

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. resume	re: Stanley Katz [partial] (1 page)	03/02/1993	b(6)

COLLECTION:

Clinton Presidential Records
Staff Secretary
John Podesta (Subject Files)
OA/Box Number: 5485

FOLDER TITLE:

Archives [1]

2018-0662-S

rs3134

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

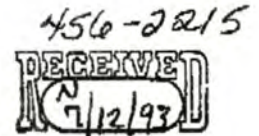
C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



PUBLIC CITIZEN LITIGATION GROUP
SUITE 700
2000 P STREET N.W.
WASHINGTON, D.C. 20036
(202) 833-3000

July 12, 1993

*file
archives*

By Hand Delivery

NARA FOIA Officer
National Archives and Records Administration
Seventh Street and Pennsylvania Ave., N.W.
Washington, D.C. 20408

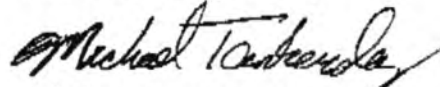
Re: Freedom of Information Act Request

Dear Sir or Madame:

In connection with the enclosed letter to Acting Archivist Trudy Peterson, I am requesting under the Freedom of Information Act, 5 U.S.C. § 552, copies of any records containing directives, instructions, plans or programs concerning actions taken by, or to be taken by, NARA to preserve and process for public access in accordance with the Presidential Records Act, 44 U.S.C. §§ 2201-07, any Presidential records stored on the computer tapes and disk drives of the Executive Office of the President from the Reagan and Bush Administration which were transferred to the custody of NARA on January 19-28, 1993. The accompanying letter more fully describes the materials requested. If you have questions concerning the scope of this request please contact me at (202) 833-3000.

I would appreciate your handling this request as quickly as possible, and I look forward to hearing from you within 10 days as provided by the statute.

Sincerely yours,


Michael Tankersley

Enclosure

PUBLIC CITIZEN LITIGATION GROUP
SUITE 700
2000 P STREET N.W.
WASHINGTON, D.C. 20036
(202) 833-3000

July 12, 1993

Honorable Trudy Peterson
Acting Archivist of the United States
National Archives and Records Administration
7th and Pennsylvania Avenue NW
Washington DC 20408

BY HAND

Dear Archivist Peterson:

On behalf of our clients, a group of historians, librarians, and researchers,¹ we are writing to request your assurance that the National Archives and Records Administration is complying with its statutory obligations to preserve, and to begin immediately the processing of, the electronic Presidential records from the Administration of former Presidents Bush and Reagan, which were transferred to the custody of the Archives during January 19-28, 1993.

The materials transferred to the Archives consist of computer backup tapes and disk drives containing electronic records created by staff of the Executive Office of the President, including the National Security Council. The tapes and disk drives store, in addition to Federal records and personal records of EOP staff, "Presidential records," as that term is defined in 44 U.S.C. § 2201(2). The Presidential Records Act, 44 U.S.C. §§ 2201-2207, vests exclusive ownership of such Presidential records in the United States, limits the former President's rights to restrict public access to those records, and makes the Archivist responsible for access to, and preservation and disposal of, the records after the conclusion of the former President's term of office.

As you are aware, the transfer of the electronic records was accompanied by an agreement between former Archivist Don W. Wilson and former President George Bush purporting to govern the records created during his Administration. The Bush-Wilson Agreement contravenes the Presidential Records Act by giving former President Bush exclusive control over Presidential records, special rights to restrict access to the records, and the right to make determinations concerning disposal of the records. Because the Bush-Wilson Agreement contravenes the Presidential Records Act, it

¹ These clients are the American Historical Association, the American Library Association, the Center for National Security Studies, the National Security Archive, Scott Armstrong, Eddie Becker, and Gary Stern.

must be considered null and void, and the Agreement must not hinder or delay the Archives in carrying out its obligations under the Presidential Records Act.

More specifically, the Presidential Records Act provides that the Archivist must take responsibility for preserving Presidential records at the conclusion of the President's term of office, and requires the Archivist to "make such records available to the public as rapidly and completely as possible." 44 U.S.C. § 2203(f)(1). Yet it appears that the Archives is not adhering to these statutory duties to preserve the materials and to process the records that they contain for public access.

First, the Archives has not fulfilled its obligation to preserve the materials. With respect to the backup tapes, the Archives began to take steps necessary to the proper storage and preservation of the tapes only after being found in contempt of the court order requiring preservation of the Federal records contained on the tapes. With respect to the disk drives, including the personal-computer disk drives from the White House Office and Office of Policy Development, it appears that the Archives has neither taken steps to preserve these materials nor made any effort to assess the damage that may have been done to the materials when they were transferred.

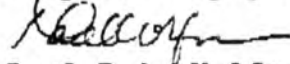
Second, it appears that the Archives has not taken any steps to process the Presidential records on the transferred materials to make them available to the public, as required by the Presidential Records Act. Indeed, as far as we can determine, the Archives has no plan in place for identifying and processing the Presidential records on the transferred materials.

Finally, the Bush-Wilson Agreement provides that, at the conclusion of the Independent Counsel's investigation into the search for President Clinton's passport records, the disk drives from the White House Office and Office of Policy Development identified in Schedule C of the Agreement will be transferred to the Archives as "personal records of George Bush." Such transfer of the materials, without steps to preserve and process the Presidential records on these materials in accordance with the Presidential Records Act, would violate the statute. Furthermore, it appears that the Archives has no program in place for ensuring the proper treatment of the Presidential records at the conclusion of the investigation.

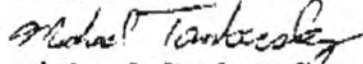
Accordingly, we request your written assurance that the Presidential records on these materials are being, and will be, preserved by the Archives as the property of the United States and processed for public access in accordance with your statutory obligations under the Presidential Records Act. We also request that you tell us what directives have been issued to ensure proper preservation of the materials and to make the Presidential records they contain available to the public. This includes identification of any program for correcting damage and preserving the disk drives

transferred to the Archives, and plans for handling the Schedule C materials at the conclusion of the Independent Counsel's investigation. We also request that you provide us with any records setting forth such directives, instructions, plans, or programs.²

Respectfully yours,



Paul R.Q. Wolfson



Michael Tankersley

² To comply with the formalities of requesting such records from the Archives under the Freedom of Information Act, 5 U.S.C. § 552, we are also submitting this request to the Archives' FOIA officer, and we look forward to a response within ten working days, as provided by law.

SETTLEMENT OUTLINE

BACKGROUND

Three "Models" of E-mail Recordkeeping Practice

- A -- Defendants' Litigation Position
- B -- Plaintiffs' Litigation Position
- C -- District Court's January 6 Opinion

TOPICS FOR DISCUSSION

- I. Prospective Recordkeeping Duties for EOP Components
- II. Obligations With Respect To E-mail Preserved To Date Since January 20, 1993
- III. Obligations With Respect To Reagan and Bush Tapes Transferred To Archivist
- IV. FOIA Position In Lawsuit to Be Reexamined

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: DB DATE: 5/24/18

BACKGROUND

Three "Models" of E-mail Recordkeeping Practice

Model A: Defendants' Prior Litigation Position (1989-1992)

- o PROFS and other E-mail networks such as All-in-1 are communication systems not intended to be used for the creation of federal records; hence, no general recordkeeping requirements exist with respect to these systems
- o When e-mail is created which rises to the level of a record, defendants' instructions require that the message be printed out and placed in official files
- o What remains on the 'live' system are extra copies of records, along with other nonrecord material (as well as a mix of nonrecord presidential materials)
- o NSC (and OSTP) are free to have staff create and maintain dual systems of presidential and federal records (on email as well as on paper); no judicial review exists of decisions regarding creation and maintenance of presidential records (per Armstrong I)
- o No legal impediments exist to recycling backup tapes containing nonrecord presidential and federal materials
- o Archivists' actions in oversight role have been adequate given nature of EOP's E-mail systems
- o FOIA: Plaintiffs' amended request for all notelogs and other PROFS materials created by a large number of NSC and other individuals (from a subset of the Reagan PROFS tapes) is per se unreasonable, since the backup tapes are neither federal records under the FRA, nor agency files or an agency database under the FOIA; moreover, the request is unreasonable based on the huge search burden required to respond to the request (220,000 pages; 26 staff years to review; 66 days computer programming time)

- 2 -

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: JB DATE: 5/24/18

~~ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL~~

Model B: Plaintiffs' Continuing Litigation Position

- o PROFS and other E-mail networks are recordkeeping systems which must be maintained in accordance with all applicable NARA regulations (including the requirement of segregation of federal record materials; the duty to periodically audit such systems for misclassification of records; and the need for a disposition schedule for all materials residing on each system)
- o Existing guidance on the printing out of federal record material is insufficient, given that not all federal record material is required to be printed out
- o Since NSC (and OSTP) are "agencies," they may not create presidential records; in any event, existing guidance allowing for categorization of records into presidential and federal record material is subject to judicial review.
- o Backup tapes are federal records subject to an appropriate disposition schedule
- o Archivist should have aggressively acted to ensure destruction of E-mail records was stopped
- o Plaintiffs' amended FOIA request calls for a search of PROFS backup tapes not unlike prior searches conducted pursuant to Iran-Contra etc.; defendants' estimates of burden are exaggerated

Model C: Armstrong Opinion of January 6, 1993 (and
Orders of January 6 and 11, 1993)

- o Defendants' prior written guidance is arbitrary and capricious in not requiring that "who knew what when" information is retained when substance of E-mail message texts are printed out
- o Defendants' must ensure that records officers supervise designations of "records" on E-mail systems and otherwise periodically review systems in accordance with NARA regulations
- o Court also stated that NARA considers that each version of federal record material (paper and electronic form) must be separately scheduled for disposition (but unclear if this is a holding)
- o Enjoined EOP agency components to preserve E-mail federal record information "until such time as the Archivist takes action"
- o Held that judicial review was precluded over NSC distinctions between presidential and federal records
- o Did not reach FOIA issues, but clear implication of opinion is that backup tapes contain federal record material -- which by extension sub silentio overrules defendants' argument that backup tapes do not function as an agency file or agency database.

TOPICS FOR DISCUSSION

I. Prospective Recordkeeping Duties For EOP Agency Components

Key Topics For Discussion:

What Would Constitute Adequate Recordkeeping Guidance Sufficient To Allow For The End Of The Current "Interim" Solution of Preserving Federal Record Material in the Form of Backup Tapes (Under the January 6 & 11 Opinion and Orders)?

How Far Apart Are The Parties' Positions Given This Administration's Expressed Intent To Develop The Technological Means For Preserving A Greater Amount of Electronic Records In Electronic Format?

Sub-Topics:

- A. What materials on E-mail systems do EOP agency components consider worthy of preservation as federal records?

(Plaintiffs' Position:

large % of E-mail is record material;
e.g., read receipt info; logs; calendars,
user directories)

- B. How would EOP agency components choose to preserve federal record material generated on E-mail communication systems?

(Plaintiffs' Position:

E-mail is created on-line and should
be preserved on-line on an indefinite
basis -- rather than in 'official' paper
files)

- C. What form of "supervision" by records officers is appropriate with respect to E-mail?

(Plaintiffs' Position:

optimum supervision accomplished by
sampling individual E-mail accounts on
periodic basis)

- D. Are records disposition schedules needed for material residing on various EOP E-mail systems, and what form would they take?

(Plaintiffs' Position:

yes -- and disposition period could be longer for 'on-line' records than for paper copies)

- E. Will backup tapes of E-Mail continue to be made, and how will they be treated (i.e., as record or nonrecord material)?

(Plaintiffs' Position:

backup tapes are federal records; EOP should work with NARA in creating disposition schedule for tapes, presumably allowing for the lodging of FOIA requests where appropriate)

- F. For "dual" hat agencies: What additional guidance is appropriate on the matter of distinguishing between presidential and federal record creation?

II. Obligations With Respect To E-mail Preserved To Date Since January 20, 1993 (Mostly on Backup Tapes)

Key Topics For Discussion:

What Actions Do The Agencies Believe Are Now Possible To Take (Irrespective of January 6 Opinion)?

What Options Exist in the Near-Term Future For Segregation of Federal Record Material?

(Plaintiffs' Position:

anticipated that plaintiffs will press for segregation of federal records from all backup tapes created to date, including related "transmission" data)

III. Obligations With Respect to Reagan and Bush Tapes Transferred to Archivist

Key Topic for Discussion:

What further actions, if any, beyond preservation copying, does NARA believe to be appropriate irrespective of January 6 Order?

Sub-Topics:

Should preservation copying be extended to the remainder of the materials in NARA's custody?

Should NARA devote the staff and budgetary resources to fully carry out the Preservation Plan for all (or only some) materials, including the restoration of logical files to hard disks and recopying files to a generic format?

Should NARA devote the staff and budgetary resources to undertake segregation of the Presidential and potential Federal record information on all (or only some) of the tapes? If so, what consultations are necessary with former Presidents?

Should plaintiffs be required to specify specifically which information on the backup tapes be preserved and segregated as Federal records?

(Plaintiffs' Position:
if no damage to tapes in process,
all federal record material should be
segregated and preserved)

IV. FOIA Position In Lawsuit To Be Reexamined

Key Topics For Discussion

Are defendants willing and/or able to process plaintiffs' amended FOIA request, at least in part, if not in whole?

If so, which component(s) of government would be assigned to this task? (NARA, NSC, WHCA, OA)

National Archives



MAY 11 1993

Washington, DC 20408

Honorable John D. Podesta
Assistant to the President
and Staff Secretary
The White House
Washington, D.C. 20500

Dear Mr. Podesta:

In accordance with the authority granted to me by the Presidential Records Act, Section 2203(c)(2), I approve of disposal of the three (3) categories of Presidential bulk mail described in your letter of April 22, 1993. Those categories are:

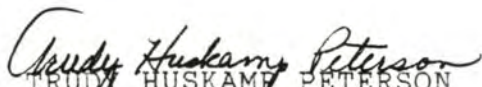
- (1) Certain categories of public mail to the President, the First Lady and their staffs including anonymous correspondence, correspondence with an incomplete address, mail from prolific writers, and public opinion mail.
- (2) Copies of press releases, press conference and briefing transcripts, personnel announcements, mass mailings and other internal publications that are distributed widely. As you stated in your letter, a record copy of each of these items should be retained in the originating White House office.
- (3) Publications, brochures, clippings and other types of enclosures in public mail, when there is no immediate or historical importance to the materials.

As in the past, I recommend that representatives of the National Archives and Records Administration, in coordination with the White House Office of Records Management, review these materials before disposal and take samples when appropriate. These samples will be retained permanently. If groups of materials that should not be destroyed are identified during sampling, the National Archives will inform you.

I do not intend to take any Congressional action with regard to this request as provided for by Section 2203(e) of the Presidential Records Act.

I support your effort to continue the disposal of Presidential bulk mail. This practice has been very successful since it began in 1982, and, as you point out, has been mutually beneficial for both the White House and the National Archives.

Sincerely,


TRUDY HUSKAME PETERSON
Acting Archivist
of the United States

THE WHITE HOUSE

WASHINGTON

April 22, 1993

Dear Dr. Peterson:

In accordance with the requirements of the Presidential Records Act, 44 U.S.C. (c) (1), I propose to dispose periodically of the following categories of Presidential records:

- o certain categories of public mail to the President, the First Lady and their staffs including anonymous correspondence, correspondence with an incomplete address, mail from prolific writers, and public opinion mail. Samples, when appropriate, will be retained.
- o copies of press releases, press conference and briefing transcripts, personnel announcements, mass mailings and other internal publications that are distributed widely. Record copies of each is retained by the originating office within the White House.
- o publications, brochures, clippings and other types of enclosures in public mail, when there is no immediate or historical importance to the materials.

The White House Office of Records Management will dispose of these materials only after representatives of the National Archives have reviewed, approved and, when appropriate in their opinion, sampled it.

This would continue a policy initiated under President Reagan and agreed to by the National Archives. This policy has allowed the disposal of over 35,000 cubic feet of materials since its inception. It is a policy that has benefitted both the White House and the National Archives by allowing significant savings in space, maintenance, and budget, in the short term for the White House, and in the long term for the National Archives.

Sincerely,



John D. Podesta
Assistant to the President
and Staff Secretary

Dr. Trudy H. Peterson
Acting Archivist of the United States
Room 111
National Archives and Records Administration
7th and Pennsylvania Avenue, N.W.
Washington, D.C. 20408

THE WHITE HOUSE
WASHINGTON

Dr. Trudy H. Peterson
Acting Archivist of the United States
Room 111
National Archives and Records Administration
7th and Pennsylvania Avenue, N.W.
Washington, D.C. 20408

Terry Good —

call me before
forwarding this letter

John

TALKED TO
JOHN. OK
TO DISPATCH —

LEE 4/23/93

— GIVEN TO DOUG
THURMOND

FOR HAND DELIVERY
NOON 4/23/93

John:

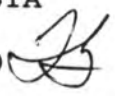
Could we
talk about
this also
today?

Jerry
(Primarily, the
first two pages)



April 15, 1993

MEMORANDUM FOR JOHN PODESTA

FROM: TERRY GOOD 

RE: DISPOSAL OF CERTAIN CATEGORIES OF PUBLIC MAIL

Since the Reagan Administration, this office has had in place a process to dispose of that portion of the public mail that has received either a form response or no response. The National Archives (NARA) agreed to this in 1982. (See attachments) We have continued to follow these guidelines ever since.

The process is fairly straightforward. Before disposal, we ask NARA to review the boxes of mail for a "second opinion". Its staff will pull a very small number as selected samples. The boxes will then be given to the Office of Administration which has a maceration facility in the NEOB. Initially, NARA contracted with a commercial operation to dispose of the material. Later, and until quite recently, we used the services of NSA at Fort Meade. NSA remains a fall-back option.

Typically, we will hold the mail for 30 to 90 days before disposal. However, the current volume is such that we do not have storage space to retain it for even 30 days. Since January we have received approximately 1300 boxes and have disposed of almost 600. Our available space will hold 600 which allows for a small amount of working area. At the moment our working area has disappeared and we are expecting more boxes this week.

Evidently, NARA is reviewing many of its policies at the request of its new Acting Archivist, Dr. Trudy Peterson. Thus, NARA's Office of Presidential Libraries has asked if the White House would submit a memorandum explaining that it would like to continue this policy. To accomodate this request, I have prepared a draft letter taking into account the requests cited in Dr. Warner's letter of March 30, 1982. I omitted reference to the Presidential Libraries Liaison Office which was later reduced to a staff of one working in and under the Office of Records Management. As we have discussed we hope that this position can be filled in the near future. However, in the meantime, the reviewing and sampling can be done by a NARA team that visits frequently to assist in performing this function.

I defer to you as to whose signature should appear on it.

Dear Dr. Peterson:

In accordance with the requirements of the Presidential Records Act, 44 U.S.C. (c) (1), the President proposes to dispose periodically of the following categories of Presidential records:

- o certain categories of public mail to the President, the First Lady and their staffs including anonymous correspondence, correspondence with an incomplete address, mail from prolific writers, and public opinion mail. Samples, when appropriate, will be retained.
- o copies of press releases, press conference and briefing transcripts, personnel announcements, mass mailings and other internal publications that are distributed widely. Record copies of each is retained by the originating office within the White House.
- o publications, brochures, clippings and other types of enclosures in public mail, when there is no immediate or historical importance to the materials.
- o unsuccessful and unsolicited applications for employment, including correspondence, resumes, letters of recommendation and other similar materials no longer under review by the Office of Presidential Personnel.

The White House Office of Records Management will dispose of these materials only after representatives of the National Archives have reviewed, approved and, when appropriate in their opinion, sampled it.

This would continue a policy initiated under President Reagan and agreed to by the National Archives. This policy has allowed the disposal of over 35,000 cubic feet of materials since its inception. It is a policy that has benefitted both the White House and the National Archives by allowing significant savings in space, maintenance, and budget, in the short term for the White House, and in the long term for the National Archives.

THE WHITE HOUSE
WASHINGTON

March 8, 1982

Dear Dr. Warner:

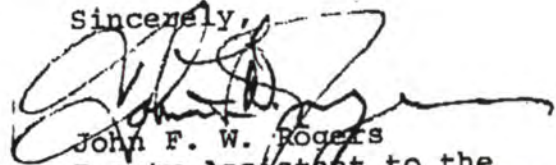
In accordance with the requirements of the Presidential Records Act, 44 U.S.C. 2203 (c) (1), the President proposes to dispose periodically of the following categories of Presidential records:

- o public mail to the President, the First Lady and their staffs including anonymous correspondence, correspondence with an incomplete address, mail from prolific writers, and public opinion mail. A sample will be retained by Records Management.
- o copies of press releases, press conference and briefing transcripts, personnel announcements, mass mailings and other internal publications that are distributed widely. One copy will be retained by Records Management.
- o publications, brochures, clippings and other types of enclosures in public mail, when there is no immediate or historical importance to the materials.
- o unsuccessful and unsolicited applications for employment, including correspondence, resumes, letters of recommendation and other similar materials.

I would like to obtain your views on this proposal. I would suggest that as a means of carrying out this plan on a continuing basis that members of the Office of Records Management would work with your designee in reviewing sample boxes of the materials involved. The materials would then be turned over to you for destruction.

I would appreciate your consideration of this proposal and a response at your earliest convenience.

Sincerely,


John F. W. Rogers
Deputy Assistant to the
President for Management

Dr. Robert Warner
Archivist of the United States
The National Archives
Washington, D.C. 20408

cc: Biff Henley
cc: Emily Ford - JFWR Chron.
cc: Central Files w/attachment

THE WHITE HOUSE

WASHINGTON

Dear Dr. Warner:

In accordance with the requirements of the Presidential Records Act, 44 U.S.C. 2203 (c) (1), the President proposes to dispose periodically of the following categories of Presidential records:

- public mail to the President, the First Lady and their staffs including anonymous correspondence, correspondence with an incomplete address, mail from prolific writers, and public opinion mail. *A sample will be retained by Records Management.*
- copies of press releases, press conference and briefings transcripts, personnel announcements, mass mailings and other internal publications that are distributed widely. *One copy will be retained by Records Management.*
- publications, brochures, clippings and other types of enclosures in public mail, when there is no immediate or historical importance to the materials
- unsuccessful and unsolicited applications for employment, including correspondence, resumes, letters of recommendation and other similar materials.

Office of Records Mgmt.
I would like to obtain your views on this proposal. I would suggest that as a means of carrying out this plan on a continuing basis that members of the ~~White House staff~~ would work with your designee in reviewing sample boxes of the materials involved. The materials would then be turned over to you for destruction. ~~In keeping with procedures recommended by the Presidential Libraries Office a sampling of this material is being retained.~~

I would appreciate your consideration of this proposal and a response at your earliest convenience.

Sincerely,

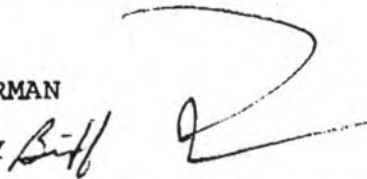
J FWR
James A. Baker, III
Chief of Staff and
Assistant to the President

Dr. Robert Warner
Archivist of the United States
The National Archives
Washington, D.C. 20408

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

February 23, 1982

MEMORANDUM FOR: RICHARD DARMAN
FROM: BIFF HENLEY *Bill* 
SUBJECT: DISPOSAL OF CERTAIN MATERIALS

Help! We really need to move ahead and dispose of the materials described at TAB A. Presently, there are 2,500 cartons stored in Alexandria and 600 more in storage here.

Last week, we received the 250,000 petitions (80 cartons) described at TAB B which should be included into the 600 mentioned above.

For your information TAB C contains copies of previous memoranda on this subject.

TAB D contains copies of the action taken by the Vice President's office with similar materials.

- 1) What are you asking me to do?
- 2) If it helps for me to read memos from Linder, I'd like to know how —

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

August 3, 1981

TO: H. P. Goldfield

FROM: Anne Higgins, Director of Presidential Correspondence *Anne*

SUBJECT: CLASSIFICATIONS OF MAIL WHICH CAN BE DISCARDED

The following represent the classifications of mail we believe may be safely discarded after an appropriate period of retention (i.e., 30 to 60 days):

I. Correspondence acknowledged by card, including requests for birthday and wedding anniversary greetings. No record is now maintained for these acknowledgments, nor do we plan to ask for any. Random sampling might be kept for historical purposes.

II. Get-well correspondence acknowledged by presidential form response. No record is maintained. Random sampling should be kept for historical purposes.

III. Unacknowledged correspondence defined by the mail room as inspired or propaganda mail. No record now maintained, but we may like to consider the possibility of keeping some sort of list on these. Samples of each form should be kept for historical purposes.

1192 boxes end of June
915 end of May

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

July 16, 1981

MEMORANDUM FOR:

H. P. GOLDFIELD

FROM:

FRANK MATTHEWS *K1*

RE:

REQUEST FOR DISPOSAL OF CERTAIN
PRESIDENTIAL RECORDS

As you requested during our July 14 meeting, attached is a list of the categories of records currently in our custody which we do not believe warrant permanent retention. .

NARS has examined and is prepared to approve for disposal these particular records as required by the Presidential Records Act.

Except for the get-well correspondence, these categories of records have been disposed of routinely in the past in cooperation with NARS.

cc: Mary Lawton

As of July 15, 1981:

Number of Boxes	Contents	Recommended Retention Period
1,293	Correspondence acknowledged by card, including requests for birthday and wedding anniversary greetings. No record is maintained of these acknowledgments.	30 days
	Unacknowledged correspondence including copy letters, mail from supporters of special interest groups variously defined by the Mail Room as inspired or propaganda mail, and multi-signature mail.	30 days
	While I don't have a precise numerical breakdown by cartons, the estimated percentages are: 40-50%: acknowledged 50-60%: unacknowledged	
169	Correspondence acknowledged by a form response by the Director of Correspondence. No copy of the acknowledgment is maintained.	60 days
24	Unacknowledged correspondence - registered	60 days
138	Oversize items from children acknowledged by Presidential form letters. A copy of the Presidential letter and the incoming cover letter, if it exists, are filed.	60 days
500-600 (various sizes)	Get well correspondence acknowledged by Presidential form response. No record is maintained of these acknowledgments.	30 days

DRAFT

THE WHITE HOUSE
WASHINGTON

April 30, 1981

MEMORANDUM FOR RICHARD G. DARMAN

FROM: ROBERT D. LINDER

SUBJECT: Disposal of Certain Materials.

The purpose of this memorandum is to seek your guidance and approval for the disposal of certain materials after an appropriate length of time as a means of managing the records received or created in the White House Office.

The Presidential Records Act provides that the President may dispose of his Presidential records that no longer have administrative, historical, informational, or evidentiary value. (44 USC 2203(c)). Procedurally, the President must obtain the views, in writing, of the Archivist of the United States concerning such disposal. If the Archivist considers the disposal to be of special interest to the Congress, he must notify certain Congressional Committees and then the President must also notify the Committees by submitting copies of his disposal schedule at least 60 calendar days of continuous session of the Congress in advance of the proposed disposal date. If the Archivist states that he does not intend to notify the Congressional Committees, the records may be disposed of without further consultations.

Current Situation

We are currently receiving in the Office of Records Management, a great deal of material which I believe could be disposed of under the code section cited above. Not only is time wasted in handling this material numerous times, but valuable storage area is also wasted by this material which has little or no archival interest.

The materials I am referring to fall into four broad categories.

