

EXHIBIT A

1 of 14 DOCUMENTS

THE NATIONAL JOURNAL

March 24, 2007

Whose E-Mail Is It?

BYLINE: Alexis Simendinger

SECTION: ADMINISTRATION

LENGTH: 815 words

HIGHLIGHT: Can the White House claim executive privilege to protect Karl Rove's e-mails sent on a Republican National Committee account?

White House Deputy Chief of Staff Karl Rove may have forfeited potential claims of executive privilege over the dismissals of eight U.S. attorneys -- if he communicated about the matter outside the White House e-mail system, using his Republican National Committee e-mail account or RNC equipment. Or at least that's a legal possibility posed by rapidly advancing electronic technology and the evolving work habits of busy White House officials.

The precise question has not been tested in court, said Chris Lehane, a former White House lawyer who helped defend President Clinton and Vice President Gore against subpoena-wielding Republican lawmakers.

"Do you really have a privilege argument if you use the RNC's e-mail system? This is not government-to-government conversation," said Lehane, now a Democratic consultant in San Francisco. "No one has ever raised the question as far as I know."

According to one former White House official familiar with Rove's work habits, the president's top political adviser does "about 95 percent" of his e-mailing using his RNC-based account. Many White House officials, including aides in the Political Affairs Office, use the RNC account as an alternative to their official government e-mail addresses to help keep their official and political duties separate. Although some White House officials use dual sets of electronic devices for that purpose, Rove prefers to use his RNC-provided BlackBerry for convenience, the former official said.

No original e-mails or documents created by Rove have emerged among the more than 3,000 pages of communications offered to Congress in its probe of the attorney firings, although several e-mails from other White House and Justice Department officials containing references to him were among the

Some White House officials, including Rove, use the RNC's gwb43.com e-mail domain (an abbreviation for George W. Bush 43). Communications originating from that RNC domain written by White House political affairs aide Scott Jennings to officials in the Justice Department appeared in the first batch of e-mails given to the House and Senate Judiciary committees last week. The Jennings e-mails stamped with the RNC domain, as well as e-mails from then-White House Counsel Harriet Miers and her deputy sent through the official White House system, were captured on Justice Department servers. Presidential privilege extends throughout the government, according to one expert with the National Archives and Records Administration who asked to remain anonymous, but the administration did not claim privilege for e-mails released to date between White House aides and Justice Department officials.

If Rove or other White House officials used RNC e-mail to discuss the prosecutor firings or the subsequent controversy -- and if their discussions went to e-mail recipients who use the White House servers -- their communications are captured and would be considered presidential records owned by the American people for purposes of eventual public disclosure under the Presidential Records Act, by virtue of both subject matter and official position, according to the archives expert.

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Congressional investigators, who authorized subpoenas this week, could demand that the RNC turn over all documents and materials that reference the prosecutors, including electronic records.

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EXHIBIT B

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April 12, 2007

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

This week, the staff of the House Committee on Oversight and Government Reform received briefings from the office of the White House Counsel and the Republican National Committee regarding the preservation of White House e-mail records. These briefings revealed that an extensive volume of White House e-mails regarding official government actions may have been destroyed by the RNC and not preserved by the White House. For this reason, I request that you preserve any e-mail communications in the possession or control of your agency that were received from or sent to White House officials using RNC or other nongovernmental e-mail accounts.

According to the counsel for the RNC, Rob Kelner, "roughly 50" White House officials have had e-mail accounts on RNC servers during the Bush Administration. These e-mail accounts were controlled by the RNC. Mr. Kelner stated that to his knowledge, the earliest e-mail records of White House officials on RNC servers are from 2004. Although White House officials had used RNC e-mail accounts since 2001, the RNC has apparently destroyed all e-mail records from White House officials from 2001, 2002, and 2003.

In addition, according to Mr. Kelner, the RNC currently has e-mail records for approximately 35 of these 50 officials. This means that the RNC appears to have no e-mail records for approximately 15 White House officials who had RNC e-mail accounts.

The briefing from Mr. Kelner also raised questions about how complete the RNC record of e-mails is from 2004 to the present. Mr. Kelner told the Committee staff that White House officials retained the ability to delete e-mails from the RNC server until as recently as this month.

According to Mr. Kelner, the RNC had a policy, which the RNC called a "document retention" policy, that purged all e-mails from RNC e-mail accounts and the RNC server that were more than 30 days old. Mr. Kelner said that as a result of unspecified legal inquiries, a "hold" was placed on this e-mail destruction policy for the accounts of White House officials in August 2004. Mr. Kelner was uncertain whether the hold was consistently maintained from August 2004 to the present, but he asserted that for this period, the RNC does have a large volume of White House e-mails. According to Mr. Kelner, the hold would not have prevented individual White House officials from deleting their e-mail from the RNC server after August 2004.

