1. get up a reasonable electronic system ]
2. NSC ]
3. FOIA ]
4. precedent
5. ATTY fees ]

U.S. Department of Justice

MIL:REK:LS:FL:MMCollette
145-1-2062

9 P4:26
(202) 514-4214

Washington, D.C. 20530

September 9, 1993

MEMORANDUM

TO: Steve Neuwirth
Associate White House Counsel

FR: Matthew M. Collette, Attorney MC
Appellate Staff
Civil Division, Room 3125 MAIN

RE: Scott Armstrong, et al. v. Executive Office of the President, Nos. 93-5002, 93-5048, 93-5156 (D.C. Cir. Aug. 13, 1993).

As you requested last week, attached are separate draft memoranda prepared by the Appellate Staff and the Federal Programs Branch concerning the above-captioned case. Feel free to contact either Mark Levy (514-7830), Robert Kopp (514-3311), Freddi Lipstein (514-4815), or me (514-4214) regarding this matter.

To: JOHN PODESTA
for your review
— Steve Neuwirth

9/9/93

**DRAFT**

U.S. Department of Justice **DRAFT**

MIL:REK:LS:FL:MMCollette
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*Washington, D.C. 20530*

September 9, 1993

MEMORANDUM

TO: Mark I. Levy
Deputy Assistant Attorney General
Civil Division

FR: Robert E. Kopp
Director, Appellate Staff
Civil Division

RE: Scott Armstrong, et al. v. Executive Office of the President, Nos. 93-5002, 93-5048, 93-5156 (D.C. Cir. Aug. 13, 1993).

I recommend against either rehearing en banc or certiorari at this time.

**BACKGROUND**

1. Electronic Communications Systems in the Executive Office of the President.

The Federal Records Act, 44 U.S.C. chapters 21, 29, 31, and 33, requires agency heads, in consultation with the Archivist, to create and preserve "records" that properly document the essential transactions of the agency and that are "appropriate for preservation". This stage of the case concerns how that Act applies to electronic communications on computers in the Executive Office of the President.

All of the offices that make up the Executive Office of the President[1] use electronic communications systems that allow

[1] The Executive Office of the President consists of various components, some of which have statutory duties and others advise and assist the President. Components that create records subject to the Federal Records Act and are subject to the courts' orders include the Office of Administration, the Council on Environmental Quality, the Office of Science and Technology Policy, the Office of Management and Budget, the United States Trade Representative, and the Office of National Drug Control Policy. The National Security Council, which is also part of the Executive Office of the President, has traditionally been regarded as creating both (continued...)

employees to maintain electronic calendars, create, edit and transfer word processing documents, and exchange messages via electronic mail ("e-mail"). When a user sends a message through the electronic system, the system keeps a copy automatically in the sender's "note log." The message is transmitted to the recipient's electronic "incoming mail."

The recipient can do several things with a message, including reply to it, file it in his own electronic "note log," or erase it. Both the sender and the recipient can decide to print a hard copy of the text of the message. However, the printed copy of the text of the message would not necessarily contain "status and distribution" information, such as distribution lists, acknowledgements of receipt, user directories, lists of user IDs, or similar information that shows to whom a particular message was sent and the time the recipient opened the message. While not automatically appearing on a print out of the text of the message, this information would be accessible to a computer user, although on some of the systems the user would have to request a "return receipt."

The agencies in the Executive Office of the President that create federal records operate traditional "paper" records systems, in which each agency's official documents are kept in paper form. These agencies issued guidelines during the Reagan and Bush administrations regarding the handling and storage of these paper records. With respect to electronic material, the agencies instructed staff that when they create or receive electronically-generated information that meets the definition of a record, they should print the information as it appears on the computer screen -- i.e. the text of the message -- and forward the hard copy to the appropriate official paper records maintenance system. No specific instructions were issued concerning the printing and preservation of status and distribution information.

2. The Lawsuit.

The day before the transition between the Reagan and Bush administrations, plaintiffs filed requests under the Freedom of Information Act, 5 U.S.C. § 552, seeking all tapes, discs, or other storage formats for the National Security Council and White House electronic communications systems. Plaintiffs brought suit to prevent the deletion of any material on the systems.

Plaintiffs argued that the computer entries on the systems constitute "records" that are required to be preserved not only under the Federal Records Act, but also under the Presidential

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[1](...continued)
"federal" and "presidential" records. The NSC's status currently is being reevaluated in light of the court of appeals' opinion.

Records Act, 44 U.S.C. §§ 2201-2207, and the Freedom of Information Act, 5 U.S.C. § 552. Our principal initial defense was that no statute provides for judicial review of a President's judgments concerning what documents of his administration should be turned over to the Archives. We also argued that in issuing the guidelines and instructions to the staff, the White House (for presidential records) and the Executive Office of the President (for federal records) were in compliance with these statutes.

3. The First District Court Decision and Appeal.

The district court (Richey, J.) held that although there is no private right of action under either the Federal Records Act or the Presidential Records Act, private citizens may nevertheless obtain judicial review of defendants' compliance with these statutes under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. The court further held that there were disputed issues of fact concerning the adequacy of and compliance with the recordkeeping guidelines. Armstrong v. Bush, 721 F. Supp. 343 (D.D.C. 1989).

On our interlocutory appeal, the court of appeals affirmed in part, reversed in part, and remanded. Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991) (Armstrong I). The court first held that all but one of the plaintiffs had standing, rejecting our argument that historians and private researchers are not within the "zone of interests" protected by the Presidential Records Act and the Federal Records Act. Id. at 287-88. The court then held that the President is not an "agency" within the meaning of the Administrative Procedure Act and that the Presidential Records Act impliedly precludes judicial review of the President's recordkeeping decisions. Id. at 288-91.

However, with respect to documents which were not "presidential" records, the court held that the Federal Records Act does not preclude limited judicial review. Although a court cannot review individual claims that agency personnel are destroying records in violation of agency guidelines, it can review the validity of recordkeeping guidelines and instructions under that Act. Id. at 291-94. The Act also permits judicial review of the failure of an agency head or the Archivist to take action while records are being destroyed. Id. at 295-97. The court remanded to the district court for further factual development.

4. District Court Decision on Remand.

On remand, plaintiffs engaged in extensive discovery and amended their complaint to include as defendants, in addition to the National Security Council and the Archivist, the White House Office of Administration, the White House Communications Agency, and "the Executive Office of the President."

The district court held that the recordkeeping guidelines instructing employees to print electronic messages that meet the definition of "records" do not comply with the Federal Records Act, because a printed version of the computer screen does not capture status and distribution information that would show "what officials knew and when did they know it." The court also held that the federal recordkeeping guidance of the agencies was inadequate because there was no supervision of electronic recordkeeping practices by records management personnel. The district court, however, rejected plaintiffs' argument that the National Security Council cannot classify any of its records as "presidential," holding that Armstrong I precludes judicial review of presidential recordkeeping decisions. Armstrong v. Executive Office of the President, 810 F. Supp. 335 (D.D.C. 1993).

The court enjoined the defendant agencies from deleting, removing or altering information on their electronic communications systems until the Archivist takes steps to prevent destruction of these federal records, including seeking the assistance of the Attorney General and notifying Congress. The court of appeals stayed the order to the limited extent of permitting deletions from the live computer systems, provided that all information be exactly replicated in some other electronic format.

