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Should Inmates Be Running the Jailhouse: Affirming the Constitutionality of Enhanced Archivist Involvement in White House Record-Keeping Policymaking

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Abstract
This Comment argues that tasking the Archivist of the United States with promulgating electronic record-keeping guidelines and certifying presidential compliance is constitutional because the President's ability to perform his or her constitutional functions will not be impaired and, additionally, because Congress has constitutional authority to promote the important objective of retaining presidential records.11 Part I examines the laws and jurisprudence that have culminated in public ownership of presidential records. Part II discusses the Bush Administration's record-keeping problems, the indirect way the United States Congress learned of the problems, and the subsequent legislative response—the Electronic Message Preservation Act (EMPA). Finally, Part III argues that the Bush Administration's constitutional argument against the EMPA was specious.

Keywords
U.S. Archivist, Presidential record-keeping, Bush Administration, EMPA

SHOULD INMATES BE RUNNING THE JAILHOUSE?: AFFIRMING THE CONSTITUTIONALITY OF ENHANCED ARCHIVIST INVOLVEMENT IN WHITE HOUSE RECORD-KEEPING POLICYMAKING

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* Note and Comment Editor, *American University Law Review*, Volume 59; J.D. Candidate, May 2010, *American University, Washington College of Law*; A.B., Government, 2006, *Georgetown University*. I would like to express my sincere thanks to all those who assisted me during the writing and editing processes. This Comment is dedicated to the memory of my grandparents: Celestine Tuschini, Eduardus Michiels, Marcel Denayer, and Mariette Putteman.

INTRODUCTION

When David Gewirtz wrote that "not a single private-sector CIO [Chief Information Officer] would be allowed to get away with negligence on this massive scale,"[1] he was referring to the failed electronic record-keeping procedures of an entity that is considered the highly secure base of operations for the formulation of domestic and international policy for the United States of America: the White House.[2]

The House of Representatives of the 110th Congress learned about the shortcomings of the e-mail archiving policies in the George W.

1. David Gewirtz, *The White House E-mail Controversy: It's Time for a Special Prosecutor*, OUTLOOKPOWER MAG., May 2008, http://www.outlookpower.com/issuesprint/issue200805/00002168.html.

2. *See, e.g.*, Joseph Curl, *Situation Room Updated, Upgraded*, WASH. TIMES, Dec. 20, 2006, at A4 (describing the White House situation room as the "most secure room in the most secure building in the world").

Bush White House almost five years after the problems began.[3] Alarmed by the reported loss of hundreds of days' worth of White House e-mails,[4] the House passed the Electronic Message Preservation Act ("EMPA" or "H.R. 5811") in July of 2008.[5] This bill, which the Senate did not vote on,[6] would have tasked the Archivist of the United States[7] with issuing record-keeping standards and certifying White House compliance with those standards in an effort to ensure the efficient retention of publicly owned presidential records.[8] The Bush White House, despite evidence indicating that its record-keeping systems were primitive,[9] attested to the adequacy of its record-keeping procedures. Further, the White House threatened to veto the bill, arguing that the bill's provisions for expanded Archivist involvement in record-keeping policymaking would upset the constitutional balance of powers.[10]

This Comment argues that tasking the Archivist of the United States with promulgating electronic record-keeping guidelines and certifying presidential compliance is constitutional because the President's ability to perform his or her constitutional functions will not be impaired and, additionally, because Congress has constitutional authority to promote the important objective of

3. *See infra* Part II.B (discussing how Congress indirectly learned of the White House's inadequate archiving systems as a result of other, unrelated investigations in early 2006 and 2007).

4. *See infra* Part II.B (describing an official report which revealed that the White House lost nearly 500 days worth of e-mails due to problems with its electronic record-keeping system).

5. H.R. 5811, 110th Cong. (2008).

6. *Id.*

7. The Archivist of the United States is the federal officer in charge of the National Archives and Records Administration. BLACK'S LAW DICTIONARY 70 (8th ed. 2004). Historian Dr. Allen Weinstein was the ninth Archivist of the United States, and served in that role between February 16, 2005, and December 19, 2008. As of June 28, 2009, the Acting Archivist is Adrienne Thomas. *See* Archivists of the United States: 1934–Present, http://www.archives.gov/about/history/archivists/ (last visited July 29, 2009). The Archivist plays an important role in presidential record-keeping, as he or she has special responsibilities with regard to decisions concerning both record disposal during the President's term of office and also record disclosure after the President's term of office. *See infra* Part I.A (describing the role of the Archivist under the Presidential Records Act of 1978). The Archivist is removable by the President and there is no for-cause requirement for removal. *See infra* Part III.A.2 (discussing how the possibility of summary removal inherently limits the Archivist's license to institute record-keeping policies that the President may find objectionable).

8. *See infra* Part II.C (detailing the passage of the EMPA by the House of Representatives in July 2008).

9. *See infra* Part II.A (describing the Bush Administration's record-keeping practices).

10. *See infra* Part II.D (discussing the White House criticism of the EMPA).

retaining presidential records.[11] Part I examines the laws and jurisprudence that have culminated in public ownership of presidential records. Part II discusses the Bush Administration's record-keeping problems, the indirect way the United States Congress learned of the problems, and the subsequent legislative response—the EMPA. Finally, Part III argues that the Bush Administration's constitutional argument against the EMPA was specious.

I. RECORD-KEEPING LAWS AND JURISPRUDENCE

A. The Legal Genesis of the Public Ownership of Presidential Records

Prior to President Richard Nixon's resignation in 1974, American Presidents did not have reason to question their personal control over the management and disposal of White House records.[12] President George Washington began a long tradition of private ownership of presidential records when he bequeathed his papers to his nephew, Associate Supreme Court Justice Bushrod Washington.[13] While a number of presidents enabled at least some access to their papers by donating them to public libraries,[14] others personally ensured that the information would be inaccessible to future generations of Americans.[15] Heirs to the records sometimes exhibited a lack of knowledge about, or concern for, the records'

11. *See infra* Part III (arguing that the EMPA does not upset the constitutional balance of powers).

12. *See generally* BRUCE P. MONTGOMERY, SUBVERTING OPEN GOVERNMENT: WHITE HOUSE MATERIALS AND EXECUTIVE BRANCH POLITICS 10–12 (2006) (describing how President Nixon argued that a tradition of private ownership of presidential papers justified the agreement with Arthur F. Sampson that gave him joint control of the materials); Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651, 657–65 (2003) (proposing that the ownership of presidential records by former chief executives was a product of a long-held assumption rather than an articulated governmental policy); Jennifer R. Williams, Note, *Beyond Nixon: The Application of the Takings Clause to the Papers of Constitutional Officeholders*, 71 WASH. U. L. Q. 871, 876–82 (1993) (exploring the common law and historical traditions of personal ownership of papers of the officeholders in all three branches of the American government).

13. *See* Turley, *supra* note 12, at 657 (adding that President Washington's nephew "dispersed Washington's papers among a wide variety of private parties").

14. *See id.* at 661 (listing Presidents Hoover, Theodore Roosevelt, Taft, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Ford, and Carter as those who bequeathed presidential materials to public libraries, but also noting that some of them gave the materials under conditions of restricted access and use).

15. *See id.* at 660 (noting that Presidents Van Buren, Pierce, Grant, Garfield, Arthur, and Coolidge ordered their records to be destroyed); *see also* MONTGOMERY, *supra* note 12, at 11 ("The papers of William Henry Harrison, John Tyler, Zachory Taylor, and Andrew Johnson were destroyed or partially lost in fires while in their private possession.").

historical value: President Abraham Lincoln's son disposed of at least some of his father's Civil War correspondence,[16] and President Warren Harding's widow destroyed most of her husband's records.[17]

After President Nixon left office, he entered into an agreement with the Administrator of General Services, Arthur Sampson,[18] that embodied the tradition of giving former Presidents control over the records of their presidency.[19] The Nixon-Sampson Agreement[20] recognized the former President's rights to the records of his tenure, including his right to destroy White House tape recordings after a three-year period during which the tapes could be used in court proceedings.[21]

The Nixon-Sampson Agreement elicited a negative response by persons who questioned the customary practice of giving former Presidents complete control over their records.[22] Advocates for historians asked Congress to craft legislation that would make official documents and presidential materials public property.[23] These voices were not ignored—only three months after the signing of the Nixon-Sampson Agreement, Congress nullified the compact by passing the

16. Turley, *supra* note 12, at 660 & n.45.

17. *Id.* at 660 n.46.

18. At the time of the Nixon-Sampson Agreement, the National Archives was under the authority of the Administrator of the General Service Administration ("GSA"). *See* ROBERT M. WARNER, DIARY OF A DREAM: A HISTORY OF THE NATIONAL ARCHIVES INDEPENDENCE MOVEMENT, 1980–1985, at 4 (1995). Robert M. Warner, who would later lead a more independent National Archives, described this as an ill-fitting arrangement, since the GSA—which, among other practical responsibilities, oversaw the maintenance of public buildings—was neither "interested in [n]or equipped to contribute to the cultural leadership of the nation." *Id.* at 4–5. President Nixon, perhaps recognizing this, "refused to work with the Archivist but instead made a deal with the Administrator of the GSA to leave final control of these records (including destruction)" to himself. *Id.* at 6.

19. Indeed, Sampson signed the agreement only after Attorney General William B. Saxbe wrote a legal opinion affirming the tradition of Presidents' personal ownership of presidential records. *See* 10 Op. Att'y Gen. 1106 (1974); *see also* Williams, *supra* note 12, at 890 (chronologizing the events related to the Nixon-Sampson Agreement).

20. The text of the Nixon-Sampson Agreement is available in the appendix to a district court decision from 1975. *See* Nixon v. Sampson, 389 F. Supp. 107, 160–63 (D.D.C. 1975) (holding, in part, that the agreement was invalidated by the Presidential Recordings and Materials Preservation Act).

21. *Id.*

22. *See* MONTGOMERY, *supra* note 12, at 5–6 (detailing the criticism of the Nixon-Sampson Agreement from various actors, including newspaper columnists, law professors, and lawmakers such as Senator Charles Percy, who asserted, "these documents, tapes, and other materials are rightly the property of the American people").

23. *Id.* at 11 (recounting that the National Historical Publications and Records Commission, the Organization of American Historians, and individual actors like M.P. Schnapper took the position that the Nixon-Sampson Agreement prevented society from attaining a complete understanding of the Nixon presidency).

