

INFORMATION

PHOTOCOPY
PRESERVATION

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

(202) 514-4214

August 31, 1993

MEMORANDUM

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

FR: Robert E. Kopp, Director
Appellate Staff
Civil Division, Room 3617 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).

I would like to outline below our tentative thoughts as to the issues that could be raised in a petition for rehearing if such a petition is deemed desirable. First, I discuss threshold jurisdictional arguments that were earlier rejected in Armstrong I. Because of the interlocutory nature of the ruling in Armstrong I, the arguments rejected in that case can be raised before the en banc Court or the Supreme Court at this time. Second, I discuss issues of statutory construction arising out of the panel's opinion in Armstrong II. The Armstrong II opinion contains numerous ambiguities that might require clarification through a petition for panel rehearing, perhaps with a request in the alternative for en banc review should the panel fail to clarify its holding. In this memorandum, except for some preliminary reactions, I do not attempt to evaluate the strengths and weaknesses of each argument.

ARMSTRONG I THRESHOLD ISSUES

1. Agency recordkeeping decisions are not 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. First, the FRA provides for an alternative enforcement scheme, allowing for administrative action and a lawsuit brought by the Attorney General at the request of the Archivist or agency head. See Kissinger v. Reporters' Comm. for Freedom of the Press, 445 U.S. 136 (1980). This specific enforcement scheme shows that Congress intended that the FRA be enforced not through private lawsuits,

but through the administrative process. Second, recordkeeping decisions are "committed to agency discretion" by the FRA. Congress did not provide a judicially manageable standard for determining when material is "appropriate for preservation * * * as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government" (44 U.S.C. 3301).

2. Plaintiffs lack standing to challenge agency recordkeeping because they are not within the "zone of interests" of the FRA.

We also could argue that historians and researchers are not within the "zone of interests" of the FRA and therefore lack standing to maintain this action. The Supreme Court in Kissinger stated that the purpose of the FRA "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). A 1983 D.C. Circuit decision holding that historians and researchers are within the zone of interests of the FRA appears to disagree with the Supreme Court by stating that the legislative history cited in Kissinger does not support the conclusion that the only purpose of the FRA was to benefit the government. See American Friends Serv. Comm. v. Webster, 720 F.2d 29, 53 (D.C. Cir. 1983). The ruling in American Friends, which the panel in Armstrong I embraced, can be challenged now in an en banc rehearing petition or in a certiorari petition seeking Supreme Court review. This may be a more difficult argument than the judicial review issue discussed above, and it raises issues about this Administration's legal approach to questions of standing.

ARMSTRONG II ISSUES

The opinion in Armstrong II consists of two different strands of reasoning that have different practical consequences. On the one hand, much of the opinion suggests that an electronic message, including its status and distribution information, must be maintained in its entirety as a record unless an exact duplicate of the complete grouping of computer information is created. This is the "extra copy" portion of the decision. On the other hand, there is language that indicates that the true vice in the agency record-keeping guidance here is simply that it categorically attempted to exclude the status and distribution information from the system of records. This is the "en masse" aspect of the decision.

Given these different theories, the opinion is full of ambiguities -- ambiguities that we might construe one way and a hostile district court judge might very well construe in another way. Is the distribution and status information part of the e-mail, or a separate document that can be managed apart from the

text of the e-mail? Must distribution and status information be requested when an e-mail message is sent? Can status and distribution information be printed in paper along with the e-mail message or instead must it be saved electronically? If it must be saved electronically, is it sufficient to do so on a back-up system or must it also be done on the "live" computer system?

It may be possible that the government can live with the panel's decision if it is given the narrow "extra copy" and "en masse" interpretation outlined above. A broader interpretation, however, might be intolerable. Thus, a possible approach to rehearing is to ask the panel to clarify its opinion in accordance with our narrow interpretation, with an alternative request for rehearing en banc if the panel fails to clarify the opinion or adopts a broad interpretation. Below are several issues we could possibly raise in attempting to clarify the opinion and in arguing that a broad interpretation is incorrect. In my judgment, only the first could warrant an alternative request for rehearing en banc, but it might be possible to take advantage of the need to resolve some of the other ambiguities as justification for the en banc court taking the case.

1. Did the panel intend to eliminate the agency's discretion to determine in individual cases that status and distribution information can be deleted?

We could ask the panel to clarify that, under its decision, the agencies retain discretion to determine in individual cases that distribution and status information is not "appropriate for preservation." Viewing the decision narrowly, the panel perhaps has merely held that the defendants erred in making an "en masse" categorical determination that transmittal information is never appropriate for preservation -- a holding that the Government could presumably live with since it need only adopt regulations that clarify that such determinations must be made on a case-by-case basis (which the previous guidance invalidated by the panel did not). A request for panel rehearing could note that the defendants never in fact made the en masse determination described in the opinion, but in any event defendants are now issuing clarifying regulations to remove the panel's objection.

Any such request for clarification would necessarily include two sub-issues. First, are defendants free to argue on remand that the distribution and status information is not part of the e-mail message, but instead may be treated as separate documents? The panel's opinion assumed as "the most natural" reading that the distribution and status information becomes part of the record (slip op. at 18-19 n.8), but it expressly did not resolve the issue. If such information is part of the record rather than a separate document, then agencies will not be free to discard it as not "appropriate for preservation" on a case-by-case basis.

A second sub-issue stems from the panel's statement that, even if the distribution and status information is not part of the record, the defendants' policies fail because they omit an entire class of information that is appropriate for preservation "in situations like this one." Id. If this statement merely references the panel's conclusion that the agencies cannot determine "en masse" that distribution and status information is not appropriate for preservation, then there may be little problem. If, on the other hand, the statement is read to mean that distribution and status information always is appropriate for preservation when the e-mail message is a "record," then it would preclude the agency from determining that the information is insignificant in individual cases.

2. If the panel intended to eliminate the agency's discretion to make document-by-document determinations with respect to status and distribution information, then it erroneously construed 44 U.S.C. 3301 and the case should be considered by the en banc Court.

If the panel fails to clarify that its opinion should be interpreted narrowly, we could in the alternative ask for rehearing en banc, arguing that the FRA 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." We also would argue that the panel went too far in suggesting that distribution and status information always will be appropriate for preservation when the related e-mail message is a record. Indeed, the Archivist's handbook upon which the panel relied (slip op. at 19 n.8) states only that sometimes related information in distribution and routing slips will be appropriate for preservation.

3. Other matters that might warrant an effort at clarification.

Normally, clarification should be sought of only one or two items, and not mere dicta or unresolved matters. Nonetheless, if we seek clarification as described above, we might at least want to consider the following items.

- a. We could ask the panel to clarify that it did not intend to change the standard as to what constitutes a "record" by holding that every electronic document that deals in any way with

agency business is necessarily a record. While the panel acknowledged that not all "scribbles and off-the-cuff comments" are records (slip op. at 24), elsewhere it suggested that anything that might be "evidence" of the government's organization, functions, policies, decisions, etc., is appropriate for preservation (id. at 16). I think this is clearly dicta and not intended to change the standard of what constitutes a "record." Nonetheless, we might want to ask the panel to clarify that the agency head retains his usual discretion under the FRA to determine that individual documents - though they might relate in some small way to agency business - are not appropriate for preservation.

b. We possibly could also ask the panel to provide guidance on whether the agencies can comply with the FRA by printing distribution and status information along with the electronic messages or instead must save all of the information electronically. This is a question of substantial practical importance, although the panel expressly declined to rule on the issue (see slip op. at 18). My inclination is against seeking clarification on this point, but rather arguing that we have discretion in the matter because the panel left the issue open.

A related question is whether, if the agencies must save information electronically, they can do so on a back-up system rather than the "live" computer systems. The district court required the agencies to save electronic information on their live systems until the Archivist takes action under the FRA. That order was stayed pending appeal, but will be renewed when the mandate issues. While this also is a question of substantial practical importance, it seems unlikely that the panel will clarify this issue, since it declined to rule on whether the information must be saved electronically in the first instance.

c. A final ambiguity concerns whether the agencies must direct their employees to request distribution and status information when they send an e-mail message on those computer systems requiring a "read receipt." 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. Nonetheless, this may be an important issue for the NSC, which might be able to justify an attempt to clear up the panel's factual misunderstanding.



U.S. Department of Justice

EAP:jrb
145-1-2062

Washington, D.C. 20530

Telephone:
(202) 514-3354

August 23, 1993

ATTORNEY CLIENT COMMUNICATION
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Stephen R. Neuwirth
Associate Counsel to the President
Old Executive Office Building, Rm. 128
Washington, D.C. 20503

Alan J. Kreczko
Legal Adviser
National Security Council
Old Executive Office Building, Rm. 348
Washington, D.C. 20506

Re: Armstrong v. Executive Office of the President

Dear Steve & Alan:

In light of the adverse ruling from the Court of Appeals dated August 13, 1993, we wanted to outline our view of the most immediate and important concerns confronting the defendants in this litigation -- which need attending to even while consideration is being given to both possible further review and settlement. We caution, however, that, given the breadth of the appellate court's holding, the ambiguities in the opinion, and the overall complexity of the issues involved in this case, the following is not meant to be an exhaustive accounting of defendants' obligations. Where appropriate, reference will be made to our prior discussion of pending litigation concerns in our letter to you of June 9, 1993.

First, you should be aware that the prior partial stay entered in this case on January 15, 1993, will dissolve upon issuance of the mandate from the Court of Appeals; this in turn demands that immediate attention be given to a range of record-keeping guidance issues.¹ Under the Clerk's order accompanying

¹ Given this circumstance, our representations at the appellate level that a new electronic recordkeeping system would be in place within "6 to 8 months" from the date of oral argument,

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the August 13 Opinion, the mandate shall enter no later than October 4, 1993, i.e., seven days after the forty-five (45) day period for filing a timely petition for rehearing. Therefore, unless the mandate is tolled by the filing of such a petition, or a stay of the mandate is otherwise obtained pending the filing of a petition of certiorari, as of October 4 defendants shall again be subject to the district court's injunction of January 11, 1993. Under that injunctive order:

Defendants are enjoined from removing,
deleting or altering information on their
electronic communications systems until such
time as the Archivist takes action pursuant
to Section 2905 of the Federal Records Act to
prevent the destruction of federal records
. . . .

The district court interpreted its Order of January 11 as encompassing an injunction against deletions of e-mail from the "live" electronic communications systems as well as a prohibition against erasure of backup tapes, until such time as the Archivist (and EOP agencies) produce adequate recordkeeping guidance. Order of January 14, 1993 (denying stay). Thus, as of October 4 at the latest, to avoid the strict prohibitions in the injunctive order, it is incumbent on both the Archivist and EOP agency components to have developed recordkeeping guidance which will pass muster under the district court and Court of Appeals opinions. Such guidance will, at a minimum, necessarily have to include consideration of:

- (a) scheduling all "records" generated on e-mail communications systems, including in both paper and electronic form (assuming EOP agencies wish to continue their present practice of printing out hard copies of e-mail);
- (b) appropriate preservation of "transmission data" associated with e-mail communications in both paper and electronic form;
- (c) supervision of electronic recordkeeping practices by records management staff;
- (d) scheduling of records existing on backup tapes.

even if being presently carried out fully and in good faith, will not relieve defendants of their present obligation to meet their legal obligations under the Federal Records Act for the existing e-mail communication systems at hand.

As you are aware, we have been working with NARA, NSC, and certain other EOP agency components in an effort to develop appropriate interim guidance which meets the requirements of the Court's order, and will continue to do so to meet the deadline described above. There are, however, a number of difficult issues which will need attention, including but not limited to whether and how existing electronic communication systems must be reconfigured to meet the demands of the courts' orders; what defendants' obligations are with respect to the duty to "segregate" federal records on their existing e-mail communication systems;² and whether "monitoring" of individual e-mail accounts is now either required or advisable. See generally our letter of June 9, 1993 at 3-4.

Second, in light of the Court of Appeals' decision on plaintiffs' cross-appeal, there will need to be special attention paid to the development of adequate recordkeeping guidance for components of the EOP which heretofore have created both "presidential" and "federal" records, including the National Security Council and the Office of Science and Technology Policy. The guidance involving the NSC may, of course, turn on the "bigger picture" issues now under consideration.

Third, wholly apart from the universe of issues present with respect to issuing adequate prospective recordkeeping guidance, there also needs to be high-level consideration given to developing a unified approach to what defendants' "retroactive" obligations now are perceived to be with respect to segregating and preserving federal record material existing on the preserved backup tapes. Such tapes include, of course, not only Reagan and Bush Administration tapes, but backup tapes from the present Administration created from January 20 to date. The National Archives and Records Administration (NARA) previously developed a Preservation Plan for the Reagan and Bush backup tapes in their custody, which has provided an initial "roadmap" for the government's preservation obligations, including the preservation copying of tapes conducted successfully to date. In light of the Court of Appeals ruling, however, the time has now come to reach a consensus on the scope of defendants' present obligations with respect to appropriate segregation and appraisal of records

² In this regard, you will recall that we stated in the June 9 memo (at page 6) our concern that serious consideration be given to going forward with prospectively segregating federal and presidential accounts on the OASIS/All-in-One system, as one way in which EOP can better manage its federal records (both on the "live" e-mail systems as well as on backup tapes). We understand that work has been progressing on this front on the technical side; however, we encourage your continued oversight and attention to this separate matter.

existing on the thousands of tapes in NARA's and EOP's custody, in order that we will be in a position to inform the district court at the earliest opportunity of the government's views with respect to implementing the next, "remedial" phase of the case.

Fourth, the district court has served notice (in its order of July 19) that "the Court shall address the Plaintiffs' FOIA claim regarding electronic records as soon as possible after the Court of Appeals issues its decision." Indeed, it is not clear whether the Court will await the technical issuance of the mandate to proceed with this aspect of the case. In any event, given that the district court will almost certainly allow the government an opportunity to re-address all aspects of the FOIA portion of the suit in light of the Court of Appeals' ruling, we ask you to provide us with further guidance on the Administration's position on the FOIA issues involved in the suit at the earliest convenient opportunity. We have provided Neal Wolin with copies of all relevant past pleadings on the FOIA issue to assist in this regard. See also our letter of June 9 (at 7-8). In making your assessment, you should bear in mind that it will be incumbent on the government to quickly develop a plan of action should the district court order that further searches of the backup tapes take place to facilitate plaintiffs' FOIA demands. While we have been working with NARA as well as staff of NSC, WHCA, and OA, to scope out the technical issues involved in going forward with what appear to us to be olympian burdens imposed by this portion of the case, it would nevertheless be extremely prudent for you to give high-level attention to the fiscal and resource issues involved.

Fifth, and finally, we continue to be concerned that EOP agency components have taken all necessary steps to ensure that all electronic communications within the scope of the district court's injunctive order of January 6, 1993 are being preserved. Our letter of June 9 sought assurances from you that no new electronic communications systems have been put in place since January 20, and more generally asked for you to keep us apprised of any new developments within EOP (including reorganization plans) which might affect the Armstrong case. In our view, we need to redouble our efforts at "recanvassing the waterfront," to ensure that plaintiffs have no cause for alleging a further contempt of the district court's prior orders. Moreover, in light of the whirlwind of activity on the general "E-mail front," including but not limited to OSTP's participation in GSA's Government-Wide E-mail Pilot Project, as well as various interagency working groups and task forces looking into "interconnectivity" issues through Internet or otherwise, we need to be kept apprised of all developments affecting the EOP (through some regular mechanism to be put into place), in order

that we may properly advise defendant components of the EOP of their continuing legal obligations in Armstrong. If you wish, we could designate a contact person in this office for coordination on these matters.

We have not attempted to address the government-wide implications of the circuit court decision, or what present obligations NARA has to advise government components. These issues, as well as all questions relating to possible appeal and/or settlement, must await another day. We trust, however, that this general overview of the most pressing issues facing defendants will serve as a framework for further discussion. In this regard, we stand ready, as always, to work with each of you on all remaining issues in the lawsuit.

Sincerely,



David J. Anderson
Director
Federal Programs Branch
Civil Division

cc: John Rogovin
Steve Aitken (OMB)
Holly Gwin (OSTP)
Miriam Nisbet (NARA)
Bruce Overton (OA)
Laura Sherman (USTR)
Frank Sobol (ONDCP)



DRAFT #2
8-30-93
11:00 a.m.

U.S. Department of Justice

DRAFT #2
8-30-93
11:00 a.m.

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

(202) 514-4214
FAX: (202) 514-8151

Washington, D.C. 20530

August 26, 1993

[AGENCY AND ADDRESS]

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

Dear _____:

On August 16, 1993, the Department of Justice wrote to your office to solicit your agency's views regarding the impact of the D.C. Circuit's decision in the above-captioned case involving the status of electronic mail ("e-mail") as "records" under the Federal Records Act. As you know, "records" under the Act must be preserved until their disposition is authorized under disposal schedules approved by the Archivist. Because of inconsistencies and unanswered questions in the Court's opinion, a definitive interpretation of Armstrong is not possible. However, the Armstrong Court appears to conclude that (1) because of their content, e-mail messages can constitute "records" under the Federal Records Act; (2) treating only the text of an electronic message as the record and preserving that text in paper form does not satisfy the statute, at least where the entire transmittal and status information generated by the computer with respect to that electronic document is not part of the printed copy; and (3) accordingly, at least until further clarification is available, status and distribution information must be retained along with the text until disposition is authorized under disposal schedules approved by the Archivist.

While Armstrong is a suit involving the White House computer systems, the decision construes a statute of government-wide applicability. As the White House and the Department of Justice continue to study the decision in conjunction with the Archivist, it is essential that, in responding to the previous inquiry, your agency address the specific questions set forth as an attachment to this letter. Because a petition for rehearing must be filed by September 27, 1993, a response to these questions should be given the highest priority and should be submitted within seven days of

- a. Can the system be modified to ensure that "purged" e-mail is transferred to an electronic storage facility or other back-up mechanism? What would these modifications cost? Would they adversely affect the operations or capacity of the system? Would they create a burden upon agency employees? Why?
- b. Can any automatic "purge" function be discontinued? If so, would doing so adversely affect the operations or capacity of the computer system? Would it have an adverse effect upon users of the system? Why?
9. Does the agency's computer system (or systems) currently have "back-up" procedures, such as a "snapshot" of the entire system preserved on computer tape in case of system failure?
- a. How often are back-up tapes made (every day; every week; etc.)?
- b. Would it be feasible to develop a system accomplishing the goals of the systems described in questions 2 and 3, supra, based on the back-up tapes? In other words, do the back-up tapes provide a feasible method of preserving e-mail messages along with related status and distribution information in a format that would enable searches to be conducted of agency records?
- c. Would it be practicable for the agency to preserve back-up tapes permanently? What extra cost would this impose upon the agency? What burdens would it impose upon employees?
10. The Court's decision requires periodic monitoring of agency employees by recordkeeping personnel to ensure that electronic material is handled correctly under the Federal Records Act. Does the agency anticipate any problems in complying with this part of the decision?
11. Does your agency currently have specific regulations concerning the usage, storage, and disposition of records originating as electronic messages? If so, please describe or attach.
12. Do you have any plans to expand your current system of e-mail within the next year? If you adapt your system to the Court's decision, will you be able to install your system within your planned time-frame? If you did so, and you had a choice between printing out records on paper (see question 2, supra) or electronic storage (question 3, supra), how would you comply?
13. Please add any explanations or additional comments you feel necessary.

- f. What would these modifications cost?
 - g. Would these modifications adversely affect the operation of the system or its capacity? Why?
 - h. Would they create an unacceptable burden for individual users? Why?
 - i. Status information can change over time as e-mail recipients open and delete electronic messages. Can the system be modified to ensure that the current status information is printed?
4. To what extent can your current computer system maintain electronic messages on-line in normal usage? Would maintaining e-mail messages on the live computer system (rather than sending them to an electronic storage facility) disrupt system operations or otherwise burden system users? Why?
5. What interim arrangements can the agency adopt in the short term (e.g., in 30- 60- 90-days) with regard to the modifications discussed above, pending long-term modifications?
6. The Federal Records Act allows agencies to dispose of "records" by promulgating disposition schedules approved by the Archivist of the United States. Your agency has such schedules for paper records. Can the agency develop a feasible disposition schedule for electronic messages and related distribution and status information? What would be the most workable disposition schedules for your agency?
7. If electronic records are subject to the Freedom of Information Act (FOIA), how would the agency handle FOIA requests?
- a. How would the agency undertake searches for records responsive to FOIA requests?
 - b. Would electronic FOIA searches create a burden on the electronic system or upon employees of the agency? Why?
 - c. Would providing material to FOIA requesters in electronic form have an adverse impact upon the electronic system? How would it be done? Would it create an unacceptable burden for agency employees? What would be the cost to the agency? Please explain.
8. Does the agency's computer system (or systems) have a "purge" function regarding e-mail, in which electronic messages are deleted automatically after a set number of days? If so, please describe.

the date of this letter. Please send the response to Robert Kopp, Director, Appellate Staff, Civil Division, U.S. Department of Justice, Room 3617, 10th & Pennsylvania Ave., N.W., Washington, D.C. 20530. Please send copies of your responses to Steven Neuwirth, Associate White House Counsel, [address], and Trudy Peterson, Acting Archivist of the United States, [address].

If you have any questions, please call Freddi Lipstein (514-4815) at the Department of Justice.

Thank you for your attention to this matter,

Sincerely yours,

Webster Hubbell

QUESTIONS REGARDING ARMSTRONG V. EXECUTIVE OFFICE OF THE PRESIDENT

1. Does your agency's electronic communications system (or systems) create and retain transmittal and status information-- showing who sent the message, who received the message, and when recipients opened it -- automatically for every e-mail message?

a. If the transmittal and status information is created automatically at the time the message is originally sent, is that information automatically updated as each recipient opens and deletes the message?

b. If a complete set of transmittal and status information is not created automatically --

(1) Can individual users request that the system create and retain this information when they send an e-mail message?

If users were required to request this transmittal and status information with every message, would this adversely impact the operation of the computer system? Would this cause an unacceptable burden for the users? Why?

Would such difficulties exist if users requested such information on less than 50% of the messages? less than 10%? less than 5%?

If users did not request such information, could the information be obtained through back-up procedures or other electronic medium at a later time?

(2) Can your electronic communications system be modified to request transmittal and status information automatically?

What type of software/hardware would be necessary to accomplish this?

What would these modifications cost? How long would it take to implement these modifications?

Would these modifications impair the operation of the system? Would they create an unacceptable burden upon individual users? Why?

¹ By "transmittal and status" information, we mean to include "read receipts," "information screens," distribution lists, acknowledgements of receipts, user directories, lists of user IDs, and any similar information.

2. Assume the Court's decision allows agencies to comply with the Act by printing and preserving on paper both the message and the complete transmittal and status information (if reproduced in its entirety) for all messages designated as "records."

a. Can your agency develop a system that ensures that such information is printed along with the text of the e-mail message?

b. Could such a system be implemented in a way which does not create an unacceptable burden upon users?

c. Would additional software/hardware be necessary to develop such a system? If so, what?

d. In what time frame could the necessary modifications be done?

e. What would these modifications cost?

f. Would these modifications have an adverse effect upon the operation of the system or its capacity? Why?

g. Status information can change over time as e-mail recipients open and delete electronic messages. Can the system be modified to ensure that the most current status information is printed?

