

THE WHITE HOUSE
WASHINGTON

DATE: 11/3

TO: John Podesta

FROM: White House Counsel
Room 128, OEOB, x7900

Harold
Kristol
X 7903

☒ FYI

☐ Appropriate Action

☐ Let's Discuss

☐ Per Our Conversation

☐ Per Your Request

☐ Please Return

☐ Other

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

*File
Armstrong*

November 1, 1993

BY HAND

Mark I. Levy
Deputy Assistant Attorney General
Department of Justice
Civil Division
10th & Constitution Ave., N.W.
Washington, D.C. 20530

Re: Armstrong v. Executive Office of the President

Dear Mark:

Following up our most recent meeting at which we discussed the dividing lines between Presidential and Federal records at the National Security Council, Mike and I have been working with our clients to try to find some possible middle ground on this issue. Our major stumbling block at this time involves the issues presented in this letter. In particular, we simply do not know how we can accept a settlement that would result in fewer records being treated as Federal records than was the case under the old guidelines, particularly given the factual nature of the documents that could be withheld and their substantial distance from the presidential advisory process. If you can give us an explanation for the NSC's treatment of such materials as Presidential records, we might be better able to understand your position, but we need some further assistance from you.

In the past, we have raised inquiries about why certain types of records should be Presidential and not Federal Records. That is again our question, but this time with respect to the enclosed NSC documents that were released under the Freedom of Information Act. The information contained in these records is generally factual in nature, is no longer (if it ever was) properly classified, and all of it appears to be the kind of information that should be released in the ordinary course under the FOIA. However, as we understand your proposed definition of Presidential records, in particular the "relating to" language that we discussed, all of these records would be labelled Presidential records and, hence, not available under FOIA and subject only to the Presidential Records Act.

For the purposes of these settlement discussions, we put aside any questions about whether the NSC could reconcile its new

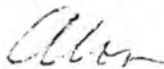
Mark I. Levy
November 1, 1993
Page 2

proposal with the previous release of these materials under the FOIA. We probably disagree on that question, but it is irrelevant to our efforts to try to find a mutually agreeable standard that will govern categorization of the materials in the future.

Instead, we present these documents as concrete examples of the types of records that will be subject to whatever dividing line is established for Presidential and Federal records, and we would like to know what valid interests the NSC believes are served by classifying the records as Presidential so that we can see if plaintiffs can propose a way to accommodate those interests without sacrificing our own. We understand your interest in protecting advice from the Assistants to the President for National Security Affairs to the President, but none of the enclosed material falls into that category. We simply do not understand why, as a matter of policy, leaving aside questions of law, these records should be treated as Presidential and hence outside the FOIA and FRA entirely.

We have some possible alternatives that we are considering to address the issue of distinguishing Presidential and Federal records, but wish to present them in a package. Therefore, it is essential that you get back to us as soon as possible with your response to this letter. If you can do so by the end of this week, we will attempt to formulate our position internally and respond to defendants early in the week of November 8, but until we have a response from you, the ball is in defendants' court.

Sincerely,



Alan B. Morrison

Enclosures

SECRET

UNCLASSIFIED

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

20458

April 11, 1990

ACTION

MEMORANDUM FOR WILLIAM SITTMANN

THROUGH: RICHARD N. HAASS

FROM: SANDRA CHARLES

SUBJECT: NSC/Deputies Committee Meeting on Iraq

SIGNED

Attached is a memorandum for agencies announcing the April 16 NSC/Deputies Committee meeting, and providing a proposed agenda.

RECOMMENDATION

That you sign the memorandum at Tab I.

Attachments

Tab I Memo to Counterparts
Tab A Agenda

10/13/92
DECLASSIFIED BY: [illegible]
ON: [illegible]

UNCLASSIFIED

Declassify on: OADR

~~SECRET~~

UNCLASSIFIED

~~SECRET~~

20458

NATIONAL SECURITY COUNCIL
WASHINGTON DC 20506

April 12, 1990

MEMORANDUM FOR MR. CARNES LORD
Assistant to the Vice President
for National Security Affairs

MR. STAPLETON ROY
Executive Secretary
Department of State

MS. EMILY L. WALKER
Executive Secretary
Department of Treasury

COL GEORGE P. COLE, JR.
Executive Secretary
Department of Defense

MR. JOSEPH S. CASPER
Director of Executive Secretariat
Department of Commerce

BGEN THOMAS E. WHITE, JR.
Executive Assistant to the Chairman
Joint Chiefs of Staff

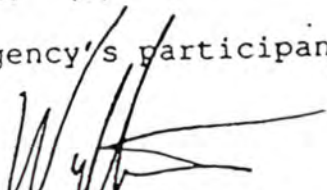
MR. H. LAWRENCE SANDALL
Executive Secretary
Central Intelligence Agency

SUBJECT: NSC/Deputies Committee Meeting on Iraq (S)

There will be a meeting of the NSC/Deputies Committee on Monday, April 16, at 3:00 p.m.* in the White House Situation Room to discuss U.S. policy options for Iraq based on recommendations from the April 12 Policy Coordinating Committee meeting. An agenda for the meeting is attached. (S)

Please notify my office of your agency's participants (principal plus one) for this meeting. (U)

Declassified on 10/13/92
by NSA/ISS/OPIC/CLM/VLS
by NSA/ISS/OPIC/CLM/VLS


William F. Sittmann
Acting Executive Secretary

Attachment
Tab A Agenda

*Please note change in time

cc: Andy Card

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THE NSC/DEPUTIES COMMITTEE MEETING

DATE: April 16, 1990
LOCATION: White House Situation Room
TIME: 4:00 - 5:00 p.m.

IRAQ

Agenda

- | | | |
|------|---|--------------|
| I. | Intelligence Update | CIA |
| II. | Review of U.S.-Iraqi Programs and
Policy Options | State |
| III. | Summary | Robert Gates |

Declassified on 10/13/92
under provisions of E.O. 12958
by D. Van Tassel, National Security Council

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Declassify on: OADR

~~SECRET~~

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United States Department of State

Washington, D.C. 20520

~~CONFIDENTIAL~~

DISCUSSION PAPER FOR IRAQ PCC:

~~CONFIDENTIAL~~

IRAQ: PROBLEMS AND SOLUTIONS

Summary: This paper summarizes the current problem with Iraq and current export controls. It then presents a proposal for a package of new export controls built on the work of other nations. In essence, the idea is to create a Country Group X for countries that have used or threatened to use chemical or biological weapons since (date to be determined). Iraq would be the first nation on the list. The export controls in Country Group X would be targeted on the chemical industry and are narrow in scope, but have a basis for international support.

Also in the paper is a plan of action asking the PCC to task the CBW Licensing Working Group (Chaired by State/EB) to develop a final draft of the proposal within 14 days.

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What Further Action is Possible?

It is possible to expand Foreign Policy Controls on Iraq through use of Section 6 of the EAA. Further, existing contracts could be severed under Section 6 if the President determined there had been a breach of the peace.

Considerations:

- If we expand controls, they should be a "targeted package," aimed at the chemical industry, the specific problem sector;
- As much as possible, the controls should be effective, not simply symbolic;
- Where possible, controls should take into account measures already enacted by other nations. This will help build a foundation of international support;
- Denial of all national security control items is probably too broad and ineffective (due to foreign availability and its effect on innocent sectors).
- Denial of all products (pvc pipes, floppy disks, etc) to the chemical industry is too broad (due to foreign availability)

Suggested Option:

Expand chemical controls along the following lines:

Create a Country Group X for countries that have used or threatened to use chemical or biological weapons since (date to be determined). Iraq would be the first nation on the list, perhaps also Libya, Iran, Syria.

- (a) Require a license for national security controlled equipment to chemical manufacturing facilities;
- (b) Require a license for the export of chemical manufacturing equipment, using existing lists from Germany and Canada as preliminary discussion models, as well as the watch list of the Australian Group.
- (c) Require a license for the export of chemical manufacturing technical data, using German concepts as models.
- (d) Make it unlawful for a US citizen to engage in activities with Iraqi chemical industries when there is a reasonable expectation that the enterprise will be used for chemical warfare;

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CONFIDENTIAL

(e) After developing our own list of what needs to be controlled; but before amending the regulations, approach the Australian Group members and encourage them to expand their existing equipment controls or warning lists so as to require licenses to countries who have threatened or used chemical weapons within the given time frame.

Note: Some countries may be reluctant to impose export licensing regulations; however, may be willing to use their good offices with industry to inhibit such sales.

Pros and Cons

-- The Australia Group has already agreed that equipment sales are a problem and thus agreed on voluntary guidelines (warning lists) for such sales;

-- Germany and Canada are major suppliers of equipment, so using their controls as models will mean our controls are not purely symbolic; but will have international support;

-- Japan, Italy and the Netherlands and other nations regularly consult with their industry on equipment controls and in certain cases have warning lists. This move may encourage them to extend their efforts to control lists, at least to nations who actually threaten or use chemical weapons.

-- The target of these controls is very narrow, hence impact on US industry will be slight;

-- Other manufacturing nations do not control this equipment, so foreign availability is still a problem;

-- Some of the equipment being proposed for control may be quite general to civil manufacturing, so for the controls to be effective, the producers of this equipment should be as much as possible limited to the western industrial powers.

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How to proceed from here

- The PCC should task the Chemical-Biological Licensing Working Group (LWG) (Chaired by State/EB) to set up an interagency technical task force that will recommend to the PCC specifically what controls should be imposed. (The LWG normally reports to the PCC on Non-Proliferation on US domestic CBW export controls.)
- The LWG should be asked to complete its work in two weeks.
- Once the PCC has received the recommendations of the LWG and decided on what controls ought to be, the Australian Group members (and other appropriate nations) should be approached with a view towards gaining their support along the same lines. (note: these controls would only effect exports to nations listed in Country Group X)
- After completion of the bilateral effort, the USG would take into account the reactions of the other governments and then take whatever appropriate regulatory action is needed

Instructions to the LWG

By April 27:

Craft a list of chemical industry equipment and technology that is useful in the production of chemical warfare agents. (the equipment need not be limited to CW production);

As much as is practical, choose items already under control by other governments, especially members of the Australia Group; (Canadian and German lists may be useful)

Except when a compelling reason can be presented, do not recommend for control equipment or technology that is so widely available that export controls would be meaningless, except as a symbol.

Cite what regulations or laws would have to amended or created.

Suggest arguments to be used with friendly governments in order to convince them to take similar measures.

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NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

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#1

May 18, 1990

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MEMORANDUM FOR DR. CARNEP LORD
Assistant to the Vice President for
National Security Affairs

MR. ROBERT KIMMITT
Under Secretary of State for Political Affairs
Department of State

MR. CHARLES DALLARA
Assistant Secretary for International Affairs
Department of Treasury

MR. PAUL WOLFOWITZ
Under Secretary of Defense for Policy
Department of Defense

MR. DENNIS KLOSKE
Under Secretary for Export Administration
Department of Commerce

MR. RICHARD T. CROWDER
Under Secretary for International Affairs
and Commodity Programs
Department of Agriculture

MR. RICHARD J. KERR
Deputy Director of Central Intelligence
Central Intelligence Agency

ADMIRAL DAVID E. JEREMIAH
Assistant to the Chairman
Joint Chiefs of Staff

SUBJECT: NSC/Deputies Committee Review of PCC Paper
on Iraq ~~SECRET~~

In response to the NSC/Deputies Committee meeting of April 16, the PCC has prepared an options paper on Iraq (Tab A), listing all U.S. economic and political programs that might be used to respond to recent Iraqi actions and statements. Based on your consideration of the options outlined in the PCC paper, I would like to have your agency's position on options for those programs

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Declassify on: OADR

Previously Declassified/Released on 5/27/92
under provisions of E.O. 12356
by S. Tuttle, National Security Council

~~SECRET~~
UNCLASSIFIED

for which your agency is responsible or in which you have a direct interest by noon Wednesday, May 23. ~~001~~

If you have any further questions, the NSC point of contact is Ms. Sandra Charles, 395-3552. ~~004~~


Brent Scowcroft
Assistant to the President for
National Security Affairs

Attachment
Tab A PCC Paper

UNCLASSIFIED

~~SECRET~~

RE: NSWT NCTELOG W WHITE HOUSE COMMUNICATIONS AGENCY

SECRET

Doc 1

02/02/87 09:42:26

SG FROM: NSWT --CPUA
TO: NSREL --CPUA
NSSES --CPUA

TO: NSREL --CPUA
NSLPB --CPUA

FROM: William Tobey
SUBJECT: Attendance

Declassified on 6-30-93
under provisions of E.O. 12356 (F92-874)
by N. Menan, National Security Council

The front office has invited

Shultz
ap
ites
egan
itze
owny

3 asked about inviting OMB and Powell said not to. No invitation to DOE, others, e.g. Baker and Meese. UNODIE CB will leave the list as it is, as that was the instruction from Powell.

(Attendance

SG FROM: NSREL --CPUA TO: NSWT --CPUA
TO: NSGSG --CPUA Colin L. Powell NSWPB --CPUA
FROM: ROBERT E. LINHARD

Doc 2
01/24/87 18:46:02
Colin L. Powell

SUBJECT: THOUGHTS ON HOW TO PROCEED ON SDI AND ARMS CONTROL ISSUES
GENERAL,

I PROMISED THAT I WOULD GET BACK TO YOU TODAY WITH A RECOMMENDATION ON HOW BEST TO PROCEED ON BOTH THE SDI AND ARMS CONTROL ISSUES. I AM CONTINUING TO REFINES THIS PLAN, BUT HERE IS HOW I WOULD LIKE TO PRESS FORWARD.

DI:

3 JAN -- WE DID SUBMIT TODAY A PAPER WHICH LAYS OUT THE ISSUES ASSOCIATED WITH THE SDI BRIEFING FOR THE PRESIDENT'S WEEKEND READING AS PLANNED.

-- SHULTZ, NITZE, HOLMES ET AL WERE BRIEFED TODAY BY ABRAHAMSON AND PERLE AS PLANNED. WE GOT A DEBRIEF ON THE SESSION FROM OSD.

5 JAN -- ON MONDAY WE WILL HAVE THE REGULAR SDI MEDIA MEETING AT 2PM IN ROOM 208. I WILL TRY TO ENCOURAGE THE EXPERT LEVEL OF THE SYSTEM TO KEEP THE ENSUING DISCUSSION "OBJECTIVE" IN ALL AGENCIES.

-- WE WILL ALSO REVIEW THE STATUS OF THE SDI ARMS CONTROL IMPACT STATEMENT AND THE SDI REPORT TO CONGRESS.

16 JAN -- I WILL MEET WITH NUNN AND WARNER TO BRIEF THEM ON NUCLEAR RISK REDUCTION, BUT TRY TO MAKE SOME INROADS ON SDI WITH NUNN.

-- I ALSO PLAN TO SIT DOWN WITH RICHARD PERLE ON THURSDAY AND SEE IF WE AGREE ON THE STATE OF PLAY AND ON THE PROPER PRESENTATION OF THE ISSUES.

27 JAN -- WILL TRY TO GET A MORE COMPLETE BRIEFING FROM ABRAHAMSON ON THE SURVIVABILITY ISSUE.

-- WILL MEET WITH NITZE TO DISCUSS COST EFFECTIVENESS CRITERIA AND SMOKE OUT HIS VIEWS ON THE LEGALLY CORRECT INTERPRETATION ISSUE.

-- WE HAVE ASKED OSD TO ENSURE THAT GATES (CIA) AND ROWNEY ARE BRIEFED BY COB WEDNESDAY.

28 JAN -- IF MAX RETURNS FROM GENEVA, I WILL TRY TO HAVE HIM COME IN AND DISCUSS BOTH SDI AND ARMS CONTROL WITH ME ON THURSDAY. HE WILL BE (I BELIEVE) THE KEY INFLUENCE ON SHULTZ ON THESE ISSUES (NOT NITZE). NITZE AND PERLE WILL LEAVE TOWN FOR WERKUNDE IN MUNICH AND BE OUT OF

Declassified on 6-30-93
under provisions of E.O. 12356 (F92-874)
by N. Menan, National Security Council

SECRET

- POCKET UNTIL TUESDAY 3 FEB.
- 29 JAN -- ASSUMING AN NSPG ON 3 FEB, WE WILL SUBMIT THE STANDARD PRESIDENTIAL MEETING MEMO BY COB FRIDAY.
- HAVE ENCOURAGED OSD TO HAVE CAP MEET WITH MAX KAMPFELMAN ON FRIDAY IF POSSIBLE BOTH TO GET A DEBRIEF FROM MAX AND TO LOBBY MAX ON OSD'S VIEWS OF THE SDI ISSUE.
- 30 JAN -- SHULTZ WILL MEET AGAIN WITH OSD STAFF TO RECEIVE THE ANSWERS TO A SERIES OF QUESTIONS THAT HE ASKED THIS SATURDAY.
- WE WILL SUBMIT THE SUGGESTED TALKERS FOR FCC AND THE PRESIDENT'S USE AT THE 3 FEB NSPG.
- 2 FEB -- WOULD ENCOURAGE A PRIVATE BREAKFAST OR LUNCH WITH FCC, CAP, SHULTZ AND PERHAPS CROWE ON MONDAY. PURPOSE WOULD BE TO HAVE ONE FINAL DISCUSSION OF THE ISSUES ON THE 3 FEB NSPG AGENDA PRIOR TO TUESDAY.
- WE WOULD SUBMIT A DECISION PACKAGE FOR FCC'S REVIEW AND USE AFTER THE NSPG ON TUESDAY. THIS WOULD INCLUDE:
1. A MEMO TO THE PRES
 2. A DRAFT NSDD
 3. A PLAN FOR THE SCHEDULE OF THE NEXT FEW WEEKS (LEADING TO THE SUBMISSION OF THE REPORT TO CONGRESS ON 15 FEB) WHICH ADDRESSES ALLIED CONSULTATION AND PUBLIC ANNOUNCEMENTS.
- 3 FEB -- NSPG FRAMED TO ADDRESS THE SDI ISSUES -- BUT ALSO THE RELATED ISSUE OF THE SOVIET (AND SHULTZ) PROPOSAL FOR ADDRESSING THE DEFENSE AND SPACE ISSUE IN GENEVA.
- AFTER THE NSPG, FCC SENDS THE DECISION PACKAGE TO THE PRESIDENT.
- 4 FEB -- WE RECEIVE THE PRESIDENT'S DECISION AND EXECUTE THE PLAN FOR IMPLEMENTATION.

AMS CONTROL:

- 3 JAN -- CIA HAS NOW PROVIDED THE FINAL DRAFT OF THE "GRIP 01" PAPER WHICH DESCRIBES THE INTEL COMMUNITIES VIEWS OF WHAT TO EXPECT IN SUBSTANCE FROM THE SOVIETS FOR THE NEXT FEW MONTHS.
- 5 JAN -- THE GRIP 01 PAPER WILL BE CIRCULATED IN THE ARMS CONTROL SUPPORT GROUP (ACSG) FOR THEIR FINAL REVIEW.
- STATE IS DRAFTING A 3-4 PAGE PRESENTATION OF THEIR DEFENSE AND SPACE PROPOSAL, THE EVALUATION OF WHICH WILL BE ONE OF THE TWO MAIN PURPOSES OF GRIP 02.
- 6 JAN -- ACSG WILL MEET TO BLESS GRIP 01 AND APPROVE IT FOR SUBMISSION TO THE CABINET LEVEL FOR THEIR INFORMATIONAL READING. IT WILL ALSO BEGIN DRAFTING OF GRIP 02. THIS PAPER WILL BE INTENDED TO EVALUATE HOW THE US SHOULD REACT TO THE POSSIBILITIES LAID OUT IN GRIP 01. IN REALITY, IT WILL FOCUS ON TWO MAIN ISSUES:
1. AN ASSESSMENT OF THE DEFENSE AND SPACE PROPOSAL STATE SENT TO THE PRESIDENT THIS WEEK, AND
 2. AN ASSESSMENT OF THE POTENTIAL PITFALLS ASSOCIATED WITH THE ARMS CONTROL PATH WE ARE NOW ON (I.E., PAPERS BEING DRAFTED IN GENEVA, LEADING TO A FOREIGN MINISTERS' MEETING AT WHICH THE ISSUES ARE DISCUSSED, WITH AN EYE ON A SUMMIT AT WHICH AN AGREEMENT IN PRINCIPLE COULD BE REACHED). ** THIS IS A CRITICALLY NEEDED ASSESSMENT! **
- 7 JAN -- 1ST FULL DRAFT OF GRIP 02 CIRCULATED TO ACSG FOR CRITICAL REVIEW.
- WILL DISCUSS GRIP 02 PAPER WITH RICHARD PERLE AND PAUL NITZER.
- 8 JAN -- ACSG TO DISCUSS GRIP 02 AND PREPARE FOR 2ND DRAFT.
- WILL DISCUSS GRIP 02 PAPER WITH MAX.
- 2ND DRAFT OF GRIP 02 PAPER DISTRIBUTED BY COB THURSDAY.
- 9 JAN -- FINAL WORKING DRAFT OF GRIP 02 PAPER DEVELOPED AND CIRCULATED.

SECRET

~~SECRET~~

- 30 JAN — FINAL DRAFT OF GRIP 02 PAPER DISTRIBUTED TO ACSG TO BE PROVIDED TO CABINET PRINCIPALS FOR THREE WEEKEND READING (PRIOR TO THE NSPG ON 3 FEB).
- 2 FEB — DISCUSSION OF GRIP 02 WITHIN NSC WITH POC PRIOR TO 3 FEB NSPG. IF APPROPRIATE, WE CAN WEAVE THE EVALUATION OF THE STATE DEFENSE AND SPACE PROPOSAL INTO THE FLOW OF THE 3 FEB NSPG DISCUSSION. IF NOT READY FOR DISCUSSION BY THAT POINT, WE CAN REQUEST A SEPARATE MEETING ON THIS SUBJECT.

IN SHORT, I BELIEVE THAT WE FACE THREE MAJOR ISSUES OVER THE NEXT TWO WEEKS:

1. SDI -- AND ESPECIALLY THE DECISION TO RESTRUCTURE THE SDI PROGRAM TO THE LEGALLY CORRECT INTERPRETATION OF THE ABM TREATY;
2. DEFENSE AND SPACE -- THE TIMELY EVALUATION BY ALL AGENCIES OF THE NEW PROPOSAL IN THE DEFENSE AND SPACE AREA SUBMITTED BY SECSTATE TO THE PRESIDENT THIS WEEK (AND AN IDEA THE SOVIETS WILL PUSH IN THE NEXT FEW WEEKS FROM THEIR DIRECTION); AND
3. PROCESS -- MAKING A CONSCIOUS DECISION WHETHER WE WANT TO ALLOW THE ARMS CONTROL PROCESS THAT WE ARE NOW ON (I.E., PAPERS IN GENEVA TO FOREIGN MINISTERS' MEETING IN MOSCOW TO SUMMIT IN DC) TO PROCEED ALONG THE CURRENT PATH -- OR PROVIDE SOME ADDITIONAL GUIDELINES TO MINIMIZE OUR RISKS ON THAT PATH.

WHILE INTERRELATED, WE WOULD USE JSC BRIEFINGS AND INFORMAL CONTACTS TO SET THE STAGE FOR LN NSPG ON 3 FEB ON ISSUE 1, WHILE USING THE ARMS CONTROL SUPPORT GROUP TO WORK 2 AND 3 SO THAT THEY TOO ARE READY ABOUT THE SAME TIME. WE CAN THEN CHOOSE IF WE WANT TO TRY TO KILL AT LEAST ISSUES 1 AND 2 AT THE SAME NSPG (THE ISSUES ARE DIRECTLY RELATED), OR USE THE 3 FEB NSPG TO WORK ISSUE 1 DIRECTLY AND SET US UP FOR A SECOND NSPG SHORTLY THEREAFTER ON ISSUES 2 AND 3.