Presidential Recordings and Materials Preservation Act ("PRMPA").[24] The PRMPA kept all historically significant materials pertaining to the Nixon Administration in the custody of the Administrator of General Services and, importantly, banned destruction of the Watergate materials pending their use in the courts.[25]

The PRMPA tasked the Administrator of General Services with devising regulations for the screening of the papers by executive branch archivists, and provided the terms for future distribution of the records.[26] The PRMPA also established the National Study Commission on Records and Documents of Federal Officials ("Commission") and directed it to consider the control, disposition, and preservation of government documents.[27] In 1977, the Commission recommended that all presidential papers be treated as public property and suggested that the President be able to control access to the records for up to fifteen years after leaving office.[28]

The PRMPA dealt only with President Nixon's records,[29] and the Commission's recommendations had no binding authority.[30] However, with passage of the Presidential Records Act of 1978 ("PRA"), Congress authoritatively declared that the United States would reserve and retain complete ownership, possession, and control of presidential records,[31] beginning with presidential documentary materials created or received after January 20, 1981.[32] The legislation defined a presidential record as:

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24. Pub. L. No. 93-526, 88 Stat. 1695 (1974) (codified as amended at 44 U.S.C. § 2111 (2006)).

25. *See* Note, *Government Control of Richard Nixon's Presidential Material*, 87 YALE L.J. 1601, 1604 (1978) (noting that the presidential materials were to be retained in order to preserve material for use upon a showing of "particularized need" and also to preserve material of interest to the public for public access).

26. Pub. L. No. 93-526, 88 Stat. 1695 (1974) (codified as amended at 44 U.S.C. § 2111 (2006)).

27. Pub. L. No. 93-526, 88 Stat. 1699 (1974) (codified as amended at 44 U.S.C. §§ 3316–17 (2006)).

28. Turley, *supra* note 12, at 665 & n.80.

29. *See* Pub. L. No. 93-256, § 101(b)(1), 88 Stat. 1695, 1695 (1974) (codified at 44 U.S.C. § 2111 (2006)) ("[T]he Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all . . . objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.").

30. *See* Pub. L. No. 93-526, 88 Stat. 1699 (1974) (codified at 44 U.S.C. § 3317 (2006)) ("It shall be the duty of the Commission to study problems and questions with respect to the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials, with a view toward the development of appropriate legislative recommendations and other recommendations regarding appropriate rules and procedures with respect to such control, disposition, and preservation.").

31. 44 U.S.C. § 2202 (2006).

32. Pub. L. No. 95-591, 92 Stat. 2524 (codified as amended at 44 U.S.C. § 2201 (2000)).

> [A document] 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.[33]

Records of a purely private or non-public character, however, are not reserved or retained by the United States.[34]

The PRA does not authorize immediate disclosure of presidential records to the public.[35] Information becomes available to the public five years after the end of a given administration, and former Presidents may demand that the release of certain documents be delayed for an additional seven years after the five-year period has elapsed.[36] Moreover, some documents are allowed to be withheld indefinitely, such as national security information that has been properly classified pursuant to an executive order.[37] In January 2009, President Barack Obama issued Executive Order 13,489, which governs the process by which presidential records are approved for release to the public.[38]

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33. 44 U.S.C. § 2201(2) (2000).

34. *Id.* § 2201(3). While the PRA does not enable judicial review of presidential record-keeping practices, courts have allowed review of the guidelines that delineate between presidential and non-presidential records. *See infra* Part I.C (describing jurisprudence that addressed the possibility of judicial review of presidential record-keeping management under the PRA).

35. *Id.* § 2204. *See generally* Turley, *supra* note 12, at 667–70 (discussing the PRA's provisions concerning the release of records after the President leaves office).

36. *See* 44 U.S.C. § 2204(a)(1)–(7) (listing the records that may be delayed for twelve years, including: materials that may be kept secret for national security reasons; materials concerning the appointment of federal officials; materials that are exempted from disclosure by statute; materials that constitute confidential trade secrets and commercial or financial information; materials that constitute confidential communications between the President and advisors concerning requests for advice; and materials such as private personnel and medical files).

37. *See id.* § 2204(c)(1) (incorporating all but one of the Freedom of Information Act's ("FOIA") exemptions as provisions that allow for indefinite withholding of presidential materials). Presidential materials that fall within the incorporated FOIA exemptions include: national security information that has been classified pursuant to an executive order; information that is related solely to the internal personnel rules and practices of an agency; information that Congress has statutorily exempted from release; trade secrets and other information that would reveal privileged or confidential commercial or financial information; information that would constitute an invasion of privacy if released; some categories of law enforcement records; information used by agencies responsible for the regulation or supervision of financial institutions; and information or maps concerning wells. *See* 5 U.S.C. § 552(b)(1)–(4), (6)–(9) (2000). The FOIA exemption that is not available for purposes of withholding a Presidential record covers materials that constitute "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." *Id.* § 552(b)(5).

38. Exec. Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 26, 2009). Executive Order 13,489 explicitly revoked President Bush's Executive Order 13,233. *Compare* Exec.

The PRA also addressed the area of presidential record-keeping management, stating that the President is responsible for documenting his or her official acts and maintaining those documents as "presidential records."[39] However, the President does not have the authority to destroy records clandestinely. Whenever the President wishes to dispose of presidential records that no longer have administrative, historical, informational, or evidentiary value, the President must notify the Archivist about the pending action and obtain the Archivist's written opinion on the matter.[40]

If the Archivist does not object to the disposal, the President must submit copies of the disposal schedule to Congress and wait sixty calendar days of continuous session before destroying the documents.[41] On the other hand, if the Archivist believes that particular records might be of special interest to Congress or that consultation with Congress regarding the disposal of the records is in the public interest, then the Archivist must request the advice of four congressional committees: the Senate Committee on Rules and Administration, the Senate Committee on Governmental Affairs, the House Committee on House Oversight, and the House Committee on Government Operations.[42] Otherwise, the PRA gives the President total discretion regarding his own record-keeping management practices and, importantly, does not endow Congress or the Archivist with the power to veto presidential record-keeping decisions.[43]

Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 26, 2009) (giving an incumbent President, but not former Presidents, authority to prohibit the Archivist from releasing presidential records), *with* Exec. Order No. 13,233, 3 C.F.R. § 815 (2002), reprinted in 44 U.S.C. § 2204 (2006) (giving the incumbent President, former Presidents, former Vice Presidents, and their designees broad authority to deny access to presidential documents or to delay their release indefinitely). Also in January 2009, the House of Representatives passed H.R. 35, a bill that that would establish a process by which incumbent and former presidents can review presidential records in order to determine whether to assert executive privilege. This bill, if passed by the Senate and signed by the President, would establish that the Archivist must comply with the wishes of the incumbent President with regard to claims of executive privilege. S. REP. NO. 111-21, at 1 (2009). However, if the current President declines to support a former President's privilege claim, the Archivist would delay releasing the records for a short time to give the former President time to obtain a court order to enforce his privilege claim. *Id.* at 4.

39. *See* 44 U.S.C § 2203(a) (2000) (directing 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 . . . .").

40. *See id.* § 2203(c)–(e).

41. *Id.*

42. *Id.*

43. *See, e.g.*, Armstrong v. Bush, 924 F.2d 282, 286–90 (D.C. Cir. 1991) (holding that that, although the Federal Records Act authorizes the Archivist to assist agencies in the development of records management systems, the PRA does not have an

B. The Supreme Court's Assessment of Presidential Records Laws

The shift to public ownership of presidential records did not go unchallenged. President Nixon attacked the constitutionality of the PRMPA, the predecessor to the PRA; he contended that Congress did not have the requisite power to delegate to a subordinate officer of the executive branch the decision whether to disclose presidential materials and to prescribe the terms that govern any disclosure.[44] Additionally, Nixon argued that the PRMPA's authorization of future publication of presidential records, except where a privilege was established, offended the presumptive confidentiality of presidential communications.[45] When the District Court of the District of Columbia dismissed Nixon's action,[46] the former President filed a petition for a writ of certiorari.

The resulting 1977 Supreme Court decision in *Nixon v. Administrator of General Services* ("*Nixon II*") directly addressed the issue of control over presidential records and materials.[47] The Court ruled, in a 7-2 decision, that granting custody of the presidential materials to the Administrator of General Services and permitting their archival screening did not render the PRMPA unconstitutional on its face.[48] The decision noted that Nixon's argument that the Act violated the separation of powers rested on "archaic" notions of "airtight departments of government."[49]

The *Nixon II* Court also ruled that the PRMPA did not impermissibly burden White House decision-making and therefore

analogous provision and, thus, the Archivist lacks authority to inspect the President's records or survey the President's records management practices); *see also* Turley, *supra* note 12, at 669 (observing that the PRA leaves record-keeping practices entirely to the President's discretion and does not expressly provide for judicial review of record-keeping decisions).

44. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 439–41 (1977).

45. *Id.*

46. *Id.* at 430.

47. *Id. See generally* Sandra E. Richetti, Comment, *Congressional Power vis a vis the President and Presidential Papers*, 32 DUQ. L. REV. 773, 782–787 (1993–94) (summarizing the decision in *Nixon II* and suggesting that the Court's analysis could have the effect of rendering constitutional any future regulation enacted by Congress to control access to presidential materials).

48. *See Nixon II*, 433 U.S. at 425–29 (rejecting Nixon's arguments that the PRMPA was an unconstitutional infringement on executive branch powers). Justice Brennan delivered the opinion of the Court, Justice Stevens issued a concurring decision, and Justices White, Blackmun, and Powell each wrote separately, all concurring in part and concurring in the judgment; Chief Justice Burger and Justice Rehnquist wrote separate dissents. *Id.*

49. *Id.* at 443 (quoting the district court, Nixon v. Adm'r of Gen. Servs., 408 F. Supp. 321, 342 (D.D.C. 1976)).

was not so at odds with executive privilege as to be unconstitutional.[50] The Court emphasized the fact that the executive branch remained in full control of presidential materials.[51] According to the Court, it was reasonable to assume that Presidents expect professional archivists, who operate within the executive branch and had previously examined records in presidential libraries, to examine their records on a confidential basis.[52] Due to this expectation, and because archivists had an "unblemished" record of handling confidential materials, the Court held that the PRMPA did not interfere with the ability of White House officials to have candid conversations with the President.[53]

The *Nixon II* Court did not limit its analysis to the possible interference with presidential communications. Instead, it held that an overriding need to promote objectives within Congress's constitutional authority would permit some interference with executive privilege.[54] Since future Presidents have an interest in accessing the records of past White House decisions, and the American people have an interest in being able to reconstruct history, limited interference with presidential confidentiality was justifiable to protect the integrity of records.[55] Further, Congress had already legislated extensively in the area of regulation and mandatory disclosure of executive branch documents,[56] so the legislation's objective of keeping historical Nixon-era documents in the possession of the United States was within the constitutional authority of Congress.[57]

50. *Id.* at 446–55. A prior case involving President Nixon, *United States v. Nixon* ("*Nixon I*"), established the rule that Presidents and former Presidents may assert a privilege with respect to communications made in performance of official responsibilities and in the process of shaping the nation's policies. 418 U.S. 683, 708 (1974). However, the existence of sufficient fundamental interests must prevail over assertions of generalized interest in presidential privacy—and, in *Nixon I*, the compelling public interest of uncovering possible criminal activities by an elected leader prevailed over President Nixon's interest in executive confidentiality. *Id.* at 711–13.