Mr. Kelner's briefing raised particular concerns about Karl Rove, who according to press reports used his RNC account for 95% of his communications. According to Mr. Kelner, although the hold started in August 2004, the RNC does not have any e-mails prior to 2005 for Mr. Rove. Mr. Kelner did not give any explanation for the e-mails missing from Mr. Rove's account, but he did acknowledge that one possible explanation is that Mr. Rove personally deleted his e-mails from the RNC server.

Mr. Kelner also explained that starting in 2005, the RNC began to treat Mr. Rove's e-mails in a special fashion. At some point in 2005, the RNC commenced an automatic archive policy for Mr. Rove, but not for any other White House officials. According to Mr. Kelner, this archive policy removed Mr. Rove's ability to personally delete his e-mails from the RNC server. Mr. Kelner did not provide many details about why this special policy was adopted for Mr. Rove. But he did indicate that one factor was the presence of investigative or discovery requests or other legal concerns. It was unclear from Mr. Kelner's briefing whether the special archiving policy for Mr. Rove was consistently in effect after 2005.

The briefings the Committee received raise serious concerns about the White House's compliance with the Presidential Records Act. This Act requires the President to "take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records." Yet despite this requirement, it appears that neither the White House nor the RNC has preserved a large volume of e-mails that may have discussed official actions and fall within the requirements of the Presidential Records Act.

The Committee knows from its investigation that some federal agencies and departments received e-mails from White House officials using their RNC e-mail accounts. The only existing record of these e-mails may reside on servers or backup devices within the control of federal entities. For this reason, the Committee requests that you preserve all e-mails received from White House officials who used "gwb43.com," "georgewbush.com," "rnchq.org," or other nongovernmental e-mail accounts. The Committee also asks you to preserve any e-mails sent to White House officials at any of these accounts.

The Honorable Alberto Gonzales
April 12, 2007
Page 3

In addition, I request that you provide the Committee with an inventory of any e-mail communications in the agency's possession or control that meet the description in the preceding paragraph. This inventory should include the name and e-mail address of the sender, the name and e-mail address of the recipient, the date of the e-mail, and a brief description of the subject of the e-mail. This inventory should be provided to the Committee by May 3, 2007.

The Committee on Oversight and Government Reform is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X. An attachment to this letter provides additional information on how to respond to the Committee's request.

I appreciate your cooperation with the Committee's inquiry. If you have any questions about the Committee's request, your staff can contact David Rapallo or Anna Laitin of the Committee staff at (202) 225-5420.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry A. Waxman".