After we filed our notice of appeal, plaintiffs filed a cross-appeal from the district court's refusal to hear their claim that the National Security Council cannot classify any of its records as "presidential records." While the appeal was pending, the district court held the Clinton administration in contempt for failing to issue new guidelines consistent with the district court's order and for failing to ensure immediate preservation of the Reagan-era tapes transferred to the Archives in January 1993. We immediately appealed the contempt order, and the appeals were argued together.

5. Court of Appeals Decision in the Current Appeal.

The court of appeals (Mikva, Wald, and Henderson) unanimously affirmed on the merits but reversed the contempt citation. The court's key holding is that the agencies' recordkeeping guidelines that instruct employees to print messages that meet the definition of "records," but establish no express requirements for the preservation of the status and distribution information related to such records, did not comply with the Federal Records Act.

The court starts with the undisputed proposition that, because of their content, some e-mail communications meet the statutory definition of "records," which includes all material "made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency * * * as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the

Government or because of the informational value of data in them." 44 U.S.C. § 3301. The court's reasoning then appears to have two strands.

First, we had defended the guidelines allowing agency personnel to delete e-mail messages after printing out only the text of the e-mail on the ground that the computer versions were "extra copies" of the paper versions which under the statute are exempt from the definition of "records." 44 U.S.C. § 3301. The court rejected this argument, holding that a document must be a "full reproduction or transcription" or a "duplicate" of the original record to constitute an "extra copy." Slip op. at 18. Because the printed version does not include related status and distribution information, the court held, the electronic version is not an "extra copy"; the two are at most "kissing cousins." Id. at 15.

Second, we had argued that the defendant agencies have discretion to determine that status and distribution information is not "appropriate for preservation" under the statutory definition of "records," and therefore not to include such information as part of the e-mail message that is printed as a "record." The court rejected this argument, noting that the agency heads had never examined the contents of their electronic communications systems and could not make an "en masse" determination that this information is not appropriate for preservation. While the agency "undoubtedly has some discretion to decide if a particular document satisfies the statutory definition of a record," the court stated, "the statute surely cannot be read to allow the agency by fiat to declare 'inappropriate for preservation' an entire set of substantive e-mail documents generated by two administrations over a seven-year period." Slip op. at 17. The Act does not grant agencies the discretion automatically to lop off a predesignated part of "a whole series of documents" that qualify as records, assuming that the e-mail message and the associated status and distribution information are treated as a single "record"; likewise, if they are regarded as separate "records," agencies cannot engage in "wholesale destruction" of seven years' worth of status and distribution materials. Id. at 21-22.

The court also held that the agencies must provide for some periodic review by records management personnel of employees' electronic recordkeeping practices.

The court reversed the district court's contempt order on the ground that the declaratory judgment invalidating prior recordkeeping guidelines did not directly order the agencies to promulgate new guidelines. The court remanded, however, to allow the district court to consider whether the failure to preserve the Reagan-era tapes can itself form the basis for contempt in light of the efforts to copy and preserve the tapes that have been undertaken since the transfer.

With respect to plaintiffs' cross appeal, the court of appeals reversed and remanded. The court held that the Presidential Records Act does not preclude judicial review of the recordkeeping guidelines for the limited purpose of ensuring that the definition of presidential records does not sweep in federal records that would be subject to the Freedom of Information Act. The court remanded to the district court for further review on this matter. Although we had not argued that the National Security Council was not an "agency" under the Freedom of Information Act, the court noted that the question has never been definitively resolved and that factual development of the record was necessary to make that determination.

6. Unanswered Questions After the Court of Appeals' Decision.

The panel's opinion leaves open several fundamental questions with respect to the agencies' obligations under the Federal Records Act, which must be addressed on remand. Most importantly:

a. The panel expressly declined to decide whether the distribution and status information must be regarded as part of an e-mail "record" integral with the text, or whether it can be treated as a separate document, allowing the agency to determine on a case-by-case basis whether the information is "appropriate for preservation." For purposes of its opinion, the panel "assumed" that the status and distribution is part of the e-mail record, but emphasized that its decision was not dependent upon such an assumption. If the information is viewed as a separate document, the defendants' guidelines fail because they omit "entirely" a class of documents (status and distribution information) that might be appropriate for preservation. Slip op. at 18-19 n.8.

b. The panel also expressly declined to decide whether agencies can maintain their official recordkeeping systems on paper by printing status and distribution information along with the e-mail message, or whether agencies instead must maintain both the e-mail record and status and distribution information in electronic form. See slip op. at 18 ("Even assuming, without of course deciding, that one set of parallel documents retained in a different records system in a different medium than another may be classified as a 'cop[y]' under the FRA and thus subject to unobstructed destruction," the e-mail messages do not qualify as copies.)

c. The panel also left open the issue of whether users can be required to request status and distribution information on those systems that do not automatically collect it. The panel emphasized that its decision does not "saddle agencies with any new obligations to make additional documents in order to satisfy the needs of researchers or investigators" (slip op. at 24; see also id. at 20 n.9), but apparently was unaware that some of the computer systems at issue do not generate distribution and status information unless the user requests it.

d. Also unclear is whether dicta in the decision was intended to remove agency discretion to determine that any substantive e-mail is not "appropriate for preservation" and therefore is not a "record." The decision contains some broad language stating that "substantive e-mail communications satisfy the FRA definition of 'records'" (slip op. at 23) and suggesting that anything that might be "evidence" of the government's organization, functions, policies, decisions, etc., is appropriate for preservation (id. at 16). On the other hand, the panel acknowledged that not all "scribbles and off-the-cuff comments" are records (slip op. at 24), and stated that agencies retain discretion to "decide if a particular document satisfies the statutory definition of a record * * *." Id. at 17.

7. Subsequent Developments.

In view of the government-wide applicability of the Federal Records Act, we have solicited the views of numerous government agencies regarding how the court's decision will affect their recordkeeping practices. Initial responses indicate that many agencies are concerned that the panel's decision will result in extremely burdensome requirements with respect to electronic communications. However, the bulk of the responses do not discuss the legal merits of the case and do not take into account the possibility of a narrow interpretation of the decision. Those responses that do identify legal issues focus primarily on the perceived removal of agency discretion to determine what is a "record." We currently are awaiting additional agency responses.

We also have consulted with the White House, the National Security Council, and the Archivist, each of whom is preparing new guidelines to comply with the court of appeals' decision. We expect to have shortly their formal recommendations regarding further review in this case, although we understand that they are preliminarily opposed to rehearing en banc or certiorari and, if the Department of Justice believes it to be a sound strategy, would prefer to go back before Judge Richey based on the new guidelines they are preparing.

## DISCUSSION

### A. INTRODUCTION AND SUMMARY.

In our view, further review is not warranted at this stage. Instead, we recommend a strategy of issuing new guidelines based on a narrow but reasonable reading of the panel's opinion and seeking to place the case back in the framework of a review of the reasonableness of the guidelines under the Administrative Procedure Act. We believe that such a strategy will enhance our ultimate legal position while preserving for us the option to pursue our arguments in a subsequent appeal.