- 1) public mail to the President, the First Lady and their staffs including anonymous correspondence correspondence with an incomplete address, mail from prolific writers, and public opinion mail (opinion mail is acknowledged by a printed card or a robo letter. The cards carry the autopenned ^{printed} signature of the President, the First Lady, or the Director of Correspondence. The robo letters are usually autopenned by the Director of Correspondence or infrequently, signed by another staff member.)
- 2) copies of press releases, press conference and briefings transcripts, personnel announcements, mass mailings and other internal publications that are distributed widely
- 3) publications, brochures, clippings and other types of enclosures in public mail, when there is no immediate or historical importance to the materials
- 4) unsuccessful and unsolicited applications for employment, including correspondence, resumes, letters of recommendation and other similar materials.

There may be certain items in each of these categories that the head of the office wants to retain. No correspondence, record or other item would be disposed of without the prior consent of the head of the office who sent the materials to the Office of Records Management for filing. However, after such consent had been given, we would like to be able to dispose of the materials in an orderly way, working with the Archivist's staff. We have several hundred boxes of materials now that could be disposed of - primarily the get-well cards and other general correspondence from the public.

Recommendation:

As a means of initiating this action, I recommend that Jim Baker send the attached letter (Tab A) to the Archivist, giving the statutory notice of the plan for disposal of certain Presidential records. Although I have informally cleared the text with some of the Archivist's staff, you may want to send it over to his office directly for informal comment before Jim officially sends it.

After the Archivist gives his written response, we can then proceed with the disposal as outlined above. Meanwhile we shall continue to collect and file the materials so that they could be disposed of with minimum effort, and we will keep everything until you give us guidance on final disposition.

Concur:

Mary Lawton

Anne Higgins

Pendleton James

cc: John Rogers

THE WHITE HOUSE

WASHINGTON

April 30, 1981

Dear Dr. Warner:

In accordance with the requirements of the Presidential Records Act, 44 U.S.C. 2203 (c) (1), the President proposes to dispose periodically of the following categories of Presidential records:

- public mail to the President, the First Lady and their staffs including anonymous correspondence, correspondence with an incomplete address, mail from prolific writers, and public opinion mail
- copies of press releases, press conference and briefings transcripts, personnel announcements, mass mailings and other internal publications that are distributed widely
- publications, brochures, clippings and other types of enclosures in public mail, when there is no immediate or historical importance to the materials
- unsuccessful and unsolicited applications for employment, including correspondence, resumes, letters of recommendation and other similar materials.

I would like to obtain your views on this proposal. I would suggest that as a means of carrying out this plan on a continuing basis that members of the White House staff would work with your designee in reviewing sample boxes of the materials involved. The materials would then be turned over to you for destruction.

I would appreciate your consideration of this proposal and a response at your earliest convenience.

Sincerely,

James A. Baker III
Chief of Staff and
Assistant to the President

Dr. Robert Warner
Archivist of the United States
The National Archives
Washington, DC 20408

Oct. 28, 1981

Ms. Susan Cockrell
Director of Administration
Office of the Vice President
The White House
Washington, D.C. 20500

Dear Ms. Cockrell:

In accordance with the authority granted me by the Presidential Records Act, 44 U.S.C. Section 2203 (c)(2), I approve the disposal of a category of Vice Presidential records described as follows in your letter of October 2, 1981:

- Unacknowledged incoming correspondence.

Included are communications received by the Vice President and his staff that contain insufficient or illegible names or addresses, information copies of letters addressed to other persons, multiple letters from prolific writers, items with offensive or irrational messages, clippings, and multiple copies of the same letter or telegram signed by different persons.

I do not intend to take any adverse action with regard to this disposal request, such as that permitted me under Section 2203 (e) of the Presidential Records Act.

Ms. Marie Allen of the Archives' Presidential Libraries Office will arrange, at your convenience, to transfer these materials to an archival staging area prior to destruction. Ms. Allen will also select for retention a small representative sample of the materials to be destroyed.

When you have additional records in this category for disposal, during the administration, you may contact the Presidential Libraries Office to arrange transfer of the materials, without further approval from my office.

The destruction of materials without continuing value, such as those described above, is an important part of any effective records management program and enables us to better direct our limited resources toward the preservation of permanently-valuable records. We are happy to provide assistance to you in your efforts to manage effectively the Vice Presidential records.

Sincerely,


ROBERT M. WARNER
Archivist of the United States

NL:MAllen:ch 10/26/81 523456-2545
cc: Official file-NL
Reading file-NL
MAllen-NLWH
N

NL

OFFICE OF THE VICE PRESIDENT
WASHINGTON

RECEIVED
OCT 10 1981

October 2, 1981

Dr. Robert Warner
Archivist of the United States
The National Archives and Records Service
Washington, D.C. 20408

Dear Dr. Warner:

In accordance with the requirements of the Presidential Records Act, 44 U.S.C. 22 Section 2203(c)(1), I am writing to request your approval of the following category of Vice Presidential records for periodic disposal:

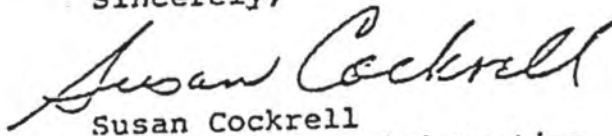
- Unacknowledged incoming correspondence.

Included are communications received by the Vice President and his staff that contain insufficient or illegible names or addresses, information copies of letters addressed to other persons, multiple letters from prolific writers, items with offensive or irrational messages, clippings, and multiple copies of the same letter or telegram signed by different persons.

We no longer need these records for administrative purposes. In keeping with procedures recommended by the samples of the material described above, I believe that the destruction of these records will result in a significant savings to the Government in storage and handling costs without detracting from the historical record.

I understand that the Presidential Libraries Office will inspect these materials and then arrange for their disposal, if you approve this disposal action.

Sincerely,

A handwritten signature in cursive script that reads "Susan Cockrell". The signature is written in dark ink and is positioned above the printed name and title.

Susan Cockrell
Director of Administration

30 MAR 1982

OPTIONAL FORM 95 (7-90)

4/12/93 4:46pm

FAX TRANSMITTAL

of pages 2

To	Terry Good	From	John Fawcett
Dept./Agency	WHORM	Phone #	202-501-5700
Fax #	202-456-2129	Fax #	202-501-5709

NSN 7540-01-317-7388

FORM-101

GENERAL SERVICES ADMINISTRATION

Honorable John F. W. Rogers
Deputy Assistant to the President
for Management
The White House
Washington, D.C. 20500

Dear Mr. Rogers:

In accordance with the authority granted me by the Presidential Records Act, Section 2203(c)(2), I approve, with two reservations, the disposal of four categories of Presidential bulk mail described in your letter to me of March 8, 1982, as public mail, internal publications, enclosures in public mail, and unsuccessful and unsolicited applications for employment.

My reservations relate to the establishment of an adequate sampling system and the retention of more copies of internal publications.

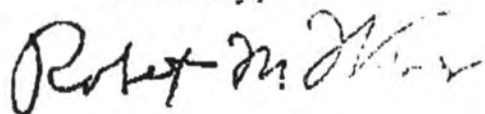
I recommend that the Office of Records Management and our Presidential Libraries Liaison Office work together to develop adequate sampling procedures designed to retain appropriate portions of such categories as anonymous correspondence, enclosures in public mail, and public opinion mail. The sampling should be accomplished jointly and the selections retained permanently. If, in the process of sampling, we identify groups of records that should not be destroyed, we will so inform you.

Secondly, I feel that the office of origination should have a responsibility for retaining a record set of mass mailings and internal publications, as well as a responsibility to send a copy to the Office of Records Management. The Presidential Libraries Office may wish to retain additional copies of some publications as reference tools at the future Reagan Library.

With the exception of these two concerns, I support and commend your efforts to dispose of these categories of Presidential mail and publications. I do not intend to take any Congressional action with regard to this request.

as provided in Section 2203(e) of the Presidential Records Act. The destruction of materials without continuing value is an important part of any effective archival and records management program and enables all of us to better direct our limited resources toward the preservation of permanently valuable records.

Sincerely,



ROBERT M. WARNER
Archivist of the United States

cc:
Official file-NL
Day file-NI
Day file-N

MBAllen:jwa 3/29/82 456-2545

NL 





THE WHITE HOUSE
WASHINGTON

Thanks so much for your ideas on health care reform. They will be carefully considered. My Administration is committed to bringing costs under control and offering quality coverage to every American. No family should face bankruptcy when a parent or child becomes ill or disabled. I appreciate your input in that effort.

Bill Clinton

unknown # of cards used

B card on outside of box

pro 2,521

THE WHITE HOUSE

WASHINGTON

March 3, 1993

Mr. John M. Doe
Title
Organization
Business Adr1
Business Adr2
Business City, BState BZip-BZip9

Dear John:

Thank you for writing to express your views on the reform of our nation's health care system.

As a first step in responding to the demands of millions of Americans for health care reform, I formed the President's Task Force on National Health Care Reform. The Task Force's goals are to coordinate policy development at the federal, state and local levels, listen to the views of interested citizens and prepare comprehensive health care reform legislation.

It is time for America's health care system to make sense. We must bring costs under control and offer quality coverage to every American. No family should face bankruptcy when a parent or child becomes ill or disabled.

Your support will be invaluable as we proceed with the complex task of reforming our health care system. I appreciate your thoughts and encouragement.

Sincerely,

(03/02/93)

THE WHITE HOUSE
WASHINGTON

March 3, 1993

Mr. John M. Doe
Title
Organization
Business Adr1
Business Adr2
Business City, BState BZip-BZip9

Dear John:

Thank you for writing to express your concerns regarding the reform of our nation's health care system.

As a first step in responding to the demands of millions of Americans for health care reform, I formed the President's Task Force on National Health Care Reform. The Task Force's goals are to coordinate policy development at the federal, state and local levels, listen to the views of interested citizens and prepare comprehensive health care reform legislation.

It is time for America's health care system to make sense. We must bring costs under control and offer quality coverage to every American. No family should face bankruptcy when a parent or child becomes ill or disabled.

A reform of this magnitude will be complex. I assure you that we will approach this task with great care and urgency. I welcome your ideas.

Sincerely,

(03/03/93)

SUSAN REICHMAN CLAMPITT

13 Ninth Street SE
Washington, DC 20003
(202) 544-8998
FAX (202) 544-8988

*File
Archives*

AUG 12 1991

*Daniel P. Moynihan
New York*

*United States Senate
Washington, D. C.*

August 5, 1991

Dear Dr. Katz:

You may find this of interest. How
did it all get started!

Best,



Dr. Stanley N. Katz
American Council of Learned Societies
228 East 45th Street
New York, NY 10017

Enclosure



July 25, 1991

Stanley N. Katz
President

The Honorable Daniel Patrick Moynihan
464 SROB
United States Senate
Washington DC 20510-3201

Dear Senator Moynihan:

I had heard indirectly that you were supporting the nomination of Dr. Carol Iannone to the NEH Council, but until I read this morning's Wall Street Journal, I had no idea that you were accusing Iannone's opponents of religious, class and ethnic prejudice.

I am outraged by your statement. Perhaps the nine Senators who voted against her hate Italians, Catholics and working class people (women, too?), but I doubt it.

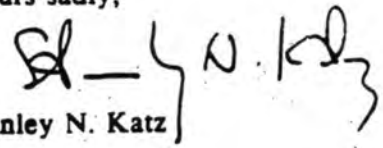
The organization of which I am President opposed Iannone's nomination in a letter to Senator Kennedy's committee. We are concerned with the steady decline in the overall quality of the NEH Council, given the fact that NEH is increasingly the dominant funder in the humanities in this country.

Something like 300,000 post-doctoral scholars belong to the 51 organizations we represent, and you have attacked the integrity of each and every one of them. You have certainly insulted me personally, as a public opponent of the nomination. ACLS is the largest humanities organization in the world, and it resides in New York state -- might it not have been a good idea for someone on your staff to inquire into our reasons for opposing Iannone? Or don't you care what we think? Or why we think it? I am simply appalled that a fellow Democrat, intellectual and academic should resort to such scandalous and irresponsible imputation of bad motives. What should I make of your own?

There are two problems of political correctness in this country, and you have now publicly endorsed the version of PC espoused by Dr. Cheney, President Bush, and the Olin and Heritage Foundations. How good for the Democratic Party is that, Senator? Much more important, how does that aid the free exchange of ideas in a democratic society?

I have never written an angry letter to a public official before, but I have never felt so betrayed by someone I admired.

Yours sadly,


Stanley N. Katz

SNK:mb

American Council of Learned Societies
228 East 45th Street, New York, NY 10017-3398
212 697 1505
Fax: 212 949 8058
Telex: 798921 ACLS UD



Congressional Record

PROCEEDINGS AND DEBATES OF THE 102^d CONGRESS, FIRST SESSION

Vol. 137

WASHINGTON, THURSDAY, AUGUST 1, 1991

No. 120

Senate

THE NOMINATION OF CAROL LANONNE

Mr. MOYNIHAN. Mr. President, on Friday of the week before last, I spoke here on the floor about the rejection by the Senate Labor and Human Resources Committee of the nomination of Carol Lanonne to the Advisory Council for the National Endowment for the Humanities. There were simple enough reasons for having done this. I recall the early days of the Council when Douglass Cater looked after it in the Johnson White House. I know what pleasure it gave them to have begun this fine enterprise. And I know of the great expectations of the early Council members, notably Paul Horgan, that most luminous, incandescent scholar and writer. I have since followed the Council's fortunes, not always the happiest, but cumulative and on balance honorable and hopeful.

Then came this recent affair, which was at very least discordant. Language was used that I do not recognize as the language of scholarly disputation; not surely of those gathered under the broad

and welcoming tent of the humanities. I was, of course, hearing the language of contemporary politics. Of which, I suppose, I am on familiar if not always friendly terms. I also heard--and here I ask the understanding of the Senate, for there are few of us who are not at times oversensitive, even prideful, on behalf of our States--I also heard the language of disapproval of New York. Very possibly, very likely, I got it wrong. But it would be disingenuous not to admit to having sensed it. Here was a New York author, and adjunct professor at New York University, being denounced for views that may be uncommon is much of the country but are in easy circulation--along with so many others--in my city, which has ever been known for disputation of this order. Further, much was made of the author's association with that quintessential New York Journal, Commentary, a publication of the American Jewish Committee.

And so I went to the floor on July 19

and spoke my piece, thinking to merely to set forth some of the cultural modes involved here. I surely meant to be good-natured.

I spoke to an empty Chamber, as is likely to be the case of a Friday morning, and did not expect any great notice to be taken. To say again, I was speaking in the Record for the record. The following Thursday, July 25, however, the Wall Street Journal had a short comment on my remarks in that portion of their editorial page which they call "Asides." They did not fail in their duty to sow discord among Democrats. They suggested that my remarks were a veiled criticism of my good friend, the senior Senator from Massachusetts, and noted, quite accurately in this case, that I had spoken of the intellectual difficulties that seem to plague our party just now. In all, the Journal quoted 68 words of my floor statement, which had been somewhere in the range of 2,000 words.

Even so, I was taken back by the tone of a letter which was "faxed" to me later the same day by Stanley N. Katz, president of the American Council of Learned Societies. I ask unanimous consent that it appear at this point in the Record.

There being no objection, the letter was ordered to be printed in the Record, as follows:

July 25, 1991.

Hon. DANIEL PATRICK MOYNIHAN,
U.S. Senate,
Washington, DC.

DEAR SENATOR MOYNIHAN: I had heard indirectly that you were supporting the nomination of Dr. Carol Iannone to the NEH Council, but until I read this morning's Wall Street Journal, I had no idea that you were accusing Iannone's opponents of religious, class and ethnic prejudice.

I am outraged by your statement. Perhaps the nine Senators who voted against her hate Italians, Catholics and working class people (women, too?), but I doubt it.

The organization of which I am President opposed Iannone's nomination in a letter to Senator Kennedy's committee. We are concerned with the steady decline in the overall quality of the NEH Council, given the fact that NEH is increasingly the dominant funder in the humanities in this country.

Something like 300,000 post-doctoral scholars belong to the 51 organizations we represent, and you have attacked the integrity of each and every one of them. You have certainly insulted me personally, as a public opponent of the nomination. ACLS is the largest humanities organization in the world, and it resides in New York state--might it not have been a good idea for someone on your staff to inquire into our reasons for opposing Iannone? Or don't you care what we think? Or why we think it? I am simply appalled that a fellow Democrat, intellectual and academic should resort to such scandalous and irresponsible imputation of bad motives. What should I make of your own?

There are two problems of political correctness in this country, and you have now publicly endorsed the version of PC espoused by Dr. Cheney, President Bush, and the Olin and Heritage Foundations. How good for the Democratic Party is that, Senator? Much more important, how does that aid the free exchange of ideas in a democratic society?

I have never written an angry letter to a public official before, but I have never felt to betrayed by someone I admired.

Yours sadly,

STANLEY N. KATZ.

Mr. MOYNIHAN. Apart from the fact that I was not accusing anybody of anything, there are two problems with this letter which lead me to feel that it is not enough simply to ignore it, or to set it aside with a soft answer.

The first problem is that Dr. Katz chose to write a letter of such fierce conviction on the basis of three brief

excerpts from a statement made on the Senate floor without having read the statement itself. There would have been no great problem obtaining the full text. The Congressional Record reaches New York. In the event the mails had proved deficient, I would happily have had a copy sent over from my New York office. I would even have faxed a copy!

Just what is going on here? Surely a first principle of scholarly work is to obtain all the available facts. In the humanities this is elementally a matter of getting "the text." By contrast, nothing so afflicts the politics of our time as the 30-second quote taken out of context, and such like. Has the disorder spread? Evidently.

But next, what is this business of my having attacked "Something like 300,000 postdoctoral scholars belong[ing] to 51 organizations." "[E]ach and every one of them?" This gets close to Newspeak. Evidently, I have offended The People, "each and every one" of whom will now rise--altogether, now--in righteous wrath. There is a whiff of the totalitarian mode in all this. I recall a passage of Hannah Arendt in which she writes of the tactic of the totalitarian elites in Europe in the 1920's and 1930's of turning every statement of fact into a question of motive. I don't care for it.

In any event, I certainly do not like hearing from Dr. Katz that he speaks for me. The current Annual Report of the American Council of Learned Societies has a page headed "Organizational Structure." It begins:

CONSTITUENT SOCIETIES (WITH YEAR OF FOUNDING)

- American Philosophical Society, 1743.
- American Academy of Arts and Sciences, 1780.
- American Antiquarian Society, 1812.

It happens that I am a member of each of these distinguished bodies. Membership is by election, and brings no small advantages. Thus, there are no dues at the American Philosophical Society, Dr. Franklin having seen to the matter centuries ago. Mind, he limited membership to 500. It also carries responsibility. I do not one bit care for the idea that an executive of the ACLS would claim to speak individually for three hundred thousand American-- and foreign--scholars whose irrepressible practice is to speak for themselves.

All of which leads me to ask, are things as bad at American universities as some would have us think? Years ago--it would be 18 now--I was asked to give the Stearns Lecture at Andover Academy in Massachusetts. This was 1973. Starting in the mid-to-late 1960's, university and college campuses across the Nation had been the scene of great tumult and disorder. It seemed to many that this could only worsen and there were not a few inclined to think the worse the better I took a dissenting view. I said it was all over. I called my lecture, "Peace"--it was later published in the Public Interest--and argued that the extraordinary demographic change of the 1960's was now a thing of the past, and would no longer sustain the ideological tumult of the period. Campus disorders were over. Here is an excerpt.

I'd like to state that most of the events that tore American society almost apart, or so it seemed in the 1960's arose from conditions unique to the decade in which they occurred. They had not ever existed before. They will never exist again. They involved the interaction of demographic and political-cultural changes. We have more complex terms of this than perhaps need be, all derived from the Greeks, and vaguely related to philosophic doctrines of the past. We use the term "synergistic,"--the interaction of

muscles, of chemicals, of philosophical doctrine, such that two events quite separate in their origin affect one another in such a way as to produce outcomes vastly different and greater than either could produce on its own, more amplified and in ways fundamentally different from the effect either event would have, had it occurred in isolation.

The proposition I'm going to put to you is simple. It is sufficient, I hope, at least to start a discussion of just what did happen. I'm going to say to you that the 1960's saw a profound demographic change occur in American society which was a one-time change, a growth in population vaster than any that had ever occurred before or any that will occur again, with respect to a particular subgroup in the population, namely those persons fourteen to twenty-four years of age. This sudden increase in population interacted in a synergistic sense with a whole series of other events which originate, if you will, in the world of ideas, as distinct from the physical world in which populations increase or decrease. In the best-known example of the 1960s, people changed their minds about the requirements of justice and decent public policy concerning minority groups in American society at just the moment when the size and location of those groups were dramatically changing. But this was not the only change. People changed their minds about this, they changed their minds about that, and they changed their minds at just the point when the physical conditions of life, the ecological facts of how many people are around and where they are, were also changing. These changes interacted in such a way as to produce extraordinary differences-- discontinuities--with the period immediately preceding and which I think will now be seen to be discontinuous with the period that now follows.

I begin to wonder. Quiet fell upon the campuses. But did disorder cease? Was I too optimistic? Too shallow? I recall how Lionell Trilling--I mentioned him in my remarks of July 19, suggesting that if Dr. Janonne only wrote the Commentary, she was even so in stately company--I recall his forebodings of the aftermath of that period. He felt, as best I understood him at the time, that an already deep division

in American culture had grown even deeper, and that there would indeed be further degradation of democratic dogma. Here is a passage from Noel Annan's remarkable memoir, "Our Age," just now published in the United States:

There was, however, another critic of Our Age [an] American. Lionell Trilling was par excellence a New York intellectual, but his works on Arnold and E.M. Forster and his sympathy for English culture gave him a special place in the affections of Our Age. His referents were Freud and Marx, but the conclusions he drew from them were very different from what the readers of the *Partisan Review* expected when he looked at the wheelbarrow of progressive conclusions that so many trundle across their garden in planting ideas. Trilling defended Whittaker Chambers and shocked his liberal friends by accepting that Alger Hiss had been a spy. The theme of his first volume of essays, *The Liberal Imagination*, was that liberals had no imagination. He used the word 'liberal' in the American sense as the 'educated class which has a mind suspiciousness of the profit motive, a belief in progress, science, social legislation, planning and international co-operation'. Trilling pointed out that no major great writer had ever celebrated these beliefs and he wondered how liberals could admire those who rejected these beliefs so decisively. He questioned whether the heroes of American modern literature in those days--Dreiser, O'Neill, Dos Passos--were heroes or plodders bereft of subtlety or ideas. He said that sociologists such as David Riesman told us more about society than most modern novels. He was a liberal in the English sense--or rather of those Englishmen who were suspicious of the good intentions of the enlightened.

These are matters of proper concern to humanists everywhere and at all times. But having read Jonathan Yardley's withering comment about this most recent "battle between the spent, irrelevant old left and the oafish, elephantine new right" I wonder whether we might all look to our manners just a bit. Mind, many of the adversaries on both sides were impeccable in this regard. I would urge Dr. Katz that he need not indulge any disinclination to

write angry letters to public officials. It is good for us. But could he keep in mind Melbourne's celebrated comment on Macaulay? And Orwell's dictum that there is always room for one more custard pie!

Mr. President, again for the record, I ask unanimous consent that my July 19 remarks be included in the Record at this point.

There being no objection, the remarks were ordered to be printed in the Record, as follows:

[From the Congressional Record, July 19, 1991]

Mr. MOYNIHAN. Mr. President, as Senators will know from the long and careful reports in yesterday's press, the Senate Labor and Human Resources Committee on Wednesday rejected by one vote the controversial nomination of Carol Iannone to the advisory council for the National Endowment for the Humanities. The view of the majority appears to have been that Dr. Iannone had insufficient citations in the Arts and Humanities Citation Index and the Social Science Citation Index. It was also alleged that her principal publications have appeared in Commentary magazine. It was never clear to me whether the objection to Dr. Iannone was that she had ever published in Commentary, or that she had done so insufficiently. No matter, I rise merely to express my disappointment on behalf of Dr. Iannone, and melancholy acknowledgement of the further intellectual decline of the Democratic Party. I almost said demise, but will leave bad enough alone.

A curious allegation: merely a Commentary writer. And in ways, a revealing one about our capital. Just to say it out loud is to realize that just possibly Washington is the only capital in the Western world in which such an allegation would be made with intent to harm. In London, Paris, Rome, Stockholm, to say of a professor of literature that his or her principal work has appeared in Commentary is--well--to say that this is a critic of the first rank. In the tradition, say, of Lionell Trilling.

Commentary is, as its cover states, "Published By The American Jewish Committee." It was founded, as I recall, in 1945--thereabouts--by the

legendary Elliot E. Cohen who was editor until his death in 1959. He was thereupon succeeded by Norman Podhoretz, who remains editor to this day, assisted by Neal Kozodoy, Marion Magid, and Brenda Brown. They have equals, one should not doubt, in the world of literary criticism. But that said, the matter rests. None surpass them.

Ours is a political world down here, and these matters do not routinely enter our thoughts, much less our conversation. This despite the fact that from the first, Commentary writers have had pronounced political views. This again may be more a European than an American style, but then New York has always had a special association with European thought which the rest of the Nation has not failed to notice.

I distinctly recall, and knowing his great good nature, I am sure he will not object to my relating, a trip to New York City in May 1977 with then Vice President Mondale. The spring recess was about to begin and he was off to one of his beloved Minnesota lakes where his tackle box and bass gear awaited him. He had been asked to stop in New York on his way home to speak at the dedication of a new facility at Sloan-Kettering Hospital. Hubert Humphrey had been treated there the previous year and there was, of course, nothing he or any other Member of the Senate would not do for Hubert. I assume it is correct to refer to the Vice President as one of us. He is, after all, our Presiding Officer. The Vice President, as was his great courtesy--which I could wish had become a custom of that office--asked if I would like to ride up with him. I was heading home as well, and would naturally want to be on hand at Sloan-Kettering. Anyway, I got out to Andrews a few minutes before Fritz arrived, and settled down aboard Air Force Two with a cup of coffee and the new Commentary. The cover featured a major article on Soviet politics by a friend of mine who was then teaching at Harvard. I thought it first-rate, and mentioned it to the Vice President when he got aboard. He asked if he could take it with him on his vacation, to which, of course, I agreed. That afternoon I called Norman Podhoretz. I said:

Norman, I have some good news and some bad news. The good news is that the Vice President of the United States is taking the new issue of Commentary with him to read over his vacation. The bad news is that until this morning

the Vice President of the United States had never heard of Commentary.

I have to believe that things have not much changed in the intervening 15 years. In the Senate, that is. Mind, the Washington Post knows about such matters. It is not so long ago that the Post called Commentary "America's most consequential journal of ideas." Which is fairly restrained by the standards of the Toronto Daily Star, which once declared:

It [Commentary] is the best monthly in the English-speaking world.

This is the journal Professor Iannone is accused of writing for. Well, there you are.

Well, no, there is more. My distinguished friend, the Senator from Utah, touched upon the matter in a remark that appeared in yesterday's Post. In an exchange in the Committee on Labor and Human Resources, he defended Professor Iannone's qualifications stating:

She's from a first-generation, immigrant, working class family. * * * And she's only 43 years old.