Henry A. Waxman
Chairman

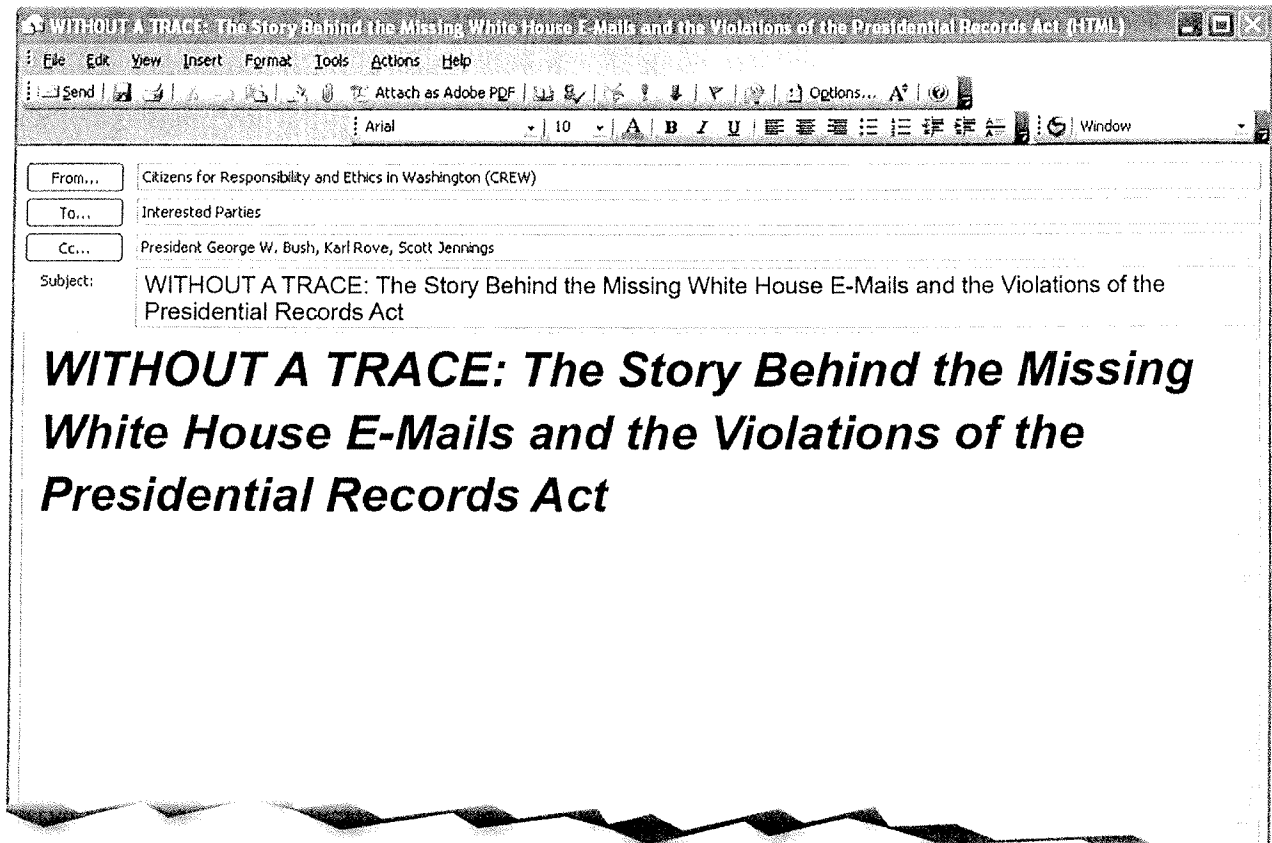
Enclosure

cc: Tom Davis
Ranking Minority Member

EXHIBIT C

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EXECUTIVE SUMMARY

Presidential Records Act (PRA) Enacted in 1978, requires the president to preserve all presidential records, which are defined as those records relating to the “activities, deliberations, decisions, and policies that reflect the performance of [the president’s] constitutional, statutory, or other official or ceremonial duties. . .”

Clinton Administration Policy: In 1993, then-Assistant to the President and Staff Secretary John Podesta sent a memo to all presidential staff explaining that the PRA required all staff members to maintain all records, including emails. Podesta stated that the use of external email networks was prohibited because records would not be saved as required. The 1997 White House Manual and a 2000 memo issued by Mark Lindsay, then Assistant to the President for Management and Administration echoed this policy, requiring staff to use only the White House email system for official communications.

Bush Administration Policy: The Bush Administration has refused to make public its record-keeping policy. A confidential source provided CREW with a 2002 document indicating the use of “non-EOP messaging-enabled mechanisms should not be used for official business.”

Bush Administration Practice: In the wake of the scandals surrounding Jack Abramoff and the fired U.S. Attorneys, emails were released showing that top White House staffers routinely used Republican National Committee (RNC) email accounts to conduct official business. For example, J. Scott Jennings, White House Deputy Political Director, used an RNC account to communicate with the former chief of staff to Attorney General Alberto Gonzales regarding the appointments of new U.S. Attorneys. Similarly, Susan Ralston, a former aide to Karl Rove, used RNC email accounts to communicate with Abramoff about appointments to the Department of the Interior.

PRA Violations: 1) The administration failed to implement adequate record-keeping systems to archive presidential email records; 2) two confidential sources independently informed CREW that the administration abandoned a plan to recover more than **five million** missing emails; 3) White House staff used outside email accounts to conduct presidential business, ensuring that emails were not adequately preserved. In fact, former Abramoff associate Kevin Ring said in an email to Abramoff that Ralston had told him not to send emails to her official White House account “because it might actually limit what they can do to help us, especially since there could be lawsuits, etc.”

Hatch Act Excuse: The administration has claimed that Rove, Jennings and other staffers use RNC accounts to avoid violating the Hatch Act. **This is untrue.** The Hatch Act prohibits White House staff from using official resources for purely “political” purposes. “Political” refers to the president’s role as either a candidate for office or as the leader of his party. Email communications regarding presidential appointments for U.S. Attorney and Interior Department positions clearly fall within the PRA as making appointment is an official presidential function and does not relate to the president’s role as party leader.