SORRY FOR THE LENGTH OF THIS. WOULD LIKE YOUR FEEDBACK. AS THEY SAY IN THE NAVY UNODIR (UNLESS OTHERWISE DIRECTED) I WILL PROCEED ALONG THE PATH OUTLINED ABOVE.

cc: NSSBS --CFUA
 NSDAM --CFUA
 NSFWE --CFUA
 NSWT --CFUA
 NSGSG --CFUA

NSSFK --CFUA
 NSLFB --CFUA
 NSWPC --CFUA
 NSRRL --CFUA
 NSWER --CFUA

bTHOUGHTS ON HOW TO PROCEED ON SDI AND ARMS CONTROL ISSUES

DECLASSIFY ON: OADR

~~SECRET~~

WJMP

NOVLOG

W

WHITE HOUSE COMMUNICATIONS AGENCY

MSG FROM: NEWSP --CPUA TO: NSJMP --CPUA
 TO: NSJMP --CPUA JOHN M. POINDEXTER

11/25/86 13:40:32

Doc 36

FROM: William M. Cockell

SUBJECT: JCJF Testimony

Bill Crowe's testimony this morning was statesmanlike and responsible, with no surprises. In Reykjavik, he anticipated the most contentious issues in his opening statement, which indicated the JCS had been fully involved in the pre-meeting preparations. In this regard, he noted that "the security consultative mechanisms in the government are richer and much more pervasive than are often given credit for in the media." He noted that he had his representative, John Moellering, at Reykjavik and that "unprecedented progress" was made there in narrowing differences between the sides. With regard to the US positions tabled, he commented that the President has an obligation not only to be cautious in such matters, "but to seize opportunities when they arise." The whole arms control dialog "has taken a significant and historic step forward as a result," he concluded. On the zero ballistic missiles option, he noted that needs to be looked at very carefully, and there are some potential problems. The Joint Staff is conducting a thorough study to ensure we can maintain deterrence in a 10 year draw down to zero ballistics. Sam Nunn and John Warner were at the hearing, in addition to Aspin and several other House members. Warner recalled that the DOD Reorganization Act made provision for direct access to the President by any JCS member who feels strongly about an issue. He asked whether any of the Chiefs had wanted to see the President on arms control issues and was told that none had. On Iran, he noted he had not been in the loop and knew little about it. The conclusion Bill received accolades from members for his frankness and the quality of his testimony. Nunn's interventions, incidentally, had the same sort of shrillness to them that has characterized much of his public speaking on Administration policy over the last month or so.

CC: NSPBM --CPUA

NSJGK --CPUA

ALTON G. KEEL

JCJF Testimony

MSG FROM: NEWSP --CPUA TO: NSJMP --CPUA
 TO: NSJMP --CPUA JOHN M. POINDEXTER

11/25/86 13:56:28

Doc 37

NOTE FROM: BOB PEARSON

Subject: Resignation

*** Forwarding note from NSBTC --CPUA 11/25/86 11:04 ***

TO: NSRBM --CPUA JOHN M. POINDEXTER NEWSP --CPUA JOHN M. POINDEXTER

NOTE FROM: RICHARD T. CHILDRESS

SUBJECT: Resignation

In my 5 1/2 years here, I have seen inspiring acts of loyalty to one of the greatest Presidents this country has ever elected. Your action is the most inspiring yet. It amazes me that those that are the most loyal, the most dedicated always seem to take the hit. Yet, perhaps it is not amazing because the most loyal put the protection of the country and the President above self.

Although not involved with the Tran project, I read you WSJ piece and I believe in hindsight, what was attempted will be recognized as bold and done with foresight. I personally will miss you, your calm, wise counsel and your support. Your example will be in my mind as I continue here and elsewhere.

LE: NSKED NCIELOG W WHITE HOUSE COMMUNICATIONS AGENCY

MSG FROM: NSDGM --CPUA TO: NSKED --CPUA

11/10/86 12:34:53
JOHN M. POINDEXTE

o: NSLBM --CPUA JOHN M. POINDEXTE NSWRP --CPUA

OTE FROM: David Major

Doc 11

SUBJECT: ARMS SALES TO IRAN

DOJ CALLED TO ADVISE THERE IS A PENDING CRIMINAL CASE IN THE SOUTHERN DISTRICT OF NEW YORK THAT COULD POSSIBLY SPILL OVER TO THE ISSUE RELATING TO OUR REPORTED CONTACTS WITH IRAN AND ARMS SELLS. DOJ ADVISED 4 ISRAELI CITIZENS AND 6 AMERICANS HAVE BEEN CHARGED, FOLLOWING A CUSTOMS INVESTIGATION INTO CONSPIRACY DURING THE PERIOD 9/85-4/86 TO SHIP ARMS FROM ISRAELI TO IRAN. THESE ARMS WERE SHIPPED TO ISRAEL FROM THE USA WITH THE PROVISION THEY NOT BE TRANSHIPPED FROM ISRAEL WITHOUT US APPROVAL. UNSURE IS DEFENDING ONE OF THE SUBJECTS AND PLANS TO SUBPOENA BUD AND OLLIE TO CLAIM THIS GROUP WAS DOING NOTHING MORE THAN WHAT THE WHITE HOUSE WAS DOING.

DOJ WILL BE OFFICIALLY ASKING FOR GUIDANCE RE THIS MATTER, HOWEVER WE SHOULD BE AWARE THIS IS GOING ON. THE INDIVIDUALS AND FRONT COMPANIES INVOLVED ARE: B.I.T. COMPANY, IMPORT-EXPORT AND METAL LIMITED; DERGO ESTABLISHMENT; FLEAR INCORPORATION; INTERNATIONAL PROCUREMENT AND SALES INC; VIANAR AND INSTALL; ABRAHAM BASHIR (FORMER ISRAELI GENERAL), NICO MINAROS, ALFRED FLEARMOY, HERMAN MOLL, RALPH KOPKA, HANS BIRN. THIS ARMS LIST IS LONG BUT INCLUDES AIRPLANES, MISSILES, RADARS, GUNS, HELICOPTERS ETC.

CC: NSOLN --CPUA
NSWRP --CPUA
NSKED --CPUA
NSPBT --CPUA

ALTON G. KEEL

NSRBM --CPUA
NSDBR --CPUA
NSVMC --CPUA

ALTON G. KEEL

ARMS SALES TO IRAN

NSC-002000

Subject: Retaliation

cc: NSRBM --CPUA ALTON G. KEEL NSWRP --CPUA
 ASPBT --CPUA NSKED --CPUA
 NSDGM --CPUA

(S)(b)(1)+(b)(3)
 ALTON G. KEEL

UNCLASSIFIED

Retaliation
 MSG FROM: NSDGM --CPUA TO: NSKAG --CPUA
 TO: NSKAG --CPUA

B
 01/15/87 12:30:22

Doc 9

JOIN FROM: David Major
 SUBJECT: MEMO FOR FCC FROM DGM, NEED SOONEST TODAY-TOP SECRET
 please type for fcc meeting with Gates tonight. thanks

Partially Declassified/Released on 6-30-93
 under provisions of E.O. 12356 (F42-401)
 by N. Menon, National Security Council

TO: FCC
 FROM: DGM
 SUBJECT: LONGTREE ESPIONAGE CASE

AS YOU WILL REMEMBER MARION SGT LONGTREE HAS BEEN ARRESTED BY THE NAVAL
 INVESTIGATIVE SERVICE AND CHARGES WITH BEING A KGB AGENT WHILE A MARINE
 IN VN IN MOSCOW AND VIENNA. THE FOLLOWING IS AN ASSESSMENT OF WHAT WE KNOW
 ABOUT THIS CASE TO DATE AND THE POLICY IMPLICATIONS:

DAMAGE ASSESSMENT
 IT APPEARS LONGTREE WAS RECRUITED BY THE KGB IN MOSCOW IN FEBRUARY 1986
 AND CONTINUED TO WORK FOR THE KGB WHEN HE WAS TRANSFERRED FROM MOSCOW IN
 MARCH 1986 VIENNA. HE CONTINUED TO WORK FOR THE KGB WHILE IN VIENNA, UNTIL
 HIS LAST KNOWN MEETING WITH THE KGB IN VIENNA on 12/14/86.

THE AMOUNT OF DAMAGE TO NATIONAL SECURITY HE DID IS STILL BEING EVALUATED
 IT IS APPARENTLY NOT SERIOUS BUT COULD BE VERY DAMAGING BUT NOT ANY WHERE
 COMPARED TO THE DAMAGE OF THE WALKER OR PELTON CASE. OUR CURRENT ASSESSMENT
 IS BLIND OF WHAT HE HAS CONFESSED TO
 WHICH IS SUBSTANTIALLY LESS THAN THE DAMAGE HE COULD HAVE
 DONE.
 DOWN INTELLIGENCE COMPROMISED BASED ON LONGTREE'S CONFESSIONS

(S) (b)(1) (b)(3)

A NUMBER OF FSN WORKING IN THE EMBASSY
 -HE ADMITS MAKING A SURRUPTETIOSENTRY INTO THE COMMUNICATION ROOM IN VIENNA
 AND STEALING 3 TOP SECRET DOCUMENTS (THESE HAVE NOT BEEN IDENTIFIED TO DATE)
 -HE ADMITS STEALING ON BURN BAG CONTAINING ABOUT 120 SECRET DOCUMENTS RELATING
 TO MBFR (THESE HAVE NOT BEEN IDENTIFIED TO DATE)
 -HE ADMITS TO BEING TASKED TO IMPLANT LISTENING DEVICES IN THE AMBASSADORS
 OFFICES IN MOSCOW AND VIENNA BUT DENIES HAVING DONE SO.

WORST CASE DAMAGE LONGTREE COULD HAVE DONE

-HE HAD THE OPPORTUNITY TO STEAL BURN BAGS CONTAINING STATE DEPARTMENT
 CLASSIFIED DOCUMENTS ON ALMOST A DAILY BASIS IN MOSCOW AND VIENNA.

-HE PERIODICALLY GUARDED A WAREHOUSE OUTSIDE THE EMBASSY COMPOUND IN MOSCOW
 THAT CONTAINED ITEMS PLACED IN THE EMBASSY SECURE AREAS AND HE MAY HAVE
 ALLOWED KGB TECHNICAL TEAMS TO PLACE DEVICES IN THESE ITEMS (DESK, CHAIRS, ETC)

-HE COULD HAVE COMPROMISED THE COMMUNICATION CENTER ON A REGULAR BASIS.

LONGTREE'S RECRUITMENT

HE WAS NOT BLACKMAILED. IN 9/85 HE MET A 26 ATTRACTIVE FEMALE SOVIET NATIONALS WHO
 WORKED IN THE CUSTOMS SECTIONS OF THE EMBASSY IN MOSCOW. THIS WAS FACILITATED
 BECAUSE THE FEMALE SOVIET NATIONALS WERE INVITED TO MARINE PARTIES HELD IN THE
 EMBASSY. THEY BEGAN A SECRET SEXUAL RELATIONSHIP WITH HER IN JANUARY 1986 USING
 HER APARTMENT. (A NUMBER OF THE OTHER MARINES KNEW OF THIS BUT DID NOT REPORT
 IT, DESPITE THE FACT IT WAS A VIOLATION OF REGULATIONS). IN JANUARY 1986 SHE
 INTRODUCED HIM TO HER "UNCLE" IN A SAFEHOUSE. DURING THE SECOND MEETING
 WITH THE UNCLE SASHA (EITHER A CO-OPTED OR OFFICER OF THE KGB/SCD) HE WAS
 ASKED FOR CLASSIFIED INFORMATION WHICH LONGTREE PROVIDED. THE FEMALE
 PARTICIPATED IN THESE MEETINGS WITH THE KGB IN MOSCOW. (SHE WAS FIRED BY
 THE EMBASSY IN 12/85 FOR POOR WORK PERFORMANCE, AND IS REPORTED TO BE
 CURRENTLY WORKING FOR THE IRISH EMBASSY IN MOSCOW). LONGTREE WAS NOT
 BLACKMAILED IN ANY MANNER. WHEN HE WAS TRANSFERRED TO VIENNA, SASHA
 CONTINUED TO MEET LONGTREE IN VIENNA FROM JUNE 1986 UNTIL DECEMBER 14, 1986.
 THEY HAD NUMEROUS MEETINGS DURING WHICH PERIOD LONGTREE ADMITS RECEIVING
 \$3500.

MOTIVATION

LONGTREE ADMITS TO DOING THIS BECAUSE HE LIKED THE INTRIGUE, WAS FLATTERED
 THE KGB WAS INTERESTED IN HIM, AND FOR REVENGE AGAINST THE US BECAUSE OF
 INJUSTICES COMMITTED AGAINST THE INDIANS IN THE PAST 100 YEARS (HE IS AN
 AMERICAN INDIAN)

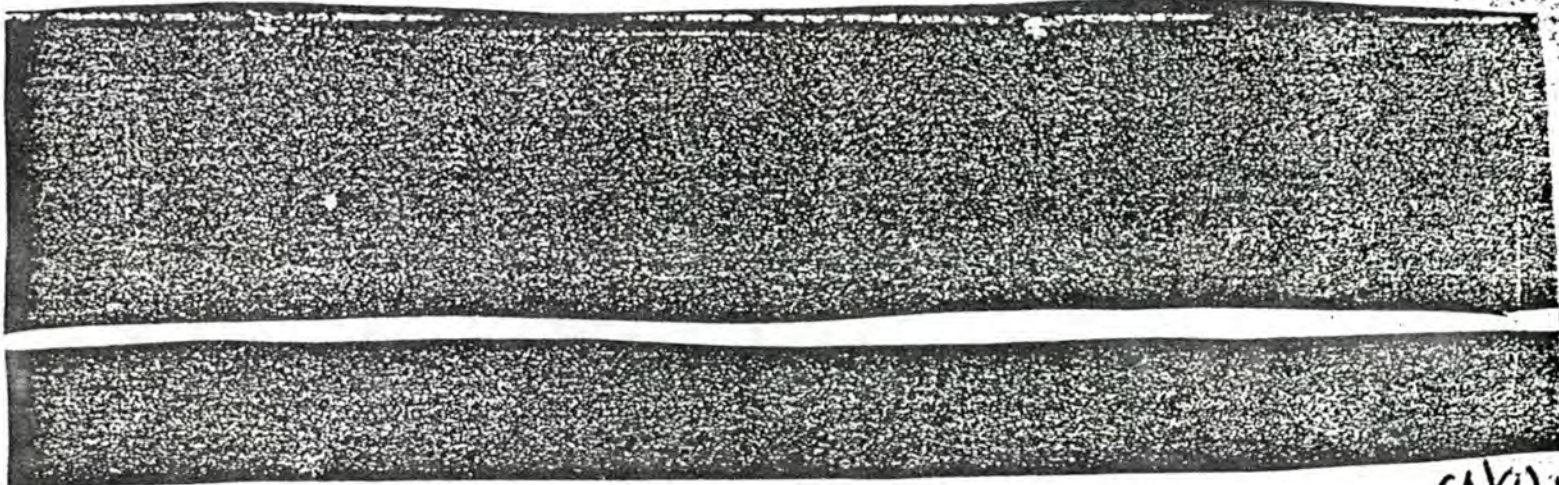
TRIST

UNLIKE OTHER CASES WE HAVE SEEN IN THE PAST THE KGB CONTINUED
 TO DEFERRED LONGTREE THE OPPORTUNITY TO DEFECT OPENLY, WHICH MAY INDICATE
 HE HAD KNOWLEDGE OF DOING SOMETHING FOR THE SOVIETS IN MOSCOW THE KGB

UNCLASSIFIED

WISHED TO PROTECT. HE WAS SCHEDULED TO TRAVEL TO MOSCOW BLACK IN JAN 1987
for further training.

(b)(1)



cc: NSDBK --CFUA
NSDGM --CFUL

NSVMC --CFUA

(b)(1) ✓
(b)(3)

) MEMO FOR PCC FROM DGM, NEED SOONEST TODAY-TOP SECRET

F

UNCLASSIFIED

MSG FROM: NSRMC --CFUA TO: NSRCH --CFUA
 TO: NSRCH --CFUA

12/19/83 08:45:19

Previously Declassified/Released on 9-28-93
 under provisions of E.O. 12056 (F93-1403)
 by H. M. Shan, National Security Council

NOTE FROM: Robert M. Kimmitt
 SUBJECT: meeting times

UNCLASSIFIED

DOC 1

The iran-iraq nspsg is on thursday, rather than wednesday as i reported this morning. the week's meeting schedule is as follows:

- tuesday, 12/20, 11-12: nsc meeting on compliance (cabinet room)
- thursday, 12/22, 11-12: nspsg meeting on iran-iraq (room 208)
- friday, 12/23, 11-12: nspsg meeting on central america (sitrm).

We are also planning a second nspsg on central america on friday, 1/6/84, the same day that the kissinger commission reports to the president, with an eye toward developing an nsdd following the meetings. we are also requesting a second compliance nsc meeting for 1/9/84.

cc: NSJMP --CFUA

meeting times
 MSG FROM: NSRMC --CFUA TO: NSRCH --CFUA
 TO: NSRCH --CFUA

12/19/83 08:45:19

UNCLASSIFIED

dup
 Doc 2

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cc: NSJMP --CFUA

meeting times

FILE: NSDBK NOTELOG W WHITE HOUSE COMMUNICATIONS AGENCY

MSG FROM: NSPSS --CPUA TO: NSDBK --CPUA
To: NSDBK --CPUA

02/17/87 11:04:44

Doc 3

PREVIOUSLY

9-16-92

(F92-992)

NOTE FROM: Paul S. Stevens
SUBJECT: Gates Confirmation Hearings

We shd get an update today on what commitments, if any, Gates makes on notification to Congress of covert actions. This issue undoubtedly will arise in connection with SSCI retreat and Carlucci should be prepared to respond. I am not comfortable with DCI-nominee being put in position of making a unilateral commitment, as suggested by press accounts, because the issue is one of the President's prerogatives under Constitution and laws. Those prerogatives cannot and shd not be bartered by nominee in confirmation process. If President makes such a commitment, that's another question. Do you know whether that's being contemplated in connection with Gates hearings? If so, we shd get a crack at it.

Gates Confirmation Hearings

MSG FROM: NSEMM --CPUA TO: NSDBK --CPUA
To: NSDBK --CPUA

02/18/87 09:13:09

6-29-93 **Doc 4**
(F92-994)

NOTE FROM: ELAINE H. MITCHELL
SUBJECT: Reminder

Just a reminder that your paper your paper for the Gates meeting is due to the Executive Secretary's Office by 1500 today. Thanks.

cc: NSCLM --CPUA
H Reminder

NSJAM --CPUA

Doc 1

MSG FROM: NSWRP --CPUA TC: NSAGK --CPUA
TO: NSAGK --CPUA ALTON G. KEEL

12/19/86 18:53:31

UNCLASSIFIED

NOTE FROM: BOB PEARSON

Subject: CRAZY GOING CNS IN COLOMBIA

*** Forwarding note from NSJT --CPUA

12/19/86 15:24 ***

To: NSRBM --CPUA ALTON G. KEEL

NSWRP --CPUA

ALTON G. KEEL

NOTE FROM: Jackie Tillman

SUBJECT: CRAZY GOING CNS IN COLOMBIA

I was over at State late this morning and learned of a development about which you should be aware. My information is still sketchy-- [REDACTED] well-respected, was in Medellin, Colombia and met with top narco Mafia family members--the Ochoa brothers, Leder, etc. He returned to the US [REDACTED]

(b)(6) per STATE

(b)(7)(D) per
FBI 5 1/2 lines(c) (b)(1) per
FBI 1 1/2 lines

[REDACTED] Our amb in Colombia found out about this last night and sent in a WCDIS requesting that it be stopped. [REDACTED] asked Whitehead to raise with Gates at their luncheon today. Whitehead was also to speak to Meese about it. Obviously, [REDACTED]

(b)(7)(D) per
FBI

[REDACTED] if you get my drift. After internal US gov't consultations are complete, we will speak to Colombian Pres Barco about this--and are considering a pre-emptive public disclosure of this development in an attempt to keep the narcos from going public with it first. I have not gotten a read out from the Whitehead Gates lunch. It's very bizarre stuff, and in light of current events, potentially damaging. Thought you should know about it.

Partially Declassified/Released on 6-29-
under provisions of E.O. 12358
by N. Menan, National Security Council
(F92-989)

cc: NSWRP --CPUA

NSJRS --CPUA

CLASSIFIED BY: MULTI Sources
DECLASSIFY ON: OADR

cc: NSJT --CPUA

(b)(7)(C)
per
FBI

; CRAZY GOING CNS IN COLOMBIA

MSG FROM: NSWRP --CPUA TC: NSAGK --CPUA
TO: NSAGK --CPUA ALTON G. KEEL

12/31/86 11:20:04

UNCLASSIFIED

Doc 2

NOTE FROM: BOB PEARSON

Subject: Serious Espionage Case at Embassy Moscow

*** Forwarding note from NSKED --CPUA

12/30/86 18:56 ***

To: NSGSG --CPUA Colin L. Powell

NSWRP --CPUA

Colin L. Powell

NOTE FROM: Ken DeGraffenreid

~~TOP SECRET//SENSITIVE//EYES ONLY~~

SUBJECT: Serious Espionage Case at Embassy Moscow

CIA has just informed us about a serious espionage case that occurred at Embassy Moscow.

In recent days a Marine security guard assigned to American Embassy Vienna

(b)(1)(Xs)

voluntarily confessed [REDACTED] that while stationed at Embassy/Moscow as the result of a sexual relationship with a female Soviet PSN he had been recruited by her "uncle." The Soviets continued to meet him clandestinely in Vienna following his Moscow tour and it appears that he provided Top Secret documents, burn tags, and may have assisted the Soviets in planting audio devices within sensitive parts of the Embassy.

(b)(1)(Xs)

[REDACTED] surveilled a meet between the Soviet and the Marine, and have been able to identify the Soviet who also may be handling another American citizen spy. No further details on this aspect.

The Marine in question is an American Indian by the name of Lonetree. He is an alcoholic and is under military arrest in London. The Navy, who has fought bitterly with the Justice Department over recent espionage cases, plans to handle the criminal aspects as a court martial.

CIA believes this to be a very serious espionage case.

I recommend you discreetly alert the President to the basic fact of - because HPSCI and SSOCI are to be briefed tomorrow, and they usually leak matters of this kind.

P.S. Concerning my own future, [REDACTED]

Regards - Ken

UNCLASSIFIED

(b)(1)(Xs)

cc: NSWGE ---CPUL

- Serious Espionage Case at Embassy Moscow

CLASSIFIED BY: MULTIPLE SOURCES

DECLASSIFY ON: OADR

Partially Declassified/Released on 6-29-93 F
under provisions of E.O. 12356 (F92-969)
by N. Menon, National Security Council

SCRIPT/VF R2.0: DEVICE 1403W6 CHASE MONO

UNCLASSIFIED

Doc 2c1
2d1
22

SITUATION ROOM EVENING SUMMARY March 27, 1986

Partially Declassified/Released on 7-6-93
under provisions of E.O. 12358 (F92-1162)
by N. Wilson, National Security Council

SOVIET UNION/EUROPE

USSR-US-LIBYA: Secretary Gorbachev lashed out at American "neoglobalism" in general and policy toward Libya in particular...offered Libya no more than political support; did not link US actions toward Libya to the summit or to Soviet-American relations in general. ~~(X)~~ Moscow 5229

[REDACTED]

(b)(1) +
(b)(3)
(S)

[REDACTED]

(b)(1) +
(b)(3)
(S)

ROMANIA-LIBYA-US: Official Romanian statement supports Libyan territorial claims in Gulf of Sidra, and condemns "attacks carried out by the American Sixth Fleet against objectives on Libyan territory." ~~(X)~~ Bucharest 2148

SWITZERLAND-PHILIPPINES: Swiss Federal Council decision to freeze Marcos' assets replaced by official directive of Federal Banking Commission that carries same effect...Swiss officials now wonder whether US contemplates similar freeze. ~~(X)~~ Bern 1843

AFRICA/ASIA/SOUTH ASIA

ISRAEL LEBANON: Israeli jets today struck two Palestinian camps near Sidon...extent of damage and loss of life unknown...retaliation for earlier Lebanese cross border rocket attack which injured four Israeli civilians. First injuries from cross-border attack in over three years. Arafat claimed responsibility for rocket attack. ~~(X)~~ FBIS 0516, 0518, 1442; CIL ME, 27 March

EGYPT: No progress made in latest talks between Israel and Egypt on issue of arbitration over Gaza and resumption of normalized relations between the two countries. ~~(X)~~ FBIS 1444

[REDACTED]

(b)(1) +
(b)(3)
(S)

CLASSIFIED BY: MULTIPLE SOURCES UNCLASSIFIED
DECLASSIFY ON: OADR

(s) (b)(1) + (b)(3)
UNCLASSIFIED

ATIN AMERICA:

CARAGUA-HONDURAS: Fighting between Sandinistas and Contras has ceased...HUSINT indicates 40-45 SPT troops killed, while Contras have incurred 35 losses.