Senator Hatch may know more than even he realizes. For it is the distinctive feature of Commentary that to a degree that I cannot imagine has any contemporary or historical equivalent, Commentary has published the work of young writers born into or raised among the working classes of New York City. Many of them were and are Jewish, as is only natural for a journal published by the American Jewish Committee. Many had grown up in the Marxist milieu that was so common in New York in the years 1920-50. Some had been Marxists, frequently Trotskyites. Others had been anti-Marxists but as young Robert Warshaw, a Commentary writer in the 1940's--who died much too young--observed, either way your life was caught up with that subject. And so issues of the political left received inordinate attention in Commentary. But with this difference. Those writing about The Workers actually knew some. The Irving Kristols and Nathan Glazers--to name but two of a succession of major American intellectuals who were editors at Commentary--grew up in the working class neighborhoods of New York City. A setting as natural to them as the salons of their radical counterparts in Paris or Berlin. Or Greenwich Village. I recall once visiting W.H. Auden in the

Village. He was living in the building from which Trotsky had published *Novy Mir* before the Russian revolution, a thought which gave the great British poet much satisfaction. As it would any Oxford graduate. Trotsky was, after all, a literateur. A bohemian. He would never, however, have made a Commentary writer. Too refined.

I ought to declare my interest here. I first appeared in Commentary--Lord save us--30 years ago this May. My article, which Norman Podhoretz features on the cover, was entitled "Bosses and Reformers: A Profile of the New York Democrats." I had been involved in New York Democratic politics for some years by then. I had watched the developing divisions within the Democratic Party as between its working class, mostly Catholic, traditional constituency, and a new group of middle or upper middle class, mostly Protestant and Jewish, professionals who were challenging the old-time leaders. Denigrated, of course, as "bosses." This was something new. With rare exceptions, such scions as Herbert Claiborne Pell, Jr., father of our revered senior Senator from Rhode Island, a Member of Congress from Manhattan, and from 1921-66 chairman of the State Democratic Committee. As New Yorkers moved into the middle classes, they left the Democratic Party in this century. The Irish were even then departing, as Glazer and I wrote in "Beyond The Melting Pot: The Negroes, Puerto Ricans, Jews, Italians, and Irish of New York City." But something in the Jewish tradition said otherwise. Middle-class professionals they may be, or may have become, but they remained Democrats. But, as Bernard Shaw might say, with different tastes.

This conflict was adumbrated in the doomed Presidential races of Adlai Stevenson in 1952 and 1956. But all hell broke out over the nomination of John F. Kennedy for President in 1960. Kennedy was a Catholic; Kennedy was a conservative. And his brother--well. The first statement was a fact, the second a perception. But among New York liberals perceptions are facts. And so the word went forth from Eleanor Roosevelt, Thomas K. Finletter, and yes, our beloved Governor Herbert Lehman, that Kennedy would not do. The reformers hated and feared him. Now these bosses were, generally speaking, perfectly democratic Democrats, such as Charlie Buckley of the Bronx, our grand old colleague

Gene Keogh of Brooklyn, even the legendary Dan O'Connell of Albany. Well, in the latter case, I suppose, a real boss as well as an alleged one. Kennedy was the overwhelming favorite in our party. But not of the reformers. The scenes in the Los Angeles Convention were tumultuous, often painful. Even if, as I recall, the reformers had only 2 1/2 votes, all pledged to Stevenson. I was a Kennedy delegate in Los Angeles--an alternate delegate, actually, but I have in my Senate office a small framed emerald green badge that says: "Delegate for Kennedy," with my name written below. But I had friends in the reform camp. When it was all over and the wounds, if anything, worse, it seemed to me a useful thing to try to explain this to the respective parties, neither of which really understood the other. There was no better place to publish such an article than Commentary, and I was thrilled when Norman Podhoretz accepted it. No, Mr. President, I haven't got that quite right. It was not just that Commentary was the best place to publish it, it was also the place that would. A journal such as the Atlantic or Harpers just wouldn't be interested in what working class Democrats thought.

That is the point I would hope to make. My good friend from Utah was absolutely right. I very much fear Professor Iannone's troubles arose not from the quality of her work, but from her genes, social and otherwise. She is an Italian,

Catholic ethnic with a working class background.

Yesterday's Wall Street Journal carried an absorbing review by David Brock of Aaron Wildavsky's new book, "The Beleaguered Presidency." Professor Wildavsky, lost now amongst the lotus eaters of Berkeley, retains the street-wise toughness of a native New Yorker. And he can spot what is going on among Democrats. What is going on is the logical extension of the trends I tried to describe in Commentary 30 years ago. To wit, the Democrats are becoming a "party that delegitimized the Nation's second largest constituency--white, working, Christian males."

I suppose the largest such group would be the female of that species. In any event, Professor Iannone has had a setback on account of it. But I dare to hope that she will not take it personally. I do not know her, but I know some of her work. From Commentary, obviously. I sense that quality William James described as tough-mindedness. Actually, the future should be bright. She has been banned in Boston. No greater fortune ever attended the struggling novelist of the 1930's. Sales would soar outside of Boston. Professor Iannone has now been banned in the Democratic Party. What greater fortune could befall an American intellectual in this decadent fin de siecle. I wish her well.

Mr. President, I wish her well.

Stanley N. Katz

Politics Wasn't Why We Opposed Iannone

Although The Post has minimized the importance of the National Council on the Humanities in two recent editorials, it has nonetheless provided its readers with a heavy dose of news and opinion pieces on the nomination of Carol Iannone to the council. With the exception of Richard Cohen's assessment, the opinion pieces by Evans and Novak, Nat Hentoff (two), Charles Krauthammer, Jonathan Yardley, Lynne Cheney and Carol Iannone

Taking Exception

have all supported the administration's charge that all opposition to Iannone was solely based on "political correctness." The Post also found space for news stories by Charles Trueheart and Kim Masters. Clearly, despite its editorials, The Post assigned a high priority to the issue.

An intensive newspaper campaign undertaken by Iannone's supporters before and after the Senate committee's action has insisted and continues to insist that the organizations questioning the nomination were motivated by "political correctness." This charge cannot go unanswered.

The American Council of Learned Societies, one of the five scholarly organizations opposing the nomination, is a coalition of 51 professional associations representing more than 350,000 post-doctoral scholars in the United States. These scholars are Democrats and Republicans, radicals and conservatives. They do not agree on matters of politics, and ACLS does not take political positions. We are simply in favor of open, fair and democratic procedures in public life as they affect teaching and scholarship. But when it comes to scholarship, we support only the highest standards—as established by peer review. For this reason we, and the other opposing organizations, did not question the two other nominees—political scientists Harvey C. Mansfield Jr. and Michael Malbin—the Senate Committee considered July 17. Both are leading exponents of views similar to those of Iannone.



BY MARGARET SCOTT

"We are simply in favor of open, fair and democratic procedures in public life as they affect teaching and scholarship. But when it comes to scholarship, we support only the highest standards."

The objections of ACLS and other organizations to Iannone's qualifications are deeply held, since the academic members of the council assist in the distribution of many millions of dollars each year to scholarly institutions, individual scholars, teachers and the public humanities. The legislation authorizing the National Endowment for the Humanities specifies the qualification of distinction for scholar members of the council precisely to ensure the highest scholarly standards in the award of NEH grants. The concurrence of Sen. Claiborne Pell, one of the drafters of the original statute, with our position should help to make the point. This was also the strongly held conviction of the committee chairman, Sen. Edward M. Kennedy.

Is Iannone, then, qualified to be a "public" member of the council? The Senate committee did not accept the fallback argument of Iannone's supporters that she could represent the public humanities. ACLS has been notably active in promoting the humanities outside institutions of higher learning—in state humanities councils, elementary and secondary schools and in the media. We welcome the appointment of public humanists who do not

make their living in the academy, but we cannot support the appointment of unqualified academics for these important positions.

Sen. Nancy Kassebaum, an Iannone supporter on the committee, gave the administration game away when she admitted that Iannone "might not meet the criteria, but I don't know that any great calamity is going to happen at the National Endowment for the Humanities." Would she say the same thing of an unqualified nominee to the National Science Board? Are the humanities less important? We think not. We believe that a distinguished council is the best guarantor of the integrity of the endowment.

Although those of us who opposed Carol Iannone's nomination did so because of her credentials and not because of her politics, we are concerned that when the terms of nine council members conclude next year, the administration will continue to put forward nominees with similarly weak records. Fortunately, both Sens. Pell and Kennedy have announced that they will continue to scrutinize the qualifications of each nominee. So will we.

The writer is president of the American Council of Learned Societies.

Hobart Rowen

The 'Too Big to Fail' Trap

How the federal deposit insurance system has been abused since 1945

The Washington Post 8/1/91

Point of View *By Stanley N. Katz**The 'Public Humanities' Depend on Vigorous, Specialized Scholarship*

ILLUSTRATION FOR THE CHRONICLE BY MELY FABARA

THE CHAIRMAN of the National Endowment for the Humanities, Lynne V. Cheney, announces mostly good news in the first biennial assessment of the state of the humanities in this country. In "Humanities in America," she gives excellent marks to two of the three institutions that she believes foster humanities education in the United States—higher education, television, and public-humanities organizations.

There is an excited tone to Ms. Cheney's account of the achievements of television and of the institutions she calls "parallel schools"—museums, libraries, historical associations, and state humanities councils—in bringing the humanities to the general public. Radio, regrettably, is ignored, but one hopes its fine humanities programming and unique coverage will not be forgotten by the endowment.

Nevertheless, I agree entirely with the fine report card it gives to public television and humanities institutions. (It is worth noting, however, that of the latter, only the state councils are products of N.E.H., and they have not always been viewed so enthusiastically by their progenitor.) Public forums of the sort celebrated in the report are as old as American society. They probably reached their high point in the 1830's, and we need to know more about why they have declined, revived, and changed over the past 150 years.

While it is true that attendance at museums, libraries, and historical societies has indeed begun to increase vastly of late, these institutions are not without serious problems. Financing has become increasingly precarious, driving them to become more commercial to keep their doors open. Some, such as the New-York and New-Jersey Historical Societies, are on the verge of bankruptcy. Still, many of the signs are good, and what the essay calls "the humanities in the public sphere" are richly deserving of continuing and increased N.E.H. support.

However, as president of an institution representing the nation's humanities scholars, I am troubled by the part of Ms. Cheney's essay (which, by the way, is what it is, rather than the systematic, data-based report that Congress requested) concerning higher education. While she has moderated the tone and carefully qualified the content of her criticism, she leaves little doubt that she believes colleges and universities to be the source of the existing difficulties of the humanities.

Over-specialization by scholars, politicization of humanities teaching, neglect of the "Western tradition," and lack of coherence in the undergraduate curriculum are the particular objects of her criticism. These are themes Ms. Cheney has developed extensively in her

public speeches over the past year, but they reflect what seems to me a narrow and sometimes factually inaccurate view.

It is certainly true that scholarship has become increasingly specialized over the past 100 years, and true that specialization should trouble scholars and teachers. But it is also true that the expansion of knowledge and improvements in research methodology compel specialization. It cannot be avoided in any modern field. Nevertheless, it does not follow that synthesis is unnecessary or impossible, and few would deny that a more general approach is particularly suitable for undergraduate teaching.

Ms. Cheney recounts the story in Carl Schorske's autobiographical essay of Charles Beard's scathing attack in 1935 on over-specialized dissertation research. It should be remembered, however, that Beard first cut his teeth on a systematic analysis of financial records at the Treasury Department. Only later did he go on to produce, in collaboration with his wife, a great synthesis of the history of the United States. Specialized research is a necessary precursor to accurate and intelligent generalization. Many scholars whose research is specialized are brilliant generalists as teachers in classrooms and in public-humanities programs.

Ms. Cheney is correct in seeing politicization as a problem, although she seems to think that it is only the politics of the left that constitute a difficulty. If anything, however, the past decade has seen a re-emergence of the sort of right-wing politicization of academic humanities that characterized the 1920's. It is surely naive to think that academe, any more than the society it reflects, can be off limits to politics. More to the point, scholars are less politicized in the United States than in any other country in the developed world.

Ms. Cheney's concern for the "Western tradition" reflects an important public debate on the question. But she leaves the content of that tradition entirely vague (although indicating it is a "continuing" and elastic tradition necessary to American democracy). She is exercised about our failure to require instruction in the Western tradition, without ever defining it. Her most passionate language is reserved for the failure of academe to be intellectually coherent, by which she seems to mean that colleges do not require particular courses in the humanities. But again, except for "Western civilization" and perhaps Shakespeare, we are not told what the courses should cover. The entire discussion is reminiscent of the attack 75 years ago on President Eliot's expansion of the elective system at Harvard. The more things change, the more they remain the same.

The report rightly laments the dramatic decline over the past 20 years in the number of undergraduates majoring in the humanities. However, it does not even begin to analyze the character of that decline: in what sorts of institutions? in which regions of the country? in general enrollments in the humanities apart from majors? There are, after all, more institutions of higher education and a more diverse student population now than there were two decades ago.

IT IS RESEARCH, however, that bears the brunt of the attack in "Humanities in America." Ms. Cheney faults colleges and universities for valuing research above teaching, even though teaching as well as every other activity praised in the report—public forums, museum and historical-society exhibitions, books, and television programming—depend upon scholarly research to insure their vitality and validity. Without vigorous humanities scholarship, there would be no "humanities in the public sphere."

We have a right to ask about the implications of Ms. Cheney's views for future N.E.H. budgets. Although there are already, by the endowment's own standards, many more worthy research proposals than the agency can support, Ms. Cheney concludes by recommending a "limited" role for N.E.H. Why?

Private money is more available for some of the public activities praised by Ms. Cheney than it is for basic humanities research. Apart from those awarded by the Mellon Foundation, virtually no humanities-research grants are available from major private foundations. There is little prospect that more will materialize soon. The great progress of the humanities, within and outside academe, is undoubtedly attributable in considerable part to the growth of support from the endowment in past years.

"Humanities in America" deserves respectful discussion. Academe should be self-critical: teaching does need to be improved and valued; efforts to develop a more coherent and integrated curriculum should be encouraged—these are all subjects that have been of enduring concern to higher education. But contrary to Ms. Cheney's position, ways should be found to maximize, not minimize, N.E.H.'s role and to increase its budget. What is also desperately needed in the next Administration is constant and open dialogue between the academic community and the endowment about ways to enhance the importance of the humanities to intellectual life in the United States.

Stanley N. Katz is president of the American Council of Learned Societies.

PORTRAIT

A Pioneering Scholar Becomes a Spokesman for the Humanities

By KAREN J. WINKLER

At annual meetings of the Organization of American Historians, former students of the association's outgoing president traditionally organize a dinner in that person's honor. But the group that gathered at Louis' Basque Corner in Reno last month to honor Stanley N. Katz was anything but traditional.

In an age of academic specialization, Mr. Katz's former students included lawyers, archivists, art curators, administrators, and scholars studying subjects ranging from the history of colonial America to 20th-century philanthropy.

"We looked around the table and realized that the only thing we had in common was our connection to Stan," says Jamil S. Zainaldin, executive director of the Federation of State Humanities Councils.

Such diversity is typical of Mr. Katz, whose own career has been as varied as the ranks of his former students. As a historian who has pioneered new fields of study, a law-school dean, and a professor of public affairs, he has thrived on innovation. For the past two years, he has served as president of the American Council of Learned Societies—the umbrella organization that represents 45 scholarly associations—and is rapidly becoming the chief spokesman for the humanities in the United States.

By Nature a Risk Taker

"I'm easily bored," he says. "I'm not the kind of scholar who can pick a subject and devote a lifetime to it."

Mr. Katz is also not the kind of scholar, or administrator, who is afraid of controversy. He believes the humanities today are alive and well precisely because so many fields like history and literary criticism are filled with debate. "Controversy is a sign of scholarly health, of creative tension," he says.

As head of the A.C.L.S., "I feel quite free to say what I think, even if it means jumping into the middle of things," he says. "By nature, I'm a risk taker."

When he was offered the A.C.L.S. position, "I said I would only take the job if the board was willing to accept a fundamentally different organization," he says. Mr. Katz wanted to make the council—which held its annual meeting in New York last week—more aggressive, to provide highly visible leadership and create a nationwide base of support for the humanities.

"Stan has become a national spokesman—he is willing to say things that the rest of us in individual organizations can't," says Phyllis Franklin, executive director of the Modern Language Association, one of the A.C.L.S.'s "constituent societies."

For Mr. Katz, that has meant lobbying in Washington—for more

federal money in support of the humanities and against political interference in such agencies as the National Archives and the National Endowment for the Humanities. It has also meant criticizing the national celebration of the bicentennial of the Constitution—for not being serious or scholarly enough.

It has led Mr. Katz to promote exchanges between scholars and elementary and secondary school teachers. He initiated a new program with the Federation of State Humanities Councils to bring

However, he recalls, "at that time the subject was not taught in history departments, except for constitutional history, a tired old field that concentrated almost exclusively on the Supreme Court. At the same time, law schools were more insulated from the rest of the university than they are today. The lawyers felt that no historian could possibly write legal history."

At Wisconsin, Mr. Katz was influenced by James Willard Hurst, a law-school professor who advocated a new social history of law that

H. Bork, then teaching law at Yale University, turned it down.

"Stan was a living demonstration to the legal community and to those of us who came after him that a person trained in history could be sensitive to the methods and questions of lawyers," says David T. Konig, chairman of the department of history at Washington University in St. Louis.

Mr. Katz has helped push back other borders in academe. At Wisconsin, he became part of group of scholars developing a new method of teaching history—treating it as a laboratory course in which students did not use secondary sources, but only primary materials to frame and answer historical questions. At Chicago, he and Barry D. Karl, a professor of history, began to write the first history of philanthropy. He has actively promoted interdisciplinary studies, international education, and state humanities programs.

Commitment to 'Relevance'

What unites Mr. Katz's career is an enduring commitment to what he calls "relevance."

"As a graduate student, I switched from European to American history because I wanted to address social and political problems in American society," he says. "Then, my students convinced me that I hadn't gone far enough, that I had to go beyond the colonial period and start thinking about the modern era. In a way, I began teaching legal history as a way of doing all of American history."

He became an administrator, he says, because "I believed that, if you have substantive goals, you have to get into administration to accomplish them."

Mr. Katz has paid a price for the diversity in his career. Putting himself in the middle of controversy has often been bruising, he says. At the University of Wisconsin, for example, the historian whose field was closest to his own was so outraged by Mr. Katz's calls for educational reform that he didn't speak to him for three years.

Further, Mr. Katz's willingness to undertake various administrative duties through the years has taken its toll on his scholarship.

"Right now, I'm living off capital, writing on the basis of research I've already finished," he says. When his project on American philanthropy—started in the early 1970's—is completed, "it's going to be hard to do what I'm doing at the A.C.L.S. and start something new."

Throughout his career, Mr. Katz has been willing to try new jobs and take on new duties, he says, "because I believe that citizens have responsibilities."

At the dinner for Mr. Katz in Reno there was a consensus: "Stan," said Mr. Zainaldin of the humanities federation, "taught us all that you really could be a scholar and a citizen."



Stanley N. Katz: "I'm not the kind of scholar who can pick a subject and devote a lifetime to it."

scholars and members of the public together to promote the humanities—an endeavor for which, next December, he will receive the federation's award for "a lasting contribution to the humanities and public life."

Under Mr. Katz, the A.C.L.S. has also absorbed the Council for International Exchange of Scholars, "making us the largest private manager of international faculty exchanges in the United States," he says.

"I don't see myself just as a cheerleader for the humanities, or as top dog," he says. "But I do see myself as an opportunist who has an open door and is willing to respond to the humanities community and identify things the A.C.L.S. can do for it."

That penchant for risk taking and innovation have marked Mr. Katz's career from the beginning. In the late 1950's and the 1960's, as a young scholar in colonial American history—first at Harvard University and then at the University of Wisconsin at Madison—he became interested in the field that is known today as "legal history."

studied not just Supreme Court decisions, but state courts, legislation, and the social and economic context in which legal decisions were made and which had an impact on ordinary people.

Then, "one day in 1969, when I was teaching at Wisconsin, I got a call from the people at the Harvard Law School," Mr. Katz recalls. "They said, 'It's great that you are writing about legal history, but it might help if you knew something about the law.'"

Carrying Out a Dream

Harvard was setting up a program to bring legal scholars and historians together, and Mr. Katz was one of the first recruits. He spent a year at the law school, and went on to carry out Willard Hurst's dream of a new legal history.

Mr. Katz became the first historian to be a full-time faculty member at a major law school—the University of Chicago's, where he eventually became associate dean. Later, he accepted the first endowed professorship in legal history in a history department—Princeton University's. He took the job after Robert

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American Council of Learned Societies
208 East 43rd Street, New York, NY 10017-3398



Stanley M. Katz

curriculum vitae

ACLS PERSONAL DATA

Born: [REDACTED] (b)(6) Married, two children
Address: 152 Clover Lane, Princeton, New Jersey, 08540. (609) 921-7379
Social Security Number: [REDACTED]

EDUCATION

A.B. Harvard University (Magna cum laude; Phi Beta Kappa).
English History and Literature, 1955.
M.A. Harvard University, American History, 1959.
Ph.D. Harvard University, American History, 1961.
-- Harvard Law School, 1969-70.
LL.D. (Hon.) Stockton (N.J.) State, 1981.

EMPLOYMENT

Harvard University

Teaching Fellow, History Department, 1957-59.
Instructor, History Department, 1961-64.
Assistant Professor, History Department, 1964-65.
(Dean: Allston Burr Senior Tutor in Leverett House, 1963-65.)

University of Wisconsin

Assistant Professor, History Department, 1965-68.
Associate Professor, History Department, 1968-71.

University of Chicago

Professor of Legal History, 1971-78.
Professor of History, 1974-78.
Associate Dean, Law School, 1974-78.
Committee on Public Policy Studies, 1975-78; Chairman, 1977-78.

University of Pennsylvania Law School

Visiting Professor of Law, 1979-86.

Princeton University

Class of 1921 Bicentennial Professor of the History of American
Law and Liberty, 1978-86.
Professor of Public and International Affairs, Woodrow Wilson
School, 1982-86.
Master, John D. Rockefeller 3rd College, 1982-1986.
Senior Fellow, Public and International Affairs, Woodrow Wilson
School, 1986- .

American Council of Learned Societies, President, 1986- .

Board of Directors, International Research & Exchanges
Board (IREX), 1986- , (Chairman, 1986-91).
Board of Directors, Council for International Exchange of Scholars
(CIES), 1986- .
Sponsors Group, Committee on Scholarly Communication with the
People's Republic of China (CSCPRC), 1986- .
Board of Directors, National Cultural Alliance, 1990- .

FELLOWSHIPS

Fulbright, King's College, London, U.K., 1959-60.
 Harvard Graduate School of Arts and Sciences, 1960-61.
 Research Fellow in Legal History, American Bar Foundation, 1966-67.
 Research Fellow, Charles Warren Center for Studies in American History,
 Harvard University, 1966-67.
 Fellow in Law and American History, Harvard Law School, 1969-70.
 Study Fellowship (Law), American Council of Learned Societies, 1969-70.
 National Endowment for the Humanities Fellowship for Independent Study and
 Research, 1981-82.
 Visiting Fellow, Institute for Advanced Study, Princeton, New Jersey, 1981-82,
 1/92-6/92.

LECTURES AND PAPERS AT CONFERENCES

"The Making and Breaking of Colonial Governors: Newcastle's New York," OAH,
 Cincinnati, April 1966.
 "Between Scylla and Charybdis: Anglo-American Politics in New York, 1710-1760,"
 20th Conference on Early American History, Rutgers University, October
 1966.
 "Andrews Revisited: The English Colonial Bureaucracy, 1607-1776," AHA, New York,
 December 1968.
 "Controversies over Chancery Courts and Equity Law in the Middle Colonies," 29th
 Conference on Early American History, Newark, October 1970.
 "Teaching Legal History in Law Schools," AHA, New Orleans, 1972.
 "Constitutionalism and the American Revolution," National Archives Conference,
 Washington, D.C., November 1973.
 "Property and Revolution: The Law of Inheritance," Cooley Lecture, University
 of Michigan Law School, November 1975.
 "Thomas Jefferson and the Right to Property in Revolutionary America,"
 Bicentennial Lecture, University of Chicago Law School, February 1976.
 "The Legal Preconditions of the American Philanthropic Foundation," ASLH,
 November 1977.
 "The Future of Legal History," Conference on American Legal History, National
 Archives, Washington, D.C., September 1978.
 "Law and Philanthropy," History Department, University of Texas at El Paso,
 March 1979.
 "The Legitimization of the Philanthropic Foundation," Davis Center, Princeton
 University, January 1981.
 "Problems in Private Foundation Support of Academic Research: The U.S.
 Experience," University of Chicago Law School Conference on
 Philanthropy, April 1981.
 "Current Research in American Legal History: The Ideological Challenge," OAH,
 Detroit, April 1981.
 "The Nation, the State and the People; or, Lessons from the Anti-Federalists,"
 Commencement Address, Stockton State College (N.J.), May 1981.
 "The Problem of a Colonial Legal History," Conference on Anglo-American Colonial
 History, Oxford, August 1981.
 "History and the Future of Philanthropy," Independent Sector, Minneapolis,
 October 1981.
 "The Current State of American Legal History," Inaugural Conference of
 Australian Law and History Society, May 16, 1982 (included in the
 Lecture Tour of Australia (United States Information Agency),
 April, May 1982).
 "Philanthropy and Cultural Diplomacy," Keynote Address, Fulbright Alumni
 Association, College Park, Maryland, September 25, 1982.
 "Legal Theory and Colonial Legal History," Yale Law School Legal Theory
 Workshop, November 1982.

- "Women and Fundraising in Historical Perspective," Mt. Holyoke College Conference on Volunteerism, March 19, 1983.
- "George Washington: The Great White Father and His Indian Children (or, White Eyes and Conotocarious)," Pennsylvania Historical Society, April 30, 1983.
- "The American Academic Community and International Educational Exchange," 13th Conference of European Fulbright Executive Directors, Salzburg, Austria, May 21, 1983.
- "The History of Philanthropy: Foundations," Organization of American Historians, Los Angeles, April 1984.
- "Changing Values and Modern American Philanthropy," Independent Sector Research Forum, New York City, April 1984.
- "Constitutionalism and the American Founding," 1st Annual Jessie Swift Lecture in American Constitutionalism, Middlebury College, May 7, 1985.
- "History, Cultural Policy and International Exchange in the Performing Arts," Rockefeller Foundation Conference on Support of Contemporary Performing Arts in Europe and America, Bellagio, June 10-14, 1985.
- "Constitutionalism and the Humanities," Annual Lecture, New Jersey Committee for the Humanities, Princeton, New Jersey, June 18, 1986.
- "Philanthropy and Public Policy in the United States," Plenary Meeting XII of the President's Committee on the Arts and the Humanities, June 19, 1986, The Henry Francis duPont Winterthur Museum, Winterthur, Delaware.
- "Foundations and the History of Philanthropy in the U.S.," Salzburg Seminar in American Studies, Salzburg, Austria, June 21 - July 4, 1986.
- "The Burden of Humanism: The University and Society," University of North Carolina Inaugural Banquet, Chapel Hill, October 16, 1986.
- "The Revolutionary Origins of American Constitutionalism," Annual Lecture, Japanese American Studies Association, Kyoto, March 30, 1987; German American Studies Association, Bremen, June 9, 1987; numerous other similar talks on the Constitution during 1987.
- "Foundations and Public Policy," Minnesota Council on Foundations 1987 Summer Seminar, Minneapolis, Minnesota, August 6, 1987.
- "Constitutional Accountability," National Archives Constitution Study Group Bicentennial Lecture, Washington, D.C., August 12, 1987.
- "The Institutional Mind: Independent Research Libraries, Learned Societies and the Humanities in the United States," 175th Anniversary of the American Antiquarian Society, Worcester, Massachusetts, October 22, 1987.
- "The Constitution, Democracy and Education in the United States," The Woodrow Wilson National Fellowship Foundation, Princeton, New Jersey, November 10, 1987.
- "Philanthropy, Politics, and Culture in American Society," American Studies Association/Canadian Association for American Studies International Convention, New York City, November 21, 1987.
- "The Strange Birth and Unlikely History of Constitutional Equality," Presidential Address, Organization of American Historians, Reno, Nevada, March 25, 1988; also as "Constitutional Equality," Harold and Margaret Rorschach Lecture in Legal History, Rice University, Houston, Texas, April 6, 1990; also as "Does the Constitution Guarantee Equality," Kohlenberg-Towne Lecture Series, Northeast Missouri State University, Kirksville, Missouri, March 19, 1991.
- "Cultural Relations between Europe (Italy) and the United States post-World War II," "Nations" Days, University of Bologna, Bologna, Italy, November 17, 1988.
- "Constitutional Equality in American History," Second Annual Alfred L. Luongo Lecture, Historical Society of the United States District Court for the Eastern District of Pennsylvania, Philadelphia, December 8, 1988.
- "The Uneasy Case for Constitutional Equality," 27th Annual Callahan Lecture, West Virginia University, Morgantown, West Virginia, April 11, 1989.