INTRODUCTION

Recent revelations about the use by certain high-ranking White House officials of outside (i.e. non-governmental) email accounts suggest that the Bush administration has taken its policy of secrecy to a new level. Not content to simply prevent the public from examining the records of its administration, the White House now seems intent on ensuring that the historical record of this presidency is purged of evidence that might cast the administration in a less than favorable light. This practice is a direct violation of the Presidential Records Act (“PRA”), a statute enacted to establish public ownership and control of presidential records.

The Bush administration’s latest acknowledgment that emails dealing with official White House business may have been “lost” because they were sent through private email accounts does not come close to admitting the full extent of the problem. CREW has learned that in addition to the so-called political emails sent through private accounts, there are over five million emails sent on White House servers over a two-year period that are also missing.

These practices clearly violate the PRA, which imposes on the president a mandatory obligation to create, maintain and preserve records of his presidency. Under the terms of the PRA, however, there is no ability to compel a president to comply with the Act until he leaves office. The Bush administration has apparently exploited this loophole to the detriment of the public and future generations as well as Congress in fulfilling its oversight role. Only Congress has the power to fully address this problem through a legislative amendment to the PRA. In addition, the General Accounting Office (“GAO”) should conduct a thorough investigation of the Bush administration’s management of presidential records, including emails.

STATUTORY BACKGROUND

Congress enacted the PRA in 1978, following a protracted legal battle between President

Nixon and the government about his ability to control the records of his presidency after leaving office.¹ The PRA took effect on January 20, 1981, governing the records of President Reagan.²

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

documentary materials . . . created or received by the President, his immediate staff, or a unit or individual in the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

Id. at § 2201(2).³

The PRA also dictates the conditions under which a sitting president may dispose of any of his presidential records: only where they “no longer have administrative, historical,

¹ Congress first enacted the Presidential Recordings and Materials Act in 1974 to transfer control of President Nixon’s presidential records to the Administrator of the General Services Administration (later changed to the archivist) and address the issue of public access to the materials. See 44 U.S.C. § 2111 note. As discussed *infra*, the PRA discusses the issue of public access to presidential records in a broader context.

² See 44 U.S.C. § 2201 note

³ Only those EOP components that advise or assist the president create records subject to the PRA. They include the White House Office, the Office of the Vice President, the Office of Policy Development, the National Security Counsel and the President’s Foreign Intelligence Advisory Board. See Memorandum for all Executive Office of the President Staff from John D. Podesta, Assistant to the President and Staff Secretary (May 5, 1993) (“Podesta Memo”) (attached as Exhibit A) Records of the other components of the EOP are governed by the Federal Records Act, 44 U.S.C. §§ 2101-2118, 2901-2910, 3101-3107, 3301-3324.

informational, or evidentiary value.” Id. at § 2203(c). Although neither the archivist nor Congress can veto a president’s decision to destroy records, if the archivist notifies Congress of a president’s intent to dispose of records, the president must submit a disposal schedule to the appropriate congressional committees and wait 60 days before destroying the records. Id. at §§ 2203(c), 2203(d).

Once a president has left office, the archivist assumes full custody and control over his presidential records and has the sole responsibility for preserving the records and preparing them for public access. 44 U.S.C. § 2203(f)(1). Under the PRA, the archivist has an “affirmative duty to make such records available to the public as rapidly and completely as consistent with the provisions of this Act.” Id. The records of the vice president are subject to the same requirements as those of the president. Id. at § 2207.

There are several provisions of the PRA allowing for the restriction of access to presidential records. First, an outgoing president, before leaving office, can restrict access to certain categories of information for up to 12 years. Id. at §§ 2204(a)(1)-(6). These categories include “confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers.” Id. at § 2204(a)(5). In addition, the PRA does not limit or expand upon any constitutionally-based privilege otherwise available to a president. Id. at § 2204(c)(2).

The PRA also requires the archivist to notify a former president when disclosure of his records is sought and such disclosure “may adversely affect any rights and privileges which the former President may have.” 44 U.S.C. § 2206(d). Through an executive order President Reagan amplified these procedures by, among other things, specifying three situations where

presidential records may be withheld: (1) national security, (2) law enforcement, and (3) to protect the deliberative process. See Executive Order 12,667, 54 Fed. Reg. 3403 (Jan. 18, 1989). The executive order also gave the incumbent president the authority to assert privilege over the records of a former president. Id. §§ 1(g), 3.