3. Assume that, instead of the paper system discussed above, the Court's decision requires that, for all messages designated as "records," that the agencies develop an electronic system for permanently storing the messages and related distribution and status information

a. Can the current system be modified to do this? Or must the agency develop a new system?

b. Could a system be developed that is user friendly, or would users have to go through several steps to ensure that e-mail messages and related information are sent to an electronic archive?

c. Can such an electronic storage system allow for indexing and accessing records by (i) subject matter, (ii) type of record, (iii) access restriction, and/or (iv) different retention periods? Can the system ensure that the records are retrievable by employees for use in their work?

d. What type of software/hardware would be necessary to accomplish this?

e. In what time frame could this be done?



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To: Sam Podesta
From: Daryl Walter
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August 12, 1993

TO: John Podesta
FROM: Sheryl Walter
RE: Armstrong v. Executive Office of the President

In response to questions regarding past attempts made by the plaintiffs in this litigation to settle all or part of the issues outstanding, I am forwarding with this memorandum a letter sent on March 6, 1992 by Michael Tankersley of Public Citizen to Vaughn Finn of the Department of Justice outlining the areas identified by plaintiffs that settlement discussions should address, should defendants be interested in entering into such discussions.

A meeting was held sometime shortly thereafter at plaintiffs' request to discuss the points in the March 6 letter. Among those attending were Alan Morrison and Mike Tankersley for the plaintiffs and Stuart Gerson, Elizabeth Pugh, and Vaughn Finn for the government. At the meeting, it was agreed that the Justice Department would get back to plaintiffs with a written response within two weeks. Elizabeth Pugh subsequently called Mike Tankersley to ask for additional time to respond. He agreed. But, no response from Justice as promised or any other follow-up to the plaintiffs' settlement approach was ever received.

If you have any questions, please give me a call.
Thanks!

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

March 6, 1992

Vaughan Finn
Department of Justice
Civil Division, Room 1082
901 E Street, N.W.
Washington, D.C. 20530

Re: Armstrong, et al. v. EOP, et al.
(Settlement Discussions)

Dear Vaughan:

I am writing, in response to your request, to set-forth for the defendants an outline of what plaintiffs believe a settlement in this action should address. This is not intended as a formal settlement proposal, nor to provide a comprehensive blueprint for settlement. Rather, it is intended to identify the principal areas that would have to be addressed by a settlement with the idea that, if the defendants are amenable to the possibility of entering into a settlement along these lines, it would be useful for both sides to meet and explore the possibility of settlement before further motions and briefing.

Plaintiffs believe that a settlement would have to address three central issues:

1. Treatment of the Preserved Tapes. A settlement would have to include an understanding that the 1986, 1987 and 1989 preserved tapes would be treated as federal record material (as opposed to nonrecord material) for purposes of both the Federal Records Acts (FRA) and Freedom of Information Act (FOIA). We believe that the record shows that (whatever the guidelines may provide now) at the time the preserved tapes were made there was no clear instruction to print-out and preserve in hard copy all federal records created on electronic mail. Consequently, even under the argument defendants have advanced, the preserved tapes could not be regarded as extra copies used solely for convenience and disposed of as nonrecord material.

Treating the tapes as federal record material would preclude disposing of them as defendants originally planned and would require that materials not exempted under FOIA be produced

Vaughan Finn
March 6, 1992
Page 2

when responsive to a FOIA request, including processing plaintiffs' FOIA request in a timely fashion. Beyond this, however, there are a number of options for handling the tapes, including transferring them to the Archives under the FRA, that plaintiffs would be willing to consider as part of a settlement.

2. Distinguishing Between Federal and Presidential Records.
A settlement would need to include an agreement on how to address materials that plaintiffs maintain are federal records subject to FOIA and FRA, but defendants (particularly the NSC) currently treat as Presidential material, exempt from both. For example, to reach a settlement on processing of the FOIA request, plaintiffs and defendants would have to arrive at mutually acceptable guidelines on what materials would not have to be reviewed for release because they are Presidential materials. To be acceptable to plaintiffs, such guidelines have to recognize substantially more materials as federal records than the NSC's current practices, as we understand them.

Plaintiffs do not have comprehensive guidelines to offer for settlement purposes, and arguing over such guidelines would probably not be a fruitful way to begin in any event. The clearest way to express what plaintiffs have in mind is through some concrete examples. For instance, plaintiffs maintain that the calendars of the Assistant to the President for National Security Affairs and his Deputy which are made available to NSC staff over PROFS are federal agency records, subject to both the FRA and FOIA. Another example is communications between NSC PROFS users that do not directly relate to NSC processes or Presidential advice, but do convey information on national security or foreign affairs for informational purposes, background, or other reasons. The PROFS notes marked at George Van Eron's deposition and attached to our Interrogatories provide some examples. Plaintiffs maintain that these types of materials are federal records, but their status under the NSC's current practices is, at best, unclear. To arrive at a settlement, we would have to agree to changes on how these types of materials are treated.

3. Future Recordkeeping Practices for Electronic Mail.
Plaintiffs believe that a settlement should include an agreement that recordkeeping practices will be incorporated into defendants' electronic mail systems, rather than subordinating the electronic mail to the paper records system. There are many ways that this could be done. One way would be to include a menu which requires users to identify record material at the time notes are created, in the same way the NSC requires PROFS users to designate a classification status when they are created. PROFS also has the capability to allow records managers to receive copies of notes, eliminate the duplicates, and archive those that are federal records. Other alternatives, which would provide more effective

Vaughan Finn
March 6, 1992
Page 3

records preservation by taking advantage of the automated features of computer systems, are also possible.

We recognize, and do not minimize the fact, that plaintiffs' outline for a possible settlement would entail a substantial change from the practices in place when this suit was brought in 1989. Enough time has passed, however, and the record has developed sufficiently that it seems to us that such changes may be worth exploring. Thus, if defendants are willing to discuss the possibility of settlement along these lines, please let us know and we will be happy to meet to discuss it. We have not received any suggestions or proposals concerning settlement from the defendants and, if they have their own agenda of concerns or issues to raise, it would be useful for us to know this in trying to assess whether settlement is possible. If, on the other hand, plaintiffs and defendants are too far apart to make discussions worthwhile, we understand and would not want to have either side expending efforts on discussions that are unlikely to be fruitful.

Sincerely yours,


Michael Tankersley

20795

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

7/30/93

26

July 26, 1993

MEMORANDUM FOR TRUDY H. PETERSON
Acting Archivist of the United States
National Archives and Records Administration

SUBJECT: NSC/NARA Declassification Program Assistance

Over the years the National Archives has been generously forthcoming in providing assistance to the NSC staff in support of the declassification review of documents from the Presidential libraries and the Office of the National Archives. Because of the recent burgeoning of declassification activity, particularly in response to mandatory review requests from the Presidential libraries, we are again asking your assistance.

In Fiscal Year 1992 we experienced a 40 percent rise in the number of new mandatory review cases received. An additional 20 percent increase is expected for FY 1993. Nearly all of the increased activity is attributable to requests for materials from the holdings of the Presidential libraries. In addition, we have shouldered significant new burdens in the review of the POW/MIA materials from the libraries (particularly Nixon and Reagan) and the unprecedented review of the Kennedy tapes. We also anticipate increased activity as the Reagan Presidential records and Bush Vice Presidential records become subject to the Freedom of Information Act in 1994.

To support this additional review burden, we require assistance in the form of experienced review and support personnel. It would be particularly useful if you would assign to duty stations at the NSC an archivist to work as a senior reviewer and a paraprofessional to provide administrative and research support. These individuals would support NARA-generated declassification activities.

In addition to helping the NSC Information Disclosure staff to meet increased demands, this assignment affords a unique training opportunity on the full scope of the declassification and Freedom of Information process at the highest level. Involvement in these activities will aid in individual professional development. Not only will these assignments provide NARA with the immediate benefit of timely responses to researchers, they will benefit the National Archives by returning staff members in the future who are thoroughly trained and experienced in records access issues and processes.

Nancy Menan, Senior Director, Information Management and Disclosure, will be contacting you concerning the specifics of these assignments. We would prefer to have a number of candidates from which to choose. Prospective review officers should have a background and work experience in recent American History. All should have a current Top Secret clearance. Please contact me if you would like to discuss this further.

for Kristie A. Kealey
William H. Itoh
Executive Secretary



U.S. Department of Justice
Civil Division

93 JUL 6 All: 26

Washington, D.C. 20530

CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
FAX TRANSMITTAL COVER STREET



DATE: 7-1-93

TO: Stephen R. Neuwirth

FAX NUMBER: 456-1647

FROM: Jason Baron
FAX NUMBER(S) ROOM 1000
COMMERCIAL: 202-616-8470
CONFIRMATION NO.: 202-616-8474

THERE ARE A TOTAL OF 17 PAGES INCLUDING THIS COVER PAGE IN
THIS TRANSMITTAL

John-
Here is the first draft
Armstrong settlement proposal-
let's discuss when you
have a chance.

Steve



U.S. Department of Justice
Civil Division

EAP:jrb
145-1-2062

Washington, D.C. 20530

Telephone:
(202) 514-4336

July 1, 1993

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BY TELEFAX

Note to Stephen Neuwirth
Miriam Nisbet
Bruce Overton
Leonard Schaitman
Neal Wolin

Re: Armstrong v. Executive Office of the President
-- Draft Settlement

As a follow-up to the meeting of July 25, 1993 in John Podesta's office, enclosed please find a draft settlement proposal, titled "Joint Stipulation and Order," for your review and comment on as expedited a basis as possible. Please note that Part II, pertaining to obligations associated with searching past backup tapes, remains to be drafted pending further discussions with Trudy Peterson, who has been away from the office.

In the interest of the litigation, we suggest that copies of this initial draft be closely held.¹ We will follow up promptly with each of you individually regarding how to proceed on advancing settlement discussions.

David J. Anderson

Enclosure

¹ Steve & Bruce: given the language of the stipulation as drafted, we believe it should nevertheless be shared with OSTP, as well as with other interested EOP agency components, as appropriate.

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: DB DATE: 5/24/18

DETERMINED TO BE AN ADMINISTRATIVE
MARKING INITIALS: M DATE: 1/30/93
2018-0662-5

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THU. 7/1/93 DRAFT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT ARMSTRONG, et al.,

Plaintiffs,

v.

EXECUTIVE OFFICE OF THE PRESIDENT,
et al.,

Defendants.

Civil Action No.
89-0142 (CRR)

JOINT STIPULATION AND FINAL ORDER

WHEREAS this litigation raises questions about the record-keeping obligations of defendants under the Federal Records Act and plaintiffs seek to compel changes in the recordkeeping practices of the defendant Executive Office of the President ("EOP") agencies with respect to their electronic communications systems; and

WHEREAS the present Administration is in the process of developing a technologically advanced computer system for use in defendant EOP agencies, including the National Security Council ("NSC"), which will permit a significantly larger amount of electronic material to be permanently stored and segregated, in retrievable electronic form, than has ever been preserved in the past; and

WHEREAS, as part of its plans, the present Administration intends to implement new technology which will automatically make it possible to associate transmittal information with particular e-mail messages; and

WHEREAS, given the condition of the current technology in the EOP, 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 the appropriate testing and implementation of an enhanced system; and

WHEREAS, not all EOP agencies have available to them or have 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; and

WHEREAS, the parties recognize, that continuation of the adjudication of the merits of the claims currently pending before both the Court of Appeals and the District Court, including pending claims under the Federal Records Act and the Freedom of Information Act, will involve substantial additional resources and expenses to both sides, and is therefore not in the public interest;

THEREFORE, without admission of liability on the part of defendants, the parties hereby stipulate and agree to the following terms and conditions in full satisfaction of all pending claims in the litigation:

I. Federal Record Management Procedures & Guidelines

A. Commitment to A New Electronic Recordkeeping System

1. Within [120?] days of the Court's approval of the Joint Stipulation, defendants shall conduct a comprehensive review ("Review"), of electronic systems management in the defendant EOP agencies, for the purpose of implementing a new electronic

recordkeeping system for "e-mail" communications. Under that system, "e-mail" communications constituting federal records will be preserved in electronic form; will be made accessible to government personnel for the conduct of ongoing official business; and will be publicly accessible when required by applicable law. A task force ("Task Force") consisting of members from [list offices] to be appointed by [the Staff Secretary to the President] will conduct the Review. Plaintiffs or their representatives may make written submissions to the Task Force.

2. At the conclusion of the [120] day period for conducting the Review, the Task Force will make a written report to the [Staff Secretary to the President] on the feasibility of proceeding with full implementation of one or more new electronic recordkeeping systems for use in the Executive Office of the President (including the National Security Council). The Report will include recommendations, including technical specifications as appropriate, concerning acquisition of proper software and hardware which will provide, to the extent feasible, that:

(a) federal and presidential records generated on the electronic communications system(s) will be segregated both "on-line" and in all other formats;

(b) the electronic communications system(s) will have the capacity to store electronic messages constituting federal records in a readily accessible form (e.g., in an ASCII file);

(c) electronic message "texts" will be associated with

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MARKING INITIALS: DB DATE: 6/24/88

appropriate transmission data;

(d) any other data residing on the electronic communications system(s) which may constitute federal records (e.g., certain calendars, user directories, logs or indices of data, log-on and log-off times, etc.), is preserved in an appropriate, accessible format.

The Task Force Report will also contain a recommendation regarding a timetable for final implementation of the new electronic recordkeeping system as envisioned, which in all events shall not exceed _____ months from the date of filing of the Report.

3. The Task Force Report will be made available to plaintiffs.

B. Interim Measures: NSC Electronic Recordkeeping

4. Within _____ days of the Court's approval of the Joint Stipulation, defendant NSC will institute procedures to provide for ongoing preservation, in electronic form, of the text of messages sent or received by NSC staff using the present All-in-One electronic communications system which constitute federal records.¹ These procedures will include, but not be limited to:

a. NSC staff continuing to designate at the time of creation of an All-in-One message whether the message constitutes a "record" under the Federal Records Act or Presidential Records Act, with automatic routing of all "record" messages to NSC Records

¹ [need to include cc:Mail (WHSR)?]

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Management Staff;

b. NSC Records Management Staff instituting procedures for "on-line" segregation of all federal and presidential records generated by use of the All-in-One communications system, to be maintained in separate electronic files set up on as consistent a basis as is feasible with the existing indexing scheme maintained for paper records;

c. NSC initiating a formal disposition schedule for the All-in-One federal electronic records routed to NSC Records Management Staff, through development of an SF-115 (Request for Records Disposition Authority), under applicable NARA regulations.

5. Within _____ days [(¶ 4) + 30 days] of the Court's approval of the Joint Stipulation, NSC will implement a periodic review process of the records generated on the All-in-One communications system, including but not limited to:

a. NSC Records Management staff periodically examining a sample of all electronic mail messages of NSC staff, including those designated as presidential records as well as nonrecords, for the purpose of identifying any problems in interpreting official guidance for distinguishing between record and nonrecord materials, and as between federal and presidential records;

b. NSC Records Management staff providing a report to the NSC Executive Secretary no later than _____, 1993, containing recommendations on any needed changes in current guidance or procedures in light of the periodic review conducted

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through that date;

c. NSC Records Management staff providing for "close-out" procedures for departing employees, which will include examination of materials residing on the All-in-One communications system in the same manner as examination is afforded materials generated and/or maintained by departing employees in paper form;

6. In addition to preserving electronic messages in the manner set forth above, NSC will preserve "record" information generated by or on NSC's present electronic communications systems, pursuant to any applicable disposition schedule, consisting of:

a. "Read receipts" (also known as "acknowledgements of receipt"), when necessary for complete and accurate documentation of agency activities;

b. On a monthly basis, any electronic calendars maintained by any NSC staff members which are shared with other staff members (beyond individual secretaries), excluding calendars maintained by the Assistant to the President for National Security Affairs (APNSA), the Deputy Assistant to the President for National Security Affairs (DAPNSA), or the Staff Secretary [which constitute presidential records];

c. User directories and distribution lists, to be preserved in paper form in files maintained by the NSC Records Management Staff, with instructions to computer operators and NSC staff to print out whenever modified, with the electronic versions subject to disposition under authority of GRS 23, item 9.

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d. User-set up functions of the All-in-One system, including changes in passwords, calendar authorizations, and log-in/log-out data, all of which may be updated or deleted under authority of GRS 20, Electronic Records, item 1c.

7. Defendant NSC will issue additional recordkeeping instructions to NSC staff to implement the above-guidance in ¶¶ 4, 5, 6] within _____ [same period as (¶ 4)] days of the Court's approval of the Joint Stipulation, which will supersede all prior recordkeeping guidance on the subject of records generated on NSC's electronic communications systems, including but not limited to the guidance on electronic federal records contained in the Itoh/Kreczko NSC memorandum entitled "Federal Records," dated May 8, 1993 (at page 6).

8. Either as part of the above-referenced additional recordkeeping instructions, or in separate guidance to all NSC staff, defendant NSC will issue further guidance which defines the categories of materials created by NSC staff which are subject to the Presidential Records Act and the Federal Records Act.

9. Defendant NSC agrees that its obligations to preserve federal record material generated on the All-in-One system will remain applicable to any electronic communications system which may be utilized by NSC staff as a replacement for the current communications system.

B. Interim Measures For Other EOP Agency Components

(i) OSTP

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10. Within _____ days of the Court's approval of the Joint Stipulation, the Office of Science and Technology Policy ("OSTP"), an agency component of the EOP, will institute procedures to enable ongoing preservation, in electronic form, of the text of messages sent or received by OSTP staff using the cc:mail electronic communications system, which constitute federal records. These procedures will include, but not be limited to:

a. OSTP staff designating at the time of creation of a cc:Mail message whether the message constitutes a "record" under the Federal Records Act or Presidential Records Act, with automatic routing of all "record" messages to the OSTP Records Management officer;

b. The OSTP Records Management Officer instituting procedures to provide that "on-line" segregation of all federal and presidential records generated by use of the cc:Mail communications system, to be maintained in separate electronic files set up on as consistent a basis as is feasible with the existing indexing scheme maintained for paper records;

c. OSTP initiating a formal disposition schedule for the All-in-One federal electronic records routed to the OSTP Records Management officer, through development of an SF-115 under applicable NARA regulations.

11. OSTP will issue additional recordkeeping guidance covering the obligation to periodically review electronic mail messages created by OSTP staff on existing communications systems;

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and to otherwise conform such additional guidance to the provisions of general guidance to be issued by the Office of Administration, as set out below in ¶ 13.

12. Either as part of the above-referenced additional recordkeeping instructions, or in separate guidance to all OSTP staff, OSTP will issue further guidance which clearly defines the categories of materials created by OSTP staff which are subject to the Presidential Records Act and the Federal Records Act.

(ii) OA

13. Within _____ days of the Court's approval of the Joint Stipulation, defendant Office of Administration (OA), which is responsible for the maintenance of the existing All-in-One electronic communications system used by staff of various EOP components, including the White House Office, will issue additional recordkeeping instructions. These instructions will include but not be limited to providing for the following additional actions to be taken by all users of the All-in-One system in components of the EOP which do not solely advise and assist the President:

a. All-in-One messages (as well as any attachments to messages), which are determined to be federal records, will be preserved in paper form in official files of each EOP agency component, where the printed copy shows the full name of the sender, full names of all recipients, and the date and time the message was sent on both the sender's and recipient's copies;

b. "Read receipts" which are necessary for complete and

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accurate documentation of agency activities, will be preserved in paper form in official files of each EOP agency component, and associated with the corresponding text of the printed out message(s);

c. All-in-One calendars maintained by policy-level officials, as designated by the heads of each EOP agency component, will be preserved in paper form on a monthly basis, and preserved in official files of each EOP agency component;

d. User directories and distribution lists will be preserved in paper form in official files maintained by the each EOP agency component, with instructions to computer operators and agency staff to print out whenever modified, with the electronic versions subject to disposition under authority of GRS 23, item

9.

e. User-set up functions of the All-in-One system, including changes in passwords, calendar authorizations, and log-in/log-out data, all of which may be updated or deleted under authority of GRS 20, Electronic Records, item 1c.

f. Provision for the identification of individual messages which constitute federal records, by means of either manual or automated "tagging" at time of creation, for the purpose of enabling agency components to implement periodic review of the record designations of messages created on the All-in-One communications system.

The parties further agree that any remaining information

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generated by or maintained on the All-in-One communication system maintained by EOP is either presidential or nonrecord material, not subject to the Court's orders.

14. For the purpose of implementing ¶ 13, defendant OA will issue additional recordkeeping instructions for the use of all EOP agency components which create federal records (other than NSC), within _____ [same period as ¶ 4] days of the Court's approval of the Joint Stipulation, which will supersede all prior recordkeeping guidance on the subject of records generated on the All-in-One electronic communications system, including but not limited to the guidance on electronic federal records contained in the Watkins/Overton memorandum entitled "Federal Records," dated May 5, 1993 (at pages 6-7).

(iii) Other EOP Components

15. The recordkeeping practices of agency components of EOP (other than NSC) with respect to federal records generated on electronic communications systems not otherwise specifically identified herein, and which are presently in use, will be left to the discretion of the agency heads of each EOP agency component pursuant to the Federal Records Act. [either this or we have to address USTR, Internet, OMB's suspended systems, etc.]

C. NARA

16. Within _____ days of the Court's approval of the parties' Joint Stipulation, defendant National Archives and Records Administration ("NARA") will perform an audit of defendant NSC's

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All-in-One electronic communications system, as well as the All-in-One system maintained by defendant OA, under applicable NARA regulations set out at 36 C.F.R. §§ 1220.50. NARA will prepare a summary report of the findings of the audit, to be made publicly available upon request.

II. {FOIA PORTION OF SUIT; RETROACTIVE OBLIGS FOR FRA MATERIALS (REAGAN, BUSH, CLINTON) -- to be written}

III. MISCELLANEOUS PROVISIONS

A. Definitions

17. "Defendants" include the Acting Archivist of the United States (in an official capacity), the National Security Council, the White House Communications Agency, the EOP Office of Administration, as well as remaining agency components of the Executive Office of the President in existence at the time of the approval of this Joint Stipulation, excluding any components the staff of which solely advise and assist the President. {OMB, ONDCP, OSTP, USTR, CEQ}

18. "Electronic communications systems" as used herein means electronic mail systems ("e-mail"), electronic conferences, and computer systems with similar electronic mail capabilities, which are used for communications solely among staff of the defendant EOP agencies.² The term does not include file transfer utilities (software that transmits files between users but does not retain any transmission data; or data systems that are used primarily to

² Meant to exclude Internet, etc.

collect and process data which have been organized into data files or databases on either personal computers or mainframe computers.

B. Savings Clauses

19. Defendants shall make their best efforts to implement the provisions of this Joint Stipulation based on the fiscal and budgetary appropriations available to them throughout the duration of this agreement. Nothing in this Joint Stipulation shall be construed to bind defendants to implementing one or more new electronic communications systems, or taking interim measures with respect to existing electronic communications systems, in the absence of appropriate levels of funding for accomplishing the terms of the Joint Stipulation. Moreover, nothing in this Joint Stipulation shall be construed to bind defendants in continuing to maintain any or all existing electronic communications systems which are presently utilized throughout the defendant EOP agencies. Defendants shall at all times have complete discretion with respect to whether to create new electronic communications systems for use by staff within the EOP agencies.

20. Upon the Court's approval of the terms of the Joint Stipulation, the terms of [Parts I and III of] the Joint Stipulation shall be binding upon the parties for a period not to exceed [3 years].

C. Attorneys' Fees

21. The parties agree that plaintiffs specifically retain their claim to attorneys fees, and nothing in this stipulation

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shall constitute a waiver or settlement of that claim.