(b)(1)

(s)

OLIVERA: Today, an explosion occurred on Embassy rooftop, shattering windows but causing no injuries. Unidentified attacker threw stick of dynamite onto Chancery Building. 127 La 12 2610; FBIS 0923, 1018

BRAZIL-LIBYA-IRAN: Official government source reports Libya interested in \$2 billion Brazilian arms purchase...Brazil studying matter from political point of view, expected not to approve sale. Iranian Ambassador

(b)(1) + (b)(3)

(s)

SRU: Last night, terrorists used explosives to attack Soviet Embassy in Lima, without causing any casualties. No claims of responsibility yet. Today, Soviets denied being the target of a terrorist attack. 127 FBI: 093, 1401

ASIA

PHILIPPINES: Access to Subic Bay remains blocked by strikers while Clark Air Base main and side gates barricaded by workers...all US personnel living off base ordered to remain at home...communist party members identified with strikers. 127 NO Intel. Notes, 27 Mar; Reuters 1334

AFRICA

CHAD: President Habi leaves today for Brazzaville for OAU-sponsored meeting where he may meet GUNT President Goukouni...Habre advisors said that trip is "friendly working visit" with Congo chief of state Sassou-Nguesso. 127 Ndjamena 1600

SUDAN: Senior Egyptian official believes Libya's military involvement has split Sudanese military and could prompt coup by radicals or conservatives...stresses Libya and Ethiopia continue to share strategic goal of destabilizing Sudan. 127 Cairo 7491

UNISIA: Arab League Ministerial ended yesterday...adopted strong resolution condemning US military actions in Gulf of

UNCLASSIFIED

0: NSCLTMOO Q16MI000 W1 WHITE HOUSE COMMUNICATIONS AGENCY

dra, announced passage of a pro forma resolution on Iran-Iraq
r, and called for holding Arab summit "to restore Arab unity."
Yunis 3060

PUBLICATION ROOM NOT-March 27, 1986

BYRON SITUATION AS OF 1800 ZD

BYRON FORCE: Libyan naval activity remains virtually nonexistent
during this reporting period. No units have been observed
trolling in the Gulf of Sidra, outside of local waters.

r defense sectors remain at heightened state of readiness;
cond S-5 site under construction; first site damaged.

VIRG FORCE: Soviet status of naval forces is unchanged.
air ships continue routine surveillance operations of US ships.

FORCE: Battle force of EXETER, DEAN Sea, and SEPTOGA
executed disengagement operations. Surface Action Group (SAG)
comprised of EXETER, DEAN, and SEPTOGA exited exercise area
and are now all north of 33-20N. No US ships presently below
33-30N line.

REACTION: Turkey's own interests preclude criticism
of the US moves. Senior Egyptian State Security officials
applaud US determination to confront Qadhafi militarily.
Mauritania and Burkina reiterate call for a search for peaceful
solution. India expresses grave concerns over Gulf exercises.

SCRIPT/VS A2.0: DEVICE 1403W6 CHARS MONO

Doc 2f

SITUATION 2004 EVENING SUMMARY

UNCLASSIFIED

April 2, 1986

SECRET

Partially Declassified/Released on 7-6-93
under provisions of E.O. 12356 (F92-1162)
by the National Security Council

TELORISM

TWA-BOMBING: According to press, the Arab Revolutionary
Cells al-Kassam, a previously unknown Palestinian group, has
claimed responsibility for placing a bomb aboard TWA flight 840.
A fifth passenger may have died as a result of today's explosion.
Greek authorities are holding five suspects for questioning in
connection with the incident.

(b)(1) +
(b)(3)
(c)

[REDACTED] FBI, and State telecons;

CNR; FBIS 127

SOVIET UNION/EUROPE

[REDACTED]

(b)(1) +
(b)(3)
(S)

USSR-US: First Deputy Foreign Minister Korniienko publicly
commented US plans to supply Stinger missiles to insurgents in
Afghanistan and Angola are creating serious negative reactions
in Moscow...indicated he would not exclude possibility that
direct diplomatic contact be made with US on this issue.

(b)(1) +
(b)(3)

[REDACTED]

(S)

TURKEY:

[REDACTED]

(b)(1)

(S)

WEST ASIA/SOUTH ASIA

LIBYA-REVIEW-THREATISM:

[REDACTED]

(b)(1)
(S)

CLASSIFIED BY: MULTIPLE SOURCES

UNCLASSIFIED

ASSISTED BY MULTIPLE SOURCES
CLASSIFY ON: C71

UNCLASSIFIED

-2-

[REDACTED] (S) (b)(1)

BIRNCH-UK: Beirut press reported two additional British persons, reportedly kidnapped in Beirut...Lebanese police said the two men are a professor at American University at Beirut and a teacher in a private school, both last seen on 28 March. They may be the same individuals who were in the custody of Syrian Relations office in Damascus. (S) Beirut 1695; J21 157

CHARLSTON: [REDACTED] (S) (b)(1)

IN AMERICA

CARAGUA-ARGENTINA: President Ortega early this week requested Argentina take lead in setting up a "peace keeping force" along the Nicaragua-Honduran border. According to Embassy Buenos Aires, President Alfonsin is considering proposal but did not indicate it would be on the agenda at this weekend's Contadora meeting in Panama. (S) Buenos Aires 2674

UNDOPOLISY: [REDACTED] (S) (b)(1) + (b)(3)

PHILIPPINES: Former South Vietnamese Prime Minister and Vice President Nguyen Cao Ky currently on "world tour" seeking a country that might provide exile for Marcos. [REDACTED] Ky and Marcos are close acquaintances. Meanwhile, 1,000 striking Filipino workers blocked main gates at Subic despite yesterday's announced settlement of 12 day strike. (S) (b)(1)

(C)

JUSTICE: Industry and Technology Minister today said although Canberra will not participate in SDI, it will permit private

Australian firms to take part in SPI research.

(b)(1) +

(b)(3)

(S)

UNCLASSIFIED

Doc 2g

SCRIPT/V: 2,0: 000000 140306 000000

DEBATE ROOM EVENING SUMMARY

March 23, 1936

UNCLASSIFIED

WIFE JONAS/AUGUST

REF-ALGERIA: Embassy Moscow reports President Bendjedid signed three agreements with Soviets on political consultation, economic and scientific/technical cooperation during his visit to Moscow. No evidence that Bendjedid's visit led to any dramatic development in Soviet-Algerian relations. Moscow 5324

REF-LIBYA: Soviet official announced the Soviet Union and Libya have dropped plans to sign a friendship treaty...said both countries see no need strengthening relations by legal acts. Enter 1005

REF: Highly dubious information suggests 300 Soviets may have been killed during US air strike, according to Moscow DEDAC. Source said high number of casualties caused by Soviet's trying to repair radar unit. Source expressed doubts about information. When Attache questioned BFA official, he denied there were casualties at Curt.

(b)(1) +
(s) (b)(3)

REF: [REDACTED]

(b)(1)

(c)

REF-USA: [REDACTED]

(b)(1)

(s)

REF: [REDACTED]

(b)(1)

(s)

UNCLASSIFIED

UNCLASSIFIED

CLASSIFIED BY MULTIPLE SOURCES

DECLASSIFY ON: CDR

-2-

WORLD EAST/SOUTH ASIA

LIBYA-CHORISM:

[REDACTED]

(b)(1)

(S)

[REDACTED]

(b)(1) +
(b)(3)
(TS)

LEBANON-OS:

[REDACTED]

(b)(1)

(S)

LEBANON: Voice of Lebanon reports a bundle of dynamite exploded at American Center Building in Beirut today...special forces of leader Al-Fukhtar claimed responsibility. No other information available. (U) FEIS NC291933

LATIN AMERICA

[REDACTED]

(b)(1) + (b)(3)
(SC)

NICARAGUA-HONDURAS:

[REDACTED]

(b)(1)

(S)

UNCLASSIFIED

UNCLASSIFIED

2: SECRETARY OF DEFENSE

-3-

12

IN: UK:

(b)(1)

(S)

PHILIPPINES-US: Several US servicemen hurt today when hundreds of strikers attacked a personnel service bus outside US military base. Clark and John Hay air base gates remained closed. All key essential base services are operating with no significant problems. Today's discussions provided no resolution to opening gates. Clark is not optimistic gates will open this weekend. (S) 1052; Clark Consolidated 5473 PSN 24873

PHILIPPINES: Assistant Secretary Sigur impressed by Filipino dedication to political, economic, military, and social reform during recently completed talks. Aquino's greatest challenge is to reconcile ideological divergencies which appear to exist among advisors. Aquino and advisors sympathetic to US concerns, but more assertive in nationalistic sense. (S) Bangkok 5753 NODIC

PAN-US: Benki or Black Flag section of communist league claimed responsibility yesterday's for bombings on US embassy and Imperial Palace. (S) FBIS HK231110

THAILAND: Retirement of Thit by Prime Minister Prem has shored discipline and promoted unity in army. Prem's desire to assert control over army probably motivating factor in decisiveness. Asserting civilian control over military contributes to strengthening constitutional democracy and democratic institutions. (S) Bangkok 5937 NODIC

UNCLASSIFIED

Doc 2h

SCRIPT/VF 22.0: DEVTX 1403W6 CHARS 5040

Partially Declassified/Released on 7-6-93
under provisions of E.O. 12356 (F92-1162)
by R. Menz, National Security Council

SITUATION ROOM MORNING SUMMARY

UNCLASSIFIED

29 March 1986

SOVIET UNION/EUROPE

ITALY: Rome court today issued its verdict on the papal assassination plot trial...all defendants acquitted for insufficient proof except for Ali Agca, who was sentenced to one year for possession of a pistol. (S) Rome 8105

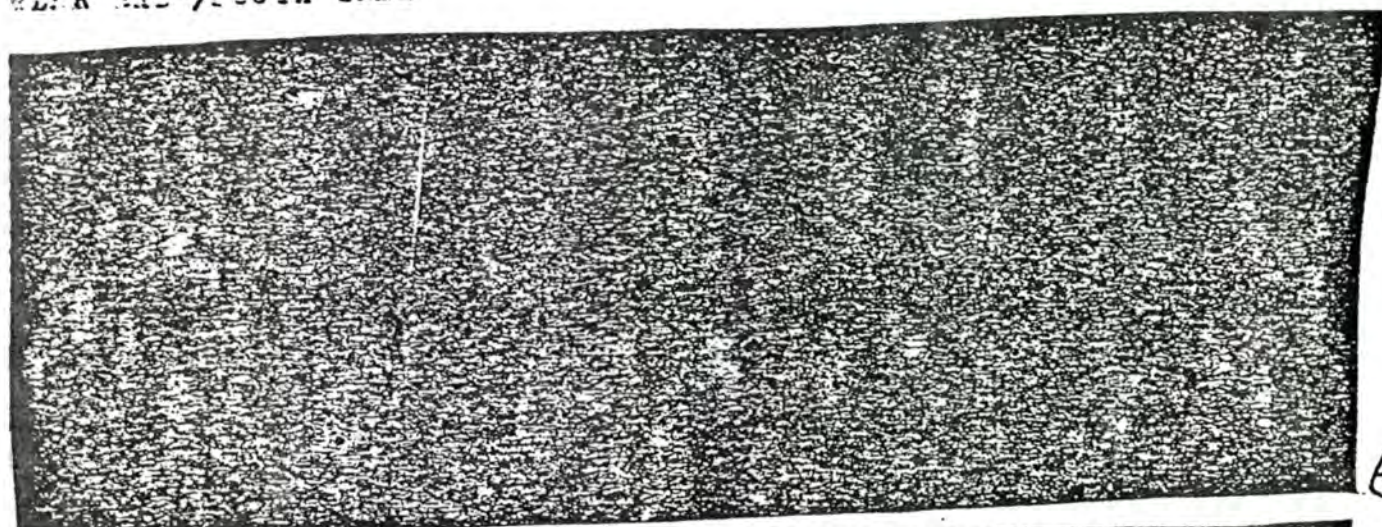
GERMANY-US: In Thursday meeting with Secretary Shultz, Papandreaou underlined importance of creating a positive climate for improving our bilateral relations...emphasized resolution of Turkish and Cypriot questions, agreed on formulas for beginning JS bases negotiations by end of 1986 and a Papandreaou visit to Washington next year if basing discussions go well. (S) Secto 5070

US-SOVIET-NICARAGUA: US allegation of Nicaraguan incursion into Honduras has received little reporting in Soviet Union, and what is reported is highly critical of US...Soviets are saying US is lying about incursion, and insists Nicaraguans are innocent of any wrong doing. (S) Moscow 5259

FRANCE: Bombs exploded in France last night...nine simultaneously in Marseilles, three in Nice, two in Aix-en-Provence...several buildings damaged, two injuries, no claim of responsibility. (S) UPI 153, State Terrorism Task Force Telecon

ITALY-US: An American serviceman shot at but not hurt near his home in Catania, Sicily. Police suspect incident is criminally related, not act of terrorism. (S) Reuter 95, State Terrorism Task Force Telecon

NEAR EAST/SOUTH ASIA



(b)(1) +
(b)(3)

(TSC)

(c) (b)(1)

PAKISTAN: [REDACTED]
CLASSIFIED BY MULTIPLE SOURCES

[REDACTED]

(b)(1)

(C)

[REDACTED]

(b)(1) +
(b)(3)

(TSC)

ARAB STATES: [REDACTED]

STL

PHILIPPINES: Gates at Subic and Clark remain blocked...source of proven reliability says before Americans will be allowed access to facilities, negotiators may demand that all Filipino workers be removed from the bases. ~~NY~~ Manila 0075, 0094

THAILAND: During Assistant Secretary Sigur's 28 March meeting with Prime Minister Prem, several issues were raised including farm act, security, bilateral with Soviets, and situation in Philippines. Prem desires same high priority for Cambodia as Afghanistan has in US/Soviet talks, and is concerned farm act will prove detrimental to Thailand's needs. ~~NY~~ Bangkok 5976, 5977

LATIN AMERICA

[REDACTED]

(b)(1) +
(b)(3)

(TSC)

ARGENTINA-US-ISRAEL: [REDACTED]

(b)(1) +
(b)(3)

(S)

AFRICA

UNCLASSIFIED

[REDACTED]

(b)(1) +
(b)(3) +
(TSC)

DAN: [REDACTED]

(b)(1) +
(b)(3) +

(S)

UNCLASSIFIED

Doc 21

REPORT/VS 12.0: SERVICE 140346 THURS 1000

Partially Declassified/Released on 7-6-93
under provisions of E.O. 12353 (F42-1162)
by K. Menon, National Security Council

TRANSITION FROM MORNING COMBAT

March 31, 1986

~~SECRET~~
UNCLASSIFIED

VICT UNION/US GROUP

SE-US: State Department concludes Gorbachev's nuclear moratorium proposal announced Saturday is attempt to lay groundwork for summation of Soviet testing program...fact that proposal was made publicly, not privately, indicates propaganda exercise. All to meet President Reagan in Europe is not an attempt to back out of summit in US. Clarification of intentions expected when Gorbachev meets with President on 9 April. (S) State 58353

ALLY-US: [REDACTED] (S)

(b)(1)

PROG-US: Prime Minister Papandreu told his cabinet and armed forces chiefs that discussions with Secretary Shultz were "constructive" and "positive"...said Greece looked forward to operating with US on equal footing. (S) Athens 6103

AR E.SI/SOUTH ASIA

TYPE-US-LIBYA: Egyptian newspaper today reported that Egypt had rejected three US requests since last July for joint military action against Libya...alludes to US delegations which traveled to Cairo to present proposals. (S) AP 66

ODE ARABIA US-LIBYA: [REDACTED] (S)

(b)(1) +
(b)(3)

BYA-SOUTH-TRANSITION: [REDACTED] (S)

(b)(1) +
(b)(3)

~~SECRET~~
UNCLASSIFIED

(S)

CLASSIFY BY MULTIPLE SOURCES
DECLASSIFY ON: OADR
SECRET COLLUSION

UNCLASSIFIED

- 2 -

[REDACTED]

(b)(1) *
(b)(3)

(TSC)

ISRAEL-EGYPT-US:

[REDACTED]

(b)(1)

(S)

SIA

PHILIPPINES-US: Strike continues at Subic and Clark. Gates still blocked at Subic, but many Filipino civilian employees at Clark returned to work today. Joint labor committee to meet tomorrow. (U) Manila 117

PHILIPPINES-NEW ZEALAND: President Aquino accepted invitation from visiting Prime Minister Lange to visit New Zealand. Lange gave Aquino \$500,000 in direct aid... reiterated stand on port access. Aquino repeated that Manila will respect US bases treaty until 1991 expiration. (U) FBIS 1102

INDONESIA-US:

[REDACTED]

(b)(1)

(S)

LIBIA

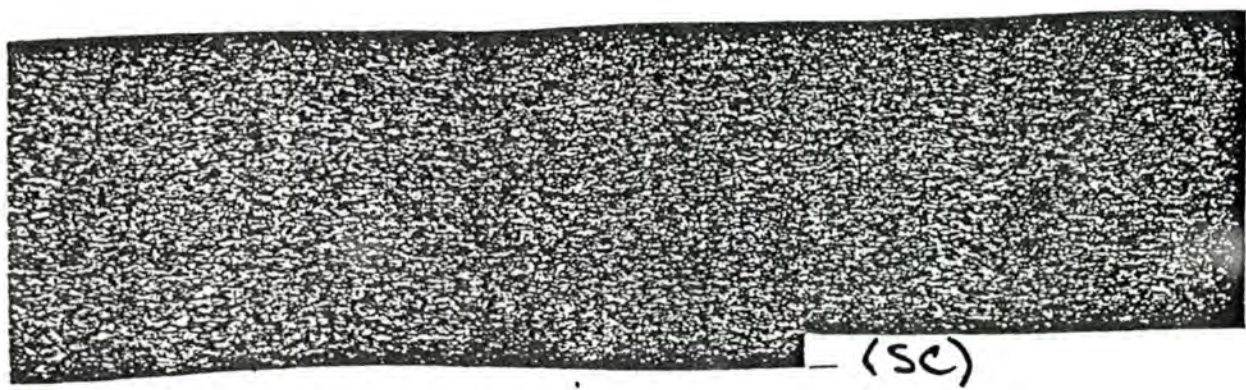
UDAN-US-EGYPT: Responding to US criticism of Libyan military assistance, Sudanese Defense Minister yesterday said Washington has no right to interfere in Sudanese-Libyan relations.

(b)(1)

(S)

UNCLASSIFIED

UNCLASSIFIED



(b)(1) +
(b)(3)

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UNCLASSIFIED

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RECEIVED	NN	NN	DDDDDDDD
RECEIVED	NN	NN	DDDDDDDD
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RE	NNNN	NN	DD DD
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RECEIVED	NN NN	NN	DD DD
RE	NN	NNNN	DD DD
RE	NN	NNN	DD DD
RECEIVED	NN	NN	DDDDDDDD
RECEIVED	NN	N	DDDDDDDD

7-6-93 (F92-1162)
S. H. GREEN, National Security Council

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0000000      222222222      44
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00      00      22      44 44
00      00      22      44444444
00      00      22      44444444
0000000      22222222      44
00000      22222222      44

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NOTE FROM: OLIVER NORTH

Subject: Payoff for the USSR's Debt Strategy

*** Forwarding note from SULLIVAN--VAIA 10/ 9/86 15:21 ***

FILE: NOTE OFSLOGEL DO WHITE HOUSE COMMUNICATIONS AGENCY

To: NSOLN --CPUA

Subject: Payoff for the USSR's Debt Strategy
d i g i t a l

I N T E R O F F I C E M E M O R A N D U M

Date: 9-Oct-1986 01:51p EDT
From: Scott Sullivan
SULLIVAN
Dept:
Tel No: 6919

TO: See Below

Subject: Payoff for the USSR's Debt Strategy

Why have West German commercial banks begun reducing their exposure in Latin America, while boosting their lending to the USSR?

As a result of the recent debt refinancing agreement with Mexico, the three major West German commercial banks (Deutsche Bank, Dresdner Bank, and Commerzbank) reportedly see an unrewarding future in the LDCs. At the same time, they are turning their attention to Eastern Europe where returns are more certain. Commerzbank, for example, plans to cash in on the USSR's huge borrowing needs by soon floating a major loan package of between 1.5 and 2.0 DM. Economist Jan Vanous predicts that the USSR is likely to become one of the world's largest sovereign borrowers by 1990, adding anywhere from \$20 to \$30 billion to its gross debt. Conversely, voluntary commercial bank lending to most high-debt LDCs has all but dried up--a state of affairs likely to remain unchanged throughout the decade. US direct investment in Latin America is also on the decline.

What opportunities does this confer upon the USSR to expand its influence in Latin America at US expense?

In the broadest terms, the survival of democracy in Latin American countries will be linked to the economic benefits which their governments can provide. A severe cutback in the flow of commercial bank lending and foreign direct investment from developed nations will erode the economic and political stability of the high-debt LDCs.

CCCCC630

DECLASSIFIED ON 7-7-93
under provisions of E.O. 12958 (F42-786)
by n. Menan, National Security Council
PAGE 00206

The Soviets may perceive that their greatest opportunities lie in improving relations with Mexico and Peru. For the first time since the establishment of diplomatic relations in 1924, a Soviet foreign minister has paid an official visit to Mexico. Although Shevardnadze seems to have achieved little of substance, it was agreed that President de la Madrid and General Secretary Gorbachev would exchange reciprocal visits. In Peru, President Garcia has locked himself into a posture of confrontation with the IMF and the commercial banks. The Soviets may be able to expand their influence with offers of assistance. There is some evidence that the Soviets tack Peru in preference to Nicaragua as the host for the next NAM meeting. This would tie in with the USSR's international economic strategy, since Peru could provide more effective leadership than either Nicaragua or Cuba for the Soviet-sponsored

FILR: NOTR OFSLOGFI DO WHITE HOUSE COMMUNICATIONS AGENCY

PAGE 00207

debt repudiation campaign.

What benefits do the Soviets gain by broadening their financial relationships ties with Western Europe and Japan?

There is a high degree of complementarity between the economies of the USSR and close US allies. The USSR is resource-rich but poor in investment capital and technology. Western Europe and Japan, on the other hand, generally lack raw materials (particularly energy) but are desperately seeking outlets for surplus capital. Through expanded trade, the USSR is able to gain greater influence over the foreign policies of our allies, and is better able to compete against the US in the development of strategic defenses.