President George W. Bush, for his part, issued Executive Order 13,233, 66 Fed. Reg. 56025 (Nov. 1, 2001). This executive order identifies the constitutional presidential privileges referenced in the PRA as including the common-law attorney client, work-product and deliberative process privileges. Id. at § 2(a). In addition, the archivist is required to notify both former and current presidents of any request for access to presidential records and is prohibited from permitting public access upon a request for additional time by the former president. Moreover, the incumbent president is given an unlimited amount of time to review and weigh in on an issue of privilege. Id. §§ 3(c), 3(d). The public is to be granted access only when authorized by both the former and incumbent presidents. Id. at § 3(d)(2)(ii). Under President Bush's executive order, the records of a vice president are given the same deference. Id., § 11. Executive Order 13,233 has been challenged as contrary to the provisions of the PRA. American Historical Ass'n v. Nat'l Archives and Records Admin., Civil No. 01-2447 (D.D.C.).

The PRA contains no provision expressly authorizing judicial review over an incumbent president's compliance with the statute. Given that the PRA gives the president "virtually complete control over his records during his term of office," one court has concluded that judicial review of an incumbent president's record keeping practices and decisions is precluded. Armstrong v. Bush, 924 F.2d 282, 290-291 (D.C. Cir. 1991). That decision was based in part on an assumption that in enacting the PRA, "Congress presumably relied on the fact that subsequent

Presidents would honor their statutory obligations to keep a complete record of their administrations.” Id. at 290.

PRIOR ADMINISTRATION PRACTICES

Prior administrations have adopted specific policies and procedures to ensure compliance with the PRA. The Clinton administration, for example, took care to outline the requirements of the PRA, including a delineation of those units within the Executive Office of the President (“EOP”) that generate presidential records and the specific definition of what constitutes a presidential record. See, e.g., Podesta Memo. As the Podesta Memo emphasizes, the PRA imposes “an affirmative obligation on staff members to document adequately the performance of the President’s constitutional, statutory and ceremonial duties.” This includes, where appropriate, documentation “through notes, minutes or memoranda” of “meetings, conversations and other business in connection with, or related to, the carrying out of the President’s duties.” Id. at p. 5. And with respect to the disposition of presidential records, the Podesta Memo makes clear that “Presidential records are the property of the United States and may be disposed of only in accordance with the procedures established by the Archivist of the United States.” Id. at 7.

The Clinton administration also adopted specific policies regarding the preservation of email under the PRA. First, that administration made clear that “[r]ecords generated electronically must be incorporated into an official recordkeeping system” and that emails should not be deleted unless and until they have either been “printed and placed in an appropriate file, or . . . preserved in an appropriate electronic system.” Podesta Memo, p. 7. In addition, the use of external email networks was prohibited because their use would bypass the ARMS (Automated Records Management System), a system put in place to automatically capture and preserve all

email sent on the EOP email system. For example, the 1997 White House Staff manual sets forth the following policy regarding the use of the internet and external email networks:

Electronic messages are prohibited using Netscape. You may not use Netscape applications to send or receive e-mail, or to send messages to bulletin boards or discussion groups. Federal law and EOP policy require the preservation of electronic communications sent or received by EOP staff. As a result, you must use the Lotus Notes [equivalent of EOP.GOV server] or OASIS All-In-1 [no longer in use] e-mail systems for all official communications. However it is permissible to download files and materials that are publicly available on the Internet/Web for reference purposes.

White House Staff Manual, 1997, p. A-27 (attached as Exhibit B).

In a similar vein, Mark F. Lindsay, then-Assistant to President Clinton for Management and Administration, sent a memorandum to all EOP staff on September 27, 2000, setting forth EOP policy on use of government office equipment, including information technology. That policy states that “the system designated for EOP mail,” which at that time was Lotus Notes, “is to be used exclusively for E-mail communications within the EOP Complex and with outside parties. Other applications (e.g., commercial E-mail services) may not be used to send or receive E-mail.” Memorandum for All Executive Office of the President Staff from Mark E. Lindsay (September 27, 2000) (attached as Exhibit C).

Notwithstanding these policies, certain email malfunctions and management weaknesses during the Clinton administration resulted in a loss of at least some presidential email records. The GAO conducted a review of the Clinton administration’s management of the EOP email system and concluded: (1) that two malfunctions in the EOP email system prevented official records from being archived in ARMS, the system implemented in 1994 to preserve EOP email records, and (2) that the Office of the Vice President did not implement adequate records

management practices to ensure preservation of email records. U.S. General Accounting Office, *Electronic Records: Clinton Administration's Management of Executive Office of the President's E-Mail System* (2001), pp. 2-4 ("GAO Report") (attached as Exhibit D).