[alternative: Plaintiffs specifically retain their claim to attorneys fees, with the proviso that the parties agree that no fees shall be claimed for work performed in connection with [subset of issues in suit: work related to PRA issues in lawsuit, including in connection with Armstrong I appeal; discovery issues govt won; NSC presidential/federal issue; FOIA; etc.]]

D. Dismissal of Claims

22. The Court's approval of this Joint Stipulation shall constitute a full settlement of all claims pending in this action, including those still before the Court (including the FOIA Count), and on the pending appeals. Upon the Court's approval of the Joint Stipulation, the parties shall jointly notify the Court of Appeals that the pending appeals (Nos. 93-5002, 93-5048, 93-5156), are withdrawn. [request to vacate district ct orders of Jan 6 and 11?]

[E. Jurisdiction]

[23. The parties agree that the District Court for the District of Columbia shall retain jurisdiction of this cause for the purpose of enabling the parties to apply at any time for such furthers orders or directions as may be necessary or appropriate to enforce the provisions of this Joint Stipulation.]

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- 14 -

[Plaintiffs' signatures]

ALAN B. MORRISON
DAVID C. VLADECK
MICHAEL E. TANKERSLEY
Public Citizen Litigation Group
2000 P Street, N.W.
Washington, D.C. 20008
(202) 833-3000
Attorneys for Plaintiffs

[Defendants' signatures: NARA, NSC, WHCA, OA, OSTP? Other EOP
components? White House?]

J. RAMSEY JOHNSON
United States Attorney

STUART E. SCHIFFER
DAVID J. ANDERSON
ELIZABETH A. PUGH
JASON R. BARON
(D.C. Bar # 366663)
ANTHONY J. COPPOLINO
PETER D. COFFMAN
PAMELA A. MOREAU
Attorneys, Department of
Justice
Civil Division, Room 1040
901 E Street, N.W.
Washington, D.C. 20530
(202) 514-4336
Attorneys for Defendants

SO ORDERED, this _____ day of _____, 1993

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

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- 15 -

Copies to:

Michael E. Tankersley, Esq.
David C. Vladeck, Esq.
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Kate Martin, Esq.
American Civil Liberties Union
Foundation
122 Maryland Ave., N.E.
Washington, D.C. 20002

Jason R. Baron
Anthony J. Coppolino
Peter D. Coffman
Pamela A. Moreau
Attorneys, Department of Justice
Civil Division
Room 1040
901 E Street, N.W.
Washington, D.C. 20530
(202) 514-4336

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U.S. Department of Justice

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Washington, DC 20530

CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
FAX TRANSMITTAL COVER STREET



DATE: 8-¹³12-93

TO: Neal Wolin

FAX NUMBER: 395-1039

FROM: Jasen Baron
FAX NUMBER(S) ROOM 1000
COMMERCIAL: 202-616-8470
CONFIRMATION NO.: 202-616-8474

THERE ARE A TOTAL OF 45 PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMITTAL

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued June 15, 1993

Decided August 13, 1993

No. 93-5002

SCOTT ARMSTRONG;
GARY M. STERN;
EDDIE BECKER;
NATIONAL SECURITY ARCHIVE;
CENTER FOR NATIONAL SECURITY STUDIES,
PLAINTIFFS-APPELLEES

v.

EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF ADMINISTRATION;
NATIONAL SECURITY COUNCIL;
TRUDY PETERSON, ACTING ARCHIVIST OF THE UNITED STATES;
WHITE HOUSE COMMUNICATIONS AGENCY,
DEFENDANTS-APPELLANTS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

2

No. 93-5048

SCOTT ARMSTRONG;
GARY M. STERN;
EDDIE BECKER;
NATIONAL SECURITY ARCHIVE;
CENTER FOR NATIONAL SECURITY STUDIES;
AMERICAN HISTORICAL ASSOCIATION;
AMERICAN LIBRARY ASSOCIATION,
PLAINTIFFS-APPELLANTS

v.

EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF ADMINISTRATION;
NATIONAL SECURITY COUNCIL;
TRUDY PETERSON, ACTING ARCHIVIST OF THE UNITED STATES;
WHITE HOUSE COMMUNICATIONS AGENCY,
DEFENDANTS-APPELLEES

No. 93-5156

SCOTT ARMSTRONG;
GARY M. STERN;
EDDIE BECKER;
NATIONAL SECURITY ARCHIVE;
CENTER FOR NATIONAL SECURITY STUDIES,
PLAINTIFFS-APPELLEES

v.

EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF ADMINISTRATION;
NATIONAL SECURITY COUNCIL;
TRUDY PETERSON, ACTING ARCHIVIST OF THE UNITED STATES;
WHITE HOUSE COMMUNICATIONS AGENCY,
DEFENDANTS-APPELLANTS

No. 93-5177

SCOTT ARMSTRONG;
GARY M. STERN;
EDDIE BECKER;
NATIONAL SECURITY ARCHIVE;
CENTER FOR NATIONAL SECURITY STUDIES,
PLAINTIFFS-APPELLEES

v.

EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF ADMINISTRATION;
NATIONAL SECURITY COUNCIL;
TRUDY PETERSON, ACTING ARCHIVIST OF THE UNITED STATES;
WHITE HOUSE COMMUNICATIONS AGENCY,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 89cv00142)

Freddi Lipstein, Attorney, United States Department of Justice, argued the cause for appellants-cross-appellees. With her on the joint brief were *Stuart E. Schiffer*, Acting Assistant Attorney General, *J. Ramsey Johnson*, United States Attorney, *Leonard Schaitman*, *Matthew M. Collette*, and *Patricia A. Millett*, Attorneys, United States Department of Justice.

Michael E. Tankersley argued the cause for appellees-cross-appellants. With him on the joint brief were *David C. Vladeck* and *Alan B. Morrison*. *Patti Ann Goldman*, *Kate Abbott Martin* and *Katherine Anne Meyer* entered appearances.

Before MIKVA, *Chief Judge*; WALD and HENDERSON, *Circuit Judges*.

Opinion for the Court filed *Per Curiam*.¹

PER CURIAM: This consolidated appeal presents us with important questions of federal agencies' statutory obligations to manage electronic records as well as issues related to the appropriate use of the civil contempt power to coerce conformity with district court orders.

In the flagship portion of the appeal, defendants-appellants—the Executive Office of the President (“EOP”), the Office of Administration, the National Security Council (“NSC”), the White House Communications Agency, and Trudy Peterson, Acting Archivist of the United States—challenge the district court’s conclusion that EOP and NSC guidelines for managing electronic documents do not comport with Federal Records Act (“FRA” or the “Act”) requirements. More specifically, these government agencies and officials contend that, contrary to the court’s ruling, they have, in the past, reasonably discharged their FRA obligations by instructing employees to print out a paper version of any electronic communication that falls within the statutory definition of a “record” and by managing the “hard-copy” documents so produced in accordance with the Act. We reject the government’s argument on this score. The government’s basic position is flawed because the hard-copy print-outs that the agencies preserve may omit fundamental pieces of information which are an integral part of the original electronic records, such as the identity of the sender and/or recipient and the time of receipt.

The defendants also appeal the district court’s order holding them in civil contempt of its prior order enjoining the Archivist to “take all necessary steps” to preserve federal records and requiring the defendant agencies not to remove, alter, or delete any information until the Archivist takes action to prevent the destruction of federal records. More

¹ Sections I and II of this opinion were authored by Circuit Judge Wald; Section IV was authored by Chief Judge Mikva.

specifically, they contest the district court's contempt citation grounded in the court's conclusions that (1) the defendant agencies failed to issue adequate recordkeeping instructions to employees in the four months after their former guidelines were held invalid and (2) the transfer of nearly 6,000 backup tapes to the Archivist "adversely affected" those tapes. Because the district court orders on which the contempt citation rests did not specify that the defendants had an affirmative duty to create new guidelines by a date certain, the district court abused its discretion in holding the defendants in contempt at least in part because of their failure to issue such guidelines within four months. We remand to allow the district court to determine whether, in light of the defendants' speeded-up attempts in recent months to assure preservation of the tapes, its second ground, the failure to preserve these tapes, by itself, justifies a contempt citation.

Finally, we are presented with a cross-appeal. The plaintiffs-cross-appellants—Scott Armstrong, the National Security Archive, and several other researchers and nonprofit organizations—take issue with the district court's conclusion that federal courts have no authority to review NSC and Office of Science & Technology Policy ("OSTP") guidelines differentiating federal records subject to the FRA from presidential records subject to the Presidential Records Act ("PRA"), 44 U.S.C. § 2201 *et seq.* Contrary to the district court, we conclude that the PRA allows limited review to assure that guidelines defining presidential records do not improperly sweep in nonpresidential records. Accordingly, we remand to the district court to determine whether the relevant NSC and OSTP directives categorize nonpresidential records as subject to the PRA.

I. BACKGROUND

A. Statutory Framework

Federal agencies' records creation, management, and disposal duties are set out in a collection of statutes known collectively as the Federal Records Act. See 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.* The

FRA, Congress informs, is intended to assure, among other things, "[a]ccurate and complete documentation of the policies and transactions of the Federal Government," "[c]ontrol of the quantity and quality of records produced by the Federal Government," and "[j]udicious preservation and disposal of records." 44 U.S.C. § 2902(1), (2), (5); *see also* *Armstrong v. Bush*, 924 F.2d 282, 292 (D.C. Cir. 1991) ("*Armstrong I*") (the FRA is intended to guarantee that agencies' records management programs "strike a balance 'between developing efficient and effective records management, and the substantive need for Federal records'" (quoting S. REP. NO. 1326, 94th Cong., 2d Sess. 2 (1976)). To achieve those ends, the FRA burdens the heads of federal agencies with several obligations. Most basically, each agency head must "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101. Moreover, under the Act, agency chiefs must also "establish and maintain an active, continuing program for . . . economical and efficient [records] management," *id.* § 3102, and "establish safeguards against the removal or loss of records [the agency head] determines to be necessary and required by regulations of the Archivist." *Id.* § 3105; *see also* *Armstrong I*, 924 F.2d at 293 (noting that these provisions, as well as others furnished "law to apply" under the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 701(a)(2), and thus permitted judicial review of agency recordkeeping guidelines' conformity with the FRA).

Besides assigning specific duties to agency heads, the FRA prescribes the exclusive mechanism for disposal of federal records. *See* 44 U.S.C. § 3314 (no records may be "alienated or destroyed" except in accordance with the FRA's provisions). For these purposes, "records" are defined as

all books, papers, maps, photographs, machine readable [i.e., electronic] materials, or other documentary materi-

als, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency ... as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.

Id. § 3301. If a document qualifies as a record, the FRA prohibits an agency from discarding it by fiat. *See American Friends Service Committee v. Webster*, 720 F.2d 29, 62 (D.C. Cir. 1983) ("Congress did not intend to grant [the agency] ... a blank check for records disposal."). Instead, the FRA requires the agency to procure the approval of the Archivist before disposing of any record. *Cf. id.* at 63. Normally, that approval may be obtained in one of two ways. First, an agency may submit a schedule of records sought to be discarded to the Archivist, who will sign off on the records' destruction only if she concludes that they do not "have sufficient administrative, legal, research, or other value to warrant their continued preservation." 44 U.S.C. § 3303a(a). Second, the agency may jettison certain common types of records pursuant to disposal schedules promulgated in advance by the Archivist (the disposal schedules are, of course, designed to take into account the FRA's goal of preserving documents of "administrative, legal, research, or other value"). *Id.* § 3303a(d).

Under the FRA, the Archivist's duties are not limited to judging the suitability of records for disposal. In addition, the Archivist must "provide guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government and ensuring proper records disposition," *id.* § 2904(a), "promulgate standards, procedures, and guidelines

with respect to records management," *id.* § 2904(c)(1), and "conduct inspections or surveys of the records and the records management programs and practices within and between Federal agencies." *Id.* § 2904(c)(7). The Archivist also plays a key role in the FRA's enforcement scheme. If she discovers that an FRA provision has been or is being breached, the Archivist must (1) inform the agency head of the violation and suggest corrections and (2) if ameliorative measures are not undertaken within a reasonable time, submit a written report to Congress and the President. *Id.* § 2115(b). Also, should the Archivist become aware of any "actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of [an] agency," she must notify the agency head of the problem and assist the agency head in initiating an action through the Attorney General for the recovery of wrongfully removed records or for other legal redress. *Id.* § 2905(a); see also *id.* § 3106 (requiring agency heads to notify the Archivist of any unlawful destruction or removal of records and placing upon them an independent duty to seek legal action through the Attorney General to recover the records). If the agency head is recalcitrant in pursuing legal remedies, the Archivist herself is to (1) request the Attorney General to initiate action and (2) inform Congress that she has made that request. *Id.* § 2905(a); see also *Armstrong I*, 924 F.2d at 295 (holding that "if the agency head or Archivist does nothing while an agency official destroys or removes records in contravention of agency guidelines and directives, private litigants may bring suit to require the agency head and Archivist to fulfill their statutory duty to notify Congress and ask the Attorney General to initiate legal action").

B. *The NSC and EOP Electronic Communications Systems*

Since the mid-1980s, the NSC and the EOP have utilized electronic communications systems to improve their operational efficiency.² These systems allow employees to create

² Originally, the EOP employed the "PROFS" computer system. In 1989, the EOP installed another "OASIS" system as an addition-

and share electronic appointment calendars as well as to transfer and edit word processing documents, but it is their electronic mail (or "e-mail") capacity that has racked up the most mileage. The 1,300 federal employees with access to the EOP and NSC electronic mail systems can, and apparently do, utilize them to relay lengthy substantive—even classified—"notes" that, in content, are often indistinguishable from letters or memoranda. But, in contrast to its paper cousin, e-mail can be delivered nearly instantaneously at any time of the day or week. And, in contrast to telephone conversations, e-mail automatically creates a complete record of the exact information users send and receive.

Other attributes of the EOP and NSC electronic mail systems are also relevant here. First, these systems give recipients the option of storing notes in their personal electronic "log." After receiving a message, a user may instruct the computer to delete the note; otherwise, it will be stored in her log for later use. Second, both the recipient and the author of a note can print out a "hard copy" of the electronic message containing essentially all the information displayed on the computer screen. That paper rendering will not, however, necessarily include all the information held in the computer memory as part of the electronic document. Directories, distribution lists, acknowledgements of receipts and similar materials do not appear on the computer screen—and thus are not reproduced when users print out the information that appears on the screen. Without this "non-screen" information, a later reader may not be able to glean from the hard copy such basic facts as who sent or received a particular message or when it was received. For example, if a note is sent to individuals on a distribution list already in the computer, the hard copy may well include only a generic reference to the distribution list (e.g., "List A"), not the names of the individuals on the list who received the document. Con-

al means of transmitting information among employees. The original PROFS system ceased operations in 1992. The NSC has its own PROFS system as well as a similar system known as "All-In-One."

sequently, if only the hard copy is preserved in such situations, essential transmittal information relevant to a fuller understanding of the context and import of an electronic communication will simply vanish. A final relevant fact here is that the individual note logs are not the only electronic repositories for information on the e-mail system. The defendant agencies periodically create backup tapes—snapshots of all the material stored on these electronic communications systems at a given time—that can be used later for retrieval purposes.

C. Procedural History

On January 19, 1989, the final day of the Reagan Presidency, the National Security Archive filed several Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requests for all the material stored on the EOP and NSC electronic communications systems from their installation in the mid-1980s up to that time. Simultaneously, the plaintiffs filed this suit for a declaration that the electronic documents contained on the NSC and EOP electronic communications systems and backup tapes were federal and presidential records and an injunction prohibiting those documents' destruction. After agreeing to preserve the electronic tapes, the defendants filed a motion in the district court for dismissal or, in the alternative, for summary judgment. After that motion was denied, *see Armstrong v. Bush*, 721 F. Supp. 343 (D.D.C. 1989), this court, on interlocutory appeal, settled several threshold issues in the litigation. Specifically, we held that the plaintiffs had standing to assert these claims because they were within the zone of interests of the records management provisions of the PRA and the FRA, *see Armstrong I*, 924 F.2d at 287-88, but that the President was not an agency under the APA and that the PRA impliedly precluded judicial review of the President's record creation, management, and disposal decisions under that statute. *See id.* at 288-91. We said, however, that the plaintiffs could seek judicial review of (1) agency guidelines' conformity to the FRA and (2) the agency heads' and Archivist's discharge of their FRA-derived responsibility to take action to prevent destruction or removal of federal

records. *See id.* at 291-96. We then remanded the case to allow for supplementation of the record as to the precise guidance—written and oral—that the defendant agencies had given employees. *See id.* at 296-97.

On remand, the parties developed an extensive record, including a Joint Statement of Facts (the "Joint Statement"), and, on January 6, 1993, the district court issued its ruling on all the FRA issues raised by the plaintiffs (the plaintiffs' FOIA claims remain undecided). *See Armstrong v. Executive Office of the President*, 810 F. Supp. 335 (D.D.C. 1993). In that ruling, the district court first addressed whether the communications stored in these electronic communications systems constituted federal records. Because the FRA's definition of "records" includes material "regardless of physical form or characteristics," the court concluded that substantive communications otherwise meeting the definition of federal "records" that had been saved on the electronic mail came within the FRA's purview. *See id.* at 340-41.

The court then found that the defendants' current practices for electronic records management were deficient in two key respects. First, assuming *arguendo* that the defendant agencies unequivocally informed their staffs to print out all on-screen information of any electronic note that qualified as a federal record (an assumption that the plaintiffs have vigorously contested throughout this litigation), that instruction was not adequate to meet the FRA's requirements because the "electronic material . . . [is] qualitatively different than a copy printed out in paper form." *Id.* at 341. The district court emphasized that unless employees also printed out the transmittal information stored in the computer but not appearing on screen, the hard copies preserved in the paper files would not necessarily contain all the important items retained in the electronic system. *See id.* ("A paper copy of the electronic material does not contain all of the information included in the electronic version."); *see also* Appellants' Brief at 22 ("[The defendant agencies] do not require that all information related to an electronic message be preserved, but only that information that is captured when the message screen is printed or incorporated into a written memoran-

dum."). Specifically, data "regarding who has received the information and when the information was received" might well be omitted from the paper versions. 810 F. Supp. at 341; see also *id.* at 346-47 (discussing NSC guidance).

The court found a second flaw in the agencies' records management practices: they failed to provide for any supervision of agency employees' electronic recordkeeping practices. Noting that (1) the National Archives Records Management Handbook provided that only "records officers" should determine the status of FRA records and (2) the defendant agencies supervise staffers' management of paper, but not electronic, records, the court concluded that the defendants' failure to supervise employees' electronic recordkeeping was arbitrary and capricious. See *id.* at 343; see also *id.* at 347 (discussing NSC guidance).³

Finally, the district court refused to adjudicate plaintiffs' claim that the NSC guidelines did not adequately distinguish between federal and presidential records. The court found that our holding in *Armstrong I* precluded judicial review of any guideline affecting the status of a presidential record. See *id.* at 347-48.

To implement its decision, the district court issued a multi-part declaratory and injunctive order. The order, as amended, first declared that the defendant agencies' current guidelines were arbitrary and capricious and contrary to law. See Amended Order, *Armstrong v. Executive Office of the President*, No. 89-142 (D.D.C. Jan. 11, 1993). Second, it enjoined the Archivist to "seek the assistance of the Attorney General with notice to Congress, and take all necessary steps to preserve, without erasure, all electronic Federal Records generated at the defendant Agencies." *Id.* Finally, it enjoined all the defendants "from removing, deleting, or altering information on their electronic communications systems until

³ The district court went on to find that older guidelines of the NSC and the EOP were deficient because, *inter alia*, some instructions did not tell staff how to save electronic records and did not differentiate between federal and presidential records. See 810 F. Supp. at 344-46.

such time as the Archivist takes action ... to prevent the destruction of federal records, including those records saved on backup tapes." *Id.* In response to an emergency motion by the defendants, this court stayed this last requirement to the extent of allowing the agencies to "remove, delete, or alter" information so long as it was preserved elsewhere in identical form. *See Armstrong v. Executive Office of the President*, No. 93-5002 (D.C. Cir. Jan. 15, 1993).

On May 21, 1993, on petition of the plaintiffs, the district court found the defendants in civil contempt. *See Armstrong v. Executive Office of the President*, No. 89-142 (D.D.C. May 21, 1993). First, it found that interim guidance issued by the defendants in the wake of the court's invalidation of their old guidelines was inadequate. Accordingly, the court reasoned, the defendants were in contempt for not substantially complying with its orders requiring the agencies to preserve all records. *See id.*, slip opinion ("slip op.") at 5-13. Second, the court held that the conditions surrounding the January 19, 1993, inauguration-eve transfer of backup tapes from the White House to the National Archives, as well as the Archivist's subsequent failure to recopy Reagan-era backup tapes nearing the end of their natural lifespan, violated the court's orders requiring preservation of the tapes. This treatment of the backup tapes, including the failure to recopy deteriorating tapes, thus furnished an additional basis for the contempt citation. *See id.* at 17-21. The court then set out a list of specific acts that the defendants were required to undertake by June 21, 1993 to purge themselves of contempt; if the defendants failed to accomplish them, fines of \$50,000 a day, to be doubled in subsequent weeks, would be imposed until the defendants cleansed themselves of their contempt. *See Order, Armstrong v. Executive Office of the President*, No. 89-142 (D.D.C. May 21, 1993).

Following oral argument on June 15, 1993, this court stayed the district court's contempt sanctions pending the outcome of this appeal. *See Armstrong v. Executive Office of the President*, No. 93-5002, *et al.* (D.C. Cir. June 15, 1993).

II. THE VALIDITY OF CURRENT NSC AND EOP GUIDELINES

A. *The Instruction to Print "Hard-Copy" Paper Versions*

We first address appellants' contention that the district court erred in finding that their pre-January-order instruction to print on-screen information from electronic federal records was inconsistent with the FRA.⁴ This question implicates two parts of this case. First, if the agencies' policy of printing on-screen information did not result in "papering" all federal records material, then at least some federal records will be permanently lost or destroyed unless the electronic backup records, currently being retained pursuant to the district court's orders, are preserved. This circumstance alone creates the predicate for an order requiring the Archivist and the relevant agency heads to take the statutorily prescribed steps to prevent the destruction of those tapes.⁵ Second, if this "print screen" policy—which was still in effect at the time the district court ruled in January—is inadequate under the FRA, then the district court appropriately issued a declaratory judgment invalidating its future use.

In proceeding to decision on this point, we adopt the district court's assumption, based on the appellants' submissions, that both the EOP and the NSC have consistently

⁴ The appellants contend that the EOP is not a proper party to this action because it is the subparts of the EOP that are "agencies" under the APA. The appellants, however, never raised this argument in their briefs to the district court; accordingly, it has been waived. See, e.g., *Association of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 862 (D.C. Cir. 1992).

⁵ Indeed, because we agree with the district court that federal records will be lost if only the paper documents are preserved, we need not address the flaws that it identified in earlier EOP and NSC recordkeeping documents. The legal insufficiency of a mere instruction to print out on-screen material is enough to create a risk that federal records will be permanently destroyed if the backup tapes are not preserved. Thus, we need not decide if additional errors in these instructions would also require the Archivist and agency heads to take curative steps to fulfill their statutory duties.

instructed employees, either orally or in writing, that when any electronic document meets the definition of a federal record, the employee should either print out the information that appears on her computer screen or incorporate that material into a written memorandum. See Appellants' Brief at 7-8; see also *id.* at 22 ("[The agencies] do not require that all information related to an electronic message be preserved, but only that information that is captured when the message screen is printed or incorporated into a written memorandum.").