51. *See Nixon II*, 433 U.S. at 444 ("It is clearly less intrusive to place custody and screening of the materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function.").

52. *Id.* at 452.

53. *Id.*

54. *Id.*

55. *See id.* at 453 ("Congress can legitimately act to rectify the hit-or-miss approach that has characterized past attempts to protect these substantial interests by entrusting the materials to expert handling by trusted and disinterested professionals.").

56. *See id.* at 445 (pointing to the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, and the Federal Records Act as examples of prior legislation regulating executive branch records).

57. *Id.*

C. Judicial Review of Presidential Record-Keeping Unavailable Under the PRA

The PRA does not give Congress or the Archivist veto power over the President's record-keeping management decisions.[58] The statute, however, does not expressly address whether presidential record-keeping could be subject to judicial review.[59] On review of a district court's refusal to dismiss a case challenging President George H.W. Bush's record-keeping practices,[60] the United States Court of Appeals for the District of Columbia Circuit held in *Armstrong v. Bush* that the PRA impliedly precludes judicial review of presidential record-keeping practices.[61]

The controversy underlying the case arose in 1989 during the transition from the Reagan Administration to the Bush Administration.[62] A group of researchers and historians filed suit to enjoin the disposal of information contained on a White House e-mail system known as the Professional Office System ("PROFS").[63] The district court did not find that the PRA envisions judicial review of presidential record-keeping practices; instead, it found that the PRA contemplates administrative action and congressional oversight as the statute's primary enforcement mechanisms.[64] However, the court decided that the President's performance of his statutory duty to adequately document and maintain presidential records is

58. *See supra* Part I.A (describing the PRA's provisions for presidential record-keeping management, including the President's broad discretion with regard to his own record-keeping practices).

59. 44 U.S.C. § 2202 (2000); *see also* Armstrong v. Bush, 924 F.2d 282, 289–91 (D.C. Cir. 1991) (noting that the PRA contains no provision that expressly precludes judicial review).

60. *See* Armstrong v. Bush, 721 F. Supp. 343, 353 (D.D.C. 1989) (concluding that judicial review of the President's compliance with the PRA is permissible under the Administrative Procedure Act (APA) because the obligation to retain presidential records is nondiscretionary).

61. *See Armstrong*, 924 F.2d at 297 (reversing the district court's decision that the APA authorizes judicial review of the President's compliance with the PRA).

62. The Reagan administration had utilized an e-mail system known as the Professional Office System, which allowed the deletion of communications sent over PROFS without first printing the communications. *See Armstrong*, 721 F. Supp. at 345–47. Most entities within the Executive Office of the President ("EOP") created daily back-up tapes of communications that had not been deleted from PROFS. *Id.* They kept these tapes for six weeks at the most before recycling the tapes, and thereby losing the records contained on them. *Id.* The National Security Council, also an EOP component, followed the same process, but created back-up tapes weekly and recycled the tapes after only two weeks. *Id.* On January 19, 1989, Reagan Administration officials started the presidential transition and began preparing to dispose of the contents of the PROFS. *Id.*

63. *See id.* at 347 (asking the court additionally to direct the President and the National Security Council to properly classify the records under either the PRA or the Federal Records Act, and to order the Archivist to carry out his statutory duties).

64. *Id.* at 349.

reviewable under the Administrative Procedure Act (APA).[65] While decisions that involve the exercise of discretionary political authority are beyond APA review,[66] the court asserted that the implementation of records management controls is ministerial rather than discretionary.[67] Therefore, since the "obligation to actually retain presidential records is clear and nondiscretionary" under the PRA, judicial review of the President's compliance with the PRA was permissible under the APA.[68]

On review by the circuit court, the plaintiffs argued that the President should be considered an agency since the APA did not include the President in its list of non-agency entities.[69] However, the three-judge panel disagreed, citing the legislative history of the APA and the fact that the President does not have to follow APA rulemaking procedures when issuing executive orders as support for the conclusion that the President is not an agency and is, therefore, not subject to judicial review under the APA.[70] The appellate court also held that, regardless of the President's agency status, Congress did not intend to allow "outsiders"[71] to interfere with White House record-keeping practices.[72] The court reached this conclusion after noting that even the Archivist did not have authority to survey the President's records management practices.[73] Thus, in overruling the lower court, the circuit court held that judicial review of the President's record-keeping policies was precluded by the PRA.[74]

65. *Id.* at 349–53.
66. *Id.* at 352.
67. *See id.* at 352–53 (stating that, because the PRA sets forth clear standards by which to determine whether certain documents qualify as presidential records, the President bears a nondiscretionary duty to apply those standards).
68. *See id.* at 353 (holding that the President's unilateral decision to discard the PROFS system was an exercise of discretion that does not comport with the PRA's disposal provisions, which set out a specific process involving the Archivist and Congress).
69. Armstrong v. Bush, 924 F.2d 282, 288 (D.C. Cir. 1991).
70. *Id.* at 289.
71. *Id.* at 290.
72. *See id.* at 288 (agreeing with the appellants' argument that even if the APA applies to the President, the PRA precludes judicial review).
73. *Id.* at 290.
74. *Id.* at 291. Two years later, however, the circuit court clarified that courts may actually review the guidelines that define what records fall within the category of "presidential records," because the PRA does not give "the President the power to assert sweeping authority over whatever materials he chooses to designate as presidential records without any possibility of judicial review." *See* Armstrong v. Executive Office of the President, Office of Admin., 1 F.3d 1274, 1283 (D.C. Cir. 1993) (holding, in part, that the mere existence of paper printouts of electronic materials did not constitute record status unless paper versions included all of the significant material contained in electronic records).

II. THE LEGISLATIVE RESPONSE TO THE BUSH ADMINISTRATION'S INEFFECTIVE ELECTRONIC RECORD-KEEPING PRACTICES

A. The Bush Administration's Electronic Record-Keeping Practices

From 1994 until 2002, the White House utilized the Automated Records Management System ("ARMS"), an archiving infrastructure that accompanied its Lotus Notes e-mail system.[75] ARMS was custom designed for the White House because, at that time, no commercial "off-the-shelf" e-mail records management system existed.[76] This system captured e-mail messages at the time of transmission and receipt and maintained these messages in an electronic format.[77] ARMS enabled users to designate the status of an e-mail as either a record or a non-record; by default, all incoming external e-mail was marked as a record, and any messages sent by White House users who did not make a designation were marked as records.[78] Despite these features, ARMS was plagued by glitches,[79] and the Clinton White House was criticized for shielding problems from public scrutiny.[80]

In 2002, senior Bush Administration staff members decided that the White House would switch from the Lotus Notes e-mail system to

75. *See* Letter from Steven McDevitt to Rep. Henry A. Waxman, Chairman of Committee on Oversight and Government Reform, Pt. 1, at 4–5, (Feb. 21, 2008), http://oversight.house.gov/documents/20080226143915.pdf [hereinafter Letter] (answering questions posed by Rep. Waxman about the preservation of presidential and federal records, writing as the former Director of Architecture and Engineering for the White House Office of the Chief Information Officer).

76. Laton McCartney, Behind the Missing White House E-Mail, http://www.ciozone.com/index2.php?option=com_content&task=view&id=1307&pop=1&page=4&Itemid=9 (last visited July 29, 2009).

77. *See* Jason R. Baron, E-mail Metadata in a Post-*Armstrong* World (1999), http://www.archives.gov/era/pdf/baron-email-metadata.pdf (noting that the Clinton Administration's Executive Office of the President instituted ARMS in order to reduce "long-term management burdens" by "the embedding of record status metadata").

78. *See id.* (describing the mechanics of e-mail recording, or non-recording, under ARMS).

79. U.S. GENERAL ACCOUNTING OFFICE, ELECTRONIC RECORDS: CLINTON ADMINISTRATION'S MANAGEMENT OF EXECUTIVE OFFICE OF THE PRESIDENT'S E-MAIL SYSTEM 2, 16 (2001), *available at* http://www.gao.gov/new.items/d01446.pdf (finding that the Executive Office of the President was afflicted by two separate archiving problems—the "Mail2" and "Letter D" malfunctions—and concluding that "[c]omputer malfunctions, ineffective systems and records management practices, and miscommunication between EOP components led to e-mail records not being preserved by ARMS").

80. *See* McCartney, *supra* note 76 (mentioning that Northrop Grumman employees working to fix the Clinton Administration's archival system were ordered by the White House Director of Management and Administration to maintain "absolute silence" regarding their work, and that the Chairman of the House Government Reform Committee chided the White House for attempting to conceal the ARMS glitches).

Microsoft Exchange.[81] The decision to switch from Lotus Notes to Microsoft Exchange required White House technical staff to modify ARMS so that this archival system would operate under the new system; however, both attempts to modify ARMS failed.[82]

The White House transitioned from Lotus Notes to Microsoft Exchange without instituting a records management solution.[83] Instead, the White House initially archived messages by manually copying messages from Microsoft Exchange and converting them to Personal Storage Table files (".pst files").[84] Later, the process of creating .pst files was "partially automated" using the program Mail Attender.[85]

By the admission of a former White House information technology professional, reliance on .pst files as an archiving tool is a primitive data management solution that does not correspond with government standards.[86] In 1997, the Department of Defense issued the Design Criteria Standard for Electronic Records Management Software Applications ("DoD Standard 5015.2-STD"), a set of baseline functional requirements that can be applied to all government records management programs.[87] The DoD Standard 5015.2-STD requires that records management programs capture and automatically store transmission and receipt data, and specifically

81. *See* Letter, *supra* note 75, pt. 1, at 4 (explaining that the staffers desired to use Microsoft's Outlook and Exchange programs because they had been used during the 2000 Republican campaigns, they were widely used in the business community, they integrated with the Microsoft Office programs used within the Executive Office of the President, and because Outlook offered features that were not available in the Lotus Notes system).

82. *See id.* at 6 (saying that the first attempt involved an effort to modify the Windows XP and Microsoft Outlook interfaces to support integration with ARMS, but failed due to "numerous technical issues"; and the second effort—using Legato E-mailXtender to "provide a mechanism for all Outlook/Exchange e-mails to be managed in ARMS"—did not effectively manage the volume of White House e-mail and was abandoned).

83. *See id.* at 7 (saying that despite the decision to proceed with the migration, "there was a great deal of concern about proceeding with the migration to Outlook/Exchange without having an adequate e-mail records management solution in place").

84. Microsoft Outlook uses .pst files to store data. *See* Microsoft Help and Support, How to Manage .pst files in Outlook 2007, in Outlook 2003, and in Outlook 2002, http://support.microsoft.com/kb/287070 (last visited July 29, 2009). When .pst files become too large, or become corrupted, data loss is a common result. OutlookBackup.com, PST Files, http://www.outlookbackup.com/pst-file.html (last visited July 29, 2009).

