperscript{44}

Executive Branch agencies of the federal government, independent regulatory agencies, and some units in the Executive Office of the President (“EOP”) are under the ambit of the FOIA.\textsuperscript{45} Subsection (f) of the FOIA defines the term “agency” to include any “executive department . . . or other establishment in the executive branch of the Government (including the Executive Office of the President).”\textsuperscript{46} In the 1974 amendments to the FOIA, Congress indicated in the legislative history that in using “Executive Office of the President,” Congress intended the term not to mean the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.\textsuperscript{47}

The D.C. Circuit Court of Appeals has developed a functional definition of “agency” used to decide whether an EOP is subject to the FOIA,\textsuperscript{48} that is, offices in the Executive Office of the President that “wield[] substantial authority independently of the President” are agencies subject to FOIA.\textsuperscript{49} To illustrate, the Council on Environmental Quality is subject to FOIA, because of its inde-

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\textsuperscript{2} related only to an internal personnel matter of an agency;

\textsuperscript{3} exempted specifically from disclosure by another act of Congress;

\textsuperscript{4} trade secrets, commercial, or financial information obtained from a privileged or confidential source;

\textsuperscript{5} inter-agency or intra-agency memoranda not normally available to the public;

\textsuperscript{6} personnel or medical files;

\textsuperscript{7} certain information relating to law enforcement;

\textsuperscript{8} related to the regulation or supervision of financial institutions; or

\textsuperscript{9} geological and geophysical information and data, including maps, concerning wells.

\textit{Id.}

\textsuperscript{43} See § 552(a)(3)(B).

\textsuperscript{44} § 552(a)(3)(C); see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009) (“All agencies should use modern technology to inform citizens about what is known and done by their Government.”).


\textsuperscript{46} § 552(f)(1). The 1974 amendments to FOIA expanded the definition of “agency” to include those entities that “perform governmental functions and control information of interest to the public.” H.R. REP. NO. 93–876, at 128 (1974); H.R. REP. NO. 93-1380, at 231 (1974).

\textsuperscript{47} H.R. REP. NO. 93-1380, at 232.

\textsuperscript{48} U.S. DEP’T OF JUSTICE, supra note 45, at 4.

\textsuperscript{49} Citizens for Responsibility & Ethics in Wash. v. Office of Admin., 566 F.3d 219, 222–23 (D.C. Cir. 2009) (internal quotation marks omitted); see also Sweetland v. Walters, 60 F.3d 852, 854 (D.C. Cir. 1995) (“[I]n cases involving units of the Executive Office that lacked substantial independent authority, we have consistently rejected the claim that they were subject to FOIA.”).
pendent authority to “issue guidelines to federal agencies for the preparation of environmental impact statements,” to “coordinate federal programs related to environmental quality,” and to oversee certain activities of other federal agencies.\(^5\) Similarly, the Office of Management and Budget is a FOIA agency, as it has a statutory duty to provide budget information to Congress.\(^5\) Similarly, the Office of Science and Technology is subject to FOIA, despite its close proximity to the President, because it has independent authority to evaluate federal scientific programs, to initiate and support research, and to award scholarships.\(^2\) In contrast, the Council of Economic Advisers (“CEA”) is not an “agency” under FOIA, because the CEA has no regulatory power and its function is limited to assisting and advising the President.\(^5\) The Office of the President, including the “President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President,” also does not constitute an agency under FOIA.\(^4\) Additionally, under this substantial independent authority analysis, the following agencies were found not to be subject to the FOIA: the Executive Residence Staff,\(^5\) the National Energy Policy Development Group,\(^6\) the Office of Counsel to the President,\(^5\) and the Presidential Task Force on Regulatory Relief.\(^6\)

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\(^5\) Sierra Club v. Andrus, 581 F.2d 895, 901–02 (D.C. Cir. 1978); see also U.S. Dep’t of Justice, supra note 45, at 4.
\(^5\) Soucie v. David, 448 F.2d 1067, 1073–76 (D.C. Cir. 1971). In fact, Congress established the Office of Science and Technology Policy in 1976 with a broad mandate, identical to that of the NSC, to advise and assist the President.
\(^5\) Sweetland v. Walters, 60 F.3d 852, 855 (D.C. Cir. 1995). In Sweetland, the D.C. Circuit observed that the Executive Residence Staff’s functions demonstrate that it is exclusively dedicated to assisting the President in maintaining his home and carrying out his various ceremonial duties. The staff does not oversee and coordinate federal programs . . . or promulgate binding regulations . . . In short, neither Congress nor the President has delegated independent authority to [the Executive Residence Staff].

Id.

\(^6\) Judicial Watch, Inc. v. Dep’t of Energy, 412 F.3d 125, 127, 129 (D.C. Cir. 2005) (concluding that the “NEPDBG is not itself an ‘agency’ subject to the FOIA because its sole function is to advise and assist the President”).

\(^5\) U.S. Dep’t of Justice, supra note 45, at 5 & n.31 (citing Nat’l Sec. Archive v. Exec. Office of the President, 688 F. Supp. 29, 31 (D.D.C. 1988)).

\(^5\) Meyer v. Bush, 981 F.2d 1288, 1294 (D.C. Cir. 1993) (reasoning that the Presidential Task Force on Regulatory Relief was exempt from FOIA, because its members functioned as assistants to the President, although the Task Force was chaired by the Vice President and composed of cabinet members).
A recent FOIA development involved the American Civil Liberties Union ("ACLU") and the Central Intelligence Agency ("CIA"). The ACLU filed several FOIA requests inquiring into the targeted unmanned drone-killing program. After the court held in favor of the CIA, the ACLU appealed to the D.C. Circuit Court of Appeals. In a noteworthy victory for transparency, the D.C. Circuit reversed the lower court, concluding that, under the circumstances, the CIA’s Glomar response (neither confirm nor deny) was not justified. On remand to the district court, the CIA would be required to “explain what records it is withholding, and on what grounds it is withholding them.”

