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Office of Legal Counsel

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Assistant Attorney General

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MEMORANDUM FOR ALAN J. KRECZKO

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RE: Status of NSC as an "Agency" under FOIA

This memorandum responds to your request that we reconsider our opinion of September 6, 1978, in which we concluded that the National Security Council ("NSC") is an "agency" for the purposes of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, in light of a recent decision by the Court of Appeals for the District of Columbia Circuit. Upon reconsideration of this issue in light the decisions of the recent court of appeals decision and our understanding of the current functions of the NSC, we conclude that the NSC is not an agency for FOIA purposes.

I.

In 1978, this Office advised the NSC that it was an agency for purposes of FOIA for two reasons.¹ First, we examined the legislative history of the FOIA section that defines "agency"² and concluded that a court would hold that Congress intended for the NSC to be included within the statutory definition. We concluded, secondly, that the NSC's governing statute, 50 U.S.C. § 401, the statute authorizing the creation of the Central Intelligence Agency ("CIA"), 50 U.S.C. § 402, and subsequent

¹See Memorandum of John M. Harmon, Assistant Attorney General, Office of Legal Counsel to Robert J. Lipshutz, Counsel for the President, Sept. 6, 1978 ("1978 opinion"), 2 Op. O.L.C. 197 (1978).

²For the purposes of the Freedom of Information Act, the term "agency" includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 557(f).

executive orders expanded the NSC's functions beyond those of advising and assisting the President by granting the NSC "substantial independent authority to perform specific functions," Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); see Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980).³ We opined that "the NSC is a body which has functions, power and authority of its own and is not simply an alter ego of the President." See 2 Op. O.L.C. at 204. Subsequent legal developments, however, lead us to conclude that the analysis in our 1978 opinion is no longer applicable.

II.

Prior to 1974, the FOIA incorporated the Administrative Procedure Act's ("APA") definition of "agency."⁴ However, in 1974 Congress amended FOIA to include a definition which would cover entities that perform governmental functions and control information of interest to the public but fall outside the APA definition. The House Report on the amendment explained the meaning of the expanded definition by citing examples of "functional entities" included within it. The National Security Council was among those listed, along with the Council of Economic Advisers, the Office of Telecommunications Policy, the Federal Property Council, and the Office of Management and Budget. See H.R. Rep. No 93-876, 93rd Cong., 2d Sess. 8 (1974). Relying primarily on this Report, we concluded in our 1978 opinion that Congress intended FOIA's definition of "agency" to include the NSC.

However, the language of the House Report is not dispositive of this issue. The Senate version of the amendment

³In Kissinger, the Court concluded that entities within the Executive Office of the President were subject to the requirements of the FOIA with the exception of the "President's immediate personal staff [and] units whose sole function is to advise and assist the President." 445 U.S. at 156. The Court adopted the "substantial independent authority" test formulated by the D.C. Circuit in Soucie to determine whether a unit falls within that exception.

⁴See 5 U.S.C. § 551(1) which defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency" with the exception of Congress, the courts of the United States, governments of the territories or possessions of the United States and the government of the District of Columbia.

contained a less expansive definition⁵ and its Report mentioned only two specific units, the U.S. Postal Service and the National Railroad Passenger Corporation. See S. Rep. No. 93-854, 93 Cong., 2d Sess., 33 (1974). When the bill went to the conference committee, the conferees adopted the House version of the amendment but the Report deleted specific mention of Executive Office establishments in favor of the judicially formulated test set forth in Soucie and Kissinger. The Conference Report stated: "With respect to the meaning of the term 'Executive Office of the President,' the conferees intend the result reached in Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." Conf. Rep. No. 93-1200, 93d Cong., 2d Sess., 14-15 (1974).

The court in Rushforth v. Council of Economic Advisers, 762 F.2d 1038 (D.C. Cir. 1985), rejected the argument that specific mention of the Council of Economic Advisers in the House Report led to the conclusion that the amendment, as enacted, covered the Council. As the court stated, "[T]he Conference elected to embrace a test to be substituted for a listing of the entities to be included; the outcome of the case before us should, accordingly, turn on an examination of Soucie and the sole-function test enunciated in that case." Id. at 1040-41. Thus, to the extent that our 1978 opinion relied on the legislative history that the Rushforth court rejected as non-dispositive, the analysis is no longer viable.

III.