85. Letter, *supra* note 75, pt. 1, at 6.

86. *See id.* at 7 ("The process by which e-mail was being collected and retained was primitive and the risk that data would be lost was high.").

87. *See generally* Jason R. Baron, *The PROFS Decade*, in THIRTY YEARS OF ELECTRONIC RECORDS 105, 122 (Bruce I. Ambacher ed., 2003) (discussing the genesis of DoD Standard 5015.2-STD).

points out that the management systems should not allow editing of the messages' metadata.[88]

The White House's method of manually copying .pst files, by contrast, did not involve a mechanism that could reconcile the messages that were retained in the .pst files and those that were processed by the Microsoft Exchange server.[89] The implication of this deficiency is that there is no way to verify either that the archival system contains all of the data that is passed through the server, or that the records themselves are preserved in an unaltered state.[90] Additionally, the system did not track user modification of data files.[91] Thus, there is neither a way to verify if inappropriate modifications took place, nor a way to determine who may have performed those inappropriate activities.[92] Unsurprisingly, it was later confirmed that the days with fewer than normal archived White House e-mails corresponded with the period when the manual archiving of .pst files occurred.[93]

The White House technology staff was aware of these potential problems when the e-mail system migration took place.[94] Therefore, the Office of Architecture and Engineering and other White House components developed a new electronic archiving system, the Electronic Communications Records Management System ("ECRMS").[95] Planning for the ECRMS started in November 2002 and—after years of completing requirements analyses, as well as system configuration, testing, and tuning—the system was ready to "go live" on August 21, 2006.[96] On that date, however, White House Chief Information Officer Theresa Payton decided not to implement

88. Baron, *supra* note 77, at 6.

89. *See* Letter, *supra* note 75, pt. 1, at 7 (elaborating that four risks existed due to migrating without an adequate records management system: incomplete data, lack of data reconciliation, negative public perception, and inability to ensure user accountability).

90. *Id.*

91. *Id.* ("The approach of simply storing e-mail message [sic] in .pst files provides no mechanism or audit trail that tracks changes to data files or the activities performed by users or system administrators.").

92. *Id.*

93. *See* The National Security Archive, White House E-mail Chronology, http://www.gwu.edu/~nsarchiv/news/20080417/chron.htm (last visited July 29, 2009) [hereinafter National Security Archive] (noting that Deputy General Counsel of Office Administration Keith Roberts informed House Committee on Oversight staffers of the correlation).

94. *See* Letter, *supra* note 75, pt. 1, at 7 ("There was a great deal of concern about proceeding with the migration to Outlook/Exchange without having an adequate e-mail records management solution in place.").

95. Letter, *supra* note 75, pt. 2, at 9.

96. *See id.* at 11 (affirming the system's ability to handle the volume of Executive Office of the President's e-mails).

the ECRMS.[97] The reasons for this decision are unclear.[98] Parties interested in the preservation of presidential records criticized Payton's decision,[99] and the White House was left without a formal electronic record-keeping system.[100]

National Archives and Records Administration[101] ("NARA") officials did not play a persuasive role in the implementation of the Bush Administration's electronic record-keeping practices. While NARA initially approved the ECRMS project in 2002,[102] the agency's later involvement was largely limited to warning staffers from the Executive Office of the President in early 2004 that the White House "was operating at risk by not capturing and storing messages outside the e-mail system."[103] At least one White House information technology professional was told to not discuss e-mail retention issues or the analysis performed regarding missing e-mails with NARA

97. *See* National Security Archive, *supra* note 93.

98. On October 31, 2007, Payton explained that ECRMS was aborted because it would have required eighteen months to ingest the backlog of messages from the journal e-mail folders in the Microsoft Exchange system and also because she claimed that the new system would not have been able to distinguish between federal and presidential records on the one hand, and personal records on the other. *See* McCartney, *supra* note 76. The Office of Administration, it should be noted, had reviewed the latter issue and had ruled that it was not a concern. *Id.* On February 26, 2008, however, Payton cited the need for additional modifications, performance issues, and projected costs as the bases for her cancellation of the ECRMS. *Id.*

99. *See* National Security Archive, *supra* note 93 (questioning Payton's reasoning that the ECRMS should not be implemented as it would take eighteen months to ingest backlogged messages, because the ingestion period would have concluded before the termination of the Presidency).

100. *See* National Archives and Records Administration, Chronology of White House Meetings 5, http://www.gwu.edu/~nsarchiv/news/20080417/NARA%20Chronology%20of%20White%20House%20Meetings.pdf (noting that, as a result of the absence of a formal record-keeping system, the National Archives and Records Administration will eventually receive the e-mails in "multiple formats").

101. NARA is the successor to the National Archives and Records Service, which had previously operated within the General Services Administration. *See infra* note 161 and accompanying text (highlighting the historical trend of gradually increasing independence of the archiving function from the Executive through legislation). NARA's self-described mission is to:

> [Serve] American democracy by safeguarding and preserving the records of our Government, ensuring that the people can discover, use, and learn from this documentary heritage. We ensure continuing access to the essential documentation of the rights of American citizens and the actions of their government. We support democracy, promote civic education, and facilitate historical understanding of our national experience.

The National Archives and Records Administration, Vision and Mission, http://archives.gov/about/info/mission.html (last visited July 29, 2009).

102. *See* McCartney, *supra* note 76 (listing the Office of Administration Counsel, the White House Office of Records Management, the White House Counsel, and the NARA as entities that reviewed and approved the ECRMS plan).

103. The National Security Archive, Summary of Jan 6, 2004, Meeting with EOP re ECRMS at Archives II 2, http://www.gwu.edu/~nsarchiv/news/20080417/Summary%20of%20Jan%206,%202004%20meeting%20with%20EOP.pdf.

staff[104] and, when NARA was finally granted access on October 31, 2007, to a 2005 Office of Administration report on missing White House e-mails,[105] they were only allowed to review, and not copy, it.[106]

B. Congress Learns About the White House's Inadequate Electronic Record-Keeping Practices Through Investigations into Unrelated Controversies

Congressional legislation relating to the White House's electronic record-keeping practices was crafted only after investigations into other controversies revealed the deleterious effects of the White House's inadequate archiving systems. During the trial of I. Lewis "Scooter" Libby, Special Counsel Patrick Fitzgerald responded to the defense's allegations that the prosecution was withholding evidence by disclosing that the White House had been unable to find and produce e-mails of the Office of Vice President and Executive Office of the President for a set of days in early October 2003.[107] While this admission was not heavily publicized,[108] a subsequent, unrelated congressional investigation into the firings of eight U.S. Attorneys in 2007 brought electronic record-keeping issues squarely into the public consciousness.

In order to determine whether the U.S. Attorneys were fired for political reasons, Democratic lawmakers asked the White House for thousands of pages of relevant White House documents.[109] On April 12, 2007, White House officials indicated that an indeterminate number of e-mails—including correspondence sought in connection with the firings—were lost because they were sent by White House

104. *See* Letter, *supra* note 75, pt. 2, at 8 (relating that the Chief Information Officer had said that the White House Counsel and White House Records Management would answer all inquiries about records management, and that White House information technology staffers were "not allowed to discuss the potential e-mail retention issues" with NARA staff).

105. *See infra* note 113 and accompanying text (noting the many days of unrecorded e-mails from both the Office of the President and the Office of the Vice President).

106. *See* National Security Archive, *supra* note 93 (showing that NARA first made a request for the Office of Administration Report on April 25, 2007, but was finally allowed to review it on October 31, 2007).

107. *See White House E-Mails Might Have Been Lost*, ST. LOUIS POST-DISPATCH, Feb. 2, 2006, at A2 (reporting that Special Counsel Fitzgerald wrote a letter to the defense team saying that while he was not aware of any destroyed evidence, "we have learned that not all e-mail . . . . was preserved through the normal archiving process on the White House computer system").

108. *See* Michael Kranish, *Subpoenas Vowed Over 'Lost' E-Mails*, BOSTON GLOBE, Apr. 13, 2007, at A1, *available at* 2007 WLNR 7060143 ("The fact that e-mails are missing was noted—but not widely and publicly noticed—in the perjury trial of Vice President Dick Cheney's former chief of staff, I. Lewis 'Scooter' Libby.").

109. *See id.* (explaining that Senator Patrick J. Leahy, a Democrat from Vermon, and Representative Henry A. Waxman led the initial inquiry into the missing e-mails).

employees who were using nongovernmental accounts.[110] Five days later, however, White House spokeswoman Dana Perino intimated that there were deeper problems with the Administration's electronic record-keeping infrastructure, saying that "there could have been some e-mails that were not automatically archived because of a technical issue."[111]

Indeed, an Office of Administration report—created in 2005 but not released to Congress or NARA until September 19 and October 31 of 2007, respectively[112]—reveals that problems with the White House's electronic record-keeping system may have resulted in 473 days in which the e-mails for one or more White House components were not archived, plus an additional 229 days with fewer e-mails than would reasonably be expected.[113] Additionally, the status of the back-up tapes on which these missing e-mails may have actually been preserved is contested: the White House says that the missing, non-archived e-mails "should" be on the tapes, while other parties point out that, by the White House's own admission, at least 83 days worth of relevant back-up tapes no longer exist.[114] The House Oversight Committee has procured documents that indicate that neither the White House's e-mail archiving system, nor its back-up tapes, retain any of the Office of the Vice President's e-mails for the period between September 30, 2003, and October 6, 2003—which is precisely the time when the Justice Department began its investigation into the Plame affair.[115] There are also serious concerns

110. *See id.* (noting that the White House declared the e-mails missing only after the Senate Judiciary Committee sought more information about the firings).

111. Press Release, Dana Perino, Press Secretary, The White House, Press Briefing (April 16, 2007), http://www.georgewbush-whitehouse.archives.gov/news/releases/2007/04/20070416-1.html.

112. National Security Archive, *supra* note 93.

113. *See* COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, EOP EXCHANGE ENVIRONMENT—ALL COMPONENTS (2006), *available at* http://oversight.house.gov/documents/20080227155329.pdf. Specifically, no White House Office e-mail was archived for December 17, 20, 21 of 2003; January 9, 11, 29, of 2004; and February 1, 2, 3, 7, 8 of 2004. No Office of the Vice President e-mail was archived for September 12, 2003; October 1, 2, 3, 5 of 2003; January 29, 30, 31 of 2004; February 7, 8, 15, 16, 17 of 2005; and May 21, 22, 23 of 2005. *See* Letter from Rep. Henry A. Waxman to Fred F. Fielding, Counsel to the President (Jan. 17, 2008), http://oversight.house.gov/documents/20080117181419.pdf; *see also* Pete Yost, *White House Missing as Many as 225 Days of E-mail*, CITIZENS FOR RESPONSIBILITY & ETHICS IN WASH., Aug. 20, 2008, http://www.citizensforethics.org/node/33804 (indicating that the White House is seeking to recover lost e-mails dating back to August 2003, but not the missing e-mails that were created between March 2003 and July 2003).