Accepting appellants' factual predicate, however, does not lead us to their legal conclusion that such an approach satisfies the Act. Our analysis is a straightforward one. We begin with the apparently undisputed proposition that the EOP and NSC electronic communications systems can create, and have created, documents that constitute federal records under the FRA. The FRA contemplates that documents qualifying as records may be stripped of that status only if they are "extra copies of documents preserved only for convenience of reference." 44 U.S.C. § 3301. Applied to this case, that means that the mere existence of the paper print-outs does not affect the record status of the electronic materials unless the paper versions include all significant material contained in the electronic records. Otherwise, the two documents cannot accurately be termed "copies"—identical twins—but are, at most, "kissing cousins." Since the record shows that the two versions of the documents may frequently be only cousins—perhaps distant ones at that—the electronic documents retain their status as federal records after the creation of the paper print-outs, and all of the FRA obligations concerning the management and preservation of records still apply. See, e.g., *id.* § 3105 (requiring agency heads to "establish safeguards against the removal or loss" of "records"); *id.* § 3314 (stating that "records" may only be "alienated or destroyed" in accordance with FRA provisions, i.e., with the approval of the Archivist).

To qualify as a record under the FRA, a document must satisfy a two-pronged test. It must be (1) "made or received by an agency of the United States Government under Federal

law or in connection with the transaction of public business" and (2) "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 [it]." *Id.* § 3301. The appellants do not contest the fact that many, if not all, of the communications relayed over the electronic system satisfy the "public transaction" element of this test. At oral argument, the government appeared to acknowledge that the "preserved or appropriate for preservation" criterion was satisfied as well for some documents on the system.⁶

To the extent any question remains, we reject the appellants' argument, on brief, that agency heads have sweeping discretion to decide which documents are "appropriate for preservation" (since we reject this contention, we do not consider whether the disputed documents have also been "preserved"). The appellants have stipulated that the electronic communications systems "contain information on the organization, functions, policies, decisions, procedures, operations, and other activities" of the agencies. Joint Statement ¶ 64. Such documents could only fail to qualify as records if, despite their content, the agency has the inherent discretion to consider them *en masse* as not "appropriate for preservation ... as evidence of [the government's] organization, functions, policies, decisions, procedures, operations or other activities," 44 U.S.C. § 3301 (emphasis added), an odd proposition to assert in this case since the agency heads admit that they have never surveyed the contents of the electronic systems. See Joint Statement ¶ 67 ("Neither the EOP nor the NSC ha[s] conducted any formal examination, inspection, or survey to determine the types of communications recorded on the system, or the amount of information on the organization, functions, policies, decisions, procedures or other activi-

⁶ The following exchange took place at argument:

The Court: We agree ... that this system has, in the past, created some things that qualify as federal records ... ?

Appellants' Counsel: We agree.

ties of the EOP or NSC recorded in [electronic] files."); cf. *American Friends*, 720 F.2d at 65. In any case, while the agency undoubtedly does have some discretion to decide if a particular document satisfies the statutory definition of a record, see *Armstrong I*, 924 F.2d at 297 n.14, 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.⁷ Cf. *American Friends*, 720 F.2d at 41 ("Congress was certainly aware that agencies, left to themselves, have a built-in incentive to dispose of records relating to [their] 'mistakes'...."). Indeed, to conclude that agencies have broad discretion to exempt seven years of substantive documents from record status would flout our prior holding in *Armstrong I* that the FRA furnishes sufficient "law to apply" to permit judicial review of agency guidelines relating to the management of federal records. See *Armstrong I*, 924 F.2d at 293 (noting that the FRA contains a "detailed definition of the 'records' that agencies *must* preserve") (emphasis added); see also *id.* ("Although the FRA understandably leaves the details of records management to the discretion of individual agency heads, it does contain several specific requirements....").

Having established that the electronic communications systems contain preservable records, we turn finally to the question of whether the government has the discretion to convert only *part* of the electronic records to paper and then manage only the partial paper records in accordance with the FRA and the Archivist's regulations. The question answers itself. Only one FRA provision exists that would even arguably sanction a document, once denominated a federal record,

⁷ We note that the substantive importance of these documents is demonstrated by the frequency with which they have been used in recent years. They were used by the Tower Commission, congressional investigators and the Independent Counsel looking into the Iran-Contra affair; by the Department of Justice in connection with its prosecution of Manuel Noriega; and by the NSC's legal advisor in relation to the confirmation of Robert Gates as Director of the CIA. See Joint Statement ¶¶ 56-59.

shedding that appellation at a later point. That provision states that "extra copies of documents preserved only for convenience of reference" are not "records." 44 U.S.C. § 3301. But it is too tight a fit for the government to shoehorn the electronic records at issue here into that exception. Even assuming, without of course deciding, that one set of parallel documents retained in a different records system in a different medium than another set may be classified as a "cop[y]" under the FRA and thus subject to unobstructed destruction, the electronic records would still not qualify as "full reproduction[s] or transcription[s]; imitation[s] of a prototype; . . . duplicate[s]," WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 404 (2d ed. 1979), of the paper print-outs. This is because important information present in the e-mail system, such as who sent a document, who received it, and when that person received it, will not always appear on the computer screen and so will not be preserved on the paper print-out. See Joint Statement ¶ 46 ("When printed on paper, a[n] [e-mail] note will not always identify the sender(s) and recipient(s) of a note by name. Instead, the sender(s) or recipient(s) may be identified only by (a) userid [i.e., user identification]; (b) nickname; or (c) the title given to a distribution list identifying several individuals. Identifying the names of the sender(s) or recipient(s) for such notes requires reference to the distribution lists or directories maintained only in electronic form.") (emphasis added; record citations omitted); see also *id.* at ¶ 47 ("If requested, [the electronic communications system] will provide the sender of a note with a confirmation that it has been received, called an 'acknowledgement.' The acknowledgement records the date and time the addressee of the note opened his or her electronic mail. This information on the date and time the note is received does not appear on the paper copy of the note when it is printed-out.") (record citations omitted). Since employees had never been—at least until the time of the district court's January order—instructed to include these integral parts of the electronic record⁸ in any paper print-out, there is

⁸ Our discussion assumes that directories, distribution lists, etc. become part of an electronic record when they are incorporated in

no way we can conclude that the original electronic records are mere "extra copies" of the paper print-outs. Cf. National Archives and Records Administration, *Managing Electronic Records* 19 (1990) ("Most agencies have decided to meet their recordkeeping requirements for documents that are created using word processing or electronic mail or messaging by printing those documents in hard copy. The success of this approach depends upon a clear understanding by all employees of the obligation to print and file *all* record material.") (emphasis added).

Our refusal to agree with the government that electronic records are merely "extra copies" of the paper versions amounts to far more than judicial nitpicking. Without the missing information, the paper print-outs—akin to traditional memoranda with the "to" and "from" cut off and even the "received" stamp pruned away—are dismembered documents

that record to specify senders and receivers of documents. We believe such an assumption is warranted as the most natural way of understanding the relation between the substance of a message and its origin and destination. See also Appellants' Brief at 22 (referring to the disputed material as "information related to an electronic message"). Nonetheless, our conclusion is in no way dependent upon this assumption. If these electronic directories, distribution lists, etc., are perceived to be separate electronic records, making the paper renderings of the substantive notes copies, the paper records system maintained by the agencies would still fail to meet the Act's requirements since it would omit entirely a different class of documents that, as the Archivist acknowledges, are "appropriate for preservation" in situations like this one. See National Archives and Records Administration, *Disposition of Federal Records* 2 (1989) ("Sometimes papers normally considered nonrecord, such as transmittals or routing slips, acquire record status *because they clarify the matter being documented.*") (emphasis added); cf. 36 C.F.R. § 1222.38 ("Agency recordkeeping requirements shall prescribe the creation and maintenance of records of the transaction of agency business that are sufficient to: . . . (e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all significant decisions and commitments reached orally (person to person, by telecommunications, or in conference).").

indeed.⁹ Texts alone may be of quite limited utility to researchers and investigators studying the formulation and dissemination of significant policy initiatives at the highest reaches of our government. See 810 F. Supp. at 341 (noting that the omitted information may be "of tremendous historical value in demonstrating what agency personnel were involved in making a particular policy decision and what officials knew, and when they knew it"). The "[t]omorrow, and tomorrow, and tomorrow" of government will be allowed to "creep in [their] petty pace from day to day" without benefit of the "last syllable of recorded time." WILLIAM SHAKESPEARE, *MACBETH*, Act V, scene v, line 19. In our view, as well as the district judge's, the practice of retaining only the amputated paper print-outs is flatly inconsistent with Congress' evident concern with preserving a *complete* record of government activity for historical and other uses.¹⁰ See 44 U.S.C. § 2902(1) (listing first among Act's goals the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government"); see also *Armstrong I*, 924 F.2d at 288 (noting the "expressed statutory goal of preserving records for historical purposes"); *American Friends*, 720 F.2d at 57 (describing the FRA's legislative history as demonstrating that "Congress intended, expected, and positively desired private researchers ... to have access to the documentary history of the federal government"); cf. 36 C.F.R. § 1222.38 ("Agency recordkeeping requirements shall prescribe the creation and maintenance of records of the transaction of agency business that are sufficient to: ... (e) Document the formula-

⁹ The appellants attempt to minimize this fact by noting that traditional letters, memoranda, and phone calls do not always leave behind a historical trail including such information. This observation is beside the point. The key facts here are that this information is available on the electronic systems and that the defendant agencies have not taken any steps to retain it on their paper documents.

¹⁰ At the same time, for the reasons discussed *infra* at pages 23-24, we do not believe that our conclusion on this point is inconsistent with the Act's desire to balance this interest against the need for efficient records management. See *Armstrong I*, 924 F.2d at 292.

tion and execution of basic policies and decisions and the taking of necessary actions, including all significant decisions and commitments reached orally (person to person, by telecommunications, or in conference)."). Perhaps that is why, in this court, the appellants seem to have abandoned their former heavy reliance on this theory.

Before us they plead an alternative, related, but no more compelling theory of statutory compliance: "that the extra information that plaintiffs argue must be preserved is in fact not always 'appropriate for preservation' as evidence of an agency's essential transactions, and that printing the actual message text on the computer screen normally is sufficient for adequate documentation of the agency's business. Since the printed copy is identical to what is on the computer screen, the electronic version of the message that remains is a copy that is nonrecord within the meaning of the statute." Reply Brief for Appellants at 9. In other words, the appellants contend that given the broad discretion vested in the agencies by the FRA, they may reasonably determine that some parts of a record document—the so-called "extra information"—are not "appropriate for preservation"; thus, after the creation of the paper records, the electronic version is a "copy" because the paper record contains all the material worth preserving from the electronic files.

This appeal to discretion, however, relies in the main on snippets of language from different parts of the FRA pasted together in ways incompatible with the overall design of the Act. As noted above, the "appropriate for preservation" phrase in the definition of "records" at most allows the agency some discretion in deciding whether a document meets that definition in the first place. See 44 U.S.C. § 3301 (providing that federal "records" must be, *inter alia*, "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"). It does not, as appellants imply, grant agencies the discretion to automatically lop off a predesignated part of a whole series of documents that qualify as records (nor would it allow the

wholesale destruction of the directories and similar materials if they were perceived to be independent records, *see supra* note 8). In substance, the appellants are claiming that it satisfies the Act to preserve a second version of a record that is an *approximation* of the first version if it includes all the material that, in their view, is "appropriate for preservation." Even if this argument made sense with respect to a particular document, it cannot be accepted across the board for seven years of records documenting high-level government decision-making. Further, as our discussion above makes clear, it cannot be squared with the FRA's "extra copies" provision. The Act explicitly provides an "out" of the system for a federal record only when a second version is identical to—i.e., an "extra copy" of—the first. There is no provision accepting abbreviated or summary versions of the original as the only record if the summary contains all material deemed "appropriate for preservation."¹¹

Equally unconvincing is the appellants' suggestion that Congress' directive to preserve "adequate documentation" of agencies' "essential transactions" justifies their practice of retaining only the "substantive information" displayed on the computer screen. The phrases "adequate documentation" and "essential transactions" are lifted from 44 U.S.C. § 3101, which states: "The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." The purpose of this provision, by its own terms, is to place a general obligation on agency leaders to create and then retain a baseline inventory of "essential" records. *See American Friends*, 720 F.2d at 54; *see also id.* at 56 (summarizing legislative history

¹¹ Further, the agencies' assertion of unilateral discretion to discard part of a federal record is at odds with the FRA's specific requirement that federal records may be "alienated or destroyed" only with the approval of the Archivist. *See* 44 U.S.C. §§ 3303a, 3314.

of this provision and concluding that it provided an enforceable "across-the-board requirement" that agencies retain certain types of records); S. REP. NO. 2140, 81st Cong., 2d Sess. 15 (1950) (this provision "provides a general declaration by the Congress [to maintain adequate records]"). Other parts of the FRA, however, go on to prescribe more particularized duties for agency heads that reach beyond their general obligation to "adequately document" core agency functions. In particular, the Act includes (1) a separate definition of the term "records" that the appellants acknowledge sweeps in many of the electronic communications at issue here—whether or not preservation of those documents is necessary to maintain "adequate documentation" of "essential transactions"—and (2) other statutory provisions that mandate that all records—again, whether or not related to "adequate documentation" of "essential transactions"—be managed and retained in accordance with explicit statutory directives. See 44 U.S.C. § 3314 ("[R]ecords . . . may not be alienated or destroyed except under this chapter.") (emphasis added); see also *id.* § 3105 (agency heads must "establish safeguards against the removal or loss of records") (emphasis added). In sum, appellants' arguments fail to detour us from the analytical path we started down and now come close to finishing: (1) substantive e-mail communications satisfy the FRA definition of "records"; (2) the lone FRA provision for terminating their status as such requires that they be merely "extra copies" of other documents preserved elsewhere; and (3) since there are often fundamental and meaningful differences in content between the paper and electronic versions of these documents, the electronic versions do not lose their status as records and must be managed and preserved in accordance with the FRA.

Contrary to appellants' assertions, the conclusion that agencies must retain and manage these electronic documents in no way collides with Congress' oft-expressed intent to balance complete documentation with efficient, streamlined recordkeeping. See, e.g., S. REP. NO. 2140, 81st Cong., 2d Sess. 4 (1950) ("It is well to emphasize that records come into existence, or should do so, not in order to . . . satisfy the

archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them."). Our decision does not require that agencies, in appellants' words, save "every scrap of paper" they create. Not all scribbles and off-the-cuff comments will qualify as federal records. Nor do we saddle agencies with any new obligations to make additional documents in order to satisfy the needs of researchers or investigators. Cf. *Armstrong I*, 924 F.2d at 288 ("[P]laintiffs do not seek the creation of any new records, but rather ask only that the records already created be appropriately classified and disposed of..."); S. REP. NO. 1326, 94th Cong., 2d Sess. 8 (1976) (emphasizing the need for economy in records creation because that is where 80% of total recordkeeping costs are incurred). Finally, our decision leaves undisturbed the agencies' ability to purge incidental electronic records from their files by acting, *with the Archivist's approval*, to dispose of those documents that lack "sufficient administrative, legal, research, or other value to warrant their continued preservation." 44 U.S.C. § 3303(a); see also 55 Fed. Reg. 19,216, 19,216 (1990) (Archivist notes that the burden of managing electronic records "can be reduced significantly by promptly scheduling all electronic records, thus limiting the application of [regulatory] requirements to the very small percentage of records that are scheduled as permanent").

In sum, we find that the district court was fully justified in concluding that appellants' recordkeeping guidance was not in conformity with the Act.

B. *Supervision of Electronic Recordkeeping Practices*

Appellants also dispute the district court's finding that their records management practices were arbitrary and capricious in failing to provide for supervision or auditing of employees' electronic recordkeeping practices by knowledgeable records management personnel. Specifically, appellants contend that they reasonably discharged their obligation to "safeguard" federal records by assigning records managers the task of providing oral and written guidance to agency

personnel and making those recordkeeping experts available for resolution of specific problems.

The FRA explicitly requires each agency head to establish such safeguards against the removal or loss of federal records as she "determines to be necessary and required by regulations of the Archivist." 44 U.S.C. § 3105; *see also* 36 C.F.R. § 1220.2 ("Federal agency records management programs must be in compliance with regulations promulgated by [the Archivist]"). In this case, the agency heads clearly failed to discharge this obligation.

The Archivist's regulations provide:

The head of each Federal agency *shall* ensure that the management of electronic records incorporates the following elements: ...

(1) Reviewing electronic records systems periodically for conformance to established agency procedures, standards, and policies The review should determine if the records have been properly identified and described, and whether the schedule descriptions and retention periods reflect the current informational content and use....

Id. § 1234.10 (emphasis added). The Archivist has defined an "electronic records system" as "any information system that produces, manipulates, or stores Federal records by using a computer." *Id.* § 1234.2 (emphasis added). As previously discussed, the electronic communication systems used by the EOP and the NSC do produce federal records, and it follows that agencies have an obligation under the Archivist's guidelines to undertake periodic reviews to assure that "established agency procedures, standards, and policies," including instructions as to what constitutes a record, are being adhered to. Moreover, the relevant regulations make clear that they apply to all electronic systems used by agency employees to create electronic records, not just, as appellants suggest, to "official" agency electronic records systems. *See id.* § 1234.1 ("Unless otherwise noted, [this section's] requirements apply to all electronic records systems, whether on

microcomputers, minicomputers, or mainframe computers, regardless of storage media, in network or stand-alone configurations."); cf. *id.* § 1234.22 (listing specific requirements for electronic records systems "that maintain the official file copy of text documents on electronic media"). Moreover, to the extent there is any residual doubt on this question, we think that the agencies' own action in undertaking some review of employees' paper records before those employees exit government service and the common sense insight that an adequate program for ensuring records preservation must include some ongoing inspections and evaluations tip the balance against the government and lead to the conclusion that oversight is necessary as part of "an agencywide program for the management of all records created, received, maintained, used or stored on electronic media." *Id.* § 1234.10(a).

On that basis, we affirm the district court's holding that the defendant agencies must undertake some periodic review of their employees' electronic recordkeeping practices.¹²

¹² We also reject the appellants' contention that the district court's injunctive order sweeps too broadly. First, they argue that the court's order requiring the Archivist immediately to seek the assistance of the Attorney General and notify Congress of that action ignores *Armstrong I*'s statements that the Archivist and agency heads could discharge their statutory obligations through informal, intra-agency mechanisms. See 924 F.2d at 296 n.12. In this case, the Archivist had failed to take any actions—formal or informal—necessary to prevent the statutory violations. See Joint Statement ¶ 237 (acknowledging that although Archivist's regulations require her to "periodically evaluate agency records management programs," the Archivist has never performed such an evaluation for the NSC and the EOP, has never reviewed their recordkeeping guidelines, and has never surveyed or inspected their e-mail systems). Given that circumstance, the district court did not abuse its discretion in ordering the Archivist to take the specific actions provided for in the statute. Similarly unpersuasive is the appellants' argument that the district court should not have enjoined the defendant agencies from destroying any electronic records until new guidelines were in place. Because those systems continue to produce federal records, the district court used its discretion appropriately in insisting upon a full-scale method for

III. THE DISTRICT COURT'S CIVIL CONTEMPT ORDER

Next, the appellants appeal from the district court's May 21, 1993 civil contempt order. The district court found the appellants "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" in two respects: (1) "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" and (2) "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" which was "contrary to this Court's Orders to preserve the tapes and federal records contained on them." Order, *Armstrong v. Bush*, No. 89-142 (D.D.C. May 21, 1992). The court further ordered that, unless the appellants should "purge themselves of this finding of contempt" by "tak[ing] appropriate action by 4:00 p.m. on June 21, 1993," they would be subject to a fine of \$50,000 for each day of noncompliance during the first week, to be doubled to \$100,000 per day the second week and \$200,000 per day the third week, "with increases in such sanctions reserved thereafter for any further noncompliance with Court Orders." *Id.* at 2-3. The appellants assert that the contempt finding must be reversed because, *inter alia*, the district court's first ground, the failure to promulgate new regulations, was not a violation of the cited orders and therefore cannot support civil contempt. "The standard of review on an appeal from a finding of contempt is whether the District Court abused its discretion." *International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines, Inc.*, 849 F.2d 1481, 1486 (D.C. Cir. 1988). We agree with the appellants that the contempt finding, as articulated, was an abuse of discretion because it rests in part on an impermissible ground.

preventing the records' destruction until the agencies came up with new, adequate records management guidelines to replace the ones voided by the district court's declaratory order.

As a preliminary matter, we reject the appellees' jurisdictional argument that the May 21, 1993 order is not an appealable one because it "imposes only a conditional sanction for failure to comply with a preexisting order." See Appellees' Contempt Brief at 13. As both the Eleventh Circuit and the Second Circuit have concluded, "'Being placed under the threat of future sanction is a present sanction'" and an order so threatening "'imposes a present remedy and hence is appealable.'" *United States v. O'Rourke*, 943 F.2d 180, 186 (2d Cir. 1991) (quoting *Sizzler Family Steak House v. Western Sizzler Steak House, Inc.*, 793 F.2d 1529, 1533 n.2 (11th Cir. 1986)) (emphasis in original). We agree and therefore proceed to the merits of the contempt appeal.

"There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). Nevertheless, "civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous," *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991), and the violation must be proved by "clear and convincing" evidence. *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 626 F.2d 1029, 1031 (D.C. Cir. 1980). The district court's first ground for its contempt finding, however, did not involve violation of any court order. The district court's January 11, 1993 order did not expressly direct the appellants to promulgate new regulations, but merely issued "a Declaratory Judgment that the guidelines issued by and at the direction of the Defendant Agencies are inadequate and not reasonable and are arbitrary and capricious and contrary to law in that they permit the destruction of records contrary to the Federal Records Act." Amended Order, *Armstrong v. Bush*, No. 89-142 (D.D.C. Jan. 11, 1993). As the Supreme Court has observed: "[E]ven though a declaratory judgment has 'the force and effect of a final judgment,' 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (quoting *Perez v. Ledesma*, 401 U.S. 82,

125-26 (1971) (Brennan, J., concurring)). Thus, because the appellants were never directly ordered to promulgate new regulations, we must reverse the district court's contempt finding which was based in part on their failure to do so. Cf. *Spallone v. United States*, 493 U.S. 265, 276-77 (1990) (reversing contempt finding against individual city councilmembers for city's violation of consent decree where "the individual city councilmembers ... were not parties to the action" and "although the injunctive portion of that decree was directed not only to the city but to 'its officers, agents, employees, successors and all persons in active concert with any of them,' ... the remaining parts of the decree ordering affirmative steps were directed only to the city"); *International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967) (reversing opinion upholding contempt finding for violating order that "did not state in 'specific ... terms' the acts that it required or prohibited") (quoting Fed. R. Civ. P. 65(d)). Accordingly, we vacate the contempt order and remand to the district court to consider whether its second ground, the failure to preserve the tapes, by itself, justifies a finding of contempt, taking into account all efforts that have or will then have been made to assure the tapes' integrity.¹³

IV. REVIEWABILITY OF EOP AND NSC GUIDELINES DEFINING PRESIDENTIAL RECORDS

Finally, the plaintiffs-appellees cross-appeal the district court's conclusion that it did not have jurisdiction to review the EOP recordkeeping guidelines regarding presidential records. As cross-appellants, they assert that the guidelines

¹³ In light of this disposition, we need not address the appellants' challenge to the second contempt ground or its claim of sovereign immunity from contempt fines. See *Spallone*, 493 U.S. at 274 (finding it unnecessary to reach alternative first amendment and legislative immunity arguments after reversing contempt finding against city councilmembers on merits).

improperly instruct NSC and OSTP staff to treat as presidential records materials that are, in fact, agency records subject to the FRA. We have jurisdiction to hear the cross-appeal under 12 U.S.C. § 1292(b) because it challenges aspects of the same interlocutory order that is the subject of the main appeal. See *Armstrong I*, 924 F.2d at 296 n.13.