With regard to the justiciability arguments rejected in Armstrong I, our chances of prevailing in the present context appear doubtful. These issues remain very abstract, and it will be difficult for the en banc court or the Supreme Court to see the disruption caused by judicial review. We also would be required to defend from any judicial review what appears to be a categorical exclusion of basic information from recordkeeping management. If we ever want to take up these issues, we will have a much better chance of prevailing after a remand, when we will have issued reasonable guidelines attempting to manage this information; if those guidelines are invalidated, we will be able to provide concrete evidence of the disruption caused by judicial review. Moreover, it is likely that the en banc court of appeals and the Supreme Court will hear this case only once. If we press the judicial review issues now and do not prevail, it will be much harder to obtain further review of the statutory issues after remand.

With regard to the statutory issues decided in Armstrong II, the panel's decision leaves numerous unanswered questions (see pp. 6-7, supra). It is possible to read the opinion narrowly as holding simply that (1) printing out an e-mail message without status and distribution data does not render the electronic version an "extra copy" exempt from the definition of "records"; and (2) the agencies could not make an "en masse" determination that seven years' worth of status and distribution information is not appropriate for preservation. The decision need not be read as depriving the agencies and the Archivist of the discretion to promulgate reasonable guidelines to manage the status and distribution information in a feasible manner, including both standards for the initial creation and retention of "records" and disposal schedules for discarding those materials that are "records." Since this is a permissible reading of the panel's decision, it will be difficult to show that the panel's decision is legally incorrect or that it will lead to substantial disruption of government activities.

We recognize that we are faced with a hostile district judge and aggressive plaintiffs who are likely to adopt an interpretation of the court of appeals' decision adverse to our interests. Moreover, it is likely that plaintiffs will conduct extensive discovery, pursue their Freedom of Information Act claim, and possibly file another motion for contempt. In short, we hold no illusions that the proceedings on remand will be anything but extremely difficult.

The burdens of litigating this case on remand, however, do little to enhance our chances of prevailing on rehearing or certiorari. The possibility of an adverse interpretation on remand remains speculative, and a rehearing or certiorari petition based on what the panel might have held falls far short of what is necessary for further review. A denial of rehearing en banc or certiorari, on the other hand, may further embolden our opponents as well as the district court, leading to an even more adverse interpretation of the panel's opinion. Moreover, a petition that characterizes the panel's decision in the most adverse way runs the risk of locking us into an interpretation we do not want and at least signals to the district court and our opponents that such an interpretation is a permissible reading of the panel's opinion.

In our view, it is preferable to adopt a fair but narrow reading of the panel's opinion and proceed with the remand. The White House, the National Security Council, and the Archivist are drafting additional guidelines and expect to have them in place soon. New guidelines from the Archivist will interpret numerous ambiguities in the panel's opinion and provide a basis for arguing that they are entitled to deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984). Issuance of these new guidelines will alter the inquiry from one focusing on the guidelines of previous administrations, which appear to be a categorical exemption of information from the definition of "records," to one evaluating whether the new guidelines making determinations of feasibility are arbitrary and capricious under the Administrative Procedure Act. Their issuance provides a way for us to seize the initiative on remand and try to forestall extensive discovery.

If we take the initiative on remand and establish a good justification for the new guidelines, we will be in a much better position in the next appeal in the event the district court strikes them down. Furthermore, for reasons both of public perception and litigation strategy, we believe it is very important to have the case focus on the Clinton Administration's position rather than that of the prior Republican Administrations, which is what is now in the record. Accordingly, it is advisable to wait and not seek further review until this Administration has an opportunity to develop a feasible system for managing the status and distribution information. Finally, the concern has been raised that the White House is an unfavorable context for litigating the Records Act issues because of the intuitive assumption that more material should be preserved there and more resources are available to do so. To the extent we can, therefore, it would be better to wait for a different case to serve as a test vehicle. For these reasons, the Solicitor General's Office and the Office of Legal Counsel, as well as the White House, have indicated that they are at least preliminarily disposed against further review at this juncture and would prefer to pursue the remand strategy based on the new guidelines that are now being drafted.

B. ARMSTRONG I THRESHOLD ISSUES

The court of appeals in Armstrong I rejected several threshold jurisdictional arguments concerning the Federal Records Act. We did not seek further review in Armstrong I because we had prevailed with regard to the Presidential Records Act and because the court had sanctioned only "limited" judicial review. Because of the interlocutory nature of Armstrong I, the arguments rejected in that case can be raised either before the en banc court of appeals or the Supreme Court at this time or upon a subsequent injunction or final judgment.[2] As discussed below, prevailing on these issues is no easy task, at least in the present context of this case, and we recommend against further review at this time.

1. Whether Plaintiffs Lack Standing Because They Are Not Within the "Zone of Interests" of the Federal Records Act.

Under the Administrative Procedure Act, not every person suffering injury in fact is entitled to bring an action. A person must show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the basis of his complaint." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990).

We could argue that historians and researchers are not within the "zone of interests" of the Records Act and therefore lack standing to maintain this action. To prevail on this argument, we would have to show that Congress enacted the Federal Records Act only to benefit the government itself. The Supreme Court's opinion in Kissinger v. Reporters' Comm. for Freedom of the Press, 445 U.S. 136 (1980), lends some support to this argument. There the Court stated that the purpose of the Act "was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole." 445 U.S. at 149 (emphasis supplied).

However, Kissinger arose in a different context than the case at bar. The Court did not address the "zone of interests" question, but merely held that the Records Act does not grant a private right of action to force a government employee to return specific records to an agency. The case at bar, in contrast, involves a challenge to agency guidelines governing recordkeeping.

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[2] Armstrong II also is interlocutory, and therefore we will be free to raise the arguments against judicial review in a subsequent appeal after remand. Accordingly, the immediate issue is not whether we will ever raise the Armstrong I issues, but rather whether we should raise them now. Given that the issues are, in our view, difficult ones, prudence counsels in favor of waiting for the best possible posture to present this questions.

A 1983 D.C. Circuit decision, embraced by the panel in Armstrong I, held that historians and researchers are within the zone of interests of the Records Act when it comes to such general challenges. See American Friends Serv. Comm. v. Webster, 720 F.2d 29, 53 (D.C. Cir. 1983). According to the court in American Friends, the legislative history cited in Kissinger does not support the conclusion that the only purpose of the Records Act was to benefit the government. Id.

In our view, an argument that historians and researchers are not "arguably within the zone of interests" protected by the Records Act will not prevail. While we have a strong argument that the statute was enacted primarily to enhance government efficiency, see, e.g., S. Rep. No. 81-2140, 81st Cong., 2d Sess. 4, reprinted in 1950 U.S.C.C.A.N. 3547, 3550, it is difficult to conclude that the sole purpose of Congress was to benefit the federal government. It is clear, for instance, that an agency must make and preserve records "designed to provide information necessary to protect the legal and financial rights of * * * persons directly affected by the agency's activities." 44 U.S.C. § 3101. Moreover, there are numerous provisions providing for the continuing preservation of "records determined to have sufficient historical or other value to warrant continued preservation." See 44 U.S.C. § 2901(5)(C) (emphasis supplied). The Records Act also allows agencies to schedule for disposition records "not needed by [the agency] in the transaction of its current business and that do not have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government." Id. § 3303(2) (emphasis supplied); see also id. § 3303a. The plain import of these provisions is that records of research or historical value are preserved even when the government no longer needs them to conduct business.