114. *See* Complaint for Declaratory, Injunctive, and Mandamus Relief at 21, Nat'l Sec. Archive v. Executive Office of the President, No. 07-1577, 2009 WL 102146 (D.D.C. Sept. 15, 2007) (arguing that the Court should not accept the Executive Office of the President's unsupported claims of e-mail preservation).

115. *See* McCartney, *supra* note 76.

about the current retention system's inability to segregate federal and presidential records, as well as its susceptibility to manual tampering.[116]

These e-mails were lost because of the White House's failure to implement adequate electronic record-keeping systems.[117] Moreover, these inadequacies, combined with the circuitous and indirect way Congress learned about them, served as the impetus for new legislation that would give the Archivist of the United States the ability to certify whether the systems are adequate, rather than relying on the chance that other investigations may reveal such problems.[118]

C. The House of Representatives Passes the EMPA

On July 9, 2008, the EMPA[119] was passed in the House of Representatives.[120] The bill's sponsors designed the legislation to modernize the requirements of both the PRA and the Federal Records Act so that deficiencies in the electronic record-keeping practices of the White House and federal agencies, respectively, could be recognized and corrected.[121] The Senate did not vote on the bill, and so the EMPA died when the 110th Congress came to a close in early 2009.[122]

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116. *See generally* Complaint for Declaratory, Injunctive, and Mandamus Relief at 12–15, National Security Archive v. Executive Office of the President, Executive Office of the President, Office of Administration, No. 07-1577, 2009 WL 102146 (D.D.C. Sept. 15, 2007) (asserting that the White House's retention system is deficient, seeking the restoration of deleted records, and compelling the Archivist to set forth guidelines for an adequate system to preserve federal records).

117. *See generally* DAVID GEWIRTZ, WHERE HAVE ALL THE E-MAILS GONE? 115–143 (2007) (finding that the White House e-mail archiving plan was "transparently unworkable").

118. *See infra* Part II.C (delineating the role and responsibilities of the Archivist under the EMPA).

119. H.R. 5811, 110th Cong. (2008). The bill was originally introduced as the Electronic Communications Preservation Act; the title of the bill was later changed to the Electronic Message Preservation Act in order to clarify that the legislation applied to electronic messages rather than electronic communications. The bill defined electronic messages as "electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals." H.R. REP. NO. 110-709, at 2 (2008).

120. *See* Richard Simon, *House Votes to Preserve E-mails*, L.A. TIMES, July 10, 2008, at 13, *available at* 2008 WLNR 12902408 (explaining that the bill passed by a vote of 286 to 137, and that Republican Representative Thomas M. Davis III of Virginia criticized the Democratic leadership for focusing on this bill at a time when a housing crisis and high gasoline prices were affecting the nation).

121. *See* H.R. REP. NO. 110-709, at 3–4 (2008) (summarizing the purpose of the bill and noting that it was introduced by Rep. Henry A. Waxman, Rep. William Lacy Clay, and Rep. Paul Hodes).

122. Rep. Paul Hodes introduced a similar bill in March 2009. H.R. 1387, 111th Cong. (2009). As of July 5, 2009, the House of Representatives has not voted on the bill.

In regard to presidential electronic record-keeping management, the EMPA would have amended the PRA by directing the Archivist[123] to establish standards for the capture, management, and preservation of White House e-mails and other electronic messages.[124] Additionally, the Archivist would have been tasked with establishing standards for a system in which electronic messages would be readily accessible for retrieval through electronic searches.[125] These standards would have needed to be formulated to ensure "economical and efficient management" of electronic records during the President's term of office.[126]

While the Archivist would have been responsible for promulgating record-keeping standards pursuant to the EMPA, the President would have continued to establish and implement the actual electronic records management policies.[127] The Archivist would, however, have certified whether the record-keeping systems established by the President met the Archivist's standards for the economical and efficient capture, management, and preservation of searchable White House e-mails and other electronic messages.[128] Pursuant to the EMPA, certification would have taken place annually, with the Archivist reporting on the status of the certification to both the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform.[129]

Under the EMPA, the Archivist would have also reported to Congress one year *after* the President's *last* term in office regarding, first, the "volume and format of presidential records deposited into

123. *See supra* note 7 (describing the position of the Archivist of the United States).
124. H.R. 5811, 110th Cong. § 3(a) (2008).
125. *Id.*
126. *Id.*
127. *See id.* § 3(b) ("The Archivist shall annually certify whether the *records management controls established by the President* meet requirements under sections 2203(a) and 2206(5) of this title." (emphasis added)).
128. *Id.* Generally speaking, a certification requirement is a statutory provision that requires the President or another official to certify to Congress that a particular state of affairs does or does not exist. *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 107 (2006) (explaining that certification requirements are often utilized "in programs involving contingent discretion, that is, discretion that may be exercised only upon the existence or nonexistence of the specified state of affairs"). Certification provisions have appeared in statutes since the infancy of the nation in the late eighteenth-century; they are especially numerous in foreign policy legislation. *See* Mark A. Chinen, *Presidential Certifications in U.S. Foreign Policy Legislation*, 31 N.Y.U. J. INT'L L. & POL. 217, 221 n.16 (1999) (stating that in 1798, for example, the President was required to certify that members and officers of the Senate have received or will receive payments for their services).
129. H.R. 5811, 110th Cong. § 3(b)(1) (2008).

that President's Presidential archival depository,"[130] and second, whether the President's records management controls comported with the record-keeping standards promulgated by the Archivist.[131] Importantly, all of the EMPA's amendments to the PRA would have taken effect one year after the legislation's enactment.[132]

D. The White House Criticizes the EMPA

Despite a record of White House electronic record-keeping mismanagement, the Bush Administration indicated that it "has always been committed to preserving electronic records," and that it does not believe that the EMPA is needed to address the record-keeping management issues.[133] Accordingly, upon the House of Representative's passage of the EMPA on July 9, 2008, the Executive Office of the President indicated that the President would veto the legislation if it ever reached the Oval Office.[134]

The White House described its opposition to the EMPA in the language traditionally used in discussions about the constitutional separation of powers.[135] In a Statement of Administration Policy, the White House first addressed the amendments to the PRA,[136] even though Federal Records Act (FRA) amendments were addressed first in the EMPA.[137] The White House threatened to veto the bill for the following reasons:

> The bill would amend the Presidential Records Act (PRA) in fundamental ways that would upset the delicate separation of powers balance that Congress established in 1978 and require the Archivist to intrude, in an excessive and inappropriate manner, into the activities of an incumbent President and his or her staff. The bill would substantially alter the framework that Congress crafted in the PRA by subjecting the President and White House offices to requirements resembling those that the Federal Records Act (FRA) applies to executive branch agencies. The bill would require the Archivist to promulgate regulations that would establish "standards necessary for the economical and efficient management of Presidential records during the President's term of

130. *Id.*
131. *Id.*
132. *Id.*
133. Simon, *supra* note 120.
134. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, STATEMENT OF ADMINISTRATION POLICY: H.R. 5811—THE ELECTRONIC MESSAGE PRESERVATION ACT (July 8, 2008), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-2/saphr5811-r.pdf [hereinafter STATEMENT].
135. *See infra* Part III.
136. STATEMENT, *supra* note 134.
137. H.R. 5811, 110th Cong. §§ 2–3 (2008).

> office." The bill does not define "economical and efficient management," and, therefore, would appear to provide the Archivist with substantial leeway to establish standards that could impose significant costs and burdens on an incumbent Administration, which could interfere with a President's ability to carry out his or her constitutional and statutory responsibilities. Moreover, the bill would require the Archivist to "annually certify whether the records management controls established by the President meet requirements" of specific provisions in the PRA, as well as to submit annual reports to Congress on the status of the annual certifications. Such authority is unprecedented and would mark a significant departure from accepted and longstanding practice.[138]

The Bush Administration concluded its Statement by expressing dissatisfaction with the EMPA's provisions to amend the FRA, saying it would impose burdens on administrative agencies and curtail those agencies' ability to implement appropriate record-keeping technologies.[139] Yet, in describing its opposition to the FRA amendments, it did not cite the potential for upset to the "delicate separation of powers" as it did in relation to the PRA amendments.[140]

Considering the Bush Administration's reaction, the question becomes whether the EMPA's amendments to the PRA impermissibly upset the balance of powers as delineated by the Constitution and the Supreme Court of the United States. Despite the Senate's failure to vote on the bill, the disagreement between the House and the Bush Administration remains important for at least two reasons. First, since the advent of e-mail, each Administration has experienced e-mail retention issues.[141] It is reasonable to presume that such issues

138. STATEMENT, *supra* note 134.

139. *See id.* (arguing, first, that "the bill's provision requiring 'the electronic capture, management, and preservation' of 'electronic messages that are records' is onerous and overly broad and, in some cases, will prove counterproductive"; second, that "the bill's requirement that electronic messages be 'readily accessible for retrieval through electronic searches' is vague"; third, that "the bill could impose enormous unfunded costs on agencies"; fourth, that "the bill would place restrictions on the technological approach that could be adopted"; and, finally, that "[t]he statement that the regulations shall include such requirements [regarding capture, management, and preservation of electronic records] '[t]o the extent practicable' does not provide sufficient clarity regarding the breadth of these requirements and the burdens that would be imposed on agencies").

140. *See supra* notes 134–139 and accompanying text (describing Bush administration arguments against amending the PRA to give the Archivist "unprecedented" authority over executive branch activities).

141. *See, e.g.*, R. Jeffrey Smith, *Bush E-Mails May Be Secret a Bit Longer: Legal Battles, Technical Difficulties Delay Required Transfer to Archives*, WASH. POST, Dec. 21, 2008, at A1 (noting that the Reagan Administration tried to order the erasure of electronic backup tapes during Reagan's final days in office, that George H.W. Bush "struck a secret deal with the U.S. archivist shortly before midnight on his final day in office to

will continue and that the legislature will look to improve oversight over the record-keeping in the future. Second, the Bush Administration's argument that this type of bill upsets the balance of powers is bolstered by a 1984 White House memorandum written by now-Supreme Court Chief Justice John G. Roberts that cautioned that the Archivist's independence from the President could raise constitutional concerns.[142] Anticipating future debates about the role of the Archivist, this comment argues that legislation in the mold of the EMPA is constitutionally permissible.

III. THE EMPA WOULD NOT HAVE UPSET THE CONSTITUTIONAL BALANCE OF POWERS

A. The EMPA Would Not Have Placed Custody or Screening of White House Materials Outside of the Executive Branch

The EMPA would have required the Archivist of the United States to promulgate standards necessary for the economical and efficient management of presidential records during the President's term of office, to annually certify whether the records management control established by the President meets statutory requirements, and to submit annual reports to Congress on the status of this certification.[143] The White House indicated that it would have vetoed the bill, ostensibly because giving the Archivist these responsibilities would undermine the balance of powers contemplated in the PRA.[144]

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seal White House e-mails," and defects in the White House e-mail archiving system resulted in political controversy and the expenditure of $12 million to recover the missing e-mails from back-up tapes).