II. THE NATIONAL SECURITY COUNCIL

The NSC was created by The National Security Act of 1947. Under the chairmanship of the President, with the Secretaries of State and Defense as its key members, the NSC coordinates U.S. foreign policy and defense policy, and reconciles U.S. diplomatic and military commitments and requirements. Beginning with the end of World War II, “each administration has sought to develop and perfect a reliable set of executive institutions to manage national security policy.” The NSC has been at the heart of the “foreign policy coordi-

59 See generally ACLU v. CIA, 710 F.3d 422 (D.C. Cir. 2013).
60 Id. at 425.
61 Id. at 426. More specifically, the court held that the CIA “was not required to confirm or deny that it had any responsive records, let alone describe any specific documents it might have or explain why any such documents were exempt from disclosure.” Id.
62 Id. at 425.
63 Press Release, ACLU, DC Appeals Court Rejects CIA’s Secrecy Claims in ACLU’s Targeted Killing FOIA Lawsuit (Mar. 15, 2013) (internal quotation marks omitted).
64 National Security Act of 1947 § 101, 50 U.S.C.A 3021 (West 2013). The statutory mandate of the NSC is generally “to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security” and to perform “such other functions as the President may direct.” National Security Act of 1947 § 101(a)–(b), 50 U.S.C.A § 3021 (a)–(b) (West 2013). The NSC consists of “the President and certain cabinet-level officials, including the National Security Adviser . . . The NSC staff, which numbers about 150 persons, is headed by an Executive Secretary, who reports to the [National Security Adviser], and whom the President appoints without need of Senate confirmation.” Armstrong, 90 F.3d at 556.
65 § 3021(a) (There are distinctions between the NSC, the NSC staff, and the NSC system. The National Security Council is the formal, statutory body consisting of the President, the Vice President, the Secretary of Defense and the Secretary of State. The National Security Council Staff consists of the National Security Advisor and the fifty or so area and functional specialists who are appointed at the pleasure of the President and who are charged with coordinating analysis, offering policy recommendations for the President, and providing the staff work for formal council meetings. The NSC system includes both the formal council and informal staff.).
nation system, but it has changed many times” to best suit the needs of each President.67

The NSC’s operation depends upon the dynamic relationship between the
President and his advisers and department heads.68 The National Security Act
envisioned an objective council, discrete from the White House, but overtime a
new, modern NSC developed.69 The modern NSC system differed from the old
one in three significant ways.70 First, the national security advisor shifted
towards an influential political presidential advisor instead of the purely adminis-
trative executive secretary to the President’s council.71 Second, the national
security advisor’s influence increased the power and reach of the NSC staff.72
Finally, with the modern, more powerful NSC, the former NSC decreased its
role.73

III. HISTORICAL PERSPECTIVE: THE NSC AND THE FOIA LITIGA-
TION THROUGH PRESENT DAY

The legal controversy over measures for the preservation of NSC records
has an extensive and complex history.74 In January 1989, the National Security
Archive (“Archive” or “NSA”)75 submitted several FOIA requests for material

67 Id.
68 Id. (President Johnson relied on the National Security Advisor and his staff and vari-
ous informal groups and trusted friends. President Nixon’s NSC was overwhelmingly influ-
enced by his National Security Advisor, Henry Kissinger, with whom he maintained a close
relationship. Kissinger nearly tripled the size of NSC staff, set up inter-departmental work-
ing groups to prepare NSC directives and became responsible for clearing policy cables.
Under Presidents Nixon and Ford, NSC staff focused on gaining information from other
departments, allowing the National Security Advisor to put before the President the best
possible range of options for decision. Carter believed that the role of the NSC was one of
policy coordination and that the NSC Adviser would be only one of many players in the
foreign policy process. The first President Bush incorporated his own foreign policy expe-
rience to the National Security Council, and restructured the NSC to include a Principals
Committee, Deputies Committee, and eight Policy Coordinating Committees. The Clinton
administration fostered a collegial approach within the NSC on national security matters,
and further expanded NSC membership.).
69 AMY H. ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, & NSC '76
(1999).
70 Id. at 85.
71 Id.
72 Id. at 86.
73 Id. at 87.
75 The National Security Archive is a private non-profit organization that pursues disclo-
sure of information relating to defense and national security policy. See About the Na-
tional Security Archive: 25 Years of Opening Governments at Home and Abroad, NAT’L
11, 2014).
stored on the Executive Office of the President ("EOP") and NSC electronic communications systems from their creation in the mid-1980s to the date of request. The Archive simultaneously filed suit for an injunction, arguing that the electronic documents contained on the EOP and NSC electronic communications systems and back-up tapes were federal or presidential records, and sought to prevent their destruction. The district court held that certain items stored in the NSC’s computer system were records subject to the FRA, and that the NSC’s guidelines relating to the records’ preservation were “arbitrary and capricious.” When the government still had no guidelines for the records’ preservation, the district court held the government in contempt. On appeal, the D.C. Circuit Court agreed that the NSC’s guidelines were inadequate, but reversed the contempt citation. This issue was remanded for the district court to determine whether the NSC properly distinguished between presidential and federal records.

President Clinton’s Office of Legal Counsel ("OLC") then rendered an opinion reversing the position taken in 1978, “declaring the NSC is not an agency subject to the FOIA and therefore does not have to comply with the FRA.” President Clinton adopted the OLC’s new position but instructed his then National Security Advisor, Anthony Lake, that the NSC should voluntarily disclose “appropriate” records, including those that had been “transferred by one Administration to another for transition and continuity purposes.” The Executive Secretary then asserted that all NSC documents are presidential records, exempt from both the FOIA and the FRA.