Distribution:

TO: Stephen Danzansky	(DANZANSKY)
TO: Raymond Burghardt	(BURGHARDT)
TO: Tyrus Cobb	(COBB)
TO: Peter Fodman	(FODMAN)
TO: Oliver North	(NORTH)
CC: Ron St. Martin	(STMARTIN)
CC: Alan Thomas	(THOMAS)
CC: Thomas N. Harvey	(HARVEY THOMAS)

cc: NSCPC --CPUA

\$2payoff for the USSR's Debt Strategy

NOTE FROM: OLIVER NORTH

Subject: Americans dissappeared in Cyprus in 74

*** Forwarding note from NSPRS --CPUA 09/29/86 08:46 ***

To: NSRBM ---CPUA

*** Reply to note of 09/27/86 15:46

NOTE FROM: Peter Schmer

Subject: Americans dissappeared in Cyprus in 74

I didn't know about it until the other day when a group of Greek-Americans raised it with Peter Rodman. It is an old case dating to the 1974 Cyprus events, as you note. The Greek-Cypriot family, who apparently live both in Cyprus and Michigan, refuse to accept that their son is dead. No body has ever been recovered. The family has been in frequent contact with our Embassy in

FILE: NOTE CFELOG1 DO WHITE HOUSE COMMUNICATIONS AGENCY

Nicosia and State. State has made representations to both the Turkish govt and the Turkish-Cypriot authorities. Within the last 10 days Denktash, the Turkish-Cypriot leader met with the boy's father here in Washington. State believes the meeting went reasonably well but the boy's father refused Denktash's offer to give him a full report which would have suggested that all evidence points to his son being dead. Instead the father got a commitment from Denktash to again review all the evidence available in Cyprus. State will contact Bloomfield to ensure that he has all the latest info. Cases like this --like the MTIs and Missing in Argentina-- tend to go on and on. And there are those who exploit them for political purpose.

CC: NSOLN --CPUA

NSWFF --CPUA

CC: NSRLE --CPUA

Americans dissappeared in Cyprus in 74

00000586

Declassified/Released on 7-7-93
Under provisions of E.O. 13526 (P42-786)
by H. Manzan, National Security Council

PAGE 00194

F

To: NSFH / --CPUA

~~SECRET~~
UNCLASSIFIED

00000295

NOTE FROM: OLIVER NORTH
Subject: Demarche from Amb Klestil
please print this for my use

*** Forwarding note from NSRBH --CPUA 04/15/86 14:07 ***
To: NSOLN --CPUA

Partially Declassified/Released on 7-6-93
under provisions of E.O. 12356 (F92-786)
by N. Menon, National Security Council

NOTE FROM: ROD E. MCDANIEL
Subject: Demarche from Amb Klestil

??
*** Forwarding note from NSHC --CPUA 04/15/86 13:26 ***
To: NSRBH --CPUA

FILE: NOTR OPSLOG#1 DO WHITE HOUSE COMMUNICATIONS AGENCY

PAGE 00114

NOTE FROM: Tyrus Cobb

SUBJECT: Demarche from Amb Klestil

1. Austrian Ambassador Tom Klestil called late this morning to express serious concern over an unclassified report issued by our Embassy indicating that the LPB in Vienna planned to stage a terrorist incident in Vienna April 17. [REDACTED] this

information had NOT been communicated at all to the Austrian Government.

2. Jack and I have checked this out, and, unfortunately, it is true. The information was made public as part of our release last night following the President's speech, and was distributed by Embassy Vienna.

3. This info was not shared with the GOA, through any channel. [REDACTED]

(S) (b)(1)

(S) (b)(1)

(S) (b)(1)

(S) (b)(1)

CLASSIFIED BY: MULTIPLE SOURCES
DECLASSIFY ON: OADR

5. [REDACTED]

(S)(b)(1)

6. We can understand the need for holding information close to the vest on impending military actions. However, it is less clear why an intelligence report of an impending terrorist attack in Vienna was not relayed to the Interior Ministry. [REDACTED]

(S)(b)(1)

[REDACTED] However, if this info was so sensitive that we could not share it, then why are we releasing it publicly? Is anyone in the political bureaus at State (PUB) coordinating these things? PUB promises a full report later today.

(S)(b)(1)

cc: NSJFM --CFUA
NSKPD --CFUA
NSPRM --CFUA

DONALD FORTIER

NSPRS --CFUA
NSOLN --CFUA
NSWEP --CFUA

DONALD FORTIER

F

? Demarch: from 1mb Klestil

UNCLASSIFIED



Washington, DC 20408

Facsimile Transmission

*file
destroy*

Date: October 14, 1993

Time: 5:00

To: ✓ Marvin Krislov - White House Counsel's Office
Bruce Overton - OA
Nell Doering - OA
Holly Gwin - OSTP
Steve Aitken - OMB
Joan Steyaert - USTR
Neal Wolin - NSC
Bill Leary - NSC
Freddi Lipstein - DOJ
Jason Baron - DOJ

Number of Pages: 16

From: James J. Hastings

Office: Office of Records Administration
Records Appraisal & Disposition Division

Phone Number: (202) 501-6038

FAX Number: (202) 501-7452

MESSAGE:

This is our revised guidance on e-mail. We have indicated with bold in brackets and strikeouts revisions of our September 24 draft.

Proposed changes:
 New words - bold in brackets
 Deleted words - strikethrough

October 14, 1993

MANAGING FEDERAL RECORDS ON ELECTRONIC MAIL SYSTEMS IN THE EXECUTIVE OFFICE OF THE PRESIDENT

Introduction

[This guidance covers documentary materials created or transmitted by electronic mail (e-mail) systems in the Executive Office of the President (EOP).] E-mail systems are increasingly used as a means of communication within and among offices in the Executive Office of the President. Because it is used in place of telephone conversations or face-to-face meetings, e-mail can significantly increase the efficiency of conducting Government business. At the same time, e-mail [often] ~~may~~ provides substantive documentation of [EOP] Government transactions, and in these circumstances an e-mail message will constitute a "record" under the Federal Records Act. Since e-mail users have control over the messages they send and receive, EOP components are responsible for training employees on how to determine which e-mail messages are records.

[The Federal Records Act (44 U.S.C. Chapters 29, 31, and 33) applies to records in all media, including e-mail messages, that are determined to be Federal records under the definition in the Act (44 U.S.C.3301).] The National Archives and Records Administration (NARA) is required to issue records management guidance to all Federal agencies (44 U.S.C. 2904 and 2905). This document [guidance applies the provisions of the Federal Records Act and traditional records management and archival principles and techniques to e-mail systems.] [It] provides [instructions to] ~~guidance for~~ EOP program managers, information and records managers, and other users of e-mail in the EOP on the proper means of identifying, maintaining, and disposing of Federal records that are created or received on an e-mail system.

[NARA has issued regulations on electronic records (36 CFR 1234) and guidance on electronic recordkeeping, *Managing Electronic Records* (1992), and *General Records Schedules 20, Electronic Records*, and 23, *Records Common to Most Offices*. This guidance is specifically addressed to e-mail systems and supplements the guidance previously issued.]

Because it may not be technologically feasible for all EOP components to manage e-mail records in the same way, [NARA] ~~this guidance~~ also recognizes the need for flexibility in the development of records management policies and practices. Also, under special circumstances, EOP components may need to vary from certain provisions of this guidance for reasons of efficiency or adequacy of documentation. In such circumstances, the EOP component(s) may, in consultation with NARA, modify their records management practices to meet their recordkeeping requirements.

October 14, 1993

Some agencies in the EOP create and receive Presidential records as well as Federal records. Presidential records are defined as "documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of 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" (44 U.S.C. 2201). Memoranda providing guidance on Presidential records and Federal records were issued to White House and EOP staff and NSC staff by the White House and NSC on May 5 and May 8, 1993, respectively. The following guidance does not apply to Presidential records. Each EOP component that creates Presidential records has a continuing obligation to identify and separately maintain Presidential and Federal records.

Definitions

The following definitions for terms used in this guidance are included for clarity and convenience. Most of these definitions are included in existing NARA guidance or regulations. Definitions that are new are so indicated.

- [★] **Electronic Mail System.** As used in this guidance, a computer application used to create or transmit messages and other documents, conduct electronic conferences, and create calendars that can be accessed by multiple staff members. Excluded from this definition are file transfer utilities (software that transmits files between users but does not retain any transmission data) and data systems used to collect and process data that have been organized into data files or data bases on either personal computers or mainframe computers.
[New]
- [★] **E-mail messages.** Documents created on an e-mail system including brief messages, notes, more formal or substantive narrative documents, and any attachments, such as word processing documents, that may be transmitted by the message.
[New]
- ★ **Electronic Record.** Numeric, graphics, text, and any other information, which may be recorded on any medium capable of being read by a computer and which satisfies the definition of a Federal record in 44 U.S.C. 3301. This includes, but is not limited to, magnetic media, such as tapes and disks, and optical disks.
[36 CFR 1234.1]

October 14, 1993

- ★ **Federal Records.** [A]ll 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 or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. (Emphasis added.)
[4 U.S.C. 3301]

- ★ **Temporary Record.** Any record which has been determined by the Archivist of the United States to have insufficient value (on the basis of current standards) to warrant its preservation by the National Archives and Records Administration. This determination may take the form of:
 - (a) A series of records designated as disposable in an agency records disposition schedule approved by NARA (Standard Form 115, Request for Records Disposition Authority); or
 - (b) A series of records designated as disposable in a *General Records Schedule*.
[36 CFR 1220.14]

- ★ **Permanent Record.** Any Federal record that has been determined by NARA to have sufficient value to warrant its preservation in the National Archives.
[36 CFR 1220.14]

- ★ **Nonrecord Material.** Informational materials that do not meet the statutory definition of records (44 U.S.C. 3301), i.e., they either do not relate to Government business, ~~or~~ are not "appropriate for preservation," or that have been specifically excluded from coverage by the definition. Excluded materials are extra copies of documents kept only for reference, stocks of publications and processed documents, and library or museum materials intended solely for reference or exhibit.
[36 CFR 1220.14, 1222.34(d)]

- [★] **Records Management.** The planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.
[36 CFR 1220.14]

October 14, 1993

- ★ **Records Schedule.** A document describing and providing instructions for the disposition of Federal records. It consists of one of the following:
 - (a) An SF 115, Request for Records Disposition Authority, that has been approved by NARA to authorize the disposition of Federal records;
 - (b) A *General Records Schedule* (GRS) issued by NARA; or
 - (c) A printed agency manual or directive containing the records descriptions and disposition instructions approved by NARA on one or more SF 115s or issued by NARA in the GRS.[36 CFR 1220.14]
- ★ **General Records Schedules.** Schedules authorizing the disposal, after the lapse of specified periods of time, of records of a specified form or character common to several or all agencies if such records will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their further preservation by the United States Government.
[44 U.S.C. 3303a(d)]
- ★ **Recordkeeping System.** Records in any media organized and maintained by an agency under a formal scheme for retrieval purposes and to meet the agency's recordkeeping requirements.
[New]
- ★ **Transmission and Receipt Data.**
 - (a) **Transmission Data.** Information in e-mail systems regarding the identities of sender and addressee(s), and the date and time messages were sent.
 - (b) **Receipt Data.** Information in e-mail systems regarding date and time of receipt of a message, and acknowledgement of receipt and/or access by addressee(s).[New]
- ★ **System Backups.** Copies on off-line storage media of software and data stored on direct access storage devices in a computer system to provide a means of recreating a system and its data in the event of unintentional loss of data or software.
[New]
- ★ **Security Backups.** Copies of records in any media that are created to provide a means of ensuring retention and access in the event the original records are deleted or corrupted on the recordkeeping system.
[New]

Records Management Responsibilities

Under the Federal Records Act, Federal agencies ~~are responsible for~~ have records management responsibilities that include creating and maintaining appropriate records, and scheduling their disposition (44 U.S.C. Chapters 31 and 33). The responsibility applies to records in all media, including records created electronically on computers or by other means. As more and more Government business is being conducted electronically, agencies must recognize that records will, in many instances, be created or received on e-mail systems. [The Federal Records Act provisions apply to electronic records, including e-mail, just as they apply to records created or received in any other media.]

Agencies are legally obligated to ensure creation and maintenance, for an appropriate period, of "records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency" (44 USC 3101). [However, the Federal Records Act does not require maintenance of records on the media on which they were created. For example, agencies may convert paper records to microform in accordance with NARA regulations (36 CFR 1230). Similarly, agencies may copy record messages on the e-mail system for maintenance in hard copy or in another electronic system.] In order to [comply with the Federal Records Act,] ~~fulfill this mandate,~~ EOP components [must apply their recordkeeping requirements to e-mail documents that meet the definition of Federal records.] ~~should incorporate provisions relating to e-mail into their recordkeeping requirements.~~

The disposition of records is also addressed in the statute (44 U.S.C. Chapter 33). Further guidance on scheduling the disposition of records is in the section entitled DISPOSITION OF E-MAIL MESSAGES below.

What Are Federal Records?

~~As quoted in the DEFINITIONS section above,~~ The Federal Records Act [provides] includes a definition of Federal records. Several aspects of that definition deserve further explanation. The phrase "regardless of physical form or characteristics" means that the records may be paper, film, disk, or any other physical type or form; and that the method used to record information may be manual, mechanical, photographic, electronic, or any combination of these or other technologies. In other words, the medium used to create the document does not determine record status. [In fact, when Federal records originally created in one medium are copied to another medium, both versions are Federal records, though each may have a different retention period.]

Under the statutory definition, Federal records are documentary materials that meet two tests: (1) they are *made or received* by agency personnel as part of their official duties in a

October 14, 1993

Federal agency, and (2) they are *preserved or appropriate for preservation*. [It is critical for agencies to apply carefully reasoned judgment in determining when documents are appropriate for preservation and thereby are Federal records. In exercising this judgment, agencies should consider their obligation to create and maintain records that adequately document the "organization, functions, policies, decisions, procedures, and essential transactions of the agency" (44 U.S.C. 3101). Documentary materials become records if the agency decides they should be filed, stored, or otherwise systematically maintained because of the evidence of agency activities or information they contain (36 CFR 1222.12).

Documentary materials, whether in paper or electronic form, are Federal records when they meet both tests. EOP components [shall] ~~should~~ use these general criteria to develop specific guidelines on how to determine which documents created or received on e-mail systems should be considered Federal records.

The activities of some EOP components are heavily policy-oriented and support the President in carrying out his functions. To a greater extent than in many other Government agencies, drafts, notes, calendars, background materials or working papers in those EOP components will document policy development, significant decisions, major activities or other matters basic to an understanding of the EOP component and its governmental role, and therefore should be considered Federal records. EOP components [shall] ~~should~~ apply the same criteria to their e-mail messages that they apply to their paper records when they make determinations of record status (see 36 CFR 1222.34). For further information on making these distinctions, see *Personal Papers of Executive Branch Officials: A Management Guide*, published by NARA in 1992.

Record Status of E-Mail Messages

Documents produced by using an e-mail system are Federal records when they meet the [same] criteria [that apply to documents in any other media, as] specified in the statutory definition. As indicated above, Federal records are documentary materials that meet both of the tests of the statute, i.e., they are made or received in the course of conducting agency business, and [in the judgment of the agency they are appropriate for preservation] ~~they are retained~~ because they document the agency's [organization, functions, policies, decisions, procedures, operations, or other activities] ~~essential transactions~~ or contain information of value to the agency. Since e-mail systems [may] are often [be] used to transmit insubstantial information that is not [appropriate for preservation for agency use or future research] ~~required for adequate and proper documentation of agency activities~~, not all messages on an e-mail system are likely to fit the statutory definition of records, [even if they relate to Government business].

In the EOP e-mail systems some messages will be [either] nonrecord material, ~~some will~~ be temporary records, [or] ~~and some may be~~ permanent records. It is critical that all e-mail users understand the concept of Federal records and that ~~agencies~~ agency guidance provide

October 14, 1993

sufficient information for users to distinguish Federal records from nonrecord materials. It is also important for users to know that there is a difference between records that only have to be kept for a brief period of time and those that have long-term value to the Government.

The first determination [that] must be [made is] whether a message is a record or not. If a message is determined to be a record, the second step [is] for the appropriate agency officials or records management personnel is to determine if it is a temporary or permanent record according to a records schedule approved by NARA (see the section in this guidance on DISPOSITION OF E-MAIL RECORDS).

[The EOP components should provide examples of record and nonrecord messages to staff to ensure accurate and consistent application of this guidance. The EOP components are in the best position to identify specific examples of the kinds of records and nonrecord materials created by each component. Examples of each category of message should be included in the components' directives to staff on the use of the e-mail system.]

Nonrecord Materials

Agencies are not obligated to retain documents that fail to meet the criteria for Federal records, regardless of the medium on which they were recorded. Such documents are considered nonrecord. Nonrecord materials either do not relate to Government business or contain Government-related information that ~~does not warrant retention because it is duplicative or so insubstantial [that it is not appropriate for preservation] as to not warrant retention.~~ Nonrecord materials are not needed to fulfill the EOP component's responsibility to document adequately and properly its organization, functions, programs, [or] ~~and major~~ transactions. E-mail messages, therefore, that are nonrecord are not subject to the statutory provisions governing the disposition of Federal records and need not be retained.

Transmission and Receipt Data [and Related Documents]

In addition to the message itself, most EOP e-mail systems include features that make certain transmission and receipt data available to users. The data may include the identity of sender, the identity of addressee(s) (including any recipients of copies), date and time sent, date and time of receipt, and acknowledgement of receipt and/or access by addressee(s). Not all systems provide all of these features, and different systems record and display all or part of this information in different ways. In some systems, transmission and receipt data are part of the message, and in others users may need to take additional steps to access the data.

October 14, 1993

Transmission Data

Messages that are records, regardless of the media on which they are created, require some transmission data to be intelligible. Most e-mail systems in the EOP automatically capture on the message the identity of the sender and the addressee(s) and the date the message was sent. [Just as with a message on paper, this is [normally] sufficient transmission data for the e-mail record to be complete and understandable. [Some e-mail systems also can provide the time a message was sent; while this is usually not necessary for a message to be complete and understandable, in some circumstances the component may consider it to be necessary for adequate documentation of the particular transaction.]

When the necessary transmission data is not part of the message itself, EOP components must ensure that the record messages and necessary transmission data ~~such as distribution lists,~~ are both maintained in designated recordkeeping systems, either electronically or in hard copy, for the same retention period (see section entitled MAINTENANCE OF FEDERAL RECORDS CREATED BY AN E-MAIL SYSTEM below). For example, in some e-mail systems users are assigned identification names or codes. For systems that use such shorthand names or codes, a record linking the codes with the names of users should be retained to facilitate identification of the sender and addressee(s) of messages. Depending on system capability, this list may be maintained electronically or in hard copy and, like a telephone directory, may be maintained as a record separate from the e-mail message. Like a telephone book, the user list or directory will be updated frequently. Each version of the lists or directories linking names of e-mail users and system codes is a record and must be kept.

EOP components should provide guidance [for] ~~In just as they do for paper records,~~ determining what [transmission data] information in e-mail systems is [appropriate for preservation as a record.] ~~necessary for adequate documentation;~~ [This guidance will be based on the features of specific systems and the needs of the component. NARA will work with the EOP components in developing this specific guidance.]

Receipt Data

Some e-mail systems also provide the message originators with the ability to request acknowledgments or receipts noting that messages reached the mailbox or in-box of each addressee. In most cases these would not be necessary for adequate and proper documentation of agency activities, just as return receipts are rarely necessary for letters sent by regular mail. [However, as with paper records, there are some instances in which the time a document reaches its destination is critical. For example, bids on contracts, applications for employment, and documents submitted to a Federal court may require a precise due date and time. In similar situations when strict deadlines must be met, e-mail users should request receipts. If receipts are not available under the e-mail system, individuals must use another means of transmitting the information that does provide a mechanism for documenting receipt. ~~As EOP components may consider such receipts for certain types of~~

October 14, 1993

~~record messages to be necessary, they should issue~~ EOP guidance for e-mail users [should specify] ~~concerning~~ when to request receipts or acknowledgements for recordkeeping purposes, [and,] when appropriate under [those] agency guidelines, ~~therefore,~~ users should request receipts or acknowledgements and follow agency procedures for maintenance in official recordkeeping systems, either electronic or paper. Any receipt generated for recordkeeping purposes must ~~should~~ be accessible along with the related message and kept for the same period of time.

Other Documents Data

Many e-mail systems have a variety of additional features that may be used to generate Federal records. Indexes, lists, or logs of messages that [reside on an] ~~are part of [e-mail] electronic communications system [as distinct documents, tables, or files]~~ may or may not be Federal records, depending on the nature of the information they contain and their potential uses. [Indexes, lists, logs, and similar materials may be useful, particularly if the message itself does not contain sufficient transmission data. EOP components should consider the usefulness of this information as part of the assessment of the Federal record status of such materials.] ~~EOP components should separately assess the Federal record status of all features on these systems in accordance with existing records schedules or ones to be developed.~~ In many e-mail systems, however, indexes, lists, or logs are only transitory displays of data gathered from various sources, not documents, tables, or files stored on the system.

[Calendars]

[An e-mail system may provide calendars and task lists for users. EOP components should advise users that calendars, indexes of events, and task lists may be Federal records if they meet record status criteria specified in the law. Calendars, whether individual or shared, regardless of the level of the individual to whom they relate, may be Federal records or they may be personal. The NARA publication *Personal Papers of Executive Officials: A Management Guide* provides specific guidance on record status of calendars. For high-level officials (as determined by respective EOP components), calendars determined to be Federal records should be maintained in the appropriate recordkeeping system, and scheduled for disposition to permit NARA appraisal of their value. The components should instruct employees on how calendars are to be maintained. For other staff, calendars and related documents determined to be Federal records are disposable under *General Records Schedule 23, Records Common to Most Offices*, item 5, Schedules of Daily Activities. Calendars determined to be nonrecord may be deleted when no longer needed.]

October 14, 1993

External Communications Systems

NARA recognizes that there are electronic communications systems external to the government, such as Internet, that are being accessed by employees of some government agencies, including the EOP components. These communications systems have established protocols for their use. This guidance is not intended to suggest a change in those protocols, to discourage use of these communications, or to impose significant burdens on users of these communications. At the same time, the EOP components need to ensure that Federal records being created-[sent or received] on these systems are being preserved and that reasonable steps are being taken to capture whatever transmission [and receipt] data [are] is available under the protocols used for these systems.

Maintenance of Federal Records Created by an E-mail System

Agencies must manage all Federal records, including those created using an e-mail system. [To assist agencies in managing electronic records, NARA has issued *Managing Electronic Records* to supplement the regulations on electronic records (36 CFR 1234) and the specific coverage of electronic records in *General Records Schedules 20, Electronic Records, and 23, Records Common to Most Offices.*

Because e-mail systems can be used to create and record such a wide variety of record and nonrecord messages, EOP components must implement mechanisms and procedures to ensure that all Federal records are identified, their status as temporary or permanent records is clearly indicated, and that they are kept in official agency recordkeeping systems. E-mail messages that are Federal records may be retained in electronic format or printed and maintained in hard copy files until expiration of their authorized retention periods.

There is no statutory requirement that records be maintained in a particular medium, [and no statutory requirement that records be maintained in the same physical format in which they were created. As long as the informational content is identical,] and EOP components have the option of deciding which method of recordkeeping best matches their capabilities and meets their needs. [Both the message on the e-mail system and any copies made for recordkeeping purposes are Federal records, though only the official recordkeeping copy would be maintained for the full period of time the information is needed by the EOP component.]

Regardless of the medium used to maintain e-mail records, the entire record including any necessary transmission and receipt data ~~necessary for adequacy of documentation~~ must be maintained for the scheduled retention period. In addition, EOP components [must] should ensure that records are maintained in a way that allows for retrieval and use for agency

October 14, 1993

purposes. Permanent records [must] should be maintained in a system that not only allows agency use, but permits efficient transfer to the National Archives.

Maintenance on the E-Mail System

E-mail systems are generally designed for convenient and efficient internal agency communications and not as a system for the storage of agency records. In order to maintain instantaneous communications capability without increasing hardware capacity, these systems tend to limit the number of messages that can accumulate on the system. Consequently, most systems are designed to maintain messages for a short period of time, and may have automatic "delete" features. Because e-mail systems usually do not anticipate maintaining messages for retention periods generally approved for records, record messages should be copied or moved to an official recordkeeping system for maintenance and disposition, and only nonrecord messages and very short-term messages that are temporary Federal records should be retained solely on the e-mail system.

Maintenance in an Electronic Recordkeeping System

Some agencies may have sufficient resources and technological capability to maintain e-mail records in an electronic storage format other than on the on-line e-mail system. This affords certain advantages. The electronic version may be more easily searched and manipulated and is more easily accessible to multiple staff members at the same time than records in hard copy. The electronic media may provide a more efficient method to store records. [Storing e-mail messages electronically should become more feasible as technology develops].

