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H.R. 5811, THE ELECTRONIC COMMUNICATIONS PRESERVATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 5811

TO AMEND TITLE 44, UNITED STATES CODE, TO REQUIRE PRESERVATION OF CERTAIN ELECTRONIC RECORDS BY FEDERAL AGENCIES, TO REQUIRE A CERTIFICATION AND REPORTS TO PRESIDENTIAL RECORDS, AND FOR OTHER PURPOSES

APRIL 23, 2008

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H.R. 5811, THE ELECTRONIC COMMUNICATIONS PRESERVATION ACT

WEDNESDAY, APRIL 23, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2154, Rayburn House Office Building, Hon. Wm. Lacy Clay, Jr. (chairman of the subcommittee) presiding.

Present: Representatives Clay, Hodes, and Sali.

Staff present: Darryl Piggee, staff director/counsel; Jean Gosa, clerk; Charisma Williams, staff assistant; Michelle Mitchell, legislative assistant, Office of Wm. Lacy Clay; and Charles Phillips, minority counsel.

Mr. CLAY. The committee will come to order.

In today's legislative hearing we will examine the Electronic Communication Preservation Act H.R. 5811. It will modernize Federal recordkeeping by requiring agencies to begin preserving electronic records more effectively.

The bill requires electronic preservation for electronic communications such as e-mails and recommends to the extent practicable that regulations are required of Federal agencies to capture, manage, and preserve other electronic records.

In addition, H.R. 5811 creates oversight of the maintenance and preservation of Presidential Records, including e-mails sent and received by Presidential advisors.

We will hear from witnesses who will testify concerning this issue and offer recommendations that they believe will improve the act. Without objection the Chair and ranking minority member will have 5 minutes to make opening statements followed by opening statements not to exceed 3 minutes by any other Member who desires recognition.

Without objection, Members and witnesses may have five legislative days to submit a written statement or extraneous materials for the record. I will begin with an opening statement and welcome everyone to today's hearing on H.R. 5811.

This bill will modernize Federal recordkeeping by requiring Federal agencies to preserve all electronic records such as e-mails more effectively. In addition, H.R. 5811 will establish necessary oversight of the maintenance and preservation of Presidential Records, including e-mails sent and received by Presidential advisors.

Under current law, Federal agencies have broad discretion to determine how electronic records and electronic communications are preserved. Guided by existing regulations and court decisions, few agencies have moved to an electronic recordkeeping system for the preservation of e-mails. This bill calls on the Archivist to issue regulations requiring agencies to preserve electronic communications in an electronic format.

In addition, the Archivist would establish testing and certification standards for any electronic records management systems implemented in Federal agencies. Committee investigations revealed deficiencies in White House preservation of e-mails under the Presidential Records Act, including a lack of proper systems for ensuring the preservation of these records. Congress passed the Presidential Records Act to clarify that the records of the President belong to the United States, not to the individual President.

Concerns have been raised over the past 2 years about White House compliance with the Presidential Records Act during the Bush administration. Investigations reveal that numerous White House officials, including Senior Advisor Karl Rove, used political e-mail accounts to conduct official business. Many of these e-mails were deleted according to Republican National Committee policy, and none were preserved as Presidential records.

In addition, the White House cannot account for hundreds of days' worth of official White House e-mails sent and received from 2003 and 2005. At the time of these losses, the White House used an e-mail archiving system that a former White House Information Technology officer described as primitive. Under the Presidential Records Act, the President has sole authority over the management of records during his term of office.

The oversight mechanism created in H.R. 5811 establishes standards for the preservation of these records. In particular, these standards would cover those records management controls necessary to capture, manage, preserve, and retrieve electronic communications.

The bill further requires that the Archivist annually certify whether the records management controls established by the President meet these standards and biannually report to Congress on the results of the certification.

I would like to thank Chairman Waxman and Mr. Hodes for their leadership on this issue and for introducing this bill aimed at safeguarding electronic records with me this week. I look forward to today's testimony and further review of H.R. 5811.

I would like to recognize Mr. Sali for an opening statement, if you have one.

[The prepared statement of Hon. Wm. Lacy Clay and the text of H.R. 5811 follow:]

Opening Statement
Of
Chairman Wm. Lacy Clay
Information Policy, Census and National Archives
Subcommittee

H.R. 5811, "Electronic Communication Preservation Act"
Wednesday, April 23, 2008
2154 Rayburn HOB
2:00 P.M.

Good Afternoon. Welcome to today's hearing on H.R. 5811, the Electronic Communications Preservation Act. This bill will modernize federal record keeping by requiring federal agencies to preserve all electronic records, such as emails, more effectively. In addition, H.R. 5811 will establish necessary oversight of the maintenance and preservation of presidential records, including e-mails sent and received by presidential advisors.

Under current law, federal agencies have broad discretion to determine how electronic records and electronic communications are preserved. Guided by existing regulations and court decisions, few agencies have moved to an electronic record-keeping system for the preservation of e-mails. H.R. 5811 calls on the Archivist to issue regulations requiring agencies to preserve electronic communications in an electronic format. In addition, the Archivist would establish testing and certification standards for any electronic records management systems implemented at federal agencies.

Committee investigations revealed deficiencies in White House preservation of e-mails under the Presidential Records Act, including a lack of proper systems for ensuring the preservation of these

records. Congress passed the Presidential Records Act to clarify that the records of a president belong to the United States, not to the individual president.

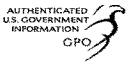
Concerns have been raised over the past two years about White House compliance with the Presidential Records Act during the Bush Administration. Investigations revealed that numerous White House officials – including Senior Advisor Karl Rove – used political e-mail accounts to conduct official business. Many of these e-mails were deleted according to Republican National Committee policy, and none were preserved as presidential records. In addition, the White House cannot account for hundreds of day's worth of official White House e-mails sent and

received between 2003 and 2005. At the time of these losses, the White House used an e-mail archiving system that a former White House information technology officer described as "primitive."

Under the Presidential Records Act, the president has sole authority over the management of records during his term of office. The oversight mechanism created in H.R. 5811 establishes standards for the preservation of these records. In particular, these standards would cover those records management controls necessary to capture, manage, preserve, and retrieve electronic communications. The bill further requires that the Archivist annually certify whether the records management controls established by the President

meet these standards, and bi-annually report to Congress on the results of the certification.

I'd like to thank Chairman Waxman and Mr. Hodes for their his leadership on this issue and for introducing this bill, aimed at safeguarding electronic records, with me this week. I look forward to today's testimony and further review of H.R. 5811.



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110TH CONGRESS
2D SESSION

H. R. 5811

To amend title 44, United States Code, to require preservation of certain electronic records by Federal agencies, to require a certification and reports relating to Presidential records, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 15, 2008

Mr. WAXMAN (for himself, Mr. CLAY, and Mr. HODES) introduced the following bill; which was referred to the Committee on Oversight and Government Reform

---

A BILL

To amend title 44, United States Code, to require preservation of certain electronic records by Federal agencies, to require a certification and reports relating to Presidential records, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Electronic Communica-
5 tions Preservation Act".

1 **SEC. 2. PRESERVATION OF ELECTRONIC COMMUNICA-**
2 **TIONS.**

3 (a) REQUIREMENT FOR PRESERVATION OF ELEC-
4 TRONIC COMMUNICATIONS.—

5 (1) IN GENERAL.—Chapter 31 of title 44,
6 United States Code, is amended by adding at the
7 end the following new section:

8 **"§ 3108. Electronic communications**

9 "(a) REGULATIONS REQUIRED.—Not later than 18
10 months after the date of the enactment of this section,
11 the Archivist shall promulgate regulations governing agen-
12 cy preservation of electronic communications that are
13 records. Such regulations shall, at a minimum—

14 "(1) require the electronic capture, manage-
15 ment, and preservation of such electronic records;

16 "(2) require that such electronic records are
17 readily accessible for retrieval through electronic
18 searches;

19 "(3) establish mandatory minimum functional
20 requirements and a software certification testing
21 process to certify electronic records management ap-
22 plications to be used by Federal agencies for pur-
23 poses of complying with the requirements in para-
24 graphs (1) and (2); and

25 "(4) include timelines for agency compliance
26 with the regulations that ensure compliance as expe-

1 ditiously as practicable but not later than four years
2 after the date of the enactment of this section.
3 "(b) COVERAGE OF OTHER ELECTRONIC
4 RECORDS.—To the extent practicable, the regulations pro-
5 mulgated under subsection (a) shall also include require-
6 ments for the capture, management, and preservation of
7 other electronic records.
8 "(c) COMPLIANCE BY FEDERAL AGENCIES.—Each
9 Federal agency shall comply with the regulations promul-
10 gated under subsection (a).
11 "(d) REVIEW OF REGULATIONS REQUIRED.—The
12 Archivist shall periodically review and, as necessary,
13 amend the regulations promulgated under this section.
14 "(e) REPORTS ON IMPLEMENTATION OF REGULA-
15 TIONS.—
16 "(1) AGENCY REPORT TO ARCHIVIST.—Not
17 later than four years after the date of the enactment
18 of this section, the head of each Federal agency shall
19 submit to the Archivist a report on the agency's
20 compliance with the regulations promulgated under
21 this section.
22 "(2) ARCHIVIST REPORT TO CONGRESS.—Not
23 later than 90 days after receipt of all reports re-
24 quired by paragraph (1), the Archivist shall submit
25 to the Committee on Homeland Security and Gov-

1 ernmental Affairs of the Senate and the Committee
2 on Oversight and Government Reform of the House
3 of Representatives a report on Federal agency com-
4 pliance with the regulations promulgated under this
5 section.".

6 (2) CLERICAL AMENDMENT.—The table of sec-
7 tions for chapter 31 of title 44, United States Code,
8 is amended by adding after the item relating to sec-
9 tion 3107 the following new item:

"3108. Electronic communications.".

10 (b) DEFINITION OF ELECTRONIC RECORDS MANAGE-
11 MENT APPLICATION.—Section 2901 of title 44, United
12 States Code, is amended—

13 (1) by striking "and" at the end of paragraph
14 (14);

15 (2) by striking the period at the end of para-
16 graph (15) and inserting "; and"; and

17 (3) by adding at the end the following new
18 paragraph:

19 "(16) the term 'electronic records management
20 application' means a software system designed to
21 manage electronic records within an information
22 technology system, including by categorizing and lo-
23 cating records, identifying records that are due for
24 disposition, and storing, retrieving, and disposing of
25 records stored in a repository.".

1 **SEC. 3. PRESIDENTIAL RECORDS.**

2 (a) ADDITIONAL REGULATIONS RELATING TO PRESI-
3 DENTIAL RECORDS.—

4 (1) IN GENERAL.—Section 2206 of title 44,
5 United States Code, is amended—

6 (A) by striking "and" at the end of para-
7 graph (4);

8 (B) by striking the period at the end of
9 paragraph (5) and inserting "; and"; and

10 (C) by adding at the end the following:

11 "(5) provisions for establishing standards nec-
12 essary for the economical and efficient management
13 of Presidential records during the President's term
14 of office, including—

15 "(A) records management controls nec-
16 essary for the capture, management, and pres-
17 ervation of electronic communications;

18 "(B) records management controls nec-
19 essary to ensure that electronic communications
20 are readily accessible for retrieval through elec-
21 tronic searches; and

22 "(C) a software certification testing proc-
23 ess to certify the electronic records management
24 application to be used by the President for the
25 purposes of complying with the requirements in
26 subparagraphs (A) and (B).".

1 (2) DEFINITION.—Section 2201 of title 44,
2 United States Code, is amended by adding at the
3 end the following new paragraph:
4 "(6) The term 'electronic records management
5 application' has the meaning provided in section
6 2901(16) of this title.".
7 (b) CERTIFICATION OF PRESIDENT'S MANAGEMENT
8 OF PRESIDENTIAL RECORDS.—
9 (1) CERTIFICATION REQUIRED.—Chapter 22 of
10 title 44, United States Code, is amended by adding
11 at the end the following new section:
12 **"§ 2208. Certification of the President's management**
13 **of Presidential records**
14 "(a) ANNUAL CERTIFICATION.—The Archivist shall
15 annually certify whether the records management controls
16 established by the President meet requirements under sec-
17 tions 2203(a) and 2206(5) of this title.
18 "(b) REPORT TO CONGRESS.—The Archivist shall re-
19 port annually to the Committee on Homeland Security and
20 Governmental Affairs of the Senate and the Committee
21 on Oversight and Government Reform of the House of
22 Representatives on the status of the certification.".
23 (2) CLERICAL AMENDMENT.—The table of sec-
24 tions for chapter 22 of title 44, United States Code,

1 is amended by adding at the end the following new
2 item:

"2208. Certification of the President's management of Presidential records.".

3 (c) REPORT TO CONGRESS.—Section 2203(f) of title
4 44, United States Code, is amended by adding at the end
5 the following:

6 "(4) One year following the conclusion of a Presi-
7 dent's term of office, or if a President serves consecutive
8 terms one year following the conclusion of the last term,
9 the Archivist shall submit to the Committee on Homeland
10 Security and Governmental Affairs of the Senate and the
11 Committee on Oversight and Government Reform of the
12 House of Representatives a report on—

13 "(A) the volume and format of Presidential
14 records deposited into that President's Presidential
15 archival depository; and

16 "(B) whether the records management controls
17 of that President met the requirements under sec-
18 tions 2203(a) and 2206(5) of this title.".