The district court erred in declining to review the EOP guidelines defining presidential records. The PRA delineates those records over which the President may exercise "virtually complete control" during his term of office, *id.* at 290, and the courts may not restrict that control by reviewing the President's recordkeeping practices and decisions. *Id.* at 291. But the courts are accorded the power to review guidelines outlining what is, and what is not, a "presidential record" under the terms of the PRA. The PRA does not bestow on the President the power to assert sweeping authority over whatever materials he chooses to designate as presidential records without any possibility of judicial review. Rather, it provides that all materials that were subject to the FOIA, 5 U.S.C. § 552, prior to the passage of the PRA remain subject to the FOIA and do not qualify as "presidential records." Thus, the court may review the EOP guidelines for the limited purpose of ensuring that they do not encompass within their operational definition of presidential records materials properly subject to the FOIA. We therefore reverse and remand to the district court for proceedings consistent with this opinion.

A. Background

The FRA and the PRA apply to distinct categories of documentary materials. As restated more fully, *supra* pages 6-7, the FRA defines the "records" subject to the Act as all documentary materials . . . 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 . . . as evidence of the . . . activities of the Government or because of the informational value of data in them.

44 U.S.C. § 3301. ("Records" subject to the FRA are referred to hereinafter as "federal records.") The PRA defines "presidential records" as

documentary materials ... 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(2). The definition goes on to exclude specifically "any documentary materials that are ... official records of an agency," as the term "agency" is defined in the FOIA, 5 U.S.C. § 552(f). *Id.* § 2201(2)(B)(i).

Whereas federal records are subject to a strict document management regime supervised by the Archivist, *see supra* pages 7-8, the PRA "accords the President virtually complete control over his records during his term of office." *Armstrong I*, 924 F.2d at 290. Neither the Archivist nor an agency head can initiate any action through the Attorney General to effect recovery or ensure preservation of presidential records. Compare 44 U.S.C. § 3106 (requiring agency heads to notify the Archivist of unlawful removal or destruction of federal records and to seek legal action through the Attorney General to recover or preserve the records); *id.* § 2905(a) (directing the Archivist to assist the agency head in initiating an action through the Attorney General for the recovery of wrongfully removed federal records or for other legal redress, and requiring the Archivist to make her own request to the Attorney General if the agency head is recalcitrant). Furthermore, the President may designate a period, not to exceed twelve years after the completion of his presidency, during which his presidential records shall not be accessible under the FOIA or otherwise. *Id.* § 2204.

The Archivist can request congressional advice regarding the President's intention to dispose of presidential records if the Archivist believes that the records may be of special

interest to Congress or that consultation is in the public interest, 44 U.S.C. § 2203(e), and she can also cause the President to submit a disposal schedule at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. *Id.* § 2203(d). But "neither the Archivist nor the Congress has the authority to veto the President's disposal decision." *Armstrong I*, 924 F.2d at 290 (citation omitted).

The EOP guidelines in question classify broad categories of NSC records as federal records, but also provide that NSC records "are [p]residential records if they were received or created for the President, the [National Security Adviser] . . . or his Deputy, or a member of the White House staff independently of any meeting or policy and staff actions of the NSC or its various groups." Joint Statement ¶ 157(c). The analogous guidelines for the OSTP provide that OSTP records are federal records, but "records produced or received by the Director of OSTP in his role as Science Advisor to the President are [p]residential records and should be segregated as such." *Id.* ¶ 157(d).

Relying in large part on our decision in *Armstrong I*, the district court held that "the NSC is entitled to segregate presidential and federal records. . . . [T]his Court has no power to review actions taken by the President to ensure that presidential records are maintained." *Armstrong*, 810 F. Supp. at 347, 348 (citations omitted). The district court also stated that our decision in *Armstrong I*

provided the methodology for separating the FRA and the PRA as it applies here: . . . EOP components whose sole responsibility is to advise the President are subject to the PRA and create presidential records. Similarly, the components of the EOP that have statutory responsibility are subject to the FRA.

Id. at 349 (citing *Armstrong I*, 924 F.2d at 286 n.2). The district court further understood *Armstrong I* to have found that the NSC advises the President and has statutory obligations, and to have applied the foregoing "methodology" to determine that the NSC "produces both presidential and

federal records." *Id.* at 347-48 (citing *Armstrong I*, 924 F.2d at 286 n.2).

In light of its interpretation of *Armstrong I*, the district court concluded that its order to take all necessary steps to preserve electronic federal records applied only to those agencies

that have statutory responsibility and not those that solely advise the President.... The Defendants shall not be required to preserve material[s] which are presidential records produced by components whose sole responsibility is to advise the President. However, in components that produce both types of records, this Court does have the jurisdiction to authorize the preservation of these materials until the Archivist can ensure that federal records are not destroyed.

Id. at 349. Thus, although the district court concluded that it could not review the presidential records guidelines, it nonetheless ordered the NSC—and other EOP components who do not have the sole responsibility of advising the President—to preserve *all* records, both federal and presidential, "until the Archivist can ensure that federal records are not destroyed." *Id.*

B. Reviewability of the Guidelines

As we have already stated, *supra* page 31, the PRA defines "presidential records" as

documentary materials ... 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(2). In addition, Congress explicitly provided that presidential records do not include "any documentary materials that are ... official records of an agency," as the term "agency" is defined in the FOIA, 5 U.S.C. § 552(f).

44 U.S.C. § 2201(2)(A)(i). The legislative history explains this limitation on the definition of "presidential records" as follows:

The term "presidential records" is intended ... to encompass all White House and [EOP] records ... which ... fall outside the scope of the FOIA because they are not agency records. In other words, that which is now subject to FOIA would remain so and that which is [not] now subject to FOIA would be subject to the [PRA], including those provisions of the [PRA] which in specified circumstances specially apply FOIA to these non-agency records after a President leaves office.

H.R. REP. No. 1487, 95th Cong., 2d Sess. 11 (1978); *see also id.* at 3.

Thus, Congress perceived the potential definitional overlap between agency records under the FOIA and presidential records under the PRA, and explicitly provided that the PRA would apply only to records that "fall outside the scope of FOIA because they are not agency records." Put another way, the PRA provides that the definition of "agency" records in the FOIA trumps the definition of "presidential records" in the PRA. Congress was "keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations," and thus sought "to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term of office." *Armstrong I*, 924 F.2d at 290. At the same time, however, Congress sought to provide a clear limitation on just which materials the President could legitimately assert control over and to preserve the pre-existing body of FOIA law governing the disclosure of government agency records.

The PRA exclusion of records subject to the FOIA from the class of materials that may be treated as presidential records averts a clash in the role of judicial review under the two statutory schemes. Judicial review plays an indispensable role in ensuring proper government disclosure under the

FOIA. 5 U.S.C. § 552(a)(4)(B); *Truitt v. Department of State*, 897 F.2d 540, 547 (D.C. Cir. 1990); *Senate of Puerto Rico v. U.S. Department of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983); *Ray v. Turner*, 587 F.2d 1187, 1190-95 (D.C. Cir. 1978). At the same time, judicial review of the President's management of admittedly presidential records is impliedly precluded by the PRA. *Armstrong I*, 924 F.2d at 289; see *infra* pages 36-38. Congress preserved the critical role of judicial review under the FOIA, and avoided a conflict between the PRA and the FOIA, by explicitly exempting records subject to the FOIA from the scope of the PRA and allowing judicial review of guidelines defining presidential records under the rubric of substantive FOIA law.

This narrow, clearly defined limitation on the scope of the PRA is absolutely essential to preventing the PRA from becoming a potential presidential *carte blanche* to shield materials from the reach of the FOIA. Of course, we presume that executive officials will act in good faith. But if guidelines that purport to implement the PRA were not reviewable for compliance with the statute's definition of presidential records, non-presidential materials that would otherwise be immediately subject to the FOIA would be shielded from its provisions, whether wittingly or unwittingly, if they were managed as presidential records. See 44 U.S.C. § 2204(a), (b) (President may designate a period, not to exceed twelve years after the completion of his presidency, during which his presidential records shall not be accessible under the FOIA or otherwise); *id.* § 2204(c)(1) (presidential records shall be administered under the FOIA after the expiration of any limitations on access imposed under subsections 2204(a) and (b)). Moreover, in light of the fact that disposal decisions under the PRA are unreviewable, *Armstrong I*, 924 F.2d at 290, a non-presidential document subject to the FOIA could be forever removed from that statute's provisions if it were improperly classified as a presidential record and destroyed.

For example, imagine a guideline defining "presidential records" as "all records produced or received by, or in the possession or under the control of, any government agency or

employee of the United States." This definition would sweep all, or virtually all, federal records—and many documentary materials that are neither federal nor presidential records—within the ambit of the PRA, and outside the scope of the FOIA. Reading the PRA to forbid judicial review of such a guideline for conformity with the PRA definition of presidential records would be tantamount to allowing the PRA to functionally render the FOIA a nullity. As we have already stated, *supra* pages 33–35, Congress avoided this problem by excluding records subject to the FOIA from the scope of the PRA, thereby preserving FOIA law intact and maintaining the integral role of judicial review.

Our holding today is also consonant with the relationship between the FRA and the PRA. The FRA defines a class of materials that are federal records subject to its provisions, and the PRA describes another, mutually exclusive set of materials that are subject to a different and less rigorous regime. In other words, no individual record can be subject to both statutes because their provisions are inconsistent. If guidelines that purport to define presidential records were not reviewable, the cross-appellees could effectively shield all federal records not only from the FOIA, but also from the provisions of the FRA—thus evading this court's holding in *Armstrong I*, 924 F.2d at 293, that the courts have jurisdiction to decide whether the NSC's recordkeeping guidelines adequately describe the material subject to the FRA.

We held in *Armstrong I* that "the PRA precludes review of the President's recordkeeping practices and decisions." *Armstrong I*, 924 F.2d at 289. The cross-appellees urge the court to give this language the broadest possible reading, holding in effect that we may not review any guidelines that purport to implement the PRA or deal with asserted presidential records. Thus, argue the cross-appellees, the district court correctly held that the guidelines for determining which materials are presidential records are not subject to judicial review. We disagree. The *Armstrong I* opinion does not stand for the unequivocal proposition that all decisions made pursuant to the PRA are immune from judicial review.

The *Armstrong I* opinion addressed the question whether the courts could review the decision to erase materials designated by the government as presidential records within the meaning of the PRA. See *id.* at 284, 291. We held that judicial review was not available to monitor disposal and emphasized that Congress drafted the PRA in a manner that would "ensure executive branch control over presidential records during the President's term of office." *Id.* at 290 (emphasis added). Thus, we held that those decisions that involve materials that are truly presidential records are immune from judicial review. We did not hold in *Armstrong I* that the President could designate any material he wishes as presidential records, and thereby exercise "virtually complete control" over it, *id.* at 290, notwithstanding the fact that the material does not meet the definition of "presidential records" in the PRA.

The cross-appellees point to individual phrases and sentences in our *Armstrong I* opinion which they contend dictate the broad result they urge upon this court. However, as we have just said, this language must be read in the context of the issue before the court in *Armstrong I*. In any case, the language seized upon by the cross-appellees is entirely consistent with the result we reach today. We stated in *Armstrong I* that the PRA "require[s] the President to maintain records documenting the policies, activities, and decisions of his administration, but leav[es] the implementation of such a requirement in the President's hands." *Id.* However, the discussion that immediately follows this statement makes clear that the *Armstrong I* court was not addressing the initial classification of existing materials. The *Armstrong I* court discusses only the "creation, management, and disposal decisions" described in the provisions of 44 U.S.C. § 2203. See *id.* at 290, 291. None of these decisions encompasses the initial classification of materials as presidential records.

A "creation" decision refers to the determination to make a record documenting presidential activities. See 44 U.S.C. § 2203(a). Thus, the courts may not review any decisions regarding whether to create a documentary presidential rec-

ord. "Management decisions" describes the day-to-day process by which presidential records are maintained. *See id.* § 2204(a), (b). The courts may likewise not review these particulars of the presidential records management system. *Armstrong I*, 924 F.2d at 290. Finally, "disposal decisions" describes the process outlined in 44 U.S.C. § 2203(c)-(e) for disposing of presidential records. Judicial review of the President's action under these provisions is also unavailable. But guidelines describing which *existing* materials will be treated as presidential records in the first place are subject to judicial review.

Thus, although the PRA impliedly precludes judicial review of the President's decisions concerning the creation, management, and disposal of presidential records during his term of office, *Armstrong I*, 924 F.2d at 291, the courts may review guidelines outlining what is, and what is not, a "presidential record" to ensure that materials that are not subject to the PRA are not treated as presidential records. We remand to the district court to conduct this inquiry.

C. *The PRA Definition of Presidential Records*

Having held that the recordkeeping guidelines defining presidential records are subject to judicial review, and having remanded to the district court for that purpose, it remains for us to discuss the definition of "presidential records" to be applied on remand. As our previous discussion of the PRA, *supra* pages 31, 33-34, has undoubtedly indicated, we must turn again to the PRA provision exempting from its scope any materials that are official records of an agency, as "agency" is defined in the FOIA, 5 U.S.C. § 552(f). 44 U.S.C. § 2201(2)(A)(i). Congress expressly intended when it passed the PRA to preserve unchanged the coherent body of law that had been developed under the FOIA, and it is that body of law that provides the basis for our limited review of the definition of presidential records provided in the guidelines. The guidelines violate the PRA to the extent that they classify as presidential records materials that would otherwise be subject to the FOIA.

The FOIA definition of "agency" invoked in the PRA raises a clear but somewhat intricate set of references and cross-references. The FOIA provision mentioned in the PRA, 5 U.S.C. § 552(f), incorporates the definition of agency provided at 5 U.S.C. § 551(1): "agency means each authority of the Government of the United States, whether or not it is subject to review by another agency, but does not include ... the Congress ... [or] the courts of the United States." 5 U.S.C. § 551(1). Section 552(f) itself adds an additional proviso:

[A]gency ... includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(f). The Supreme Court has added still another layer of complexity, holding that for FOIA purposes, the EOP does not include the Office of the President. "[T]he President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President" are not included within the term "agency" under the FOIA." *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. CONF. REP. No. 1380, 93d Cong., 2d Sess. 15 (1974)).

The Supreme Court test adopted in *Kissinger* for determining which entities within the EOP are agencies subject to the FOIA was originally developed by this court in *Soucie v. David*, 448 F.2d 1067 (1971). In *Soucie*, this court held that only entities whose "sole function [is] to advise and assist the President" are not separate agencies subject to the FOIA. *Id.* at 1075. Thus, the court concluded that the Office of Science and Technology ("OST")—the precursor of the OSTP, one of the agencies whose guidelines are at issue in this appeal—was an agency subject to the FOIA because its duties went beyond advising the President and included evaluating federal scientific programs. *Id.*

The legislative history of the PRA could not be clearer in indicating congressional intent to adopt the test articulated in

Soucie to determine what entities are "agencies" subject to the FOIA:

The [PRA] does not modify the applicability of the [FOIA] to White House and [EOP] records.... That is, it does not redefine the term agency to include entities not now covered by the FOIA. The Conference Report for the 1974 Freedom of Information Act amendments stated that "[w]ith respect to the meaning of the term '[EOP]' the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 [(D.C. Cir. 1971)]. The term is not interpreted as including the President's immediate staff or units in the [EOP] whose sole function is to advise and assist the President."

H.R. REP. NO. 1487, 95th Cong., 2d Sess. 11 (1978) (quoting H.R. CONF. REP. NO. 1380, 93d Cong., 2d Sess. 13 (1974)), reprinted in 1978 U.S.C.C.A.N. 5732, 5742. The FOIA Conference Report quoted in the PRA legislative history is the same report upon which the Supreme Court relied in *Kissinger*, 445 U.S. at 156.

This court has consistently applied the "sole function" test developed in *Soucie* and adopted in *Kissinger* in its subsequent decisions. In *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), we rejected the argument that certain records of the Attorney General regarding judicial nominations were not subject to the FOIA because the Attorney General was acting in his independent capacity as an advisor to the President when he prepared the records in question. *Id.* at 788. The Court explained that

Soucie did not intimate that the [OST] might be an agency only when performing its non-advisory functions, and still be a presidential staff component, or non-agency, when performing its other function of advising the President. In fact, the reports under consideration in *Soucie* were requested by the President precisely for advisory purposes, but we did not deem the [OST] to be a non-agency in that specific context.

Id. (citing *Soucie*, 448 F.2d at 1075-76). See also *Pacific Legal Foundation v. Council on Environmental Equality*, 636 F.2d 1259 (D.C. Cir. 1980) (holding that the Council on Environmental Equality ("CEQ") is a FOIA agency because, in addition to advising the President, the CEQ coordinated federal environmental regulatory programs, issued guidelines for preparing environmental impact statements, and promulgated regulations for implementing the procedural provisions of the National Environmental Policy Act); *Rushforth v. Council of Economic Advisors*, 762 F.2d 1038 (D.C. Cir. 1985) (holding that the Council of Economic Advisors is not an agency under the FOIA because its sole function is to advise and assist the President); *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993) (holding that the President's Task Force on Regulatory Relief "[f]alls within the *Soucie* test as an entity whose sole function is to advise and assist the President").

We hasten to add that our opinion in *Armstrong I* did not hold as a matter of law that the NSC "produces both presidential and federal records" because the NSC "advises the President and has statutory obligations." See *Armstrong*, 810 F. Supp. at 347-48, 349 (citing *Armstrong I*, 924 F.2d at 286 n.2.). The passage on which the district court relied appears as a footnote in the "background" section of our *Armstrong I* opinion, without any of the legal exposition that would be expected to accompany a holding announcing the resolution of a previously unsettled legal question. See *Maggard v. O'Connell*, 703 F.2d 1284, 1290-91 (D.C. Cir. 1983) (statements in the background discussion of an opinion should not be construed as deciding unresolved legal issues, especially where the court was only reviewing and reversing a grant of summary judgment). The footnote appears to be nothing more than a description of the position of the defendants-appellants as embodied in the EOP regulations. See Joint Statement ¶ 157 ("The records of the [NSC] staff are federal records if they were received or created in connection with the work of the statutorily-created [NSC]. . . . The records of the NSC staff are presidential records if they were received or created for the President, the Assistant to the President for National Security, his Deputy, or a member of

the White House staff independently of any meeting or policy and staff actions of the NSC or its various groups."). Consequently, *Armstrong I* did not provide the legal basis for distinguishing federal and presidential records nor decide the legal status of various NSC materials.

Although we hold in accordance with the PRA that materials subject to the FOIA are not presidential records, we are unable to ascertain on the record before us whether the guidelines defining presidential records inappropriately classify certain materials. We cannot determine with certainty whether materials that the guidelines classify as presidential records are in fact official records of an agency subject to the FOIA. The NSC appears to have routinely conceded its status as an "agency" subject to the FOIA in litigation regarding specific FOIA requests to the NSC. See, e.g., *Lisee v. CIA*, 741 F. Supp. 988 (D.D.C. 1990) (NSC made requisite showing of exceptional circumstances and exercise of due diligence in processing FOIA request to justify stay of further proceedings); *Willens v. NSC*, 726 F. Supp. 325 (D.D.C. 1989) (requested NSC documents were within the FOIA exemption for documents authorized to be kept secret in the interest of national defense or foreign policy); *Halperin v. NSC*, 452 F. Supp. 47 (D.D.C. 1978) (same). The Supreme Court also appears to have assumed, without deciding the issue, that the NSC is a FOIA agency. See *Kissinger*, 445 U.S. at 156 (stating that the FOIA requesters argued that certain documents which related to the [NSC] "may have been [NSC] records and therefore subject to the [FOIA]. See H.R. REP. NO. [876, 93d Cong., 2d Sess. 8 (1974)], indicating that the [NSC] is an executive agency to which the FOIA applies."). But the issue has never been definitively resolved, and the record before us does not contain sufficient facts for us to make the determination.

Moreover, the cross-appellees suggest that the materials in question may not be subject to the FOIA—even if the NSC is an "agency" under the FOIA—because they are not "official records" of the NSC. See Brief for Cross-Appellees at 44-48. The factual record is also insufficient to resolve this issue on appeal. Thus, we remand to the district court for further

proceedings to determine whether the guidelines under review inappropriately classify as presidential records materials that would otherwise be subject to the FOIA.

CONCLUSION

To recap: We affirm the district court's decision that the EOP and NSC electronic records management guidelines violate the FRA, reverse the district court's civil contempt finding, and remand to allow the district court to determine whether the challenged NSC and OSTP guidelines inaccurately classify some documents as presidential records.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5002, et al.

September Term, 1992
89cv00142

Scott Armstrong, et al.

vs.

Executive Office of the President, et al.

O R D E R

It is ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. R. 15 (August 1, 1987). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For The Court

RON GARVIN
Clerk

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

April 7, 1993

INFORMATION

MEMORANDUM FOR ANTHONY LAKE
NANCY E. SODERBERG

THROUGH: NANCY V. MENA

FROM: DAVID VAN TASSEL

SUBJECT: Declassification Review of Kennedy Tape Recordings

20331
Nancy/Anthony
We've already had one
press call, there will
be more. The Kennedy Library
has had years to do something
with these tapes if the Kennedy
family would allow. The NSC
staff has 6 mos in let it is
lucky! April

The attached recent stories in the press (Tab I) indicate renewed interest in tape recordings of meetings held during the Kennedy administration. Many of the 200 hours of tapes that remain closed to researchers at the Kennedy Library deal with foreign policy matters and are presumed to contain classified information until they are reviewed for declassification.

The subject of declassifying the tapes most recently arose in connection with the thirtieth anniversary of the Cuban missile crisis. Late last summer, NBC was pressing the Kennedy Library for release of the tapes for use in a television special. Although the Library did not formally request declassification review at the time, they did consult with us concerning the requirements of such a review. In mid-March we received the first 15 hours of tapes dealing with the missile crisis along with very rough transcripts that were created in the 1960's. The Library requested that we coordinate with appropriate agencies in reviewing the tapes for declassification.

Following our consultation with the Library last fall, the Kennedy Library did the basic preparatory work to ready the tapes for review. The recordings were transferred to a digital format, time codes were added so that reviewers could refer to specific passages, and a rough subject outline of each tape was created to serve as a listening aid for reviewers. Last Friday, April 2, we received from the National Archives the digital tape player necessary to listen to the tapes.

Declassification review of audio recordings is a new venture for us and there will likely be some experimentation and adjustment of the review process before we are confident of our procedures. Because of the continuing sensitivity of some Cuba-related material, we will have to consult with a minimum of three agencies, State, Defense, and CIA, on all of these first tapes, and with NSA on many of the tapes.

John

from Nancy
Soderberg

93 APR 9 P5:58

FVI

We have already sent the rough transcripts of this first group of tapes to the agencies and have forewarned them to expect to receive tapes for review. Review of even the unreliable transcripts will provide reviewers some guidance for review of the tapes.

Our next step will be to spot check the tapes to identify major problems with audio review and to establish basic review procedures. We will then meet with agency representatives to establish a common approach and answer the many technical and procedural questions involved in entering a virtually untouched area of declassification review.