Agencies that decide to maintain the record messages in electronic form should move or copy all but the most short-term messages to an electronic system that is a designated recordkeeping system. The electronic recordkeeping system should be designed to allow segregation of permanent and temporary records and [must] should be adequate to maintain projected volumes of records for their authorized retention periods, including appropriate retention periods for various types of temporary records, as well as permanent records [(36 CFR 1234.10)]. If a component decides to maintain e-mail records off-line, it must store them on a reliable medium under appropriate conditions, and with adequate documentation to allow the records to be retrieved and read [36 CFR 1234.28].

Tapes generated for system backups [are not suitable as recordkeeping systems because they] are merely mirrors of storage disks with data and documents scattered throughout as they are on the disks themselves. They are meant to provide only a means of recreating a system and its data in the event of an emergency. EOP components, therefore, should not rely on system backups as their official recordkeeping system because their format and design do not allow ease of access or retrievability. In addition, system backups are not acceptable as a means to transfer permanent records to NARA. (For more information on transferring permanent electronic records to NARA, see 36 CFR 1228.188.) [In extraordinary circumstances, if e-mail

October 14, 1993

messages exist only on system backups, the agency should take steps to copy them to a recordkeeping system as described in this guidance.] ~~EOP components must establish a suitable record storage method, as specified in this guidance, to protect e-mail records appropriately.~~

Maintenance in Hard Copy

Rather than maintain records electronically, an EOP component may decide that hard copy retention best meets its operational needs. In this case the component [shall] should instruct e-mail users to print messages that are Federal records. ~~When Messages are printed for recordkeeping purposes [including related transmission and receipt data will] they should be maintained according to the same procedures used for other paper records.~~ Advantages of this approach are the ease of segregation of permanent and temporary messages for separate filing in appropriate records series, and the opportunity it provides to file e-mail messages with related documents created by other means [which could facilitate both current operations and future research]. ~~For example, e-mail messages could be incorporated into case files that contain all other relevant documentation of the transaction.~~ [Some] EOP components may decide to maintain e-mail [in] on paper [form] until a satisfactory electronic recordkeeping system is developed.

Disposition of E-Mail Records

Materials that are Federal records under the law may not be destroyed without the approval of the National Archives and Records Administration (44 USC 3303a). NARA authorizes records disposition through two mechanisms: the *General Records Schedules* developed by NARA to schedule records common to most or all Federal agencies, and approval of schedules developed by agencies for records unique to the agency. To request approval, agencies submit to NARA records schedules that describe and propose the disposition (retention period) of each series of records they create or acquire. The authorization process employed by NARA involves records appraisal, i.e., determination of the future research or other value of the records. Most Federal records are appraised as temporary and authorized for disposal at the expiration of the retention period specified in the disposition schedule. A small [percentage] proportion of Federal records is appraised as permanent because they [records] provide significant evidential information about the agency's programs and accomplishments or because they contain information of continuing value for historical or other research. These permanent records are scheduled for transfer to the National Archives after they have served the needs of the creating agency.

E-mail records will have varying retention periods, based on their content, use, purpose, and level of the creating staff member. NARA will appraise the records after they have been placed in an official recordkeeping system and will determine how long they must be retained

October 14, 1993

by the EOP. The appraisal will be done whether the records are being maintained electronically or in hard copy. When e-mail records have been transferred to an official paper recordkeeping system, the [records] documents that remain on the e-mail system may be deleted in accordance with *General Records Schedule 23*, item 2. If e-mail records have not been printed on paper and appropriately maintained, or if they have been copied to an electronic recordkeeping system, they may not be deleted from the on-line e-mail system until a schedule has been approved by NARA authorizing their disposal.

[As the e-mail system may not be appropriate for maintenance of record messages for the length of their retention period, in most cases agencies will copy the message to a recordkeeping system. In that situation, when the same information is stored on more than one medium, agencies must treat both versions as records and schedule the disposition of both copies.]

Integrity of E-Mail Records

Agencies should take adequate measures to protect records in e-mail systems [(36 CFR 1234.26)]. Protective measures should ensure that Federal records are ~~not altered or deleted~~ [only] except in accordance with authorized records schedules. Agencies should regularly back up messages stored on-line to off-line media in order to guard against system failures or inadvertent erasures. Normally, Federal records should not be maintained exclusively on [security] backups.

Training Employees

Because Federal records may be created using an e-mail system, each agency using e-mail must ensure that all employees are familiar with the legal requirements for creation, maintenance, and disposition of Federal records. EOP components must provide training and guidance to employees using e-mail so that messages are accurately categorized.

NARA will provide guidance and assistance to agencies in preparing training for staff members.

Monitoring Implementation of Recordkeeping Guidance for the E-Mail System

EOP components have the responsibility for reviewing the implementation of guidance concerning records to ensure that e-mail users are accurately identifying record messages and

October 14, 1993

following guidance concerning preservation of transmission and receipt data and instructions on maintenance of e-mail records. Monitoring consists of **[reviewing a specified percentage of all messages on a regular basis.]** EOP components should also conducting periodic staff interviews and internal records management evaluations (36 CFR 1220.54) of the e-mail and electronic or paper recordkeeping systems to ensure that proper determinations of record status are being made, that receipts are requested when appropriate, that record messages are being properly maintained, that permanent and temporary messages are being kept separately, and that temporary records are disposed of according to approved schedules, and nonrecord messages are deleted.

Summary of Guidance

In summary, regardless of the medium in which the records are maintained, for EOP components **[to properly manage records created or received on e-mail systems and]** to satisfy statutory and regulatory requirements for records creation, maintenance, and disposition pertaining to e-mail, the components must ensure that:

- Users properly identify messages that are Federal records.
- Record messages are copied or moved to an official recordkeeping system.
- The identities of message originators and all addressees, and the date sent, are retained with the message or in a way that can be associated with the message either in electronic or paper form.
- Receipts or acknowledgements are maintained when they are considered necessary for adequate documentation of the transaction ~~and when the system has this feature.~~
- **[Record]** messages are only deleted in accordance with a schedule approved by NARA. ~~after the record messages have been copied to an electronic or paper recordkeeping system or they are no longer required by the agency.~~
- Nonrecord messages are deleted.
- **[Users have]** access ~~is provided~~ to messages and to associated transmission data and any receipt data determined to be needed for adequate documentation.

EOP components can ensure that the above measures are implemented if they:

October 14, 1993

- Provide guidance and training to all staff concerning determination of record status of e-mail messages.
- Establish policies and procedures concerning maintenance and disposition of e-mail messages that are records, including ensuring that messages are maintained in a system that continues their availability until the expiration of the approved retention period or transfer to the National Archives.
- Advise message originators to request a receipt or acknowledgement for Federal records when receipt information is necessary for complete and accurate documentation of agency activities, ~~when the system has this feature.~~ **[or to use an alternative method for transmitting the document if the e-mail system does not provide receipts.]**
- Monitor staff compliance with the guidance and instructions for identifying and maintaining e-mail records.

E-mail systems provide unprecedented communications convenience for the EOP components. However, the EOP components ~~[must] should take [the necessary measures]~~ **[must] should take [the necessary measures]** precautions to ensure that there is no diminution of ~~[their] the records of an agency~~ resulting from the use of e-mail. E-mail systems in many EOP components have become important tools for the transmission of substantive information; they now are used to create Federal records. Consequently, EOP components must take special care that employees understand their responsibilities when using e-mail to ensure the adequate creation, maintenance, and proper disposition of Federal records.

MEMORANDUM
OF CALL

Previous editions usable

TO:

☒ YOU WERE CALLED BY-- ☐ YOU WERE VISITED BY--

OF (Organization)

☒ PLEASE PHONE ► ☐ TS ☐ AUTOVON

☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

copy of affidavit in Nat'l
Archives case. It hasn't
been rec'd yet.

331-0275 (FAX)

RECEIVED BY

DATE

TIME

attn Henna Rosen

63-110 NSN 7540-00-634-4018

STANDARD FORM 63 (Rev. 8-81)

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FPMR (41 CFR) 101-11.6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

file

SCOTT ARMSTRONG, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	89-0142 (CRR)
EXECUTIVE OFFICE OF THE PRESIDENT,	)	
<u>et al.</u> ,	)	
	)	
Defendants.	)	
_____	)	

DECLARATION OF JOHN PODESTA

I, JOHN PODESTA, declare and state as follows:

1. Since January 20, 1993, I have been Assistant to the President and Staff Secretary in the White House Office of President William J. Clinton. In these positions, I am responsible for overseeing White House personnel with records management responsibilities. I have also participated in the development of Clinton Administration guidance, practices and policy pertaining to the creation and preservation of federal and presidential records in the Executive Office of the President and the National Security Council. I submit this declaration in support of defendants' motion for a stay, pending appeal, of the District Court's order dated May 21, 1993.

2. Prior to arriving at the White House on January 20, 1993, I was familiar with the proceedings in this case, and was aware that on January 6 and 11, 1993, the District Court had entered orders which held the Bush Administration guidance for the maintenance and preservation of electronic records to be arbitrary and capricious. On or about January 21, 1993, I also became aware that on the eve of the termination of the Bush Administration,

President Bush and the former Archivist of the United States, Don Wilson, had entered into an agreement governing the disposition of back-up tapes of Bush Administration electronic materials.

3. I and other members of the White House staff are firmly committed to full implementation of the Federal Records Act and the Presidential Records Act. In order to understand what steps that commitment entailed, I and other members of the staff first had to become familiar with the records management processes of the White House and the various agencies in the Executive Office of the President. We also had to become familiar with the computer systems and networks in the White House and other components of the EOP; to learn what, if any, steps had been taken by the Bush Administration to develop new procedures for the creation and maintenance of electronic information; and to assess what, if any, new computer technologies might be introduced to facilitate internal and external communications by EOP staff.

4. It is our goal to develop a technologically advanced computer system in the Executive Office of the President which will permit a significantly larger amount of electronic material to be permanently stored and segregated, in retrievable form, than has ever been preserved in the past. We would anticipate that with more sophisticated computer technology, the burden of record-keeping for employees could be reduced, and it would become feasible to save a significantly greater range of material documenting the business of government in an electronic format. Moreover, it is our goal to implement new technology which will

automatically make it possible to associate "who knew what when" information with particular e-mail messages.

5. However, given the current state of the technology in the Executive Office of the President, to achieve these goals and develop a computer system which effectively provides for improved record keeping and improves the performance of the work of the Executive Office of the President is not a simple process. For instance, in the EOP the Administration inherited an OASIS "All-in-One" computer system which did not provide for the computerized segregation of federal and presidential records. Moreover, under the OASIS system, "read receipts" could be used to obtain the "who knew what when" information, but if the read receipts are requested on only 10% of the messages, the system will slow to the point where it would be unable to provide a satisfactory level of performance. See Sixth Declaration of James B. Wright, paragraph 9. We also inherited a situation where prior administrations had not implemented any long range plan for developing and implementing a technological capacity to segregate, store, and retrieve e-mail information in a computer system. In short, and as detailed further below and in the accompanying affidavits, given the condition of the current technology in the Executive Office of the President, the development of an enhanced system that will properly achieve the goals of this Administration is a process that requires a careful redesign of the current system, the acquisition of necessary funding, and then the appropriate testing and implementation of an enhanced system. That is not a process that

can be completed in anywhere close to the timeframe contemplated by the district court.

6. Our introduction to EOP computer systems was interrupted, during the first week of the Administration, by the subpoena of all White House Office computer hard disk drives by the special prosecutor investigating possible wrongdoing by Bush Administration officials in connection with a review of then Governor Clinton's passport files. All existing White House Office hard disk drives were removed from individual computer stations, and were replaced by new hard disk drives several days later.

7. During the first three months of the new Administration, White House staff and new employees in the EOP agencies worked diligently to address a wide variety of urgent priorities, including the development of new guidance for EOP staff on federal and presidential records. The White House determined that it would be appropriate to issue comprehensive new guidance that would, among other things, emphasize the importance of records preservation; clarify as much as possible the distinctions between federal and presidential records; clearly state requirements governing the creation, maintenance and preservation of records; and set forth specific new guidelines addressing the creation, maintenance and preservation of electronic systems material.

8. I am aware that since mid-January, all EOP offices and the NSC had been preserving on computer back-up tape all electronic information identified in the District Court's orders as "record" material. In order to implement new procedures to preserve

electronic systems information, however, the White House staff sought to understand not only pending court orders governing electronic systems, but also the technology requirements that would be necessary to accommodate the court's orders and the agencies' recordkeeping needs, and the costs of such technology.

9. With respect to the preservation of electronic systems information, I have been informed by members of the staff of the EOP Office of Administration that a variety of complicated technical issues must be addressed in connection with the implementation of the court's orders. Those issues are addressed in the Declaration of Arnold Shore and the Sixth Declaration of James B. Wright which are also being filed in support of the motion for a stay pending appeal. For instance, the EOP agencies have not yet developed a technological means for segregating electronic presidential records from other material and for connecting information relating to sending, receipt and content of particular e-mail information. The OASIS All-in-One system does not have the capacity to accommodate "read receipt" information for all e-mail messages.

10. As set forth more fully in the declaration of Arnold Shore, the EOP and the Office of Administration are developing new e-mail systems for the EOP component offices. I have sought to ensure that any such new e-mail systems be designed to ensure that presidential and federal records be easily segregated and be able to accommodate and maintain "read receipt" information for particular e-mail messages. I have insisted that in developing

such e-mail systems, or in making plans to connect those systems with external e-mail networks, the fullest consideration be made to the requirements of the Federal Records Act and the Presidential Records Act.

11. Substantial costs are also associated with the establishment of new procedures to preserve electronic systems material, particularly in connection with EOP electronic mail systems. These costs include fiscal expenditures described in Mr. Wright's Sixth Declaration (§7) and the Declaration of William H. Itoh (§10), as well as significant diversion of other resources from ongoing projects as explained in the Declaration of Arnold Shore (§10).

12. Aware of the technological requirements and costs of adapting the various electronic communications systems, the White House initiated a series of meetings with representatives of the White House Counsel's Office; the White House Staff Secretary's Office; the White House Records Management Office; the EOP Office of Administration; the General Counsel of the EOP Office of Administration; the National Security Council Records Management Office; and the Legal Adviser to the National Security Council. These meetings were also regularly attended by Trudy Peterson, the Acting Archivist; other members of the NARA staff; and Justice Department attorneys familiar with the orders of the District Court in this action.

13. In these meetings, it was my goal not only to ensure compliance with the District Court's orders, but also to ensure

that the Clinton Administration provided to staff of the NSC and other EOP components the most comprehensive possible guidance on the creation, disposition and maintenance of federal records. The comprehensive nature of the guidance necessitated an equally comprehensive drafting and review process that lasted several weeks. From personal participation in the meetings, I can confirm the careful effort that was made to review the requirements of the District Court's orders, and to assess the accuracy and clarity of the proposed guidance on a line-by-line -- even word-for-word -- basis. Care was also taken to ensure that guidance for the National Security Council Staff addressed any issues that arose uniquely in the context of that entity. The proposed guidance under review was far more comprehensive than any previous guidance of which I am aware; indeed, the federal and presidential records guidance distributed totaled eighteen single-spaced, typed pages.

14. Because the district court had determined that the guidance issued by the previous administration was invalid, I decided that it was necessary promptly to issue the new guidance to the EOP staff on recordkeeping. The process of preparing federal and presidential records guidance included careful attention to the procedures for preserving electronic material. We agreed that until a long-term solution had been developed, it was important to continue the practice -- already in place -- of preserving all electronic mail ("e-mail") material on back-up tape; and the EOP and NSC guidance on both federal and presidential records was carefully drafted to ensure continuation of this practice. See

Attachment to Defts. Supplemental Exhibits 23 and 24, filed May 12, 1993.

15. The final records guidance for all EOP staff (other than NSC staff) was completed on May 5, 1993 and distributed to all EOP staff beginning May 6. The package distributed including (a) a memorandum from myself and Stephen Neuwirth of the Counsel's Office, concerning presidential records; and (b) a memorandum from David Watkins, Assistant to the President for Management and Administration, and Bruce Overton, General Counsel of the EOP Office of Administration, concerning federal records. To ensure that EOP staff members would carefully review these memoranda, we also took the extraordinary step of attaching a cover memorandum from Thomas F. McLarty, III, White House Chief of Staff, which expressly instructed all personnel in the White House and other offices in the Executive Office of the President to review these memoranda carefully and to comply with the guidance set forth therein. See Defts. Supp. Ex. 23. Similar guidance was issued for NSC staff. See Defts. Supp. Ex. 24.

16. This Administration is considering developing more technologically advanced recordkeeping systems, and would issue additional guidance as we are able to acquire and implement those systems. It is and has been the intent of the Clinton Administration to conduct a comprehensive review of electronic systems management in the Executive Office of the President and to develop policies and practices for the Clinton administration as a whole that will ensure that all electronic systems material is

preserved in usable form. The development of such policies and practices will, of course, need to occur in conjunction with the development of appropriate technical solutions for the various computer systems in the Executive Office of the President agencies, including the new computer systems that the Office of Administration is already considering (see Declaration of Arnold Shore, ¶10.e) to improve the technological and internal and external e-mail capabilities of the White House and other Executive Office of the President components. Upgrading these technological capabilities is a high priority of this administration, and we have created an interagency task force to assess and propose potential advancements in this area.

17. I expect that the Clinton Administration, after it conducts its comprehensive policy and technology review, will be able to dramatically upgrade the quality of its computer systems. We would anticipate that with more sophisticated computer technology, the burden of record keeping for employees will be reduced, and it will become feasible to save a greater range of material documenting the business of government in an electronic format. Moreover, as previously noted, it is our goal to implement new technology which will automatically make it possible to associate "who knew what when" information with particular e-mail messages. However, I do not believe it is possible by June 21 -- the deadline set by the district court -- to develop, in a coherent manner, a comprehensive new system for segregating electronic presidential and federal records; for maintaining "read receipt"

information for e-mail messages; or for connecting the sending, receipt and content information for particular e-mail information. As discussed above, the development of such a system requires the solution to several complicated and expensive technical problems. Existing appropriations to the Executive Office of the President for the current fiscal year are insufficient to support the immediate implementation of a new system for preserving electronic information.

18. I believe that a stay of the District Court's May 21 order is critical, not only because it would not be possible to comply fully with what this court intended in the January 6 and 11 orders by June 21, but also because the May 21 order would require the Executive Office of the President to devote inordinate resources to attempting to comply by that date. This Administration is firmly committed to full compliance with the federal and presidential records statutes. But staff and resources would need to be diverted from other equally important Administration initiatives were the process of developing a new system for preserving electronic information to be subject to a June 21 deadline. Moreover, because individuals in components of the Executive Office of the President not subject to the court's orders -- including the White House -- also use the Office of Administration's OASIS All-in-One communications system, significant down-time of the All-in-One system to implement interim software "fixes" to the system, until comprehensive review of the electronic systems management is complete, will interfere with

White House operations.

I declare under penalty of perjury that the foregoing is true
and correct to the best of my knowledge.

5-28-93
DATE

John I. Podesta
JOHN PODESTA

THE WHITE HOUSE

WASHINGTON

93 JUN 10 P1:16

June 9, 1993

TO: John Podesta ✓
Bruce Overton

FROM: Steve Neuwirth

*file
Hawthorn
case*

Let's discuss the attached at your
earliest convenience.

The Court of Appeals issued an order
today holding our motion for a stay
"in abeyance" until the oral argument
on June 15.



U.S. Department of Justice

Civil Division

EAP:jrb
145-1-2062

Washington, D.C. 20530

Telephone:
(202) 514-4336

June 9, 1993

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Washington, D.C. 20503

Alan J. Kreczko
Legal Adviser
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Old Executive Office Building, Rm. 348
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Re: Armstrong v. Executive Office of the President

Dear Steve & Alan:

This letter is intended to follow-up on prior conversations among yourselves and various attorneys in Federal Programs Branch, during which it has been suggested that it would be helpful to have an overview of the most important pending matters involved in the Armstrong litigation, as well as our recommendations concerning further actions defendants need to be taking to comply with the Court's orders (to the extent they are presently known and can be anticipated). In what follows, we first assess the issues involved in the Court's May 21, 1993 order finding defendants in civil contempt; we then proceed to discussing other "action items" remaining to be resolved in the litigation.

A. Actions To Be Contemplated Within Scope of May 21 Order

As you are aware, in an order dated June 8, 1993, the district court denied defendants' request for a stay of the Court's order of May 21, 1993 -- despite the fact that we told the district court that its order was impossible or unduly burdensome to comply with, and otherwise unsuitably vague with respect to what actions defendants need take to purge the contempt finding. Nevertheless, absent a stay of the Court's Order from an appellate court, we have been ordered to provide the Court with a written status report of the "remedial efforts" taken by defendants by 4 p.m. on June 21,

- 1 -

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: OB DATE: 5/24/18

1993, which, at a minimum, involve actions in the three broad areas the Court outlined in its order:

(a) defendants issuing "new, appropriate and proper guidelines for the management of electronic federal records" to replace guidelines struck down in the January 6 and 11, 1993 orders;

(b) defendants "taking all necessary steps" to preserve the transferred backup tapes, including "all necessary preservation copying and the repair and enhancement of any damaged tapes"; and

(c) defendants "demonstrating . . . that the materials are being stored under conditions that will ensure their preservation and future access."

Certainly with respect to (b), we would expect to emphasize in the report to the Court the actions the Acting Archivist has taken in undertaking all necessary preservation copying of the transferred Reagan and Bush backup tapes. However, with respect to conditions (a) and (c), it is obviously prudent for the defendant agency components of the Executive Office of the President (EOP) to demonstrate having taken substantial action within the 30 day time frame. Notwithstanding our stay request, and irrespective of whether the January 6 and 11 Orders compelled such actions on their own force, we therefore recommend that several further courses of action be pursued.

First, consistent with the intent expressed in the May 5 Watkins/Overton Federal Records Act (FRA) memorandum, all components of EOP should now move forward on training agency staffs with respect to FRA recordkeeping obligations. To this end, we understand that staff in the Office of Administration, working with staff of the National Archives and Records Administration (NARA), have been heading up efforts to begin a round of oral training sessions on the Watkins/Overton recordkeeping guidance. These sessions are scheduled to begin June 10 and 11 for OMB employees, and to continue on June 17 and 18 for all remaining employees of EOP agency components (except for NSC staff). While we understand that the training will have a more general focus than merely electronic recordkeeping issues within the scope of Armstrong, we believe it would be prudent to make sure that appropriate references to Armstrong-related concerns are made. We have made our concerns known to OA and NARA and are working with them on the training agenda. It would also be useful to have your participation and input in these ongoing efforts. Also, NSC has expressed the desire to conduct more individualized training than that contemplated by OA for all other EOP staff. It would be helpful, however, in terms of the litigation, if NSC's recordkeeping training planning take concrete shape prior to June 21.

Second, apart from the training described above, and consistent with the intentions expressed in the May 5 memorandum, it is important that we show that the records management staffs of agency components of EOP are moving forward with a program for the "monitoring" of the implementation of recordkeeping guidance. While the exact parameters of what the Court had in mind in its January 6 Opinion are far from clear, the Court has apparently required that recordkeeping staff institute an ongoing program for reviewing the decisions of EOP staff with respect to e-mail record designations. See January 6 slip op. at 15-18; 810 F. Supp. at 342-43. The Court further stated in its January 6 opinion that "the Archivist and the Defendants must institute immediate provisions for periodic review to ensure the adequacy, effectiveness and efficiency of the recordkeeping program," citing to 44 U.S.C. § 3102, 3105; 36 C.F.R. §§ 1220.54, 1220.10, 1222.20, 1222.32, 1222.50.¹ Whether such a "monitoring" program necessarily includes plaintiffs' expressed desire to have records officers actually sample individual e-mail accounts to test whether records are appropriately being designated is an open question in the litigation; however, we are certainly willing to work with whomever is designated in each agency component to ensure that all policy options are considered, and that "proper and appropriate" guidelines are issued covering this area.