Although the NSC had maintained an active FOIA program during the administrations of Presidents Ford, Carter, Reagan, and Bush, the D.C. Circuit’s decision in Armstrong has, since 1996, effectively precluded any citizen from

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72 Id. at 556–57.
73 Id. at 557.
74 Id.
75 Id.
76 Id.
77 Id.
access to NSC generated documents. Current litigation is revisiting the question of whether courts outside the D.C. Circuit should adopt the holding in Armstrong or reject it and require the NSC to be subject to the FOIA once again. The on-going litigation, coupled with convincing evidence that the NSC has expanded its role in recent years, strongly corroborates the notion that the time has come for courts to restore FOIA access to NSC records, which permits greater transparency, accountability, and a stronger democracy.

IV. THE NSC AND AGENCY STATUS UNDER THE FOIA

In Armstrong v. Executive Office of the President, the court held that the NSC was not an agency under the FOIA, even though the NSC had admitted to being an agency and the NSC had processed many FOIA claims as if it were subject to FOIA. In reaching this conclusion, the court applied the test employed in Meyer v. Bush. The court believed that because the NSC had a “firm structure” and its own staff and budget, the NSC did more than merely advise and assist the President. The court also found that the NSC had an elaborate and self-contained structure. Nevertheless, the court noted the NSC had close proximity to the President, because the President chaired the NSC and the National Security Adviser, who works closely with the President, controls the NSC staff.

As to the third-prong of Meyer, the court noted that because the NSC was proximate to the President, there would have to be a “strong showing” that the NSC exercised “substantial authority, independent of the President.” The third-prong in the Meyer analysis looked to the nature of the authority dele-

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80 Gerstein, supra note 24.
81 Armstrong, 90 F.3d at 559, 567 (holding that although structure of National Security Council is self-contained and proximate to the President, NSC staff exercise no substantial authority either to make or to implement policy and, thus, NSC was not an “agency” subject to disclosure requirements of Freedom of Information Act and therefore was not obligated to preserve its records in accordance with Federal Records Act (FRA)).
83 Armstrong, 90 F.3d at 558–59. To determine whether an agency exercises substantial independent authority, the court will focus on: the unit’s proximity to the President, “the nature of its delegation from the President,” and “whether it has a self-contained structure.” [Courts treat] the three factors not as elements to be weighed against each other as in a balancing test, but rather as keys to understanding the nature of an [agency’s] functions in order to determine whether the unit exercises substantial independent authority apart from advising and assisting the President.
Id. at 568.
84 Id. at 559.
85 Id. at 560.
86 Id.
87 Id.
gated to the NSC.94 The divided court concluded, however, that Armstrong failed to carry his burden, as he did not show that the NSC exercises meaningful non-advisory authority.95 The Armstrong court reasoned that the NSC has no authority from Congress.96 The NSC’s authority stemmed from Executive Orders.97 Although the Executive Orders have given the NSC authority in diplomacy, non-proliferation, and telecommunications, the Armstrong court believed that the NSC did not have a substantive role in those matters that was distinct from that of the President.98 Therefore, neither the President nor Congress gave the NSC significant independent authority.99 Consequently, the FOIA request failed.100

In deciding whether the Eastern District of New York should adopt Armstrong, as the government argued,101 it is important to understand the NSC’s legal responsibilities and how it carries out those responsibilities. This understanding can only come from looking back two decades. Just months after the Armstrong decision, for example, Congress established the NSC Committee on Foreign Intelligence.102 Not only was this Committee created over the objection of the President,103 it also gave the NSC authority that extends beyond advising the President, such as reporting directly to an entity outside the NSC and the White House.104

V. THE EVOLUTION OF THE NATIONAL SECURITY COUNCIL IN LIGHT OF U.S. EMPHASIS ON NATIONAL SECURITY

In Armstrong, the D.C. Circuit evaluated a NSC that, despite exercising significant independent authority, was still developing. It follows that, for Armstrong to bind courts today, the NSC must continue to solely advise and assist the President, as the court found in 1996. A finding that the NSC has expanded its role beyond its 1996 capacity certainly calls into question the integrity of Armstrong. Accepting this underlying premise, we must consider the U.S.

94 Id.
95 Id. at 565.
96 Id. at 560.
97 Id.
98 Id. at 565.
99 Id. at 567.
100 Id. at 565.
102 Intelligence Renewal and Reform Act of 1996 § 802, Pub. L. 104-293, 110 Stat. 3474, 3474 (current version at 50 U.S.C.A. § 3021(h) (West 2013)).
104 50 U.S.C.A § 3021(h)(5) (West 2013).
emphasis on national security in the twenty-first century and how the NSC has responded to this climate. The September 11, 2001 attacks, in many ways, marked the beginning of a transformation in U.S. national security policy. President George W. Bush declared a national emergency and indicated that “we are facing a new and different type of enemy,” an enemy that he described as “nameless,” “faceless,” and without “specific borders.”\(^{105}\) In response to the 9/11 attacks, the government has taken extensive measures to ensure our national security by strengthening airline security and securing U.S. borders.\(^{106}\) This emphasis on national security is evidenced by the enactment of the Homeland Security Act,\(^{107}\) the USA PATRIOT Act,\(^{108}\) and the current expansive role of the National Security Agency in targeted killings.\(^{109}\) Similarly, the NSC’s authority has expanded far beyond purely advising the President.\(^{110}\) Landmark cases before the Supreme Court after 9/11 further demonstrate the emphasis on national security. In *Hamdi v. Rumsfeld*\(^{111}\) and *Rumsfeld v. Padilla*,\(^{112}\) the Court addressed the President’s power to declare American citizens as “enemy combatants” and detain them indefinitely without trial.\(^{113}\) Then, in *Rasul v. Bush*\(^{114}\) and *Boumediene v. Bush*,\(^{115}\) the Court addressed the government’s power to hold non-citizen enemy combatants at Guantanamo Bay, Cuba, without the opportunity to challenge the basis of their detention in any court of the United States.\(^{116}\)

Changing the NSC system to meet novel U.S. national security needs has been reasonably easy to do.\(^{117}\) The NSC staff routinely handles long-term planning as well as the more immediate business of national security.\(^{118}\) The National Security Act allowed major changes to be instituted without new legisla-


\(^{109}\) Miller, *supra* note 13.