The review process will be lengthy because of startup time (perhaps including equipment procurement) and the need for reviewers to learn to review in a new medium. After review, the Kennedy Library will edit the tapes and otherwise prepare them for public access. Review of the first 15 hours of tape will take a minimum of six months, depending on the priority it receives in other agencies and in relation to our other ongoing, and in many cases more pressing, workload.

Attachment:

Tab I - four (4) press clippings

Mystery surrounds role of JFK tapes transcriber

By Philip Bennett
GLOBE STAFF

During the winter that followed the death of John F. Kennedy, a young naval aide was summoned to the Executive Office Building in Washington and instructed to begin transcribing reels of White House tapes secretly recorded by the president.

The job put George Dalton in elite company. Only a handful of people even knew that the tapes existed: JFK's personal secretary, Evelyn Lincoln, his brother, Robert Kennedy, the two Secret Service technicians who installed and ran the system.

But over the next decade, by many accounts, no single person

would have greater access to the tapes — those eventually donated to the Kennedy Library in 1975 and several the library said were left out of the donation — than Dalton.

Dalton's role has mystified archivists who have tried to reconstruct the handling of the tapes during the 12 years that they were private property of the Kennedy family. Particularly, scholars have asked whether the collection, widely regarded as a unique record of the Kennedy presidency, is complete or edited.

As he left the Navy, performed chores for Robert Kennedy, and found work in the household of Sen. Edward Kennedy, Dalton's contact with the tapes raised additional un-

TAPES, Page 8

Mystery surrounds JFK tape transcribing

1 aide began job the winter after assassination

Page 1
ans
why did he pre
he 1960s? Did he
have a green or alter
tapes? and for whom did he
continue in the 1970s, according to
several accounts, to remove private
Kennedy records, including tapes,
from a family vault in the National
Archives warehouse in Waltham?

"I always felt that the story of
the tapes was incomplete because we
weren't able to interview Dalton,"
said William W. Moss, the former
chief archivist at the Kennedy Li-
brary in Boston, who wrote the li-
brary's official history of the tapes.
Moss called questions about Dalton a
"significant gap."

Dalton won't discuss work

No one in a position to fill the
gap seems eager to do so today. Ap-
proached at his home on a Florida
golf course, Dalton, said to have be-
come a prosperous gas station owner

after leaving the Kennedys' employ,
refused to discuss his work on the
tapes. So did a dozen of his former
colleagues or acquaintances.

In a letter sent later to the Globe,
Dalton wrote "I have no information
to contribute to your interest in the
history, content, or historical signifi-
cance of any tape recordings which
may have been made during the
Kennedy Administration."

Sen. Kennedy's chief of staff,
Paul Donovan, confirmed that Dal-
ton joined Kennedy's household staff
in the early 1970s, but added, "Mr.
Dalton did not work on the tapes at
the direction of Sen. Kennedy."
Donovan said: "Sen. Kennedy has no
specific knowledge about the tapes."

The Kennedy White House re-
cordings have been the subject of re-
newed interest as scholars, former
Kennedy aides, and family members
have recently advocated declassifi-
ing more than 200 hours of tapes
that remain closed to researchers
and the public.

The tapes deal with many of the
most dramatic moments and impor-
tant foreign policy decisions of the
Kennedy presidency, from the Cu-
ban missile crisis to US involvement
in Vietnam. Scholars say an audio
record of how Kennedy made deci-
sions under enormous pressure will
contribute to a fuller picture of his
personality, further shaping his im-
age and legacy.

Kennedy Library officials, saying
they support releasing remaining
tapes, sent a portion of the collection
this month to the National Security
Council for classification review. In-
cluded in the shipment were tran-
scripts prepared by Dalton.

The library last week refused a
request to see any Dalton material,
even that pertaining to nonclassified
information. A spokesman said that
Dalton's work, officially called the
"primitive transcripts" because it is
allegedly rife with inaccuracies, has
yet to be organized by the library.

Dalton was a familiar figure to li-
brary staffers at the time the exis-
tence of the tape collection was made
public in 1973. Three sources said
that Dalton regularly removed items
from a vault containing tapes and
other private Kennedy material at
the federal archives records center
in Waltham. Former library officials
say Dalton possessed the combina-
tion to the lock on a file cabinet con-
taining the tapes. No library staffers
at the time knew the combination.

"Dalton would appear every now
and then and take stuff from there,"
recalled Dan Fenn, the former direc-
tor of the library. "He was very se-
cretive about it. He didn't tell me

former chief archivist, said that he
relied in some instances on versions
of the recordings already at hand:
the Dalton transcripts.

President Kennedy's private tap-
ing system was removed from the
Oval Office and Cabinet Room on
the day he was assassinated. The
tapes were taken by Kennedy's pri-
vate secretary, Lincoln, to an office
in the Executive Office Building.
Lincoln said that she later asked
Robert Bouck, the Secret Service
agent who had run the system, to
provide transcription machines.

Bouck confirmed in an interview
that Dalton performed the transcrip-
tions. "Outside of Dalton I don't
know of anybody who listened to the
tapes during that period," Bouck
said, speaking of the two or three
years following the assassination.

Lincoln declined to speak about
Dalton in an interview last week.
"The person who did the transcrib-
ing, you'll have to talk to the Ken-
edy family about that," she said.

RFK book included quotes

Several scholars said they be-
lieved that Dalton was hired to han-
dle the tapes by Robert Kennedy,
who had custody of his brother's pa-
pers after the 1963 assassination. It
was revealed years after his death in
1968 that Robert Kennedy's book
about the Cuban missile crisis,
"Thirteen Days," included quota-
tions taken from the tapes. It is not
publicly known whether RFK re-
lied on Dalton's transcripts or lis-
tened to the tapes himself.

Throughout the 1960s, Dalton
stayed in touch with the Kennedy
family. According to archives, he
wrote Sen. Robert Kennedy from a
posting in Japan in 1967, and sent
small gifts to the personal secre-
taries of both Robert and Edward
Kennedy.

Dalton was employed by Edward
Kennedy in the early 1970s, when he
came in contact again with the tapes
in Waltham.

In July 1973, tapes of some 280
telephone conversations recorded by
President Kennedy were turned
over to the library for the first time.
The telephone recordings had been
in the custody of Robert Kennedy,
the library said.

Richard Burke, the author of
"The Senator," a highly critical
memoir of his experience as an aide
to Edward Kennedy, said that Dal-
ton told him that he was reviewing
the contents of White House tapes at
the behest of the late Steven Smith,

personality, further shaping his image and legacy.

Kennedy Library officials, saying they support releasing remaining tapes, sent a portion of the collection this month to the National Security Council for classification review. Included in the shipment were transcripts prepared by Dalton.

The library last week refused a request to see any Dalton material, even that pertaining to nonclassified information. A spokesman said that Dalton's work, officially called the "primitive transcripts" because it is allegedly rife with inaccuracies, has yet to be organized by the library.

Dalton was a familiar figure to library staffers at the time the existence of the tape collection was made public in 1973. Three sources said that Dalton regularly removed items from a vault containing tapes and other private Kennedy material at the federal archives records center in Waltham. Former library officials say Dalton possessed the combination to the lock on a file cabinet containing the tapes. No library staffers at the time knew the combination.

"Dalton would appear every now and then and take stuff from there," recalled Dan Fenn, the former director of the library. "He was very secretive about it. He didn't tell us what he was doing there, what family stuff he was taking or why. He would just sort of appear."

Some tape boxes empty

When library officials took custody of the tapes in 1975, they discovered that some were carelessly wound backwards on their reels, officials now say, and at least nine numbered tape boxes were empty. At least four of these missing audiotapes correspond to rough transcripts made by Dalton.

"That at least some items were removed cannot be doubted," concluded a library history of the material. The library has not investigated whether the tapes contain erasures, but officials wrote that a preliminary survey did not reveal tampering.

If the tapes were altered prior to their donation, it would not have violated any law. Under terms of the deed of materials to the library, the Kennedy family has broad authority to remove items concerning JFK's private life, or any material deemed by the family as not intended by JFK to have been made public.

Burke Marshall, an assistant attorney general under Kennedy who heads a three-person panel that screens library material for release, recalled only one instance in which material was removed from the tapes under terms of the deed: a conversation between the president and Jacqueline Kennedy.

Yet Marshall and other members of the panel cannot be sure what else might have been removed since none have listened at length to the tapes. Marshall said that he had listened to "very, very little." William Johnson, currently the library's chief archivist, said: "I don't know if any single person has ever heard all of them."

In fact, required in the mid-1970s to determine the security classification of the tapes but without time to listen to them all, William Moss, the

1968 that Robert Kennedy's book about the Cuban missile crisis, "Thirteen Days," included quotations taken from the tapes. It is not publically known whether RFK relied on Dalton's transcripts or listened to the tapes himself.

Throughout the 1960s, Dalton stayed in touch with the Kennedy family. According to archives, he wrote Sen. Robert Kennedy from a posting in Japan in 1967, and sent small gifts to the personal secretaries of both Robert and Edward Kennedy.

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Richard Burke, the author of "The Senator," a highly critical memoir of his experience as an aide to Edward Kennedy, said that Dalton told him that he was reviewing the contents of White House tapes at the behest of the late Steven Smith, Sen. Kennedy's brother-in-law.

"George Dalton said he was going up on behalf of Steve Smith to make sure that nothing of national security or personal was on the tapes and then become public," said Burke, whose credibility on many issues has been assailed by Kennedy aides.

According to others who are on good terms with the Kennedys, Dalton performed a variety of minor duties as a member of Sen. Kennedy's household staff until the late 1970s. Later, former colleagues said, he owned a string of gas stations in the Washington area. The Daltons moved in the late 1980s to an exclusive development on a golf course in Palm Beach Gardens, Fla. A food mart on a nearby highway is registered to the ownership of George E. Dalton.

A clue to how Dalton may have come to the attention of the Kennedy family is contained in the archives of the library.

In a letter to his secretary of the Navy in August 1963, President Kennedy expresses gratitude for assistance during a family tragedy, the premature birth and death several hours later of his son Patrick Kennedy, whom Jacqueline Kennedy delivered while vacationing on Cape Cod.

"Particularly," Kennedy wrote, "I want to commend the performance of Chief George Dalton ... whose responsibility it is to launch helicopters at Hyannis during the summer. His forethought and quick action resulted in the helicopter landing at Squaw Island eight minutes after Dr. John Welsh, Mrs. Kennedy's obstetrician, directed that she should go immediately to the Otis Air Force Base hospital. During the three days thereafter he handled operations with the helicopter fleet without sleep but with great efficiency. The Navy can well be proud of his service."

Kennedy tapes stay mired in security-review process

By Philip Bennett
GLOBE STAFF

WASHINGTON - Ten White House tapes sent with fanfare by the Kennedy Library in Dorchester one month ago to the government for declassification review have yet to be listened to by officials here in charge of processing the recordings.

"We haven't had time to work on them yet," said Steven Tilley, who directs the National Security Council office that assesses classified material. "It's probably going to take us some time to get off the ground."

Tilley said the delays were due to "an enormous backlog of documents awaiting security review at the council and to additional demands presented by tape recordings. He said that the Kennedy tapes were not a priority for the agency."

Since their existence was revealed twenty years ago, the Kennedy tapes have defied repeated commitments to speed their release to researchers and the public. Long delays have kept more than 200 hours of recordings secret, despite calls to open them from the Kennedy family, former aides, and scholars.

The 10 tapes submitted by the library March 1, a fraction of the remaining tapes, are recordings of dramatic White House meetings during the height of the Cuban missile crisis. But here they share the same hopeless status of other artifacts adrift in an ocean of classified government records.

Clinton administration officials say they are studying ways to streamline the classification system to save money and increase public access to information. But they have provided no indication of how they plan to accomplish this.

Meanwhile, under guidelines issued by President Reagan to protect secrets from Cold War enemies, thousands of decisions are made each day to classify records. One trillion classified documents are already held in government vaults and warehouses

should come up for automatic review this year, since material in the National Archives is required to be screened for release after 30 years. The Kennedy tapes were made in 1962 and 1963.

But such is the overflow of secrets that the archives would need until 2010 under current rules to process even its existing backlog, said Tom Blanton, executive director of the National Security Archive, a private group involved in secrecy issues. More than 300 million documents are in the archives' backlog.

For presidential libraries, the classification regulations have clogged archives and frustrated archivists and researchers.

"It's a terribly slow and cumbersome process," said Donald Schewe, director of the Carter Library in Atlanta. "The problem is that you have so much information that is classified in the system because of all the, pardon my French, crap that had some reason or another to be classified."

Schewe and others favor changing the system to permit opening entire areas of information, excluding specific topics still relevant for national security. A similar procedure existed under the Nixon, Ford, and Carter presidencies.

Critics say there is a material in-

centive for reform. "It costs much money to keep so many secrets," said Blanton of National Security Archive. "If they have to a page-by-page list for this back they will choke on this."

But Steven Garfinkel, director of the Information Security Oversight Office, points to large costs in cleaning up the mess. "The budget argument will never result in declassification," he said. "Declassification to come from historical and research value and the interest of academics and journalists."

There are indications that Clinton administration will be inclined toward greater openness. Several individuals likely to be involved in designing new classification policies have recorded strong opposition to current regulations.

In an interview last week, a senior administration official said the review of classification policy is under way and that Clinton had instructed the NSC and other agencies to adopt higher standards in classifying new documents.

But asked if he could be more specific about the instructions, the official said: "No, it's classified."

Globe staff writer Mary Curtius contributed to this report.

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The Kennedy tapes are in line at the national council with a backlog of 2,200 cases. Tilley said that his office has a staff of eight, having lost a position to recent personnel cuts, and will require time to come up with an efficient way to assess the tapes.

"Obviously there is great public interest in it," Tilley said of the tapes. But, he added, "Doing tapes is a very, very difficult process simply because of the medium it's on. You have to have to have specialized equipment. You have to have people listening to it. You have to make decisions."

A Kennedy Library spokesman, Frank Rigg, said that the library has not been given a timetable for review of the tapes. He said he believed the NSC would rule on the tapes in a matter of months rather than years.

"We want very much for these tapes to be released," he said yesterday. "A month has gone by and we have been waiting for some kind of response from the National Security Council." But, he added: "Under their current circumstances it does not seem that a month is too long."

Coincidentally, under a provision of the Reagan executive order on classification, the Kennedy tapes

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Schewe and others favor changing the system to permit opening entire areas of information, excluding specific topics still relevant for national security. A similar procedure existed under the Nixon, Ford, and Carter presidencies.

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But asked if he could be more specific about the instructions, the official said: "No, it's classified."

Globe staff writer Mary Curtius contributed to this report.

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MYSTERY SURROUNDS THE ROLE OF TRANSCRIBER OF KENNEDY'S SECRET WHITE HOUSE TAPES

BALTIMORE MORNING SUN (BS) - Sunday, April 4, 1993

By: Philip Bennett Boston Globe

Edition: Final Section: News (National and Foreign) Page: 14A

Word Count: 1,015

TEXT:

BOSTON - During the winter that followed the death of John F. Kennedy, a young naval aide was summoned to the Executive Office Building in Washington and instructed to begin transcribing reels of White House tapes secretly recorded by the president.

The job put George Dalton in elite company. Only a handful of people even knew that the tapes existed: JFK's personal secretary, Evelyn Lincoln; his brother, Robert F. Kennedy; the two Secret Service technicians who installed and ran the system.

But over the next decade, by many accounts, no single person would have greater access to the tapes -- those eventually donated to the Kennedy Library in 1975 and several the library said were left out of the donation -- than Mr. Dalton.

Mr. Dalton's role has mystified archivists who have tried to reconstruct the handling of the tapes during the 12 years that they were private property of the Kennedy family. Particularly, scholars have asked whether the collection, widely regarded as a unique record of the Kennedy presidency, is complete or edited.

As Mr. Dalton left the Navy, performed chores for Robert Kennedy and found work in the household of Sen. Edward M. Kennedy, his contact with the tapes raised more unanswered questions:

For whom and why did he prepare transcripts in the 1960s? Did he have authority to screen or alter tapes? And why and for whom did he continue in the 1970s, according to several accounts, to remove private Kennedy records, including tapes, from a family vault in the National Archives warehouse in Waltham, Mass.?

"I always felt that the story of the tapes was incomplete because we weren't able to interview Dalton," said William W. Moss, the former chief archivist at the Kennedy Library in Boston, who wrote the library's official history of the tapes. Mr. Moss called questions about Mr. Dalton a "significant gap."

No one in a position to fill the gap seems eager to do so today. Approached at his home on a Florida golf course, Mr. Dalton, said to have become a prosperous gas station owner after leaving the Kennedys' employ, refused to discuss his work on the tapes.

In a letter to the Boston Globe, Mr. Dalton wrote: "I have no information to contribute to your interest in the history, content, or historical significance of any tape recordings which may have been made during the Kennedy Administration."

Senator Kennedy's chief of staff, Paul Donovan, confirmed that Mr. Dalton joined the senator's household staff in the early 1970s but added, "Mr. Dalton did not work on the tapes at the direction of Senator Kennedy."

Mr. Donovan also said: "Senator Kennedy has no specific knowledge about the tapes."

The Kennedy White House recordings have been the subject of renewed interest as scholars, former Kennedy aides and family members have recently advocated declassifying more than 200 hours of tapes that remain closed to researchers and the public.

The tapes deal with many of the most dramatic moments and important foreign policy decisions of the Kennedy presidency, such as the Cuban missile crisis and U.S. involvement in Vietnam. Scholars say an audio record of how Kennedy made decisions under enormous pressure would contribute to a fuller picture of his personality.

Kennedy Library officials, saying they support releasing remaining tapes, sent part of the collection this month to the National Security Council for classification review. Included in the shipment were transcripts prepared by Mr. Dalton.

Last month the library refused a request to see any of Mr. Dalton's material, even that pertaining to nonclassified information. A spokesman said that Mr. Dalton's work, officially called the "primitive transcripts" because it is alleged to be rife with inaccuracies, has yet to be organized by the library.

Mr. Dalton was a familiar figure to library staffers at the time the existence of the tape collection was made public in 1973. Three sources said Mr. Dalton regularly removed items from a vault containing tapes and other private Kennedy material at the federal archives records center in Waltham. Former library officials say Mr. Dalton had the combination to the lock on a file cabinet containing the tapes. No other library staffers at the time knew the combination.

"Dalton would appear every now and then and take stuff from there," recalled Dan Fenn, the former director of the library. "He was very secretive about it. He didn't tell us what he was doing there, what family stuff he was taking or why. He would just sort of appear."

When library officials took custody of the tapes in 1975, they discovered that some were carelessly wound backward on their reels, officials now say, and at least nine numbered tape boxes were empty. At least four of these missing audio tapes correspond to rough transcripts made by Mr. Dalton.

"That at least some items were removed cannot be doubted," concluded a

library history of the material. The library has not investigated whether the tapes contain erasures, but officials wrote that a preliminary survey did not reveal tampering.

If the tapes were altered before their donation, it would not have violated any law. Under terms of the deed of materials to the library, the Kennedy family has broad authority to remove items concerning JFK's private life or any material the family deemed as not intended by JFK to have been made public.

President Kennedy's private taping system was removed from the Oval Office and the Cabinet Room on the day he was assassinated. The tapes were taken by Mr. Kennedy's private secretary, Ms. Lincoln, to an office in the Executive Office Building. Ms. Lincoln said she later asked Robert Bouck, the Secret Service agent who had run the system, to provide transcription machines.

Mr. Bouck confirmed in an interview that Mr. Dalton performed the transcriptions.

"Outside of Dalton I don't know of anybody who listened to the tapes during that period," Mr. Bouck said, speaking of the two or three years after the assassination.

Ms. Lincoln would not speak about Mr. Dalton in an interview.

"The person who did the transcribing, you'll have to talk to the Kennedy family about that," she said.

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The Kennedy tapes

Shades of Nixon, scholars say of apparent gaps

By Michael Hedges
THE WASHINGTON TIMES

✓ A1

Historians have found what may be gaps in the tapes of President John F. Kennedy's secretly recorded conversations in the Oval Office.

Several scholars have drawn parallels to the gaps in the famous Watergate tapes of Richard Nixon.

"If you remember during Watergate, there was all this palaver from

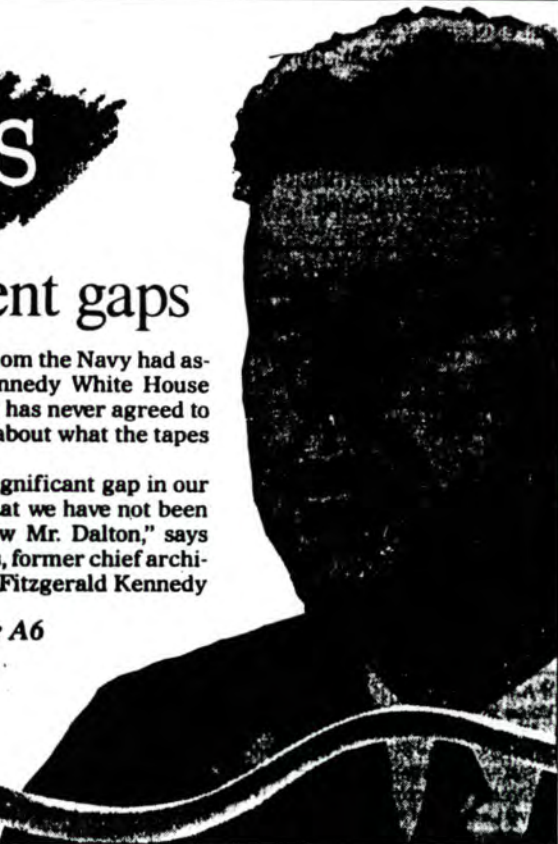
Senator Ted Kennedy's office that this wouldn't have happened with his brother," says Kennedy chronicler Leo Damore. "Well, it did happen, and there has been much more of a cover-up surrounding the Kennedy tapes."

In the months following the assassination on Nov. 22, 1963, the president's brother and attorney general, Robert, entrusted the transcription of the tapes to George Dalton, a chief

petty officer whom the Navy had assigned as a Kennedy White House aide. Mr. Dalton has never agreed to be interviewed about what the tapes contain.

"There is a significant gap in our knowledge in that we have not been able to interview Mr. Dalton," says William W. Moss, former chief archivist at the John Fitzgerald Kennedy

see JFK, page A6



JFK

From page A1

Library in Boston.

Historians and presidential scholars can only guess whether the dozens of tapes now in the Kennedy presidential library have been edited, perhaps to spare his family embarrassment.

Indeed, the library's official history of the tapes says: "We cannot know if the present inventory matches the body of material as it existed on November 22, 1963. ... That at least some items were removed cannot be doubted. The very first dictabelt [of telephone conversations] is absent."

Says Mr. Damore, who is writing a book on the Georgetown murder of Mary Pinchot Meyer, a reputed mistress of President Kennedy's: "There is a hell of a tale there. JFK did as much taping as Nixon ever did. I'd love to hear his conversations with Marilyn Monroe."

The man most likely to know about those recorded conversations, scholars say, is Mr. Dalton, who after leaving the Navy owned two gas stations in the District and is now the owner of a convenience store in South Florida. He won't talk.

Why the tapes were given to Mr. Dalton is something of a puzzle, too. His handling of them revealed him to be neither historian nor scholar — or even someone who meticulously cared for the tapes, which historians consider an invaluable resource.

Scholars are curious why Mr. Dalton was asked to transcribe the tapes

and for whom the transcript was intended, when only a handful of people at that time even knew the tapes existed.