Date: Fri, 14 May 95 15:27:57 EDT
From: Douglas Greenberg <SDGLS@CUNYVM.CUNY.EDU>
Subject: Archives
To: William_Gilcher@umail.umd.edu

Bill--

Just to tell you what to expect from ACLS: rather than faxing we are fedexing the material. Much of it is photocopies of news articles and won't fax well. YOU will receive the package tomorrow at home. No signature required! The package probably contains more than you need, but I wanted to err on the side of too much rather than too little. In addition, since speaking with you, I have spoken with Stan who continues to be quite agitated about all of this. I told him what you told me about wanting to avoid having precisely the same problem with him that you may (or do?) have with Sheldon. He said what I knew he would say: the same problem cannot come up since he has never been in a position to enforce a speech code and has been categorically opposed to them for a long time. He will be home on Sunday evening.

I also spoke with Sandy Crary along the lines that we discussed. He was very surprised to hear about Moynihan. He also said he had no information about the archives because the "White House Personnel" folks are so "goddamned discrete." I told him I wasn't calling for information so much as for advice about how Moynihan's position re: Stan might be more accurately gauged. I also said that I thought it would be good if he brought Kathy Cruse into the conversation since both Pell and Kennedy had been so instrumental in persuading Stan to oppose Iannone. He agreed to do that and said that he thought he could get some info out of Moynihan's office without appearing to be stalking horse for Stan. He said he would call me next week to tell me what he had found out. I think this works out well since it leaves both you and Stan out of any direct connection to Sandy's inquiries. Unless he is being more cagey than I think, he does not have any idea that your conversation with Stan has gone as far as it has nor (from what I said to him) could he guess that the information about Moynihan's views comes from you. I will keep you posted on whatever he tells me next week.

Sandy also gave me a distressing and (possibly) useful piece of information: the person who is Moynihan's eyes and ears on the arts and humanities and who pushed him on the Iannone business is Charles Blitzer of the Wilson Center. YOU may know Charles--former director of the NATIONAL Humanities Center and before that an employee of.....ACLS!!!! Charles, according to Sandy, has expressed some considerable hostility to Stan and is very close to Moynihan. In fact, it wouldn't surprise Sandy if it were Blitzer who alerted Moynihan to the possibility of Stan's nomination and reminded him of the now ancient history of the Iannone business. I was shocked to hear this at first, but on reflection it makes a great deal of sense. Blitzer has always been envious of Stan and was desperate for the ACLS presidency when Stan was appointed. In addition, he has lusted after a variety of Washington jobs over the years and it would not surprise me if he is hoping to eliminate Stan in order to secure the nomination for himself. You can imagine the scenario he has in mind, however, distant it may be from what may actually be possible.

I told Stan all of this and it did little to brighten his mood. I have been trying to think what use we might make of this especially slimey tidbit, but I am stumped. If you have any ideas about what we might do to blunt Blitzer's influence, I would be grateful.

This message is already too long, but I hope you will indulge me a bit more. I can't resist telling you how wise I think you all are to have settled on Stan for the Archivist job. At the risk of telling you what you already know: Stan is as fine and principled a person as I have ever known. He is also generous and genuinely supportive of others. We have been friends for fifteen years. We taught legal history together at Princeton and we have been together at ACLS for the last seven years. Although we do not always agree, I know absolutely no one else for whom I have as much respect and genuine admiration as Stan. No one will miss his presence here more than I and no one will mourn his absence from Princeton more than I. But it is also true that no one knows better than I just what superb contribution he will make to the country as Archivist. Whatever you can do to keep the nomination alive in the current circumstances will be a real service to the entire scholarly community and, more important, to the people of the country.

As I say, I guess you know all of that but I couldn't resist saying it anyway! I will be here at ACLS tomorrow morning if you need to reach me and will check e-mail and voice mail during the morning.

Doug Greenberg

Douglas Greenberg Vice President
American Council of Learned Societies
228 E. 45th St., 16th Floor
New York, N.Y. 10017
Tel: 212 697 1505 X133
Fax: 212 949 8058
BITNET: sdgls@cunyvm
INTERNET: sdgls@cunyvm.cuny.edu

National Archives



Archivist of the United States

Washington, DC 20408

93 MAR 26 P5:01

John,
Here is the guide
book which you requested -
I hope it is a helpful
tool for the Health Care
Commission. I have
put together a package
of FYI reading - Nixon -
Profs Case - Reagan/Bush -
Senate Report etc.

You will want to read
the New Yorker article.

Let me know if
I can help in any way.

- Marianne Smith
501-5130

National Archives



Marianne
Washington, DC 20408

Date : March 2, 1993
Reply to :
Attn of : NARA93- 154 NOTICE
Subject : Armstrong v. EOP materials
To : Office Heads, Staff Directors, NP, NG

At a recent open forum on the Armstrong case, staff asked that we make available to them copies of the Court of Appeals decision, the District Court order, and the White House agreements (attached).

I have also placed a set in the library. In addition, I request that you place a set in each division or branch office so that staff might have convenient access to them. NC, NL, and NS should send a set to each center, library, and regional archives.

Please let me know if you have any questions.

Ray Mosley
RAYMOND A. MOSLEY
Acting Deputy Archivist
of the United States

Attachment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 06 1993

Clerk, U.S. District Court
District of Columbia

Scott Armstrong, et al.,

Plaintiffs,

v.

Executive Office of the
President, et al.,

Defendants.

Civil Action No. 89-142 (CRR)

Appearances

Plaintiffs: Michael E. Tankersley, Public Citizen Litigation Group, with Alan B. Morrison, Public Citizen Litigation Group, Washington, D.C. were on the briefs.

Defendants: Jason Baron, Attorney, United States Department of Justice, Civil Division, Washington, D.C., with whom Stuart M. Gerson, Assistant Attorney General; Jay B. Stephens, United States Attorney for the District of Columbia; and David J. Anderson, Elizabeth A. Pugh, Peter D. Coffman, and Stephen G. Harvey, Attorneys, United States Department of Justice, Civil Division, Washington, D.C. were on the briefs.

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PRESERVATION OF RECORDS CREATED BY EOP
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OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This case is before the Court on the merits of the Plaintiffs' claims under Counts II and III of the Third Amended Complaint.¹ This case was filed in 1989 against Ronald Reagan, President of the United States, *inter alia*, just before his term of office ended.² In September 1989, this Court denied the Defendants' motion to dismiss or, in the alternative, for summary judgment. This Court held that § 702 of the Administrative Procedure Act ("APA") provided for judicial review of the Defendants' compliance with the Presidential Records Act ("PRA"), 44 U.S.C. §§ 2201 et seq., and the Federal Records Act ("FRA"), 44 U.S.C. §§ 2101-2118, 2901-2910, 3101-3107, and 3301-3324. In addition, the Court determined that

¹ The Defendants' have also filed a motion for summary judgment as to the Plaintiffs' claim under the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552, *et seq.*, contained in Count I of the Third Amended Complaint. However, as the Plaintiffs have recently filed an amended FOIA request with the Defendants, this claim is not yet ripe for review.

In addition, the Plaintiffs' Complaint had originally included a claim under the Presidential Records Act. However, this claim has been omitted from the Third Amended Complaint and therefore need not be considered by the Court.

² The Plaintiffs present suit is against the Executive Office of the President ("EOP"), the National Security Council ("NSC"), and the Archivist of the United States.

there were unresolved factual issues regarding whether the Defendants had complied with the recordkeeping statutes. Armstrong v. Bush, 721 F.Supp. 343 (D.D.C. 1989).

Thereafter, an appeal was taken. The Court of Appeals for the District of Columbia Circuit approved of this Court's holding that the APA provides for limited review of the adequacy of the NSC's and EOP's recordkeeping guidelines and instructions pursuant to the FRA. Armstrong v. Bush, 924 F.2d 282, 291-293 (1991). The Court of Appeals also held that the APA does not provide judicial review of the President's compliance with the PRA. Id. at 288-291. Finally, the Court of Appeals remanded for further development of the record to determine whether the electronic communications systems operated and controlled by the Defendants were within appropriate and proper guidelines as required by law and regulations issued thereunder by the Archivist of the United States, who is also a Defendant here. Id. at 296-297.³

In other words, the basic question is whether on this record, which counsel for the parties agree is ready for a decision on the merits, the Defendants have complied with the statutory

³ After remand, the Plaintiffs filed a Third Amended Complaint to include information about new electronic communication systems used by the Defendants. In the Third Amended Complaint, the Plaintiffs allege that the guidelines issued by the Defendants are arbitrary and capricious in violation of the FRA because they authorize destruction of agency records and that the Archivist has violated his statutory duty to initiate action to stop improper destruction of agency records on these electronic communications systems. See Third Amended Complaint at 13-15. The Third Amended Complaint dropped the President as a Defendant, and set forth the following Defendants: the EOP, the Office of Administration ("OA"), the NSC, and the White House Communications Agency ("WHCA").

requirements and whether the guidelines are reasonable or sufficiently clear as to provide adequate guidance to personnel employed by the Defendants in their maintenance and preservation of federal records. The other issue is whether the United States Archivist has fulfilled his statutory duties under the Federal Records Act. 44 U.S.C. § 2905.

In light of the foregoing, the Plaintiffs particularly seek preservation of and access to the Defendants' computerized systems known as PROFS, OASIS, and A-1, on which the Defendants send e-mail, write documents, transmit messages inter- and intra-agency and perhaps even to people outside the official government payroll.⁴ These computerized systems contain transmit logs indicating to whom messages and documents were sent by date, time

⁴ Both the EOP and the NSC copy the information on their electronic communication systems (PROFS, OASIS, and A-1) onto backup tapes. The backup tapes contain a snapshot of the information stored on the these systems at a given moment and can be used to retrieve data that is captured on the tape. The purpose of the backup tapes is to ensure that agency personnel are able to recover data as quickly and efficiently as possible if the computer system fails or files stored on it are inadvertently deleted.

The same day this suit was filed, the Plaintiffs received a Temporary Restraining Order prohibiting the Defendants from erasing certain material stored on the National Security Council's ("NSC") Professional Office ("PROFS") computer system during the Reagan administration. As a result of the Temporary Restraining Order and a stipulation entered on January 31, 1989, the Defendants have preserved the computer tapes of the material stored in 1989.

A second Temporary Restraining Order was entered on November 20, 1992 requiring the Defendants to preserve all the current and existing computer backup tapes in their custody from their electronic communication systems. At a status conference on December 4, 1992, the Defendants agreed to maintain these backup tapes until January 7, 1993.

and hour.⁵ They also have Receipt logs containing the same or similar information.

While Plaintiffs are now on the Third Amended Complaint and while each side has filed cross motions for summary judgment, the Court, with consent of counsel, has combined the parties cross motions for Summary Judgment with a decision on the merits.⁶ The Court also determined that it was reasonable to make findings of fact and conclusions of law on the basis of the joint submissions of the parties because it was unclear, based on the parties separate submissions, whether there was a material issue of fact in dispute.⁷ Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); see Local Rule 108(h).

After careful consideration of the foregoing, the Court, with the consent of counsel, has combined the Plaintiffs' request for a Preliminary Injunction with their request for Declaratory and Injunctive relief on the merits pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. Accordingly, this opinion shall

⁵ The systems are also used to transmit electronic mail and to generate calendars of appointments and meetings. They are also used for creating and editing of memoranda, and transferring files and documents in electronic format. The creation and transmittal of electronic mail, in the form of "notes" is the most commonly used function of the systems.

⁶ The parties did not wish to present any witnesses or further evidence beyond what has been presented to the Court in their papers.

⁷ Pursuant to a request by the Court made at a status conference on December 4, 1992, the parties filed a Joint Statement of Facts on December 8, 1992.

constitute the Court's findings of fact and conclusion of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

II. DISCUSSION

The Defendants' record keeping guidance pursuant to the FRA is subject to review under the APA. Under the APA, the reviewing court shall compel "agency action unlawfully withheld or unreasonably delayed" 5 U.S.C. § 706(1), and "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In examining an agency's action under the APA, the first question is whether the agency properly interpreted the statute involved. The second question is whether the agency action was arbitrary and capricious. Under this second inquiry, an agency action can be set aside if it fails to offer an adequate explanation for its action or fails to consider a relevant factor in reaching its decision, see International Fabricare Institute v. EPA, 972 F.2d 384, 389 (D.C. Cir. 1992); Federal Election Comm'n v. Rose, 806 F.2d 1081, 1089 (D.C. Cir. 1986), but the reviewing court is not to substitute its judgment for that of the agency. See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983); Adams House Health Care v. Sullivan, 895 F.2d 767, 770 (D.C. Cir. 1990); Center for Auto Safety v. Pack, 751 F.2d 1336, 1342 (D.C. Cir. 1985).

- A. THE STATUTORY COMMAND FROM 1943 THROUGH THE LAST AMENDMENT BY CONGRESS IN 1984 SHOWS A CLEAR LEGISLATIVE PURPOSE THAT RECORDS OF HISTORICAL VALUE INVOLVING THE PUBLIC, REGARDLESS OF PHYSICAL FORM, SHALL BE PRESERVED, PARTICULARLY WHERE SUCH MATERIAL REFLECTS THE FUNCTION, POLICIES, DECISIONS, PROCEDURES, OPERATIONS OR OTHER ACTIVITIES OF THE GOVERNMENT OR BECAUSE OF THEIR INFORMATIONAL VALUE.

The Federal Records Act governs the creation, management and disposal of federal records.⁸ The FRA defines a federal record as:

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

44 U.S.C § 3301 (emphasis added). The plain language of the statute and legislative history show a clear legislative purpose to allow private researchers and those whose rights may have been affected by the actions of government to have access to the records under the FRA. See American Friends Service Comm'n v. Webster, 720 F.2d 29 (D.C. Cir. 1983); Armstrong v. Bush, 924 F.2d 282, 287-88.

Therefore, each agency head must "maintain an active,

⁸ The FRA is a series of statutes, beginning with the 1943 Disposal of Records Act, ch. 192, 57 Stat. 380, and the Federal Records Act of 1950, ch. 849, 64 Stat. 583. These acts were subsequently amended by the Government Records Disposal Amendments of 1970, 84 Stat. 320, the Federal Records Management Amendments of 1976, 90 Stat. 2723, and the National Archives and Records Administration Act of 1984, 98 Stat. 2280. See Armstrong v. Bush, 924 F.2d 282, 284 n.1 (D.C. Cir. 1991).

continuing program for the economical and efficient management of the records of the agency," 44 U.S.C. § 3102, and establish "safeguards against the removal or loss of records he determines to be necessary and required by the Archivist." Id. § 3105. In turn, the Archivist is to provide "guidance and assistance to the Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal government and ensuring proper record disposition." Id. § 2904(a). Federal records may only be destroyed after the Archivist's review and approval.⁹ Id. § 3314.

B. THE INFORMATION ON THE DEFENDANTS' PROF, OASIS AND A-1 SYSTEMS IS SUBJECT TO THE FRA BECAUSE IT MEETS THE STATUTORY DEFINITION OF A RECORD.

The threshold issue before the Court is whether the material created or saved on the Defendants' computer systems falls under the FRA's definition of federal records. On the one hand, the Defendants urge the Court to rule that none of the material on the PROFS, OASIS, and A-1 systems are records under the FRA. The Defendants also argue that any record material on the systems has been saved by its staff in "hard" or paper copy and thus any materials on these electronic communications systems records are

⁹ The FRA establishes procedure in which the agencies submit lists and schedules of records to be disposed of to the Archivist. 44 U.S.C. § 3302(1). The Archivist must examine the lists or schedules submitted to him by agencies to determine whether or not any of the records "have sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government...." Id. § 3303a.

simply copies preserved for the convenience of reference.¹⁰ See 44 U.S.C. § 3301. On the other hand, the Plaintiffs argue that all the material contained on the Defendants' computer systems meet the statutory definition of records under the FRA and cannot be destroyed without approval of the Archivist. See 44 U.S.C. §§ 3302, 3303, 3303a.

The Court does not agree with the extreme positions taken by either party. On the one hand, the Court will not and cannot read the FRA to exclude computer systems such as those at issue here. The statutory language makes clear that the FRA was intended to include materials "regardless of physical form or characteristic." 44 U.S.C. § 3101. Furthermore, the Court cannot assume that the Defendants' staff are being advised to save all computer records in paper form because the Plaintiffs have explicitly challenged this contention. See Joint Statement of Facts, No. 83, at 25. In addition, the Defendants' argument assumes that a federal record on these systems is exactly the same as a version printed out on paper, a contention that the Plaintiffs dispute as well.

However, it would also be inconsistent to declare that all materials on these electronic communications systems are records, as the Plaintiffs request, where it is clear that these systems produce many non-record or presidential record materials that are not the subject of this suit. The factual record before the Court

¹⁰ The Defendants argue that it has instructed its staff that all material on these computer systems that constitutes a federal record must be printed out in paper form and saved and, therefore, all materials on these computer systems are copies saved only for convenience.

shows that while these computer systems can be and are used for substantive communications by staff, they are also used to convey information that does not rise to the level of a record.¹¹ Under the APA, it is not for this Court to second guess the wisdom of agency policies, but simply to determine if the policies are arbitrary and capricious or not in accordance with the law.

- C. THE ELECTRONIC MATERIAL CREATED OR STORED ON THE DEFENDANTS' PROFS, OASIS AND A-1 SYSTEMS CONTAIN INFORMATION THAT IS NOT REPRODUCED ON ANY PAPER COPIES. THEREFORE, PRINTING THE SUBSTANCE OF THESE MATERIALS IN PAPER FORM DOES NOT SATISFY THE REQUIREMENTS OF THE FRA AS IT DOES NOT SHOW WHO HAS RECEIVED THE INFORMATION AND WHEN.

With the two extreme positions above rejected, the Court concludes that some of the material stored on these computer systems do meet the definition of record under the FRA and must be saved, regardless of whether a paper or hard copy of the material has been printed out.

The Defendants' record keeping guidelines give its staff the responsibility of deciding whether material on the PROFS, OASIS, and A-1 systems are records under the FRA. Once it has been determined that a certain PROF, OASIS or A-1 note or document is a federal record, the Defendants allegedly instruct their staff to print out this information in paper form. However, even assuming arguendo, that the staff are properly preserving computer material

¹¹ Even the Plaintiffs admit that some PROFS communications convey information that does not constitute federal records. The Plaintiffs' position is that a substantial amount of the electronic mail is record material. See Joint Statement of Fact at 16-18.

that are federal records by printing out a copy of the material on paper, the Defendants nevertheless have not complied with FRA. The electronic material on the PROFS, OASIS, and A-1 systems are qualitatively different than a copy printed out in paper form and, therefore, the Defendants' record keeping system violates the FRA because it does not save all the information contained in these electronic records.

A paper copy of the electronic material does not contain all of the information included in the electronic version. For example, a note distributed over these computer system includes information that is not reproduced on the paper copy regarding who has received the information and when the information was received, neither of which is reproduced on the paper copy. See Affidavit of Eddie Becker, Plaintiffs' Exhibit Q. In addition, distribution lists contained on these computer systems are used by staff to route documents. These lists are maintained separately from the material being sent, which will simply designate a code that tells the systems which distribution list to use. The distribution lists are not necessarily printed out when the material is saved in paper form.

Such information can be of tremendous historical value in demonstrating what agency personnel were involved in making a particular policy decision and what officials knew, and when they knew it.¹² Requiring the preservation of such information is

¹² The Court does not agree with the Defendants' contention that this information has no value. The question of what government officials knew and when they knew it has been a key

consistent with the legislative history of the FRA, which clearly shows that "Congress intended, expected, and positively desired private researchers and private parties whose rights may have been affected by government actions to have access to the documentary history of the federal government." American Friends Service Comm'n v. Webster, 720 F.2d 29, 57. (D.C. Cir. 1983).

Secondly, Congress was aware that, when left to themselves, agencies have a built-in incentive to dispose of records relating to their mistakes or simply do not think about preserving information. Id. at 41. Thus, the FRA requires the Archivist to "establish standards for the selective retention of records of continuing value, and assist Federal agencies in applying the standards to records in their custody." 44 U.S.C. § 2905. Pursuant to this authority, the Archivist has issued regulations and a Records Management Handbook containing additional criteria for appraising records of permanent value. The regulations issued by the National Archives and Records Administration ("NARA")¹³ are persuasive authority in considering what is reasonable conduct under the FRA. The NARA is unquestionably concerned about the creation of federal records on electronic medium: "Special

question in not only the Iran-Contra investigations, but also in the Watergate matter.

The historical value of this information is best illustrated by the amount of information contained in PROFS notes that was used during the Iran-Contra investigation. See Plaintiffs' Exhibits B, Q, R, T.

¹³ Because the NARA is administered under the supervision and direction of the Archivist, 44 U.S.C. § 2102, the Court will refer to the NARA and the Archivist interchangeably.

attention must be given to machine-readable records.... Unquestionably, those media are slowly replacing paper records." NARA Handbook, Disposition of Federal Records, 1989, at 1.

In fact, even if this electronic information was the same as that produced on paper, the NARA has issued several guidelines on the disposition of records stating that "[i]f the same information is stored on more than one medium (such as paper and disk), agencies, in consultation with the NARA should schedule the disposition of all copies." See NARA Bulletin No 85-2, dated June 18, 1985, (Plaintiffs' Exhibits, Vol. I., No. 1, attachment A, at 5, ¶ e); NARA Bulletin 87-5, dated February 2, 1987 (Plaintiffs' Exhibits, Vol. I., No. 2, attachment A, at 5, ¶ e).

In common terms, a record is defined as "an account made in an enduring form, especially in writing, that preserves the knowledge or memory of events or facts" and "something on which such an account is made." The American Heritage Dictionary, 1976. These computer materials certainly fit into an everyday understanding on a record.

The Defendants contend "[s]tanding by themselves, such miscellanea such as lists of individual senders and recipients, times of acknowledgement, and accounting records of log-on and log-off times, do not rise to the level of a federal 'record.'" Defendants' Reply Memorandum in Support of Summary Judgement, August 8, 1992, at 35 n.33. However, the Defendants' argument misses the point because this information does not stand alone. This information must be saved because, in combination with the

substantive information contained in the electronic material, it will convey information about who knew what information and when they knew it.

The Defendants also cite General Record Schedule 23 for the proposition that after an electronic medium is used to produce a hard copy which is maintained in organized files, the electronic version may be deleted. Joint Statement of Facts No. 83, at 25. The Court does not find such reasoning persuasive. Neither the EOP nor the NSC relies on General Record Schedule 23 as authorization for deleting information from their respective computer systems or routinely destroying backup tapes of information stored on the PROFS systems. Id. No. 84, at 25.

Given the record before the Court, it is clear that once the Defendants staff decide that a note or other computer material on these computer systems constitutes a federal record, that material must be saved in a way that includes all the pertinent information contained therein. As any paper copies of these materials do not include all of the relevant information, the Defendants record keeping guidance are contrary to law under the FRA and arbitrary and capricious under the APA.

- D. THE DEFENDANTS' RECORD KEEPING PROCEDURES ARE ARBITRARY AND CAPRICIOUS BECAUSE THERE IS NO ADEQUATE MANAGEMENT PROGRAM OR SUPERVISION BY RECORD KEEPING PERSONNEL OF THE STAFF'S DETERMINATION OF RECORD OR NON-RECORD STATUS OF COMPUTER MATERIAL.

The Court also finds that the Defendants record keeping procedures are arbitrary and capricious because there is no

oversight of the agency staff by the record keeping personnel. The agency staff make the decision in every instance whether computer material is a federal record that must be saved. The Plaintiffs argue that the Defendants' record keeping personnel should at least provide supervision to the agency staff to ensure that federal records are being preserved.

The Court agrees. "Federal agency records management programs must be in compliance with regulations promulgated by ... NARA." 36 C.F.R. § 1220.2. "Each Federal Agency, in providing for effective controls over the maintenance of records, shall: (1) Establish and implement standards and procedures for classifying, indexing and filing records as set forth in GSA and NARA handbooks." The National Archives Records Management Handbook, "Disposition of Federal Records," promulgated by the Archivist, states:

Within the agency, only records officers should determine the record or non-record status of files. No officials at agency staff or operating levels should be given the authority to do so. Such authority weakens the disposition program by indiscriminate use of the nonrecord label and can result in the loss of valuable records.

Records Management Handbook, Plaintiff's Appendix, Tab 8, at 2-3. Therefore, the Court is convinced that the Defendants are not permitted to allow its staff to make its record keeping decisions under the FRA without some supervision from record keeping personnel. Such a determination is consistent with the written and authoritative guidance of the NARA. It is also consistent with the

purpose and history of the FRA.¹⁴

It is notable that the EOP and NSC perform such supervision and review for paper records but not electronic records.¹⁵ Therefore, while the Defendants' review of paper materials prevents the destruction of misclassified paper files, there is no such safeguard in the case of electronic records. Such a practice is consistent with the Defendants' position that once a paper copy of a computer e-mail is printed out, the computer material is a convenience copy and therefore not a record under the FRA. However, since the Court has determined that computer materials are not simply convenience copies, these computer materials are subject to the FRA and the Archivist and the Defendants must institute immediate provisions for periodic review to ensure the adequacy, effectiveness and efficiency of the record keeping program. See 44 U.S.C. §§ 3102, 3105; 36 C.F.R. §§ 1220.54, 1222.10, 1222.20, 122.32, 122.50.

The lack of supervision and review is of particular concern because the NSC instruct their staff that "the most common types of electronic mail notes are non-record materials" and that "non-record materials are notes that relate to official business but do

¹⁴ For this reason and because the Archivist and the agencies have not initiated an enforcement action with the Attorney General to ensure the preservation of these federal records, the Court shall remand this case to Archivist. See Section II(G) infra.

¹⁵ At the end of the Reagan Administration, officers of the NSC Information and Policy Directorate reviewed all paper files, including all files that employees believed to be personal in nature, to assure that staff members had complied with their record keeping obligations. However, no such review of electronic material was performed.

not need to be made a matter of record because of their insignificance or because they are duplicated elsewhere." NSC Memorandum dated May 13, 1992 (Second Menan Declaration, Exhibit 1 and Tab C). This encourages staff to classify materials as non-record, thus exempting them from preservation.