142. John G. Roberts wrote the memorandum, but it was signed by his superior, Fred F. Fielding. Memorandum from Fred F. Fielding, Counsel to the President, to Richard G. Darman, Assistant to the President (May 16, 1984) (on file with author) [hereinafter Memorandum from Fred F. Fielding]. It must be noted, however, that Roberts was commenting on a draft version of the bill that created the NARA. The memorandum found the proposed legislation troubling because the Archivist would have been appointed for a ten-year term, without regard to political affiliations, and solely on the basis of the professional qualifications. It also expressed ambivalence about whether the President could actually remove the Archivist at will. However, the bill that was signed into law removed the term requirement. The law also explicitly gave the President power to remove the Archivist. The language concerning professional qualifications remained unchanged. 44 U.S.C. § 2103 (2000). Roberts also made the separate point that, from a *policy* standpoint, the legislation would make it difficult for the President to control the Archivist because the bill increased the "stature of the Archivist" and contributed to an "aura of professional detachment." Memorandum from Fred F. Fielding, *supra*.

143. *See supra* Part II.C (detailing the Archivist's proposed duties under the EMPA).

144. *See supra* Part II.D (summarizing the Bush Administration's objections to the EMPA).

The Supreme Court's reasoning in *Nixon II*[145] provides the analytical basis for discussions about the constitutionality of record-keeping statutes.[146] In that 1977 decision, the Court established that the proper inquiry is whether such legislation prevents the executive branch from accomplishing its constitutionally assigned duties.[147] The Court determined that the legislation in question in *Nixon II*, the PRMPA, was not unduly disruptive to the executive branch because neither an agency outside of the executive branch nor Congress had the power to perform the function of screening the records of former President Nixon.[148] Additionally, the Act was designed to ensure that White House records could only be released when the release was not barred by a claim of executive privilege.[149]

A decade later, the Court added a measure of specificity to the *Nixon II* test for evaluating the scope and constitutionality of Congressional intrusion into executive branch responsibilities. In *Morrison v. Olson*,[150] the Court held that Congress's creation of an independent counsel to investigate allegations of wrongdoing against executive branch officials did not erode executive power to an impermissible extent because the President possessed sufficient control over the independent counsel.[151] This conclusion resulted

145. 433 U.S. 425 (1977).

146. *See* Richetti, *supra* note 47, at 782–87 (characterizing *Nixon II* as a case involving Congressional regulation of presidential papers and noting that the principles underlying this decision differed from previous separation of powers cases which had accorded the President more deference on the issue of executive privilege).

147. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). The President, also known as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States," has administrative powers, clemency powers, treaty-making powers, appointing powers, the power to fill vacancies, the power to send messages to Congress and the power to call special sessions and adjourn Congress, the power to receive foreign representatives, and the more general power to faithfully execute the laws. *See* U.S. CONST. art. II. Commentators have noted that the executive power is not defined in the Constitution, and thus the President can "draw upon a vast reservoir of authority to sustain actions that defy exact enumeration in the Constitution." *See, e.g.*, EDWARD F. COOKE, A DETAILED ANALYSIS OF THE CONSTITUTION 62 (7th ed. 2002); *cf.* C. HERMAN PRITCHETT, THE AMERICAN CONSTITUTIONAL SYSTEM 45 (5th ed. 1997) (offering the proposition that the President's executive powers are limited more by "the confines of political feasibility" than by the Constitution).

148. 433 U.S. at 444–45.

149. *Id.* at 444.

150. 487 U.S. 654 (1988).

151. *Id.* at 694–96. Chief Justice Rehnquist wrote the majority opinion, which was joined by six other justices. Justice Scalia filed a dissenting opinion. Justice Kennedy took no part in the case and did not give a reason for his decision to recuse himself. *See* Stuart Taylor, *Justice Kennedy Shuns Special Prosecutor Case*, N.Y. TIMES, Feb. 27, 1988, at A7 (hinting that Justice Kennedy may have wanted to recuse himself from a decision that could have affected Attorney General Edwin Meese—a major player in

from an analysis of the independent counsel's nature and place in the governmental framework.[152] First, the Court noted, Congress retained no powers of control or supervision over the independent counsel.[153] Second, Congress's role under the Act was limited to receiving reports or other information and oversight of the independent counsel's activities.[154] Third, while the Act reduced the amount of control that the Attorney General and, by extension, the President exercised over the investigation and prosecution of a certain class of alleged criminal activity,[155] the independent counsel could nevertheless be removed for "good cause" by the Executive.[156] Considering the precedent set by these two cases, the EMPA passes constitutional muster because the President would retain a sufficient amount of authority over the electronic record-keeping process.

1. The White House would have continued to make record-keeping policy decisions under the EMPA

Similar to the PRMPA at issue in *Nixon II*, the EMPA would have placed all custody and screening of presidential materials within the executive branch. Therefore, the EMPA comported with the holdings in *Nixon II* and *Morrison* by not interfering with the President's ability to perform his or her constitutional duties.[157] This conclusion is supported by the fact that, under the EMPA, the President and his or her staff would have continued to operate the White House electronic record-keeping system.[158] The EMPA merely tasked the Archivist with promulgating standards for electronic record-keeping systems that aim at ensuring that presidential

the nomination of Justice Kennedy by President Reagan—who was under investigation by a special prosecutor himself).

152. *See Morrison*, 487 U.S. at 660–65 (analyzing the provisions of Title VI of the Ethics in Government Act, which provided for an independent counsel who would have the power "to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws").

153. *Id.*; *see also* Bowsher v. Synar, 478 U.S. 714, 732 (1987) (holding that agents who are removable by Congress may not be entrusted with executive powers).

154. *Morrison*, 487 U.S. at 696.

155. *Id.* at 695–96 ("The Attorney General is not allowed to appoint the individual of his choice; he does not determine the counsel's jurisdiction; and his power to remove a counsel is limited.").

156. *Id.* at 696 (noting that the Attorney General's power to remove for cause "provides the Executive with substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel").

157. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443–44 (1977) (holding that, since the proper inquiry focuses on the extent to which it prevents the executive branch from accomplishing its constitutionally assigned functions, it is relevant that the PRMPA provided for "custody of the materials in officials of the Executive Branch and that employees of that branch have access to the materials only 'for lawful Government use, subject to the [Administrator's] regulations'").

158. Electronic Message Preservation Act of 2008, H.R. 5811, 110th Cong. § 3(a).

electronic communications will be properly captured, managed, and preserved, and certifying the level of presidential compliance with those standards.[159] Therefore, since the President and his staff would remain responsible for crafting the actual White House record-keeping controls and processes, the EMPA would have been constitutionally permissible.[160]

2. The Archivist of the United States is effectively an executive branch official

Even if it is argued that granting the Archivist the authority to issue standards and certify presidential implementation is an impermissible transfer of control away from the White House, the EMPA would have passed constitutional muster under *Nixon II* because the Archivist is effectively an executive branch official. The Archivist is the head of the NARA,[161] an administrative entity that is popularly referred to as an independent agency.[162] However, NARA does not possess the traditional characteristics of an independent agency; instead, the structure of NARA resembles that of a more traditional executive branch agency.

Congress designed independent administrative agencies to be shielded from the unimpeded political will of the executive branch.[163]

159. *Id.*

160. *Id.*

161. *See* National Archives and Records Administration Act of 1984, 44 U.S.C. §§ 2101–2119 (2000) (establishing NARA as "an independent establishment in the executive branch of the Government to be known as the National Archives and Records Administration. The Administration shall be administered under the supervision and direction of the Archivist."). *But see* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1236–94 (2000) (describing independent federal agencies, but not including NARA, on a list which is meant to be inclusive).

162. *See* BLACK'S LAW DICTIONARY 785 (8th ed. 2004) (defining an independent agency as "[a] federal agency, commission, or board that is not under the direction of the executive, such as the Federal Trade Commission or the National Labor Relations Board"). While independent agencies may not be under the direct and obvious control of the executive, it has been widely noted that even the most independent of independent agencies are located within the executive branch. *See, e.g.*, Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 65 (1986) (concluding that since the Constitution specifies that there are three branches of government, independent agencies may not be considered as constituting a "fourth branch"; rather, they must be considered as part of the executive branch); Alan B. Morrison, *How Independent are Independent Regulatory Agencies*, 1988 DUKE L.J. 252, 252–56 (1988) (arguing that the answer to the question "how independent are independent agencies" is "not very" because, in part, the leaders of independent agencies are redesignated on an annual basis by the President and most independent agencies do not have independent litigation authority separate from the Department of Justice). Therefore, even if NARA is a truly independent agency, it is still an executive branch agency and, thus, legislation like the EMPA is not constitutionally impermissible.

163. *See* KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW § 1.2 (2008) ("As the names suggest, executive agencies are designed to be responsive to the political and

Independent agencies often have sensitive and vital responsibilities, and so Congress intended independent agencies to interact with the three traditional branches of government with a degree of "'separateness but interdependence, autonomy but reciprocity,' so that 'practice will integrate the dispersed powers into a workable government.'"[164] On the other hand, non-independent agencies are designed by Congress to administer statutory programs; the President fulfills the Constitutional obligation to see that the laws are "'faithfully executed' by overseeing the manner in which administrative agencies carry out their statutory authority."[165]

Structurally, independent agencies possess certain characteristics that serve to insulate agency decision-making from undue political influence.[166] Despite its popular reputation, however, NARA does not possess these characteristics and, therefore, is not a traditional independent agency.

The most salient characteristic of agency independence is the protection provided to agency leaders against summary removal by the President.[167] Statutory language such as "[removable only for] inefficiency, neglect of duty, or malfeasance in office" means that the President may not remove agency officials "without either reason or explanation."[168] Additionally, if the agency exercises adjudicatory responsibilities, then courts may imply a "for cause" limitation on the President's ability to remove officers from the agency even if the statute is silent regarding removal restrictions.[169] Conversely, the President does not need to proffer any reason in order to remove agency officials at non-independent agencies.[170]

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policy direction of the president, while independent agencies are somewhat insulated from presidential control."); *see also* Breger & Edles, *supra* note 161, at 1117 (noting that structural and organizational elements, along with agency traditions and practices, contribute to independent agencies' ability to "conduct their business fairly and effectively while keeping them somewhat above the political fray").

164. Westinghouse Elec. Corp. v. U.S. Nuclear Regulatory Comm'n, 598 F.2d 759, 775 (3d Cir. 1979) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring)).

165. WERHAN, *supra* note 163, § 2.4.

166. *See* Breger & Edles, *supra* note 161, at 1135–55.