19 (d) EFFECTIVE DATE.—The amendments made by
20 this section shall take effect one year after the date of
21 the enactment of this Act.

○

Mr. SALI. Well, thank you, Mr. Chairman. I appreciate this opportunity to comment briefly on the topic of preserving our Nation's history.

I could not agree more with Ms. Anna Nelson, Director of History for American University about having to rely on unreliable memoirs, scattered agency records, or the New York Times to reconstruct the history of policymaking records. Our historian should not rely on events as reported by the New York Times or from memoirs whose authors may embellish the facts.

This hearing seems to be focusing on only the Presidential Records Act portion of this possible legislation. The focus should not only be on these important records, but records from all of the Federal agencies. To make Federal agencies comply, I believe this legislation should include enforceable repercussion language. Ms. Patricia McDermott of OpenTheGovernment.org suggests this is the only way to make Federal agencies comply with the Federal Records Act. Ms. McDermott states that she does not, "think anyone has ever been prosecuted for destroying, much less failing to preserve, Federal records."

Just ask former Clinton EPA Director Carol Browner. She supposedly oversaw the destruction of her computer files in violation of a judge's order requiring the agency to preserve its records. Today, however, we seem to be elevating actions by a small number of staffers who, allegedly, deleted private e-mail accounts years ago to the same level as that of a former EPA director.

The purpose of this subcommittee hearing should be on preserving our Nation's history and not on political gamesmanship. The American people deserve better from their representatives.

Thank you, Mr. Chairman.

Mr. CLAY. I thank Mr. Sali for that opening statement and also look forward to working with you and those on your side. As we go through the bill I think you will see that it is more comprehensive than what you described, and it does cover Federal agencies as well as the White House.

Mr. SALI. Great.

Mr. CLAY. Thank you.

Now I would like to recognize Mr. Hodes for an opening statement.

Mr. HODES. Thank you, Mr. Chairman, and I thank you for your leadership on this very important bill. I look forward to the testimony and to working on this bill which really is, I think, of a discussion of how to bring our recordkeeping into the modern age. Things are changing very, very quickly in the way we communicate, the way we keep our records, and I appreciate the various concerns that I have seen in the written testimony.

I look forward to the oral testimony as we engage in this dialog with the goal of preserving history, preserving records, and making sure that the people of this country have access to the records that are necessary to an effective Government.

So I thank you, Mr. Chairman, and yield back.

Mr. CLAY. Thank you so much.

Now we will receive testimony from the witnesses before us today, and I want to start by introducing our panel.

Our first witness, with whom this subcommittee is very familiar, is Ms. Linda Koontz, Director of Information Management Issues at the U.S. Government Accountability Office. She is responsible for issues concerning the collection, use, and dissemination of Government information in an era of rapidly changing technology. Welcome back to the subcommittee, Ms. Koontz.

Next, representing the National Archives Records Administration, we will hear from Mr. Gary M. Stern, General Counsel of the Archivist, and Mr. Paul Wester, Director of the Modern Records Program. Welcome to both of you today.

And apparently the fourth witness is on her way. When she gets in, we will swear her in, also.

Thank you all for appearing before the subcommittee today. It is the policy of the Oversight Committee to swear in all witnesses before they testify. I would like to ask each witness to please stand and raise your right hands.

[Witnesses sworn.]

Mr. CLAY. Thank you, you may be seated. Let the record reflect that the witnesses have answered in the affirmative, and I ask that now each witness give a brief summary of their testimony and to keep this summary under 5 minutes in duration.

Ms. Koontz, you may proceed.

STATEMENTS OF LINDA KOONTZ, DIRECTOR, INFORMATION MANAGEMENT ISSUES, GOVERNMENT ACCOUNTABILITY OFFICE; GARY STERN, GENERAL COUNSEL, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; PAUL WESTER, JR., DIRECTOR, MODERN RECORDS PROGRAM, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; AND PATRICE MCDERMOTT, DIRECTOR, OPENTHEGOVERNMENT.ORG

STATEMENT OF LINDA KOONTZ

Ms. KOONTZ. Thank you, Mr. Chairman, and members of the subcommittee. I appreciate the opportunity to discuss critical issues surrounding the Federal Government's management of electronic mail messages.

As you know, Federal agencies are increasingly using e-mail for essential communications and, in doing so, they are potentially creating messages that have the status of Federal records. My remarks today are based on ongoing work requested by you and the full committee.

E-mail by its very nature presents significant records management challenges. First, information contained in e-mail records may contain any subject or function and document various types of transactions. As a result, in many cases decision on which e-mail messages are records must be made individually.

Second, the context of an e-mail which includes the sender's and receiver's date and time and attachments may be crucial to understanding its content and needs to be maintained.

Third, a message may be part of an exchange of messages between two or more people or even a string of many messages.

Finally, the large number of Federal e-mail users and the high volume of e-mails increase the management challenge. Despite these challenges, managing records, including e-mail records, is

vital. If these records are not managed effectively, individuals might lose access to benefits for which they are entitled, the Government could be exposed to unwarranted legal liabilities, and historical records could be lost forever.

In addition, agencies with poorly managed records risk increased costs when attempting to search records in response to FOIA requests or litigation-related discovery actions.

Our ongoing review of e-mail management at four agencies illustrates these challenges. Although the agencies, generally with few exceptions, have put in place policies that contain the appropriate elements. Senior officials were not consistently following these policies. Specifically, for 8 out of 15 officials we are reviewing e-mail messages that qualified as records were not being appropriately identified and preserved. Instead, e-mail messages including records were generally being maintained in e-mail systems that lacked recordkeeping features that would permit easy and timely retrieval of the information.

Key factors contributing to this practice were the sheer volume of e-mails involved, and the agencies generally relied on paper-based processes to manage e-mail records rather than on electronic recordkeeping systems, although several of them are in the process of planning for or implementing such systems. In addition, awareness of Federal records requirements is an ongoing concern.

In regard to the draft bill, the Electronic Communications Preservation Act would encourage agencies to transition to electronic records management. This has the potential to improve e-mail management in the Federal Government by taking advantage of the efficiencies of automation and limiting expenditure on cumbersome manual processes.

In addition, although agencies are moving toward electronic records management, the 4-year deadline could help expedite this transition but also allow agencies time to do the planning required to implement those systems effectively.

Finally, the development of minimum functional requirements by NARA should reduce the development risks that could have resulted from multiple agencies concurrently developing similar systems.

Mr. Chairman, that concludes my statement. I would be happy to answer questions at the appropriate time.

[The prepared statement of Ms. Koontz follows:]

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Information Policy, Census, and National Archives, House Committee on Oversight and Government Reform

For Release on Delivery
Expected at 2 p.m. EDT
Wednesday, April 23, 2008

FEDERAL RECORDS

Agencies Face Challenges in Managing E-Mail

Statement of Linda Koontz, Director
Information Management Issues

GAO-08-699T

April 23, 2008

GAO
Accountability·Integrity·Reliability

Highlights

Highlights of GAO-08-699T, a testimony before the Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, House of Representatives

FEDERAL RECORDS

Agencies Face Challenges in Managing E-Mail

Why GAO Did This Study

Federal agencies are increasingly using electronic mail (e-mail) for essential communication. In doing so, they are potentially creating messages that have the status of federal records, which must be managed and preserved in accordance with the Federal Records Act. To carry out the records management responsibilities established in the act, agencies are to follow implementing regulations that include specific requirements for e-mail records.

In view of the importance that e-mail plays in documenting government activities, GAO was asked to testify on issues relating to the preservation of electronic records, including e-mail. As agreed, GAO's statement discusses challenges facing agencies when managing their e-mail records, as well as current policies and practices for managing e-mail messages that qualify as federal records.

This testimony is primarily based on preliminary results of ongoing work, in which GAO is examining, among other things, e-mail policies at four agencies of contrasting sizes and structures (the Department of Homeland Security, the Environmental Protection Agency, the Federal Trade Commission, and the Department of Housing and Urban Development), as well as the practices of selected senior officials.

To view the full product, including the scope and methodology, click on GAO-08-699T. For more information, contact Linda Koontz at (202) 512-6240 or koontzl@gao.gov.

GAO's Preliminary Findings

E-mail, because of its nature, presents challenges to records management. First, the information contained in e-mail records is not uniform: it may concern any subject or function and document various types of transactions. As a result, in many cases, decisions on which e-mail messages are records must be made individually. Second, the transmission data associated with an e-mail record—including information about the senders and receivers of messages, the date and time the message was sent, and any attachments to the messages—may be crucial to understanding the context of the record. Third, a given message may be part of an exchange of messages between two or more people within or outside an agency, or even of a string (sometimes branching) of many messages sent and received on a given topic. In such cases, agency staff need to decide which message or messages should be considered records and who is responsible for storing them in a recordkeeping system. Finally, the large number of federal e-mail users and high volume of e-mails increase the management challenge.

Preliminary results of GAO's ongoing review of e-mail records management at four agencies show that not all are meeting the challenges posed by e-mail records. Although the four agencies' e-mail records management policies addressed, with a few exceptions, the regulatory requirements, these requirements were not always met for the senior officials whose e-mail practices were reviewed. Each of the four agencies generally followed a print and file process to preserve e-mail records in paper-based recordkeeping systems, but for about half of the senior officials, e-mail records were not being appropriately identified and preserved in such systems. Instead, e-mail messages were being retained in e-mail systems that lacked recordkeeping capabilities. (Among other things, a recordkeeping system allows related records to be grouped into classifications according to their business purposes.) Unless they have recordkeeping capabilities, e-mail systems may not permit easy and timely retrieval of groupings of related records or individual records. Further, keeping large numbers of record and nonrecord messages in e-mail systems potentially increases the time and effort needed to search for information in response to a business need or an outside inquiry, such as a Freedom of Information Act request. Factors contributing to this practice were the lack of adequate staff support and the volume of e-mail received. In addition, agencies had not ensured that officials and their responsible staff received training in recordkeeping requirements for e-mail. If recordkeeping requirements are not followed, agencies cannot be assured that records, including information essential to protecting the rights of individuals and the federal government, is being adequately identified and preserved.

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to discuss critical issues surrounding the federal government's management of electronic mail messages. As you are aware, federal agencies are increasingly using electronic mail (e-mail) for essential communication, and in doing so, they are potentially creating messages that have the status of federal records. According to the Federal Records Act,[1] federal records are information in whatever form that documents government functions, activities, decisions, and other important transactions, and such records must be managed and preserved in accordance with the act.[2] As the volume of federal e-mail grows, so does the challenge of managing electronic records.

Under the act, the National Archives and Records Administration (NARA) has responsibilities for oversight and guidance of federal records management, which includes management of e-mail records. Agencies also have records management responsibilities, which as specified by NARA include the responsibility to develop e-mail management policies and practices that include specific requirements, such as defining staff responsibilities for determining whether an e-mail (including any associated attachments) is a federal record and, further, requiring preservation of record e-mail.

As requested, my statement will focus on current practices used in managing e-mail messages that qualify as federal records. After a brief discussion of federal requirements, I will outline some of the challenges facing agencies when managing their e-mail records and then discuss e-mail records management policies and practices that we are reviewing at four agencies. Finally, I will offer brief comments on recently drafted legislation in this area.

In my statement today, my discussion of e-mail records management challenges, policies, and practices is based on the preliminary results of work we are doing at your and the full committee's

[1] 44 U.S.C. chapters 21, 29, 31, and 33.

[2] The definition of a record is given at 44 U.S.C. 3301.

request, which we expect to publish later this year. For this engagement, we selected four federal agencies based on contrasting sizes and structures and on the significance of their records to protecting rights and documenting accountability: the Department of Homeland Security (DHS), the Environmental Protection Agency (EPA), the Federal Trade Commission (FTC), and the Department of Housing and Urban Development (HUD). For each agency, we are reviewing the e-mail management practices of four senior officials (including the agency head),[3] using responses to a series of data collection instruments, interviews with agency officials, and inspection of a limited number of sample e-mail records identified by the agencies to corroborate their statements. Also, to develop comments on the legislation, we analyzed the provisions of the bill related to our ongoing work.

The ongoing performance audit on which my comments today are based, which began in April 2007, is being conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Results in Brief

E-mail, because of its nature, presents challenges to records management. First, the information contained in e-mail records is not uniform: it may concern any subject or function and document various types of transactions. As a result, in many cases, decisions on which e-mail messages are records must be made individually. Second, the transmission data associated with an e-mail record—including information about the senders and receivers of messages, the date and time the message was sent, and any attachments to the messages—may be crucial to understanding the context of the

[3] According to agency officials, the head of DHS did not have an e-mail account or use e-mail for agency business; accordingly, we reviewed the practices of 15 senior officials.

record. Third, a given message may be part of an exchange of messages between two or more people within or outside an agency, or even of a string (sometimes branching) of many messages sent and received on a given topic. In such cases, agency staff need to decide which message or messages should be considered records and who is responsible for storing them in a recordkeeping system. Finally, the large number of federal e-mail users and high volume of e-mails increase the management challenge. According to NARA, the use of e-mail results in more records being created than in the past, as it often replaces phone conversations and face-to-face meetings that might not have been otherwise recorded.