The House Government Reform Committee also held a series of hearings into the missing White House emails. Then Chairman Dan Burton raised a concern that the Clinton administration's failure to address a technical problem that resulted in the loss of an estimated 246,000 email messages meant that "[f]or almost two years, the White House knew subpoenas weren't being complied with." Ian Christopher McCaleb, White House Officials Say E-mail Problem Was Not a High Priority at End of 1999, *CNN.com*, May 3, 2000 (attached as Exhibit E).

THE BUSH ADMINISTRATION PRACTICES VIOLATE THE PRA

The Bush administration has knowingly committed serious violations of the PRA in multiple ways. First, the White House has wilfully ignored evidence of a systemic problem with its internal email archiving system and has failed to put an adequate and effective record keeping system in place. Second, top Bush administration officials have deliberately used outside email accounts to avoid creating a record of their actions.

In the wake of the email problems that had plagued the previous administration, the Bush administration early on announced its intention to create a White House chief information officer position to oversee the EOP email system. Tony Lee Orr, White House CIO Will Monitor, Manage E-mail, *Government Computer News*, June 4, 2001 (attached as Exhibit F). According to White House officials, they had "plans for improving electronic records management," that reportedly included "developing and updating the executive office's policies for maintaining

federal and presidential records.” Id.

To date, however, the Bush administration has refused to make public its record keeping policies, on the ground that “we don’t share internal White House memos.” Alexis Simendinger, The E-Mail Trail, *The National Journal* (April 9, 2007), available at http://www.govexec.com/story_page.cfm:articleid=36551, (attached as Exhibit G). A document shared with CREW, but which CREW has been unable to authenticate, suggests that in 2002, the White House adopted a policy on “messaging” to both ensure the security of information and for records management purposes. Under that policy

[n]on-EOP issued messaging-enabled mechanisms should not be used for official business. Such communications present an unacceptable risk of information disclosure. Such prohibited peer-to-peer communications that involve the constitutional, statutory or ceremonial functions of the President or the Vice President also fail to comply with Presidential Records Act requirements.

During the revelations about the role of the White House in the firing of eight U.S. Attorneys it became clear that the actual practices of at least some high-level White House officials violate this purported policy. For example, Karl Rove reportedly uses an outside email account maintained by the Republican National Committee (“RNC”) for “about 95 percent” of his e-mail. Alexis Simendinger., Whose E-Mail Is It?, *The National Journal* (March 24, 2007) (attached as Exhibit H).

Emails released by the House Judiciary Committee document the use by J. Scott Jennings, White House Deputy Political Director, of an email account on an RNC server to communicate with then-Justice Department Chief of Staff D. Kyle Sampson. Mr. Jennings communicated with Mr. Sampson from an email address identified as “SJennings@gwb43.com”

regarding creating and filling vacancies in certain U.S. Attorney slots. (Emails attached as Exhibit I). According to WHOIS, a public database director of domain name information, that email address is owned by the RNC. See <http://www.networksolutions.com/whois>. See generally Letter from Melanie Sloan to Chairman Henry A. Waxman, March 15, 2007 (attached as Exhibit J).

This was by no means an isolated use of outside email accounts. Susan Ralston, a top aide to Karl Rove, used at least four outside email accounts to communicate with convicted lobbyist Jack Abramoff: “rnchq.com” (used for the RNC headquarters), “georgebush.com,” “an aol.com” account, and a “gwb” domain account. Id.; see also John D. McKinnon, Congress Follows Email Trail, *Wall Street Journal*, April 10, 2007 (attached as Exhibit K). Ms. Ralston frequently exchanged emails with Mr. Abramoff and his associations about possible Interior Department appointments. See Exhibit I.

Mr. Jennings also used an outside RNC account to communicate with political appointees at the General Services Administration about a PowerPoint presentation on democrats targeted for defeat in the 2008 elections. One email cautions that the presentation “is a close hold and we’re not supposed to be emailing it around.” McKinnon, *Wall Street Journal*, Apr. 10, 2007 (referenced emails and PowerPoint attached as Exhibit L).

Use by EOP officials of outside email accounts to conduct presidential business violates the PRA. By using outside email accounts, these officials ensured that no system administered and maintained by the EOP was capturing those emails for preservation purposes. Indeed, there appears to have been a conscious decision by White House officials to use outside email accounts precisely to avoid having an official record created. So, for example, in an email to Mr.