As a Navy aide, Mr. Dalton had performed some minor services for President Kennedy. He continued to work for the family — especially Sen. Edward M. Kennedy — through the 1970s.

Mr. Damore, among other writers who have done research into the Kennedy family, believes Mr. Dalton received the tapes because the family was confident that he would delete and hold confidential anything he learned that would embarrass the president's family.

"Everybody who works for the Kennedys, their entire entourage, is required to cover up for them," says Mr. Damore, who wrote a critical book on Sen. Kennedy's behavior at Chappaquiddick. "They have to subscribe to the mythology."

Mr. Dalton could not be reached at his Palm Beach Gardens, Fla., home yesterday. In a brief interview with the Boston Globe, he declined to discuss his work on the tapes.

Mr. Moss, the Kennedy archivist, declines to speculate why Mr. Dalton was chosen. "That is a conclusion in which I would have to read into the minds of the Kennedy family. ... I can say this man was no historian or scholar. I would like to have seen someone more specifically trained for the job given the tapes."

For more than a decade after the assassination, the tapes were kept in a private file cabinet at the presidential library. Mr. Dalton had the combination to the cabinet's lock and

would frequently take material from the file, library staffers say. No one employed at the library had access to the material at that time.

By the time the library staff took possession of the tapes in August 1975, the tapes had been examined extensively but not necessarily treated with the care professional historians would have liked, say archivists.

The material on the tapes is "episodic" — recording some meetings held by President Kennedy but not all encounters involving the president, Mr. Moss says.

When the archivists received the tapes, each reel was numbered. According to the official list of tapes, four of the numbered reels were never received by the archivists.

"The tapes were manually activated," Mr. Moss says, noting that on one tape President Kennedy can be heard telling someone, "press that button," and the recording stops.

"The tapes are selective, entirely whimsical, at [President Kennedy's] discretion as far as I know."

Archivists estimate that as much as 75 percent of the material they took possession of "requires national security protection" and that "probably less than 1 percent of the material is going to require protection on grounds of personal privacy."

Mr. Moss says of the tapes: "Kennedy's were not as complete as Nixon's."

Asked if he was certain Mr. Dalton turned over all the tapes — or if Mr. Dalton ever had the entire set, Mr. Moss says: "I simply can't answer that. I don't know."

NATIONAL SECURITY COUNCIL

WASHINGTON, D.C. 20506

August 16, 1993

93 AUG 16 P8:10

INFORMATION

6534 MEMORANDUM FOR WILLIAM H. ITOH

FROM: ALAN J. KRECKOR

SUBJECT: Armstrong v. EOP

The Court of Appeals for the D.C. Circuit ruled Friday against the EOP (including the NSC) on most the substantive records-keeping issues under litigation in Armstrong v. EOP. The Court of Appeals did however vacate Judge Richey's contempt order. We have 45 days to decide whether to seek a rehearing. We are consulting with Justice on the implications of the decision and next steps.

Specifically, the Court of Appeals:

1. Affirmed the District Court's decision that the EOP and NSC electronic records management guidance violate the Federal Records Act, for two principle reasons:

- Guidance required that E-mail containing record material be printed out. However, such print-outs did not capture all material in the computer, such as the names of all senders and recipients.
- NSC and EOP staff recordkeeping practices are not supervised or audited by knowledgeable records management personnel.

2. Reversed the District Court's contempt finding.

- The Court of Appeals found we could not be in contempt for failure to issue new, corrective guidance since the District Court had not ordered the preparation of new guidance.
- The Court of Appeals asked the District Court to consider whether failure to preserve back-up tapes by itself justifies a finding of contempt in light of NARA's current efforts to preserve the tapes.

3. Remanded to the District Court to determine whether NSC and OSTP guidelines inaccurately classify some documents as presidential rather than federal records.

- The Court of Appeals reversed the District Court's determination that it could not review guidance on what constitute presidential records, and said that the definition of federal (or "agency") records trumps that of

presidential records. In passing the court noted that the NSC appears to have conceded over years of FOIA litigation that it is an agency subject to FOIA.

Subject to the significant caveat that the Court of Appeals order is subject to interpretation by Judge Richey, the first finding should not be problematic for the NSC. The finding was based on the old guidance and practice of the NSC. We now require that all material about "who sent a message, who received it, and when that person received it" be captured if E-mail is printed out. Moreover, we are moving to an electronic filing system which will capture all created material. We also have in the works new guidance, coordinated with NARA, on monitoring E-mail records practices.

The second part of the order is helpful, insofar as it lifts the contempt finding against us.

The third part of the order is most problematic for us, as it invites the courts into the difficult area of what part of the NSC's work is presidential and what part is federal. The court left open (slightly) the possibility that we are entirely presidential. This is an argument we will want to evaluate, but which has not previously been advanced by the NSC. If we do not advance it, we will have to think through very carefully our distinction between federal and presidential records.

We are meeting with Justice this week to review the opinion and discuss next steps.

While the decision does not eliminate the possibility of settlement, which we will pursue, it certainly puts us in a weaker position.

cc: John Podesta
Anthony Lake

NATIONAL SECURITY COUNCIL

10 August 1993

TO: 93 AUG 10 P8:21 JOHN PODESTA

FROM: NEAL WOLIN

For your information.

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

20839

July 29, 1993

ACTION

MEMORANDUM FOR WILLIAM H. ITOH

THROUGH: ALAN KRECZKO *AK*

FROM: NEAL WOLIN *NW*

SUBJECT: Settlement Discussions in Armstrong v. EOP

Our office, together with Department of Justice (DOJ) attorneys, White House Counsel's office, John Podesta and other EOP units, has begun to discuss the possibility of settling the Armstrong case. Based on preliminary discussions with the various defendants in the case (NSC, OA, OSTP, NARA, etc.), DOJ has drafted a settlement offer that is being discussed within the White House and between the White House and DOJ. The view of all involved, based on conversations between Alan Kreczko and John Podesta with Scott Armstrong and on the fact that what is likely to be an unfavorable Court of Appeals ruling has not yet been issued, is that now is a relatively propitious time for us to be attempting to settle this case.

The draft settlement being discussed internally would make concessions to the plaintiffs in the area of our recordkeeping responsibilities in exchange for concessions by the plaintiffs in the extremely burdensome Freedom of Information Act (FOIA) aspects of the case. Absent a settlement, we face the real prospect of the courts ordering the National Archives to return Bush and Reagan Administration NSC backup tapes to us for processing under FOIA. Through settlement we might be able to narrow this extremely burdensome task.

We seek your concurrence in this basic approach and two basic elements of it: commitments to (1) electronic recordkeeping for e-mail and (2) periodic monitoring of electronic mail record status designations.

Electronic recordkeeping. The draft settlement contemplates a commitment by all defendant EOP agencies to moving to an electronic recordkeeping system for e-mail. This is our main carrot in the proposed settlement. Under the settlement, federal and presidential records generated by e-mail would have to be segregated on-line, federal records generated by e-mail would have to be stored electronically either on-line or in a readily accessible and searchable format (such as in ASCII files), and e-mail texts would have to be associated with relevant transmission data (i.e., time of message creation, addressees, etc.).

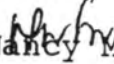
The only escape clause to these requirements contained in the proposed settlement is the absence of sufficient funding with which to implement such commitments. We understand from the NSC Systems and Technical Planning staff that sufficient computer funds are already budgeted for the NSC. The draft settlement, therefore, would commit the NSC to an electronic recordkeeping system for its e-mail records even if we later decided that a paper system better suited our needs (though we would not be precluded from maintaining electronic and paper systems). John Podesta has focused explicitly on this issue and is willing to give this kind of commitment.

(In addition, the draft settlement proposes interim measures to be taken by the NSC and other EOP agencies. As drafted, the interim measures proposed for the NSC would require us in the short term to institute procedures for the electronic filing, storage and retrieval of all federal and Presidential records generated by the NSC's e-mail system. The Systems & Technical Planning and Information Management staffs inform us that this can be done with little modification to the current system (approximately one week's work) and at relatively small cost (approximately \$10,000). This would be an important element of a settlement offer because it would be one of the few concrete steps we would propose taking in the short term.)

Periodic monitoring of electronic mail. The draft settlement also proposes that the NSC (and other EOP agencies) commit to periodically monitoring a sample of all electronic mail messages created by NSC staff, for the purpose of identifying any problems in interpreting official guidance on distinguishing between record and nonrecord materials and between federal and presidential records. Although NSC Information Management staff would presumably be responsible for any monitoring, details as to how it would be done, and how often, would have to be worked out.

It is important to point out that whether we include monitoring as part of our settlement offer, Judge Richey has already required the NSC and other defendant agencies to undertake some sort of periodic review of staff decisions about the record status of e-mail messages. Although he has not specifically ordered monitoring as such, he may do so in the future.

We understand that some in OA have privacy concerns about a plan to monitor staff e-mail. We do not share these concerns (neither does John Podesta nor DOJ). NSC staff would be notified of any monitoring before it began. Monitoring would be on a limited and periodic basis. Moreover, the NSC's electronic communications systems are to be used for official business only.

Concurrences by:  Nancy Menan,  David Herrington

RECOMMENDATION

That you approve the Legal Adviser's office going forward with settlement discussions in the Armstrong case as generally outlined above, including specifically (1) the expenditure of approximately \$10,000 for the interim measures, (2) the commitment to file and store electronically all NSC federal and presidential e-mail records and (3) the commitment to implement a system of periodic monitoring of NSC staff e-mail.

Approve ☒Disapprove ☐

NATIONAL SECURITY COUNCIL

WASHINGTON, D.C. 20506

July 29, 1993

93 JUL 30 P1:22

MEMORANDUM FOR JOHN PODESTA

FROM: ALAN KRECZKO/NEAL WOLIN

SUBJECT: Armstrong v. EOP -- NSC Settlement Issues

This memorandum is to inform you about various issues concerning the settlement of the Armstrong case and NSC's electronic mail that arose during yesterday's meeting.

Proposed Interim Solution

The NSC computer systems and Information Management staffs inform us that the proposed interim measure contained in paragraph 4(b) of the draft settlement document (e.g. ". . . 'on-line' segregation of all federal and presidential records generated by use of the All-in-One communications system, to be maintained in separate electronic files set up on as consistent a basis as feasible with the existing indexing scheme . . .") can be done in a short period of time, perhaps as little as a week, and at relatively small cost.

As we mentioned yesterday, the NSC already has on-line all Clinton Administration e-mail messages designated by NSC staff as record material at the time they were created. The database constituting these messages can be searched by keywords. NSC Information Management staff could segregate presidential and federal record e-mail messages into electronic folders without any modifications of the current system. NSC computer staff estimate that it would take approximately a week and between \$5,000 and \$10,000 to modify the system so that these segregated records could be stored on disks in ASCII format (which also is searchable). When stored in ASCII format, however, the e-mail messages will not retain all of their original formatting (i.e., underlining and bolding will not appear).

The one matter that would be difficult to offer (and is not in the proposed settlement and Scott Armstrong at least claims he is not seeking) is the automatic creation, retention and association of "read receipts" with each e-mail message determined at the time of its creation to be record material. Although the NSC electronic communications software could be modified to automatically create such "read receipts" with relative ease (and approximately \$10,000 cost), the association of such receipts with their original messages would be technically much more challenging. Moreover, NSC computer staff suggest that such a modification would substantially slow the already slow NSC e-mail

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: OB DATE: 5/24/8

system as well as produce a tremendous burden on Information Management staff charged with segregating them between federal and presidential records.

The NSC's Longer Term Computer Plans

As we mentioned, the NSC currently has contractors studying our hardware and software needs with a view toward recommending options for the next generation of NSC computer systems. The current plan is that within the next two months the contractors will report on what they think the NSC's computer needs are, the NSC computer staff and the contractors will discuss how best to fulfill those needs and the NSC will make decisions. NSC computer staff plan to begin implementing those decisions within six months and hope to finish within a year. The NSC already has funding for this project. The NSC computer people have been, and will continue to be, in touch with their counterparts in OA and elsewhere in the EOP on their plans for NSC's computers.

As part of the long-term computer arrangements, the NSC computer staff plan for the NSC to stop using our current electronic communications system, All-in-One, and move to some other off-the-shelf e-mail system. We have made the computer people aware of the possibility of an EOP-wide task force being created, in connection with the settlement of the Armstrong case. They believe that any e-mail system chosen will satisfy the basic elements identified as part of the long-term technical specifications in the proposed settlement.

Monitoring

As you requested, attached is draft e-mail guidance developed by NSC Information Management staff that contains a brief discussion of monitoring record status designations. The guidance is being held in abeyance pending settlement discussions.

Attachment

Tab I Draft E-Mail Guidance for NSC Staff

cc: Steve Neuwirth
Nancy Menan
David Herrington

Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

TAB I

Divider Title: _____

DRAFT

June 9, 1993

ACTION

MEMORANDUM FOR NSC STAFF

FROM: WILLIAM H. ITOH

SUBJECT: Electronic Communications Systems (Electronic Mail)

All National Security Council employees have ongoing responsibilities to create, maintain, and preserve records of their activities pursuant to the Federal Records Act (44 U.S.C., Chapters 29, 31, and 33) and the Presidential Records Act (44 U.S.C., sections 2201-2207). This memorandum provides guidance for fulfilling these obligations as they apply to records created on electronic communications systems.

The National Archives has defined electronic communications systems as electronic mail systems, electronic conferences, and comparable systems with similar e-mail capabilities. Within the NSC, this definition (and the guidance in this memorandum) applies to the e-mail and calendar functions of the VAX All-in-One and CC:Mail systems as well as the calendar function of the PROFS (OfficeVision) system.

The staff of the NSC create both federal and Presidential records electronically, including by the use of electronic communications systems. The NSC preserves electronic mail documents that are federal or Presidential records by printing them out (with associated "read receipts" when requested) and incorporating them into the appropriate records system maintained in Records Management.

Successful implementation of this policy requires each NSC employee to do two things: (1) determine the record/nonrecord status of any e-mail document at the time of creation and (2) ensure the printing and filing of any read receipts requested for a message determined to be a federal or Presidential record. All other tasks associated with the proper maintenance and disposition of e-mail records will be performed by the staff of Records Management and WHSSS or WHCA.

DETERMINING RECORD STATUS

Electronic mail documents in the NSC (like all other documentary materials) fall into one of four categories: federal records, Presidential records, nonrecord materials, or personal materials. On May 8, 1993, Alan Kreczko and I sent you two memoranda (Tabs I and II) that provide detailed guidance in distinguishing among these categories of documentary materials. The following discussion briefly summarizes that guidance and provides some examples of nonrecord or personal e-mail messages. The chart at

Tab III provides the statutory definitions and examples of federal and Presidential records within the NSC.

Federal or Presidential Records. NSC federal records are those that relate to certain statutorily mandated functions of the NSC, which include managing the interagency process as described in PDD 2 and overseeing intelligence activities, as well as those related to lawsuits or investigations involving the NSC and administering the day-to-day activities of the NSC. Electronic mail documents that contain unique, substantive information about these activities are federal records. Presidential records consist of materials that are created or received by or for the President, the APNSA, the DAPNSA, the White House office, or any NSC employee in advising or assisting the President, and that are not federal records.

Nonrecord or Personal Materials

Information rises to the level of a record when it provides unique substantive documentation of official NSC activities and responsibilities. Some documentary materials do not need to be filed and preserved because of their transient nature, or because they are duplicated in official files, or because they are exclusively personal in nature. Examples of electronic mail documents that are nonrecord or personal materials are those related to the following:

Staff work and leave schedules (which are officially documented elsewhere)

Reminders about meetings and appointments

Routine office procedures, such as requests for supplies

Telephone messages (unless the message contains substantive information)

Preliminary drafts of official, logged records (unless the draft reflects policy development)

Exclusively personal matters, such as private political or professional activities

Monitoring Record Status Designations

To assist the NSC staff in making proper record status determinations, the staff of Records Management will periodically examine a sample of all electronic mail messages, including those designated as nonrecords. The purpose of the examination is to identify any problems in interpreting the official guidance for distinguishing between record and nonrecord materials. The first of these sample inspections will take place within the next month. The staff of Records Management will report their findings to me and recommend any needed changes in current guidance or procedures.

No copies of electronic mail documents (either electronic or paper) may be removed from the NSC unless they are determined to be exclusively personal materials. If a departing staff member wishes to retain such documents, the staff of the Information Management and Disclosure Office must review the documents before authorizing their removal.

PRESERVING ELECTRONIC MAIL MESSAGES

To facilitate the preservation of e-mail messages that are records, you are asked to indicate whether a message is Record (R) or Nonrecord (N) each time you create the message. You should make that determination by following the guidelines in this memorandum and in the memoranda at Tabs I and II for identifying federal records, Presidential records, nonrecord materials, and personal materials (a personal message should be labeled nonrecord (N)). When in doubt, designate a message as a record.

If you designate a message as a record, a copy will automatically be routed to Records Management for printing, segregating federal from Presidential records, indexing, and incorporation into the appropriate records system. All messages will be purged from the All-in-One system after one month, with the exception of extra copies placed in your "personal folder" because they need to be retained more than one month for personal convenience.

Transmission Data

All electronic mail messages contain certain "transmission data" regarding the sender, addressee(s), transmission, and receipt of a document. Whenever you designate a message as a record, it is necessary to capture and preserve all available transmission data and associate it with the appropriate message. All e-mail messages routed to Records Management as records will be printed with the following transmission data included: the full name of the sender and all recipients and the date and time of transmission.

Additionally, if you request "read receipts" for a message designated as a record, you must print them out. You should request read receipts whenever it is important to confirm that the addressee(s) has read a message by a certain time. The printed read receipts also must be associated by paper clip, staple, or other means with a printed copy of the originating e-mail message. The originating message and attached read receipts should be forwarded to Records Management for incorporation into the appropriate records system.

PRESERVING CALENDARS

Calendars created on the NSC's e-mail systems (except those of the APNSA, DAPNSA, Staff Secretary, Executive Secretary, and Deputy Executive Secretary) are either personal materials or temporary federal records. In either case, they do not need to be printed and filed, and they should be deleted from your e-mail environment when no longer needed. In no case should the e-mail calendar function be used to record substantive unique information about the official activities of the NSC.

Calendars are personal materials when they are shared only with a secretary. They are temporary federal records when they are shared more widely with other members of the NSC staff. In accordance with the provisions of General Records Schedule 23, Item 5a, the e-mail calendars that are temporary federal records

should be deleted when no longer needed. The electronic calendars of the APNSA, the DAPNSA, and the Staff Secretary, which are created on PROFS, must be printed out and preserved as Presidential records. The electronic calendars of the Executive Secretary and the Deputy Executive Secretary (also created on PROFS) will be retained in accordance with a schedule approved by the National Archives.

* * *

This memorandum supersedes all previous guidance on electronic mail issued prior to January 6, 1993, as well as the instructions on "Electronic Federal Records" on page 6 of the May 8, 1993 memo on "Federal Records" (Tab I). I cannot emphasize too strongly the importance of staff compliance with this guidance in order to ensure that the NSC fulfills its legal obligations regarding the creation and preservation of federal and Presidential records. If you have any questions about this guidance, please contact the Records Management Staff (7356) or the Office of the Legal Adviser (6538).

Attachments

Tab I	Memorandum on Federal Records
Tab II	Memorandum on Presidential Records
Tab III	Chart on NSC Records Systems



U.S. Department of Justice
Civil Division

Washington, D.C. 20530

July 23, 1993

ATTORNEY CLIENT COMMUNICATION
PRIVILEGED AND ~~CONFIDENTIAL~~

Stephen R. Neuwirth, Esq.
Associate Counsel to the President
Old Executive Office Building, Room 128
Washington, D.C. 20503

Re: Armstrong v. Executive Office of the President

Dear Steve:

I am enclosing copies of a new and more comprehensive draft of a settlement proposal in Armstrong. The draft includes provisions in Part II for resolution of how materials on the preserved backup tapes will be processed pursuant both to the Federal Records Act as well as plaintiffs' outstanding FOIA claim. In addition to the proposed commitments on the part of the White House, you should also take careful note of the provisions relating to the Archives because they will impose additional obligations on White House agencies as well.

After you and John Podesta have had an opportunity to review this material, I suggest we have an early meeting to discuss it. At that time, we should also put on the agenda the related subjects of my letter to you of June 9, 1993 and Robert Kopp's July 19 note to John Rogovin, a copy of which was forwarded to you by John. In particular, we have concerns that work which was in progress toward developing interim guidance for the existing e-mail systems used by NSC and other EOP agency components has been effectively suspended pending our discussions about what to offer in settlement.

Very truly yours,

DAVID J. ANDERSON
Director
Federal Programs Branch
Civil Division

Enclosures

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: DA DATE: 5/24/98



U.S. Department of Justice
Civil Division

Copy +
Potenza

Deputy Assistant Attorney General

Washington, D.C. 20530

July 21, 1993

TO: Stephen Neuwirth ✓
Associate White House Counsel

David Anderson
Director
Federal Programs Branch
Civil Division

FROM: John Rogovin JAR

RE: Armstrong

I am sure you both share Bob Kopp's
sentiments (see attached) re the Armstrong
matter.

Thank you.

Attachment



U.S. Department of Justice

REK:FLipstein:jw

Washington, D.C. 20530

July 19, 1993

MEMORANDUM:

TO: John Rogovin
Deputy Assistant Attorney General
Civil Division

FROM: Robert E. Kopp *AK*
Director, Appellate Staff

RE: Armstrong v. Executive Office of the President
D.C. Circuit Nos. 93-5002, 93-5048, 93-5156

As we have previously discussed, the Administration has made several commitments on the public record concerning its intentions with respect to issues in this litigation. Specifically, it has, in public declarations and in open court, 1) committed to instituting an electronic record-keeping system that will permit it to preserve more information in a format that permits electronic searching; 2) stated that it intends to have this new system in place within 6-8 months; 3) stated that it intends to issue additional recordkeeping guidelines with respect to electronic records; and 4) stated that the Archivist intends to continue preservation copying of all backup tapes from the Bush and Reagan administrations that were transferred to Archives. These representations played a significant role in the court of appeals' stay of the district court's contempt order. As we discussed, it is critical that efforts to accomplish these goals be sustained and that the Division be kept apprised of the Administration's progress.

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FRI 7/23/93 DRAFT

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.	)	
_____	)	

JOINT STIPULATION AND FINAL ORDER

WHEREAS this litigation raises questions about the record-keeping obligations of defendants under the Federal Records Act and plaintiffs seek to compel changes in the recordkeeping practices of the defendant Executive Office of the President ("EOP") agencies with respect to their electronic communications systems; and

WHEREAS the present Administration is in the process of developing a technologically advanced computer system for use in defendant EOP agencies, including the National Security Council ("NSC"), which will permit a significantly larger amount of electronic material to be permanently stored and segregated, in retrievable electronic form, than has ever been preserved in the past; and

WHEREAS, as part of its plans, the present Administration intends to implement new technology which will automatically make it possible to associate transmittal information with particular e-mail messages; and

WHEREAS, given the condition of the current technology in the EOP, 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 the appropriate testing and implementation of an enhanced system; and

WHEREAS, not all EOP agencies have available to them or have 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; and

WHEREAS, the parties recognize, that continuation of the adjudication of the merits of the claims currently pending before both the Court of Appeals and the District Court, including pending claims under the Federal Records Act and the Freedom of Information Act, will involve substantial additional resources and expenses to both sides, and is therefore not in the public interest;

THEREFORE, without admission of liability on the part of defendants, the parties hereby stipulate and agree to the following terms and conditions in full satisfaction of all pending claims in the litigation:

I. Federal Record Management Procedures & Guidelines

A. Commitment to A New Electronic Recordkeeping System

1. Within [120?] days of the Court's approval of the Joint Stipulation, defendants shall conduct a comprehensive review ("Review"), of electronic systems management in the defendant EOP agencies, for the purpose of implementing a new electronic

recordkeeping system for "e-mail" communications. Under that system, "e-mail" communications constituting federal records will be preserved in electronic form; will be made accessible to government personnel for the conduct of ongoing official business; and will be publicly accessible when required by applicable law. A task force ("Task Force") consisting of members from [list offices] to be appointed by [the Staff Secretary to the President] will conduct the Review. Plaintiffs or their representatives may make written submissions to the Task Force.