Our ongoing review of e-mail records management at four agencies provides illustrations of these difficulties. In their e-mail records management policies, the four agencies addressed, with a few exceptions, the requirements that we identified in NARA's regulations. However, for the senior officials whose practices we reviewed, recordkeeping requirements for e-mail were not always met. Each of the four agencies generally followed a print and file process to preserve e-mail records in paper-based recordkeeping systems, but for about half of the senior officials, e-mail records were not being appropriately identified and preserved in such systems. Instead, e-mail messages, including records, were generally being retained in e-mail systems that lacked recordkeeping capabilities, which is contrary to regulation. (Among other things, a recordkeeping system allows related records to be grouped into classifications according to their business purposes.) Unless they have recordkeeping features, e-mail systems may not permit easy and timely retrieval of both groupings of related records as well as individual records. Further, keeping large numbers of record and nonrecord messages in e-mail systems potentially increases the time and effort needed to search for information in response to a business need or an outside inquiry, such as a Freedom of Information Act request. Factors contributing to this practice were the lack of adequate staff support and the volume of e-mail received. In addition, officials and their responsible staff had not always received training in the recordkeeping requirements for e-mail records. If recordkeeping requirements are not followed, agencies cannot be assured that records, including information that is

essential to protecting the rights of individuals and the federal government, is being adequately identified and preserved.

The provisions of a draft bill (the Electronic Communications Preservation Act) would mandate the transition to electronic records management for e-mail records. Such a transition could help agencies improve their recordkeeping practices in this area. As our review shows, agencies recognize that devoting significant resources to creating paper records from electronic sources is not a viable long-term strategy and have accordingly begun to plan or implement such a transition. The investment in information technology needed to implement electronic recordkeeping will have to be managed appropriately to avoid unnecessary cost and performance risks. Accordingly, the bill's requirement that NARA develop minimum functional requirements should reduce the development risk that could result from multiple agencies concurrently developing similar systems. Once implemented, however, electronic recordkeeping systems could potentially help agencies obtain the efficiencies of automation and avoid expenditure of resources on duplicative manual processes and storage.

Background

Advances in information technology and the explosion in computer interconnectivity have had far-reaching effects, including the transformation from a paper-based to an electronic business environment and the capability for rapid communication through e-mail. Although these developments have led to improvements in speed and productivity, they also require the development of ways to manage information that is increasingly in electronic rather than paper form. For federal agencies, such information includes e-mail messages that may have the status of federal records.

NARA and Federal Agencies Have Responsibilities for Federal Records Management

Under the Federal Records Act,[4] each federal agency is required to make and preserve records that (1) document the organization, functions, policies, decisions, procedures, and essential transactions of the agency and (2) provide the information necessary to protect the legal and financial rights of the government and of persons directly affected by the agency's activities.[5] These records, which include e-mail records, must be effectively managed. If they are not, individuals might lose access to benefits for which they are entitled, the government could be exposed to unwarranted legal liabilities, and historical records of vital interest could be lost forever. In addition, agencies with poorly managed records risk increased costs when attempting to search their records in response to Freedom of Information Act requests or litigation-related discovery actions.

Accordingly, agencies are required to develop records management programs to ensure that they have appropriate recordkeeping systems with which to manage and preserve their records. Among the activities of a records management program are identifying records and sources of records and providing records management guidance, including agency-specific recordkeeping practices that establish what records need to be created in order to conduct agency business. Agencies are also required to *schedule* their records: that is, to identify and inventory records, appraise their value, determine whether they are temporary or permanent, and determine how long the temporary records should be kept.

The act also gives the National Archives and Records Administration (NARA) responsibilities for oversight and guidance of federal records management, which includes management of e-mail records. NARA works with agencies to schedule records, and it must approve all records schedules. Records schedules may be specific to an agency, or they may be general, covering records common to several or all agencies. According to NARA, records covered by general records schedules make up about a third of all

[4] 44 U.S.C. chapters 21, 29, 31, and 33.

[5] 44 U.S.C. 3101.

federal records. For the other two thirds, NARA and the agencies must agree upon specific records schedules.

No record may be destroyed unless it has been scheduled. For temporary records, the schedule is of critical importance, because it provides the authority to dispose of the record after a specified time period. (For example, General Records Schedule 1, Civilian Personnel Records, provides instructions on retaining case files for merit promotions;[6] agencies may destroy these records 2 years after the personnel action is completed, or after an audit by the Office of Personnel Management, whichever is sooner.) Once a schedule has been approved, the agency must issue it as a management directive, train employees in its use, and apply its provisions to temporary and permanent records.

NARA has issued regulations that specifically address the management of e-mail records.[7] As with other records, agencies are required to establish policies and procedures that provide for appropriate retention and disposition of e-mail records. NARA further specified that for each e-mail record, agencies must preserve certain transmission data—names of sender and addressees and message date. Further, except for a limited category of "transitory" e-mail records,[8] agencies are not permitted to store the recordkeeping copy of e-mail records in the e-mail system, unless that system has certain features, such as the ability to group records into classifications according to their business purposes and to permit easy and timely retrieval of both individual records and groupings of related records. These recordkeeping features are important to ensure that e-mail records remain both accessible and

[6] That is, records relating to the promotion of an individual that document qualification standards, evaluation methods, selection procedures, and evaluations of candidates.

[7] 36 CFR Part 1234.24.

[8] These are e-mail records with very short-term (180 days or less) NARA-approved retention periods (under the authority of General Record Schedule 23, Item 7, or a NARA-approved agency records schedule). Agencies may elect to manage such records on the e-mail system itself, without the need to copy the record to a recordkeeping system, provided that (1) users do not delete the messages before the expiration of the NARA-approved retention period, and (2) the system's automatic deletion rules ensure preservation of the records until the expiration of the NARA-approved retention period.

usable during their useful lives. For example, it is essential to be able to classify records according to their business purpose so that they can be retrieved in case of mission need. Further, if records cannot be retrieved easily and quickly, or they are not retained in a usable format, they do not serve the mission or historical purpose that led to their being preserved. If agencies do not keep their e-mail records in systems with the required capabilities, records may also be at increased risk of loss from inadvertent or automatic deletion.

If agency e-mail systems do not have the required recordkeeping features, either agencies must copy e-mail records to a separate electronic recordkeeping system, or they must print e-mail messages (including associated transmission information that is needed for purposes of context) and file the copies in traditional paper recordkeeping files. NARA's regulations allow agencies to use either paper or electronic recordkeeping systems for record copies of e-mail messages, depending on the agencies' business needs.

The advantages of using a paper-based system for record copies of e-mails are that it takes advantage of the recordkeeping system already in place for the agency's paper files and requires little or no technological investment. The disadvantages are that a paper-based approach depends on manual processes and requires electronic material to be converted to paper, potentially losing some features of the electronic original; such manual processes may be especially burdensome if the volume of e-mail records is large.

The advantage of using an electronic recordkeeping system, besides avoiding the need to manage paper, is that it can be designed to capture certain required data (such as transmission data) automatically. Electronic recordkeeping systems also make searches for records on particular topics much more efficient. In addition, electronic systems that are integrated with other applications may have features that make it easier for the user to identify records, and potentially could provide automatic or partially automatic

classification functions.[9] However, as with other information technology investments, acquiring an electronic recordkeeping system requires careful planning and analysis of agency requirements and business processes; in addition, electronic recordkeeping raises the issue of maintaining electronic information in an accessible form throughout its useful life.[10]

Management of E-Mail Records Poses Challenges

Because of its nature, e-mail can present particular challenges to records management. First, the information contained in e-mail records is not uniform: it may concern any subject or function and document various types of transactions. As a result, in many cases, decisions on which e-mail messages are records must be made individually. Second, the transmission data associated with an e-mail record—including information about the senders and receivers of messages, the date and time the message was sent, and any attachments to the messages—may be crucial to understanding the context of the record. Third, a given message may be part of an exchange of messages between two or more people within or outside an agency, or even of a string (sometimes branching) of many messages sent and received on a given topic. In such cases, agency staff need to decide which message or messages should be considered records and who is responsible for storing them in a recordkeeping system. Finally, the large number of federal e-mail users and high volume of e-mails increase the management challenge. According to NARA, the use of e-mail results in more records being created than in the past, as it often replaces phone conversations and face-to-face meetings that might not have been otherwise recorded.

[9] According to Gartner Research, "What enterprises really need (and want), is a mechanism that automatically classifies messages by records management type ... without user intervention." However, such technology is "in its infancy," as of August 2007, although the company expected it to mature rapidly because of high demand. Gartner Research, *Best Practices in Records Management: FAQs*, G00149526 (Aug. 17, 2007).

[10] That is, if the hardware, software, or media required to access the information become obsolete or deteriorate, the information must be migrated to hardware, software, or media that continue to be accessible.

These challenges have been recognized by NARA and the records management community in numerous studies and articles.[11] A 2001 survey of federal recordkeeping practices conducted by a contractor for NARA concluded, among other things, that managing e-mail was a major records management problem and that the quality of recordkeeping varied considerably across agencies.[12] In addition, the study concluded that for many federal employees, the concept of a "record" and what should be scheduled and preserved was not clear.

A 2005 NARA-sponsored survey of federal agencies' policy and practices for electronic records management concluded that procedures for managing e-mail were underdeveloped.[13] The study, performed by the University of Maryland Center for Information Policy, stated that most of the surveyed offices had not developed electronic recordkeeping systems, but were instead maintaining recordkeeping copies of e-mail and other electronic documents in paper format. However, all of the offices also maintained electronic records (frequently electronic duplicates of paper records). According to the study team, the agencies did not establish electronic recordkeeping systems due to financial constraints, and implementing such systems was a considerable challenge that increased with the size of the agency. As a result, organizations were maintaining unsynchronized parallel paper and electronic systems, resulting in extra work, confusion regarding which is the recordkeeping copy, and retention of many records beyond their disposition date.

[11] For example, Robert F. Williams and Lori J. Ashley, Cohasset Associates Inc., *2005 Electronic Records Management Survey—A Renewed Call to Action*, Cohasset/ARMA/AIIM White Paper (2005) Giovanna Patterson and J. Timothy Sprehe, "Principal Challenges Facing Electronic Records Management in Federal Agencies Today," *Government Information Quarterly*, Vol. 19, (2002), pp 307–315; available at www.sciencedirect.com.

[12] SRA International, Inc., *Report on Current Recordkeeping Practices within the Federal Government*, a report sponsored by NARA (Dec. 10, 2001), www.archives.gov/records-mgmt/pdf/report-on-recordkeeping-practices.pdf.

[13] Center for Information Policy/College of Information Studies/University of Maryland, *Best Practices in Electronic Records Management: A Survey and Report on Federal Government Agency's Recordkeeping Policies and Practices*, a report sponsored by NARA (Dec. 19, 2005), www.archives.gov/records-mgmt/initiatives/umd-survey.html.

Most recently, a NARA study team examined in 2007 the experiences of five federal agencies (including itself) with electronic records management applications, with a particular emphasis on how these organizations used these applications to manage e-mail.[14] The purpose of the study was to gather information on the strategies that organizations are using that may be useful to others. Among the major conclusions from the survey was that implementing an electronic records management application requires considerable effort in planning, testing, and implementation, and that although the functionality of the software product itself is important, other factors are also crucial, including agency culture, training provided, and management and information technology support. With regard to e-mail in particular, the survey concluded that e-mail messages can constitute the most voluminous type of record that is filed into records management applications.

Agency Policies on Preserving E-Mail Records Are Not Followed Consistently

Our work on e-mail records management demonstrates that agencies continue to face challenges similar to those identified by the prior studies. While our results are preliminary and we are not able to project them beyond the agencies we reviewed, I believe they help illustrate the difficulties agencies can face when applying NARA's requirements to today's operating environment.

Most Agency Policies Generally Complied with NARA Guidance

Three of the four agencies we reviewed—FTC, DHS, and EPA—had policies in place that generally complied with NARA's guidance on how to identify and preserve e-mail records, but each was missing one applicable requirement. Specifically, the policies at EPA and FTC did not instruct staff on the management and preservation of e-mail records sent or received from nongovernmental e-mail systems (such as commercial Web-based systems). Both EPA and FTC

[14] NARA, *A Survey of Federal Agency Records Management Applications 2007* (Jan. 22, 2008), www.archives.gov/records-mgmt/resources/rma-study-07.pdf.

officials told us that these instructions were not provided because the staff were informed that use of outside e-mail systems for official business was prohibited. However, whenever access to such external systems is available at an agency, providing these instructions is still required. DHS's policy did not specify that draft documents circulated via e-mail may be federal records. DHS officials recognized that their policies did not specifically address the need to assess the records status of draft documents, and said they planned to address the omission during an ongoing effort to revise the policies.

The policy at one of the four agencies, HUD, was missing three of eight applicable requirements.[15] One element of the policy was inconsistent with NARA's regulation: it required only the sender of an e-mail message to review it for potential records status, but the regulation states that e-mail records could include both messages sent or received. HUD officials acknowledged that its policy omits the recipient's responsibility for determining the record status of e-mail messages and stated that its e-mail policy fell short of fully implementing NARA regulations in this regard because the department's practice is not to use e-mail for business matters in which official records would need to be created. However, this practice does not remove the requirement for agency employees to assess e-mail received for its record status, because the agency cannot know that employees will not receive e-mail with record status; the determination of record status depends on the content of the information, not its medium.

In addition, two other requirements were missing from HUD's policy: it did not state, as required, that recordkeeping copies of e-mail should not be stored in e-mail systems and that backup tapes should not be used for recordkeeping purposes. HUD officials stated that they considered that these requirements were met by a reference in their policy to the NARA regulations in which these

[15] The requirement to instruct staff on the management and preservation of official messages sent or received in non-governmental e-mail systems was not applicable at HUD, which has implemented technical controls to prevent access to such e-mail systems.

requirements appear.[16] However, this reference is not sufficient to make clear to staff that e-mail systems and backup tapes are not to be used for recordkeeping.