The recent cases addressing the question of whether an Executive Office entity is an agency for FOIA purposes have applied the sole-function test developed by the D.C. Circuit in Soucie, endorsed by the 1974 Conference Committee Report, and adopted by the Supreme Court in Kissinger. See Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259 (D.C. Cir. 1980), Rushforth v. Council of Economic Advisers, 762 F.2d 1038 (D.C. Cir. 1985), and Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993). See also Energy Research Foundation v. Defense Nuclear Facilities Safety Board, 917 F.2d 581 (D.C. Cir. 1990) (applying the Soucie sole-function test to an "independent

⁵The Senate version of the amendment expanded the APA definition of "agency" by adding, specifically, the United States Postal Service, the Postal Rate Commission and "any other authority of the Government of the United States which is a corporation and which receives any appropriated funds." See Conf. Rep. No. 93-1200, 93d Cong., 2d Sess., 14-15 (1974).

establishment in the executive branch"). Under that test, an entity provides only assistance and advice to the President and is not an agency for purposes of the FOIA if the unit does not have "substantial independent authority to perform specific functions."

The test requires a specific inquiry into the authority granted to the entity and courts examine governing documents, such as statutes and executive orders, in order to determine the types of functions an entity has the authority to perform. For example, in Pacific Legal Foundation, the court initially looked at the statute which created the Council on Environmental Quality and determined that the statute provided for an advisory role only: Pacific Legal Foundation, 633 F.2d at 1262. The court then examined the executive orders that have expanded the statute's original grant of authority. It concluded that since the President gave the Council the authority to coordinate and evaluate federal programs, issue guidelines and promulgate regulations, the Council's functions were no longer limited to advising and assisting the President. Id. at 1262, 1263.

Following the same analysis, the court in Rushforth concluded that the authority of the Council of Economic Advisers was limited to advising and assisting the President. Rushforth, 762 F.2d at 1043.⁶ Similarly, the court in Meyer examined the Executive Order that created the President's Task Force for Regulatory Relief and determined that the Task Force's functions were limited to giving advice and assistance to the President. Meyer, 981 F.2d at 1291-95.

A.

An examination of the National Security Act of 1947, 50 U.S.C. § 402, the statute which establishes the NSC, reveals that its authority is limited to advising the President on issues of foreign and domestic intelligence. The statute states that the NSC's function shall be

⁶The Council of Economic Adviser's governing statute, 15 U.S.C. § 1023, authorizes the CEA to (1) assist and advise the President in the Preparation of the Economic Report; (2) gather, compile and submit to the President timely and authoritative information concerning economic developments and economic trends; (3) to appraise the various programs and activities of the Federal Government and make recommendations to the President; (4) to develop and recommend to the President national economic policies to foster and promote free competitive enterprise; and (5) to make and furnish whatever material the President may request on matters of Federal economic policy.

to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.

50 U.S.C. § 401(a). In addition, the NSC is authorized to perform such other functions as the President may direct, for the purpose of more effectively coordinating the policies and functions of the departments and agencies . . . and it shall . . . 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 . . . and (2) to consider policies on matters of common interest to the departments and agencies of the Government concerned with the national security, and make recommendations to the President in connection therewith.

50 U.S.C. § 401(b). We conclude that the National Security Act does not contemplate the NSC performing any functions other than those associated with advising and assisting the President.

The duties and functions of the NSC are established also by presidential directives issued by each President at the beginning of his or her administration. The directive issued by the Clinton administration, which we understand to be similar to the majority of those issued, describes the NSC as the "principal forum for consideration of national security policy issues requiring Presidential determination." It states that the NSC "shall advise and assist [the President] in integrating all aspects of national security policy as it affects the United States . . . [and] shall be [the President's] principal means for coordinating Executive departments and agencies in the development and implementation of national security policy." See Presidential Decision Directive No. 2., Jan. 20, 1993. It is our opinion that none of the duties listed in this directive rise to the level of "substantial independent authority to perform a specific function" because in each instance, the NSC is either advising the President on national security policy issues or assisting the President in the implementation of that policy.⁷

⁷The directive also creates two standing committees, one for Cabinet-level officials and another for senior sub-Cabinet level officials, to serve as forums for policy issues affecting national security. See Presidential Decisional Directive No. 2 at 2. Although the President does not serve on either of these committees, the groups' responsibilities are limited to advising

B.

At the time of our previous opinion, the NSC was charged, specifically, with directing and supervising the activities of the Central Intelligence Agency ("CIA"). See 50 U.S.C. §403(1) (1988). This was a distinct statutory obligation that existed independently of its duty to advise the President. Accordingly, we concluded that NSC could not be viewed as a unit whose sole function consisted of advising and assisting the President.