In addition, the Records Act includes provisions regarding public access to records kept by the Archivist. See 44 U.S.C. §§ 2103(3), 2105, 2108, 2109, 2110, 2901(9). While records will be available through a different statute, the Freedom of Information Act, the fact remains that the Archivist maintains records with public access in mind. In fact, when Congress limited restrictions on access, it indicated its intent "to simplify access problems for the researcher, the agency, and the Archives." H.R. Rep. No. 95-1522, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S.C.C.A.N. 2288, 2289; see also id. at 4, 1978 U.S.C.C.A.N. at 2291.

We previously attempted to avoid the impact of these provisions by distinguishing between records "disposal" provisions -- which appear to encompass historical and research interests -- and records "creation and management" decisions, which arguably are directed at the efficiency of the government. At least for purposes of the "zone of interests" test, however, it is difficult to separate the duty to manage records from the duty not to dispose of them without the Archivist's approval -- especially in the context of a perceived "en masse" exclusion of status and distribution information. An agency's records management program must include "maintenance and security of records deemed appropriate for preservation" and "segregation and disposition of records of temporary value." 44 U.S.C. § 3102(2). Moreover, the agency head must "establish safeguards against the removal or loss of records * * *." Id. § 3105.

Thus, it is difficult to argue that determining what is a "record" is wholly unrelated to the myriad duties that attach to "records" -- duties that implicate preservation on the basis of historical and research value. In presenting such a standing argument, we would be required to make some very fine distinctions, and we have little confidence we would prevail. Finally, this issue implicates the Administration's general legal and policy approach concerning public access to information and government agencies. At least at this interlocutory stage of the case, it may be inadvisable to stir up such matters. In our view, since the question of standing can be presented to the en banc circuit court or the Supreme Court in an appeal from any adverse judgment of Judge Richey on remand (so-called "Armstrong III"), a stronger litigating strategy is to stay our hand at this point.

2. Whether Agency Recordkeeping Decisions Are Subject to Judicial Review Under the Administrative Procedure Act.

We could argue that the panel erred in Armstrong I when it held that agency recordkeeping decisions are subject to judicial review under the Administrative Procedure Act. In Kissinger, the Supreme Court held that the Records Act does not create a private right of action regarding access to individual records (see 445 U.S. at 148-50), but left open the issue of what remedies might be available under the Administrative Procedure Act to private parties complaining of an agency's or the Attorney General's failure to enforce the Records Act. The Administrative Procedure Act provides for judicial review of final agency action except to the extent that: "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

a. Preclusion of Review.

The Administrative Procedure Act contains a strong presumption in favor of judicial review. Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). However, where a legislative intent to preclude judicial review is "fairly discernable in the statutory scheme," that presumption is rebutted. Block v. Community Nutrition Inst., 467 U.S. 340, 351 (1984).

Preclusion of review under the Administrative Procedure Act, while a close question, is probably our best argument against judicial review. As the Supreme Court discussed in Kissinger, Congress declined to allow private lawsuits and instead "opted in favor of a system of administrative standards and enforcement." 445 U.S. at 149. The Federal Records Act expressly provides for judicial review only in an action initiated through the Attorney General to prevent the unlawful removal or destruction of records. 44 U.S.C. §§ 2905(a), 3106. When a statute provides "a detailed mechanism for judicial construction of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." Block, 467 U.S. at 349.

While an alternate judicial review mechanism "may" lead to the conclusion that review is precluded, however, "'[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.'" Abbott Laboratories, 387 U.S. at 141 (quoting Jaffe, Judicial Control of Administrative Action 357 (1965)). It takes a stronger showing of legislative intent to establish the "clear and convincing evidence" necessary to overcome the presumption in favor of review. Id.

We have a good argument (for the most part ignored by the panels in both American Friends and Armstrong I) that the primary purpose of the Records Act was to benefit the government by reducing the number of records that must be preserved. Congress sought to reduce the "burgeoning proportions of the Federal paperwork blizzard" and to cut the cost and quantity of federal records. See 122 Cong. Rec. 27464 (Aug. 24, 1976) (statement of Rep. Thone); 96 Cong. Rec. 11915 (Aug. 7, 1950) (statement of Rep. Madden); id. at 11917-18 (statement of Rep. Wolverton). The Act is a carefully crafted scheme that seeks "to ensure that a balance is struck between efficient and effective records management, and the substantive need for federal records." S. Rep. No. 94-1326, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S.C.C.A.N. 6150-51.

Moreover, Congress made clear that records management focuses on the agency's needs and not those of outside researchers. Congress emphasized that "records come into existence * * * not to fill filing cabinets or occupy floor space, or even to satisfy the archival needs of future generations, but first of all to serve the administrative and executive purposes of the organization that creates them." S. Rep. No. 81-2140, 81st Cong., 2d Sess. 4, reprinted in 1950 U.S.C.C.A.N. 3547, 3550. Congress also stated that "[t]he measure of effective records management should be the usefulness to the executives who are responsible for accomplishing the substantive purposes of the agency." Id.

While this legislative history lends support to our contention that the Records Act is aimed at government efficiency, its usefulness in showing preclusion of any judicial review -- even if there is a categorical failure to comply with the Act -- is limited. The fact that records are created and managed to serve the agency's purposes does not alter the fact that Congress provided a definition of "records" and specified that records may not be removed or destroyed unless approved by the Archivist. The fact that records come into existence "first of all to serve the administrative and executive purposes" of the agency does nothing to show that Congress intended to preclude judicial review to prevent the destruction of records once they are created.

In addition, despite its broad language, Kissinger is of limited help. The Kissinger Court recognized that the Records Act did not contain an express right of action allowing private parties to sue a government official accused of removing specific records, and merely refused to find such a right by implication. See 445 U.S. at 148-150. The present case is a challenge to general agency recordkeeping guidelines, and arises under the Administrative Procedure Act, which contains a strong presumption in favor of judicial review. See Abbott Laboratories, 387 U.S. at 141.

At bottom, our argument rests upon the notion that Congress enacted the Records Act to further administrative efficiency and that any form of judicial review -- no matter how egregious the violation of the Act -- would subvert this goal. It should be noted, however, that the panel in Armstrong I held that the Act does preclude judicial review of whether a particular document or electronic message is a "record." See 924 F.2d at 294-95. The review of the agencies' recordkeeping guidelines contemplated in Armstrong I is not inherently disruptive, and does not appear to violate Congress' desire to promote administrative efficiency. While the Armstrong II opinion may open the door to that kind of disruptive review, the Armstrong II opinion need not be read as modifying the limited judicial review contemplated by Armstrong I. At a minimum, a holding of broad judicial review and a record of demonstrated disruption to the government are necessary to set up our strongest and most attractive legal argument, and both of these factors are missing from this case in its present posture.