2. At the conclusion of the [120] day period for conducting the Review, the Task Force will make a written report to the [Staff Secretary to the President] on the feasibility of proceeding with full implementation of one or more new electronic recordkeeping systems for use in the Executive Office of the President (including the National Security Council). The Report will include recommendations, including technical specifications as appropriate, concerning acquisition of proper software and hardware which will provide, to the extent feasible, that:

(a) federal and presidential records generated on the electronic communications system(s) will be segregated both "on-line" and in all other formats;

(b) the electronic communications system(s) will have the capacity to store electronic messages constituting federal records in a readily accessible form (e.g., in an ASCII file);

(c) electronic message "texts" will be associated with

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appropriate transmission data;

(d) any other data residing on the electronic communications system(s) which may constitute federal records (e.g., certain calendars, user directories, logs or indices of data, log-on and log-off times, etc.), is preserved in an appropriate, accessible format.

The Task Force Report will also contain a recommendation regarding a timetable for final implementation of the new electronic recordkeeping system as envisioned, which in all events shall not exceed _____ months from the date of filing of the Report.

3. The Task Force Report will be made available to plaintiffs.

B. Interim Measures: NSC Electronic Recordkeeping

4. Within _____ days of the Court's approval of the Joint Stipulation, defendant NSC will institute procedures to provide for ongoing preservation, in electronic form, of the text of messages sent or received by NSC staff using the present All-in-One electronic communications system which constitute federal records.¹ These procedures will include, but not be limited to:

a. NSC staff continuing to designate at the time of creation of an All-in-One message whether the message constitutes a "record" under the Federal Records Act or Presidential Records Act, with automatic routing of all "record" messages to NSC Records

¹ [need to include cc:Mail (WHSR)?]

Management Staff;

b. NSC Records Management Staff instituting procedures for "on-line" segregation of all federal and presidential records generated by use of the All-in-One communications system, to be maintained in separate electronic files set up on as consistent a basis as is feasible with the existing indexing scheme maintained for paper records;

c. NSC initiating a formal disposition schedule for the All-in-One federal electronic records routed to NSC Records Management Staff, through development of an SF-115 (Request for Records Disposition Authority), under applicable NARA regulations.

5. Within _____ days [(¶ 4) + 30 days] of the Court's approval of the Joint Stipulation, NSC will implement a periodic review process of the records generated on the All-in-One communications system, including but not limited to:

a. NSC Records Management staff periodically examining a sample of all electronic mail messages of NSC staff, including those designated as presidential records as well as nonrecords, for the purpose of identifying any problems in interpreting official guidance for distinguishing between record and nonrecord materials, and as between federal and presidential records;

b. NSC Records Management staff providing a report to the NSC Executive Secretary no later than _____, 1993, containing recommendations on any needed changes in current guidance or procedures in light of the periodic review conducted

through that date;

c. NSC Records Management staff providing for "close-out" procedures for departing employees, which will include examination of materials residing on the All-in-One communications system in the same manner as examination is afforded materials generated and/or maintained by departing employees in paper form;

6. In addition to preserving electronic messages in the manner set forth above, NSC will preserve "record" information generated by or on NSC's present electronic communications systems, pursuant to any applicable disposition schedule, consisting of:

a. "Read receipts" (also known as "acknowledgements of receipt"), when necessary for complete and accurate documentation of agency activities;

b. On a monthly basis, any electronic calendars maintained by any NSC staff members which are shared with other staff members (beyond individual secretaries), excluding calendars maintained by the Assistant to the President for National Security Affairs (APNSA), the Deputy Assistant to the President for National Security Affairs (DAPNSA), or the Staff Secretary [which constitute presidential records];

c. User directories and distribution lists, to be preserved in paper form in files maintained by the NSC Records Management Staff, with instructions to computer operators and NSC staff to print out whenever modified, with the electronic versions subject to disposition under authority of GRS 23, item 9.

d. User-set up functions of the All-in-One system, including changes in passwords, calendar authorizations, and log-in/log-out data, all of which may be updated or deleted under authority of GRS 20, Electronic Records, item 1c.

7. Defendant NSC will issue additional recordkeeping instructions to NSC staff to implement the above-guidance in ¶¶ 4, 5, 6] within _____ [same period as (¶ 4)] days of the Court's approval of the Joint Stipulation, which will supersede all prior recordkeeping guidance on the subject of records generated on NSC's electronic communications systems, including but not limited to the guidance on electronic federal records contained in the Itoh/Kreczko NSC memorandum entitled "Federal Records," dated May 8, 1993 (at page 6).

8. Either as part of the above-referenced additional recordkeeping instructions, or in separate guidance to all NSC staff, defendant NSC will issue further guidance which defines the categories of materials created by NSC staff which are subject to the Presidential Records Act and the Federal Records Act.

9. Defendant NSC agrees that its obligations to preserve federal record material generated on the All-in-One system will remain applicable to any electronic communications system which may be utilized by NSC staff as a replacement for the current communications system.

B. Interim Measures For Other EOP Agency Components

(i) OSTP

10. Within _____ days of the Court's approval of the Joint Stipulation, the Office of Science and Technology Policy ("OSTP"), an agency component of the EOP, will institute procedures to enable ongoing preservation, in electronic form, of the text of messages sent or received by OSTP staff using the cc:mail electronic communications system, which constitute federal records. These procedures will include, but not be limited to:

a. OSTP staff designating at the time of creation of a cc:Mail message whether the message constitutes a "record" under the Federal Records Act or Presidential Records Act, with automatic routing of all "record" messages to the OSTP Records Management officer;

b. The OSTP Records Management Officer instituting procedures to provide that "on-line" segregation of all federal and presidential records generated by use of the cc:Mail communications system, to be maintained in separate electronic files set up on as consistent a basis as is feasible with the existing indexing scheme maintained for paper records;

c. OSTP initiating a formal disposition schedule for the All-in-One federal electronic records routed to the OSTP Records Management officer, through development of an SF-115 under applicable NARA regulations.

11. OSTP will issue additional recordkeeping guidance covering the obligation to periodically review electronic mail messages created by OSTP staff on existing communications systems;

and to otherwise conform such additional guidance to the provisions of general guidance to be issued by the Office of Administration, as set out below in ¶ 13.

12. Either as part of the above-referenced additional recordkeeping instructions, or in separate guidance to all OSTP staff, OSTP will issue further guidance which clearly defines the categories of materials created by OSTP staff which are subject to the Presidential Records Act and the Federal Records Act.

(ii) OA

13. Within _____ days of the Court's approval of the Joint Stipulation, defendant Office of Administration (OA), which is responsible for the maintenance of the existing All-in-One electronic communications system used by staff of various EOP components, including the White House Office, will issue additional recordkeeping instructions. These instructions will include but not be limited to providing for the following additional actions to be taken by all users of the All-in-One system in components of the EOP which do not solely advise and assist the President:

a. All-in-One messages (as well as any attachments to messages), which are determined to be federal records, will be preserved in paper form in official files of each EOP agency component, where the printed copy shows the full name of the sender, full names of all recipients, and the date and time the message was sent on both the sender's and recipient's copies;

b. "Read receipts" which are necessary for complete and

accurate documentation of agency activities, will be preserved in paper form in official files of each EOP agency component, and associated with the corresponding text of the printed out message(s);

c. All-in-One calendars maintained by policy-level officials, as designated by the heads of each EOP agency component, will be preserved in paper form on a monthly basis, and preserved in official files of each EOP agency component;

d. User directories and distribution lists will be preserved in paper form in official files maintained by the each EOP agency component, with instructions to computer operators and agency staff to print out whenever modified, with the electronic versions subject to disposition under authority of GRS 23, item 9.

e. User-set up functions of the All-in-One system, including changes in passwords, calendar authorizations, and log-in/log-out data, all of which may be updated or deleted under authority of GRS 20, Electronic Records, item 1c.

f. Provision for the identification of individual messages which constitute federal records, by means of either manual or automated "tagging" at time of creation, for the purpose of enabling agency components to implement periodic review of the record designations of messages created on the All-in-One communications system.

The parties further agree that any remaining information

generated by or maintained on the All-in-One communication system maintained by EOP is either presidential or nonrecord material, not subject to the Court's orders.

14. For the purpose of implementing ¶ 13, defendant OA will issue additional recordkeeping instructions for the use of all EOP agency components which create federal records (other than NSC), within _____ [same period as ¶ 4] days of the Court's approval of the Joint Stipulation, which will supersede all prior recordkeeping guidance on the subject of records generated on the All-in-One electronic communications system, including but not limited to the guidance on electronic federal records contained in the Watkins/Overton memorandum entitled "Federal Records," dated May 5, 1993 (at pages 6-7).

(iii) Other EOP Components

15. The recordkeeping practices of agency components of EOP (other than NSC) with respect to federal records generated on electronic communications systems not otherwise specifically identified herein, and which are presently in use, will be left to the discretion of the agency heads of each EOP agency component pursuant to the Federal Records Act. [either this or we have to address USTR, Internet, OMB's suspended systems, etc.]

C. NARA

16. Within _____ days of the Court's approval of the parties' Joint Stipulation, defendant National Archives and Records Administration ("NARA") will perform an audit of defendant NSC's

All-in-One electronic communications system, as well as the All-in-One system maintained by defendant OA, under applicable NARA regulations set out at 36 C.F.R. §§ 1220.50. NARA will prepare a summary report of the findings of the audit, to be made publicly available upon request.

II. Preservation of Electronic Federal Records on Backup
And Resolution of FOIA Claim

A. Preservation of Electronic Federal Records

17. NARA shall carry out the provisions of the Preservation Plan ("Preservation Plan") approved by the Acting Archivist on April 16, 1993 with respect to those materials transferred to its custody in January 1993 as identified at Attachment A.

18. With respect to the materials identified at Attachment A, NARA may exclude from processing any computer backup tape which contains the following types of non-record systems information: commercial operating and applications software; "spool files" which computer systems create to provide an orderly flow of data to devices such as printers; "sort files" which hold data temporarily during the execution of a program; and "systems files" which contain information which allows systems managers to monitor the usage and state of the system and to report operational problems.

19. Upon restoration of the backup tapes identified in Attachment A in accordance with the provisions of Item No. 6 of the Preservation Plan, NARA shall establish procedures setting forth the method by which it will make its initial determination as to what may constitute Federal records on the tapes. These procedures

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shall include the application by NARA of the definition of a Federal record set forth in 44 U.S.C. § 3301. In addition, NARA may consult with the EOP agencies which originated the information.

20. Upon the completion of the segregation process, NARA shall place information it has initially determined to be federal record information on separate computer tapes and transmit such tapes to the responsible originating agency within the Executive Office of the President. Subject to ¶ 21, below, the agency head of the responsible originating agency within the EOP shall make a final determination in accordance with the provisions of the Federal Records Act as to which information on the tapes constitutes Federal records subject to preservation, and which record and non-record information shall be disposed of. NARA will then appraise the record material to determine its disposition.

21. Defendants NARA and NSC stipulate that the following special procedures shall apply with respect to making federal record determinations concerning materials contained on the NSC backup tapes in the custody of NARA:

(a) With respect to Reagan Administration NSC backup tapes identified on Attachment A, Categories (a), (b), and (c), [OPTIONAL: as well as Bush Administration NSC backup tapes identified on Attachment A, Categories (e) and (f),] both NARA and NSC shall consider all information contained on these tapes to be covered within the scope of the Federal Records Act, subject to NSC's final determination with respect to the record or nonrecord

status of particular information pursuant to ¶ 20.

(b) Duplicate copies of all information ultimately determined to be federal records will be forwarded to the Reagan Presidential library. [necessary to spell out?]

(c) With respect to Bush Administration NSC backup tapes identified on Attachment A, Categories (e) and (f), NARA and NSC shall be obligated solely to identify and segregate federal record material constituting:

(i) electronic mail created and transmitted prior to May 13, 1992, the date on which NSC instituted procedures for its staff identifying the "record" nature of e-mail at time of creation; and

(ii) transmittal information (i.e., read receipts) associated with all electronic mail contained on the backup tapes.

22. The parties agree that final determinations of what material constitutes federal records will be made contemporaneously with the processing of the FOIA claim, under the timetable established in ¶ 28, below.

23. Presidential information on the tapes which remain at NARA shall be disposed of in accordance with the direction of the applicable former President.

24. [Upon transmitting to the responsible originating agency within the EOP computer tapes containing information which NARA has initially determined to be federal records, all tapes and materials that remain in NARA's custody may be disposed of as nonrecord

information.]

25. The parties agree that the remaining backup tapes in the current custody of defendants in this action other than NARA, which have been preserved pursuant to the second temporary restraining order of November 20, 1992 and subsequent court orders, will be subject to disposition at the discretion of each responsible EOP agency. [applies to ONDCP PROFS tapes Nov 92 - present; Clinton Administration NSC/WHSSS/WHSR/WHCA, OA/OASIS, USTR, OSTP, OMB, NSPC tapes] [alternative formulation: separate Attachment with selected dates for subset of tapes to be preserved, and FRA determinations made by agencies]

Alternative proposal for Bush & Clinton materials:

** NARA and EOP agencies agree to conduct 'sample' of information on selected tapes; any 'record' information identified as permanent records would lead to more extended search of remaining backup tapes only for categories of records identified; NARA and EOP would hold on to backup tapes until determination of possible permanent record status made.

B. Processing of FOIA Claim

26. For the purpose of resolving the FOIA Count in this action, the parties agree that defendants will shall conduct a FOIA search for materials on selected backup tapes in the current possession of NARA. The exact parameters of the agreed-upon search are as set out at Attachment B. [duplicates only]

27. In the sole discretion of defendants, either NARA,

defendant White House Communications Agency, or one or more components of the EOP shall be tasked to perform the actual FOIA search.

28. Once a search has been completed for responsive materials, and subject to ¶ 29, below, defendants shall make their best efforts to complete final determinations for declassification and release of all PROFS materials recovered from the backup tapes within [4 years] of the date of the approval of this Joint Stipulation by the Court. During this period, defendants shall, on a quarterly basis, release materials and give plaintiffs notice of any final decisions to withhold particular materials pursuant to the FOIA.

29. Defendants shall promptly forward recovered PROFS materials in defendants' possession that need to be referred to entities of the United States government outside the EOP for possible declassification and release; however, such materials will not be subject to the [4 year] deadline for processing set out in ¶ 28.

30. Within one month of receiving materials released by defendants in redacted form, or upon receiving written notice of a final decision to withhold a record in its entirety, plaintiffs will give notice to defendants identifying any redactions or withheld materials for which plaintiffs request that defendants provide a Vaughn index to substantiate the basis for asserting that the material is not subject to release under the

FOIA.

31. Defendants agree to provide the Court every six months [quarterly?] with a status report describing: the number of materials which have been processed and released, in full or in part; the number of materials involved in interagency coordination or referral; the agencies to which referral has been made; and the dates of referral.

32. The parties agree that on or before the date due under ¶ 31 for defendants' second status report, the parties will enter into good faith negotiations regarding a schedule for preparation of partial Vaughn indices, as necessary; provided, however, that the parties agree that defendants shall have a minimum of two months after the second status report to finalize preparation of any Vaughn index with respect to all redacted or withheld materials pursuant to ¶ 28.

33. Nothing in this agreement shall preclude the defendants from asserting any defense or exemption for withholding a document permitted under the FOIA.

III. MISCELLANEOUS PROVISIONS

A. Definitions

34. "Defendants" include the Acting Archivist of the United States (in an official capacity), the National Security Council, the White House Communications Agency, the EOP Office of Administration, as well as remaining agency components of the Executive Office of the President in existence at the time of the

approval of this Joint Stipulation, excluding any components the staff of which solely advise and assist the President. {OMB, ONDCP, OSTP, USTR, CEQ}

35. "Electronic communications systems" as used herein means electronic mail systems ("e-mail"), electronic conferences, and computer systems with similar electronic mail capabilities, **which are used for communications solely among staff of the defendant EOP agencies.**² The term does not include file transfer utilities (software that transmits files between users but does not retain any transmission data; or data systems that are used primarily to collect and process data which have been organized into data files or databases on either personal computers or mainframe computers.

B. Savings Clauses

36. Defendants shall make their best efforts to implement the provisions of this Joint Stipulation based on the fiscal and budgetary appropriations available to them throughout the duration of this agreement. Nothing in this Joint Stipulation shall be construed to bind defendants to implementing one or more new electronic communications systems, or taking interim measures with respect to existing electronic communications systems, in the absence of appropriate levels of funding for accomplishing the terms of the Joint Stipulation. Moreover, nothing in this Joint Stipulation shall be construed to bind defendants in continuing to maintain any or all existing electronic communications systems

² Meant to exclude Internet, etc.

which are presently utilized throughout the defendant EOP agencies. Defendants shall at all times have complete discretion with respect to whether to create new electronic communications systems for use by staff within the EOP agencies.

37. Upon the Court's approval of the terms of the Joint Stipulation, the terms of Parts I and III of the Joint Stipulation shall be binding upon the parties for a period not to exceed [3 years].

C. Attorneys' Fees

38. The parties agree that plaintiffs specifically retain their claim to attorneys fees, and nothing in this stipulation shall constitute a waiver or settlement of that claim.

[alternative: Plaintiffs specifically retain their claim to attorneys fees, with the proviso that the parties agree that no fees shall be claimed for work performed in connection with [subset of issues in suit: work related to PRA issues in lawsuit, including in connection with Armstrong I appeal; discovery issues govt won; NSC presidential/federal issue; etc.]

D. Dismissal of Claims

39. The Court's approval of this Joint Stipulation shall constitute a full settlement of the claims pending in this action before the Court of Appeals. Upon the Court's approval of the Joint Stipulation, the parties shall jointly notify the Court of Appeals that the pending appeals (Nos. 93-5002, 93-5048, 93-5156), are withdrawn. Additionally, upon approval of the Joint

Stipulation, this Court shall issue an order vacating the prior Orders entered in this action of January 6, 1993, January 11, 1993, and May 21, 1993. The parties further agree that defendants' pending motion for summary judgment (filed July 2, 1992) shall be withdrawn as moot.

[E. Jurisdiction]

[40. The parties agree that the District Court for the District of Columbia shall retain jurisdiction of this cause for the purpose of enabling the parties to apply at any time for such furthers orders or directions as may be necessary or appropriate to enforce the provisions of this Joint Stipulation.]

[Plaintiffs' signatures]

ALAN B. MORRISON
DAVID C. VLADECK
MICHAEL E. TANKERSLEY
Public Citizen Litigation Group
2000 P Street, N.W.
Washington, D.C. 20008
(202) 833-3000
Attorneys for Plaintiffs

[Defendants' signatures: NARA, NSC, WHCA, OA, OSTP? Other EOP components? White House?]

J. RAMSEY JOHNSON
United States Attorney

STUART E. SCHIFFER
DAVID J. ANDERSON
ELIZABETH A. PUGH
JASON R. BARON
(D.C. Bar # 366663)
ANTHONY J. COPPOLINO
PETER D. COFFMAN
PAMELA A. MOREAU
Attorneys, Department of
Justice
Civil Division, Room 1040
901 E Street, N.W.
Washington, D.C. 20530
(202) 514-4336
Attorneys for Defendants

SO ORDERED, this _____ day of _____, 1993

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

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Copies to:

Michael E. Tankersley, Esq.
David C. Vladeck, Esq.
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Kate Martin, Esq.
American Civil Liberties Union
Foundation
122 Maryland Ave., N.E.
Washington, D.C. 20002

Jason R. Baron
Anthony J. Coppolino
Peter D. Coffman
Pamela A. Moreau
Attorneys, Department of Justice
Civil Division
Room 1040
901 E Street, N.W.
Washington, D.C. 20530
(202) 514-4336

ATTACHMENT A

The National Archives and Records Administration shall carry out the provisions of the Preservation Plan approved by the Acting Archivist on April 16, 1993 with respect to the following materials transferred to its custody in January 1993:

- (a) NSC-WHCA Backup Tapes of NSC PROFS electronic mail messages from the Reagan Administration for the following dates:

- (i) all dates in 1986;
- (ii) February 15, 21, and 28, 1987
- (iii) October 15, 1988
- (iv) January 7 and 20, 1989
- (v) ten additional tapes for which dates are undetermined which contain PROFS data

[See Pls. Letter of June 15, 1992 -- revised FOIA request] [approx 165 tapes]

- (b) NSC-WHSSS Backup Tapes of NSC All-In-One electronic mail messages from the Reagan Administration for the following dates:

[subset of 65 tapes to be determined]

- (c) NSC-WHCA Backup Tapes of NSC All-In-One electronic mail messages from the Reagan Administration
[4 tapes] [include at all?]

- (d) OA Backup Tapes of PROFS electronic mail messages from the Reagan Administration for the following dates:

- (i) January 7, 1989
- (ii) January 20, 1989

- (e) NSC-WHSSS Backup Tapes of NSC All-In-One electronic mail messages for the following dates:

- (i) November __, 1992 [earliest date for a complete set of tapes preserved under second TRO of 11/20/92]

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OTHER POSSIBLE DATES:

- (ii) November 20, 1992 (date of second TRO)
- (iii) December 10, 1992 (date second TRO expired)
- (iv) January 19, 1993 (last day of Bush Admin.)

- (f) NSC-WHCA Backup Tapes of NSC PROFS electronic mail messages for the following dates:

- (i) November __, 1992 [earliest date for a complete set of tapes preserved under second TRO of 11/20/92]

OTHER POSSIBLE DATES:

- (ii) November 20, 1992 (date of second TRO)
- (iii) December 10, 1992 (date second TRO expired)
- (iv) January 19, 1993 (last day of Bush Admin.)

- (g) OA Backup Tapes of OASIS/All-in-One electronic mail messages for the following dates:

- (i) November __, 1992 [earliest date for a complete set of tapes preserved under second TRO of 11/20/92]

OTHER POSSIBLE DATES:

- (ii) November 20, 1992 (date of second TRO)
- (iii) December 10, 1992 (date second TRO expired)
- (iv) January 19, 1993 (last day of Bush Admin.)

ATTACHMENT B

The parties agree that the scope of the FOIA claim in this action shall be limited as follows:

[TO BE FILLED IN]

Note:

1. Feb 21, 1992 and June 15, 1992 letters form maximum universe--can attempt to winnow categories down from current estimate of 220,000 total pages to be dumped out from backup tapes and processed for FOIA exemptions

--(e.g., no HEX Dump material; smaller list of individuals at NSC whose notelogs would be retrieved, etc.)

--Would at a minimum offer up doing equivalent search to search performed in Dec. 1992 for Weinberger's attorneys [which resulted in 457 notelogs (each containing dozens/hundreds of notes) and approx 1,000 other documents (cable summaries) being turned over by NSC without copies in paper form being kept]

2. Duplicate copies of each backup tape subject to search (not originals)

3. Plaintiffs agree to allow defendants to develop computer program which eliminates duplicate information on tapes.