167. *See id.* at 1138 (noting that protection against summary removal has been, and continues to be, the "critical criterion" by which legal academics distinguish between independent and executive branch agencies); Paul Verkuil, *Separation of Powers, The Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 330 (1988–89) ("The condition that makes the independent agency truly independent is a statutory restriction on removal for cause.").

168. Breger & Edles, *supra* note 161, at 1135, 1145.

169. *Id.* at 1146.

170. *See* WERHAN, *supra* note 163, § 2.4 (explaining that those executive department heads that occupy a seat in the President's cabinet are especially prone to removal without cause).

The leader of NARA, the Archivist of the United States,[171] may be removed from his office without cause,[172] thereby inherently limiting the Archivist's license to institute electronic record-keeping policies that the President may find objectionable or overly burdensome. The President must report to Congress "the reasons for any such removal,"[173] but the absence of language that the President may only remove the Archivist for inefficiency, neglect of duty, or malfeasance in office indicates that summary removal is allowable. It is apparent that Congress intended to omit this for-cause removal provision: an early version of the Senate bill that established NARA included for-cause removal language, but this provision was eventually removed.[174] Additionally, courts are not likely to imply a for-cause limitation on the President's removal power because the Archivist has no adjudicatory duties.[175]

The leadership structure of independent agencies is designed to insulate agency decision-making from political influences. Independent agencies are normally led by multi-member entities, such as five- or seven-member boards. Typically, a leader—such as a Chairman—will serve as chief executive and administrative officer.[176] Importantly, no more than a bare majority of agency leaders may be from the same political party.[177] On the other hand, a single individual, who serves at the pleasure of the president, typically heads executive agencies.[178]

171. *See supra* note 7. The Archivist prescribes such regulations as he or she deems necessary to effectuate the functions of the Archivist. 44 U.S.C. § 2104(a) (2000).

172. *Id.* § 2103(a).

173. *Id.* § 2103(a).

174. *See* Stephen H. Yuhan, *The Imperial Presidency Strikes Back: Executive Order 13,233, the National Archives, and the Capture of Presidential History*, 79 N.Y.U. L. REV. 1570, 1578 n.44 (2004) ("The version of the Act initially passed by the Senate provided for the Archivist to serve a fixed term of ten years, removable only for good cause, see S. Rep. No. 98-373, at 23 . . . . but this section was changed by the Conference Committee to its present form, in which the term of the Archivist is not specified, and in which there is no 'good cause' requirement for removal, see H.R. Conf. Rep. No. 98-1124, at 19–20 . . . .").

175. Breger & Edles, *supra* note 161, at 1146 (referencing a case in which a court read a limitation on the President's removal power because the agency had an intrinsic adjudicatory character).

176. *See id.* at 1165. For example, it is common for a Chairman to manage the use and expenditure of funds as well as the appointment and supervision of employees. *Id.* The Board of the Defense Nuclear Facilities Safety Board, for example, will defer to the Chairman on administrative matters; but, still, the Chairman will work cooperatively with them on those issues. *Id.* at 1245–46.

177. *See id.* at 1137–41 (noting that there are a few exceptions to the "bare majority" rule, as the statutes governing the National Labor Relations Board, the Occupational Safety and Health Review Commission, and the Federal Mine Safety and Health Review Commission do not require political balance).

178. WERHAN, *supra* note 163, § 2.4.

The leadership structure of NARA does not resemble that of the traditional independent agency because most responsibility and decision-making is vested solely in the Archivist—who is appointed by the President with the advice and consent of the Senate and is not protected by removal restrictions[179]—rather than a multi-member entity.[180] According to the statute that established NARA, the Archivist plans, develops, and administers all programs and functions of NARA.[181] While the Archivist must be chosen on the basis of professional credentials rather than political affiliation, there is no mechanism in place to balance the Archivist's views with those of other appointees.[182] Indeed, the Deputy Archivist is not coequal with the Archivist and performs the duties that the Archivist assigns him.[183] The Inspector General is appointed by the Archivist and reports to and is under the general supervision of the Archivist.[184]

The Archivist, thus, is effectively an executive branch official who serves at the pleasure of the President. Not only does the White House retain control over the implementation of electronic record-keeping policies under the EMPA,[185] but the Archivist, who is tasked with issuing electronic record-keeping standards and certifying compliance to Congress, is appointed, and can be removed, by the President. Therefore, the Bush Administration's contention that the EMPA would have impermissibly infringed on the President's ability to perform his or her constitutional duties to execute the laws is, at the least, an overstatement.

B. The EMPA Would Not Have Imposed an Impermissible "Chilling Effect" on White House Communications

The EMPA directed the Archivist to promulgate standards for record-keeping during the President's term of office.[186] By contrast, the PRMPA pertained to the management of records after President

179. 44 U.S.C § 2103(a) (2000).
180. Breger & Edles, *supra* note 161, at 1137-38.
181. 44 U.S.C. § 2104.
182. 44 U.S.C. § 2103.
183. 44 U.S.C. § 2103(c).
184. Inspector General Act, 5 U.S.C. app. 3 § 8(d) (1978). The NARA Office of Inspector General performs "audits and investigations of NARA, its contractors, and its grantees, to promote economy and efficiency and to prevent and detect fraud, waste, and abuse." Office of the Inspector General, National Archives and Records Administration, http://www.archives.gov/oig/index.html (last visited July 29, 2009).
185. *See supra* Part III.A.1 (stating that "the EMPA merely tasked the Archivist with promulgating standards for electronic record-keeping systems" and that "the President and his staff would remain responsible for crafting the actual White House record-keeping controls and processes").
186. Electronic Message Preservation Act of 2008, H.R. 5811, 110th Cong. § 3(a).

Nixon had left the White House.[187] Despite this difference, the EMPA would not have imposed burdens on the Executive that would have limited the ability of the President and his advisers to communicate frankly and with the expectation of confidentiality.

In *Nixon II*, the Supreme Court held that the PRMPA would not impermissibly interfere with presidential communications.[188] The Court assumed that allowing archivists to screen presidential materials after a President's term constituted only a "very limited" intrusion;[189] moreover, it was an intrusion that Presidents and their staffs must have anticipated considering that executive branch personnel had previously screened records in presidential libraries, and had compiled an "unblemished" record while handling these confidential materials.[190]

While the EMPA's provisions related to electronic record-keeping management during the President's tenure, the legislation would not have impeded the President's ability to communicate effectively. The EMPA would not have altered the ability of the President to exercise his or privilege to withhold certain records from public disclosure after the term of office.[191] Instead, the EMPA was crafted to preserve the mere existence of these records.[192] Thus, a fear of disrupted executive branch communications under legislation like the EMPA should be considered specious for two reasons: first, the EMPA would likely have decreased third-party interference with White House communications and, second, the EMPA did not mandate that the Archivist and his staff examine actual records, as certification would involve only a survey of record-keeping practices.

First, the implementation of the Archivist's electronic record management standards should not lead to increased disclosure of records during the President's term of office. Rather, contemporary electronic record-keeping systems are more likely to secure communications from third-party interference.[193] The DoD Standard 5015.2 mandates that record-keeping systems store transmission and

187. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 433–36 (1977) (discussing the provisions of the PRMPA).
188. *Id.* at 455.
189. *Id.* at 451.
190. *Id.* at 452.
191. *See supra* notes 35–43 and accompanying text (discussing categories of information falling into a former President's executive privilege).
192. *See* H.R. REP. NO. 110-709, at 3 (2008) ("H.R. 5811 modernizes the requirements of the Federal Records Act and the Presidential Records Act to ensure the preservation of e-mails and other electronic messages.").
193. *See supra* notes 86–93 and accompanying text (analyzing risks of not implementing adequate record-keeping systems).

receipt data and also prevent editing of the document's metadata.[194] On the other hand, the Bush Administration negligently failed to protect the security of its file servers and file directories prior to the middle of 2005.[195] Therefore, about two thousand staff members within the Executive Office of the President could have chosen to clandestinely access and possibly alter the White House's .pst files, which were being used to store the Administration's e-mails.[196] This possibility existed during a period, after September 11, 2001, when the government was conducting anti-terror operations and military action worldwide.[197] Had the White House implemented an electronic record-keeping system that complied with common standards, the President could have given his advisers a more meaningful assurance of confidentiality.[198] It is reasonable to assume that more intimate collaboration between the Archivist and White House information technology professionals will lead to a more secure electronic communications system,[199] and so the EMPA would have operated to legitimatize the President's expectation of confidentiality.

Secondly, the certification requirement of the EMPA would not have necessarily involved the examination of actual presidential records.[200] The Archivist, who is removable by the President,[201] would have been tasked with annually certifying that the electronic records management system implemented by the President is able to capture, manage, and preserve electronic messages that are readily accessible for retrieval through electronic searches.[202]

194. JASON R. BARON, E-MAIL METADATA IN A POST-*ARMSTRONG* WORLD 5 (1999), *available at* http://www.archives.gov/era/pdf/baron-email-metadata.pdf.

195. *See supra* notes 89–93 (discussing risks of failing to keep users accountable).

196. *See supra* notes 89–93 (noting the risks of a failure to track users' activity).

197. *See* McCartney, *supra* note 76 (noting that many of the lost e-mails are believed to coincide with the outset of the Iraq war).

198. *See* Nixon v. Adm'r of Gen. Servs., 443 U.S. 425, 448–49 (1977) (noting that the President's ability to give an assurance of confidentiality is a prime rationale for the theory of executive privilege).

199. There is no reason to believe that the White House's archiving problems were unavoidable. *See* McCartney, *supra* note 76 (quoting Bill Tolson, director of legal and regulatory solutions marketing at Mimosa Systems, who observed that "[t]here never has been a technical reason [for the White House] not to have this capability in place. Perhaps it was a matter of budgetary constraints or political foot dragging, but technology is not an obstacle.").

200. *See supra* note 127 and accompanying text (noting that the President sets the actual electronic records management policies).

201. 44 U.S.C. § 2103(a) (2000).

202. Electronic Message Preservation Act of 2008, H.R. 5811, 110th Cong. § 3(a)–(b) (2008).

NARA officials have discussed record-keeping policies with White House officials in the past,[203] indicating that it is entirely possible to discuss and certify record-keeping systems without discovering, or divulging, records themselves.[204] For example, NARA collaborated with the Office of Administration Counsel, the White House Office of Records Management, and the White House Counsel in an effort to implement the ECRMS, starting in 2002.[205] However, these meetings were not routine,[206] and the Archivist had no authority under the PRA to report to Congress unless the President actually communicated a desire to dispose of certain records, which did not occur.[207]

Thus, under the EMPA, it is unlikely that the Archivist would have encountered actual presidential records. Moreover, Congress would have learned about the White House's record-keeping system from the Archivist on a consistent basis, but there is reason to believe that confidential communications would not have been disclosed.[208] This certification requirement would not have impermissibly burdened the ability of the President to communicate frankly with his advisors, but would only have alerted Congress to unsatisfactory record-keeping practices that have gone unnoticed in the past.[209]

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203. *See supra* notes 101–103 and accompanying text (explaining NARA's initial ties with the Executive Branch and its collaboration with Executive Branch offices on the ECRMS plan).