\(^{110}\) Cox & Kassem, *supra* note 5.


\(^{117}\) ZEGART, *supra* note 69.

\(^{118}\) Id. at 77.
tion, and executive orders, presidential directives, and other self-executing commands have all been used to “create the national security adviser’s position; to alter fundamentally the NSC staff’s role, power, and jurisdiction; and to downgrade the operation of the formal National Security Council.”119 In contrast to the pre-Kennedy system, the NSC developed to wield substantial power and broad jurisdiction encompassing the full range of near, immediate, and long-term affairs.120 Kennedy and his successors have allowed and even encouraged the NSC’s staff-dominance by expanding its jurisdiction and bolstering its capabilities.121 After Armstrong, 9/11, and two decades of war, the NSC has further expanded its jurisdiction, developed its capabilities, and wielded substantial and broad authority independent of the President.

Courts are recognizing that secrecy surrounding U.S. national security programs seriously undermines a meaningful and informed public debate on these pressing issues, and our ability to evaluate and, when necessary, hold accountable the U.S. government.122 The litigation involving the ACLU and CIA highlights that this is the climate we are in: the time for transparency in these programs is now and the day has come to overturn Armstrong.

A. The Significance of Soucie v. David: The Sole Function Test

As previously mentioned, the 1974 FOIA amendments indicate the congressional intent behind the phrase “Executive Office of the President (“EOP”).”123 With regard to the meaning of EOP, Congress endorsed the holding reached in Soucie v. David.124 The Soucie court found that if an entity’s “sole function [was] to advise and assist the President” that would signal the entity “is part of the President’s staff and not a separate agency.”125 In contrast, if an entity wields “substantial independent authority in the exercise of specific functions,” this would indicate agency status.126 When applying the Soucie Sole Function

119 Id. at 98.
120 Id.
121 Id.
122 PALLITTO & WEAVER, supra note 34, at 5–7.
124 Id. at 232. In Soucie v. David, citizens filed a lawsuit against the Director of the Office of Science and Technology for injunctive relief under the Freedom of Information Act to compel the director to release certain documents. The D.C. Circuit Court of Appeals held that where the Office of Science and Technology had the independent function of evaluating federal scientific programs, the office was an agency subject to the FOIA. Soucie v. David, 448 F.2d 1067, 1068 (D.C. Cir. 1971) (holding that Office of Science and Technology was an agency because it had independent function of evaluating federal scientific programs).
125 Soucie, 448 F.2d at 1075.
126 Id. at 1073.
test to the NSC, it is clear that the NSC is charged with substantial, broad, non-advisory authority, and is therefore an agency for purposes of the FOIA.

B. The National Security Council Has Significant Authority Beyond Advising the President

The significance of NSC authorities is best understood by its tight-knit immersion in some of the most troubling assertions of government power. The secrecy behind these pressing social issues affects us all. The NSC exercises an incredible amount of independent authority in deciding to take the extraordinary action of using lethal force against U.S. citizens and foreign nationals in kill authorizations such as drone strikes.127 In fact, the NSC’s process in which U.S. citizens are placed on the “kill list” and executed is conducted entirely independently of the President.128 It involves a committee of mid-level NSC officials who draw up targeted American citizens for “kill lists.”129 Their target recommendations are sent to the panel of NSC “principals,” including Cabinet secretaries and intelligence unit chiefs, for approval.130

The Director of the CIA has also acknowledged the NSC’s control over the programs that target American citizens with deadly force without judicial process.131 The NSC exercises all this significant authority independent of the President.132 For instance, when Anwar al-Awlaki became the first U.S. citizen on the “kill list,” President Obama was not required to personally approve the targeting of an American; rather, one official said Obama would be notified of the principal’s decision.133 A former NSC official explained that “one of the

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129 Id.

130 Id.

131 Questions from Chairman, Senate Select Comm. on Intelligence, to John Brennan, at 5 (Apr. 30, 2012) [hereinafter Brennan Responses], available at www.intelligence.senate.gov/130207/posthearing.pdf (confirming central role of NSC in the “process of deciding to take such an extraordinary act”).

132 Mark Hosenball, supra note 128.

133 Id.
reasons for making senior officials principally responsible for nominating Americans for the target list was to ‘protect’ the President."\textsuperscript{134} The magnitude of NSC power in systematically killing American citizens is the precise independent authority of the President\textsuperscript{135} that qualifies the NSC as an agency and therefore subject to the FOIA. "Even if, as the press has stated, the President ultimately approves lists of individuals ‘nominated’ for drone killing, there can be no more significant authority than the NSC compiling the list, culling names, and deciding who will and who will not be included."\textsuperscript{136}

In addition, the NSC approved and is responsible for the extremely aggressive interrogation methods used after 9/11.\textsuperscript{137} After the capture of senior Al-Qaeda operative Abu Zubaydah in the spring of 2002, attorneys from the CIA’s Office of General Counsel began discussions with the NSC’s Legal Advisor and OLC concerning the CIA’s proposed interrogation plan for Abu Zubaydah and any legal restrictions on interrogation.\textsuperscript{138} It was NSC officials who approved the interrogation program, which utilized extremely aggressive measures.\textsuperscript{139} With NSC approval, the CIA employed an alternative interrogation program, including waterboarding on Zubaydah and other detainees between 2002 and 2003.\textsuperscript{140} In the spring of 2003, the same interrogation policies and practices were again called into question.\textsuperscript{141} According to CIA records, NSC officials met to discuss the interrogation techniques and reaffirmed that the CIA program was lawful.\textsuperscript{142}