However, the Intelligence Authorization Act for Fiscal Year 1993, Pub. L. No. 102-496, amended the National Security Act of 1947 by removing the NSC as the supervisory body of the CIA. The previous § 403 read "[t]here is established under the National Security Council a Central Intelligence Agency with a Director of Central Intelligence who shall be the head thereof, and with a Deputy Director of Central Intelligence who shall act for, and exercise the powers of the Director during his absence or disability. . . ." *Id.* That section now simply reads, "[t]here is established a Central Intelligence Agency." Other provisions make it clear that the Director of Central Intelligence is responsible for supervising the activities of the CIA. See e.g., § 403-3(d). These statutory changes eliminate the supervisory authority over the CIA the NSC once possessed.

Additionally, the 1993 Act makes the NSC, along with the President, responsible for giving direction to the Director of Central Intelligence.⁸ For example, the Director is responsible for providing national security intelligence to the President, and others, under the direction of the NSC. See § 403-3(a). In connection with directing the activities of the CIA, the Director is required "to perform such other functions and duties related to intelligence affecting the national security as the President or the NSC may direct." See § 403-3(d)(5). Although this language suggests that the NSC may direct agency action, recent interpretations of similar language suggest otherwise. In discussing a similar situation in *Meyer*, the court concluded that the language did not "authorize . . . the Task Force, qua Task Force to give directions to the executive branch. Instead, the OMB Director took up that responsibility" *Meyer*, 981 F.2d at 1294. With regard to the authority to provide general direction to the OMB Director, the court said "In that respect

the President on the interagency-implementation of national security policy.

⁸The Director of Central Intelligence serves as (1) the head of the U.S. intelligence community, (2) the principal adviser to the President for intelligence matters related to the national security, and (3) head of the CIA.

. . . the Task Force theoretically was positioned between the OMB Director and the President, placing the Task Force only a hair's breadth from the President" and concluded that the Task Force members were functioning as assistants to the President. Id. Accordingly, we conclude that the amendment's language authorizes the NSC to serve only as an advice and assistance panel.

C.

Since the establishment of the NSC as an Executive Office entity, Presidents have given the NSC duties and responsibilities through executive orders. In 1978, we opined that many of the executive orders "empowered [the NSC] to perform important, substantial and far-reaching governmental functions relating to intelligence matters." However, our recent review of those orders still effective reveals that they do not grant the NSC any "substantial independent authority to perform specific functions" as required by the Soucie sole-function test. The majority of these orders require the NSC to provide guidance and direction for national security policy.⁹ As we stated earlier, in this capacity the NSC is merely assisting and advising the President as mandated by the National Security Act of 1947 and the latest Presidential Decision Directive.¹⁰

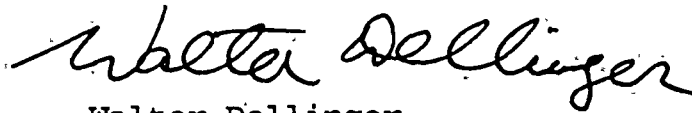
⁹There are some executive orders that give us pause. For example, Executive Order No. 12356 authorizes the NSC to review declassification decisions of the Director of the Intelligence Security Oversight Office. However, it is our understanding that the NSC has never performed this function and has no established procedure. Although the Soucie test focuses on the authority to act, the Meyer court stressed the actual actions of the Task Force and suggested on several occasions that absent an indication that the entity performed the function, the Task Force would not be charged with that function. Meyer, 981 F.2d at 1294, 1295, 1297.

We are also aware that, under the authority of the same executive order, 32 CFR § 2003.20(k) provides that "only the NSC may grant an agency's request for a waiver from the use of the SF 312." We conclude that in this capacity the NSC is merely assisting the President because the regulation does not require the NSC to exercise "substantial independent authority." The actual determination is made by the Director of the Information Security Oversight Office and the Department of Justice. See 32 CFR § 2003.20(k). Furthermore, it is our understanding that the NSC does not perform this function on a regular basis.

¹⁰In our 1978 opinion, we took the position that the legislative history of FOIA necessitated a very narrow interpretation of the term "assist." See 1978 opinion, n.9. However, the cases give the term a much broader meaning. See e.g., Rushforth, 762 F.2d at 1043; Meyer, 981 F.2d at 1294.

IV.

In light of our understanding of NSC functions, we conclude that the FOIA definition of "agency" does not include the NSC. Our examination of the statutes, directives and executive orders that authorize the NSC to act establishes that it has not been given any "substantial independent authority to perform specific functions" as that test has been applied by the courts. Accordingly, our 1978 opinion is withdrawn.



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