Third, components of EOP need to issue further recordkeeping guidance to staff (even apart from the controversial issue of requiring "read receipts," as discussed infra, n.2).² This would

¹ Prior to the May 21 Order, we took the position that the ongoing retention of backup tapes -- while defendants developed alternative recordkeeping procedures -- mooted out the need for an active program of monitoring on the part of agency staffs. Given the contempt finding, however, defendants continue to act at their peril if they do not make good faith efforts to apply the Court's pronouncements in this area to present practices.

² Our stay papers reflect a divergence of views as to whether "read receipts" are required to be generated as well as preserved in all cases of e-mail constituting federal records. Plaintiffs have now seemingly gone on record against a more expansive interpretation; however, while the district court has stated in its latest opinion that "nowhere has the Court required the Defendants to make any changes to its electronic communications systems," June 8 slip op. at 9, this aspect of the Opinion is difficult to reconcile with the Court's prior orders to the effect that "who knew what when" information must be saved. See January 6 slip op. at 14; 810 F. Supp. at 342. If further clarification is not obtained, components of EOP will be forced to confront the implications of the broader legal position we have taken in our stay papers, and must be prepared to issue appropriate instructions consistent therewith -- even if this means that "read receipt"

constitute a follow-up to the NARA guidance titled "Electronic Communications Systems and Federal Records Within the Executive Office of the President," transmitted by letters to OA and NSC dated May 7, 1993, and in turn sent by OA to all EOP components. As reflected in NARA's cover notes to this guidance, it was NARA's intent to work with EOP components in tailoring more specific guidance aimed at each specific feature of the various "e-mail" communication systems in use within EOP (e.g., calendars, calendar authorizations, "logs" or "indexes" of e-mail notes, user directories, distribution lists, log-on/log-off times, as well as a myriad of special features found on OASIS/All-in-One, as well as the separate systems utilized by OSTP, USTR, and NSC/WHSSS/WHSR).³ Attorneys assigned to the case in Federal Programs have been in contact with various components within EOP regarding the issuance of additional guidance, including at a general meeting held on May 25, 1993 (attended by representatives of all agency components except CEQ). We are actively working with OA and NARA in considering policy options for retaining "record" material on these systems, and would welcome your input into this process.⁴

Fourth, as a corollary to issuing new guidance, and even if not strictly required by any prior order of the Court, we recommend that NSC and OA, as well as any other agency component which has existing recordkeeping guidance, take steps to expressly rescind any portions of manuals or instructions still in effect which are inconsistent with any orders of the Court. This may be done independently of issuing whatever new guidance is appropriate. For example, the Court has struck at least a portion of a 1991 OA Directive as insufficiently vague, on the basis that it informed

requests being generated will overload the OASIS/All-in-One system and/or otherwise unduly burden the staffs of various EOP components, including NSC.

³ By memorandum dated June 2, 1993, from Robert Damus, re "Electronic Mail Systems in OMB," OMB has acted to shut down the two e-mail systems presently in use within subcomponents of OMB, and has directed staff in turn to utilize All-in-One instead.

⁴ We also have been coordinating with NSC and OA on implementing further guidance which has come back from NARA with respect to a variety of computer systems maintained by those components. For example, we understand that NSC either has or is about to issue additional instructions to WHCA, WHSSS, and WHSR, which, among other things, allows for WHCA's resumption of normal backup procedures (including the recycling of post-January 20 backup tapes), for one computer system (the WHCA VAX) which is not used for e-mail communications. Similarly, draft OA guidance exists which will allow for the resumption of normal backup/recycling procedures for the IBM mainframe computer (which also does not involve e-mail).

staff that they have complied with the FRA without the need for additional action (in the form of printing out an e-mail message) if the substance of the e-mail message already has been incorporated into a memorandum. Portions of any outstanding NSC transmittals, as well as other EOP components' guidance should be reviewed for consistency with the Court's prior orders.

Fifth, consistent with (c), supra, all EOP components should take immediate actions to ensure that backup tapes in their custody which are properly included within the scope of the Court's January orders -- including tapes created prior to as well as after January 20, 1993 -- are being preserved in accordance with NARA regulations on the proper handling and storage of electronic records, see 36 C.F.R. § 1234.28(g), (h), and that adequate instructions on the procedures to be followed for the care and handling of those tapes exist. There are a variety of backup tapes within the scope of the litigation in the custody of EOP components (as well as WHCA, which provides services to the NSC), which fall within the scope of the Court's commands, including but not limited to tapes presently in the custody of NSC/WHSSS/WHSR, WHCA, OA, ONDCP, USTR, OMB, and OSTP. Included within these tapes are Bush Administration PROFS tapes created for ONDCP which contain only non-presidential materials, not transferred to the Archivist prior to January 20, 1993. There also exist four National Space Council (NSpC) tapes from the Bush Administration which contain a mix of presidential and non-presidential materials, for which an agreement with the Archivist was never finalized.⁵ Attorneys from Federal Programs informed representatives of EOP components at the May 25 meeting that they should review the storage conditions for all such materials; however, we are certain that staff at NARA could also be enlisted to assist in the effort to ensure that NARA regulations are followed with respect to these tapes, and would suggest that a call from you to NARA is in order to facilitate this process.

Sixth, it may be possible to initiate further actions prior to June 21, with respect to segregating federal record material which has come into existence after January 20, 1993, and which is presently maintained either on-line or in the form of backup tapes. For example, we are informed that, while the PROFS system is no longer utilized within ONDCP as of June 1993, there exist e-mail communications which came into existence between January 20, 1993 and the present, which may still be retrievable "on-line." If that is the case, an opportunity exists for records management staff to

⁵ Pursuant to a phone conversation of January 28, 1993 among transition team member Roslyn Mazer, NSpC lawyer Gerald Mussara, and Jason Baron of Federal Programs, Ms. Mazer requested that ongoing efforts to finalize an agreement regarding the NSpC tapes (between NARA and NSpC) be halted until White House Counsel's office further consider what actions to take with respect to these separate tapes.

segregate out from these materials whatever federal records exist (with their corresponding transmission data), for placement in official agency files. Similar opportunities to "make a record" may exist for other e-mail systems within EOP. The more difficult matter of taking action to segregate federal records on the post-January 20 backup tapes should also be considered, at least on a preliminary basis.

B. Additional Specific Actions Required

In addition to the above actions, serious consideration should be given to going forward with segregating presidential and federal materials accounts on the OASIS/All-in-One system. Consistent with the statements made in the Sixth Wright Declaration, ¶ 7, filed with defendants' stay papers on May 28, 1993, we understand that such a reconfiguration is a condition precedent to defendants' making further technological "fixes" to implement the Court's prior Orders for the OASIS/All-in-One system. We also understand that this matter has been under discussion with the Office of Administration since January. Jim Wright states that such a reconfiguration will cost \$50,000 in new hardware, and has previously stated (in his Third Wright Declaration, dated Dec. 4, 1992, ¶ 6), that it would take two paid consultants working full time for three weeks to implement on a prospective basis. This commitment to segregation of the "live" system would in turn ensure the creation of separate sets of backup tapes which contain solely presidential and solely federal materials, respectively. Given that we understand there to be over 12,000 backup tapes from the OASIS/All-in-One system which have been created since January 20, 1993, and which are not so segregated, and given the serious possibility that defendants will be ordered to proceed forthwith in committing the fiscal resources to segregating information off these tapes (at an undetermined but huge cost), it would seem fiscally and otherwise prudent to now take steps to prospectively reconfigure the OASIS system as soon as possible.

Our office also needs assurances from you that there are no new components of the EOP which create federal records, and no new electronic communications systems which have been put into place since January 20, which potentially contain federal record materials within the scope of the Armstrong orders.⁶ In this

⁶ For example, we were informed during the past week that the "Internet" electronic communications system is being used by staff of OSTP and possibly other EOP agency components, in a manner which potentially generates federal records within the scope of the Court's injunction. OSTP has drafted proposed interim guidance addressing saving Internet communications which are federal records, which is expected to be issued imminently. Other components, however, may need to issue additional guidance with respect to Internet as well, depending on their utilization of the

connection, we need to discuss further the matter of NSC staff working on the newly created National Economic Council (NEC) -- the latter of which we understand is considered a component which solely advises and assists the President -- in light of the fact that we have been led to understand that at least some "dual" NSC/NEC staff members use the NSC's existing A-1 communications system in furtherance of work performed for the NEC. We further need to be kept informed of all changes within the EOP structure with implications regarding the creation of federal records. Additionally, if any local area networks or intra-EOP communications systems of various types are on the drawing board, which involve tie-ins between White House Office and EOP agency personnel, we need to be kept apprised. It may also be prudent to keep us apprised of the activities of the Computer Task Force, especially regarding recommendations for changes in electronic communications software or hardware which affect EOP agency components.

Finally, we should be kept informed of any plans to eliminate or physically remove any existing computer hardware system which has the present capability of reading the Reagan PROFS tapes subject to plaintiffs' pending FOIA request (as generally discussed below). We wrote to WHCA on May 14, 1993 apprising them of our concerns in this regard; however, NSC/WHSSS staff as well as OA also need to be vigilant in ensuring that, should the Court rule adversely to defendants' position on the FOIA portion of this case, defendant components of EOP have the capability of immediately beginning a search pursuant to Court order -- notwithstanding the fact that NARA is the current custodian of these tapes.

C. Issues Remaining To Be Litigated

The Court has yet to rule on a number of pending motions in this case, including defendants' main motion for summary judgment on plaintiffs' amended FOIA request, filed July 2, 1992, as well as defendant NSC's secondary motion for partial summary judgment on the printed PROFS notes (filed March 1993). In the 1992 motion, the government argued that plaintiffs' amended request for materials from the Reagan PROFS tapes was unreasonable under the FOIA, 5 U.S.C. § 552(b)(3), both as a matter of law, as well as due to the unreasonable burden it imposed on the staffs of WHCA, NSC and OA. Among other things, defendants made a threshold argument in these papers that, on the assumption that no federal record materials were involved,⁷ the PROFS backup tapes could not be said to be either agency "files" or an agency "database" for which a reasonable search could ever be conducted. Our further argument on the burden to staff was based on estimates of a need to spend 120

Internet system.

⁷ But cf. Court's Opinion of January 6, 1993, holding to the contrary.

days of computer personnel time to print out approximately 220,000 pages of printed materials, which in turn would take some 26 staff years to sort through for the purpose of classification and release. We have informed the Court that defendants desire it to hold in abeyance further consideration of the FOIA issues related to the PROFS backup tapes, until resolution of the pending appeal on the Federal Records Act issues (but that the Court should proceed to decide the "garden variety" FOIA classification issues involved in the separate motion by defendant NSC on the printed PROFS materials); plaintiffs, however, have urged the Court to proceed immediately in ruling on defendants' 1992 motion.

Plaintiffs recently filed a supplemental statement with the Court, arguing (based on documents obtained in discovery) that a search of NSC PROFS backup tapes in December 1992, conducted pursuant to a subpoena from former Secretary Weinberger, constitutes rebuttal evidence to our arguments on the burden imposed by plaintiffs' amended request. While we have a thorough response to plaintiffs' filing, it would be useful to have your overall views on this aspect of this suit before we go forward with filing a response. Our draft memorandum along with prior relevant filings are attached for your review and comment.

On other matters, we are continuing to await the Court's ruling on plaintiffs' motion for release of documents withheld on deliberative process grounds, as well as for the Court's ruling on plaintiffs' motion to compel a Vaughn index on those remaining printed PROFS notes currently in circulation from NSC to other agencies for a security classification review.⁸ We would also anticipate litigating the need for appointment of a special master to enforce the Court's orders, as well as in connection with any further action the Court wishes to take on the matter of criminal contempt.

D. Settlement

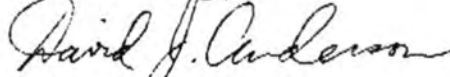
As I believe you are both aware, plaintiffs made various settlement overtures in 1992, which were discussed in-house and ultimately went nowhere. We understand that the Acting Archivist is interested in pursuing settlement, and that various plaintiffs (outside the presence of their counsel) recently have approached one of you as well as other government officials in the interest of exploring settlement further. Once the dust settles after the

⁸ On a separate matter, we previously have reminded NSC (by letter of May 11, 1993) that they may wish to revisit the issues raised in plaintiffs' letter of March 31, 1993, concerning plaintiffs' demand that defendants immediately release certain information which has been redacted from various logs pertaining to the scope of the December 1992 Weinberger search of the PROFS backup tapes conducted pursuant to subpoena.

current spate of briefing and the argument of the pending appeal, we should explore whether these overtures are serious and whether defendants can live with the kind of out-of-court resolution of this matter that plaintiffs would demand.

Notwithstanding the length of this letter, we do not pretend that the above-mentioned items constitute an exhaustive list of the concerns which may yet arise, based on further actions of the plaintiffs and the Court. In any event, we welcome the chance to work with both of you further on these and all remaining issues in this difficult and complex lawsuit.

Sincerely,



David J. Anderson

Enclosures



U.S. Department of Justice

file

Armstrong v.
EOPTo →
John Podesta

Washington, D.C. 20530



CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER STREET

DATE:

5/21/93

TO:

Steve Neuwirth

FAX NUMBER:

456-1647

FROM:

JRWan

FAX NUMBER(S) ROOM 1000

COMMERCIAL: 202-616-8470

CONFIRMATION NO.: 202-616-8474

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will be fixed later

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAY 21 1993

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIASCOTT ARMSTRONG, et al.,

Plaintiffs,

v.

EXECUTIVE OFFICE OF THE
PRESIDENT, et al.,

Defendants.

Civil Action No. 89-142 (CRR)

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGEAppearances

Plaintiffs: Michael E. Tankersley, Public Citizen Litigation Group, with David C. Vladeck, Public Citizen Litigation Group, Washington, D.C. were on the briefs.

Defendants: David J. Anderson, Attorney, United States Department of Justice, Civil Division, Washington, D.C., with whom Stuart E. Schiffer, Acting Assistant Attorney General; J. Ramsey Johnson, United States Attorney for the District of Columbia; and Elizabeth A. Pugh, Jason R. Baron, Anthony J. Coppolino, Peter D. Coffman, and Pamela A. Moreau, Attorneys, United States Department of Justice, Civil Division, Washington, D.C. were on the briefs.

I. INTRODUCTION

Before the Court are the Defendants' and the Plaintiffs' responses to this Court's Order of April 6, 1993, where this Court ordered the Defendants to show cause as to whether they should be held in civil contempt for their failure to comply with this Court's Orders of January 6 and 11, 1993. The Court held a hearing on this matter on May 17, 1993.

After careful consideration of the parties' submissions, the arguments of counsel, the record in the case and the underlying

law, the Court finds that the Defendants are in contempt of this Court's Orders of January 6 and 11, 1993, because they have failed to promulgate new, appropriate, and proper guidelines for the preservation of electronic federal records under the Federal Records Act and because the Defendants have damaged some of the backup tapes which store the electronic federal records that this Court has ordered to be preserved. The following shall constitute this Court's findings of fact and conclusions of law.

II. BACKGROUND

The Plaintiffs brought this suit alleging that the Executive Office of the President ("EOP"), the National Security Council ("NSC"), and the Archivist of the United States,¹ inter alia, were violating the Federal Records Act ("FRA"), 44 U.S.C. §§ 2101-2118, 2901-2910, 3101-3107, and 3301-3324, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 et seq. More specifically, the Plaintiffs alleged that the recordkeeping practices of the Defendant federal agencies violated the FRA and were arbitrary and capricious under the APA. Furthermore, the Plaintiffs alleged that the Archivist of the United States failed to fulfill his statutory duties under the FRA.²

¹ The Archivist is head of the National Archives and Records Administration ("NARA"), 44 U.S.C. § 2102.

² The Plaintiffs also alleged in Count I of their Complaint that they are entitled to certain information stored on computer tapes under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Court has not yet addressed this FOIA claim.

On January 6 and 11, 1993,³ this Court granted the Plaintiff Summary Judgment as to Counts II and III of their Third Amended Complaint and held, inter alia, that the guidelines issued by and at the direction of the Defendant Agencies were arbitrary and capricious and contrary to law because, inter alia, they permitted the destruction of records contrary to the FRA. In its January 6 and 11, 1993 Orders, the Court granted the Plaintiffs declaratory and injunctive relief and required the Defendants to take all necessary steps to preserve, without erasure, all electronic federal records generated by the Defendant Agencies pursuant to the Orders of this Court, and the stipulations and representations of the parties. Armstrong v. Executive Office of the President, 810 F. Supp. 335 (D.D.C. 1993).

The question before the Court is whether the Defendants have taken appropriate and proper action to comply with the Orders of this Court. The Court finds that the Defendants have failed to promulgate new guidelines under the FRA to replace those struck down over four months ago by this Court. Furthermore, the Court finds that the Defendants have damaged the backup tapes which stores electronic federal records that this Court has ordered to be preserved for the duration of this lawsuit. Thus, the Defendants have violated the spirit and letter of this Court's Orders pursuant to the FRA and the APA that require them to preserve the valuable

³ The Court issued its original Opinion and Order on January 6, 1993. On January 11, it granted the Plaintiffs' motion to amend the January 6, 1993 Order to clarify the scope of the Defendants' responsibilities.

historical information that is stored on these backup tapes.

III. THIS COURT HAS JURISDICTION IN THIS CASE TO ISSUE AN ORDER OF CONTEMPT TO ENFORCE ITS ORDERS.

It is an established principle of law that once a court issues an injunction, those persons subject to it must obey the terms of the Order as long as the injunction remains in effect. See SEC v. Diversified Growth Corp., 595 F. Supp. 1159, 1170 (D.D.C. 1984) (it is within the court's civil contempt power to coerce obedience to a lawful Order). A court has the inherent power to enforce compliance of an injunction through civil contempt. Spallone v. United States, 493 U.S. 265, 276 (1990); Shillitani v. United States, 384 U.S. 364, 370 (1966). Where an injunction imposes a "duty to obey specified provisions of [a] statute," failure to abide by the injunction constitutes contempt. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191-92 (1949).

Civil contempt is a remedial sanction used to obtain compliance with a Court Order or to compensate for damage sustained as a result of noncompliance. NLRB v. Blevins Popcorn, Co., 659 F.2d 1173, 1184 (D.C. Cir. 1981). A civil contempt proceeding is a three stage process: 1) a court must issue an Order directing a party to take or not take certain action; 2) following disobedience of that Order, the court must issue a conditional Order finding the recalcitrant party in contempt and threatening to impose a specified penalty unless the recalcitrant party complies with prescribed conditions set forth in a "purgation Order;" and 3) execution of the threatened penalty if the conditions are not

fulfilled. NLRB v. Blevins Popcorn, Co., 659 F.2d 1173 (D.C. Cir. 1981). In a proceeding for civil contempt, the moving party has the burden of proving by clear and convincing evidence that the alleged contemtor has violated the court's Order. Id. at 1183.

In requesting an Order of contempt, the Plaintiffs have made several specific allegations regarding the Defendants' violations of this Court's Orders. The Court shall address each of these allegations separately.

IV. THE DEFENDANTS ARE IN CIVIL CONTEMPT FOR FAILING TO PROMULGATE NEW REGULATIONS FOR THE PRESERVATION OF ELECTRONIC FEDERAL RECORDS.

The Plaintiffs allege that the Defendants have not implemented proper procedures to identify and preserve electronic federal records on their electronic communications systems. The Court agrees with the Plaintiffs and finds that the Defendants have failed to comply with this Court's Orders. More specifically, the Court finds that the Defendants have not substantially complied with this Court's Orders because they have failed to issue appropriate and proper new guidelines for the preservation of electronic federal records to replace those struck down by this Court.

A. THE COURT'S OPINIONS AND ORDERS IN THIS CASE, AS WELL AS THE DEFENDANTS' OWN CORRESPONDENCE, CLEARLY SHOW THAT THE DEFENDANTS ARE REQUIRED TO PROMULGATE NEW GUIDELINES FOR THE PRESERVATION OF ELECTRONIC FEDERAL RECORDS.

The Defendants have been on notice since the beginning of this lawsuit in 1989, some four years ago, that they might be obligated

to preserve materials on their electronic communications systems pursuant to the FRA, and have been aware since then that they might be required to develop new and proper regulations in that regard. In addition, on January 6 and 11, 1993, this Court specifically held 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.

Armstrong v. Executive Office of the President, 810 F. Supp. 335, 350 (D.D.C. 1993). By striking down the Defendants' guidelines as inadequate and ordering the preservation of all electronic records, the Court has made it clear that the Defendants are required, under the FRA, to promulgate appropriate and proper new guidelines.

Moreover, the Defendants requested a stay of this Court's Orders pending appeal, which was denied. Armstrong v. Executive Office of the President, No. 89-142, slip op. (D.D.C. January 14, 1993) (Order denying the Defendants' Motion for a stay Pending Appeal). Therefore, the Defendants are still bound by this Court's Orders of January 6 and 11, 1993. In denying the Motion for a Stay, this Court was careful to point out that the Defendants must not delete materials on their electronic communication systems "until the Archivist and the Defendant agencies develop proper guidelines so as to comply with the law." Id. slip op. at 3.

Furthermore, Chief Judge Mikva and Judges Sentelle and Williams of the United States Court of Appeals for the District of

Columbia also refused to stay this Court's Orders pending appeal.⁴ Therefore, under these circumstances, the Court concludes that its Orders were specific enough to "'create a predicate for contempt,'" NAACP, Jefferson County Branch v. Brock, 619 F. Supp. 846, 849 (D.D.C. 1985) (quoting Aero Corp. v. Department of the Navy, 558 F. Supp. 404, 418 (D.D.C. 1983)), because the terms of the Orders clearly spelled out what actions the Defendants were enjoined from taking and what actions the Defendants were required to take. See id.

In addition, the Defendants' own correspondence and submissions to this Court confirm that they are aware of their responsibility to promulgate new guidelines. For example, James W. Moore, the Assistant Archivist for Records Administration, wrote that:

[t]he Court's orders in the Armstrong case contemplate that, while interim guidance on electronic records is in place, components of the Executive Office of the President will work with the National Archives and Records Administration to develop further guidance in

⁴ The Court of Appeals granted the Defendants' Motion for a stay pending appeal only: insofar as [the district court's orders] enjoin[] defendants from 'removing, deleting, or altering information on their electronic communications systems.' Amended Order at 1-2. Defendants may remove, delete, or alter such information as they see fit, so long as the information is preserved in identical form, pending the disposition of this appeal.

Armstrong v. Bush, No. 93-5002, slip op. at 1 (D.C. Cir. Jan. 15, 1993) (order granting in part and denying in part the defendant appellants' emergency motion for stay pending appeal).

Thus, the Court of Appeals has left undisturbed this Court's finding that the Defendants' recordkeeping guidelines are arbitrary and capricious and the accompanying mandate that the Defendants promulgate appropriate and proper guidelines for the preservation of electronic federal records.

conformance with the requirements of the court's order.

Letter from James W. Moore, dated May 7, 1993, Exhibit 22A, Defendants' Supplemental Exhibits, filed on May 12, 1993.

However, the Defendants claim that they had in place the means to comply with this Court's Orders before the Orders were issued because they had been saving onto backup tapes all electronic communications that might contain federal records. The Defendants claim that by preserving all the electronic communications material on tape, they are preserving the status quo in this action along with all of the Plaintiffs' rights to this material and thus satisfying this Court's Orders. However, such a claim is misplaced. It ignores the fact that the Defendants are required by this Court's Orders to promulgate new guidelines for the preservation of electronic computer records.

B. THE RECORDKEEPING INSTRUCTIONS ISSUED BY THE DEFENDANTS DO NOT FULFILL THE REQUIREMENTS OF THIS COURT'S ORDER.

Once a predicate for contempt has been established, a court must consider whether a party can be held in civil contempt in light of the evidence before it and any mitigating factors. NAACP, Jefferson County Branch v. Brock, 619 F. Supp. 846, 849 (D.D.C. 1985). A violation need not be willful or intentional because the intent of the party is irrelevant in a civil contempt proceeding. NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1184 (D.C. Cir. 1981). This Circuit has considered good faith compliance efforts or a party's inability to comply with a court's Orders as defenses which call for mitigation of contempt sanctions. See NAACP, Jefferson

County Branch v. Brock, 619 F. Supp. 846 (D.D.C. 1985).