\textsuperscript{134} \textit{Id.}
\textsuperscript{135} John Brennan, Answers to Questions for the Record from Senate Select Committee on Intelligence 5 [“Brennan Responses”] (confirming central role of NSC in the “process of deciding to take such an extraordinary act”), www.intelligence.senate.gov/130207/posthearing.pdf.
\textsuperscript{138} Letter from Att’y Gen. Eric H. Holder, Jr. to Sen John D. Rockefeller IV (Apr. 17, 2009), available at http://www.intelligence.senate.gov/pdfs/olcopinion.pdf. The CIA determined that Abu Zubaydah had information regarding future Al-Qaeda attacks against the US. The CIA believed Zubaydah was withholding imminent threat information at the time of the initial interrogation and concluded that alternative interrogation methods, including waterboarding, were appropriate.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
In August 2009, the Special Task Force on Interrogations and Transfer Policies, building on suggestions by the Intelligence Science Board, proposed the establishment of the High-Value Detainee Interrogation Group to “bring together officials from law enforcement, the U.S. Intelligence Community and the Department of Defense to conduct interrogations in a manner that will strengthen national security consistent with the Rule of Law.” Despite failures in maintaining lawful techniques in intelligence interrogations, the NSC was in charge of policy guidance and oversight of the High-Value Detainee Interrogation Group. In light of the NSC’s ever-increasing legal authorities beyond advising the President, the NSC exercises the independent authority to qualify as an agency under the FOIA.

C. Through Executive Orders, Publicly-Available Directives, and Regulations, the NSC Exercises Significant Authority Independent of the President

The President of the United States has, since the Armstrong decision, issued several executive orders and directives that have fundamentally altered the NSC staff, authorities, and jurisdiction. In fact, through executive orders, the President has delegated to the NCS/NSS significant independent authority, which in the aggregate, qualifies the NSC as an agency for purposes of the FOIA. President Clinton issued an executive order in 1993 that illustrates how the NSC is fundamentally altered, changing its power, jurisdiction, and capabilities. President Clinton, through executive order, delegated to the NSC overall policy direction for the newly established National Industrial Security Program, designed to safeguard classified information. In the Executive Order, “Structural Reforms To Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information,” Presi-

143 See INTELLIGENCE SCIENCE BOARD, FAS, http://www.fas.org/irp/dni/ish/ (stating that the Intelligence Science Board was chartered in August 2002 and that it advises the Office of the Director of National Intelligence and senior intelligence community leaders on emerging scientific and technical issues of special importance to the Intelligence Community).
145 Id.
147 Exec. Order No. 12,829 58 C.F.R. 3,479 (Jan. 6, 1993) (stipulating that the Program shall, “in consultation with the agencies, and promulgate subject to the approval of the National Security Council, directives for the implementation of this order, which shall be binding on the agencies.”).
dent Obama established a Senior Information Sharing and Safeguarding Steering Committee.\textsuperscript{148} The President delegated overall responsibility for the implementation of policies and standards for safeguarding classified information on computer networks and provided that any “policy or compliance issues” that the Steering Committee could not resolve be referred to the Deputies Committee of the NSC.\textsuperscript{149}

In February 2009, the President, through Presidential Policy Directive – 1, Organization of the National Security Council System, organized the NSC and delegated to the NSC/NSS significant independent authority.\textsuperscript{150} The President ordered the NSC Principals Committee (“NSC/PC”), which the National Security Advisor rather than the President chairs, to continue to be the senior interagency forum for consideration of policy issues affecting national security.\textsuperscript{151} The President ordered the NSC Deputies Committee (“NSC/DC”) to review and monitor the work of the NSC interagency process, to ensure that issues brought before the NSC/PC or the NSC have been properly analyzed and prepared for decision.\textsuperscript{152} The President also delegated responsibility for day-to-day crisis management to the NSC/DC.\textsuperscript{153} In addition, the President delegated responsibility to the NSC Interagency Policy Committees (“NSC/IPCs”) to achieve development and implementation of national security policies by multiple agencies.\textsuperscript{154} The President also assigns the NSC/IPCs to be the main day-to-day responsible entity for interagency coordination of national security policy.\textsuperscript{155} The President further ordered the NSC/IPCs to be established at the direction of the Deputies Committee and chaired by the NSC.\textsuperscript{156} At the NSC’s discretion, the NSC may add co-chairs to any NSC/IPC if desirable.\textsuperscript{157}

In a July 2008 Executive Order, entitled “Further Amendments to Executive Order 12333, United States Intelligence Activities,” the President updated the Strengthened Management of the Intelligence Community and United States Intelligence Activities.\textsuperscript{158} In doing so, the President assigned to the NSC responsibility to consider and submit to the President a policy recommendation,

\begin{itemize}
  \item \textsuperscript{149} Id.
  \item \textsuperscript{151} Id. The President states that the NSC/PV shall meet at the call of the National Security Advisor, who determines the agenda and shall ensure that necessary papers are prepared and decisions are made in a timely manner.
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Id.
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} Exec. Order No. 13, 470, 73 C.F.R. 45,325 (July 30, 2008).
\end{itemize}
including all dissents, on each proposed covert action and conduct a periodic review of ongoing covert action activities, including an evaluation of the effectiveness and consistency with current national policy of such activities and their consistency with applicable legal requirements. The President further ordered the NSC to review proposals for other sensitive intelligence operations. In an Executive Order entitled “National Defense Resources Preparedness,” the President delegated the NSC to serve as the integrated policymaking forum for consideration and formulation of national defense resource preparedness policy. In the Executive Order entitled “Assignment of National Security and Emergency Preparedness Communications Functions,” the President assigned to the NSC policy coordination, guidance, dispute resolution and periodic in-progress reviews for security and emergency preparedness communications.