Requiring that records personnel provide supervision in records decisions is also consistent with the level of difficulty in discerning whether the Defendants' computer materials are federal records, presidential records or non-record. Finally and perhaps most importantly, given the FRA's goal of the preservation of records for historical purposes, the Defendants should err, if at all, on the side of preservation.

E. THE EOP'S RECORD KEEPING GUIDELINES ARE ARBITRARY AND CAPRICIOUS BECAUSE THE GUIDELINES DO NOT PROVIDE SUFFICIENT GUIDANCE TO DETERMINE WHAT IS A FEDERAL RECORD THAT MUST BE PRESERVED AND THEY ALSO PERMIT THE DESTRUCTION OF FEDERAL RECORDS.

The Court finds that the record keeping guidelines provided to the EOP staff at the time this suit was filed in 1989 were arbitrary and capricious.¹⁶

The written records management guidelines for the components of the EOP using these computer communication systems are contained

¹⁶ The NSC has a PROFS system for its staff that is maintained separately from other components of the EOP. For this reason, any reference to the EOP is intended to refer only to EOP components other than the NSC, which shall be referred to separately.

in the "Federal Records Manual," first issued in 1979.¹⁷ The 1982 edition of the Manual was in use when PROFS first was introduced at the EOP in 1986 and when the Plaintiffs filed this suit.¹⁸ It does not provide a reasonable method of ensuring compliance with the FRA. While it quotes the definition of a federal record contained in the statute, it simply refers to those materials meeting the statutory definition as "records" and does not distinguish between federal and presidential records.¹⁹ It also does not instruct staff on how to go about saving record material in electronic form. For example, after providing a definition of the term record, the 1982 Manual proceeds to discuss a central filing system, without discussing the way that records make their

¹⁷ The Library and Information Services Division ("LISD") within the EOP maintains a records management program for the OA, the Council on Environmental Quality, the Office of Management and Budget, the Office of Science and Technology Policy, Office of the United States Trade Representative and, since 1989, the Office of National Drug Control Policy. LISD issues written guidelines on the retention, management, and disposition of Federal records for these component agencies.

¹⁸ The Manual was later updated in 1989, after this suit was filed. The 1982 and 1989 Federal Records Manuals were the exclusive written guidance on recordkeeping for the EOP staff from 1982 through June 1991.

¹⁹ This distinction is an important one. Presidential records are "[d]ocumentary materials produced or received by the President, his staff, or units or individuals in the Executive Office of the President the function of which is to advise and assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and shall be filed separately." 44 U.S.C. § 2203(b).

Presidential records are stored, and disposed of differently than federal records. Compare 44 U.S.C. § 2203 with 44 U.S.C. §§ 3301 et seq. Finally and perhaps most importantly, federal records are made available to the public through FOIA while presidential records are not. See 44 U.S.C. § 2201(2)(B).

way into such a filing system. Neither does it discuss the format that such record material must or can take when being placed in these files.

In addition, the memoranda issued to the EOP staff during 1988 concerning record management at the close of the Reagan Administration simply reference the Manual and does not clarify or improve the record keeping guidance.²⁰ Similarly, the oral guidance provided to the EOP staff does not remedy the adequacy of the recordkeeping procedures because it was based on the written guidance. In light of the foregoing, the Court concludes that the EOP's record keeping guidance to the staff, at the time this suit was filed, was not reasonably calculated to achieve the goals of the FRA.

However, the Court finds that the 1989 Manual is a far better presentation of record keeping requirements than the 1982 version and provides better guidance to EOP staff. The 1989 Manual, unlike the 1982 version, differentiates between federal and presidential records and cites the statutory language of both the FRA and the PRA. While the 1989 edition of the Manual defines a federal record in the same language used in the 1982 Manual, it further defines documentary material to include:

all media containing recorded information, regardless of the nature of the medium or the method or circumstances of recording. The related phrase "regardless of physical

²⁰ At the close of the Reagan Administration, a memorandum issued by OA asked the staff to print out "any notes or documents that may be covered under the Presidential Records Act or that may be transferred to the next Administration." Joint Statement of Facts No. 97.

form or characteristics" means that the medium may be paper, film, disk, or other physical type or form; and that the method of recording may be manual, mechanical, photographic, electronic, or any other combination of these or other technologies.

Anton Dec., Exhibit B, at 5 (emphasis in the original). Therefore, the Court finds that while the 1982 Manual violates the APA, the 1989 Manual does not.²¹

However, this does not end the Court's inquiry. The Plaintiffs have also challenged various instructions given to the EOP staff as being contrary to law in violation of the explicit mandate of the FRA. The Court again agrees. In June 1991, the Defendant Office of Administration, a component of the EOP, issued a new directive on its record management program to its staff. The June 1991 directive contains the first and only recordkeeping instruction by the OA explicitly mentioning electronic mail. The Directive states:

Electronic mail should not be used to convey official records information. If an employee creates or receives an electronic message that contains such information, the message should either be incorporated into a memorandum, or reduced to paper. The electronic mail function is not designed to replace the existing system of document production and retention.

Other EOP components, including the Office of Management and

²¹ The Plaintiffs also contend that both the 1982 and 1989 Manuals are unreasonable because they do not instruct the staff to print out in paper form all federal record material contained or created on these computer systems. The Defendants contend that such an instruction is implicit in the Manuals and also has been made explicitly in other memoranda to their staff.

However, since the Court has already held that such an instruction does not satisfy the requirements of the FRA because the paper and the computer versions of these electronic records are different, the Court does not need to address this particular issue.

Budget, have adopted this directive and issued similar instructions to their staff.²² The Court finds that this June 1991 instruction is impermissible under the FRA because it tells staff that they have complied with the FRA simply by incorporating record material into a memorandum. It is unclear from this directive whether such memorandum should be in paper form or on the computer and what steps should be taken to preserve the information incorporated into the memorandum. Such a vague instruction is not reasonably calculated to preserve federal record material and will lead to the destruction of record material, particularly those previously discussed herein on computers which indicate who said what to whom and when.

F. THE NSC'S RECORD KEEPING GUIDELINES AT THE TIME THIS SUIT WAS FILED WERE ARBITRARY AND CAPRICIOUS BECAUSE THE GUIDELINES DID NOT PROVIDE SUFFICIENT GUIDANCE TO DETERMINE WHAT WAS A FEDERAL RECORD THAT MUST BE PRESERVED AND TO DETERMINE THE DIFFERENCE BETWEEN FEDERAL RECORDS, PRESIDENTIAL RECORDS AND NON RECORD MATERIAL.

The Court finds that the record keeping guidelines given to NSC staff at the time this suit was filed was arbitrary and capricious. The FRA's definition of a federal record, contained in 44 U.S.C. § 3301, does not appear in any of the NSC's written

²² The 1989 Manual is still the exclusive written guidance on recordkeeping for those EOP components that have not adopted the June 1991 OA Directive.

record keeping guidance used by its staff.²³ While some memoranda quote parts of the definition, they do not quote the definition in its entirety. At the very least, compliance with the FRA requires that the staff be fully advised of the definition of a federal record. None of the written materials provided to the staff provide this definition.²⁴

²³ From the time PROFS was introduced in 1985 until March 1987, the NSC written guidelines on recordkeeping obligations were contained in the 1984 "National Security Council Administrative Manual." The Manual has a section entitled "Records Management," which states:

All materials received or developed by an employee, detailee, or consultant during his/her tenure with the NSC Staff are official records of either the NSC or the President, and they may not to be removed or destroyed. NSC 1984 Administrative Manual, at 33, Defendants Motion for Summary Judgment, Exhibit A, Tab D. The Manual also states that: The following procedures should be followed with regard to all files maintained by each individual: 1. All originals of logged items ... and other NSC institutional documents must be separated and sent to the Secretariat. The originals are Federal records and must be law be included in either the NSC institutional records, which will remain with the NSC, or Presidential records, which will be sent to the National Archives for the President's Library. Id.

Finally, the 1984 Manual contains instructions on non-record materials:

Unclassified, wholly personal items, i.e., not related to White House or NSC business, should be filed separately and may be removed and retained.... The remaining files should be boxed according to established procedures ... and turned over to the Secretariat. Id., at 34.

In addition to the 1984 Manual, various memoranda were given to the staff on the subject of records management before the Plaintiffs filed this suit in January 1989.

²⁴ A May, 19, 1988 memorandum requests that the staff begin reviewing their records in "preparation for the eventual transfer of all officials records to a depository at the end of the administration." It states that all presidential and NSC records will be reviewed before the start of the new administration and that electronic data "will be subject to a similar process of review and disposition." The memorandum goes on to divide files

The Defendants contend that it is unnecessary for NSC staff to be given more detailed instructions because the staff is instructed to save all their records other than personal records for the Secretariat staff to review. However, the record belies this assertion. The guidelines do not instruct staff that all electronic materials, other than personal records, must be saved. In fact, only one memorandum tells the NSC staff to save computer materials that meet the definition of a federal record.²⁵ Therefore, the NSC guidelines during this time period gave the staff the responsibility of deciding whether electronic material constituted a federal record even though the staff has not been given the statutory definition. A complete explanation of what

into 3 categories: personal records, presidential records and NSC records and states that personal records must be reviewed by records personnel before their removal. A memorandum dated November 11, 1988 restates the information contained in this May memorandum.

²⁵ A memorandum dated December 20, 1988 reminds staff of its responsibilities under the FRA. It states that the FRA "requires the creation of records reflecting the 'organization, functions, policies, decisions, procedures and essential transactions' of an agency. It states that

Consistent with longstanding NSC policy and practice, information meeting the definition of a federal or presidential record is required to be formally entered into the Secretariat's record systems and may not be maintained solely by staff in convenience files or in electronic mail or other computer files.

The memorandum also states:

I ask that you review your computer files prior to your departure or January 20, 1989, whichever comes first. Should you identify therein any federal or presidential record as defined above, that you believe is not contained in the Secretariat systems, please forward it in hard copy....

constitutes a record under the FRA is necessary.

The oral guidance the NSC provided to its staff during this time did not ensure compliance with the FRA. The oral guidance addressed the record keeping issue in the same manner as the written guidance. While the Defendants claim that the oral guidance might go beyond the written guidance, there is no evidence in this record that this oral guidance uniformly provides substantive guidance complimenting the written.

The NSC issued additional instruction to its staff after this action was filed. The Court finds that these guidelines define what constitutes a federal record to its staff.²⁶ However, they are still arbitrary and capricious because the staff are told that electronic mail does not constitute record material and need not be saved once a paper copy has been printed out. See Section II(B) supra.²⁷ Moreover, the record keeping personnel do not exercise adequate supervision over the staff's determination of what

²⁶ On March 20, 1989, a memorandum was issued to the NSC staff on "Presidential Records and NSC Agency Records." The memorandum quotes the statutory definition of a federal record and presidential records.

This memorandum, along with other materials, are still distributed to new employees and used by NSC staff as the official record keeping guidelines of the agency.

²⁷ For example, a March 18, 1989, memorandum to the NSC staff on "Use of Electronic Mail" states:

Electronic mail should not be used to convey substantive information about policy issues when such information is not already contained or will not otherwise be contained in a written federal or presidential recordAs stated in [the] memorandum of January 25, 1989, information meeting the definition of a federal or presidential record should not be maintained solely in electronic mail files.

constitutes a federal record. See Section II(D) supra.²⁸ While the NSC's practice of requiring departing employees to attest that they have complied with record keeping laws may be a good practice, it does not aid the staff in their day-to-day determinations of record keeping status.²⁹

The Plaintiffs also contend that the NSC's record keeping guidance is contrary to law because it instructs the staff to save certain material as presidential records when, in fact, they are federal records.³⁰ The Plaintiffs argue that, under the "sole function" test announced in Soucie v. David, 448 F.2d 1067 (D.C.

²⁸ For example, on May 18, 1992, the NSC installed a new program for electronic mail on the PROFS and A-1 systems. The program requires that when a user creates an electronic mail note, he or she must enter a code identifying the note as a presidential record, a federal record, or non-record material. The computer automatically routes copies of notes identified as Presidential or Federal records to Records Management for entry into NSC's records system. Significantly, if a user identifies a note as non-record material, it is not copied or routed to Records Management.

²⁹ Since February, 1990, departing NSC employees have been required to sign a certificate attesting:

I have reviewed my computer memory files, including my electronic mail files, and have forwarded to the Secretariat any materials containing information that constituted a Presidential record or an agency record which was not otherwise recorded in a presidential or agency record All material remaining in my computer memory files, including my electronic mail file, constitutes non-record material, or information already recorded in another record, and can be deleted.

³⁰ In the Plaintiffs' view, the NSC does not produce presidential records. See Plaintiffs' Opposition to the Defendants' Motion for Summary Judgment, July 6, 1992, at 45-52. The Plaintiffs argue that because the NSC is an agency for purposes of the FOIA, it produces agency records and not presidential records. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (depending on its general nature and functions, a particular unit is either an agency or it is not).

Cir. 1971), the NSC is an agency and therefore, all records made or received by its staff whether they are used to assist the President or perform the statutory functions of the NSC, are federal records subject to the FOIA, exempt from the PRA and covered by the FRA.³¹ Therefore, the Plaintiffs contend that the NSC cannot designate certain records as presidential simply because the staff member was advising the President. See Ryan v. Department of Justice, 617 F.2d 781, 788 (D.C. Cir. 1980).

The Court disagrees. The clear language of the PRA and the history of this lawsuit clearly demonstrate that the NSC is entitled to segregate presidential and federal records. The clear language of the PRA provides that EOP components, which include the NSC, produce presidential records:

"[d]ocumentary materials produced or received by the President, his staff, or units or individuals in the Executive Office of the President the function of which is to advise and assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and shall be filed separately.

44 U.S.C. § 2203(b). Furthermore, our Circuit Court explicitly stated that, because the NSC advises the President and has statutory obligations, the NSC produces both presidential and federal records. Armstrong v. Bush, 924 F.2d 282, 284 n.2 (D.C. Cir. 1991). Our Circuit Court also held that the PRA precludes judicial review and this Court has no power to review actions taken by the President to ensure that presidential records are

³¹ The Plaintiffs note that the PRA specifies that it does not cover official records of an agency that fall under FOIA. 44 U.S.C. § 2201(2)(B).

maintained. Id. at 289-90; see 44 U.S.C. § 2203.

This Court stated that the question of how the NSC classified presidential records was not before the Court because the PRA precludes judicial review of the President's recordkeeping practices and decision, which includes the guidelines used in keeping Presidential records. Armstrong v. Bush, 139 F.R.D. 547, 551 (D.D.C. 1991).

G. THE COURT SHALL REMAND THIS CASE TO THE ARCHIVIST FOR IMMEDIATE REMEDIAL ACTION UNDER THE FRA TO PREVENT THE DESTRUCTION OF FEDERAL RECORDS.

The duty of the Archivist and the defendant agency heads to prevent the destruction of federal records has been violated in this case with the result that the Court is compelled to grant the Plaintiffs a declaratory judgment to that effect. The Court finds that the Archivist has breached his statutory duty to prevent the destruction of federal records. The Archivist responsibilities are triggered once an unlawful destruction of federal records has or will likely occur. See 44 U.S.C. § 2905(a); Armstrong v. Bush, 924 F.2d 282, 295.³² Injunctive relief under § 706(1) of the APA is appropriate where a reviewing court concludes that the "defendant official has failed to discharge a duty that Congress intended him to perform." Covelo Indian Community v. Watt, 551 F.Supp. 366 (D.D.C. 1982) (citations omitted); see Environmental

³² The Archivist shall notify the agency head of "any actual, impending or threatened unlawful removal ... or destruction of records ... that shall come to his attention...." 44 U.S.C. § 2905(a) (emphasis added).

Defense Fund, Inc. v. Costle, 657 F.2d 275 (D.C. Cir. 1981).

It is not the Court's place to instruct the Defendants on exactly what procedures must be followed to comply with the FRA.³³ Instead, the FRA requires that, where actual, impending unlawful removal or destruction of records in the custody of an agency comes to the attention of the Archivist, the Archivist shall notify the head of the agency and:

assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law. In any case in which the head of the agency does not initiate action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and notify the Congress when such a request has been made.

44 U.S.C. § 2905; see Armstrong v. Bush, 924 F.2d at 294-296.³⁴

Therefore, the Court shall remand this case to the agencies and the Archivist for appropriate and immediate action to preserve these

³³ The Supreme Court has held that there is no implied right of action for private litigants under the FRA. See Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980). However, our Court of Appeals concluded that "it would not be inconsistent with Kissinger and the FRA to permit judicial review of the agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General." Armstrong, 924 F.2d 282, 295. This is why the Court today will remand this case to the Archivist who shall notify the Attorney General and the Congress.

³⁴ The 1984 amendments to the FRA strengthened the administrative enforcement mechanism to prevent the unlawful removal or destruction of records by requiring the Archivist to notify Congress and independently request that the Attorney General initiate an action if the agency refused to do so. H.R. Conf. Rep. No. 98-1124, 98th Cong. 2d Sess. 28 (1984), reprinted in 1984 U.S.Code Cong. & Admin. News 3865, 3894, 3903. Congress enhanced the administrative enforcement mechanism because "of the frequency of incidents of removal or destruction of records in recent years." Id. at 28, 1984 U.S.Code Cong. & Admin. News 3903.

electronic federal records consistent with this opinion.

As the Defendants record keeping procedures violate the FRA, the Defendants are enjoined from removing, deleting or altering their electronic records systems until such time as the Archivists takes action pursuant to Section 2905 of the FRA to prevent the destruction of federal records, including those records saved on backup tapes pursuant to the two Temporary Restraining Orders entered in this case. See footnote 4.

Issue:
Does this
include
live E-R
systems?

H. THIS COURT HAS JURISDICTION TO ORDER THE PRESERVATION OF THE DEFENDANTS' ELECTRONIC RECORDS UNTIL THE ARCHIVIST CAN TAKE APPROPRIATE ACTION REQUIRED BY II(G) ABOVE. HOWEVER, THE COURT CANNOT ORDER THE PRESERVATION OF RECORDS CREATED BY EOP COMPONENTS WHOSE SOLE RESPONSIBILITY IS TO ADVISE THE PRESIDENT BECAUSE THERE IS NO JUDICIAL REVIEW OF THE PRA.

The Court is limited by the Court of Appeals decision in framing the scope of relief in this case. See Armstrong, 924 F.2d 282 (D.C. Cir. 1991). The Circuit Court, while providing for judicial review under the FRA, expressly held that there was no review under the PRA. Id. at 289. This distinction is an important one for, while the Court has power to review the recordkeeping guidance of federal agencies under the FRA, it can not delve into record management practices under the PRA.

The Circuit also provided the methodology for separating the FRA and the PRA as it applies here: The Circuit noted that EOP components whose sole responsibility is to advise the President are subject to the PRA and create presidential records. Armstrong, 924 F.2d at 286 n.2. Similarly, the components of the EOP that have

statutory responsibility are subject to the FRA. Id. Thus the Order of the Court today only applies to agencies that have statutory responsibility and not those that solely advise the President.

The parties have disputed the scope of this Court's Temporary Restraining Order. See Defendants' Statement to the Court dated December 8, 1992; Plaintiffs' Response dated December 10, 1992. The parties disagree as to whether the electronic material produced by various components of the EOP are federal or presidential records. Under the Court of Appeals mandate, this Court has no power to review compliance with the PRA, and thus, no power to review the record keeping procedures of EOP components whose "sole responsibility is to advise the President." Armstrong 924 F.2d at 286 n.2. It was for this reason that the Court exempted such components, containing only presidential records, from the Temporary Restraining Order requiring the preservation of electronic records. See Order dated November 23, 1992.

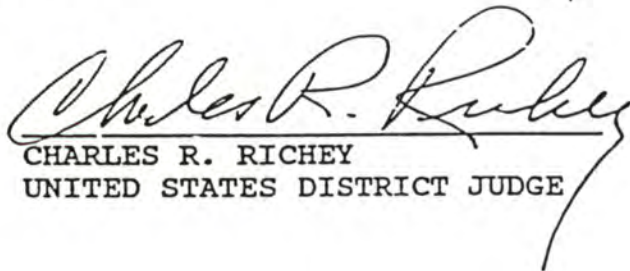
In the court's decision today on the merits of the Plaintiffs' FRA claims, the same logic applies. The Defendants shall not be required to preserve material which are presidential records produced by components of the EOP whose sole responsibility is to advise the President. However, in components that produce both types of records, this Court does have jurisdiction to authorize the preservation of these materials until the Archivist can ensure that federal records are not destroyed. Once again, the Defendants must err on the side of preservation.

V. CONCLUSION

The Court finds that the EOP and NSC have violated the Federal Records Act and that their record keeping practices are arbitrary and capricious under the Administrative Procedures Act. The Court also finds that the United States Archivist has failed to fulfill his statutory duties under the Federal Records Act. The Court will remand this case to the Archivist to take immediate action with the assistance of the Attorney General pursuant to the FRA with notice to Congress to take all necessary steps to preserve the electronic federal records here in question.

The Court shall issue an Order of even date herewith consistent with the foregoing Opinion.

DATE:

January 6, 1993
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 06 1993

Clerk, U.S. District Court
District of Columbia

Scott Armstrong, et al.,

Plaintiffs,

v.

George Bush, et al.,

Defendants.

Civil Action No. 89-142 (CRR)

ORDER

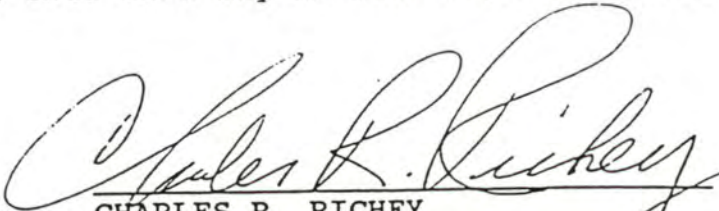
Upon consideration of all the papers filed in this case, the applicable law, the oral arguments of counsel, and pursuant to and for the reasons set forth in the Opinion of the Court, issued of even date herewith, it is, by the Court, this 6th day of January, 1993,

ORDERED, that the Plaintiff shall have a Declaratory Judgment that the guidelines issued by and at the direction of the Defendant Agencies are inadequate and not reasonable and are arbitrary and capricious and contrary to law in that they permit the destruction of records contrary to the Federal Records Act; and it is

FURTHER ORDERED, that the Defendant Archivist shall immediately, upon receipt of today's opinion and this Order, seek the assistance of the Attorney General with notice to Congress, and take all necessary steps to preserve, without erasure, all electronic Federal Records generated at the defendant Agencies to date, except purely Presidential Records; and it is

FURTHER ORDERED, that the parties shall process the pending Freedom of Information Act claim administratively, with all deliberate speed, and advise the Court at the earliest practicable

date of when that phase of this case may be made ripe for Judicial resolution.



CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 11 1992

Clerk, U.S. District Court
District of Columbia

SCOTT ARMSTRONG, et al.,
Plaintiffs,

v.

EXECUTIVE OFFICE OF THE PRESIDENT, et al.,
Defendants.

C.A. No. 89-0142 CRR

AMENDED ORDER

Upon consideration of Plaintiffs' Motion to Amend the Order of January 6, 1993, pursuant to Fed. R. Civ. P. 60(a), the Court grants plaintiffs' motion, and, for reasons set forth in this Court's Opinion of January 6, 1993, in lieu of the Order of January 6, 1993, it is hereby, this 11th day of January, 1993,

ORDERED, that the Plaintiffs shall have a Declaratory Judgment that the guidelines issued by and at the direction of the Defendant Agencies are inadequate and not reasonable and are arbitrary and capricious and contrary to law in that they permit the destruction of records contrary to the Federal Records Act; and it is

FURTHER ORDERED, that the Defendant Archivist shall immediately, upon receipt of today's opinion and this Order, seek the assistance of the Attorney General with notice to Congress, and take all necessary steps to preserve, without erasure, all electronic Federal Records generated at the defendant Agencies to date, except purely Presidential Records; and it is

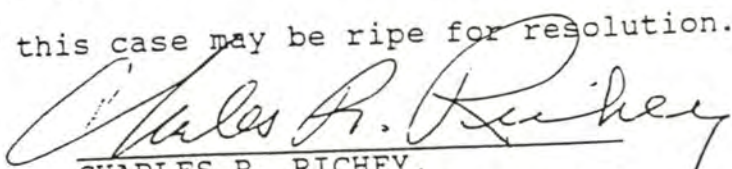
FURTHER ORDERED, that Defendants are enjoined from

removing, deleting, or altering information on their electronic communications systems until such time as the Archivist takes action pursuant to Section 2905 of the Federal Records Act to prevent the destruction of federal records, including those records saved on backup tapes pursuant to the two Temporary Restraining Orders entered in this case; and it is

FURTHER ORDERED, that, in accordance with the mandate of the Court of Appeals, the requirement that Defendants preserve information on their electronic communications systems does not extend to components of the EOP whose sole responsibility is to advise the President, but Defendants are enjoined to preserve materials of other components of the EOP; and it is

FURTHER ORDERED that the Director of the Office of Administration, the Executive Secretary of the National Security Council, and the Commander of the White House Communications Agency, and their successors shall be responsible for the compliance of the Defendant Agencies with this Order; and it is

FURTHER ORDERED, that the parties shall process the pending Freedom of Information Act claim administratively, with all deliberate speed, and advise the Court at the earliest practicable date of when that phase of this case may be ripe for resolution.


CHARLES R. RICHEY,
UNITED STATES DISTRICT JUDGE

Memorandum of Agreement
Between
National Archives and Record Administration
And
National Security Council
And
Office of Administration
And
George Bush

Whereas, the court in Armstrong v. Executive Office of the President, et.al., (C.A. No. 89-0142, CRR) ("the lawsuit"), has ordered the Executive Office of the President to preserve certain computer backup tapes and other electronic materials; and

Whereas, the Bush Administration ends at 12:00 noon on January 20, 1993, and the parties to this agreement desire to designate an appropriate repository to preserve these materials, as well as other electronic materials potentially relevant to various ongoing investigations, and to establish procedures governing the information contained on these materials until the conclusion of such lawsuit and investigations;

Now therefore, the parties agree that the following terms, conditions, provisions and understandings shall govern the custody, control, storage, access and disposition, and access to the information contained on the materials listed at Schedules A, B and C.

I. Transfer of Materials

1. On or before 12:00 noon, January 20, 1993, all materials listed at Schedules A, B and C ("the materials") shall be transferred by the Office of Administration ("OA") and the National Security Council ("NSC") to the physical custody of the National Archives and Records Administration ("NARA") for storage in an appropriate NARA facility.

2. Prior to transfer, OA and the NSC will clearly label each tape externally with volume and serial numbers, note the date of creation of the tape (if known), mark the materials with the appropriate security classification levels, or otherwise label the materials appropriately.

3. Upon transfer, NARA will be provided all technical manuals and/or other available information, including systems information, for operation or reading of the materials and the name, title, employer, and phone number of a systems administrator for each system affected by the transfer by OA and NSC.

4. Upon transfer, OA and NSC shall provide NARA with an inventory of the materials and NARA shall execute proper documentation for receipt of these materials.

5. George Bush shall retain exclusive legal control of all Presidential information, and all derivative information in whatever form, contained on the materials.

6. The originating agency shall retain legal control of all agency information, and all derivative information in whatever form, contained on the materials.