In sum, we think the preclusion of review argument is a close one, and the context in which it arises may very well be determinative. As the case now stands, it is not apparent that the panel's opinion will cause an undue burden on the government. Moreover, the decision can be viewed as promoting "good government" and openness by invalidating a categorical "en masse" determination that status and distribution is not appropriate for preservation, and holding that the electronic materials at issue can constitute "records" that are not "extra copies" and must be managed under the Act. So viewed, the holding appears to leave open the agencies' ability to promulgate reasonable and feasible guidelines, and to develop sensible disposition schedules approved by the Archivist. Of course, it is quite possible that Judge Richey will require more on remand. If so, additional burdens placed upon the agencies by Judge Richey will aid us in showing the deleterious impact of judicial review. We will be much better positioned arguing against judicial review if we are defending guidelines which reasonably attempt to accommodate the policies of the Act in a feasible manner than if we are attempting to defend a categorical exclusion. Since it is likely that we will only have one shot at convincing the en banc court of appeals or the Supreme Court to hear this issue, we believe it is advisable to wait until the record is more developed.

b. Committed to Agency Discretion by Law.

We argued in Armstrong I that recordkeeping decisions are "committed to agency discretion" by the Records Act. Typically, action is deemed "committed to agency discretion" if the statute is "drawn in such broad terms that in a given case there is no law to apply." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 401, 410 (1971). In Armstrong I, we acknowledged that the definition of "records" provides "law to apply," but relied instead upon the more novel argument that judicial review is inappropriate if the statutory criteria are not "judicially manageable." See National Fed'n of Federal Employees (NFFE) v. United States, 905 F.2d 400, 405 (D.C. Cir. 1990).

In our view, it will be extremely difficult to prevail on this argument in the present context of this case. First, courts that have held statutory criteria not "judicially manageable" generally have done so in cases involving inherently sensitive subjects, such as the military policies at issue in NFFE. See, e.g., Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992). Second, our argument in Armstrong I was aimed primarily at the disruption that would be caused by judicial review of individual decisions regarding what is and is not a record. But the panel in Armstrong I held that decisions as to whether particular documents are "records" is not judicially reviewable. It is unlikely that a court would hold that judicial review of generally applicable agency guidelines for consistency with statutory requirements is not "judicially manageable." As the panel stated in Armstrong I, "[c]ourts review the adequacy and conformity of agency regulations and guidelines with statutory directives every day." 924 F.2d at 294. Third, the panel's opinion can be fairly read as holding that the agencies' "en masse" exclusion of status and distribution information amounts to a failure to exercise discretion, since the agencies had not evaluated the contents of their electronic communications systems. Surely a court deals with "judicially manageable" standards when it steps in to force an agency to exercise its discretion.

Thus, if the judicial review recognized in Armstrong I is kept properly within its limits, a "committed to agency discretion" argument is likely to fail. If the district court on remand provides more intrusive review, we may be able to show that judicial review has gone beyond the limits of Armstrong I. In light of the ambiguity of the opinion in Armstrong II, however, we doubt that such a showing can be made at this time. As with the argument on preclusion of review, we recommend that this argument be raised, if at all, after the district court has an opportunity to rule on the Clinton Administration's new guidelines.

B. ARMSTRONG II STATUTORY ISSUES.

We also recommend against further review of the statutory issues decided in Armstrong II at this stage. Instead, we propose a strategy of adopting a fair but narrow reading of the panel's opinion, issuing new guidelines that resolve remaining questions, and focusing the case on the reasonableness of those guidelines under the Administrative Procedure Act.

1. A significant problem standing in the way of rehearing en banc or certiorari is the ambiguity of the panel's decision. Read narrowly, the opinion merely holds that (1) printing out an e-mail message without status and distribution data does not render the electronic version an "extra copy" exempt from the definition of "records"; and (2) the defendants erred in making an "en masse" categorical determination that status and distribution information is never "appropriate for preservation" under 44 U.S.C. § 3301. Neither of these holdings is objectionable on its face. The notion that an "extra copy" must be identical certainly is consistent with the most logical reading of the term, and it will be difficult to argue otherwise.

With respect to the panel's "en masse" rationale, it is hard to defend a categorical determination that certain types of information are not appropriate for preservation. It is possible to present what is essentially a factual argument that the Bush and Reagan administrations did not actually make a categorical exemption of status and distribution information from the record-keeping requirements of the Act. See Brief for Appellant in Armstrong II, at 27-28. However, at best our argument is simply that, while the Bush and Reagan Administrations failed expressly to address the issue of preserving electronic status and distribution information, employees should have known what to do from general recordkeeping principles. Given the obvious importance of status and distribution information in at least some contexts, this argument would appear unlikely to prevail. Moreover, we cannot seek further review simply to present a factual argument. Thus, to obtain review and prevail before the en banc court of appeals or Supreme Court, we would have to be prepared to convince the court that under the Act the defendants can make a categorical determination that status and distribution information is never appropriate for preservation. Needless to say, such an argument is unlikely to succeed.

Given the unobjectionable nature of the panel's opinion if it is read narrowly, any argument in favor of rehearing en banc or certiorari must be based on characterizations as to what the panel might have held. This type of speculative argument is not likely to catch the eye of the en banc court of appeals or the Supreme Court. Moreover, if we interpret the opinion in the most adverse manner in connection with a petition for rehearing or certiorari, we run the risk of indicating to the plaintiffs and the district court that such an adverse interpretation is a reasonable reading of the panel's opinion.

2. An alternative approach would be to ask the panel to clarify its opinion and request en banc review if the panel either declines to do so or does so in a way that creates a broad and harmful precedent. Outlined below are several issues that remain ambiguous after the panel's opinion and possible arguments we might raise if the opinion is interpreted broadly.

a. It is unclear from the panel's opinion whether its decision precludes the agencies from determining that status and distribution information is not appropriate for preservation on a case-by-case basis. We do not think the opinion need be read to bar such discretion. Indeed, the panel stated that agencies retain discretion to "decide if a particular document satisfies the statutory definition of a record * * *." Id. at 17. Admittedly, however, there is language which can be cited against us. The panel "assumed" that the status and distribution is part of the e-mail record as the "most natural" interpretation, but emphasized that even if the information is viewed as a separate document, the defendants' guidelines fail because they omit "entirely" a class of documents (status and distribution information) that is appropriate for preservation "in situations like this one." Slip op. at 18-19 n.8.

If the decision precludes case-by-case determinations of whether status and distribution information is appropriate for preservation, then we can argue that the court went too far. The Records Act gives the agencies discretion to determine in individual cases that distribution and status information is not appropriate for preservation even when the text of the message is a record. Without such discretion, the panel's decision would have the unjustified effect of treating paper and electronic records differently. Inherent in this argument is the notion that electronic distribution and status information -- like paper transmittals or routing slips -- are separate documents subject to a separate analysis as to whether they are "records.

In addition, if the panel's opinion is read as holding that distribution and status information always will be appropriate for preservation when the related e-mail message is a record, ("in situations like this one," see slip op. at 19 n.8), we can argue that the panel erred. Indeed, the Archivist's handbook upon which the panel relied (id.) states only that sometimes related information in distribution and routing slips will be appropriate for preservation.

The obvious downside in presenting such an argument is that we would be resolving an ambiguity in the opinion against ourselves. This would cause serious problems in the event further review is denied and we find ourselves back before Judge Richey. Any petition seeking clarification would have significantly less than a 50% chance of success, and it would be unwise to construe the opinion unfavorably when a favorable construction is possible.

b. It also is unclear whether the panel's decision limits agency discretion by requiring that every electronic document that deals in any way with agency business must be a record. Once again, there is language that supports contrary interpretations. On the one hand, the panel acknowledged that not all "scribbles and off-the-cuff comments" are records (slip op. at 24), and emphasized that the agency head can determine whether "a particular document satisfies the statutory definition of a record * * *." Id. at 17. Elsewhere, however, the panel stated that "substantive e-mail communications satisfy the FRA definition of 'records'" (slip op. at 23), and, by highlighting the term "evidence" in the statute, suggested that anything that might be "evidence" of the government's organization, functions, policies, decisions, etc., is appropriate for preservation (id. at 16).