E-Mail Records of Senior Officials Were Not Consistently Preserved

While agency policies were generally compliant with recordkeeping regulations, these policies were not applied consistently. Specifically, for 8 of the 15 senior officials we reviewed, e-mail messages that qualified as records were not being appropriately identified and preserved. Instead, the officials generally kept every message within their e-mail systems. Each of the four agencies generally followed a print and file process to preserve e-mail records in paper-based recordkeeping systems because their e-mail systems did not have required record-keeping capabilities. Factors contributing to this lack of compliance with recordkeeping requirements were the lack of adequate staff support and the volume of e-mail received—several of these officials had thousands or even tens of thousands of messages in their e-mail system accounts. Another reason was that keeping every e-mail ensured that no information was lost, which was seen as safe from a legal standpoint. However, by keeping every message, they were potentially increasing the time and effort that would be needed to search through and review all the saved messages in response to an outside inquiry, such as a Freedom of Information Act request. In addition, by not keeping the e-mail in an appropriate recordkeeping system, these officials were making it more difficult for their agencies to find information by subject. Appropriately identifying and saving record material also allows agencies to avoid expending resources on unnecessarily preserving nonrecord material and on keeping record material beyond its usefulness (that is, beyond the date when it can be disposed of according to the records schedule).

In contrast, many of the officials whose e-mail records were appropriately managed delegated responsibility for this task to one

[16] Under Electronic Mail Database Management, Record Retention Responsibilities, the HUD Electronic Mail Policy states that "Records created or received on electronic mail systems must be managed in accordance with the provisions of 36 CFR 1220, 1222, and 1228."

or more administrative staff members. These individuals were responsible for identifying which e-mail messages qualified as records and ensuring that the message and any attachments were preserved according to the agency's records management policies. Generally, this required that they print the message, including any attachments and transmission information (who the message was to and from and when it was sent), and place the paper copy in a file.

Printing and filing copies of e-mail records is acceptable under NARA's regulations. However, printing copies of e-mails can lead to an agency maintaining multiple copies of the message in both paper and electronic formats, which can lead to agencies' expending resources on duplicative storage, as well as confusion over which is the recordkeeping copy. Further, as with all electronic documents, conversion to paper entails the risk of losing some features of the electronic original.

Awareness of federal records requirements is also an ongoing concern. At one department, training for senior officials on their records management responsibilities took place only at the beginning of the current administration. Officials who joined the department subsequently were not trained on records management. Similarly, several administrative staff responsible for managing the e-mail of senior officials told us that they had not been trained to recognize a record.

Recently Proposed Legislation on Electronic Records Management

A draft bill, the Electronic Communications Preservation Act, would mandate agencies to transition to electronic records management by requiring the Archivist of the United States to promulgate regulations governing agency preservation of electronic communications that are federal records. Among other things, the regulations would

- require the electronic capture, management, and preservation of these records;
- require that such electronic records are readily accessible for retrieval through electronic searches; and

- require the Archivist to develop mandatory minimum functional requirements for electronic records management applications to meet the first two requirements.

The legislation would also require agencies to comply with the new regulations within 4 years of enactment.

Requiring a governmentwide transition to electronic recordkeeping systems could help federal agencies improve e-mail management. For example, storing e-mail records in an electronic repository could make them easier to search and potentially speed agency responses to Freedom of Information Act requests. As our review shows, agencies recognize that devoting significant resources to creating paper records from electronic sources is not a viable long-term strategy and have accordingly begun to plan or implement such a system. The 4-year deadline in the draft bill could help expedite this transition.

In addition, the development of minimum functional requirements by NARA should reduce the development risk that could have resulted from multiple agencies concurrently developing similar systems. By providing time both for standards to be developed and implemented by agencies, these provisions recognize the need for a well-planned process. Like any investment in information technology, the development of electronic recordkeeping systems will have to be carefully managed to avoid unnecessary cost and performance risks. However, once implemented, such systems could potentially provide the efficiencies of automation and avoid the expenditure of resources on duplicative manual processes and storage.

In summary, the increasing use of e-mail is resulting in records management challenges for federal agencies. For example, the large number of federal e-mail users and the high volume of e-mails present challenges, particularly in the current paper-based environment. While agency e-mail policies generally contained required elements, about half of the senior officials we reviewed were not following these policies and were instead maintaining their e-mail messages within their e-mail accounts, where records cannot

be efficiently searched, are not accessible to others who might need the information in the records, and are at increased risk of loss. Several agencies are considering developing electronic recordkeeping systems, but until such systems are implemented, agencies may have reduced assurance that information that is essential to protecting the rights of individuals and the federal government is being adequately identified and preserved.

Mr. Chairman, this concludes my testimony today. I would be happy to answer any questions you or other members of the subcommittee may have.

Contacts and Acknowledgements

If you have any questions concerning this testimony, please contact Linda Koontz, Director, Information Management Issues, at (202) 512-6240, or koontzl@gao.gov. Other individuals who made key contributions to this testimony were Timothy Case, Barbara Collier, Jennifer Stavros-Turner, and James Sweetman.

Mr. CLAY. Thank you very much for that.
Mr. Stern.

STATEMENT OF GARY STERN

Mr. STERN. Chairman Clay, members of the committee, on behalf of the Archivist of the United States, Allen Weinstein, I want to thank you for providing the National Archives with this opportunity to share our views on H.R. 5811, the Electronic Communications Preservation Act.

I am Gary Stern, the General Counsel of the Archives, and with me, as you know, is Paul Wester, who directs our Modern Records Program which oversees records management policy under the Federal Records Act. The two substantive sections of the bill address two very distinct statutes and entities that are governed by the statutes. The Federal Records Act applies to all Federal agencies across all three branches of the Government, and the Presidential Records Act applies solely to the President and the Vice President, and certain entities within the Executive Office of the President.

I will address the PRA section of the Bill, and then Mr. Wester will discuss the FRA section.

Now, the Presidential Records Act was enacted in 1978 to establish public ownership of the Presidential administration's records and establish procedures governing the preservation and public availability of those records. The House report on the bill noted the need for the President to implement sound records management practices, and it is worth noting that, in fact, the White House has been at the forefront of trying to manage e-mail records electronically.

All the way back in 1994, largely in response to then long-running litigation about White House e-mails that began at the end of the Reagan administration, the Clinton administration built a comprehensive e-mail archiving recordkeeping system known as the Automated Records Management System [ARMS].

Now, while there were serious technical issues with ARMS toward the end of that administration, including the need to restore approximately 2 million e-mails that were missing from ARMS, restore from backup tapes, this system nonetheless achieved a very important result of preserving roughly 20 million Presidential Record e-mails as well as 12 million Federal record e-mails from the Federal agency components of the EOP, and all of those records are now part of the National Archives preserved as permanent electronic records.

The ARMS system did carry over into the Bush administration and to which, then, the committee has been looking into issues that have resulted. The PRA was crafted after very careful consideration concerning the delicate separation of powers balance between the Congress and the President, and the proper level of intrusion by the Archivist into the incumbent President's affairs.

For example, although the FRA authorizes the Archivist to promulgate guidelines and binding regulations to assist agencies in the development of their records management systems, the PRA lacks any such provision. Similarly, the Archivist lacks authority under the PRA to formally inspect the President's records while in office or survey the President's records management practices.

Given this history of the PRA in this Constitutional dimension, we believe it is highly appropriate for the committee to seek the views of the Department of Justice regarding the separation of powers issues raised by Section 3 of the bill. As the committee is aware from the prior full committee hearing in February, there are efforts underway by the White House to review and ensure its issues relating to, allegedly, missing White House e-mails, including the possible need to restore e-mails from backup tapes, which NARA certainly hopes will be completed before the end of this administration.

The Archivist also noted at that hearing that he did support the EOP's efforts, continuing efforts, to put in place a new electronic recordkeeping system to replace the ARMS system that would better conform to best practices in both the public and private sector. These more recent efforts by the EOP are, in our view, consistent with the goals of the proposed bill to ensure effective records management controls are in place at the White House.

So along these lines, NARA believes that it is not unreasonable to presume that an incumbent President should and would want to adopt best practices in the area of electronic records management that parallel the efforts that are or would be under this Bill required for Federal agencies.

So to the extent the standards required under Section 3(a) would generally attract the new regulations that would be required under Section 2, NARA believes this provision is consistent with the overall aims of the PRA. However, because of the Constitutional concerns already mentioned, these standards would likely need to be non-binding on the incumbent President.

The provisions of Section 3(b) of the legislation requiring NARA to make an annual certification that the records management controls established by the incumbent President meet newly established standards would best be implemented through the type of oversight authority, including inspection authority, that we are empowered to conduct under the Federal Records Act, which would normally include access by NARA to the processes, procedures in place, and possibly even to the records being managed by the system. However, we note again that such authority would be unprecedented and defer once again to the Department of Justice on how this would work as a formal matter.

Finally, Section 3(c) of the legislation would require a report by the Archivist after the President leaves office regarding the volume and format of Presidential records that have been transferred to the National Archives. We do not believe that this reporting requirement raises any Constitutional issues, and NARA should, therefore, be able to provide the Congress with such a report, if required.

I would now like to turn it over to Mr. Wester to discuss Section 2 on the FRA.

Mr. CLAY. Thank you. Mr. Wester, you may proceed.

STATEMENT OF PAUL WESTER, JR.

Mr. WESTER. Again, thank you for the opportunity to testify today.

Although the Federal Government's work processes still operate in a mixed media environment, paper and electronic, the Government's records are increasingly and overwhelmingly "born digital." This proposed legislation reflects the new paradigm. NARA conceptually supports managing electronic records within electronic recordkeeping systems in the Federal Government. We also firmly believe that electronic communications as well as other forms of electronic records need to be managed in accordance with sound records management and archival principles.

In NARA, strategic directions for Federal records management we state that NARA will partner with stakeholders to ensure that Federal agencies can economically and effectively create and manage records necessary to meet business needs, that records are kept long enough to protect rights and assure accountability, and that records of archival value are preserved and made available for future generations.

We believe the intent of this proposed legislation supports these broad goals. However, we have four areas of concern regarding the intended scope and effect of the legislation. The four areas are:

One, NARA has issued guidance on the management of e-mail records, and the term "electronic communications" may be too broad and ambiguous. This may be especially the case since the term is also used in other legislation of a decidedly different scope, the Electronic Communications Preservation Act.

Two, the meaning of the term "preservation" should also be clarified. The proposed legislation suggests all electronic communications that are Federal records as defined by Section 3301 shall be captured, managed, and preserved electronically. NARA's view is that, as is true for all Federal records, these types of records should only be captured, managed, and preserved consistent with the dispositional requirements outlined in Section 3302 and 3303 of Title 44 of the U.S. Code.

Three, the potential cost of this proposed legislation are enormous. The costs of managing all Federal electronic communications and electronic records management in electronic management applications would likely be in the billions of dollars. This legislation also would require other financial and personnel investments by Federal agencies to keep electronic records usable or readily accessible for retrieval through electronic searches over a long period of time. These costs are separate for procuring electronic records applications for agencies across the Government. And four, while certified electronic RMAs are one method for managing electronic communication records in a recordkeeping system, there are likely to be a variety of other technological solutions. Department of Defense 5015.2, Standard Certified Records Management Applications, which NARA endorses as a standard for civilian agencies, in which DOD has for their own agencies certified, are not the only way to attractively manage electronic communication. Alternative technological approaches that can carry out the intent of the proposed legislation should be allowed.

It is also important to note that technological solutions may not always be the most effective means for ensuring the management and preservation of electronic communications and other electronic records. In agencies where the work processes are not currently en-

tirely electronic, paper-based or perhaps a hybrid approach may be the right solution. In this and other similar cases, agencies should have the flexibility to determine the appropriate solution after analyzing business needs and, if needed, in consultation with NARA.

A full explanation of NARA's concerns is contained in our full testimony, but the National Archives of Records Administration does believe the proposed legislation can ensure electronic communications that constitute thorough records are effectively managed and accessible throughout their life cycle.

Thank you for considering NARA's views on this important issue, and we look forward to answering questions.

[The prepared statement of Mr. Stern and Mr. Wester follows:]

FORMAL STATEMENT

Paul M. Wester, Jr.
Director, Modern Records Program
National Archives and Records Administration

and

Gary M. Stern
General Counsel
National Archives and Records Administration

on H.R. 5811, the Electronic Communications Preservation Act

before the Subcommittee on Information Policy, Census, and National Archives
Committee on Oversight and Government Reform
U.S. House of Representatives

April 23, 2008

2:00pm

Thank you for providing the opportunity for the National Archives and Records Administration (NARA) to provide our views on the proposed legislation in the Electronic Communications Preservation Act.

NARA is supportive of the goals of the proposed legislation – to ensure that electronic communications that constitute records are effectively managed and accessible throughout their life cycle.

Although the Federal government's work processes (and default recordkeeping practices) still operate in a mixed media environment – paper and electronic – the government's records are increasingly and overwhelmingly "born digital." This proposed legislation reflects the new paradigm. NARA conceptually supports managing electronic records within electronic recordkeeping systems in the Federal government. We also firmly believe that electronic record communications, as well as other forms of electronic records, need to be managed in accordance with sound records management and archival principles.