7. Except to the extent necessary to effectuate other provisions of this Agreement, the NSC (in the case of materials listed in Schedule A) and OA (in the case of materials listed in Schedule B) shall retain legal control of the materials themselves. At the conclusion of the investigation described in paragraph V.6., materials in Schedule C shall be transferred to NARA as personal records of George Bush.

8. NARA shall keep the other parties informed at all times of the location of the materials, and shall notify, by certified mail or equivalent procedure, the other parties in writing at least 10 days before moving any of the materials.

II. Access to Information on the Materials

1. Except as provided below, access to the materials, and the information contained on the materials, shall be granted only pursuant to a lawful subpoena, court order, or request by an independent counsel appointed under federal law.

2. Before granting access to any of the materials (or the information contained thereon) NARA shall notify the other parties to this Agreement (or their designated representatives), by certified mail or equivalent procedure, at least 10 days before such access is to occur.

3. NARA shall maintain and provide access to these materials only in accordance with procedures, including proper security clearance and log-in, log-out procedures, appropriate for classified materials.

4. Subject to the exceptions listed in subparagraph II.4.c., NARA shall segregate Presidential from non-Presidential information before providing access to NSC, OA, or any third party to any non-Presidential information contained on the materials.

a. NARA shall perform such segregation pursuant to procedures approved in advance by the other parties. Such procedures shall include a provision by which NARA performs an initial review of the materials (or the responsive portions thereof), identifies Presidential materials, then permits George

Bush or his designee to review the materials to ensure that all Presidential materials have been properly identified by NARA.

b. Any segregation under this agreement shall be accomplished in a manner designed to ensure preservation of the information contained on the materials.

c. The provisions of this paragraph regarding segregation by NARA shall not apply:

(i) in the case of a subpoena or court order requiring access to Presidential information;

(ii) to the extent precluded by any court order;

(iii) in the case of any request for information by an independent counsel appointed under federal law; or

(iv) whenever the parties agree to waive these requirements in a particular case.

5. In the event of a system failure in OA or NSC prior to February 1, 1993, requiring the use of backup tapes to restore NSC or OA computer systems, and notwithstanding paragraphs II.1 and II.2, NSC or OA shall be provided copies of the Bush Administration backup tapes created on January 19, 1993, for the sole purpose of performing such restoration. OA or NSC shall return such tapes to NARA no later than February 2, 1993, and shall not copy or otherwise reproduce the information contained thereon beyond that necessary to effect a system restoration.

6. George Bush and his designees shall have unconditional and unlimited access to all information contained on the materials, other than that information for which such access is prohibited by law.

7. The parties shall agree upon procedures to provide NSC and OA access to agency information contained on the materials for the purpose of conducting ongoing agency business. Such procedures need not include transfer of any materials back to OA or NSC.

III. Disposition of the Materials and Information Contained on the Materials

1. All materials and information thereon shall be preserved until after the conclusion of the lawsuit as well as any law enforcement investigation and any congressional investigation in which the investigator has made a lawful demand for access to information on the materials.

2. Thereafter, all agency information on the materials shall be disposed of in accordance with instructions from NSC, OA, and any interested originating agency, or, if the information is ultimately determined to be a record, pursuant to a proper records schedule.

3. Similarly, Presidential information on the materials shall be disposed of in accordance with instructions of George Bush or his designee.

4. Finally, the materials themselves (as opposed to the information contained on the materials) shall be disposed of by agreement between the parties (other than NARA), and shall remain in the custody of NARA until such agreement is reached.

IV. Costs

1. NARA will be responsible for the costs of storing and preserving the materials.

2. Costs, if any, of any segregation pursuant to paragraph II.4 of this Agreement shall be allocated by future agreement between NARA and NSC (with respect to materials listed at Schedule A) and between NARA and OA (with respect to materials listed at Schedule B).

3. NSC or OA, as appropriate, will bear the costs of any search (as opposed to segregation under paragraph II.4) performed by NARA for agency information pursuant to a subpoena, court order, or request by law enforcement authorities properly directed to NSC or OA.

V. Reservations

1. Nothing in this agreement shall be construed to waive or limit any rights and privileges of, or other protection provided to, George Bush by the Constitution of the United States, statute, or other law.

2. George Bush reserves the right to intervene in any lawsuit or other matter concerning the materials.

3. This agreement is subject to Executive Order 12356 of April 2, 1982, any successor executive order, and any other applicable law governing classified information.

4. Nothing in this Agreement shall be construed as extinguishing, or conferring, any rights of any person under the Freedom of Information Act, 5 U.S.C. 552 et seq.

5. Nothing in this Agreement shall be construed as disputing, or conceding, that any materials or information

subject to this Agreement constitute "federal records" for purposes of the Federal Records Act, 44 U.S.C. 3301, or as in any way suggesting that any materials listed in Schedule C are subject to any injunction entered to date in the lawsuit.

6. During the pendency of the investigation by the independent counsel established by order of the Special Division of the U.S. Court of Appeals for the District of Columbia Circuit in matter No. PN 92-5, the agreement attached as Schedule D shall govern the retention of and access to the materials, and shall supersede any provision of this agreement to the extent of any inconsistency.

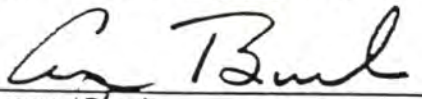
VI. Additional Definitions

1. "Presidential information" means information, contained on the materials, that was created or received by the President, any individual or unit in the Executive Office of the President (including, but not limited to, all staff of the White House Office and the Office of Policy Development) whose sole function is to advise and assist the President, and/or the NSC staff in their functions as advisers and assistants to the President.

2. "Agency information" means information contained on the materials that was created or received by officials or employees of federal agencies within the Executive Office of the President in the course of performing their functions and work on behalf of their agencies.

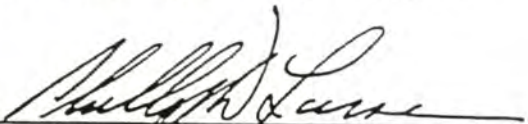
3. "Originating agency" means the agency within the Executive Office of the President that created particular information contained on the materials.

Signed this 20 day of January, 1993, at Washington, D.C.


George Bush


William F. Sittman
Executive Secretary
National Security Council


Don W. Wilson
Archivist of the United States


Phillip D. Larsen
Acting Director
Office of Administration

Schedule A

Materials currently in the custody of the National Security Council (NSC) to be transferred to the Archivist:

1. all Bush Administration NSC WHCA PROFS and WHCA VAX A-1 systems backup tapes in existence as of 12:00 p.m. on January 20, 1993;
2. all Bush Administration NSC WHSSS system backup tapes in existence as of 12:00 p.m. on January 20, 1993; and
3. all Bush Administration White House Situation Room "live" computer and communications systems backup tapes in existence as of 12:00 p.m. on January 20, 1993;
4. hard disks used in NSC staff personal computers at individual staff workstations during the Bush Administration and accompanying computer equipment.

Schedule B

Materials currently in the custody of the Office of
Administration (OA) to be transferred to the Archivist:

all OA All-In-One on OASIS backup tapes existing as of 12:00
p.m. on January 20, 1993.

Schedule C

Materials currently in the custody of NSC and OA, and not subject to any injunction in the lawsuit:

hard disks used by personnel of the White House Office and the Office of Policy Development during the Bush Administration;



OFFICE OF INDEPENDENT COUNSEL

1200 New Hampshire Avenue, NW (Suite 200)
Washington, DC 20036-6889

202/463-4343

January 19, 1993

The Honorable C. Boyden Gray
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Gray:

This letter memorializes the agreement reached today between representatives of our respective offices concerning the disposition of certain materials responsive to the grand jury subpoena served on The White House on January 15, 1993. The purpose of this agreement is to establish procedures that will satisfy compliance with the subpoena with respect to the categories of documents referenced herein. This agreement supersedes any other agreement between The White House and any other third party, including other government agencies, concerning the disposition of the materials referenced herein.

As you are aware, the contents of and access to materials produced pursuant to a grand jury subpoena are governed by grand jury secrecy provisions of Federal Rule of Criminal Procedure 6(e). The provisions of this agreement have been designed to accomplish the goals of continued access to these materials by the grand jury, the needs of the Bush Administration to remove the materials from the premises of the White House by 12:00 noon on January 20, 1993, and the requirements of Rule 6(e). I set forth below the various categories of materials that are covered by this agreement.

1. Paper Documents

The Office of Independent Counsel (OIC) has been advised by your representatives that approximately 10,000 boxes of

paper documents have been shipped or are being shipped to College Station, Texas for President Bush's library. The White House agrees to provide immediately to the OIC the inventory of the contents of these boxes. The OIC understands and agrees that access to these documents will require that attorneys on the OIC staff or agents of the Federal Bureau of Investigation travel to the presidential library in Texas.

2. Computer Materials

a. Personal Computer Hard-Drives

The subpoena requires production of certain material maintained on the hard drives of personal computers used by various White House personnel. The OIC has identified certain White House staff members whose computer material is desired on a priority basis. In response the White House Office of Administration advised the OIC that it will immediately replace hard drives in computers used by those persons and immediately turn over the current hard drives to the OIC. These hard drives will be maintained in the custody of the FBI.

Hard drives from computers of persons not specifically identified by the OIC shall be "restored" to their original condition using available computer software and the information shall be duplicated onto floppy disks and provided to the OIC. To the extent that this restoration and duplication cannot be accomplished by January 20, 1993, these computers containing these hard drives shall be sequestered or the hard drives from these computers shall also be removed and provided to the OIC.

b. Computer Back Up Tapes of Electronic Mail ("E-Mail")

It is our understanding that "back up tapes" of E-Mail communications are maintained by the Office of Administration on mini-computers. It is also our understanding that these tapes are presently designated for storage at the National Archives and Records Administration (NARA) facility. The OIC agrees to this procedure on the following conditions:

- (1) Boxes containing these tapes are sealed in a fashion that any attempt to open a box is readily apparent;

The Honorable C. Boyden Gray
January 19, 1993
Page 3

- (2) Such boxes shall be segregated from all other materials sent to NARA;
- (3) Except for members of the staff of the OIC and investigative agents working on behalf of the OIC, no person or entity shall have access to the boxes except by a lawfully issued order signed by a judge after notice to the OIC. Members of the OIC staff and agents working on behalf of the OIC shall have immediate and continuing access to these tapes during reasonable business hours.

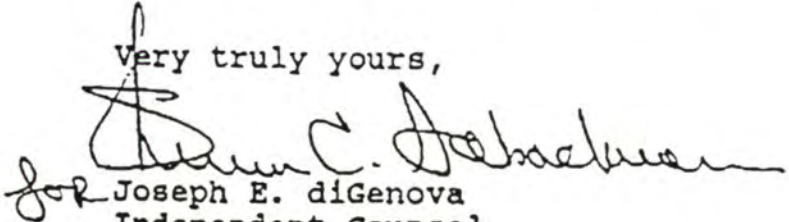
c. Mainframe Materials

Because it is not entirely clear what material is maintained on the mainframe computer, it is agreed that subject to further discussions (to be held before 12:00 noon on January 20, 1993) the mainframe materials will be handled pursuant to the provisions in section 2b pertaining to the E-mail back-up tapes.

I would appreciate your signing and dating this letter and returning the original to me as soon as possible.

I appreciate your cooperation in this matter and that of your staff.

Very truly yours,


for Joseph E. diGenova
Independent Counsel

JED:slh

SEEN AND AGREED:

C. Boyden Gray
Counsel to the President

January 19, 1993



OFFICE OF INDEPENDENT COUNSEL

1200 New Hampshire Avenue, NW (Suite 200)
Washington, DC 20036-6889

202/463-4343

January 20, 1993

The Honorable John P. Schmitz
Acting Counsel to the President
The White House
Washington, D.C.

Dear Mr. Schmitz:

This letter memorializes the agreement reached today between representatives of our respective offices concerning the disposition of certain materials responsive to the grand jury subpoena served on The White House on January 15, 1993. The purpose of this agreement is to establish procedures that constitute compliance with the subpoena with respect to the categories of documents referenced herein. This agreement supersedes any other agreement between The White House and any other third party, including other government agencies, concerning the disposition of the materials referenced herein.

As you are aware, the contents of and access to materials produced pursuant to a grand jury subpoena are governed by grand jury secrecy provisions of Federal Rule of Criminal Procedure 6(e). The provisions of this agreement have been designed to accomplish the goals of continued access to these materials by the grand jury, the needs of the Bush Administration to remove the materials from the premises of the White House by 12:00 noon on January 20, 1993, while preserving the ability of President Bush or Vice President Quayle to assert the attorney-client privilege where appropriate, and the requirements of Rule 6(e). I set forth below the various categories of materials that are covered by this agreement.

1. Paper Documents

The Office of Independent Counsel (OIC) has been advised by your representatives that approximately 10,000 boxes of paper documents have been shipped or are being shipped to College Station, Texas for President Bush's library. The White House agrees to provide immediately to the OIC all available inventories of the contents of these boxes. The OIC understands and agrees that access to these documents will require that attorneys on the OIC staff or agents of the Federal Bureau of Investigation travel to the presidential library in Texas.

The OIC has also been advised that there are boxes that are marked as President Bush's "personal materials" that are being deposited with the National Archives and Records Administration facility (NARA) in Washington, D.C. It is expressly understood and agreed that the OIC is not bound by this designation and may seek to review these materials, and that President Bush may seek to preclude such review through legal means available to him.

2. Computer Materials

a. Personal Computer Hard-Drives

The subpoena requires production of certain material maintained on the hard drives of personal computers used by various White House personnel. The OIC has identified certain White House staff members and offices whose computer material is desired. In response the White House Office of Administration advised the OIC that it will immediately replace hard drives in computers used by the following persons:

- (1) all persons listed as "Commissioned Officers" on pages I-VII in the "Executive Office of the President Telephone Directory, October 1992" (the "Directory");
- (2) all persons listed on pages WHO-1 thru WHO-14 of the Directory;
- (3) all persons listed on pages OVP-1 thru OVP-4 of the Directory;

- (4) all persons listed on pages OPD-1 and OPD-2 of the Directory.

These hard drives will be maintained in the custody of the FBI. Upon conclusion of the OIC investigation, all hard drives will be deposited with NARA.

In an effort to accommodate the needs for continued operation of the Executive Office of the President (EOP) after January 20, 1993, and in light of the severe time constraints resulting from the change in administrations, the OIC has agreed to limit the subpoena's specification concerning additional hard drives to those computers that were used by political appointees, their secretaries, deputies, and assistants within any agency, branch office or other subdivision of the Executive Office of the President ("EOP subdivision") in order to ensure that all material producible under the subpoena is preserved. Because of the inability of your staff under the time constraints to identify with precision all such persons, it has been agreed that your staff and the Office of Administration will notify in writing the general counsel and administrative personnel of each EOP subdivision of the grand jury subpoena, this agreement, and the requirement to preserve all existing hard drive information for the above-described persons. In addition, your office and the Office of Administration will provide by 12:00 noon on January 20, 1993 the OIC with the home telephone numbers of the general counsels of the EOP subdivisions so that they can be contacted by OIC as quickly as possible.

Any additional hard drives received by OIC from EOP subdivisions will be deposited with NARA upon conclusion of the OIC investigation.

b. Computer Back Up Tapes of Electronic Mail
("E-Mail")

It is our understanding that "back up tapes" of E-Mail communications are maintained by the Office of Administration on mini-computers. It is also our understanding that these tapes are presently designated for storage at the NARA facility. The OIC agrees to this procedure on the following conditions:

- (1) Boxes containing these tapes are sealed in a fashion that any attempt to open a box is readily apparent;

- (2) Such boxes shall be segregated from all other materials sent to NARA;
- (3) Except for members of the staff of the OIC and investigative agents working on behalf of the OIC, no person or entity shall have access to the boxes except by a lawfully issued order signed by a judge after notice to the OIC. Members of the OIC staff and agents working on behalf of the OIC shall have immediate and continuing access to these tapes during reasonable business hours.

c. Mainframe Materials

Based upon information your staff has received from technical personnel within the Office of Administration, members of your staff have advised the OIC that all mainframe materials from the Bush Administration were delivered to the NARA prior to 5:00 p.m. on January 15, 1993 when the grand jury subpoena was served on The White House. All such materials are currently maintained at NARA, and access to those materials by the OIC will be had through NARA.

4. Preservation of the Ability to Assert the Attorney-Client Privilege

Your staff and private counsel for President Bush have raised concerns that permitting the OIC to take custody of the above-described materials might be construed to constitute a waiver of the attorney-client privilege by President Bush as to all such materials in the OIC's custody. The OIC is sympathetic to those concerns. Accordingly, with respect to the computer hard drives from the offices of the President's or Vice-President's counsel that are being provided to the OIC for maintenance by the FBI, the OIC agrees that these items will not be examined by the OIC attorneys or investigators working with the OIC until January 29, 1993 at 10 a.m., the date specified in the subpoena for production of these materials to the grand jury. During the period between transfer of custody to the FBI and January 29, 1993, the OIC will undertake to provide access to these materials by President Bush's private counsel in order that counsel may review them and assert the privilege to those items to which they believe it to be applicable. This provision, of course, does not waive the OIC's right to contest the assertion of the privilege and, if necessary, to seek a ruling from the United

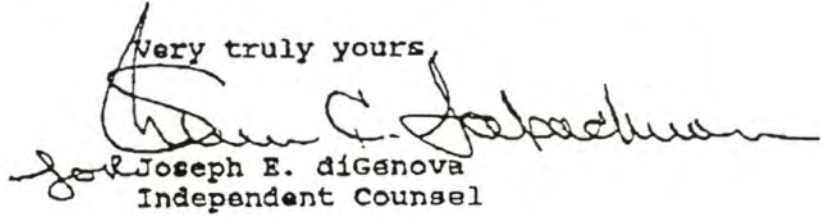
The Honorable John P. Schmitz
January 20, 1993
Page 5

States District Court for the District of Columbia on this issue.

I would appreciate your signing and dating this letter and returning the original to me as soon as possible.

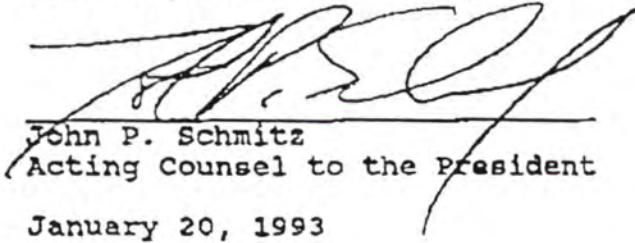
I appreciate your cooperation in this matter and that of your staff.

Very truly yours,


Joseph E. diGenova
Independent Counsel

JED:slh

SEEN AND AGREED:


John P. Schmitz
Acting Counsel to the President
January 20, 1993

GIBSON, DUNN & CRUTCHER
LAWYERS

1050 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036-5306

(202) 955-8500

TELEX: 892501 GIBTRASK WSH

FACSIMILE: (202) 467-0539

January 19, 1993

JAS. A. GIBSON, 1052-1022
W. E. DUNN, 1061-1925
ALBERT CRUTCHER, 1060-1931

LOS ANGELES

333 SOUTH BRAND AVENUE
LOS ANGELES, CALIFORNIA 90071-3107

CENTURY CITY

2025 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067-3026

ORANGE COUNTY

JAMBOREE CENTER
4 PARK PLAZA
IRVINE, CALIFORNIA 92714-0337

SACRAMENTO

400 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814

SAN DIEGO

750 B STREET
SAN DIEGO, CALIFORNIA 92101-4605

SAN FRANCISCO

ONE MONTGOMERY STREET, TELECOM TOWER
SAN FRANCISCO, CALIFORNIA 94104-4503

SAN JOSE

50 WEST SAN FERNANDO STREET
SAN JOSE, CALIFORNIA 95113

SEATTLE

955 THIRD AVENUE
SEATTLE, WASHINGTON 98104-7003

WRITER'S DIRECT DIAL NUMBER
(202) 955-8668

NEW YORK

200 PARK AVENUE
NEW YORK, NEW YORK 10166-0163

DALLAS

1717 MAIN STREET
DALLAS, TEXAS 75201-4603

DENVER

1001 CALIFORNIA STREET
DENVER, COLORADO 80202-2604

BRUSSELS

AVENUE LOUISE 222
B-1050 BRUSSELS, BELGIUM

PARIS

104 AVENUE RAYMOND POINCARÉ
75116 PARIS, FRANCE

LONDON

30/35 PALL MALL
LONDON SW1Y 6LP

HONG KONG

8 CONNAUGHT PLACE
HONG KONG

TOKYO

11-3 MARUNOUCHI, CHYODA-KU
TOKYO 100, JAPAN

AFFILIATED SAUDI ARABIA OFFICE

CHAMBER OF COMMERCE BUILDING
P.O. BOX 12870
RITDAH II SA, SAUDI ARABIA

OUR FILE NUMBER

H 75003-00132

Honorable Don W. Wilson
Archivist of the United States
National Archives and Records
Administration
Eighth and Pennsylvania Avenue, N.W.
Washington, D.C. 20408

Dear Mr. Wilson:

As attorney for President Ronald W. Reagan, I am authorized to convey his request that the following action be taken by the Archivist, pursuant to established law and regulation, and that full and prompt cooperation and assistance be extended to the Archivist or his representative by the Assistant to the President for National Security Affairs and others at the National Security Council; the Assistant to the President for Communications and others at the White House Communications Agency; the Assistant to the President for Management and Administration and others at the White House Office of Administration; and, all others whose cooperation and assistance may be requested by the Archivist.

The Archivist is hereby requested to take and retain custody and access control, as further described below, of certain computer tapes created during and within the Reagan Administration that have been stored by the White House Communications Agency and the White House Office of Administration from January 20, 1989 to date.

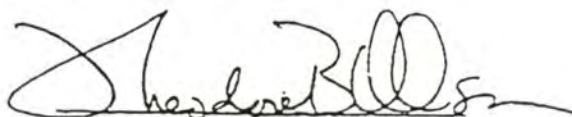
Honorable Don W. Wilson
January 19, 1993
Page 2

The computer tapes have been identified to me as approximately 392 computer tapes (and additional copies of such tapes) created as back-up for PROF notes prepared during and within the Reagan Administration.

By Memorandum of Agreement between Ronald W. Reagan and the Archivist of the United States, dated January 19, 1989, provisions were made for transfer to the Archivist of custody and control of all documents related to the Iran/Contra matter over which the Office of Counsel to the President maintained custody and control as of midnight on January 19, 1989. While back-up computer tapes were not named specifically in the January 19, 1989 Memorandum of Agreement, consistent with that Agreement and at the direction of the Office of Counsel to the President, a portion of the above-described backup computer tapes for PROF notes were retained segregated in their present location for convenient access, as required during the investigation and prosecutions in the Iran/Contra matter and for security of the evidence chain of custody of the tapes. It now appears that any need for access for official investigation and for security of the tapes would be satisfied by custodial retention by the Archivist.

Therefore, the Archivist is requested immediately to take and retain custody and access control of the tapes described above, and to administer them in accordance with applicable law, court orders, regulation, and agreement, including the January 19, 1989 Memorandum of Agreement between President Ronald W. Reagan and the Archivist of the United States.

Very truly yours,



Attorney for
Ronald W. Reagan

Accepted and Agreed:-



Archivist of the United States

JAM/jtf

1-20-93

January 19, 1989

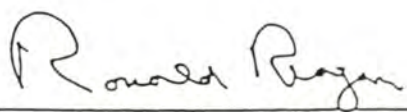
Memorandum of Agreement Between President Ronald W. Reagan
and the Archivist of the United States

The following understandings, terms, and conditions shall govern the custody, control, storage, access, and disposition of all documents related to the Iran/Contra matter over which the Office of the Counsel to the President maintains custody and control as of midnight on January 19, 1989, unless superseded by a subsequent agreement by the parties herein.

1. As used herein, the term "documents" is defined to include:
 - a. Presidential records as defined by the Presidential Records Act of 1978, 44 U.S.C. § 2201(2), which were created or received during President Reagan's terms of office.
 - b. Federal records as defined by the Federal Records Act, 44 U.S.C. § 3301.
 - c. Personal records such as certain excerpts from President Reagan's personal diary that are the property of Ronald W. Reagan.
2. As used herein, the term "Iran/Contra Task Force" is defined as the group of individuals working under the supervision of the Office of the Counsel to the President who will have physical custody of the documents.
3. Formal custody and control of all Presidential records will be transferred from President Reagan to the Archivist of the United States as of 12:00 p.m. on January 20, 1989. In addition, as of the same time, the Archivist agrees to store, along with the above-referenced Presidential records, both the Federal records and President Reagan's personal records that are subject to this agreement.
4. The Archivist agrees to keep all documents intact at a convenient facility in the Washington, D.C. area and to defer processing of the Presidential records that are subject to this agreement pending resolution of all litigation concerning the Iran/Contra matter or until directed to do otherwise by the incumbent President.
5. Formal custody and control of the above-referenced Federal records will be transferred to the Archivist at the conclusion of the Iran-Contra litigation unless the agency in which those records were originated objects. The originating agency shall be provided with an opportunity to object to such a transfer or to remove original agency records before custody and control is transferred to the Archivist.

6. President Reagan's personal records that are subject to this agreement are to be stored by the Archivist with the understanding that President Reagan will transfer title to those records by deed of gift at the conclusion of the Iran/Contra litigation. The Archivist shall have no responsibility for the preservation and maintenance of President Reagan's personal records until such time as President Reagan transfers title to those records to the Archivist.
7. President Reagan, and any individuals or entities that President Reagan designates in writing to the Iran/Contra Task Force Coordinator, shall have unconditional and unlimited access to all documents, subject to verification by the Iran/Contra Task Force that all individuals provided access to classified materials have the necessary security clearances.
8. The Counsel to the President and any member of the Executive Branch authorized by the Counsel to the President or his designee shall have unconditional and unlimited access to all Presidential and Federal records that are subject to this agreement. No member of the Executive Branch, including members of the Iran/Contra Task Force, shall have access to any of President Reagan's personal records that are the subject of this agreement without the written authorization of President Reagan.
9. The Archivist shall rely on the Iran/Contra Task Force to respond to requests for assistance by those individuals and entities authorized under paragraphs 7 and 8 to have access to the Presidential and Federal records that are subject to this agreement.
10. Access to the above-referenced Presidential records by any person or entity not specified in paragraphs 7 and 8 will be subject to the terms and conditions of the Presidential Records Act of 1978, 44 U.S.C. § 2201 et seq. and the regulations implementing that Act, 36 C.F.R. 1270.
11. Access to the above-referenced Federal records by any person or entity not specified in paragraphs 7 and 8 will be subject to the terms and conditions of the Freedom of Information Act, 5 U.S.C. § 552.
12. Access to President Reagan's above-referenced personal records by any person or entity not specified in paragraph 7 will be subject either to the approval of President Reagan under whatever terms and conditions he specifies or, once President Reagan has transferred title to those records by deed of gift, to the terms and conditions specified in the deed of gift.