In our view, the latter comments are dicta and not intended to change the standard of what constitutes a "record." The parties did not dispute that some e-mail messages created on the computers were in fact "appropriate for preservation," and this aspect of the standard was not litigated. The panel appears to have used the term "substantive" as a shorthand reference to the undisputed fact that some electronic messages are appropriate for preservation and not as a holding that anything "substantive" automatically becomes a record. We doubt that there is a chance the panel will amend its opinion to clarify mere dicta.

c. Similarly, if the panel's decision means that agencies cannot comply with the Records Act by making paper print-outs of the distribution and status information along with the electronic messages but instead must save all of the information electronically, we could argue that the court has robbed the agency of discretion to determine the best way to manage its records. Because the panel expressly declined to rule on the issue (see slip op. at 18), however, there seems little chance of obtaining further review on this basis, or even of getting the panel to clarify its opinion.

d. A final ambiguity of considerable practical consequence concerns whether agencies must direct their employees to request distribution and status information when they send an e-mail message on those computer systems that are not programmed to generate such information automatically. The panel emphasized that it did not wish to require that the agencies create any records as a result of its decision (slip op. at 24), but apparently was unaware that some of the computer systems at issue do not generate distribution and status information unless the user requests it. It appears doubtful that the panel will clarify its opinion merely to resolve an issue that turns upon an understanding of the agencies' computer technology.

3. Finally, we note that the Armstrong II decision decides two additional issues which do not merit further review at this time. First, the court holds that the Act requires the agencies to undertake some form of oversight of the record-keeping process by records management personnel. Slip op. at 24-28. In the abstract, this requirement does not appear to present much of a problem for the agencies. Second, the court remands the cross appeal for review of the status of the guidelines of the NSC defining presidential records. While some extremely important matters will be presented on the remand, the panel's decision is plainly interlocutory at this point, since the panel is unable to resolve the issue on the record before it. Slip op. at 42. Moreover, the Office of Legal Counsel and the NSC are still in the process of formulating their position on the question, and in particular whether OLC will reconsider a 1978 opinion that the NSC is an "agency" under the Freedom of Information Act and thus creates "agency records" subject to the Federal Records Act.

In sum, we do not think the Armstrong II issues justify further review at this stage in the proceedings.

**CONCLUSION**

For the foregoing reasons, I recommend against further review.

U.S. Department of Justice

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September 9, 1993

MEMORANDUM

TO: John A. Rogovin
Deputy Assistant Attorney General
Civil Division

FROM: David J. Anderson
Director
Federal Programs Branch
Civil Division

SUBJECT: Armstrong et al. v. Executive Office of the President, et al., Civil No. 89-0142 (D.D.C.), D.C. Circuit Nos. 93-5002, 5048, 5156, 5177 -- Appeal Recommendation

I recommend filing a petition for rehearing and/or rehearing en banc, or in the alternative seeking certiorari.

## QUESTIONS PRESENTED

1. Whether plaintiffs have a justiciable case or controversy, including whether they have available a private right of action to enforce the provisions of the Federal Records Act ("FRA"), 44 U.S.C. §§ 2101 et seq., 2901 et seq., 3101 et seq., and 3301 et seq.?

2. Whether the Armstrong II panel erred in taking an overly expansive view of the scope of defendants' obligations to ensure "adequate and proper documentation" under the requirements of the FRA, in a manner which violates the intent of Congress and which imposes serious practical and fiscal burdens both on defendants as well as on the remainder of the Executive Branch?

3. Whether the Court erred in rigidly adhering to the "sole function" test embodied in Ryan v. Dep't of Justice, 617 F.2d 781 (D.C. Cir. 1980), as the framework for deciding on remand whether the National Security Council and Office of Science and Technology Policy improperly designate certain of their records as "presidential"?

## DISCUSSION

The decision of the Court of Appeals interpreting the Federal Records Act has profound implications for the recordkeeping practices not only of the Executive Office of the President, but for the entire Executive Branch. Further review is appropriate now for three reasons. First, there are strong, over-arching legal grounds on which this suit should have been dismissed, which need to be definitively resolved. Second, we should not underestimate the difficulties of compliance for the EOP, which are likely to cause continued friction with the District Court and the resolution of such issues in procedurally unfortunate contexts, such as contempt proceedings. In part for this reason, the record is not likely to be better overall in some future appeal. Third, if there is a future appeal, the courts are likely to wonder where we have been; the grounds we will be asserting are available now and will never be more ripe.

Three important sets of legal issues are appropriate for en banc and/or Supreme Court review. The first, centering on reviewability and standing, deals with plaintiffs' right to be in court at all. The second concerns the interpretation of the Federal Records Act, an increasingly important statute of government-wide application. And, finally, issues of presidential authority and separation of powers are presented by the D.C. Circuit's analysis of the NSC's and OSTP's status for FOIA and FRA purposes.

1. At the outset, the Supreme Court has recognized that the Federal Records Act neither expressly nor impliedly confers a private right of action on private parties, see Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 148 (1980). For that reason, the panel in Armstrong I erred in rejecting the government's position on this threshold legal question. See Armstrong v. Bush, 924 F.2d 282, 292 (D.C. Cir. 1991). The FRA's statutory scheme seeks "to ensure that a balance is struck between efficient and effective records management, and the substantive need for federal records." S. Rep. No. 1326, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S.C.C.A.N. 6150-51; see also 44 U.S.C. § 2902 (listing "objectives" of Act). As the Kissinger Court recognized, Congress "opted in favor of a system of administrative standards and enforcement" for "violations of the duties" the Act imposes, 445 U.S. at 148-49. These included, in addition to Congressional oversight, enforcement actions to be brought by the Attorney General at the request of the Archivist and each agency head, 44 U.S.C. §§ 2905(a), 3106. Thus, while judicial enforcement by the Attorney General under the FRA is provided for "unlawful removal, defacing, alteration, or destruction of records," 44 U.S.C. §§ 2905(a), 3106, the FRA makes no provision for court review over decisions made by agency heads to "create" records.

Moreover, as noted in Kissinger, the legislative history of the federal records acts "reveals that their purpose was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole," 445 U.S. at 149 (citing S. Rep. No. 2140, 81st Cong., 2d Sess. 4 (1950)). As plaintiffs are not regulated in any fashion under the statute and, since the FRA deals only with the internal management practices of government, they simply are not within the zone of interests of the statute. Under well-settled Supreme Court case law, plaintiffs have no standing to pursue their challenge to alleged defects in EOP's recordkeeping practices.[1]

The Armstrong I panel found, however, that "it would not be inconsistent with Kissinger or the FRA to permit judicial review of the agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General" in the event of alleged record destruction or removal. 924 F.2d at 295. Yet in the guise of the limited review found to be so available, the Armstrong II opinion improperly restricts the discretion given to agency heads under the FRA to make decisions regarding which documentary materials constitute "records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency." 44 U.S.C. § 3101. It has effectively allowed for a judicial receivership over the most minute aspects of the internal record-keeping of the EOP with respect to their recordkeeping systems (at least for e-mail). Indeed, under the panel's opinion, it is difficult to discern any effective limitation on the power of the district court to control the Archivist and the EOP in the fashioning of further recordkeeping guidance.