The two substantive sections of the bill address to two distinct statutes and their attendant organizations: the Federal Records Act (FRA), which applies to "Federal agencies" in all three branches of the Government; and the Presidential Records Act (PRA), which applies only to the President, the Vice President, and certain entities within the Executive Office of the President. We will address each section separately. Given the very important and complicated issues raised by these proposals, we can only offer our initial views. We remain available to work with the Committee as it attempts to address these issues.

I. *The Federal Records Act*

As the Federal Records Act and our current regulations require, Federal agencies must effectively manage their records (electronic and otherwise) to ensure adequate and proper documentation of agency activities. Federal agencies must identify what records they are creating; propose dispositions to the National Archives for records series regardless of format, according to their business needs to protect citizen rights and assure government accountability; manage their records according to NARA-approved established records schedules and NARA-promulgated regulations and guidance; and finally, after their business needs are completed, carry out appropriate disposition activities. The latter includes both proper destruction or deletion of temporary records that have no further value, as well as transfer of records of archival value to the National Archives to be preserved and made available for future generations.

In NARA's Strategic Directions for Federal Records Management, we state that NARA "will partner with stakeholders to ensure that:

- Federal agencies can economically and effectively create and manage records necessary to meet business needs
- Records are kept long enough to protect rights and assure accountability, and
- Records of archival value are preserved and made available for future generations

We believe the intent of this proposed legislation supports these broad goals. However, we have concerns regarding the intended scope and effect of the legislation.

1. NARA has issued guidance on the management of e-mail records and the term "electronic communications" may be too broad and ambiguous.

Current NARA regulations speak specifically to the management of e-mail records. See 36 CFR 1234.24. We have also issued recent guidance to agencies with respect to such new media as instant messaging and other Web 2.0 applications. See "Frequently Asked Questions about Instant Messaging" at http://www.archives.gov/records-mgmt/initiatives/im-faq.html; "NARA Guidance on Managing Web Records" at http://www.archives.gov/records-mgmt/policy/managing-web-records-index.html; and "Implications of Recent Web Technologies for NARA Web Guidance" at http://www.archives.gov/records-mgmt/initiatives/web-tech.html.

In light of this existing body of NARA guidance, we believe that further authority to issue regulations is not needed. However, we will continue to refine our guidance to ensure that electronic records are properly managed. Also, without more specific refinement, the term "electronic communications" in the scope of this legislation may be overbroad or ambiguous. This may be especially the case since the term is used in other legislation of a decidedly different scope, see, e.g., the Electronic Communications Privacy Act.

2. The meaning of the term "preservation" should be clarified.

The proposed legislation suggests all electronic communications that are Federal records as defined by Section 3301 shall be captured, managed, and preserved electronically. NARA's view is that, as is true for all Federal records, these types of records should only be captured, managed, and preserved consistent with the disposition requirements outlined in Sections 3302 and 3303 of Title 44 of the U.S. Code. With these requirements in mind, we wish to better understand the Committee's goals in this legislation regarding the requirement that "electronic records are readily accessible for retrieval through electronic searches," per proposed section 3108(a)(2):

- First, does the Committee believe that there can or should be a minimum time period required under the records laws that *all* electronic communications need to be preserved and accessible, merely for purposes of agencies conducting searches for information? Put another way, is it the intent of the Committee that electronic communications must be preserved solely for the purpose of facilitating searches, irrespective of how e-mail records may otherwise be managed as part of agency business processes? This is important, because many transitory e-mail records are not appropriate for preservation for more than a very short term retention period, as recognized in NARA's regulations at 36 C.F.R. 1234.24(b)(2).

- Second, does the Committee believe that electronic communications created in the course of governmental activities that also generate traditional hard copy records should nevertheless always be kept in electronic repositories, separate and apart from those related records in paper files or other electronic systems?

With respect to the first bullet above, NARA does not believe that *all* electronic communications records need to be preserved in perpetuity; rather, we believe that electronic records must be managed and understood within, or associated with, the work processes that generated the records. NARA further believes that there are significant challenges in this area, and that not every quick-fix technological solution may ultimately advance the goals of good records management. Indeed, depending upon the answers to these and related questions, there may be other technological solutions that could address this challenge. Also, imposing a technological solution that does not fit well with an agency's business processes or needlessly requires an agency store unimportant e-mails for longer than is necessary could be harmful to sound records management and may be costly.

Turning to the second bullet, from NARA's perspective, a critical aspect of "preservation" is preserving electronic communications not in isolation, but along with other records (electronic and paper) that arise from the same business context. Whenever a record type – like e-mail or web records, for instance – is managed outside of the business process that created the record, the authenticity of the records may be lessened, and the value of the record could be diminished. In other words, we believe the Committee should reconsider whether mandating that *all* government e-mail records be

preserved in electronic form is consistent with the greater goals of the Federal Records Act, where related records on a case or project continue to remain in traditional paper files as maintained in many Federal agencies.

3. The potential costs of this proposed legislation are enormous. Such costs are realized in two different dimensions.

In the first dimension, the costs of managing *all* Federal electronic communications in electronic records management applications (RMAs) – including e-mail records, but also potentially including in the near term instant messaging, wikis, blogs, and other record types that are emerging from web 2.0 social networking software applications- -- would likely be in the billions of dollars. At the National Archives, we spend approximately $450,000 annually to support the deployment of a records management application for e-mail and some other electronic record types for approximately 60 employees. We would need to do a further study to provide more accurate costs, but extrapolating our costs – and our anecdotal understanding of RMA costs in other agencies - across the Federal government results in potential astronomical outlays by Federal agencies if they were to be required to create and provide ongoing support for such RMAs.

A second dimension of the cost challenge is the financial and personnel investment Federal agencies would need to make in order to keep electronic records usable – or "readily accessible for retrieval through electronic searches" – over a long period of time.

Unless records and their metadata are filed correctly by agency staff, having electronic records in an RMA repository does not ensure that the records will be findable and usable. Effectively implementing an RMA in any agency takes a lot of effort and cannot be accomplished quickly.

Moreover, electronic records still in the custody of the Federal agency require continual maintenance, even if they are in an electronic RMA. Unlike paper records which can sit on a shelf in a box in good environmental conditions for years without significant degradation, electronic records must be more regularly and repeatedly described, inspected, migrated, and refreshed. And this challenge increases as electronic record types beyond e-mail are considered, like newer record types as well as more traditional e-mail attachment records.

4. While certified electronic RMAs are one method for managing electronic communication records in a recordkeeping system, there are likely to be a variety of other technological solutions.

Toward this end, we would recommend changing the definition at Section 3108(f)(16) to

(16) the term "electronic records management application" means a software system designed to manage electronic records within an information technology system, including categorizing and locating records***, ensuring that records are***

retained as long as necessary, identifying records that are due for disposition, and storing, retrieving, and ***disposition*** of records ***controlled by the application***.

The first suggested change – ***ensuring that records retained as long as necessary*** – adds the key requirement for managing records. The second suggested change – ***disposition*** – is to ensure inclusion of transfer of permanent records to the National Archives as well as appropriate disposal of temporary records. And the third suggested change – ***controlled by the application*** – substitutes a more general provision for one which is unnecessarily tied to a specific solution, "stored in the repository."

While RMA's that conform to the Department of Defense 5015.2 standard tend to store electronic records in separate, recordkeeping repositories, that is not the only way to accomplish the requirements for managing records.

For example, the Records Management Services concept, which NARA developed over the last two years in collaboration with other agencies and the private sector, defines an approach for managing records that remain stored in the systems used to conduct business. While this concept has not yet been translated into software that agencies can implement, it is an example of the alternatives that should be allowed in the legislation.

It is also important to note that technological solutions, such as RMAs and Records Management Services, may not always be the most effective means for ensuring the management and preservation of electronic communications and other electronic records. As alluded to above, in agencies where the work processes are not currently entirely electronic, a paper-based or hybrid approach may be the right solution. Also, in many of the smaller agencies, independent commissions, etc, it may be cost-prohibitive and otherwise impractical to implement sophisticated technological solutions where the recordkeeping and preservation requirements are modest in scope. In these cases, agencies should have the flexibility to determine the appropriate solution after analyzing their business needs and, if needed, consultation with NARA.

Regarding the proposed Section 3108 requirements for NARA to create regulations related to electronic communications, we have already promulgated extensive regulations for the preservation of electronic records, but concededly they do not reflect our current success in preserving those records that have the least reliance on hardware and software, nor do they mandate that agencies rigidly adopt electronic recordkeeping in a particular form.

That concludes our comments on the Federal Records Act related portion of the proposed legislation.

II. *The Presidential Records Act*

With respect to the Presidential Records Act, we would like to start by noting that the White House has been at the forefront of trying to manage electronic e-mail records electronically, even though the execution of this effort has presented NARA with

enormous challenges that we have done our best to overcome. In response to long-running litigation that began in the Reagan era, the Clinton Administration sought supplemental funding from Congress in 1994 for the building of a comprehensive e-mail recordkeeping system, known as the "Automated Records Management System" (ARMS). While there were serious technical issues to be resolved with ARMS toward the end of that Administration – including the need to restore some 2 million missing e-mails – it achieved the important result of preserving some 20 million presidential record e-mails, and 12 million Federal record e-mails for the entire Executive Office of the President. All of these e-mails presently reside in the National Archives of the United States as permanent records, including as part of the Clinton Presidential Library.

The Presidential Records Act was enacted in 1978 to establish public ownership of the records created by subsequent Presidents and their staffs and to establish procedures governing the preservation and public availability of the records. As noted in the House Report accompanying the pending bill:

> The legislation would terminate the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition. Instead, the preservation of the historical record of future Presidents would be assured and public access to the materials would be consistent *under standards affixed in law*. * * *

H. Rep. 95-1487, at 2 (95th Cong., 2d Sess., Aug. 14, 1978) (emphasis added).

The House Report went on to note that "[t]o facilitate the compiling of a complete record and the orderly transfer of materials, the President is encouraged to implement *sound records management practices* . . . ." *Id.* at 4 (emphasis added).

Congress defined "Presidential records" under the PRA to mean "documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." 44 U.S.C. § 2201(2). In turn, Congress drew a parallel with existing recordkeeping practices under the Federal Records Act in conforming the definition of what constitutes "documentary material":

> . . . to include all types of written, recorded, verbal or visual communications regardless of the form or medium. The definition is an expansion upon the traditional notion of the form a government record may assume, but still relies heavily on the definition of the[] term 'record' in 44 U.S.C. section 301 and the practice that has evolved in the administration of Chapter 29 of that title. To the extent that certain categories of documentary materials are not considered to be records under that chapter, the same categories of materials generated or received by the President and his aides would generally also fall outside the ambit of what constitutes a record.

H. Rep. 95-1487, at 10-11.

The PRA was crafted after very careful consideration concerning the delicate separation of powers balance between the Congress and the President, and the proper level of intrusion by the Archivist into the incumbent President's affairs. As the U.S. Court of Appeals for the District of Columbia explained in the case that led the White House to create the ARMS e-mail archiving system:

> Congress balanced the[] competing goals [in the PRA] by requiring the President to maintain records documenting the policies, activities, and decisions of his administration, but leaving the implementation of such a requirement in the President's hands. See 44 U.S.C. § 2203(a). For example, although the FRA authorizes the Archivist to promulgate guidelines and regulations to assist the agencies in the development of a records management system, the PRA lacks an analogous provision. The Archivist also lacks the authority under the PRA to inspect the President's records or survey the President's records management practices. Finally, the PRA does not require the Archivist to provide Congress with the annual reports on the President's recordkeeping policies and practices that he must submit for agencies.

Armstrong v. EOP, 924 F.2d 282, 290 (D.C. Cir. 1991).

Given the recognized history of the PRA and the delicately balanced scheme it represents with respect to issues of constitutional dimension, we believe that it would be highly appropriate for the Committee to seek the views of the Department of Justice regarding the separation of powers issues raised by section 3.

As the full Committee is aware from its prior hearing in February 2008, at which Archivist Allen Weinstein testified, there are substantial efforts underway by staff in the Office of Administration, Executive Office of the President, to ensure that as complete and comprehensive a record as possible of electronic mail messages will exist from this Administration. The full Committee also knows from that hearing that the Archivist has been vocal in expressing both his continued concerns that the efforts of the EOP are satisfactorily completed before the end of the current Administration, as well as his support for EOP's efforts to institute a new electronic archiving system that will better conform to best practices in the public and private sector. These more recent efforts by EOP staff are, in our view, consistent with the goals of the proposed bill to ensure that effective records management controls are maintained at the White House.

NARA believes that it is not unreasonable to presume that an incumbent President should and would attempt to adopt best practices in the area of electronic records management that parallel the efforts to be required of Federal agencies. To the extent the standards required under section 3(a) would generally track the new regulations required under section 2, NARA believes the provision is consistent with the original aims of the PRA.

However, in light of the above discussion, such standards would likely need to be non-binding on the incumbent President.

The further provisions of section 3(b) of the legislation, requiring NARA to make an annual certification that the records management controls established by the incumbent President meet newly established standards, and requiring a bi-annual report to Congress, can, in our view, only be successfully implemented were NARA to be able to conduct the type of oversight inspection that we are empowered to conduct under Title 44, Section 2904, of the Federal Records Act, including possibly needing to review presidential records along with the general automated processes and procedures EOP has put into place. However, such authority is unprecedented and would mark a significant departure from accepted and long-standing practice. It would likely be deemed intrusive to White House records management processes and an encroachment on the internal administration by the White House of records management compliance with the PRA. Again, we would defer to the Department of Justice on this issue.