The Defendants contend they have demonstrated "substantial compliance with the orders of this Court" by promulgating some new instructions regarding the management and preservation of electronic federal records. Defendants' Proposed Findings of Fact and Conclusions of Law, filed May 12, 1993, at 27-28, 35. They also contend that they are not in contempt because "no clear deadlines were imposed by the Court for compliance." Defendants' Memorandum in Opposition to the Plaintiffs' Motions, filed April 19, 1993, at 59.

The Court does not agree. The three new sets of instructions to which the Defendants refer do not support their claim that they have "substantially" complied with this Court's Orders. None of these instructions were issued to the staff at the Defendant agencies.⁵ Moreover, the Court is particularly skeptical of the Defendants' efforts to comply because the three sets of recordkeeping instructions referred to were all issued by the Defendants after the Plaintiffs requested that the Defendants be

⁵ The three sets of instructions that the Defendants rely on are memoranda between the NARA and the EOP or NSC. The cover letter from the NARA accompanying two of these instructions explicitly states that "[t]he attached guidance is not intended for direct circulation to EOP staff but, rather, is being provided to you in anticipation that we will work with you to develop more specific staff guidelines on electronic communications for each EOP component." Letters from James W. Moore, Assistant Archivist, Exhibit 22A and 22B, Defendants' Supplemental Exhibits in Opposition, filed on May 12, 1993.

held in contempt.⁶ See Glover v. Johnson, 934 F.2d 703, 708 (6th Cir. 1991).⁷

In addition, the Defendants themselves admit that they have failed to issue new guidelines to replace those guidelines struck down by this Court. See Letter from James W. Moore, dated May 7, 1993, Exhibit 22A of the Defendants' Supplemental Exhibits, filed on May 12, 1993.⁸ In fact, the record before this Court shows that only one set of new instructions were provided to EOP and NSC staff. However, these "new guidelines" consist of less than one page of text. The guidelines provided to the EOP and NSC staff state simply that:

Records generated electronically must be incorporated into an official recordkeeping system. Thus no word processing or e-mail document that is a federal record should be deleted unless it has been (a) printed and placed in an appropriate file, or (b) preserved in an appropriate electronic system.

Plaintiffs' Show Cause Motion, Exhibit 64. The guidelines go on to state that:

⁶ The Plaintiffs filed their Motion for an Order to Show Cause as to whether the Defendants should not be held in contempt on April 1, 1993. The instructions referred to by the Defendants were issued on April 12, May 7, and May 12, 1993. Defendants' Proposed Findings of Fact and Conclusions of Law, filed May 12, 1993, at 27-28, 35.

⁷ The Court in Glover found that the facts did not support the defendants' contention that they had diligently tried to comply with the Court's orders. The Court noted that the defendants' actions in complying "displayed an evident sense of nonurgency bordering on indifference, contrasting vividly with the spurt of activity on the heels of the plaintiffs' motion for a finding of contempt." Glover, 934 F.2d at 708.

⁸ The Defendants also admitted at the hearing that they had not put together a new set of guidelines and procedures to replace those struck down by this Court.

Pursuant to [court] orders, and until further instructions from the Counsel's office, the following special rules should be observed by components of the EOP that generate federal records:

1. Material may not be deleted from any e-mail file unless (a) the material has been retained in full on a back-up tape or other comparable medium, and (b) the retained version includes full text and all available transmittal information; and
2. EOP staff member with records management responsibility must monitor the implementation of guidance on federal records (including the status of records) to ensure consistent application of the court's order.

Id. The Plaintiffs argue, and the Court agrees, that this guidance falls short of what is required by this Court's Orders.

Pursuant to Orders and stipulations in this case, the Defendants have been storing information from their electronic communications systems onto backup tapes for some time. The backup tapes are designed to preserve the information from the electronic communication systems and to ensure that any federal records on these systems are preserved pending the resolution of this lawsuit. Similarly, the interim guidance issued on May 7 and 8, 1993 to EOP and NSC staff ensures that all the information created on the electronic communication systems at the Defendant agencies will also be preserved on backup tapes.

However, the interim guidance does not fully comply with the statutory command of the FRA and the Orders of the Court. This interim guidance makes no effort to separate federal records from other material or to integrate the Defendants' electronic recordkeeping systems and their recordkeeping guidance. Thus, this interim guidance is incomplete and does not absolve the Defendants of their responsibility to promulgate appropriate and proper

guidelines to replace those struck down by this Court.⁹

Therefore, the undisputed evidence before this Court shows that, despite the passage of over four months time since this Court's Orders, the Defendants still have not put together appropriate and proper new guidelines for their staff designed to preserve electronic federal records. See 44 U.S.C. §§ 3102, 3105, 2904. In light of these circumstances, it cannot be said that the Defendants have taken "all reasonable steps within their power to insure compliance' with the Court's Orders." Stone v. City and County of San Francisco, 968 F.d 850, 856 (9th Cir. 1992); see Peppers v. Barry, 873 F.2d 967, 969 (6th Cir. 1989); Glover v. Johnson, 934 F.2d 703, 708 (6th Cir. 1991) (upholding a finding of contempt where the defendants "neglected to marshall their own resources, assert their high authority, and demand the results

⁹ In addition, the first part of these interim instructions does not, by its plain language, comport with this Court's Orders. The first part of these instructions provides that a federal record should not be deleted unless it has been printed out or preserved on an appropriate electronic system. However, as this Court's January 6, 1993 Opinion and Order made clear, instructing staff to print out electronic federal records in paper form does not satisfy the requirements of the FRA because often the paper copy does not contain all the information contained in these electronic records. Armstrong v. Executive Office of the President, 810 F. Supp. 335, 841-42 (D.D.C. 1993). In other words, the paper copies do not show who knew what and when they knew it. Id.

The second part of these instructions, which provides that material may not be deleted from the electronic communication system unless it has been retained in full elsewhere and the retained version includes all transmittal information is consistent with this Court's Orders and the partial stay granted by our Court of Appeals because it ensures that any electronic federal record, and all the information contained therein, will be preserved. While the second part of these instructions are not contrary to this Court's Orders, they do not fulfill the Defendants' obligation to promulgate new appropriate and proper guidelines to replace those struck down by this Court.

needed from subordinate persons and agencies in order to effectuate the course of action required.")

Therefore, the Court finds that the Plaintiffs have proved by clear and convincing evidence that the Defendants are in civil contempt for their failure to promulgate new appropriate and proper regulation for the preservation of electronic federal records. The Court shall order the Defendant agencies to promulgate new guidelines by June 21, 1993 or they shall be subject to sanctions.

The Court is very concerned with respect to the delay in complying with its Orders, and is considering the possibility of appointing a Special Master, pursuant to Federal Rule of Civil Procedure 53, to oversee the task of developing new and proper regulations to carry out not only this Court's Orders but for the purposes of complying with the FRA in order that the valuable lessons of our recent history will not be lost.

- V. THE MERE FACT THAT THE DEFENDANTS TRANSFERRED THE BACKUP TAPES TO THE ARCHIVIST DOES NOT CONSTITUTE CONTEMPT OF THIS COURT'S ORDERS. HOWEVER, THE DEFENDANTS ARE IN CONTEMPT OF THIS COURT'S ORDERS BECAUSE THE TRANSFER HAS ADVERSELY AFFECTED THE CONDITION OF THE TAPES AND THE FEDERAL RECORD INFORMATION STORED ON THEM.

Throughout this lawsuit, the backup tapes that have been created by the Defendant agencies have also been stored by the individual Defendant agencies who created the tapes. On January 19, 1993, the Defendant agencies transferred approximately 5,839 of these backup tapes to the Archivist.¹⁰ See Archives General Plan

¹⁰ This transfer occurred from 10:30 p.m. on January 19, 1993 until 5 p.m. the next day.

for Preservation at 2, Defendants' Exhibit 19A, filed April 19, 1993. The Court finds that the transfer has damaged some of the backup tapes and has impaired the Defendants' ability to preserve the information on these tapes. Therefore, the Court finds that the Defendants are in contempt because they have violated this Court's Orders that require these backup tapes to be preserved.

The Court notes that the Plaintiffs are historians seeking to preserve the documentary history of the United States. It has already been shown that backup tapes in this lawsuit contain valuable historical information. In addition to previously being used during the Iran-Contra investigations, these tapes have just recently been subpoenaed by Independent counsel Joseph E. diGenova for his investigation of a preelection search of State Department documents for information on President Clinton. Exhibit 9, Defendants' Exhibits in Opposition, filed April 19, 1993. Therefore, it is clear that by failing to preserve these tapes, the Defendants are failing to preserve history and the lessons to be learned from it.

- A. THERE IS NO LEGAL PROHIBITION PREVENTING THE TRANSFER OF THESE BACKUP TAPES TO THE ARCHIVIST AS LONG AS THE TRANSFER DOES NOT DAMAGE THE FEDERAL RECORD MATERIAL ON THESE TAPES AND ADVERSELY AFFECT THE PLAINTIFFS' RIGHTS.

These backup tapes were transferred to the Archivist pursuant to an agreement between the Archivist, President Bush, the NSC, and the EOP's Office of Administration ("the Agreement"). Defendants' Proposed Findings of Fact and conclusions of Law, filed May 12, 1993, at 13-14. The Agreement provides that former President Bush

retains exclusive "legal control" over all presidential information on the backup tapes transferred to the Archivist. Memorandum of Agreement at 2, Plaintiffs' Exhibit 24, filed April 1, 1993. The Agreement also provides that the Archivist segregate all presidential from non-presidential information on the tapes before providing another party access to any non-presidential information contained on the tapes. Id.

The Defendants maintain that the transfer conducted pursuant to the Agreement is consistent with former President Bush's legal right to exclusive legal custody of any presidential records stored on these tapes.¹¹ The Plaintiffs complain that the transfer to the Archivist is a contempt of this Court's Orders because it illegally limits access to the tapes in the Archivist's possession.

Unfortunately, our Court of Appeals has held that there is no judicial review of the Presidential Records Act ("PRA"), 44 U.S.C. §§ 2201 et seq. See Armstrong v. Bush, 924 F.2d 282, 288-89 (D.C. Cir. 1991). Therefore, the Court has no authority to address the fate of records created pursuant to that statute or any arrangements made for the maintenance or custody of such

¹¹ The Court notes that the Agreement defines "presidential materials" as:

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 advisors and assistant to the President.

Id. at 5. This definition is consistent with that of a presidential record under the Presidential Records Act, 44 U.S.C. §§ 2201 et seq.

presidential records. If the transferred tapes at issue here contained only presidential records, this Court might have no jurisdiction to address the legality of this transfer.

However, it is undisputed that these tapes contain both presidential and federal records. Defendants' Findings of Fact and Conclusions of Law, filed May 12, 1993, at 13. Furthermore, these tapes were created, and continue to be created, in order to save electronic federal records pursuant to the Orders of this Court and the Stipulations entered into by the parties. Thus, under this set of circumstances, there is no legal prohibition preventing this transfer of tapes to preserve President Bush's rights to presidential material so long as the transfer does not damage the federal record material on these tapes and adversely affect the Plaintiffs' rights. Of course, notwithstanding any agreements by the Archivist with former President Bush, the tapes preserved as a result of this lawsuit should not be transferred to the custody of a third party who is not subject to this suit until such time as the FRA claims in this lawsuit are resolved and the pending investigation of the Independent counsel has been completed. In addition, such an agreement also does not provide a defense to undue delay in segregating federal and presidential materials on these tapes or further delaying the resolution of this already protracted lawsuit.¹²

¹² In their oral argument before this Court, the Plaintiffs argued that this transfer violates stipulations in this case in which the parties agreed that certain backup tapes would be preserved by the Defendant agencies. See Plaintiffs' Exhibit 36, 37. However, the Court is not persuaded that any of the prior

B. THE COURT FINDS THE DEFENDANTS IN CONTEMPT BECAUSE THE TRANSFER OF THE TAPES TO THE ARCHIVIST HAS JEOPARDIZED THE FEDERAL RECORD MATERIAL CONTAINED THEREIN.

While the transfer, per se, does not run afoul of this Court's Orders, the Court finds the Defendants in contempt of this Court's Orders because the method of transferring of these tapes has adversely affected the condition of the tapes and the information stored on them. As such, the Defendants' actions are contrary to this Court's Orders to preserve the tapes and federal records contained on them.

1. This Court's Orders clearly required the Defendants to preserve the electronic federal record material that is stored on the backup tapes in the custody of the Archivist.

This Court's Orders clearly required the Defendants to "preserve, without erasure, all electronic federal records generated at the defendant agencies" and "to prevent the destruction of federal records, including those records saved on backup tapes." Armstrong v. Executive Office of the President, No.

stipulations of this Court prohibit this transfer. These orders and stipulations were designed to preserve electronic federal records on backup tapes pending a decision by this Court on the Plaintiffs' FRA claim in this case. In its Opinion and Orders of January 6 and 11, 1993, the Court acted to preserve these electronic federal records by ordering the Archivist to take appropriate action. Armstrong v. Executive Office of the President, 810 F. Supp. 335, 348 (D.D.C. 1993). As the Court noted in its earlier decision, there is no implied right of action under the FRA and it is not this Court's place to instruct the Defendants on exactly how to comply with the FRA. Id. Therefore, as long as the Defendants are acting to ensure the preservation of the electronic federal records on these tapes, the Court will not proscribe exactly how the Defendants must achieve this objective.

89-142, Amended Order at 1-2 (D.D.C. January 11, 1993).

However, at the same time that the Defendants contend that they are complying with this Court's Orders by producing such backup tapes, they are also acting in a way to jeopardize the information on those tapes.

2. The record shows that as many as 300 of these tapes must be copied immediately in order to ensure their preservation but that the Defendants have no immediate plans to copy them.

The medium on which these tapes are recorded is very sensitive and certain measures must be taken to safeguard that information on the tapes is preserved. See 36 C.F.R. § 1228.188(a) ("Computer magnetic tape is a fragile medium, highly susceptible to the generation of error by improper care and handling."). For example, the average life span of one of these tapes is ten years and, therefore, care must be taken to copy tapes before they become too old. The record here shows that as many as 300 tapes may require immediate copying because they have either exceeded their life span or there are other indications that they have deteriorated. Deposition of Kenneth Thibodeau at 88:5-89:1, Plaintiffs' Reply, Exhibit 59, filed May 12, 1993. However, the Archivist has taken no action to begin such preservation copying nor is there any immediate plan to do so. Id. at 52:5-53:15.¹³

3. The record shows that a number of

¹³ It is also uncontroverted that the Defendants transferred such tapes from the agencies, that had the means to copy these tapes, to the Archivist, who currently does not have the capacity to do so.

19

these tapes have been physically damaged but the Defendants have no immediate plans to repair these tapes.

The record before the Court shows that a number of these tapes were physically damaged in the process of being moved to the Archives.¹⁴ Id. at 43:9-44:8. While the Defendants contend that these tapes can be repaired, they have not yet attempted to do so. Id. at 52:5-53:15. Furthermore, at the hearing before this Court, the Defendants admitted that they would not know if it is possible to fully repair the tapes until they try to repair them. In addition, it is unclear whether such damage may become worse over time. Id. at 122. Therefore, the Court cannot rely on the Defendants' representations as to the well-being of the tapes, especially given the sensitive nature of the medium.

4. The Preservation Plan approved by the Archivist is inadequate because it does not call for any immediate action to preserve these backup tapes.

The Court does acknowledge that the Archivist has finally announced a "plan" to ensure preservation of these tapes and their contents (over three months after being Ordered to do so). Preservation Plan, Exhibit 19A, Defendants' Exhibits in Opposition, filed April 19, 1993. The Preservation Plan provides, inter alia,

¹⁴ At the hearing before the court, the Defendants contended that these tapes may have been damaged before the transfer and that the damage was only discovered when the tapes were moved. Even assuming that this is true, the fact remains that many of these tapes have been damaged and that the Defendants have an obligation to ensure that they are repaired before the federal record information stored on them is lost.

for the proper storage of these tapes, preservation copying, and maintenance. Id. The Acting Archivist approved the Plan on April 16, 1993. Deposition of Kenneth Thibodeau at 2, Defendants' Exhibits in Opposition, filed April 19, 1993. However, the Court concludes that the so-called Preservation Plan does not constitute substantial compliance with this Court's Orders. The Court notes that it has taken the better part of three months to come up with a detailed "plan" to preserve these tapes.¹⁵ More importantly, the Defendants acknowledge that no action has been taken to preserve these tapes under this Plan and that the matter of funding for the Plan has not yet been resolved. Deposition of Kenneth Thibodeau at 24:22-25:22, Plaintiffs' Reply, Exhibit 59, filed May 12, 1993. Furthermore, at the hearing, the Defendants could not tell the Court when the Defendants would begin to take action under the Preservation Plan would take effect. Thus, there is no guarantee that any of the actions under the "Plan" will take place anytime soon or, for that matter, ever. The Court finds that, because of the delay in putting together and carrying out this "Preservation Plan," many of these tapes may be irreparably damaged.

Based on this record, the Court finds that this behavior and lack of action does not comply with this Court's Order to "preserve without erasure all electronic federal records generated at the defendant agencies" and to prevent the destruction of federal records, including those records saved on backup tapes." Armstrong

¹⁵ The Archivist acquired custody of these tapes on January 20, 1993; the Preservation Plan was approved by the Acting Archivist on April 16, 1993. Id.

v. Executive Office of the President, No. 89-142, Amended Order at 1-2 (D.D.C. January 11, 1993). While the Defendants may not have intended the transfer to damage these tapes, they are still responsible for the results of their actions. "Even where the court does not command a certain method of compliance, nevertheless there is 'an obligation to provide full and prompt compliance' by whatever means is felt appropriate" United States v. Greyhound Corp., 363 F. Supp. 525, 557 (N.D. Ill. 1973), supplemented by 370 F. Supp. 881 (N.D. Ill. 1974), aff'd 508 F.2d 529 (7th Cir. 1974). "Having chosen a course of action, [the defendant] must bear the responsibility for the failure of that course of action to achieve its desired end." Id., at 559.

Therefore, the Court finds the Defendants in contempt for their failure to take proper care of these tapes during and after the transfer to the Archivist. The Court shall order the Defendants to take all necessary steps by June 21, 1993 to preserve these tapes, including preservation copying. Furthermore, the Court shall order the Defendants to demonstrate that the materials are being stored under conditions that will ensure their preservation. As mentioned previously, the Court is considering appointing a Special Master to ensure that the Defendants comply with the Court's Orders and the FRA and preserve history.

VI. THE DEFENDANTS' ERASURE OF SIX BACKUP TAPES AND ANY DELAY IN COMPLYING WITH THE ORDERS OF THIS COURT ARE MATTERS THAT MAY MORE PROPERLY BE THE SUBJECT OF A CRIMINAL CONTEMPT PROCEEDING, WHICH THE COURT RESERVES THE RIGHT TO INITIATE AT A LATER DATE.

In their Motion for an Order to show Cause, the Plaintiffs complain that the Defendants erased six backup tapes from the NSC and thus destroyed tapes that this Court had ordered preserved in this lawsuit. The Plaintiffs also complain that the Defendants unreasonably delayed complying with this Court's Orders in a variety of ways.¹⁶

It is inappropriate for the Court to address these contentions at this time. Civil contempt proceedings are reserved for those instances where the court acts to ensure compliance by a recalcitrant party. As these allegation concerning past destruction of tapes and delay on the part of the Defendants cannot be remedied at this time, they are not appropriate in a civil contempt proceeding. Malfeasance of this sort that cannot be rectified is a matter of criminal contempt, which is designed to

¹⁶ The Plaintiffs allege that the Defendant agencies did not take any steps for 9 days after this Court's January 6, 1993 Memorandum and Order to instruct individuals that they should not erase or delete information from the electronic communications systems used by the agencies. In addition, the Plaintiffs complain that the Defendant agencies also took over a week to disable programs that permit users to delete information (known as the "empty wastebasket" function) and other programs that automatically delete messages (known as "purging"). They also contend that the instructions that were given to staff at that point were not adequate because they still allow staff to delete certain materials subject to the Order (such as distribution lists).

Similarly, the Plaintiffs contend that the Archivist failed to take any steps to make sure that electronic records were not erased during the final days of the Bush administration, contrary to the January 6th Order's explicit directions. No instructions were issued by the Archivist until January 15, 1993. According to the Plaintiffs, these letters did not reach the heads of EOP components until January 28 and 29, 1993 and still did not instruct the agencies properly.

Again, these matters may very well call for the appointment of a Special Master by the Court to see that the requirements of the law are met and carried out without further delay.

punish the offending party. Roe v. Operation Rescue, 919 F.2d 857, 868-69 (3d Cir. 1990). However, the Court reserves the right to bring such a criminal contempt proceeding in the future.¹⁷

VII. HAVING FOUND THE DEFENDANTS IN CIVIL CONTEMPT, THE COURT SHALL IMPOSE A MONETARY SANCTION UNLESS THEY COMPLY BY JUNE 15, 1993.

Once a court finds a party to be in civil contempt, it must decide what sanctions are appropriate. The penalty imposed may consist of either a monetary fine or imprisonment. Douglas v. First National Realty Corp., 543 F.2d 894 (D.C. Cir. 1976).¹⁸ A monetary sanction can be imposed so long as it is designed to coerce the offending party to comply with the court's Orders or to compensate the injured party. In re Magwood, 785 F.2d 1077 (D.C. Cir. 1986). If a sanction is compensatory, it is payable to the injured party and must be based proof of actual loss. See In re Chase & Sanborn Corp. 872 F.2d 397, 400 (11th Cir. 1989). If a sanction is coercive, it is paid into the court registry and is based on "the character and magnitude of the harm threatened by continued contumacy and the probable effectiveness of any suggested sanction in bringing about the result desired." United States v.

¹⁷ The Court notes that in the Motion for an Order to Show Cause, the Plaintiffs stated that "much of the harm caused by the defendants' delay in implementing the requirements of the injunction is irreparable. The only remedy available for the deliberate delay in complying with the Court's order during the final weeks of the Bush administration is criminal contempt." Plaintiffs' Memorandum in Support, dated April 1, 1993, at 24.

¹⁸ Some courts have commented that "[i]mprisonment should be a sanction of last resort." Securities and Exchange Comm'n v. Diversified Growth Corp., 595 F. Supp. 1159, 1172 (D.D.C. 1984).

United Mine Workers of America, 330 U.S. 258, 304 (1947).

In the instant case, the Plaintiffs have not argued that the Defendants' failure to comply with this Court's Orders has resulted in any monetary damage, moreover, the Court finds that any injury suffered could not be adequately measured so as to permit the imposition of a compensatory fine. Therefore, the Court concludes that imposition of any compensatory sanctions is not appropriate. However, the Court's finding that the Defendants are in contempt nonetheless demands some remedial action, and the Court shall impose coercive sanctions in order to ensure future compliance with its Orders.

The Court concludes that it has the power to impose coercive sanctions on the federal agency Defendants in this case. The Court is aware that imposition of monetary sanctions against the federal government often is barred by the doctrine of sovereign immunity. However, the Defendants have not raised a defense of sovereign immunity in their papers or arguments before this Court and, in any event, the Court finds the doctrine inapplicable to the imposition of coercive fines.

Several courts have held that the doctrine of sovereign immunity applies to prevent a court from imposing compensatory fines against a government entity in a civil contempt proceeding. See Coleman v. Espy, 986 F.2d 1184 (8th Cir. 1993); McBride v. Coleman, 955 F.2d 571 (8th Cir. 1992); Barry v. Bowen, 884 F.2d 442 (9th Cir. 1989). The rationale for applying the doctrine of sovereign immunity in such cases is to prevent a claimant from

being "positioned to recover an unlimited amount of compensatory damages from the United States without being bound by the strictures of the Tucker Act or the Federal Tort Claims Act." McBride, 955 F.2d at 576.