Archivist of the United States


President Ronald W. Reagan

Memorandum of Agreement
Between
National Archives and Record Administration
And
Office of Administration

Whereas, the court in Armstrong v. Executive Office of the President, et.al., has ordered the Executive Office of the President to preserve thirty-one (31) computer backup ("backup tapes") associated with the PROFS electronic communications system maintained by the Office of Administration ("OA"); and

Whereas, the court has ordered in addition the preservation of other backup tapes associated with the successor OA electronic communications system known as All-in-One on OASIS which are being transferred to the Archivist of the United States ("Archivist") under a separate agreement with the Archivist as of January 20, 1993; and

Whereas, the attorney for Former President Reagan has requested by letter dated January 19, 1993 (Attached) that the 1989 PROFS backup tapes from the Reagan Administration be transferred to the Archivist; and

Whereas, it is in the best interests of the defendants National Archives and Records Administration ("NARA") and OA to maintain these materials from the Reagan and Bush Administrations together, until such time as the Armstrong case is fully resolved;

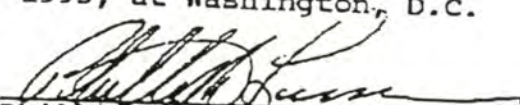
Now therefore, the parties agree to the following:

1. The thirty-one (31) 1989 PROFS backup tapes shall be transferred to the Archivist on January 20, 1993.
2. Such transfer is not intended to create, alter, or prejudice the rights of any plaintiff, defendant, or former President.
3. Prior to transfer, OA will clearly label each tape externally with volume and serial numbers, note the date of creation of the tape (if known), or otherwise label appropriately.
4. Upon transfer, OA shall provide NARA with an inventory of the tapes and NARA shall execute proper documentation for receipt of these backup tapes.

Signed this 20th day of January, 1993, at Washington, D.C.


Don W. Wilson
Archivist of the United States

*Consistent of original
signed FAX copy of
1-20-93*


Phillip P. Larsen
Acting Director
Office of Administration

**MEMORANDUM OF AGREEMENT
BETWEEN PRESIDENT GEORGE H.W. BUSH
AND THE ARCHIVIST OF THE UNITED STATES**

The following understandings, terms, and conditions shall govern the custody, control, storage, access and disposition of all documents related to the Iran-Contra matter that shall be deposited with the Archivist of the United States as of midnight on January 19, 1993, unless superseded by a subsequent agreement by the parties.

1. As used in this agreement, the term "documents" is defined to include:

- a. Bush Vice Presidential and Presidential records as defined by the Presidential Records Act of 1978, 44 U.S.C. § 2201(2), which were created or received during President Bush's or President Reagan's terms of office.
- b. Personal records such as personal correspondence, notes and excerpts from President Bush's personal diary that are the property of George H.W. Bush.

Documents, as defined above, that are subject to this agreement are the following: (1) any document that is identified as related to the Iran-Contra Independent Counsel Investigation; and (2) any document that is identified as related to the In Re Janet Mullins Independent Counsel Investigation.

2. The Archivist agrees to accept physical custody of all President Bush's Vice Presidential, Presidential and personal records that are subject to this agreement. The Archivist agrees to keep all documents subject to this agreement intact at a convenient facility in the Washington, D.C. area and to defer processing of any records that are subject to this agreement until the completion of the Iran-Contra Independent Counsel Investigation, the In Re Janet Mullins Independent Counsel Investigation, or until directed to do so by George H.W. Bush or his designee in accordance with the provisions of the Presidential Records Act.

3. Custody and control of all Presidential records that are subject to this agreement will be transferred from President Bush to the Archivist of the United States as of 12:00 p.m. on January 20, 1993.

4. President Bush's personal records that are subject to this agreement, which will be clearly identified as such, are to be deposited with the Archivist with the understanding that President

Bush intends to transfer title to these documents by deed of gift at a future date. The Archivist shall not be deemed to have control of any personal records subject to this agreement until the execution of a deed or gift.

5. President Bush and any individuals or entities that President Bush designated in writing to the Archivist shall have unconditional and unlimited access to all documents, subject to verification by the National Archivist Records Administration ("NARA") that all individuals provided access to classified materials have the necessary security clearances.

6. President Bush hereby designates Griffin B. Bell and J. Sedwick Sollers III and their designees at the law firm of King & Spalding to have unconditional and unlimited access to all documents covered by this agreement. This access may be revoked at any time at the President's direction in writing.

7. No access to any of President Bush's personal records that are subject to this agreement shall be provided without the written authorization of President Bush. Before access to any documents that are subject to this agreement is granted by the Archivist, President Bush or his designee(s) shall be given an opportunity to review the documents to object to access on the grounds of any applicable privilege and to make any determinations about whether a document is a personal record.

8. The Archivist shall respond to requests for assistance by those individuals and entities authorized under paragraph 6 to have access to the Presidential records that are subject to this agreement.

9. Access to the Presidential records that are subject to this agreement by any person or entity not specified in paragraph 6 will be subject to the terms and conditions of the Presidential Records Act of 1978, 44 U.S.C. § 2201 et seq. and the regulations implementing that Act, 36 C.F.R. § 1270.

10. Access to President Bush's personal records by any person or entity not specified in paragraph 6 will be subject either to the approval of President Bush under whatever terms and conditions he specifies or to the terms of any deed of gift executed between the parties concerning any personal records whose title is to be transferred to the Archives.


Archivist of the United States

1-20-73


President George H.W. Bush

the Commission will continue its investigation of FPE circuit breakers if further information warrants.

The Commission advises consumers to take certain safety precautions with all circuit breakers and fuses. Consumers should:

- Know your electrical circuit. Know which outlets and products are connected to each circuit.
- Never overload any electrical circuit by connecting too many products to the circuit. Be particularly careful not to connect several products that demand high current (such as heating appliances) to a low amperage circuit.
- Comply with local building codes in wiring or adding electrical circuits. Make sure the wiring and devices used in the circuit are connected to a circuit breaker or fuse of the proper size.
- Immediately disconnect any electrical product if problems develop. Have the product examined by a competent repair person.
- Investigate to determine why a fuse blows or circuit breaker trips. Do not simply replace the fuse or reset the breaker. If a fuse blows or breaker trips, it is often a warning that the circuit is overloaded. Check the circuit for causes of overloading (for example, too many appliances plugged in, a malfunctioning product, a short circuit). When in doubt, consult a licensed electrician.

Consumers who have questions concerning circuit breakers, or who wish to report information relating to their safety, may call the U.S. Consumer Product Safety Commission's toll-free safety hotline at 800-638-CPSC, teletypewriter for the hearing impaired at 800-638-8270 (Maryland only 800-492-8104).



Scott ARMSTRONG, et al., Appellees,

v.

George BUSH, et al., Appellants.

No. 90-5173.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 8, 1990.

Decided Jan. 25, 1991.

Action was brought challenging proposed destruction of records. The United States District for the District of Columbia, Charles R. Richey, J., 721 F.Supp. 343, denied motion of government officials to dismiss or for summary judgment, and certified order for interlocutory appeal. The Court of Appeals, Wald, Circuit Judge, held that: (1) private researchers and historians had standing to sue under the Federal Records Act and the Presidential Records Act; (2) President is not an "agency" for purposes of the Administrative Procedure Act; (3) Presidential Records Act impliedly precludes judicial review; (4) Federal Records Act does not preclude judicial review; and (5) establishment of guidelines and directives defining records under the Federal Records Act is not committed to agency discretions.

Affirmed in part and reversed in part, and remanded.

1. Records ⇐3, 30

One of the reasons the Congress mandated creation and preservation of federal and presidential records was to ensure that private researchers and historians would have access to the documentary history of the federal government. 44 U.S.C.A. §§ 2101-2118, 2201 et seq., 2901-2910, 3101-3107, 3301-3324.

2. Records ⇐22

Private researchers and historians had standing to sue under the Presidential Records Act and Federal Records Act to challenge proposed destruction of records.

44 U.S.C.A. §§ 2101-2118, 2201 et seq., 2901-2910, 3101-3107, 3301-3324.

U.S.C.A. §§ 2101-2118, 2901-2910, 3101-3107, 3301-3324.

3. Administrative Law and Procedure ⊖5

Congress did not intend to subject the President to the Administrative Procedure Act, and the President is not an "agency" for purposes of the Act. 5 U.S.C.A. § 701(b)(1).

See publication Words and Phrases for other judicial constructions and definitions.

4. Records ⊖3

Presidential Records Act impliedly precludes judicial review. 5 U.S.C.A. § 701(a)(1); 44 U.S.C.A. § 2201 et seq.

5. Records ⊖22

Federal Records Act does not impliedly preclude judicial review and court may entertain a claim that recordkeeping guidelines and directives are inadequate because they permit the destruction of records which must be preserved under the terms of the Act. 44 U.S.C.A. §§ 2201-2118, 2901-2910, 3101-3107, 3301-3324.

6. Records ⊖3

Amendment of the Federal Records Act to require the Archivist to ask the Attorney General to sue and notify Congress if agency head has failed to make a similar request of the Attorney General was not intended to preclude ordinary judicial review of the adequacy of the agency's recordkeeping guidelines and directives. 44 U.S.C.A. §§ 2905(a), 3106.

7. Records ⊖3

Establishment of guidelines and directives defining records for purposes of the Federal Records Act is not committed to agency discretion by law, and is subject to judicial review. 5 U.S.C.A. § 701(a)(2); 44 U.S.C.A. §§ 2101-2118, 2901-2910, 3101-3107, 3301-3324.

8. Records ⊖3, 22

Private litigants may not sue directly to enjoin agency actions in violation of agency guidelines with respect to maintenance of records under the Federal Records Act. 5 U.S.C.A. § 701(a)(2); 44

9. Records ⊖3

Judicial review is available under the Federal Records Act with respect to agency head's or the Archivist's refusal to seek initiation of an enforcement action by the Attorney General. 5 U.S.C.A. § 701(a)(2); 44 U.S.C.A. §§ 2101-2118, 2901-2910, 3101-3107, 3301-3324.

10. Federal Courts ⊖617

Claim that the Archivist violated the Federal Records Act by failing to request the Attorney General to initiate action to prevent the National Security Council from destroying records in contravention of NSC guidelines was preserved for review by allegation that Archivist had acquiesced in the intention to destroy the bulk of certain records in violation of his responsibilities under the Act. 44 U.S.C.A. §§ 2101-2118, 2901-2910, 3101-3107, 3301-3324.

11. Records ⊖21, 22

Decision to seek initiation of an enforcement action under the Federal Records Act to prevent the destruction and removal of records is not committed by law to the discretion of agency heads or Archivist and the decision is not immune from judicial review. 5 U.S.C.A. § 701(a)(2); 44 U.S.C.A. §§ 2101-2118, 2901-2910, 3101-3107, 3301-3324.

12. Records ⊖22

Archivist and agency head need not initially attempt to prevent unlawful action with respect to destruction of records by seeking the initiation of legal action; agency head and the Archivist may proceed first by invoking the agency's safeguards against the removal or loss of records and taking such intraagency actions as disciplining the staff involved, increasing oversight, or threatening legal action. 44 U.S.C.A. §§ 2905(a), 3105.

13. Federal Courts ⊖660.35

Issue of whether record was adequate for summary judgment was preserved by petition for permission to take an interlocutory appeal which stated that, assuming that district court review of agency action

was available, it was limited to a determination of whether agency action was arbitrary and capricious and that the district court erred in finding a disputed issue of material fact.

14. Federal Courts ⇐660.35

Because interlocutory appeal is from an order of the district court and not from a particular question that the district court found controlling, court has jurisdiction to review the entire order, not merely the question certified as controlling. 28 U.S.C.A. § 1292(b).

15. Records ⇐22

Fact that some record material may have been destroyed on the basis of innocent mistake does not compel a finding that Federal Records Act guidelines of the agency are arbitrary and capricious. 44 U.S.C.A. §§ 3105(a), 3303(a).

Appeal from the United States District Court for the District of Columbia (Civil Action No. 89-CV-00142).

Patricia M. Bryan, Deputy Asst. Atty. Gen., with whom Stuart M. Gerson, Asst. Atty. Gen., Jay B. Stephens, U.S. Atty., Leonard Schaitman, Freddi Lipstein and Matthew M. Collette, Attys., Dept. of Justice, were on the brief, for appellants.

Alan B. Morrison, with whom Michael E. Tankersley, Patti A. Goldman and Kate Martin were on the brief, for appellees.

Before WALD, D.H. GINSBURG and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

Plaintiffs-appellees, journalist Scott Armstrong, the National Security Archive, and several other individuals and organizations, brought suit to prohibit defendants-appel-

1. The FRA is actually a series of statutes, which originated with the Federal Records Act of 1950, ch. 849, 64 Stat. 583, and the 1943 Disposal of Records Act, ch. 192, 57 Stat. 380. These acts were subsequently amended by the Government Records Disposal Amendments of 1970, 84 Stat.

lants President George Bush, Archivist of the United States Don Wilson, and the National Security Council ("NSC") from erasing any material stored on the NSC computer system during the last two weeks of the Reagan Administration. Appellees allege that some of these materials are "records" within the meaning of the Presidential Records Act ("PRA"), 44 U.S.C. §§ 2201 *et seq.*, and the Federal Records Act ("FRA"), 44 U.S.C. §§ 2101-2118, 2901-2910, 3101-3107, and 3301-3324, and, therefore, cannot be erased without the approval of the Archivist. The district court held that § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, authorized review of the President's and NSC's compliance with the PRA and the FRA and that there are unresolved factual issues regarding whether the appellants have complied with the recordkeeping statutes. *Armstrong v. Bush*, 721 F.Supp. 343 (D.D.C.1989). Accordingly, the district court denied appellants' motion to dismiss the complaint or, in the alternative, for summary judgment.

The district court subsequently certified its order for interlocutory appeal under 28 U.S.C. § 1292(b), and this court granted appellants' petition for permission to take an interlocutory appeal. We now reverse in part, affirm in part, and remand to the district court for proceedings consistent with this opinion.

I. BACKGROUND

A. The Statutory Framework

1. The Federal Records Act

The FRA governs the creation, management and disposal of federal records.¹ In enacting the FRA, Congress sought to ensure *inter alia*: (1) "efficient and effective records management"; (2) "[a]ccurate and complete documentation of the policies and transactions of the Federal Government"; and (3) "[j]udicious preservation and dispos-

320, the Federal Records Management Amendments of 1976, 90 Stat. 2723, and the National Archives and Records Administration Act of 1984, 98 Stat. 2280. See 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.*

al of records." 44 U.S.C. § 2902. Accordingly, the FRA requires "[t]he head of each Federal agency [to] make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency...." *Id.* § 3101. Each agency head shall also "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," *id.* § 3102, and "shall establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Archivist." *Id.* § 3105.

The FRA also mandates that "[t]he Archivist shall provide guidance and assistance to Federal agencies," 44 U.S.C. § 2904(a), shall "promulgate standards, procedures, and guidelines with respect to records management," *id.* § 2904(c)(1), and shall "conduct inspections or surveys of the records and records management programs and practices within and between Federal agencies." *Id.* § 2904(c)(7). If the Archivist discovers that any provision of the FRA

has been or is being violated, the Archivist shall (1) inform in writing the head of the agency concerned of the violation and make recommendations for its corrections; and (2) unless satisfactory corrective measures are inaugurated within a reasonable time, submit a written report of the matter to the President and Congress.

Id. § 2115(b).

The FRA similarly regulates the disposal of "records," which it defines to include all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency ... as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Govern-

ment or because of the informational value of the data in them.

44 U.S.C. § 3301. No records may be "alienated or destroyed" except pursuant to the disposal provisions of the FRA. *Id.* § 3314. The Archivist plays a key role in the disposal of records. Upon the request of an agency head, the Archivist may authorize the disposal of records that are no longer needed by the agency and that do not have "sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government...." *Id.* § 3303a. In addition, the Archivist

shall notify the head of a Federal agency of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency that shall come to his attention, and assist the head of the agency in initiating action through the Attorney General for the recovery of records wrongfully removed and for other redress provided by law.

Id. § 2905(a); *see also id.* § 3106 (providing that each agency head shall notify the Archivist of any unlawful removal or destruction of records and shall initiate, through the Attorney General, an action to recover the records). If, however, the agency head does not initiate an action, the Archivist "shall request the Attorney General to initiate such action, and shall notify the Congress when such a request has been made." *Id.* § 2905(a).

2. The Presidential Records Act

The PRA directs the President to "take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records...." 44 U.S.C. § 2203. The statute defines "Presidential records" as

documentary materials ... created or received by the President, his immediate staff, or a unit or individual in the Executive Office of the President whose function is to advise and assist the President,

in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

Id. § 2201(2).

Like the FRA, the PRA also regulates the disposal of presidential records. "During his term of office, the President may dispose of those of his Presidential records that no longer have administrative, historical, informational, or evidentiary value." *Id.* § 2203(c). If the Archivist thinks it advisable, he may notify Congress of the President's intent to dispose of the records; and if the Archivist notifies Congress, the President must submit the disposal schedules to the appropriate congressional committees and wait sixty days before destroying the records. *Id.* §§ 2203(c), 2203(d). The PRA gives neither the Archivist nor the Congress the authority to veto the President's decision to destroy the records.

Somewhat different disposal provisions apply after the President has left office. Upon the conclusion of the President's term of office, the Archivist assumes control of the presidential records and, after giving notice in the Federal Register, may dispose of the records that have "insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation." 44 U.S.C. §§ 2203(f)(1), (f)(3). "Publication of such notice shall constitute a final agency action" for purposes of judicial review under the APA. *Id.* § 2203(f)(3).

B. This Action

Plaintiffs-appellees allege that defendants-appellants intend to delete material from the White House computer systems in violation of the FRA and the PRA.² Several components of the Executive Office of

2. Because the various components of the Executive Office of the President ("EOP") perform different functions, they create different kinds of records. The President, the Office of Vice President, and the components of the EOP whose sole responsibility is to advise the President are subject to the PRA and create "presidential records." The components of the EOP that have statutory responsibility (such as the Office of Management and Budget and Council

the President ("EOP")), including the NSC, utilize the "PROFS" computer system, "an inter-computer communications system marketed by the IBM Corporation." *Armstrong*, 721 F.Supp. at 345. EOP and NSC staff use the PROFS system to create and send to other staff connected to the system three types of documents: "(1) short 'notes' or 'mail'; (2) larger documents, which the recipients can revise; and (3) individual calendars." *Id.* Both the sender and recipient can make a hard-copy printout of a PROFS document or delete the document from their PROFS files. If both the sender and recipient delete the document from their PROFS files, the document is deleted from the PROFS system; unless a hard-copy printout was made, "it is possible that no record would exist of its ever having been created." *Id.*

The disputed material in this case consists of computer "backup" tapes compiled pursuant to the normal EOP and NSC backup procedure. Each Saturday night the NSC makes a backup tape that records all the information on the PROFS system at the time the tape is made. The NSC keeps these backup tapes for two weeks before erasing their contents and recycling them. *Id.* Other components of the EOP make nightly backup tapes and keep the tapes for two to six weeks before recycling. *Id.*

On January 19, 1989—the last day of the Reagan Administration—the National Security Archive filed three Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requests for copies of all information stored on the PROFS computer system in the EOP and NSC from its date of installation in 1985 until the end of the Reagan Administration. *Armstrong*, 721 F.Supp. at 347. Later that day, plaintiffs sued the President, the Vice President,³ the NSC,

on Environmental Quality) are subject to the FRA and create "federal records." Because NSC advises the President and has statutory obligations, it creates both presidential and federal records.

3. Plaintiffs initially sued Ronald Reagan in his capacity as President and George Bush in his capacity as Vice President and President-elect. Complaint for Declaratory and Injunctive Relief

and the Archivist seeking a declaration that many of the documents stored in the PROFS system at the close of the Administration are federal and presidential records. *Id.* Plaintiffs also sought an injunction prohibiting the destruction of these documents and directing the President and NSC to classify and preserve the documents as required by the FRA and PRA. *Id.* Finally, plaintiffs sought an order requiring the Archivist to carry out his responsibilities under the two statutes. *Id.*

The district court initially issued a Temporary Restraining Order, enjoining defendants-appellants from destroying or altering the PROFS computer tapes or backup files. Appellants agreed to preserve the backup tapes pending resolution of this case and moved to dismiss the complaint or, in the alternative, for summary judgment. *Id.* at 348. The district court denied both motions, holding that: (1) although the PRA does not expressly provide for judicial review of the President's implementation of the statute, the plaintiffs may obtain judicial review under the APA because the President is an "agency" within the meaning of 5 U.S.C. § 701(b)(1); (2) presidential action under the PRA is not "committed to agency discretion by law" under § 701(a)(2) of the APA; and (3) there exists a genuine dispute of material fact about whether the material on the PROFS tapes qualifies as presidential or agency records and whether defendants' implementation of the FRA and PRA was "arbitrary and capricious" under § 706(2) of the APA. *Id.*

Appellants challenge each of these holdings. They also argue against the justiciability of the action, contending that: (1) plaintiffs do not have standing because they are not within the zone of interests of the records creation provisions of the FRA and PRA; (2) the PRA claims are not reviewable under the APA because the PRA precludes judicial review; and (3) the FRA claims are not reviewable under the APA because the FRA precludes judicial review of an agency's records creation decisions

¶¶ 9-10. Plaintiffs subsequently amended their complaint, dropping their claim against President Reagan and naming George Bush in his

and the question of what constitutes a record is committed to agency discretion by law. We address each of these issues in turn.

II. STANDING

[1.2] In order to have standing under the APA, plaintiffs must satisfy the "zone of interests" test. That is, "the interest sought to be protected by the [plaintiffs must be] arguably within the zone of interests to be regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970); see also *Clarke v. Securities Industry Association*, 479 U.S. 388, 396, 107 S.Ct. 750, 755, 93 L.Ed.2d 757 (1987). In this case, appellants contend that the plaintiffs are not within the zone of interests of the records creation and management provisions of the PRA and FRA. We disagree. We find that the statutory language and legislative history of both statutes indicate that one of the reasons that Congress mandated the creation and preservation of federal and presidential records was to ensure that private researchers and historians would have access to the documentary history of the federal government.

Congress enacted the PRA "to insure the preservation of and public access to the official records of the President." Presidential Records Act of 1978, Pub.L. No. 95-591, 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.); see also H.Rep. No. 95-1487, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5732, 5733. The FRA, enacted to ensure the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government," 44 U.S.C. § 2902(1), evinces a similar congressional intent. As we concluded in *American Friends Service Committee v. Webster*, 720 F.2d 29, 57 (D.C. Cir. 1983), "the legislative history of the [FRA] supports a finding that Congress

capacity as President. Amended Complaint for Declaratory and Injunctive Relief ¶ 11.

intended, expected, and positively desired private researchers and private parties whose rights may have been affected by government actions to have access to the documentary history of the federal government."

Appellants attempt to distinguish *American Friends*, in which private researchers were held to be within the zone of interests of the records disposal provisions of the FRA, on the ground that plaintiffs in this case seek to create, rather than to prevent the destruction of, records. Although appellants concede the inclusion of plaintiffs within the zone of interests of the FRA disposal provisions, they argue that plaintiffs are outside the zone of interests of the records creation provisions of the FRA. We do not find this difference compelling. First, plaintiffs do not seek the creation of any new records, but rather ask only that the records already created be appropriately classified and disposed of pursuant to disposal schedules approved by the Archivist. Additionally, we note that the distinction between records "creation" and records "disposal" in a computer system like PROFS is not as clear as appellants claim. There is little practical difference between an agency official's decision to delete, and thus destroy, a PROFS note because he believes it is not a "record" for purposes of the FRA and his decision to delete a PROFS note that he believes is a "record" without first obtaining the permission of the Archivist. In either case, the note will be lost forever to history. On the basis of the expressed statutory goal of preserving records for historical purposes and our previous decision in *American Friends*, we now hold that because plaintiffs are researchers and historians who make extensive use of government documents, they are within the zone of inter-

ests of the records creation and management provisions of the PRA and FRA.⁴

III. THE PRESIDENTIAL RECORDS ACT

Appellants argue that the APA does not provide a cause of action for judicial review of the President's compliance with the PRA because the President is not an "agency" within the meaning of the APA. Furthermore, even if the APA applies to the President, appellants argue that the PRA precludes judicial review. For the reasons discussed below, we agree with both arguments⁵ and reverse the district court's holdings to the contrary.

A. The APA Definition of "Agency"

[3] The APA defines an "agency" as: each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia; . . .

5 U.S.C. § 701(b)(1) (definition for judicial review provisions); *see also id.* § 551(1) (definition for subchapter on administrative procedure). Because this definition expressly excludes Congress and the courts but not the President, plaintiffs argue that the plain language should be read as implying that the President is an agency. *See, e.g., De Rieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1322 n. 13 (Temp. Emer. Ct. App.) (suggesting in dicta that the President is an agency under the APA), *cert. denied sub nom., Five Smiths, Inc. v. Hollaway*, 419 U.S. 896, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974); *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337

precludes judicial review, 5 U.S.C. § 701(a)(1), and additionally the President's recordkeeping decisions are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). Because we hold that the PRA precludes judicial review, we need not decide whether the President's recordkeeping decisions are committed to agency discretion by law.

4. However, plaintiff Gaylord Nelson is not within the zone of interests of the PRA and FRA because he has not established that he is a researcher or historian who uses government documents. This observation does not affect the outcome of the case, however, because the researcher plaintiffs have standing.

5. Appellants argue that plaintiffs may not obtain judicial review under the APA because the PRA

F.Supp. 737, 761 (D.D.C.1971) (three-judge panel) (same). We find, however, that the textual silence, when read against the backdrop of the legislative history of the APA and the canons of construction applicable to statutes that implicate the separation of powers, points in the opposite direction—i.e., that Congress did not intend to subject the President to the APA.

The legislative history of the APA indicates that Congress wanted to avoid a formalistic definition of "agency" that might exclude any authority within the executive branch that should appropriately be subject to the requirements of the APA. For this reason, Congress thought it "necessary to define agency as 'authority' rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or 'divisions' to have final authority." Senate Judiciary Committee Print, *reprinted in* Legislative History of the Administrative Procedure Act, S.Doc. No. 248, 79th Cong., 2d Sess. 13 (1946) [hereinafter "S.Doc. No. 248"]; *see also* H.Rep. No. 1980, 79th Cong. 2d Sess. (1946), *reprinted in* S.Doc. No. 248 at 253. But we find no expression whatsoever in the legislative history that Congress used the broader term in order to subject the President to the requirements of the APA.

A conclusion that the President is not an "agency" under the APA is also supported by the longstanding practice of the executive branch. Even though the APA rulemaking provisions contain substantially the same "agency" definition as the judicial review provisions, the President has never been thought to have to comply with APA rulemaking procedures when issuing executive orders. Given the lack of any express legislative intent to the contrary, we are reluctant to hold that this longstanding presidential practice is contrary to the APA. *Cf. Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, 67 S.Ct. 1129, 1132, 91 L.Ed. 1375 (1947) (even though statute does not expressly grant the President the authority to create a new agency, the fact that the President has consistently construed the statute as con-

ferring such authority is entitled to "great weight").

When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear. The Supreme Court has recognized that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in decision." *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971). Although the "clear statement" rule was originally articulated to guide interpretation of statutes that significantly alter the federal-state balance, there are similar compelling reasons to apply the rule to statutes that significantly alter the balance between Congress and the President.

Legislation regulating presidential action, no less than legislation altering the federal-state balance, raises "serious" practical, political, and constitutional questions that warrant careful congressional and presidential consideration. *See id.* at 350, 92 S.Ct. at 523. The answer to whether the APA should apply to the President depends on an analysis of several factors, including the President's "constitutional powers, the multifarious responsibilities of his office, and his direct political accountability as the only elected official with a national constituency." Bruff, *Judicial Review and the President's Statutory Powers*, 68 Va.L. Rev. 1, 22 (1982). In the absence of any affirmative evidence that these issues were considered in the legislative process and that Congress passed the APA with the understanding that it would regulate presidential as well as other executive branch action, we refuse to hold that the President is an "agency" within the meaning of the APA.