The NSC and the OST are responsible for the promulgation of telecommunications regulations concerning national security preparedness activities. The regulations afford to the NSC responsibility to resolve issues involving the misuse of federal government activities brought to the attention of communication carriers. The regulations also provide that the NSC has oversight and final decision-making responsibilities for certain government and public telecommunications systems. The NSC also has responsibility to approve certain communication requests during national emergencies. All assignments, denials and changes of restoration priorities and sub-priorities are subject to review and modification by the NSC. Based upon the publicly available delegations of power to the NCS/NSS, the government’s argument that the function of the NSC is purely advisory is unsustainable.

Publicly available delegations of power clearly indicate the NSC has more on its plate than a purely advisory role to the President. Most likely, however, there are other non-public functions and authorities relevant to the NSC. This gets back to the issue of where the burden of proof should fall in whether an entity is an “agency” as that term is defined under the FOIA. It is reasonable, in cases where a government entity asserts that it does not constitute an agency under FOIA, to require the government entity to prove that its role is purely advisory and that it does not exercise any independent authority.

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159 Id.
160 Id.
163 47 C.F.R. § 201.3 (2012).
164 Id.
166 47 C.F.R. § 211.1(b) (2012).
167 47 C.F.R. § 211.6(g) (2012).
D. Congress Delegates to the NSC Significant Independent Authority Beyond Advising the President

Congress has expressly authorized the NSC to take on functions that are well beyond purely advising the President. Congress has authorized the NSC to engage in additional activities, including assessing and appraising the objectives, commitments, and risks of the U.S. in relation to its actual and potential military power, in the interest of national security, and to consider policies on matters of common interest to the departments and agencies of the government concerned with national security. Congress has established within the NSC the Committee on Foreign Intelligence. Not only is the President not a member of this Committee, but the Committee was created over the express objection of the President. The Committee is further tasked with conducting annual reviews of U.S. national security interests. Furthermore, Congress established within the NSC the Committee on Transnational Threats, and, like the Committee on Foreign Intelligence, the President is not a member. This Committee is tasked with the wide-ranging mandate to coordinate and direct the activities of the United States Government relating to combating transnational threats. The Committee is further tasked with developing strategies and policies and procedures to ensure the effective sharing of information about transnational threats among federal agencies. Additional independent authority present within the NSC is the Board for Low Intensity Conflict,

168 50 U.S.C.A. § 3021(b) (West 2013) (“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 national security, it shall, subject to the direction of the President, be the duty of the Council.”)
170 50 U.S.C.A. § 3021(h)(1) (West 2013) (“There is established within the National Security Council a committee to be known as the Committee on Foreign Intelligence (in this subsection referred to as the ‘Committee’).”)
171 § 3021(b)(2)(A)-(D) (The Director of National Intelligence, the Secretary of State, the Secretary of Defense, the Assistant to the President for National Security Affairs, who shall serve as the chairperson of the Committee. Such other members as the President may designate).
173 § 3021(b)(4)(A) (“In carrying out its function, the Committee shall—conduct an annual review of the national security interests of the United States.”).
174 §§ 3021(i)(1)-(2) (There is established within the National Security Council a committee to be known as the Committee on Transnational Threats (in this subsection referred to as the ‘Committee’). The Committee shall include the following members: The Director of National Intelligence, The Secretary of State, The Secretary of Defense, The Attorney General, The Assistant to the President for National Security Affairs, who shall serve as the chairperson of the Committee, Such other members as the President may designate).
175 § 3021(i)(3).
176 §§ 3021(i)(3), (4)(A)-(C).
tasked with coordinating the policies of the United States for low intensity conflict. 177

The government attempts to label the NSC as a small group of cabinet officials purely advising the President. As the immediately preceding paragraph shows, this is far from the truth. The NSC’s organization consists of hierarchies of Committees engaged in substantive policy and decision-making, grave in nature. Much of this authority, standing alone, may be sufficient to support a finding that the NSC exercises independent authority, but the cumulative effect of these authorities clearly makes the government’s argument unsustainable. In light of the numerous assigned authorities from the President and Congress, the NSC is charged with the broad and non-advisory functions and authorities to constitute an agency.

VI. REBUTTING THE GOVERNMENT’S CASE

An excerpt from the book, A Culture of Secrecy: The Government Versus the People’s Right to Know states that, “[t]he best measure of how dearly government officials protect something from becoming public is how energetically they defend it.” 178 In fact, from 1989 to early 1997 leading up to Armstrong, government lawyers spent over 35,000 hours litigating and appealing decisions in the case, costing taxpayers over $4,000,000. 179 The government argues that subjecting the NSC to the FOIA will unconstitutionally intrude upon both the President and the NSC. 180 The government argues further that NSC compliance with FOIA overlaps with the nature of the President’s power as enumerated under Article II of the Constitution. 181 Both these arguments, however, are unfounded and contrary to NSC and FOIA precedent. 182 In its 1978 opinion, the Office of Legal Counsel (OLC), not only stated that the NSC was an agency under FOIA, but addressed the concerns of those who believed that FOIA might unconstitutionally intrude upon the President or the NSC. 183 “[D]ue to that nature of the work of the NSC and its staff it is clear that valid

177 § 3021(g) (“The President shall establish within the National Security Council a board to be known as the ‘Board for Low Intensity Conflict’. The principal function of the board shall be to coordinate the policies of the United States for low intensity conflict.”).
179 Id.
181 Id., supra note 12, at 1501.
182 Id.
183 Id.
exemptions are available for the vast bulk of the material which constitutes NSC records.” In considering whether the NSC could ever have complete immunity from FOIA, the 1978 OLC thought it undoubtedly could not. Moreover, although the government argues that subjecting the NSC to the FOIA would violate constitutional separations of power, there is no evidence that such intrusions ever occurred during the time the NSC fell within the ambit of the FOIA. In addition, applying the FOIA to the NSC would not present a substantial risk of “improper intrusion into the President’s exercise of constitutional responsibilities,” since the FOIA already exempts materials classified “in the interest of national defense or foreign policy.” Further weakening the government’s argument, as Judge Tatel’s dissent pointed out, is the fact the FOIA has exemptions for national security materials. This, coupled with the FOIA’s inapplicability to certain information produced by members of the NSC who hold distinct non-NSC positions, as in the Office of the President or the Vice President, guarantees that NSC compliance with FOIA would not interfere with the President.