Finally, section 3(c) of the legislation, adding a new subsection (4) to section 2203(f) of the PRA, would require a report by the Archivist after a President leaves office, regarding the volume and format of presidential records deposited into that President's archival depository. We do not believe this separate reporting requirement raises any constitutional issues and NARA should have no objection to providing Congress with the required report.

Thank you again for considering NARA's views on this important issue. We are available to answer any questions that you might have.

Mr. CLAY. Thank you so much, Mr. Wester.

Without objection the committee will include in the record the written testimony of Professor Anna Nelson, distinguished historian and resident at American University.

[The prepared statement of Ms. Nelson follows:]

FOR THE RECORD ONLY

Testimony of Anna K. Nelson
Before the
Information Policy, Census, and National Archives
Subcommittee
Oversight and Government Reform Committee
Wednesday, April 23, 2008
2154 Rayburn HOB
2:00 P.M.

I am Anna K. Nelson, Distinguished Historian in Residence at American University. I am representing the National Coalition for History. The Coalition includes a large majority of the historical and archival organizations in the country including the three largest, American Historical Association, Organization of American Historians and the Society of American Archivists.

More that 25 years ago, a foundation funded committee formed to study the records of government in the computer age began its report with the sentence, "The United States is in danger of losing its memory." The committee's warning fell upon deaf ears. As a result, today we would have to rewrite that sentence to read, "The United States has now lost part of its memory."

The Electronic Communications Preservation Act is designed to preserve these records. All researchers in American history and government will benefit from this proposed legislation. As a representative of this history coalition, I would like to assure you of the strong support from the historical community.

I would like to concentrate today on presidential records since some of the most egregious failures of preservation have occurred in the White House. Although this administration has been especially negligent, the National Archives has noted missing e-mails in other administrations going back to President Reagan and including President Clinton. Fortunately, the e-mails of presidents Reagan, Bush and Clinton were recovered from back-up tapes. The George W. Bush e-mails have not been retrieved.

All those who research and write about public policy (including political scientists, experts in international relations, and independent scholars in various think tanks), must necessarily gravitate to presidential records. Since the end of World War II, more than sixty years ago, presidents have used their staffs to gradually subsume policy making within the federal government. Losing valuable records simply because they are not on paper will

leave us to reconstruct the history of policy making from unreliable memoirs, scattered agency records and the *New York Times*.

The failure to preserve White House electronic records, and indeed all federal records, is based on the assumption that electronic records don't really count. Accustomed to records being on paper, staffs dismiss their importance and reach for the delete key. Although not a perfect solution, this legislation, which requires records management controls of electronic records and gives the Archivist the ability to monitor the implementation of the controls, will substantially correct that assumption.

The problems in the White House as illustrated by the Bush administration are two-fold. One involves the losses that stem from changes in the archiving system. While that may appear as a one time problem, technology will continue to advance and administrations will continue to change systems. In planning the change, the Bush staff failed to protect the information that should have been archived. The White House staff also rebuffed warnings from the National Archives and their offer to try to retrieve the lost e-mails. Hundreds of days elapsed without any record of the e-mails sent by the White House staff. Adding to the problem, the e-mails disappeared just as important

decisions were being made concerning the decision to go to war in Iraq.

The second problem is illustrated by the use within the White House of e-mail accounts on the outside. This enabled public officials on to completely bypass the preservation of electronic records under the Federal Records Act. It is not necessary to believe in conspiracy theories to realize that the ability of 50 individuals to use the Republican National Committee address removed hundreds of e-mails and other electronic records from review and analysis of American citizens. Using outside e-mail addresses is a perfect way to protect information from public view ad infinitum.

There is no reason to believe that another White House will not follow suit. While this legislation does not specifically address the second problem, the presence of record management controls and the required annual certification by the Archivist should serve to remind public officials in the White House of their obligations.

When letter writing gave way to the telephone, researchers of public policy turned to agency paper records which were kept in convenient file folders that could, if containing historically valuable files, easily move to the Archives. Meanwhile, the National Archives began to drown

under the flow of these papers, and historians found themselves with infinite documentation that promised endless research. Now the telephone has been eclipsed by e-mail. The tide has turned. When historians and other researchers turn to these e-mails will they find empty files? Will we have a paperless world of information or will we lose information and the history of public policy along with the paper? It is this question that gives this legislation such importance.

Mr. CLAY. We have also been joined by our fourth witness, Ms. Patrice McDermott. Ms. McDermott, can I ask you to stand and raise your right hand in order to be sworn in?

[Witness sworn.]

Mr. CLAY. Thank you, and let the record reflect the witness answered in the affirmative. Ms. McDermott, you may proceed with your 5-minute opening statement.

STATEMENT OF PATRICE MCDERMOTT

Ms. MCDERMOTT. Thank you for accommodating me. I had a board meeting that I had to participate in.

So thank you, Chairman Clay, Mr. Hodes, and members of the subcommittee for the opportunity to speak today on the proposed legislation that would require the executive branch to make concrete and documented progress toward the preservation of electronic records, including e-mail and electronic communications.

My name is Patrice McDermott. I am Director of OpenTheGovernment.org, a coalition of consumer and good government groups, library associations, journalists and environmentalists, labor organizations, and others united to make the Federal Government a more open place in order to make us safer, strengthen public trust in Government and support our democratic principles.

In 1982, 26 years ago now, the Committee on the Records of Government proclaimed that the United States is in danger of losing its memory. They were talking, of course, about paper records. Our memory is at much greater risk now, and this loss is not just of family photos, as it were, but of that information necessary for accountability. Across the Federal Government we do not know with any certainty that all of the documents and information that we need to write our history, to understand policy development and implementation to trace who knew what, read and edited, what documents are being preserved.

Why is our memory in danger? Because the vast majority, if not all, of our documentary and information history is being created electronically, but not necessarily well-managed and preserved electronically. Those of us outside of Government understand that the common policy is to only preserve the final policy document, for instance. That is important but not sufficient.

Some of us who have been around for more than a few years remember the days of carbon copies and complete paper files. In the Government, the paper copies were annotated and initialed by those who saw and commented on them. It was not just the final version of the policy or memo that was filed away but a documentary history of that policy's development. This is the stuff of what did you know, and when did you know it, it is the stuff of history and accountability.

The various reasons given for not preserving at all are ones we have heard before. The volume is too great, we don't have the resources to manage all this. It is not important to the leadership of our agency.

Another reason, frankly, is that Congress has been lax at holding agencies accountable and for ensuring that records management is seen as part of the mission critical component of every department

and agency. The loss of documents and information through indifference should be viewed with as much alarm as their loss through a system breach. The end result is the same except that with indifference or intentional failure to preserve, we will not necessarily know what has been taken from us. We will not be able to restore our history to the previous status.

A report of which you have a copy, Record Chaos: The Deplorable State of Recordkeeping in the Federal Government, issued last week by Citizens for Responsibility and Ethics in Washington in which OpenTheGovernment.org offered some assistance, gives us a good indication of the state we are in with electronic records generally and electronic communications in particular. In general, our admittedly unscientific survey which was part of this report exposed a number of major problems.

First, there is a lack of consistent policies, as evidenced by the fact that so many respondents—and the details are in my submitted testimony—use multiple techniques to preserve e-mail records at their agencies. Second, movement toward electronic records systems has been unacceptably slow. They are by far from universal across the Government, and I think it would be safer to say they are almost universal in not existing across the Government.

Third, agencies are exposing themselves to legal and litigation sanctions, particularly in regard to the lack of care for metadata if this is not corrected. Fourth, agencies lack training and compliance monitoring, two problems that could be easily cured by reforming agency policy and increased NARA involvement. Even knowledgeable agency employees lack a basic understanding of their recordkeeping obligations and how they can be satisfied.

Fifth, senior level agency management needs to realize the serious problems with their agency's electronic records management and take steps to correct them. The legislation under discussion at this hearing is an important step in terms of announcing that Congress is going to pay attention to this serious issue and of taking some beginning steps toward addressing the systemic problems with electronic records, in general, and electronic communications records in particular, your caveat notwithstanding.

We appreciate this initiative. I do not think, however, that this bill goes nearly as far as it needs to. I am focusing my remarks only on the Federal Records Act section of the bill, as I know others, well, I thought others were going to be addressing the Presidential Records Act portion.

As I noted in my submitted testimony, NARA has been talking since at least 1996 about working "with agencies on the design of recordkeeping systems for creating and maintaining records of value." We know from the CREW report and from what I understand of the GAO report to date that, in essence, little has concretely occurred, and therefore agencies have done little. NARA and the agencies don't need another 18 months to "establish mandatory minimal functional requirements and a software certification testing process to certify electronic record management applications."

NARA endorsed, and as Mr. Wester indicated, DOD 5015.2 in November 1998, and there are records management applications

that are available off the shelf. They need some adjusting, but they are off the shelf.

Nor do the agencies need 3 more years beyond the 18 months to comply with the requirement to implement the regulations in a electronic records management system. This is an issue that has been under discussion for more than 10 years. What are needed are some enforceable repercussions for failure to meet obligations under the Federal Records Act. I do not think that anyone has ever been criminally prosecuted for destroying, much less failing to preserve, Federal records.

Records management is not a priority in agencies, as evidenced by our survey. Unless Congress makes it a priority, including through funding, we will likely be having this same discussion in years to come. Congress must make the agencies answerable, and agencies must make employees answerable. Reporting is not going to be enough; although, unfortunately, I don't have a specific remedy to offer to you today.

The partners in OpenTheGovernment.org look forward to opportunities to work on this bill and to ensure that strong legislation begins to move the executive branch forward on this critical aspect of Government management and accountability.

Thank you for the opportunity to speak to you on this important issue, and I am happy to answer any questions you might have.

[The prepared statement of Ms. McDermott follows:]

Statement
Of
Patrice McDermott
Director
OpenTheGovernment.org

Information Policy, Census, and National Archives Subcommittee
Oversight and Government Reform Committee
On
The "Electronic Communications Preservation Act,"
Wednesday, April 23, 2008
2154 Rayburn HOB
2:00 P.M.

Thank you, Chairman Clay, Mr. Turner, and Members of the Subcommittee, for the opportunity to speak today on the proposed legislation that would require the Executive Branch to make concrete and documented progress toward the preservation of electronic records, including e-mail.

My name is Patrice McDermott. I am the Director of OpenTheGovernment.org, a coalition of consumer and good government groups, library associations, journalists, environmentalists, labor organizations and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

In 1982, the Committee on the Records of Government proclaimed that "the United States is in danger of losing its memory."[1] They were talking about paper records. Our memory is at much greater risk now. And, of course, this is not just the loss of our family photos, as it were, but of that information necessary for accountability. Across the federal government, we do not know with any certainty that all of the documents and information that we need to write our history, to understand policy development and implementation, to trace who knew what, read and edited what document, are being preserved.

Why is our memory in danger? Because the vast majority – if not all – of our documentary and information history is being created electronically but not necessarily well-managed and preserved electronically. Those of us outside government understand that the common policy is to only preserve the final policy document, for instance. That is important, but not sufficient. Some of us who have been around for more than a few years remember the days of carbon copies and complete paper files. In the government, the paper copies were annotated and initialed by those who saw and commented on them. It was not just the final version of the policy or memo that was filed away, but a documentary history of that policy's development.

This is the stuff of "what did you know and when did you know it"; it is the stuff of history and accountability. The various reasons given for not preserving it all are ones

1 Committee on the Records of the Government 1985:9, 86-87.

that we have heard before – the volume is too great; we don't have the resources to manage all this; it is not of importance to the leadership of our agency. Another reason is that Congress has been lax in holding agencies accountable and for ensuring that records management is seen as part of the mission-critical components of every department and agency. The loss of documents and information through indifference should be viewed with as much alarm as their loss through a system breach. The end result is the same except with indifference – or intentional failure to preserve – we will not necessarily know what has been taken from us and will not be able to restore our history to its previous status.

The National Archives and Records Administration (NARA) is supposed to be the leader in this area. The Federal Records Act gives NARA clear authority (44 USC 2904) including for promulgating standards, procedures, and guidelines, and conducting inspections or surveys of the records and the records management programs and practices within and between Federal agencies. As far back as 1996, NARA committed to working "with agencies on the design of recordkeeping systems for creating and maintaining records of value." While a procurement standard developed by the Department of Defense was accepted many years ago by NARA, very little progress has been made government-wide toward electronic records management systems. Records are stored on servers and, in some cases, on individual PCs, but they are not managed in the sense of being easily retrievable by subject or creator or, I would guess, disposition schedule. We repeatedly have to relearn the lesson, apparently, that servers and backup tapes are not appropriate records management systems.

A report, "*Record Chaos: The Deplorable State of Electronic Record Keeping in the Federal Government*," issued last week by Citizens for Responsibility and Ethics in Washington (http://www.citizensforethics.org/recordchaos), in which OpenTheGovernment.org offered some assistance, gives us a good indication of the state we are in with electronic records generally and electronic communications in particular. To determine federal agency compliance with electronic record keeping obligations, CREW used a combination of FOIA requests and internet-based research from federal agency websites to compile the written guidance and policies on electronic record keeping within the majority of larger, cabinet-level agencies. The intent was to assess the sufficiency of current electronic record keeping policies. The FOIA requests went to a variety of cabinet-level agencies seeking CREW also submitted FOIA requests to a handful of agencies on discrete topics to test the agencies= ability to locate and produce responsive email records. To ascertain actual agency practices, CREW and OpenTheGovernment.org prepared a non-scientific on-line survey on email record keeping practices and policies that was submitted to over 400 agency records managers. Eighty-seven partial or complete responses were received over a three-week period. Unless otherwise noted, statistics cited on this survey have at least 50 respondents for a particular question.