However, when a court, as in the instant case, imposes coercive fines upon a government agency in a contempt proceeding, these fines are deposited into the court registry and thus, do not allow a party to recover any damages and thereby circumvent Congress' express waivers of sovereign immunity under the Tucker Act or the Federal Tort Claims Act. See McBride, 884 F.2d at 580-82 (Lay, C.J. concurring in part and dissenting in part). Furthermore, it has been argued that when imposing any type of fine in a civil contempt proceeding, a court is not granting money damages, and therefore, when the action arises under the Administrative Procedures Act (APA), as the instant case does, Congress has expressly waived all sovereign immunity. See 5 U.S.C. § 702; McBride, 884 F.2d 580-82 (Lay, C.J. concurring in part and dissenting in part).

In any case, the Court finds that the doctrine of sovereign immunity does not prevent the imposition of coercive sanctions against the federal agency Defendants for their contempt of this Court's Orders. In fact, such coercive sanctions are necessary to ensure that "the executive branch of government [does not] treat with impunity the valid orders of the judicial branch." Nelson v. Steiner, 279 F.2d 944, 948 (7th Cir. 1960).

Under these circumstances, where public interest favors the

preservation of the historical material on these tapes, the Court will order the Defendants to take action within 30 days of this Order. Failure by the Defendants to take appropriate action by 4:00 pm. on June 21, 1993, will result in a fine of \$50,000 a day for the first week of noncompliance. This fine will double every week thereafter, resulting in fines of \$100,000 every day during the second week of noncompliance, \$200,000 a day during the third week of noncompliance, with increases in such sanctions reserved thereafter for any further non-compliance with the Orders of the Court. The Court may use such sanctions to pay the expenses of a Special Master appointed to ensure compliance with this Court's Orders and the Order of the Court of Appeals.

VIII. CONCLUSION

For the reasons explained above, the Court finds that the Defendants are in civil contempt for their failure to fully comply with this Court's Orders of January 6 and 11, 1993. More specifically, the Court finds that the Defendants failed to promulgate new appropriate and proper regulations for the preservation of electronic federal records and that the transfer of 5,839 backup tapes to the Archivist adversely affected the condition of these tapes and the information contained therein. As the Court has made clear throughout the duration of this longstanding suit, the statutes in this case and the interests of this democratic society mandate that the federal record material in this suit be preserved for historical purposes. Thus, the Court

27

must act today to ensure that these records will be available for the historians of tomorrow. Armstrong v. Executive Office of the President, 810 F. Supp. 33, 341-42 (D.D.C. 1993).

The Court shall issue an Order of even date herewith in accordance with this Memorandum Opinion.

May 21, 1993



CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

FILED

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MAY 21 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)

ORDER

Before the Court are the Defendants' and the Plaintiffs' responses to this Court's Order of April 6, 1993, which ordered the Defendants to show cause whether they should be held in civil contempt for failure to comply with this Court's Orders of January 6 and 11, 1993. After careful consideration of the parties' submissions, the arguments of counsel, the record in the case and the underlying law, and for the reasons articulated in this Court's Opinion of even date herewith, the Court finds that the Defendants are in contempt of this Court's Orders of January 6 and 11, 1993, and the Order of the United States Court of Appeals for the District of Columbia dated January 15, 1993.

Accordingly, it is, by the Court, this 21st day of May, 1993,
ORDERED that the Plaintiffs' Motion to Enforce valid Court Orders of January 6 and 11, 1993, and the Order of United States Court of Appeals for District of Columbia dated January 15, 1993, shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Court finds, by clear and convincing

evidence, that the Defendants are in Civil Contempt for failing to promulgate new, appropriate, and proper recordkeeping regulations for electronic federal records to replace those regulations struck down by this Court on January 6, 1993. See Armstrong v. Executive Office of the President, 810 F. Supp. 335 (D.D.C. 1993); and it is

FURTHER ORDERED that the Court finds the Defendants in Civil Contempt because the transfer of 5,839 tapes from the Defendant agencies to the Archivist has adversely affected the condition of the tapes and the information stored therein. As such, the Defendants' actions are contrary to this Court's Orders to preserve the tapes and federal records contained on them; and it is

FURTHER ORDERED, that in order to purge themselves of this finding of Civil Contempt, that Defendants shall take appropriate action by 4:00 p.m. on June 21, 1993. Such actions shall include, but are not limited to:

- The Defendants promulgating new, appropriate, and proper guidelines for the management of electronic federal records in the Defendant agencies to replace those guidelines struck down by this Court's Orders of January 6 and 11, 1993;
- The Defendants taking all necessary steps days to preserve the tapes transferred to the Archivist. These steps shall include all necessary preservation copying and the repair and enhancement of any damaged tapes;
- The Defendants demonstrating to the Court that the materials are being stored under conditions that will

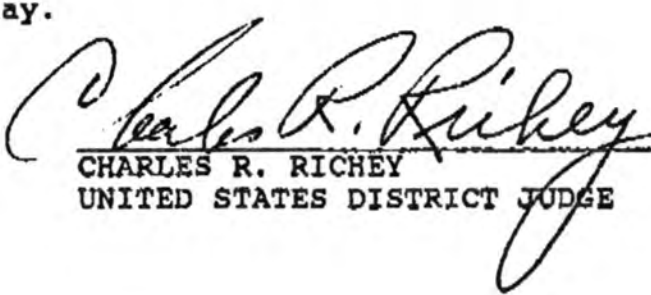
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ensure their preservation and future access;
and it is

FURTHER ORDERED that, in order to purge itself of this Civil Contempt finding, the Defendants shall notify the Court of their remedial efforts in a written status report, which shall be filed with this Court by 4:00 pm. on June 21, 1993.

FURTHER ORDERED that failure by the Defendants to take the above-mentioned remedial steps by 4:00 p.m. on June 21, 1993, shall lead to the imposition of a fine of \$50,000 a day for the first week of noncompliance. This fine will double every week thereafter, resulting in fines of \$100,000 every day during the second week of noncompliance, \$200,000 a day during the third week of noncompliance, and with increases in such sanctions reserved thereafter for any further noncompliance with Court Orders; and it is

FURTHER ORDERED that, in the event that the Defendants do not purge themselves of this finding of Civil Contempt, the appropriate fine shall be paid to the Registry of this Court, and, as indicated, the Court will give serious consideration to appointing a Special Master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, to assist the Court in seeing that its Orders are carried out without further delay.


CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

file
Armstrong
✓
EOP

SCOTT ARMSTRONG, et al.,

Plaintiffs,

v.

EXECUTIVE OFFICE OF THE PRESIDENT,
et al.,

Defendants.

Civil Action No.
89-0142 (CRR)

DECLARATION OF JOHN PODESTA

I, JOHN PODESTA, declare and state as follows:

1. Since January 20, 1993, I have been Assistant to the President and Staff Secretary in the White House Office of President William J. Clinton. In these positions, I am responsible for overseeing White House personnel with records management responsibilities. I have also participated in the development of Clinton Administration guidance, practices and policy pertaining to the creation and preservation of federal and presidential records in the Executive Office of the President and the National Security Council. I submit this declaration in support of defendants' motion for a stay, pending appeal, of the District Court's order dated May 21, 1993.

2. Prior to arriving at the White House on January 20, 1993, I was familiar with the proceedings in this case, and was aware that on January 6 and 11, 1993, the District Court had entered orders which held the Bush Administration guidance for the maintenance and preservation of electronic records to be arbitrary and capricious. On or about January 21, 1993, I also became aware that on the eve of the termination of the Bush Administration,

President Bush and the former Archivist of the United States, Don Wilson, had entered into an agreement governing the disposition of back-up tapes of Bush Administration electronic materials.

3. I and other members of the White House staff are firmly committed to full implementation of the Federal Records Act and the Presidential Records Act. In order to understand what steps that commitment entailed, I and other members of the staff first had to become familiar with the records management processes of the White House and the various agencies in the Executive Office of the President. We also had to become familiar with the computer systems and networks in the White House and other components of the EOP; to learn what, if any, steps had been taken by the Bush Administration to develop new procedures for the creation and maintenance of electronic information; and to assess what, if any, new computer technologies might be introduced to facilitate internal and external communications by EOP staff.

4. It is our goal to develop a technologically advanced computer system in the Executive Office of the President which will permit a significantly larger amount of electronic material to be permanently stored and segregated, in retrievable form, than has ever been preserved in the past. We would anticipate that with more sophisticated computer technology, the burden of record-keeping for employees could be reduced, and it would become feasible to save a significantly greater range of material documenting the business of government in an electronic format. Moreover, it is our goal to implement new technology which will

automatically make it possible to associate "who knew what when" information with particular e-mail messages.

5. However, given the current state of the technology in the Executive Office of the President, to achieve these goals and develop a computer system which effectively provides for improved record keeping and improves the performance of the work of the Executive Office of the President is not a simple process. For instance, in the EOP the Administration inherited an OASIS "All-in-One" computer system which did not provide for the computerized segregation of federal and presidential records. Moreover, under the OASIS system, "read receipts" could be used to obtain the "who knew what when" information, but if the read receipts are requested on only 10% of the messages, the system will slow to the point where it would be unable to provide a satisfactory level of performance. See Sixth Declaration of James B. Wright, paragraph 9. We also inherited a situation where prior administrations had not implemented any long range plan for developing and implementing a technological capacity to segregate, store, and retrieve e-mail information in a computer system. In short, and as detailed further below and in the accompanying affidavits, given the condition of the current technology in the Executive Office of the President, the development of an enhanced system that will properly achieve the goals of this Administration is a process that requires a careful redesign of the current system, the acquisition of necessary funding, and then the appropriate testing and implementation of an enhanced system. That is not a process that

can be completed in anywhere close to the timeframe contemplated by the district court.

6. Our introduction to EOP computer systems was interrupted, during the first week of the Administration, by the subpoena of all White House Office computer hard disk drives by the special prosecutor investigating possible wrongdoing by Bush Administration officials in connection with a review of then Governor Clinton's passport files. All existing White House Office hard disk drives were removed from individual computer stations, and were replaced by new hard disk drives several days later.

7. During the first three months of the new Administration, White House staff and new employees in the EOP agencies worked diligently to address a wide variety of urgent priorities, including the development of new guidance for EOP staff on federal and presidential records. The White House determined that it would be appropriate to issue comprehensive new guidance that would, among other things, emphasize the importance of records preservation; clarify as much as possible the distinctions between federal and presidential records; clearly state requirements governing the creation, maintenance and preservation of records; and set forth specific new guidelines addressing the creation, maintenance and preservation of electronic systems material.

8. I am aware that since mid-January, all EOP offices and the NSC had been preserving on computer back-up tape all electronic information identified in the District Court's orders as "record" material. In order to implement new procedures to preserve

electronic systems information, however, the White House staff sought to understand not only pending court orders governing electronic systems, but also the technology requirements that would be necessary to accommodate the court's orders and the agencies' recordkeeping needs, and the costs of such technology.

9. With respect to the preservation of electronic systems information, I have been informed by members of the staff of the EOP Office of Administration that a variety of complicated technical issues must be addressed in connection with the implementation of the court's orders. Those issues are addressed in the Declaration of Arnold Shore and the Sixth Declaration of James B. Wright which are also being filed in support of the motion for a stay pending appeal. For instance, the EOP agencies have not yet developed a technological means for segregating electronic presidential records from other material and for connecting information relating to sending, receipt and content of particular e-mail information. The OASIS All-in-One system does not have the capacity to accommodate "read receipt" information for all e-mail messages.

10. As set forth more fully in the declaration of Arnold Shore, the EOP and the Office of Administration are developing new e-mail systems for the EOP component offices. I have sought to ensure that any such new e-mail systems be designed to ensure that presidential and federal records be easily segregated and be able to accommodate and maintain "read receipt" information for particular e-mail messages. I have insisted that in developing

such e-mail systems, or in making plans to connect those systems with external e-mail networks, the fullest consideration be made to the requirements of the Federal Records Act and the Presidential Records Act.

11. Substantial costs are also associated with the establishment of new procedures to preserve electronic systems material, particularly in connection with EOP electronic mail systems. These costs include fiscal expenditures described in Mr. Wright's Sixth Declaration (§7) and the Declaration of William H. Itoh (§10), as well as significant diversion of other resources from ongoing projects as explained in the Declaration of Arnold Shore (§10).

12. Aware of the technological requirements and costs of adapting the various electronic communications systems, the White House initiated a series of meetings with representatives of the White House Counsel's Office; the White House Staff Secretary's Office; the White House Records Management Office; the EOP Office of Administration; the General Counsel of the EOP Office of Administration; the National Security Council Records Management Office; and the Legal Adviser to the National Security Council. These meetings were also regularly attended by Trudy Peterson, the Acting Archivist; other members of the NARA staff; and Justice Department attorneys familiar with the orders of the District Court in this action.

13. In these meetings, it was my goal not only to ensure compliance with the District Court's orders, but also to ensure

that the Clinton Administration provided to staff of the NSC and other EOP components the most comprehensive possible guidance on the creation, disposition and maintenance of federal records. The comprehensive nature of the guidance necessitated an equally comprehensive drafting and review process that lasted several weeks. From personal participation in the meetings, I can confirm the careful effort that was made to review the requirements of the District Court's orders, and to assess the accuracy and clarity of the proposed guidance on a line-by-line -- even word-for-word -- basis. Care was also taken to ensure that guidance for the National Security Council Staff addressed any issues that arose uniquely in the context of that entity. The proposed guidance under review was far more comprehensive than any previous guidance of which I am aware; indeed, the federal and presidential records guidance distributed totaled eighteen single-spaced, typed pages.

14. Because the district court had determined that the guidance issued by the previous administration was invalid, I decided that it was necessary promptly to issue the new guidance to the EOP staff on recordkeeping. The process of preparing federal and presidential records guidance included careful attention to the procedures for preserving electronic material. We agreed that until a long-term solution had been developed, it was important to continue the practice -- already in place -- of preserving all electronic mail ("e-mail") material on back-up tape; and the EOP and NSC guidance on both federal and presidential records was carefully drafted to ensure continuation of this practice. See

Attachment to Defts. Supplemental Exhibits 23 and 24, filed May 12, 1993.

15. The final records guidance for all EOP staff (other than NSC staff) was completed on May 5, 1993 and distributed to all EOP staff beginning May 6. The package distributed including (a) a memorandum from myself and Stephen Neuwirth of the Counsel's Office, concerning presidential records; and (b) a memorandum from David Watkins, Assistant to the President for Management and Administration, and Bruce Overton, General Counsel of the EOP Office of Administration, concerning federal records. To ensure that EOP staff members would carefully review these memoranda, we also took the extraordinary step of attaching a cover memorandum from Thomas F. McLarty, III, White House Chief of Staff, which expressly instructed all personnel in the White House and other offices in the Executive Office of the President to review these memoranda carefully and to comply with the guidance set forth therein. See Defts. Supp. Ex. 23. Similar guidance was issued for NSC staff. See Defts. Supp. Ex. 24.

16. This Administration is considering developing more technologically advanced recordkeeping systems, and would issue additional guidance as we are able to acquire and implement those systems. It is and has been the intent of the Clinton Administration to conduct a comprehensive review of electronic systems management in the Executive Office of the President and to develop policies and practices for the Clinton administration as a whole that will ensure that all electronic systems material is

preserved in usable form. The development of such policies and practices will, of course, need to occur in conjunction with the development of appropriate technical solutions for the various computer systems in the Executive Office of the President agencies, including the new computer systems that the Office of Administration is already considering (see Declaration of Arnold Shore, ¶10.e) to improve the technological and internal and external e-mail capabilities of the White House and other Executive Office of the President components. Upgrading these technological capabilities is a high priority of this administration, and we have created an interagency task force to assess and propose potential advancements in this area.

17. I expect that the Clinton Administration, after it conducts its comprehensive policy and technology review, will be able to dramatically upgrade the quality of its computer systems. We would anticipate that with more sophisticated computer technology, the burden of record keeping for employees will be reduced, and it will become feasible to save a greater range of material documenting the business of government in an electronic format. Moreover, as previously noted, it is our goal to implement new technology which will automatically make it possible to associate "who knew what when" information with particular e-mail messages. However, I do not believe it is possible by June 21 -- the deadline set by the district court -- to develop, in a coherent manner, a comprehensive new system for segregating electronic presidential and federal records; for maintaining "read receipt"

information for e-mail messages; or for connecting the sending, receipt and content information for particular e-mail information. As discussed above, the development of such a system requires the solution to several complicated and expensive technical problems. Existing appropriations to the Executive Office of the President for the current fiscal year are insufficient to support the immediate implementation of a new system for preserving electronic information.

18. I believe that a stay of the District Court's May 21 order is critical, not only because it would not be possible to comply fully with what this court intended in the January 6 and 11 orders by June 21, but also because the May 21 order would require the Executive Office of the President to devote inordinate resources to attempting to comply by that date. This Administration is firmly committed to full compliance with the federal and presidential records statutes. But staff and resources would need to be diverted from other equally important Administration initiatives were the process of developing a new system for preserving electronic information to be subject to a June 21 deadline. Moreover, because individuals in components of the Executive Office of the President not subject to the court's orders -- including the White House -- also use the Office of Administration's OASIS All-in-One communications system, significant down-time of the All-in-One system to implement interim software "fixes" to the system, until comprehensive review of the electronic systems management is complete, will interfere with

White House operations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

5-28-93

DATE

John I. Podesta
JOHN PODESTA

THE WHITE HOUSE
WASHINGTON

DATE: 6/6

TO: STEVE KPTZ

FROM: JOHN D. PODESTA
Assistant to the President and
Staff Secretary

Thought you would
be interested in the
Hawke.

John

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT ARMSTRONG, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	89-0142 (CRR)
EXECUTIVE OFFICE OF THE PRESIDENT,	)	
<u>et al.</u> ,	)	
	)	
Defendants.	)	

DECLARATION OF JOHN PODESTA

I, JOHN PODESTA, declare and state as follows:

1. Since January 20, 1993, I have been Assistant to the President and Staff Secretary in the White House Office of President William J. Clinton. In these positions, I am responsible for overseeing White House personnel with records management responsibilities. I have also participated in the development of Clinton Administration guidance, practices and policy pertaining to the creation and preservation of federal and presidential records in the Executive Office of the President and the National Security Council. I submit this declaration in support of defendants' motion for a stay, pending appeal, of the District Court's order dated May 21, 1993.

2. Prior to arriving at the White House on January 20, 1993, I was familiar with the proceedings in this case, and was aware that on January 6 and 11, 1993, the District Court had entered orders which held the Bush Administration guidance for the maintenance and preservation of electronic records to be arbitrary and capricious. On or about January 21, 1993, I also became aware that on the eve of the termination of the Bush Administration,

President Bush and the former Archivist of the United States, Don Wilson, had entered into an agreement governing the disposition of back-up tapes of Bush Administration electronic materials.

3. I and other members of the White House staff are firmly committed to full implementation of the Federal Records Act and the Presidential Records Act. In order to understand what steps that commitment entailed, I and other members of the staff first had to become familiar with the records management processes of the White House and the various agencies in the Executive Office of the President. We also had to become familiar with the computer systems and networks in the White House and other components of the EOP; to learn what, if any, steps had been taken by the Bush Administration to develop new procedures for the creation and maintenance of electronic information; and to assess what, if any, new computer technologies might be introduced to facilitate internal and external communications by EOP staff.

4. It is our goal to develop a technologically advanced computer system in the Executive Office of the President which will permit a significantly larger amount of electronic material to be permanently stored and segregated, in retrievable form, than has ever been preserved in the past. We would anticipate that with more sophisticated computer technology, the burden of record-keeping for employees could be reduced, and it would become feasible to save a significantly greater range of material documenting the business of government in an electronic format. Moreover, it is our goal to implement new technology which will

automatically make it possible to associate "who knew what when" information with particular e-mail messages.

5. However, given the current state of the technology in the Executive Office of the President, to achieve these goals and develop a computer system which effectively provides for improved record keeping and improves the performance of the work of the Executive Office of the President is not a simple process. For instance, in the EOP the Administration inherited an OASIS "All-in-One" computer system which did not provide for the computerized segregation of federal and presidential records. Moreover, under the OASIS system, "read receipts" could be used to obtain the "who knew what when" information, but if the read receipts are requested on only 10% of the messages, the system will slow to the point where it would be unable to provide a satisfactory level of performance. See Sixth Declaration of James B. Wright, paragraph 9. We also inherited a situation where prior administrations had not implemented any long range plan for developing and implementing a technological capacity to segregate, store, and retrieve e-mail information in a computer system. In short, and as detailed further below and in the accompanying affidavits, given the condition of the current technology in the Executive Office of the President, the development of an enhanced system that will properly achieve the goals of this Administration is a process that requires a careful redesign of the current system, the acquisition of necessary funding, and then the appropriate testing and implementation of an enhanced system. That is not a process that

can be completed in anywhere close to the timeframe contemplated by the district court.

6. Our introduction to EOP computer systems was interrupted, during the first week of the Administration, by the subpoena of all White House Office computer hard disk drives by the special prosecutor investigating possible wrongdoing by Bush Administration officials in connection with a review of then Governor Clinton's passport files. All existing White House Office hard disk drives were removed from individual computer stations, and were replaced by new hard disk drives several days later.

7. During the first three months of the new Administration, White House staff and new employees in the EOP agencies worked diligently to address a wide variety of urgent priorities, including the development of new guidance for EOP staff on federal and presidential records. The White House determined that it would be appropriate to issue comprehensive new guidance that would, among other things, emphasize the importance of records preservation; clarify as much as possible the distinctions between federal and presidential records; clearly state requirements governing the creation, maintenance and preservation of records; and set forth specific new guidelines addressing the creation, maintenance and preservation of electronic systems material.

8. I am aware that since mid-January, all EOP offices and the NSC had been preserving on computer back-up tape all electronic information identified in the District Court's orders as "record" material. In order to implement new procedures to preserve

electronic systems information, however, the White House staff sought to understand not only pending court orders governing electronic systems, but also the technology requirements that would be necessary to accommodate the court's orders and the agencies' recordkeeping needs, and the costs of such technology.

9. With respect to the preservation of electronic systems information, I have been informed by members of the staff of the EOP Office of Administration that a variety of complicated technical issues must be addressed in connection with the implementation of the court's orders. Those issues are addressed in the Declaration of Arnold Shore and the Sixth Declaration of James B. Wright which are also being filed in support of the motion for a stay pending appeal. For instance, the EOP agencies have not yet developed a technological means for segregating electronic presidential records from other material and for connecting information relating to sending, receipt and content of particular e-mail information. The OASIS All-in-One system does not have the capacity to accommodate "read receipt" information for all e-mail messages.

10. As set forth more fully in the declaration of Arnold Shore, the EOP and the Office of Administration are developing new e-mail systems for the EOP component offices. I have sought to ensure that any such new e-mail systems be designed to ensure that presidential and federal records be easily segregated and be able to accommodate and maintain "read receipt" information for particular e-mail messages. I have insisted that in developing

such e-mail systems, or in making plans to connect those systems with external e-mail networks, the fullest consideration be made to the requirements of the Federal Records Act and the Presidential Records Act.

11. Substantial costs are also associated with the establishment of new procedures to preserve electronic systems material, particularly in connection with EOP electronic mail systems. These costs include fiscal expenditures described in Mr. Wright's Sixth Declaration (§7) and the Declaration of William H. Itoh (§10), as well as significant diversion of other resources from ongoing projects as explained in the Declaration of Arnold Shore (§10).

12. Aware of the technological requirements and costs of adapting the various electronic communications systems, the White House initiated a series of meetings with representatives of the White House Counsel's Office; the White House Staff Secretary's Office; the White House Records Management Office; the EOP Office of Administration; the General Counsel of the EOP Office of Administration; the National Security Council Records Management Office; and the Legal Adviser to the National Security Council. These meetings were also regularly attended by Trudy Peterson, the Acting Archivist; other members of the NARA staff; and Justice Department attorneys familiar with the orders of the District Court in this action.

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White House operations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

5-28-93
DATE

John I. Podesta
JOHN PODESTA

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

File
Armstrong

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)

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)