In Armstrong, the court found that the NSC is proximate to the President simply because the President is a member. This argument is conclusory and presents several problems. As the dissent pointed out, the President is an ex officio member of other EOP groups, which do comply with the FOIA. Further undermining this argument is the availability of the “dual-hat” rationale to make certain NSC documents available to the public. The Supreme Court has supported the proposition that an individual serving a department of government may wear more than one hat. For example, “when an individual serves in two capacities, as an advisor to the President and as a member of an agency, that person’s records are not subject to FOIA in the former instance, but are in the latter.” If proximity to the President were the determining factor, virtually

184 Id.
185 Id.
186 Id.
187 Id. (FOIA Exemption).
189 Armstrong, 90 F.3d at 567.
190 Id. at 560.
191 Id. at 568 (Tatel, J., dissenting) (explaining, in the dissenting opinion, that “[i]n my view, that conclusion should simply be a starting point for our consideration of the second Meyer factor; we still must analyze how the President’s membership on the NSC affects that entity’s functions.”).
192 Bailey, supra note 12, at 1502. FOIA exempts from its coverage materials classified in the interest of national defense or foreign policy. § 552(b)(1)(A).
194 Bailey, supra note 12, at 1502-03.
every person or entity within the EOP would be excluded from the FOIA, contrary to the statute’s expressed inclusion of the EOP in its definition of the term “agency.”195

In Armstrong, the court stressed that units of the EOP with the sole functions of advising and assisting the President are not agencies.196 Specifically, units that do not exercise “substantial independent authority” are not agencies under the FOIA.197 The President does, however, delegate additional responsibilities to Executive Office agencies.198 In this context, the entity performing the delegated function is no longer principally advising and assisting the President.199 Assisting the President in this capacity is quite attenuated from the type of aid contemplated by the advise-and-assist exception to FOIA.200 As the dissent in Armstrong warned, by construing the “advise and assist” language in such broad terms, the court was laying the groundwork for exempting all EOP units from FOIA merely because the President’s involvement could be traced to the units; any delegation the President makes can, if read broadly enough, be interpreted to be for the purpose of assisting him.201 This interpretation is excessively expansive and would, if applied literally, exempt many agencies currently subject to the FOIA.202 Under the current reading, no EOP would be sufficiently independent to constitute an agency.203 Accordingly, the inquiry into agency status should evaluate whether an entity has the power to act provided no higher authority disapproves.204

195 § 552(f)(1).
197 Id.
198 Bailey, supra note 12, at 1497.
199 Id.
200 Id.
201 Id. at 1498.
202 Armstrong v. Exec. Office of the President, 90 F.3d 553, 569 (D.C. Cir. 1996). “Apparently because of the President’s membership on the NSC, the court treats the Meyer delegation prong in what I believe to be an unrealistic fashion, expecting Armstrong to demonstrate that NSC activities reflect a sort of independence from the President that neither FOIA nor our cases envision as a requirement for FOIA agencies. Id. at 569. For example, I think the court makes too much turn on whether an entity may act without the consent of the President. Id. The Court suggests that an entity cannot have ‘substantial non-advisory authority of its own’ unless it may exercise its authority ‘without the consent of the President’.” Id.
203 Meyer v. Bush, 981 F.2d 1288, 1309 (D.C. Cir. 1993). Judge Tatel explained in his dissent, “I doubt that any President would permit an EOP unit to act against his will or that other executive agencies would comply with any order from an EOP unit thought not to reflect either the President’s wishes or his general policies; yet, FOIA clearly specifies that EOP units can be “agencies” under the statute: Armstrong, 90 F.3d at 569 (Tatel, J., dissenting).
204 Armstrong, 90 F.3d at 569.
It is troubling that the Armstrong decision forces individuals to show the NSC exercises significant independent authority in order to constitute an agency. Traditionally, the burden of proof fell on the plaintiff only to show a document held by an agency was a “record” as the term is defined pursuant to the FOIA. Because the government has sole access to information to prove whether an entity is or is not an agency, the burden should be on the government to demonstrate that an entity is not an agency, especially when that entity has historically been categorized as such. Otherwise, a plaintiff such as CUNY can only argue that an entity is an agency by inference or by reference to generally known facts about a unit such as the NSC. Given the inequity of resources in this contest, it would be extremely difficult for a FOIA litigant to successfully prove that a unit of the government is an agency when the entity maintains it is not.

Finally, the Armstrong court failed to recognize that the stated purpose and policy of the FOIA makes it clear that documents possessed by the government should, if at all possible, be made available to the public. The congressional intent behind the passage of the FOIA was to provide clear access for the public to government held information. Congress intended only those documents that fell within the ambit of the enumerated exemptions articulated in the FOIA be excluded in whole or part from public scrutiny; all other information was to be made available. In other words, if information in a record falls within an exempt category, it should not be released; if it does not fall within the ambit of an exemption, it must be disclosed.