The report focuses on email records due to their ubiquitous nature in the federal government and in the modern office. A 1999 Department of Justice memo speculated that, in aggregate, federal agencies created at least 36.5 billion messages per year, a

number that most certainly has increased exponentially in nine years. More recently, a respondent to our online survey posited that about 90% of the business of the federal government was conducted by email. And while electronic records include a variety of records (e.g., spreadsheets, maps, pictures), the widespread usage of email records makes them a top priority for agency record keeping policies. A key finding for this hearing is that no agency looked at used an agency-wide electronic record keeping system. Previously published reports document that most agencies do not use electronic systems for any records management.

The survey confirmed what CREW's research into agency policy had shown, namely that the most popular method of email records management is to print email records and file them with paper records. It is important to note that this was an option made available to the agencies by NARA in its GRS 20. Survey results also pointed to the fact that some agencies seem to have multiple policies governing email records or no policy at all, something that the FOIA releases from agencies hinted at. Worse than multiple policies, is a lack of any method to manage email records. When asked how emails are preserved at their agency one person responded, Awe have not gotten to that phase of records management.@

Only six respondent to our survey said that their agency exclusively used some type of electronic system to manage its email records. Eighty-three percent of respondents (but only five individuals) who used an electronic system to manage their emails said that their system was searchable for email records. By contrast, of those using paper or some other system, 61% found it difficult to impossible to search for and find specific email records. This is, of course, the sort of difficulty over which NARA was sued[2] when GRS 20 was issued.

Significantly, the survey also exposed a potential legal pitfall in the apparent lack of concern for metadata. As was made clear in the case of Armstrong v. Executive Office of the President[3] -- which involved a challenge the government's plans to dispose of electronic mail and word processing records of Reagan, Bush and Clinton White House officials at the end of each administration -- metadata must be retained with its associated email records. Metadata includes the names of senders and recipients including those carbon copied (cc'd), date of e-mail transmission, and, if requested time and date of receipt acknowledgment. Yet, in the survey fewer than 75% of respondents said that the most basic information, the time and date of the e-mail and full names of the sender and recipients, was saved. Other potentially important email data fared even worse: attachments to emails were retained only by 68% of respondents, while names of those cc'd on emails by only 56%.

Lack of compliance and lack of penalties for non-compliance emerged as major problems. One respondent commented, AI do know that less than 80% of the agency complies.@ Overall, 30% of respondents did not think their co-workers complied with email record policies; 34% were not aware of any monitoring of employee record

2 Public Citizen, et al v. Carlin 6 August 1999. 184 F.3d 900. 910-11 (D.C. Cir. 1999)
3 See Armstrong v, Executive Office of the President, 810 F.Supp. at 341.

keeping practices; and 56% said there was no penalty for non-compliance (at least on the agency level). This is an area where agencies and NARA can make quick and meaningful changes.

In general, our admittedly unscientific survey exposed a number of major problems.

- First, there is a lack of consistent policies, as evidenced by the fact that so many respondents use multiple techniques to preserve email records at their agencies.

- Second, movement towards electronic record systems has been unacceptably slow.

- Third, agencies are exposing themselves to legal problem and litigation sanctions, particularly in regard to the lack of care for metadata, if not corrected. Indeed, the failure of the federal government to adequately meet its electronic record keeping obligations has exposed it to potential liability in a host of other contexts. Inadequate electronic record keeping also means inadequate compliance with the FOIA and other information access statutes. Agencies= ability to meet their litigation obligations are seriously hampered by their inability to deal effectively with electronic records.

- Fourth, agencies lack training and compliance monitoring, two problems that would be easily cured by reforming agency policy and increased NARA involvement. Even knowledgeable agency employees lack a basic understanding of their record keeping obligations and how they can be satisfied. Written policies and guidelines within individual agencies are often inconsistent, confusing or outright misleading. This lack of understanding correlates directly to a lack of compliance with record keeping obligations.

The blame in terms of compliance falls most squarely on NARA, which, as I noted earlier, has a statutory obligation to promulgate standards, procedures, and guidelines, and conduct inspections or surveys of the records and the records management programs and practices within and between Federal agencies. NARA has elected, however, to limit its role to providing guidance only with little or no agency follow-through. Most significantly, NARA has abandoned its previous practice of conducting annual audits of agency compliance and proclaimed publicly that the responsibility rests first and last with individual federal agencies. At a symposium last fall, NARA was told by agency personnel that the failure to audit meant a failure of records management.

- Fifth, senior-level agency management needs to realize the serious problems with their agencies= electronic records management and take steps to correct them.

The legislation under discussion at this hearing is an important step in terms of announcing that Congress is going to pay attention to this serious issue, and of taking some beginning steps toward addressing the systemic problems with electronic records in

general and electronic communications records in particular. We appreciate this initiative.

I do not think, however, that this bill goes nearly as far as it needs to. I am focusing my remarks only on the Federal Records Act section of the bill, as I know others are addressing the Presidential Records Act portion. As I noted earlier, NARA has been talking since at least 1996 about to working "with agencies on the design of recordkeeping systems for creating and maintaining records of value." We know from the CREW report (and the GAO report to date) that in essence little has concretely occurred and, therefore, the agencies have done nothing. NARA and the agencies don't need another 18 months to "establish mandatory minimum functional requirements and a software certification testing process to certify electronic records management applications to be used by federal agencies;" NARA endorsed "*Design Criteria Standard for Electronic Records Management Software Applications, DoD 5015.2-STD*" in November **1998**.

Nor do the agencies need three more years – beyond the 18 months -- to comply with a requirement to implement the regulations and an electronic records management system. This is an issue that has been under discussion for more than 10 years. What are needed are some enforceable repercussions for failure to meet obligations under the Federal Records Act. I do not think anyone has ever been prosecuted for destroying, much less failing to preserve federal records. Records management is not a priority in agencies, as evidenced by our survey. Unless Congress makes it a priority, including through funding, we will likely be having this same discussion in years to come. Congress must make the agencies answerable and agencies must make employees answerable. Reporting is not going to be enough, although I do not have a specific remedy to offer today.

In a limited defense of the agencies and NARA, the volume of electronic communications conducted by government officials is growing exponentially. Not every electronic communication is worthy of permanent preservation. GRS 20 has given agencies permission to treat all e-mail according to a common schedule for disposition; the policy of print and destroy the electronic copy derives from it. The legislation needs to make explicit that "managing" electronic communications means developing records schedules for them according to office, etc. and getting the Archivist's approval of those schedules. The need for the scheduling electronic communications along with the records of offices and programs – record series – unfortunately highlights a separate issue with NARA's records management priorities. Again, starting at least in 1996, NARA began looking at "functional appraisal;" evaluating records for how well they document major agency *functions* rather than individual agency *offices*. More recently, they described this as focusing on "those records that are essential to the government as a whole for accountability, protection of rights, and documentation of the national experience." (Ready Access to Essential Evidence, 1997-2008, Revised 2003, p.14) Those records are, of course, essential but not sufficient to constitute the United States' memory or its policy and political history.

The partners in OpenTheGovernment.org look forward to opportunities to work on this bill and to ensure that strong legislation begins to move the Executive Branch forward on

this critical aspect of government management and accountability.

Thank you for the opportunity to speak to you on this important issue. I am happy to answer any questions you might have.

Mr. CLAY. Thank you very much, Ms. McDermott, for your testimony, and we will start the first round of questioning with the gentleman from New Hampshire.

Mr. Hodes, you are recognized for 5 minutes.

Mr. HODES. Thank you, Mr. Chairman. I thank the panelists for their testimony.

I grew up during a period when Rosemary Woods stretched her foot out and somehow lost 18 crucial minutes, as I recall, of tape. When I pick up my Blackberry now, there is something that comes up on the bottom, a message that says, please don't print this out, save the trees.

So here we are with agencies in this vast bureaucracy of our Federal Government using different means, methods, standards apparently, to preserve the people's records because these records belong to the people of this country. It is vital in terms of performing our function of accountability and oversight to have access to records. As we have seen in our investigation of the White House in recent times, somehow millions of e-mails, hundreds of days disappeared. So we have both the Federal records side, and we now have the Presidential side.

Mr. Wester, I saw you nodding your head while Ms. McDermott testified that NARA doesn't need more time, the agencies don't need another 18 months to establish mandatory minimum functional requirements, and we don't need 4 years following enactment for compliance. Do you agree?

Mr. WESTER. I may have been nodding my head, but I am not in complete agreement with Ms. McDermott.

Mr. HODES. You mean you were politely listening?

Mr. WESTER. I was politely listening.

Mr. HODES. OK. So do you agree with Ms. McDermott that more time is not necessary, the kind that we have put in the Bill for time periods?

Mr. WESTER. I think more time is needed for a couple of reasons because of the cost associated with implementing records management applications. They are not insignificant, as we have in our testimony talked about.

There are also issues related to, aside from purchasing the RMA software, there is a lot of training which Ms. McDermott did talk about in her testimony that would have to be done within agencies to get both the records staff up to speed as well as folks who would actually be using these kinds of software applications. It would take a long time to be able to stand up these sorts of things.

Mr. HODES. And consistent with the testimony that I heard about the need for perhaps varying methods, depending on the agency, do you believe that NARA could develop the kind of standard that would allow for the flexibility that we heard testimony may be required?

Mr. WESTER. Yes, sir.

Mr. HODES. A couple of specific questions, Mr. Wester, about your testimony. You were concerned about the definition of electronic communication.

Mr. WESTER. Yes.

Mr. HODES. May I ask, and without taking up our time today, I am certain, would you be able to provide this committee your sug-

gestion for a definition which you believe would be comprehensive enough and forward thinking enough to be of a right definition in the bill, so we would have the benefit of that thinking?

Mr. WESTER. Yes, sir.

Mr. HODES. Similarly, in terms of the word preservation and the definition, clearly our goal is to be able to preserve, maintain, keep, and have access to electronic records in whatever form they may now be or will be in the future, and enable us to go back. Now, without engaging in a long discussion about particulars, will you also make available to us your thinking on the word preservation?

Mr. WESTER. Yes, sir.

Mr. HODES. I understand the concern about the costs. I think it is a legitimate concern that we have to consider. Ultimately, we are going to have to balance the costs of implementation against the necessity for maintenance preservation and accountability.

Mr. WESTER. Yes.

Mr. HODES. And I also appreciate the technological flexibility required, and as I say, I think your thoughts on that and examples will be important because our goal is to make sure that our Federal Government is effective. And these days, with new kinds of communication that may be coming and that we have now that the acts don't seem to be working with as well as we would like, we really need to make sure that we have both flexibility, but that we have a Federal Government which is serious about preserving and maintaining its electronic records. Do you agree?

Mr. WESTER. I do agree, yes, sir.

Mr. HODES. And do you also agree that up to now, as Ms. McDermott has laid out in her testimony with this recent survey, although not completely scientific, it seems that there has been uneven compliance?

Mr. WESTER. Yes.

Mr. HODES. OK.

Mr. WESTER. But I was nodding at some parts of the——

Mr. HODES. That is the part where you were nodding.

Mr. WESTER. Right.

Mr. HODES. Mr. Stern, in your testimony you seem to agree with the concept of developing standards for electronic record management controls at the White House, but you are concerned that there are Constitutional impediments or concerns about the way the Archives would interface with the White House about enforcing standards?

Mr. STERN. That is correct. Up to now under the Presidential Records Act, we have always worked closely with Presidential administrations on their records management issues, but we have had no formal authority or responsibility. We have done it in an informal way, and we have used the analogy, as has White House counsel and records people in the White House, of the Federal Records Act.

So again, to the extent that the bill says establish standards, in our view standards would probably be the same records management standards you would want to have for Federal agencies, and if it is formally non-binding, we would think nonetheless the White House, given it has been at the forefront of preserving its e-mails electronically, it should be willing to go along with those best prac-

tice standards that already exist or would exist under the Federal Records Act.

Mr. HODES. You have some concern, I take it, about the power and how it would be exercised by an agency like yours in dealing with the White House, let's just say hypothetically, that was interested in asserting some privilege to avoid compliance with the revelation or the recordkeeping or accountability that you were trying to exercise if given the power we are planning to give you?

Mr. STERN. When the PRA was passed in 1978, I think there was a fair amount of consideration given to what role could the Archivist as well as the Congress have in legislating specific requirements on the President himself and Vice President and his close advisors. And the Congress, ultimately, sort of left that alone, so the President is responsible for his own records management, and that is where it has been.

And so the question is to the extent that the bill would in certain aura in a formal way in overseeing records management within the White House over the President, it is not clear, given the past history in enacting the statute whether that would be permissible under the Constitution. Again, we think you should talk to the Department of Justice who has studied this issue for a long time to get their views on how that could work.

Mr. HODES. Mr. Chairman, I see my time is up, but may I have one last question?

Mr. CLAY. Certainly.

Mr. HODES. Thank you, Mr. Chairman.

Ms. McDermott, in your testimony you suggest that we are not being tough enough.

Ms. MCDERMOTT. Right.

Mr. HODES. You want the White House security chief hauled off in handcuffs when the e-mails are lost? How tough do you want us to be, and how should we get tough?