2. On the statutory merits, the panel has wholly misconceived the scope of the FRA, by decreeing that a much broader class of documents be considered records than Congress intended or the agencies themselves believe are necessary for "adequate and proper documentation" of agency action. In affirming the district court, the Armstrong II panel assumed for the purpose of argument

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[1] The decision in American Friends Serv. Comm. v. Webster, 720 F.2d 29 (D.C. Cir. 1983), which found standing to challenge records disposition schedules under the FRA, is in our view wrongly decided under Kissinger and should be overruled en banc. More generally, American Friends is distinguishable as a case involving whether judicial review is available under 5 U.S.C. § 701(a)(2) (agency action committed to agency discretion by law), rather than under a strict judicial preclusion argument pursuant to § 701(a)(1). If we were to make the additional argument that the recordkeeping decisions at issue are "committed to agency discretion" by the FRA, American Friends is distinguishable on the grounds that it involves standards for record disposition, rather than creation.

that defendants had consistently and properly instructed employees, either orally or in writing, that electronic documents appearing on defendants' e-mail systems which meet the definition of a federal record should be printed out or incorporated into a written memorandum. Slip op. at 14-15. Nevertheless, stating that it "reject[s]" the argument that "agency heads have sweeping discretion to decide which documents are 'appropriate for preservation,' id. at 16, the panel went on to conclude that defendants had "by fiat" declared "'inappropriate for preservation' an entire set of substantive e-mail documents generated by two administrations over a seven-year period," id. at 17, namely, the remaining electronic versions of these same e-mail documents otherwise printed out in paper form. Given the Court's initial assumption, its latter statement only makes sense if the Court has a sound basis for its conclusion that "fundamental and meaningful differences in content between the paper and electronic versions" of e-mail documents exists. Id. at 23; see also id. at 15 ("the mere existence of the paper printouts does not affect the record status of the electronic materials unless the paper versions include all significant material contained in the electronic records" (emphasis added)).

These "fundamental and meaningful differences in content" amount, however, to no more than the inclusion of full names of senders and recipients, as well as times of receipt of the e-mail messages, to be associated with the substance of the messages themselves. While the panel deems this to be "important information," see slip op. at 18, this judicial determination is invented out of whole cloth, using a standard of "importance" not based on the FRA itself, but tied to the use such evidence has played in past criminal investigations. Id. at 17. n.7. Yet the FRA itself gives no clear answer to the question of whether such information constitutes "record" material, i.e., whether such information meets the test of being "appropriate for preservation" within 44 U.S.C. § 3301, and defendants never interpreted the FRA to require the equivalent "historical trail" of "who knew what when" information in the context of paper records management. See slip op. at 20 & n.9. In this regard, while the panel chooses to emphasize the "complete" documentation requirement expressed in 44 U.S.C. § 2902, it has disingenuously ignored a slew of counter-balancing "goals" of the FRA to provide for "efficient and effective" records management, including the goal of judicious preservation of records and prevention of unnecessary paperwork, id., as well as effectively read out of the statute the clear Congressional intent to allow agency heads discretion to determine what constitutes "adequate and proper" documentation.[2] Indeed,

[2] We have little doubt, for example, that a directive that employees write a paper memo to Files on the substance of any "record" e-mail (with subsequent deletion of the e-mail) would fully comply with the FRA, but the Court of Appeals plainly has a

what the panel has done is to change the requirement of adequate documentation of agency business to one of detailed documentation of the activities of every employee. There is no such mandate in the FRA.

Given the absence of a clear statutory answer on what proper record "creation" entails, substantial deference was due defendants' interpretation of their obligations under the relevant statute. Udall v. Tallman, 380 U.S. 1, 16 (1965); NLRB v. United Food and Commercial Workers Union Local 23, 484 U.S. 112, 123 (1987) (quoting Chevron U.S.A. Inc. v. Nat'l Resources Def. Council, 467 U.S. 837, 843 (1984)) ("where the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether an agency's answer is based on a permissible construction of the statute," according deference to the agency's interpretation). In contrast, faced with defendants' interpretation, the panel has essentially "engraft[ed] [its own] notions of proper procedures," Vermont Yankee Nuclear Power Corp. v. Natural Resources Def. Council, Inc., 435 U.S. 519, 525 (1984); i.e., what constitutes documentation "appropriate for preservation," under the FRA.[3] On the contrary, there is room for policy judgment under the statute. It is entirely appropriate for the Clinton Administration to take a broad view of what is "appropriate for preservation," while the previous administrations, consistently with the Act, could view it more narrowly.

The extent to which the panel has overread the requirements of the FRA is perhaps made more abundantly clear when consideration is given to the practical and fiscal dimensions of the Court's holding. The panel apparently acted under the assumption that the "extra" information not contained on the hard copy versions "is

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different, extra-statutory model in mind.

[3] There are numerous troubling statements laced throughout the opinion which collectively embrace a far more expansive vision of FRA requirements than what agencies have heretofore thought was required. The most prominent example is the panel's disquieting observation that "no provision [of the FRA] accept[s] abbreviated or summary versions of the original as the only record if the summary contains all material deemed 'appropriate for preservation,'" id. at 22 -- which is simply at odds with the longstanding position of the Executive branch. Cf. Kissinger, 445 U.S. at 163 & n.4 (Stevens, J., concurring and dissenting) (noting that "to the extent that Dr. Kissinger saw to it that the information was properly recorded elsewhere, the Government argues that the summaries became 'non-record materials' which could be disposed of with the agency's permission"). Left intact, this statement by itself may yet have wide repercussions for all government recordkeeping practices outside of the context of electronic records.

available on the electronic systems" (emphasis in original) in a format which is "incorporated" into the electronic version of e-mail, and must therefore be managed as part of an agency's recordkeeping program. Slip op. at 18 & n.8. Even under the less restrictive assumption that such "transmission" information need only be preserved _if in fact created_,[4] the panel opinion nevertheless apparently assumes that association of such transmission data with the texts of e-mail communications can be accomplished in routine fashion. In fact, the imposition of this new requirement imposes an immediate and substantial burden on EOP agencies to either (a) continue a paper system of recordkeeping with the additional requirement that transmission data must be preserved in paper form and associated with substantive paper print-outs; (b) preserve "backup tapes" on an indefinite basis; and/or (c) "reconfigure" or customize existing electronic communications systems in a manner which allows for the association of transmission data with substantive e-mail. The record indicates that defendants consider the first choice to substantially diminish the utility of existing e-mail communication systems (by imposing demands on end-users contrary to the objective of enhancing office efficiency inherent in having installed e-mail in the first place); the second choice to represent a wholly unsatisfactory storage mechanism for long-term access to "record" material; and the third choice to be generally possible (subject to technical problems still to be worked out), but fiscally wasteful given this Administration's stated intention of replacing the EOP's existing electronic communication systems with systems which, among other things, will allow for greater preservation of e-mail (including transmission data) in electronic storage format. _See generally_, defendants' exhibits attached to stay papers filed with Court of Appeals in May 1993.