VII. CONCLUSION

As Justice Louis Brandeis claimed, “sunlight is said to be the best of disinfectants.” The D.C. Circuit’s ruling in Armstrong was a significant setback for transparency, accountability and, therefore, principles at the heart of democracy. The Armstrong court, in reaching its opinion, stressed that entities of the EOP lacking substantial independent authority should not be categorized as agencies as that term is defined in the FOIA. Before Armstrong, it was unequivocally accepted that the NSC exercised substantial independent authority

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205 Bailey, supra note 12, at 1508.
206 Id.
207 Id. at 1509.
209 § 552(a).
210 Bailey, supra note 12, at 1510.
that mandated it be subject to the FOIA.\textsuperscript{213} Although \textit{Armstrong} has been strongly criticized on several grounds, nevertheless it has remained the law of the land since 1996. Yet, much has changed in the national security and foreign policy arena from 1996 to 2001, and from 2001 to present day. As foreign and national security policy has changed significantly, unsurprisingly, the NSC’s role has substantially expanded along with it. This vast expansion and transformation of the NSC renders \textit{Armstrong}’s analysis outdated and necessitates a new evaluation of the issues resolved by the D.C. Circuit eighteen years ago in a different time and atmosphere.

The lawsuit filed last year in district court in Brooklyn, N.Y., was over a FOIA request by Main Street Legal Services seeking information on the U.S. Government’s use of drone strikes and kill-lists in the war on terror.\textsuperscript{214} Main Street Legal Services argued that \textit{Armstrong} was erroneously decided and the day has come for courts to revisit the question of whether the NSC should be subject to the FOIA.\textsuperscript{215} District Court Judge Eric Vitalian ruled in August 2013, rejecting the bid to restore access to National Security Council records under the FOIA.\textsuperscript{216} In light of the expansive and ever-increasing authority of the NSC, this reasoning is outdated and erroneous, and therefore, cannot be relied on.

\textsuperscript{213} \textit{Id.} at 567. The NSC interpreted “agency” under the FOIA to include the NSC. A month after the 1974 FOIA amendments, the NSC issued proposed FOIA regulations. \textit{See} Freedom of Information Fees, 40 Fed. Reg. 3612 (Jan. 23, 1975); \textit{Armstrong}, 90 F.3d at 567. A month later, the NSC promulgated final FOIA regulations. \textit{See} Freedom of Information Act Requests for Classified Documents—Processing, Fees, Reports, Applicable Material, Declassification Criteria, Partial, Release, 40 Fed. Reg. 7316 (Feb. 19, 1975) (codified at 32 C.F.R. § 2101 (2012)); \textit{see also} Armstrong, 90 F.3d at 567. Thereafter, the NSC ran an active FOIA program and was a defendant in multiple lawsuits in which the NSC did not argue that it was categorically exempt from the FOIA. \textit{See, e.g., Armstrong}, 90 F.3d at 567; Willens v. Nat’l Sec. Council, 726 F. Supp. 325 (D.D.C. 1989).

\textsuperscript{214} Main St. Legal Servs., Inc. v. Nat’l Sec. Council, No. 13-CV-00948, 2013 WL 4494712, at *2 (E.D.N.Y. Aug. 7, 2013). By letter dated November 27, 2012, Main Street Legal Services (Plaintiff) requested access to records relating to the killing and attempted killing of United States citizens and foreign nationals by drone strikes, and a copy of all National Security Council meeting minutes taken in the year 2011. \textit{Id.} In a letter dated December 14, 2012, but postmarked January 18, 2013, the NSC acknowledged receipt of Plaintiff’s November 27, 2012 letter and stated “[a]n organization in the Executive Office of the President that advises and assists the President, the NSC is not subject to the Freedom of Information Act. \textit{Id.}

\textsuperscript{215} \textit{Id.} at *5.

\textsuperscript{216} \textit{Id.} at *6. In his order, Judge Vitaliano explained how he saw no reason to depart from the 1996 D.C. Circuit ruling that found files beyond the reach of FOIA on the grounds that the NSC’s primary role is to advise the President: “Current event have changed little, except perhaps to heighten the American government’s concern over (and awareness of) threats to national security interest.” \textit{Id.} In analyzing the NSC’s functions, Judge Vitaliano explained the Armstrong Court concluded that the NSC’s delegated powers primarily involve advising and assisting the President on national security matters and that the NSC exercises the same type of powers today, and, therefore, he found “no reason to depart from Armstrong’s thoroughly persuasive reasoning. \textit{Id.} at *4-5.
The lawyers for Main Street Legal Services are pursuing an appeal to the Second Circuit, which should recognize the D.C. Circuit’s ruling is outdated. A split between the D.C. Circuit and the Second Circuit will prompt the Supreme Court to grant certiorari on the issue, which the justices passed up on in 1997. A conflict on the law in the two circuits on such an important issue—an issue that goes to the heart of the level of transparency in our democracy—makes the issue of whether NSC records are subject to the FOIA one that will necessitate ultimate resolution by the Supreme Court.

The NSC has dramatically expanded its role since Armstrong, specifically through its involvement in the drone targeting process and inhumane interrogation techniques. In addition to reports claiming the NSC’s role has expanded in recent years, there is clear evidence of significant independent authority delegated to the NSC from the President and Congress. This is what the court will address in Main Street Legal Services v. National Security Council; based on the activities of the NSC today, it would not be surprising for the court to reject the Armstrong rational, thus setting up a potential resolution of the matter in the Supreme Court. In light of the explosion of intelligence activities and the expansion of NSC powers, which have occurred in the last eighteen years since Armstrong, complete NSC secrecy and lack of transparency is a critical issue to us all. Failure to include NSC records under the ambit of FOIA substantially undermines the Act’s purpose of open government and transparency, elements essential to a healthy democracy. In this context, it is time for a reevaluation of the issues previously decided in Armstrong. It is submitted that an examination of the full range of NSC activities in 2014 unequivocally evidence that the NSC should be characterized as an agency as the term is defined in the FOIA and that the NSC should once again be required to respond to FOIA requests for information in its file.

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207 Jung, supra note 22.
208 Hosenball, supra note 128.
209 Cox & Kassem, supra note 5.