Abramoff, his associate Kevin Ring conveys a message from Susan Ralston cautioning that “it is better not to put this stuff in writing in their e-mail system because it might actually limit what they can do to help us, especially since there could be lawsuits, etc. . . .” See Exhibit I. Mr. Abramoff was clearly aware of this practice, as he responded: “It was sent to Susan on her rnc pager and was not supposed to go into the WH system.” Id.

When these practices came to light, at least some White House aides stopped using the White House email system to avoid public or congressional scrutiny of their actions, and substituted private email systems such as those available on cellular phones or blackberries. Peter Cary, Sorry, You’re Not Reading My E-mail, *U.S. News & World Report*, April 9, 2007 (attached as Exhibit M); Separate White House E-mail Accounts Draw New Criticism, *U.S. News & World Report Blog*, March 29, 2007 (attached as Exhibit N).

Moreover, prior to 2004 emails sent from RNC accounts were automatically deleted every 30 days. White House Admits Misuse of Republican Party-Sponsored E-Mail, *Associated Press*, April 12, 2007 (attached as Exhibit O). And even when the RNC excluded White House staffers from its automatic deletion policy in 2004, individual White House aides were still able to delete their files and avoid preservation of their emails. Id. As the White House now admits, emails from White House staffers, including those transmitting official business, have been lost. Michael Abramowitz and Dan Eggen, White House E-Mail Lost in Private Accounts, *The Washington Post*, April 12, 2007 (attached as Exhibit P).

Even if the RNC and other outside entities were preserving at least some of the emails sent by White House officials in the conduct of White House business, this would not be an adequate substitute for the president’s obligation to comply with the requirements of the PRA.

The PRA is a mandatory statutory directive to the president. As the GAO noted in its report on the email preservation practices of the Clinton Administration, the PRA “requires the President and Vice President to adequately record their official acts” and “maintain certain official records.” GAO Report, p. 4. In addition, “[p]ursuant to the PRA, both the Office of the President and the Office of the Vice President are to implement records management controls and other necessary actions to ensure that presidential and vice presidential activities, deliberations, decisions, and policies are adequately documented and maintained.” Id. Moreover, under the PRA, presidential records shall be made available pursuant to subpoena or other judicial process and to either House of Congress.” Id.

Second, CREW has learned that the Bush administration’s use of outside email accounts to conduct the business of the administration is only the tip of the iceberg when it comes to non-compliance with the mandates of the PRA. Two confidential sources independently have confirmed to CREW that currently the EOP has *no* effective email records management system in place. The Bush administration discontinued the ARMS system, implemented by the Clinton administration in 1994 to fulfill its record keeping requirements, and in early 2006 terminated a project to implement a new system. As a result, the only email retention process in use by the White House consists of extracting email messages from the email system and saving them in large, undifferentiated files on a file server.

This system, however, does not have adequate safeguards in place to ensure that stored messages are not modified or deleted; nor is there any way to assess or audit the completeness of the stored messages. According to CREW’s sources, in October 2005, the Office of Administration (“OA”) discovered a problem with this email retention process. The OA

undertook a detailed analysis of the issue, which revealed that between March 2003 and October 2005, there were *hundreds of days* in which emails were missing for one or more of the EOP components subject to the PRA. The OA estimated that roughly *over five million email messages* were missing. Although the White House Counsel (then Harriet Miers) was provided a detailed briefing of this analysis and a plan of action to recover the missing email was developed, the plan has never been executed.⁴

As these facts make clear, the Bush administration has failed to implement adequate record keeping systems to manage and archive presidential email records, as the PRA requires. This is not a mere oversight. The Bush administration discontinued use of the ARMS system but failed to replace it with an adequately functioning system that ensured preservation of all presidential records, including email. Most troubling of all, the Bush administration abandoned a plan of action to recover more than five million missing email and continued to use a grossly inadequate email retention process that had proven to be ineffective in preventing the destruction of a massive amount of presidential records,

These actions simply cannot be squared with the president's obligation under the PRA to "take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records . . ." 44 U.S.C. § 2203. Not only has President Bush not taken all necessary

⁴ In a January 23, 2006 letter to Mr. Libby's counsel Special Counsel Patrick J. Fitzgerald noted that he had "learned that not all email of the Office of Vice President and the Executive Office of President for certain time periods in 2003 was preserved through the normal archiving process on the White House computer system." (Attached as Exhibit Q).

steps, he has taken virtually no steps to adequately maintain and preserve his presidential email records.

**NOTHING IN THE HATCH ACT JUSTIFIES THE BUSH
ADMINISTRATION'S VIOLATION OF THE PRA**

When confronted with its illegal record keeping practices, the Bush administration has offered various and differing justifications. For example, the White House has suggested that its use of outside email accounts is mandated by the Hatch Act. McKinnon, *Wall Street Journal*, Apr. 10, 2007. This excuse is unavailing.