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[4] A substantial question exists as to whether both the district and appellate courts nevertheless have read into the FRA a requirement that "who knew what when" information, including the time of sending _and_ receipt of messages, _must_ be included when e-mail is preserved. While certain e-mail software packages (_e.g._, Wordperfect Office, used by defendant USTR as well as, incidentally, within DOJ), contain "information" screens which record all such data in every case, other "off-the-shelf" software (_e.g._, the "All-in-One" product used by most of the EOP, including the systems run by defendants NSC and OA), only allows for users obtaining time of receipt information by specifically having to _request_ such information (_i.e._, _create_ what the panel deems to be "records"). The record indicates that if time of receipt information is required in all cases of federal record e-mail, the existing OASIS communication system operated by OA on behalf of much of the EOP will effectively be overloaded and disabled. If not clarified, defendants' narrower interpretation of what the courts have required will presumably be open to further challenge in district court.

Left unchallenged, there is no doubt that the Armstrong II decision poses an immediate and substantial threat to disrupt both the ongoing activities of the EOP, as well as the current record-keeping practices with respect to e-mail for the myriad of government departments, agencies and commissions. The district court, which has been a hostile forum for defendants' positions in this case since its inception, has shown a willingness to tolerate both a continual expansion of this action on prior remand (by allowing wholesale discovery plus multiple amendment of plaintiffs' Complaint to embrace the entire EOP), as well as the imposition of extraordinary deadlines and contempt findings in the face of substantial if not overwhelming evidence of good faith compliance.[5] There is no question but that, once the case is again remanded, the EOP will be faced with aggressive litigation aimed at enforcing immediate compliance with the panel's view of the FRA (coupled with potentially new issues under the FRA to be fashioned by plaintiffs). At bottom, the district court and Court of Appeals have read the FRA in such a way as to permit a continuing judicial receivership over all aspects of the EOP's electronic recordkeeping practices.

Moreover, based on responses to Appellate Staff's survey of federal agencies, it would appear that numerous other agencies of government which utilize e-mail are positioned similarly to the EOP with respect to the fiscal burdens imposed by the Armstrong II panel decision.[6] Given that the public interest community is well

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[5] Indeed, the district court is still on record as contemplating criminal contempt proceedings for what the government views as de minimis and unintentional violations of the Court's January 6, 1993 injunction.

[6] A few examples from the file of appeal recommendations (solicited by Appellate Staff) which have been received from agencies throughout government: the IRS estimates a $1 million cost for redesigning e-mail in conformance with the opinion. NASA, a self-described heavy user of e-mail networks, also has provided hard estimates in the range of $1 million in overall start-up costs. CIA indicates that "substantial costs" would be incurred to modify existing software, and that implementation of Armstrong II would "require at least one year." The U.S. Army Corps of Engineers states that, given current technology, the costs of implementation are "prohibitive" (while also noting that its state of the art e-mail system, which is in compliance "with the most advanced international standards," nevertheless "still does not appear to meet the court's requirements"). The Department of Transportation views the decision with "grave concern," given a two to five year period necessary for a vendor to redesign all DOT's e-mail systems and the "phenomenal" costs involved. The Pension Benefit Guaranty Corporation states that the decision "may impose a significant burden on the agency's resources, both administrative

aware of the[7] defects in recordkeeping practices throughout government, it is only a matter of time before multiple lawsuits are brought under the FRA challenging governmental recordkeeping practices.[8]

3. We understand that the Court's ruling on plaintiffs' cross-appeal is, on the surface at least, interlocutory in nature, therefore making problematic the issue of pursuing further appeal at this time on the issue of whether the NSC and OSTP improperly designate certain of their records as "presidential." Nevertheless, and notwithstanding the Court's finding to the contrary, the record is already clear that, under the panel's reading of the law of the circuit, including Ryan v. Dep't of Justice, 617 F.2d 781 (D.C. Cir. 1980), current NSC and OSTP recordkeeping guidance fails to pass muster if these entities continue to believe themselves to be "agencies" for purposes of the FRA and the FOIA and, at the same time, designate certain records created by staff in advising and assisting the President as "presidential" under the PRA. The Court made clear that the designation of a record as "presidential" under the PRA cannot shield that record from disclosure as an "agency record" subject to the FOIA. In a case currently pending in district court, plaintiffs' counsel have already relied on this holding in asserting that NSC must search presidential records in response to a FOIA request. McKone v. NSC, C.A. No. 90-2119 (D.D.C.). Short of a wholesale change from "agency" status (which we understand is under consideration with respect to the NSC), there is nothing of substance left to be developed on this issue on remand. The agencies' recordkeeping guidance is already in place and on the record. This guidance expressly adopts the notion that these specialized EOP entities may wear dual hats, including that of advisor to the President, and thus create records under both the PRA and FRA. The question of law as to whether this is permissible under Ryan is ripe for further review now.

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and budgetary." The Equal Employment Opportunity Commission states that the decision will cause "major problems" both "in terms of operations and budget." See also thoughtful recommendations in favor of appeal from the National Science Foundation, and the Federal Trade Commission.

[7] As an invitee to a meeting of the Association of Access Professionals held August 31-Sept 1, 1993 in Rockville, Maryland, counsel from Public Citizen recited numerous examples of agency recordkeeping guidance which allegedly are in error under Armstrong II.

[8] Indeed, requests to preserve backup tapes with citation to Armstrong II already have been noticed in a variety of disparate lawsuits being defended within Federal Programs Branch.

These entities may, of course, disavow their past voluntary acceptance of "agency" status in deference to their primary mission to advise and assist the President. They may also choose to voluntarily surrender to the Court's (and plaintiffs') interpretation of the law and cease designating any records as "presidential," or severely limit this designation to so few records as to constitute surrender in practical terms.[9]

Should neither approach be pursued and the government seeks to preserve its "dual-hat" theory, all that is likely to occur on remand is potentially intrusive discovery of these entities which will reconfirm what has been their historical practice of designating certain records as Federal and Presidential, and allow plaintiffs to build a greater case that this practice is in violation of Ryan. Unless and until such time as the rationale of Ryan as applied to these unique EOP entities is reconsidered in an en banc context, this aspect of the case will simply be relitigated on remand on what is essentially the existing record expanded only by whatever additional details are produced by plaintiffs' discovery into how recordkeeping guidance already explained fully in the existing record is actually carried out.

For this reason, we believe the present record is adequate to seek rehearing now on the legal question of whether NSC and OSTP may create both federal and presidential records. Indeed, this would appear to be a threshold jurisdictional question which must be resolved before any further consideration can be given to whether their recordkeeping guidance satisfies the FRA under the APA's arbitrary and capricious standard.

For these reasons, I recommend further review.

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[9] In particular, it is ironic that a consequence of the Court's interpretation of the FRA would be to either penalize the NSC for voluntarily treating certain institutional records as subject to the FRA and FOIA by forcing it to treat all records as such, or, in the alternative, to force the NSC to retreat from past practice and designate all records as presidential in order to protect the interests of the Presidency. We see little alternative to these approaches unless the "dual-hat" theory is upheld, and the record for appealing this question of law is established and more than adequate.

U.S. Department of Justice

Washington, D.C. 20530

CIVIL DIVISION/APPELLATE STAFF

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