Ms. MCDERMOTT. Well, I understand the Constitutional issues, and I don't have a good answer. But one of the concerns for the public interest community is that there is no way to enforce accountability, to enforce records management in the White House, and that is not NARA's fault. It is a delicate issue.

We would like to have, and it is probably not possible, but we would like to have a private right of action. Our community would like to be able to sue the Office of Administration directly, not just through the Archivist for failures like the current one to adequately manage their electronic records and, particularly, their e-mail.

That doesn't exist in the legislation, and it is something that would be on our wish list, but we understand that the Presidential Records Act portion of it is a difficult dance, and it has been a difficult dance. I used to work for NARA, so I know that it is a difficult dance for them with the White House, that they are sort of there at the invitation of the White House in many cases.

So I think some way for the outside community, for non-government people to hold the White House accountable, but whether Congress can do that, it is I don't have a good answer.

Mr. HODES. All right, just a quick followup. You believe that some kind of private right of action for outside groups would be an

inspiration to the White House to comply with whatever standards? Not really?

Ms. MCDERMOTT. No.

Mr. HODES. But it is on your far-extended wish list, right?

Ms. MCDERMOTT. Yes. Some of the partners in my coalition are suing the Archives under the Federal Records Act, but they are suing them under the Federal Records Act about White House e-mails because they cannot sue under the Presidential Records Act. And it is a way of getting some attention from the White House, but it doesn't get their full attention.

Mr. HODES. What you want is, you want attention must be paid?

Ms. MCDERMOTT. Yes.

Mr. HODES. Thank you, I yield back. Thank you, Mr. Chair.

Mr. CLAY. Thank you, Mr. Hodes.

Ms. Koontz, in your written statement, you note that Federal agencies recognize that it takes significant resources to create paper records from electronic records, and that this is not a viable long-term strategy for records management, is that correct?

Ms. KOONTZ. That is absolutely correct.

Mr. CLAY. You also testified that the four agencies that are part of your study are all still using a print and file approach to preserving e-mail records. Are these agencies making any progress toward electronic preservation of e-mail records?

Ms. KOONTZ. Yes. One of the four agencies, EPA, is in the midst of implementing a electronic solution. Two other agencies are thinking about or considering electronic recordkeeping systems for the future, and the last is not moving in that direction. So it is quite mixed.

Mr. CLAY. Which agency is the one that is not?

Ms. KOONTZ. Federal Trade Commission is not currently considering it.

Mr. CLAY. OK. Based on the work that GAO has done in these issues in recent years, do you believe that agencies will convert to electronic preservation without a mandate to do so?

Ms. KOONTZ. I think a mandate is necessary to encourage agencies to move in this direction. I think, as some of the other witnesses have said on the panel, records management in general is afforded a rather low priority across the Government, and without a mandate to invest the money in it to improve it, I think that we won't get too far.

Mr. CLAY. Thank you for that response.

Ms. McDermott, in your testimony you referenced a new survey of agency records managers that was released last week by a group called CREW. Based on your experience with these issues and the results of your survey, do you believe that agencies will implement electronic preservation of these records in the absence of a mandate?

Ms. MCDERMOTT. Absolutely not, and I also think that part of the problem has been a general records schedule, GRS–20 that NARA issued—it is almost 10 years ago or more than 10 years ago now—that allows agencies to treat all their e-mails as the same. They don't have to schedule the e-mails of a departmental secretary any differently than they schedule a GS–5 e-mails. They may do it, but they are not required to do it, and part of that gen-

eral record schedule says they can print and then destroy the electronic version.

So I think no. I think agencies are going to have to be forced, and there is a cost. Some agencies have been looking at this and no off the shelf product suits every agency, and they all have to be adjusted. But I think Mr. Hodes' comment about, we have to weigh the cost of doing it over against the cost of not doing it, and the cost to accountability and history of not doing it, is correct.

Mr. CLAY. Now, in your testimony you talked about the time period involved in the bill, and I am just curious, do you agree with this group called CREW that H.R. 5811 is woefully inadequate? That is kind of how they characterized it. When should the bill take effect, and the way the bill is drafted now, won't it force agencies to implement the law?

Ms. MCDERMOTT. It will force them to implement it, but it puts it off for a minimum of 4½ years. My biggest concern is that I don't believe that NARA needs 18 months to develop a standard that has existed for 12 years that may need some tweaking, but it has been revisited and rejiggered over the years. The DOD standard is accepted throughout the Government, so I don't think they need 18 months to do this.

The agencies may need a couple years after that to get this up and running, but I think the amount of time overall that is given takes us well into the administration, and I think that is just too long, given that this has been an issue. The Government moved to electronics creation of its records, documents, its memos, its policies in the 1980's, at the latest, so we are talking a long time that this information is not being appropriately preserved that we know for sure.

Mr. CLAY. Which brings me to my next question. You began your testimony by quoting from a 1982 statement by the committee on records of Government.

Ms. MCDERMOTT. Right.

Mr. CLAY. That the United States is in danger of losing its memory. You stated that this quote remains true today, and the records may be more at risk now than they were 26 years ago.

Interestingly, another witness who was unable to join us today but submitted written testimony regarding the Presidential Records Act, Dr. Anna Nelson, quoted the same passage and made the same point about the risk to Presidential Records that you made regarding Federal Records.

What do the non-governmental groups you represent fear losing if agency e-mail records are not adequately preserved?

Ms. MCDERMOTT. We are losing our history. We are losing the trail of, as I said in my testimony, who knew what when.

Mr. CLAY. Sure.

Ms. MCDERMOTT. E-mail is the way that people communicate now, e-mail and other electronic communications, and I understand your concern about the Electronic Communications Preservation Act and not getting into that. But I think the language has to be broader than just e-mail because it is an evolving field.

But that is how Government conducts its business now, and if the e-mail and the electronic communications of the Government officials who are creating policy and implementing policy are not

preserved, it is like we went in and destroyed all the letters and memos that had been written over our history, just went in and wiped them out, if they were paper files if we just went in and destroyed them. We are losing accountability, and we are losing the ability of our historians to write histories in the future.

Mr. CLAY. How about the clamor now in this Presidential campaign seeking the records of the former First Lady Hillary Clinton, and really there may be a logistical issue here with them standing in line and waiting for previous records from the President himself, Bill Clinton?

Ms. MCDERMOTT. Right. Right.

Mr. CLAY. And, then, prioritizing whether the First Lady's records come now or should they wait in line for it? How do open Government groups view that issue?

Ms. MCDERMOTT. Having actually worked in a Presidential library at one point, I understand how slow the archival and how detailed the archival processing of Presidential records are, and First Lady records, so I am sympathetic, actually, with what the Clinton Presidential Library is saying.

I think in terms of review of aides and all, there might have been some delay. I don't have any insider knowledge on that. But it is a, of necessity, a detailed and painstaking process because you have to look at the documents to make sure they don't contain privacy-implicated information, classified information that got in there inadvertently, or confidential information. So I am sympathetic.

And in terms of e-mail, I think that we are looking at the same sort of volume issues, and that is why I think that it is important that agencies treat e-mail like they would treat print letters that they are scheduled, based on the office and the program, and not according to a general records schedule; that they have to be treated just like the print letters, the ones that were typed out back when I worked in Government, just if those were and continued to be.

These are important records. They are records of the business of government, and they need to be treated as such, and they have to be scheduled. Not all of it is permanent; not all of it is archival quality. Five percent, maybe, needs to be preserved, but those 5 percent need to be managed and archived.

Mr. CLAY. Ms. McDermott, thank you so much for your input on this legislation, and the subcommittee looks forward to working with you on improving it. Thank you, and I recognize the gentleman from New Hampshire for a second round of questions.

Mr. HODES. Thank you, Mr. Chairman. I appreciate the testimony and the suggestions I have heard.

Ms. Koontz, both you and the witnesses from the Archives acknowledge that a mandate on all Federal agencies to preserve communications is going to be expensive, certainly, in the short term. But you also have indicated that you think there is some long-term cost savings that will result. Could you tell us how you see that?

Ms. KOONTZ. I think that we will get some corresponding cost savings, but most of those are very difficult to quantify. But when we went into agencies and we looked at senior official practices, we found in a lot of cases they had one or more administrative people

reviewing the voluminous e-mail that they received and printing and filing it.

We had one case in an agency where they actually printed out e-mail and then scanned it into another system. These kinds of cumbersome processes, you can't help but get some cost-savings if we have records management systems that are integrated with our e-mail systems.

And I think also, when you look more broadly at what are we spending on something like FOIA across Government. I have been before this panel a number of times testifying on FOIA, and when you think about the time that goes into searching for responsive records through lots and lots of paper files, there are going to be savings if we have better means of identifying those records.

Mr. HODES. So, on balance, in your view, is the investment in creating the mandate that we are contemplating and doing it in a way that will lead to preservation, is the investment going to be worth it if we take a longer-term view of the payback?

Ms. KOONTZ. I think we do need to take a longer-term view. I think the cost benefit, of course, will differ according to the agency and the kinds of workers that they have and the business processes that they have. But that will be part of the planning process that I think that the bill allows for is for people to study that and determine the appropriate solution that will get a return on investment.

Mr. HODES. Thank you, Mr. Chairman. I yield back at this time.

Mr. CLAY. Thank you so much.

Let me get to Mr. Wester real quickly. Mr. Wester, the National Archives expresses understandable concerns about the short-term cost to agencies of a requirement to preserve electronic communications, electronically. These records management systems can be costly, and it will take resources to train agency staff and officials to use them correctly. But I wonder if the Archivist is sensitive to the cost of not taking these steps.

We have heard today about the cost of paper preservation of these records, including the loss of some important data and the loss of efficiency. Does the Archives share GAO's concerns about the losses of data inefficiency from paper preservation of these records?

Mr. WESTER. I think we do share the same concerns that Ms. Koontz talked about. One of the concerns that we also were worried about with electronic recordkeeping systems or electronic approaches to these issues where you are gathering all the electronic communications separate from the regular recordkeeping systems in an organization, that you are going to lose the context of those records. And that is more of a detailed Archival Records Management kind of issue that we are concerned about.

I think what we are focused on with the agencies is that they have good records management practices, they are able to deal with all types of records and all types of electronic records, and I guess our concern is if you mandate a specific type of application and a specific way of doing this kind of work, you could open the door to other issues that would be harder to deal with from an Archival Records Management perspective over time to document the activities and the business processes of a particular Federal agency.

Mr. CLAY. Without a Federal mandate about law, how do we get the agencies to conform to preserving these records electronically?

Mr. WESTER. What we have to do is to continue the kinds of work that we have done in the past years in developing a body of regulations and guidance that agencies can follow and can actually apply within their organizations to get this kind of work done.

On the legislation that is proposed, notwithstanding the cost issues, does drive that issue in a legal way into the agencies where they would have to be in compliance with electronic recordkeeping in dealing with electronic communications.

Mr. CLAY. Mr. Stern.

Thank you for your answers.

Mr. WESTER. Thank you.

Mr. CLAY. Mr. Stern, the Presidential Records Act seems to put the National Archives in a difficult spot with regard to the preservation of Presidential Records. The Archives is required to accept all Presidential Records from a President on the last day of his term. The Archives is then required to manage and preserve these records and, eventually, make them available to the public.

However, the Archives has no official role with regard to these records during the President's term. Is that correct?

Mr. STERN. That is correct.

Mr. CLAY. OK. Prior to taking possession of these records on the last day of a President's term, what role does the Archives play in ensuring that a complete record of the presidency is preserved?

Mr. STERN. Well, we attempt to work, and, generally are able to work cooperatively with the White House, especially in the last year of an administration to manage, literally, the physical transfer of the records as part of the transition from one president to the other. So that is what we are doing now with this administration.

Eight years ago we worked closely with the Clinton administration to do the physical transfer, which includes understanding an electronics system and what types of records those are, what formats, and also we can have a way to bring them in to our systems.

So we are able to work cooperatively, and that is the only way we have been able to work is to on sort of a voluntary cooperative basis, because, of course, it is not only required by law but it is in the President's interest to get the records to us. Then we will be managing and running the Presidential Library where all former presidents have been very active and very interested in having their records there, and once they become former presidents, and making them open and available to the public.

Mr. CLAY. Would the National Archives and the Presidential Libraries benefit by having a clear understanding of how the White House is preserving records prior to the end of an administration? Would it be helpful if you all could come in and advise on the format and just the entire concept of preserving electronic records?

Mr. STERN. Absolutely. It would help us, and it has helped us to be able to work with the White House closely throughout the administration. And I noted we worked most closely in the last year on transition. We have, in fact, with this administration and the prior ones, worked cooperatively throughout the administration on records management issues.

Again, we do it, essentially, at their invitation in a cooperative way and a voluntary way, but they do—all administrations have looked to us because we have the institutional, historical, and professional experience that a brand new administration doesn't have. And so for the most part, it works well overall, and the more information we can get and understanding we can have of their records, their systems, and all throughout the course of the administration, the better it works.

Mr. CLAY. Thank you for that response, and the legislation we are discussing today would ensure that the National Archives is kept informed at a minimum about the records management systems used by the White House to preserve Presidential records. And it seems clear that with such information, it would be useful to the Archives, as it prepares to accept Presidential records at the end of a President's term.

Let me say that this has been quite helpful, this hearing, to this subcommittee. And I look forward to working with the panelists on this legislation. And I will conclude this hearing and say the subcommittee now stands adjourned, and that concludes this hearing.

Thank you.

[Whereupon, at 3:07 p.m., the subcommittee was adjourned.]

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