The Hatch Act permits employees who are paid from an appropriation for the EOP to “engage in political activity otherwise prohibited . . . if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States.” 5 U.S.C. §§ 7324(b)(2)(B)(i) and (b)(1). Implementing regulations define “political activity” as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.” 5 C.F.R. § 734.101.

As applied here, the fact that Bush administration officials might “regularly interface with political organizations’ such as the RNC,” McKinnon, *Wall Street Journal*, Apr. 10, 2007,⁵ does not excuse them from complying with the PRA when they are not engaged in purely political matters. Deliberations over the proposed firing of U.S. Attorneys reflect on the

⁵ The Hatch Act does not prohibit employees paid from appropriations for the EOP from engaging in political activity while on duty at the White House (or any other federal building). 5 U.S.C. § 7324(b)(1). The costs associated with that activity, however, cannot be “paid for by money derived from the Treasury of the United States.” 5 U.S.C. § 7324(b)(1). Moreover, even if a White House official inadvertently uses government resources for political activities, all that the Hatch Act requires is that the government be reimbursed. This is, for example, the routine practice when the president uses Air Force One for a strictly political event.

performance by the president of his constitutional and statutory duties. See 44 U.S.C. § 2203.

The Abramoff emails concerning deliberations and discussions with White House aides about placing specified individuals within the administration, including the Department of the Interior, also reflect on the president's performance of his constitutional and statutory duties. Both of these sets of emails relate to President Bush's policies, programs and agenda and, even if they are matters on which opinion is politically divided, they were sent in the conduct of "official" business. As an opinion of the Department of Justice's Office of Legal Counsel reinforces, these activities were not "political" as their primary purpose did not involve the president's role as either a candidate for office or as a leader of the Republican Party (e.g., appearing at party functions, fund raising, or campaigning for specific candidates). 6 O.L.C. 214, 217 (March 24, 1982) (attached as Exhibit R). As such, these emails must be preserved as presidential records.

CONCLUSION

The mounting evidence paints a disturbing picture of an administration wilfully ignoring, if not outright flouting, its record keeping obligations under the PRA. These actions are part of a larger administration effort to expand executive power and maintain high levels of secrecy. While the vice president's refusal to disclose the documents of the president's energy task force has been held up as a prime example of the Bush administration's commitment to secrecy, there are many more examples to add to this ever-growing list.

More recently, for example, the administration has claimed in response to multiple FOIA requests sent by CREW and others for records created and maintained by the Secret Service of visitors to the White House and residence of the vice present that such records are "presidential" and therefore not available under the FOIA. If the administration prevails on this claim, a

significant piece of historical evidence will be off-limits to the public. The Bush administration has even stopped publishing the White House phone book, something prior administrations made publicly available through the Government Printing Office.

While the PRA violations are the most recent examples of presidential abuse, they are among the most frustrating given that, as the D.C. Circuit has held, they are beyond judicial review. It now falls to Congress to consider a legislative fix for an administration that has not honored its statutory obligation to maintain a complete record of its administration.

Specifically, Congress should amend the PRA to grant the Archivist the authority to inspect the records of an incumbent president and to survey the president's records management practices, much like the authority accorded the Archivist under the Federal Records Act. Congress should also grant the Archivist the power to veto a president's disposal decision that is made contrary to the requirements of the PRA. In addition, Congress should add a provision to the PRA that authorizes the Archivist to promulgate guidelines and regulations to assist the EOP in the development of a records management system for presidential records. And Congress should require the Archivist to provide Congress with annual reports on the president's record keeping policies and practices.

Anticipating that the Bush administration will argue that some, if not all, of these proposed legislative fixes raise constitutional concerns, we also recommend that Congress hold hearings on what, if any, constitutional limitations exist on Congress' ability to enact these and any other additional requirements for presidential records. One question worthy of congressional consideration is whether it would be constitutional for citizens to be able to sue for violations of the PRA, as they can under the Freedom of Information Act. This is a matter of great public

interest and urgency that warrants careful consideration of a full range of views, not just those of the Bush administration.

Left unchecked, the unlawful record keeping practices of the Bush administration will deprive the public of an important piece of historical evidence and the ability to evaluate this presidency in the full context of its actions, not just those self-selected for public review. By destroying presidential records, this administration is also thwarting the ability of Congress and the courts to effectively oversee its actions, and the ability of the public to hold the administration fully accountable.