B. Implied Preclusion of Judicial Review

[4] Appellants also argue that the court cannot review the President's and NSC's compliance with the PRA because the PRA precludes judicial review, 5 U.S.C.

§ 701(a)(1). Because the PRA contains no provision expressly precluding judicial review, the question in this case is whether the statute impliedly precludes judicial review. The presumption favoring judicial review of administrative action is well-established. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). Nevertheless, a congressional intent to overcome the presumption may be found not only in the statute's "express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 104 S.Ct. 2450, 2453, 81 L.Ed.2d 270 (1984). We conclude that permitting judicial review of the President's compliance with the PRA would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns. We therefore hold that the PRA is one of the rare statutes that does impliedly preclude judicial review.

The statutory scheme and legislative history of the PRA reflect a congressional intent to balance two competing goals. First, Congress sought to establish the public ownership of presidential records and ensure the preservation of presidential records for public access after the termination of a President's term in office. H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S.CODE CONG. & ADMIN. NEWS 5732, 5733. But Congress was also keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations. See *id.* at 6-7, 1978 U.S.CODE CONG. & ADMIN. NEWS at 5737-38. Congress therefore sought assiduously to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term in office.

Congress balanced these competing goals by requiring the President to maintain records documenting the policies, activities, and decisions of his administration, but

leaving the implementation of such a requirement in the President's hands. See 44 U.S.C. § 2203(a). For example, although the FRA authorizes the Archivist to promulgate guidelines and regulations to assist the agencies in the development of a records management system, the PRA lacks an analogous provision. The Archivist also lacks the authority under the PRA to inspect the President's records or survey the President's records management practices. Finally, the PRA does not require the Archivist to provide Congress with the annual reports on the President's record-keeping policies and practices that he must submit for agencies.

Moreover, the PRA accords the President virtually complete control over his records during his term of office. Although the President must notify the Archivist before disposing of records and the Archivist may inform Congress of the President's desire to dispose of the records, neither the Archivist nor the Congress has the authority to veto the President's disposal decision. See H.R. Rep. No. 95-1487 at 13, 1978 U.S.CODE CONG. & ADMIN. NEWS at 5744. Instead, the provision authorizing the Archivist to notify Congress "is solely for notification though the Congress would have its traditional means of voicing objection to particulars in the proposal directly to the President, or ultimately by passing legislation to block the destruction of certain records." *Id.* In light of such cautious authority for the Archivist and Congress to question the President's disposal decisions and the lack of any authority to interfere with his records management practices, it is difficult to conclude that Congress intended to allow courts, at the behest of private citizens, to rule on the adequacy of the President's records management practices or overrule his records creation, management, and disposal decisions. Cf. *Banzhaf v. Smith*, 737 F.2d 1167, 1169 (D.C.Cir.1984) (en banc).

In declining to give outsiders the right to interfere with White House recordkeeping practices, Congress presumably relied on the fact that subsequent Presidents would honor their statutory obligations to keep a complete record of their administrations.

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We will not second-guess that decision or upset the political compromises it entailed. Allowing judicial review of the President's general compliance with the PRA at the behest of private litigants would substantially upset Congress' carefully crafted balance of presidential control of records creation, management, and disposal during the President's term of office and public ownership and access to the records after the expiration of the President's term. We therefore hold that the PRA precludes judicial review of the President's recordkeeping practices and decisions.

IV. THE FEDERAL RECORDS ACT

Appellants similarly contend that the district court may not consider plaintiffs' claims under the FRA because the FRA precludes judicial review and records creation and management decisions are committed to agency discretion by law. A statute may, of course, provide for judicial review of some agency action but not others, so it is important to distinguish between plaintiffs' separate claims, i.e.: (1) the NSC's recordkeeping guidelines and directives are inadequate because they fail to provide NSC staff with sufficient guidance about what material constitutes "records"; and (2) some NSC staff members are destroying records in contravention of the NSC's and Archivist's recordkeeping guidelines and directives.⁶ For the reasons discussed below, we find that there is APA review of the NSC's recordkeeping guidelines and instructions, but only limited APA review of claims that records are being destroyed in violation of such guidelines. We therefore affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

A. Judicial Review of the Recordkeeping Guidelines

1. Implied Preclusion of Judicial Review

[5] Like the PRA, the FRA contains no express preclusion of judicial review. Ap-

6. Plaintiffs' complaint alleged primarily that appellants are destroying information on the PROFS system in violation of the FRA. As the litigation progressed in the district court, however, the parties focused on two issues: the adequacy of the recordkeeping guidelines, and

pellants here repeat their argument that the statute impliedly precludes judicial review. They point out that the FRA expressly provides for judicial review only in an action, initiated by the Attorney General at the request of the Archivist or an agency head, to prevent the unlawful removal or destruction of documents. 44 U.S.C. §§ 2905(a), 3106. All other review, they argue, is precluded because Congress chose to ensure compliance with the FRA through administrative enforcement and congressional oversight rather than judicial review. We do not find, however, in the FRA the "clear and convincing evidence" necessary to overcome the presumption in favor of judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). We thus reject appellants' argument for implied preclusion and hold that the district court on remand may entertain plaintiffs' claim that appellants' recordkeeping guidelines and directives to the NSC staff are inadequate because they permit the destruction of "records" that must be preserved under the FRA.

First, the fact the FRA expressly provides for judicial review in an action brought by the Attorney General to prevent the destruction or removal of records does not of itself mean that all other judicial review is precluded. It is well-established law that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Laboratories*, 387 U.S. at 141, 87 S.Ct. at 1511 (quoting Jaffe, *Judicial Control of Administrative Action* 357 (1965)).

Similarly, the fact that Congress retains some direct oversight over agencies' com-

the extent of agency compliance with them. The district court also considered these two issues separately in ruling on appellants' motion for summary judgment. See *Armstrong*, 721 F.Supp. at 353-54.

pliance with the FRA does not necessarily indicate an intent to preclude judicial review. Indeed, in *American Friends* we rejected this argument as overbroad because it "would create an enormous exception to judicial review: Congress exercises oversight over all agencies, gets reports from many, and is often consulted by the executive branch before specific actions are taken." 720 F.2d at 44. Accordingly, the fact that the Archivist must submit to Congress annual reports evaluating the agencies' records management practices, 44 U.S.C. §§ 2106, 2904(c)(8), and notify Congress of violations of the FRA, *id.* §§ 2115(b), 2905(a), is insufficient evidence to overcome the presumption in favor of judicial review.⁷

[6] Appellants additionally argue that Congress, by amending the FRA in 1984 to enhance the enforcement authority and responsibilities of the Archivist, reinforced its intent to supplant all judicial review. We view the 1984 amendments, however, as not intended to bar judicial review, but instead as a direct response to the Supreme Court's decision in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980). In *Kissinger*, the Supreme Court held that the FRA does not contain an implied cause of action allowing private parties to bring suit to recover records that have been unlawfully removed from an agency. Recognizing that this created "the anomalous situation . . . whereby an agency head has a duty to initiate action to recover records which he himself has removed," Congress amended the FRA to require the Archivist to ask the Attorney General to sue and to notify Congress if the agency head failed to make a similar request of the Attorney General. H.R. Conf. Rep. No. 98-1124, 98th Cong. 2d Sess. 28 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3865, 3894, 3903; *see*

also 44 U.S.C. § 2905(a) (Archivist's enforcement authority), § 3106 (agency head's enforcement authority). Nothing in the Conference Report or the 1984 amendments indicates a congressional intent to preclude ordinary judicial review of the adequacy of an agency's recordkeeping guidelines and directives. The more natural reading is that Congress intended only to eliminate the *Kissinger* loophole and establish a more effective administrative enforcement process to prevent the unlawful destruction or removal of records by agency officials.

In sum, neither the statutory scheme nor the legislative history evinces a congressional intent to preclude judicial review of the adequacy of the NSC's recordkeeping guidelines and directives. In this respect, we note that the legislative history and statutory scheme of the FRA differ significantly from the PRA. In drafting the FRA, Congress did not have to worry about the stark separation of powers questions implicated by legislation regulating the conduct of the President's daily operations. The congressional intent, evident in the PRA, to minimize outside interference with the President's recordkeeping practices is lacking in the FRA, with its more detailed and comprehensive agency recordkeeping provisions. Instead, the FRA reflects a congressional intent to ensure that agencies adequately document their policies and decisions, S.Rep. No. 2140, 81st Cong., 2d Sess. 2 (1950), and that their records management programs strike a balance "between developing efficient and effective records management, and the substantive need for Federal records." S.Rep. No. 94-1326, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6150, 6150-51; *see also* 44 U.S.C. § 2902. Allowing judicial review of the adequacy of an agency's recordkeeping

7. *Banzhaf v. Smith*, 737 F.2d 1167 (D.C.Cir. 1984) (en banc), on which appellants primarily rely, is not contrary to this conclusion. In *Banzhaf*, we held that the Ethics in Government Act, 28 U.S.C. § 591 *et seq.*, precluded private actions. Under the Ethics in Government Act, Congress' role was specifically prescribed: Congress was empowered to seek the appointment

of independent counsel when the Attorney General refused to do so. In contrast, the FRA merely requires the Archivist to report violations of the Act to Congress. What Congress will then do is not specified. The FRA's reporting requirement is not the sort of "explicit provision of congressional oversight" we found controlling in *Banzhaf*, 737 F.2d at 1169.

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guidelines will frustrate neither the intent of Congress nor the FRA statutory scheme designed to implement that intent. Accordingly, we hold that the district court was authorized to hear plaintiffs' APA claim that the NSC's recordkeeping guidelines and directives do not adequately describe the material that must be retained as "records" under the FRA.

2. Committed to Agency Discretion by Law

[7] Appellants claim that even if the FRA does not preclude judicial review, the establishment of guidelines and directives defining "records" under the FRA is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Because we find that there is "law to apply" and the factors that courts point to as weighing against judicial review are not present in this instance, we reject appellants' argument.

Under the classic formulation, agency action is committed to agency discretion by law if the statute authorizing the agency action is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971) (internal quotations omitted). The FRA clearly provides sufficiently detailed standards regarding what material the agencies must retain. For example, the FRA contains a detailed definition of the "records" that agencies must preserve. 44 U.S.C. §§ 2901(1), 3301. It also mandates that the head of each agency "shall establish and maintain" a records management program, 44 U.S.C. § 3102, and "shall establish safeguards against the removal or loss of records," 44 U.S.C. § 3105. Although the FRA understandably leaves the details of records management to the discretion of individual agency heads, it does contain several specific requirements, including the requirement that each agency head shall cooperate with the Archivist and develop a program that is

consistent with the Archivist's regulations. See 44 U.S.C. § 3102. We thus have no difficulty in concluding that the FRA provides sufficient law to apply in evaluating the adequacy of appellants' guidelines and directives.

In determining whether agency decisions are committed to agency discretion by law, courts have also considered several pragmatic considerations that may militate for or against judicial review of appellants' guidelines and directives. These factors include: "(1) the need for judicial supervision to safeguard the interests of the plaintiffs; (2) the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and (3) the appropriateness of the issues raised for judicial review." *American Friends*, 720 F.2d at 41 (internal quotations omitted).

In this case, none of these considerations suggests that preclusion of review is appropriate. First, judicial review of the appellants' recordkeeping guidelines and directives is necessary to protect plaintiffs' interests because, if the guidelines are both inadequate and unreviewed, documents that plaintiffs would otherwise be able to study will be destroyed. Second, judicial review of the guidelines and directives will not impede the "effectiveness of the agency in carrying out its congressionally assigned role." See *id.* at 44. Appellants' concerns that allowing judicial review of their guidelines will "unduly interfere with agency functioning" by requiring agency staff to save "every scrap of paper" pending a judicial determination of whether it is a record are unfounded. As we recognized in *American Friends*, even if a court may review the adequacy of an agency's guidelines, agency personnel will implement the guidelines on a daily basis. 720 F.2d at 41. Thus agency personnel, not the court, will actually decide whether specific documents—whether they be scraps of paper or PROFS notes—constitute "records" un-

8. We note, moreover, that the Archivist has recently promulgated new regulations defining federal records, 36 C.F.R. § 1222.12, detailing the agencies' responsibilities in developing records management programs, *id.* §§ 1222.20,

1222.32, and identifying distinguishing characteristics of federal records, *id.* § 1222.34, and personal papers, *id.* § 1222.36. See 55 Fed.Reg. at 27,422-25 (1990).

der the guidelines. Third, and most importantly, the only issue a court would be asked to consider, *i.e.*, the adequacy of appellants' recordkeeping guidelines and directives, is clearly appropriate for judicial review. Courts review the adequacy and conformity of agency regulations and guidelines with statutory directives every day.

In sum, none of the practical factors prompting against review applies in this case. The FRA provides sufficient law to apply, and we find no reason to conclude that Congress intended to commit the development of recordkeeping guidelines and directives to the agencies' complete discretion.

B. *Judicial Review of Compliance with the Guidelines*

1. Preclusion of Judicial Review

[8] Plaintiffs also allege that even if the NSC's guidelines are found to be reasonable, some NSC officials and staff are not complying with the guidelines and the APA authorizes the district court to entertain their challenges and grant relief. Here we part company with the plaintiffs and the district court. We believe that the FRA contains a prescribed method of action in such cases: it requires the agency head, in the first instance, and then the Archivist to request that the Attorney General initiate an action to prevent the destruction of documents, thereby precluding private litigants from suing directly to enjoin agency actions in contravention of agency guidelines.

In reaching this result, we rely on the rationale of the Supreme Court in *Kissinger*. In rejecting the claim that the FRA contained an implied right of action for private litigants to prevent the removal of records, the Court stated that "the Federal Records Act establishes only one remedy for the improper removal of a 'record' from the agency": the agency head, in conjunction with the Archivist, is required to request the Attorney General to initiate an action to recover records unlawfully removed from the agency. *Kissinger*, 445 U.S. at 148, 100 S.Ct. at 967; *see also* 44

U.S.C. § 3106. After briefly analyzing the legislative history of the FRA, the Court concluded that "Congress expressly recognized the need for devising adequate statutory safeguards against the unauthorized removal of agency records, and opted in favor of a system of administrative standards and enforcement." *Id.* at 149, 100 S.Ct. at 968.

The 1984 amendments to the FRA support the reasoning of *Kissinger* and indicate that Congress again decided to rely on administrative enforcement, rather than judicial review at the behest of private litigants, to prevent the destruction or removal of records. After the *Kissinger* case, Congress recognized that the FRA administrative enforcement mechanism needed to be strengthened "[b]ecause of the frequency of incidents of removal or destruction of records in recent years." H.R. Conf. Rep. No. 98-1124 at 28, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3903. Therefore, Congress enhanced the Archivist's authority to prevent the unlawful removal or destruction of records by requiring the Archivist to notify Congress and independently request that the Attorney General initiate an action if the agency head refused to do so. *See id.* at 27, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3902; 44 U.S.C. § 2905(a).

Thus the conferees, "mindful of the protracted private litigation" involved in the *Kissinger* case, chose to strengthen the administrative enforcement mechanism rather than explicitly sanctioning litigation at the behest of private citizens. *See* H.R. Conf. Rep. No. 98-1124 at 28, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3903. We will not second-guess that decision. Because it would clearly contravene this system of administrative enforcement to authorize private litigants to invoke federal courts to prevent an agency official from improperly destroying or removing records, we hold that the FRA precludes judicial review of such actions. *Cf. Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 104 S.Ct. 2450, 2455, 81 L.Ed.2d 270 (1984) ("When a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular

persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded."').⁹

[9, 10] We do conclude, however, that it would not be inconsistent with *Kissinger* or the FRA to permit judicial review of the agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General.¹⁰ Nothing in the legislative history suggests that Congress intended to preclude judicial review of either the agency head's or the Archivist's failure to take enforcement action. Indeed, judicial review of the agency head's and Archivist's failure to take enforcement action reinforces the FRA scheme by ensuring that the administrative enforcement and congressional oversight provisions will operate as Congress intended. Unless the Archivist notifies the agency head (and, if necessary, Congress) and requests the Attorney General to initiate legal action, the administrative enforcement and congressional oversight provisions will not be triggered, and there will be no effective way to prevent the destruction or removal of records. Thus, if the agency head or Archivist does nothing while an agency official destroys or removes records in contravention of agency guidelines and directives, private litigants may bring suit to require the agency head and Archivist to fulfill their statutory duty to notify Congress and

ask the Attorney General to initiate legal action.

2. Committed to Agency Discretion by Law

[11] Finally, we hold that the decision to seek the initiation of an enforcement action to prevent the destruction or removal of records is not committed by law to the agency head's or Archivist's discretion.¹¹ Although there is a presumption that an agency's decision not to take enforcement action is immune from judicial review under 5 U.S.C. § 701(a)(2), "Congress may limit an agency's exercise of enforcement power . . . [and overcome the presumption] by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Heckler v. Chaney*, 470 U.S. 821, 833, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985). Because the FRA enforcement provisions leave no discretion to determine which cases to pursue, the agency head's and Archivist's enforcement decisions are not committed to agency discretion by law.

[12] In contrast to a statute that merely authorizes an agency to take enforcement action as it deems necessary, the FRA requires the agency head and Archivist to take enforcement action. Cf. *Heckler*, 470 U.S. at 835, 105 S.Ct. at 1657

9. *American Friends* is not contrary to this holding. In that case, we held that the APA authorized judicial review of the adequacy of the FBI's record disposal schedules, which had been approved by the National Archives and Records Service. We went on to hold that two of the disposal schedules were "arbitrary and capricious" because they failed to provide a "reasoned justification explaining why certain types or categories of investigative data should be destroyed" and because the disposal instructions they contained were "broad enough to justify wholesale destruction or selective, standardless retention [of records] on the basis of 'administrative needs.'" 720 F.2d at 65-66. Thus *American Friends* decided only that the APA authorized judicial review of the adequacy of an agency's records disposal schedules and system; it did not decide whether the APA authorized a court, at the behest of private litigants, to enjoin individual agency officials from destroying records in contravention of the agency's and Archivist's established recordkeeping guidelines and disposal schedules.

10. Plaintiffs' complaint did not specifically allege that the Archivist violated the FRA by failing to request that the Attorney General initiate an action to prevent the NSC staff from destroying records in contravention of the NSC's guidelines. Plaintiffs did allege, however, that the Archivist "has acquiesced in the other defendants' intention to destroy the bulk of information generated by the PROFS system in the normal course of business, in violation of his responsibilities" under the FRA. Amended Complaint for Declaratory and Injunctive Relief ¶ 32. We therefore believe that the plaintiffs have preserved the issue, and the district court on remand may allow plaintiffs to amend their complaint accordingly.

11. Because the Attorney General is not a defendant in this case, we do not decide whether the Attorney General's decision not to initiate an enforcement action at the request of the Archivist or an agency head is immune from judicial review under 5 U.S.C. § 701(a)(2).

(FDA's decision not to take enforcement action is unreviewable under 5 U.S.C. § 701(a)(2) because the Federal Food, Drug, and Cosmetic Act's enforcement provision "provides only that '[t]he Secretary is *authorized* to conduct examinations and investigations . . . '") (emphasis in original). Once the Archivist becomes aware of "any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records," the Archivist "shall notify the head of [the] Federal agency" involved and "assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law." 44 U.S.C. § 2905(a) (emphasis added). Similarly, once the agency head becomes aware of "any actual, impending, or threatened unlawful, removal, defacing, alteration, or destruction of records," the agency head "shall notify the Archivist" and "with the assistance of the Archivist shall initiate action through the Attorney General." *Id.* § 3106 (emphasis added).¹² If, however, the agency head does not initiate an enforcement action "within a reasonable period of time," the Archivist "shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made." *Id.* (emphasis added). On the basis of such clear statutory language man-

dating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head's and Archivist's enforcement actions are subject to judicial review.

V. STANDARD OF REVIEW AND PROCEEDINGS ON REMAND

[13, 14] Although the district court correctly held that the APA authorized judicial review of appellants' recordkeeping guidelines and directives, it denied appellants' motion for summary judgment, pending further development of the record, on the grounds that "a reasonable factfinder, surveying the record in the light most favorable to the plaintiffs, would [not] necessarily conclude that the guidelines are adequate." *Armstrong*, 721 F.Supp. at 354. Appellants challenge this denial of summary judgment. Because we agree that the present record is inadequate to determine the reasonableness of the guidelines, we remand for further proceedings on the merits of the adequacy of the guidelines.¹³

At the time summary judgment was denied, the record contained copies of several documents informing the NSC staff of their obligation to create and maintain hard copy "records" before erasing the PROFS tapes—e.g., the White House Office Staff Manual, the EOP Records Management

cious" test was the proper scope of judicial review of the NSC and EOP guidelines. We reject this argument because appellants presented the same arguments in their petition for permission to take an interlocutory appeal as in their opening brief in this court, i.e., that, if available, APA review must be limited to a determination of whether the guidelines are arbitrary and capricious or otherwise not in accordance with law and that the district court erred by misreading the guidelines and finding a disputed issue of material fact that warranted further discovery. In addition, under 28 U.S.C. § 1292(b), "the appeal is from an order of the district court, not from the particular question that the district court found controlling." *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n. 2 (D.C.Cir.1986) (emphasis in original), *cert. denied*, 482 U.S. 915, 107 S.Ct. 3188, 96 L.Ed.2d 677 (1987). We therefore have jurisdiction to review the entire order, not just the questions certified as controlling. See *Wright, Miller & Cooper*, 16 FEDERAL PRACTICE AND PROCEDURE § 3929 at 144.

12. We emphasize the mandatory statutory language because it indicates that the agency head and Archivist are required to take action to prevent the unlawful destruction or removal of records and, if they do not, private litigants may sue under the APA to require them to do so. We do not mean to imply, however, that the Archivist and agency head must initially attempt to prevent the unlawful action by seeking the initiation of legal action. Instead, the FRA contemplates that the agency head and Archivist may proceed first by invoking the agency's "safeguards against the removal or loss of records," 44 U.S.C. § 3105, and taking such intra-agency actions as disciplining the staff involved in the unlawful action, increasing oversight by higher agency officials, or threatening legal action.

13. In affirming the district court's decision not to grant summary judgment, we obviously hold that the issue is properly before this court. Plaintiffs argued that appellants failed to raise the issue because their petition for permission to take an interlocutory appeal presented only the question whether the "arbitrary and capri-

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Program manual, and other memoranda concerning records management. It is not clear from the record, however, whether these documents comprise the total "guidance" given to NSC staff regarding their recordkeeping responsibilities or whether, as plaintiffs asked in interrogatories, there are other informal, supplementary guidance. For example, how did appellants respond to questions about whether particular documents or types of documents constitute records that must be maintained? Was any additional guidance provided in staff meetings in which recordkeeping responsibilities were discussed? Did appellants consistently advise their staff that particular types of documents—such as PROFS notes or calendars—are or are not records?

[15] With answers to such questions, which can be obtained "either through affidavits or testimony," the record should contain sufficient information for the district court to determine whether the NSC recordkeeping guidelines and directives satisfy the NSC's statutory obligations to "make and preserve records" documenting the "functions, policies, decisions, procedures, and essential transactions" of the NSC, 44 U.S.C. § 3101, and to ensure that these records are destroyed only pursuant to disposal schedules approved by the Archivist, *id.* §§ 3105(a), 3303a. *Cf. Camp v. Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). On remand, therefore, the district court should determine whether the NSC's guidelines and directives are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), because they permit the destruction of record material that should be maintained.¹⁴

VI. CONCLUSION

We hold first that plaintiffs are within the zone of interests of the PRA and FRA

14. We recognize, of course, that the determination of whether a variety of particular documents or computer entries are, in fact, records must be made by agency staff on a daily basis, and some innocent mistakes are bound to occur. Consequently, the fact that some record material may have been destroyed does not

and, therefore, have standing to bring this action. Second, we reverse the district court's decision that the APA authorizes judicial review of the President's compliance with the PRA. The APA does not authorize judicial review of the President's compliance with the PRA because the President is not an "agency" within the meaning of the APA and because the PRA precludes judicial review of the President's record creation and management decisions.

Third, we affirm the district court's decision that the APA authorizes judicial review of plaintiffs' claim that the NSC's recordkeeping guidelines and directives are arbitrary and capricious. Fourth, we hold that the FRA precludes direct private actions to require that agency staff comply with the agency's recordkeeping guidelines. Instead, the APA authorizes the district court to entertain a properly pleaded claim that the Archivist or an agency head has breached the statutory duty to take enforcement action to prevent an agency official from destroying records in contravention of the agency's recordkeeping guidelines or to recover records unlawfully removed from an agency.

Finally, we affirm the district court's decision to deny appellants' motion for summary judgment because the record is not yet adequate to determine whether the NSC's guidelines are arbitrary or capricious.

It is so ordered.



compel a finding that the guidelines are arbitrary and capricious. Instead, the guidelines should be evaluated on the basis of whether they adequately explain the factors that agency staff should consider in deciding whether specific documents or computer entries are records.

National Archives



Washington, DC 20408

DEC 17 1992

The Editor
New Yorker Magazine
20 West 43rd Street
New York, New York 10036

To the Editor:

Seymour M. Hersh's article, "Nixon's Last Cover-Up," alleges that the National Archives is delaying release of additional Nixon tapes because of political pressure and the fear of lawsuits from Mr. Nixon. These allegations come as a surprise to those of us at the National Archives who have been in extensive litigation with Mr. Nixon since 1974.

Ongoing litigation limits what the National Archives can say in public, but this much can be said: Since 1977, the National Archives has been processing the Nixon Presidential materials in adherence to the law, the regulations implementing the law, and professional archival principles. The policy of the National Archives has been--and remains--to make all the records in its custody accessible to the public as rapidly and completely as legally possible.

With regard to the Nixon tapes, the National Archives is working under specific constitutional, statutory, and regulatory requirements that charge us with processing those tapes for public release while at the same time ensuring that the privacy not only of Mr. Nixon but of all the many individuals secretly taped or mentioned on the tapes is protected. This is a complex and difficult task, not only because of the unique nature of the materials but because of the dual and sometimes conflicting mission that the National Archives is to perform. When the Supreme Court upheld the constitutionality of the Presidential Recordings and Materials Preservation Act in 1977 it reserved judgment on whether the Act was constitutional as applied; the National Archives has no choice but to exercise the utmost care in the application of the Act, or it risks increased delay because of additional litigation.

In fact, the National Archives is processing the Nixon materials and opening them for research as rapidly as materials from other presidents' libraries. Since the first major opening in 1987, the National Archives has opened some 4.5 million of the most revealing pages and 60 hours of the most critical tapes. Processing of the remaining materials will require the same care and attention to detail as with the materials already opened. This processing takes more time than any of us would like it to take.

But if our work does not exhibit the utmost care and consistency in meeting our mandate to protect the privacy of individuals as well as the interests of the public, the courts may well conclude that the National Archives failed its responsibility under the Act, thereby further delaying the date at which the publicly releasable materials can be opened for research. To us--and we would think to Mr. Hersh--that is an unacceptable risk. Such an outcome would defeat what both the National Archives and Mr. Hersh want: the earliest possible public access to the unparalleled record of some of the most important events in modern American history.

Sincerely,



DON W. WILSON
Archivist of the United States, 1987-Present



FRANK G. BURKE
Acting Archivist of the United States, 1985-87