204. The Supreme Court in *Nixon II* reasoned that the President and his advisors could reasonably assume a level of confidentiality because archivists had amassed an unblemished record handling presidential materials. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 452 (1977).

205. *See* McCartney, *supra* note 76 (remarking that the initial draft of the Concept of Operations for the ECRMS project was reviewed by various White House offices and NARA).

206. *See* National Security Archive, *supra* note 93 (showing that although ECRMS was proposed in late 2001 to early 2002, the initial draft plan was not reviewed by the numerous offices until the end of 2002 through the first half of 2003 and the final draft plan was not reviewed until mid-2004).

207. *See* 44 U.S.C. § 2203(c)–(e) (mandating that the President must obtain the Archivist's approval before disposing of records and that the Archivist must consult Congress before responding to the President's record disposal request); *see also* 44 U.S.C. § 2106 (1985) (directing the Archivist to "submit to the Congress, in January of each year and at such other times as the Archivist finds appropriate, a report concerning the administration of functions of the Archivist, the Administration, the National Historical Publications and Records Commission, and the National Archives Trust Fund," but not mentioning any authority to comment on the President's electronic record-keeping practices absent a disposal request).

208. *See supra* notes 129–132 and accompanying text (explaining that the EMPA's proposed amendments to the PRA would require the Archivist to report to Congress regarding White House electronic record-keeping systems on an annual basis; however, these amendments would not take effect until one year after the EMPA's enactment).

209. *See supra* Part II.B (describing the White House's past inadequate archiving that led to the controversies surrounding "Scooter" Libby and the termination of eight U.S. Attorneys).

C. Regardless of Whether Passage of the EMPA Would Have Disrupted the Executive Branch in the Performance of Its Constitutional Duties, the Impact Would Have Been Justified by an Overriding Need to Promote Objectives that Fall Within Congress's Authority

Laws are not presumptively unconstitutional merely because they may impose limited intrusions on executive confidentiality. In *Nixon II*, the Supreme Court held that the PRMPA could be upheld, regardless of any potential intrusions, if the "impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."[210] Thus, the Court delineated two requirements which, if satisfied, justify the intrusion: first, the legislation's objective must be within the constitutional authority of Congress and, second, an overriding need to promote the objective of the legislation must exist.[211]

Regarding the first requirement, the *Nixon II* Court declared that "[t]here is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch."[212] Moreover, since the decision, Congress has declared that presidential records are the property of the United States.[213] This legislative declaration bolsters the Court's prior determination in *Nixon II* that regulation of executive branch documents is well within the constitutional authority of Congress.[214]

The second requirement for such a law to be upheld is that an overriding need to promote the objective of the legislation must exist.[215] On this count, the Court in *Nixon II* presented the argument that unlimited deference to Presidential privilege would harmfully impinge upon the decision-making of future Presidents.[216] Furthermore, the Court did not only waive President Nixon's claim of executive privilege in order to enable effective future presidential decision-making; it also noted that the American people have an

210. 433 U.S. 425, 426 (1977).
211. *Id.*
212. *See id.* at 445 (pointing to the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, and the Federal Records Act).
213. 44 U.S.C. § 2202 (2000).
214. The *Nixon II* Court, however, did not wish to "engage in the debate" regarding who held legal title to President Nixon's materials. 433 U.S. at 446 n.8. This was later definitively established by the Presidential Records Act. *See* H.R. REP. NO. 95–1487, at 2 (1978) (stating explicitly that despite contentious debates about records management procedures before and after the President's term of office, the idea of public ownership of presidential records was not controversial).
215. *Nixon II*, 433 U.S. at 426.
216. *Id.* at 452 ("An incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations.").

interest in the ability to understand the reasoning behind the decisions of their elected leaders, and that this interest may not be "truncated by an analysis of Presidential privilege that focuses only on the needs of the present."[217]

1. Congress has the authority to issue legislation that, like the EMPA, concerns the regulation of executive branch documents

The Supreme Court has confirmed that Congress has the authority to issue legislation, such as the EMPA, that concerns the regulation of executive branch documents.[218] Additionally, the EMPA, with its provisions that would have enabled the Archivist to issue non-binding electronic record-keeping standards and to make subsequent certifications of presidential compliance to Congress,[219] falls under the investigative power with which Congress is endowed.[220] Indeed, a legitimate legislative purpose will be presumed when the general subject of investigation is one in which Congress can legislate and when the information sought might aid congressional consideration.[221] It follows, then, that the creation of legislation that aims to investigate executive branch activities that emanate from appropriations expenditures, such as electronic archiving of White House records,[222] is a permissible use of Congressional power.[223]

217. *Id.* at 453.

218. *See supra* note 212 and accompanying text (listing examples of legislation which have regulated the executive branch's handling of documents).

219. *See* H.R. REP. NO. 110–709, at 6 (2008) (explaining that the Archivist's duty to annually certify would enable Congress to learn whether the management controls put in place by the President meet the existing requirements of the Presidential Records Act as well as the standards developed by the Archivist).

220. *See, e.g.*, McGrain v. Daugherty, 273 U.S. 135, 175 (1927) ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.").

221. *See, e.g.*, United States v. Cross, 170 F. Supp. 303, 306 (D.D.C. 1959) (utilizing the legislative purpose rule when considering the question of whether, when the defendant Cross was recalled before the Select Committee and gave allegedly false testimony upon which the indictment was based, the Committee propounded the questions to the defendant Cross for the purpose of eliciting from him facts which might aid in legislation).

222. For example, as part of the proposed budget for the fiscal year of 2009, the White House requested $11,923,000 for continued modernization of the information technology infrastructure within the Executive Office of the President. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT: APPENDIX, FISCAL YEAR 2009 1055 (2008), *available at* http://www.gpoaccess.gov/USbudget/fy09/pdf/appendix/eop.pdf. Also, the White House requested $8,000,000 for the costs of processing records of the departing President and Vice President under the Presidential Records Act, transferring records to the NARA, and paying for other transition-related administrative expenses. *Id.* at 1063.

Historically, legitimate congressional investigations have focused on the types of executive branch activities that can be traced to constitutional clauses giving the executive exclusive authority to act, such as military action and bureaucratic administration.[224]

The EMPA's certification requirement, which would have tasked the head of an administrative body with issuing electronic record-keeping standards and then reporting back to Congress regarding the White House's progress towards those goals, are well within Congress's investigative power and did not constitute an improper delegation to the Archivist.[225] Congress has the authority to secure needed information relative to legislation through tools such as registration, answers to questionnaires, congressional committees, or through administrative bodies that exist in a manner prescribed by Congress.[226] This certification requirement would have enabled Congress to gain vital information about White House compliance with the letter and spirit of the PRA.[227] Importantly, this information would have been received by Congress on a consistent basis,[228] rather than in a piecemeal and fortuitous fashion.[229] The information provided by the Archivist would help the legislative branch determine

223. *Cf.* William P. Marshall, *The Limits of Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 800–01 (2004) (describing the federal legislative power as very broad and noting that "[e]verything the Executive does, by definition, fits within the scope of federal authority and most can be tied to appropriations expenditures"). It is far more difficult to obtain the authorization of both chambers of Congress to institute an investigation—as the EMPA requires both House and Senate approval—than it is to utilize the powers of one chamber or committee to begin an investigation. *See generally id.* at 803–06 (considering the limited inherent process constraints on the use of the congressional investigatory power). This difficulty is evidenced by the fact that the EMPA was never voted on by the Senate.

224. *Id.* at 802 nn.127 & 129 (explaining that Congress investigated the 1792 failed military expedition of General St. Clair as well as purported bureaucratic mismanagement in the Department of the Interior and the Department of Forestry in the 1920s).

225. *See supra* Part II.C (describing the enactment and substance of EMPA).

226. *See* United States v. Rappeport, 36 F. Supp. 915, 917 (S.D.N.Y. 1941) (citing cases that support the multiple tools Congress can use in effectuating its investigatory powers); *see also* Watkins v. United States, 354 U.S. 178, 205 (1957) ("It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected.").

227. *See supra* notes 39–43 (explaining that, while the PRA requires the President to keep records, the Archivist and the courts cannot review the President's record-keeping standards).

228. *See supra* note 208 and accompanying text (detailing how the EMPA requires the Archivist to report annually to Congress on the White House's electronic record-keeping systems).

229. *See supra* Part II.B (noting how the inadequacies of the White House's record-keeping arose while Congress was investigating an unrelated matter).

whether further changes to the PRA or to White House information technology appropriation levels are necessary.

A 2002 U.S. District Court for the District of Columbia decision, *Walker v. Cheney*,[230] does not indicate that the Archivist lacks the authority to certify the adequacy of the White House's electronic record-keeping practices to Congress. In that case, the court held that the Comptroller General of the United States could not compel Vice President Cheney to disclose certain documents.[231] However, *Walker* was dismissed due to a lack of standing[232] and the Court did not decide the separation of legislative and executive powers issues raised by the controversy.[233] Regardless, further factual distinctions exist to disassociate *Walker* from consideration of the EMPA. First, the Comptroller was seeking a right of action to obtain a judicial order compelling the release of documents,[234] while the EMPA would have only allowed the Archivist to report to Congress on the state of presidential electronic record-keeping practices.[235] The EMPA would have granted neither a right of action to the Archivist nor the authority to examine actual records.[236] Second, the EMPA would have granted the authority to certify compliance with standards to the Archivist—the leader of an executive branch agency[237]—and not an agent of Congress, such as the Comptroller

230. 230 F. Supp. 2d 51 (D.D.C. 2002).

231. *See id.* at 53 (dismissing plaintiff's action and noting that no court has ever granted an order directing the President or the Vice President to produce information to Congress).

232. *See id.* at 67 (holding that the Comptroller General, as an agent for Congress, had suffered neither the level of personal injury nor institutional injury that would confer standing, and that even the injury to the principal, Congress, was "too vague and amorphous to confer standing").

233. *See id.* at 52–53 (explaining that while the case "engender[ed] a struggle between the political branches," the outcome of the case was ultimately ordained by "equally fundamental separation of powers concerns relating to the restricted role of the Article III courts in our constitutional system of government").

234. *Id.* at 58 ("The Comptroller General filed this action seeking declaratory and injunctive relief . . . . Specifically, relying upon his authority to investigate and evaluate under 31 U.S.C. §§ 712 and 717, and his right to obtain access to documents under § 716, the Comptroller General requests that the Court order the Vice President to produce documents . . . .").

235. *See supra* Part II.C (outlining the limits of the Archivist's powers under the EMPA).

236. *See supra* Part II.C (explaining the distinction between the Archivist's duty to promulgate record-keeping standards and the President's responsibility to implement policies to meet those standards).

237. Regardless of whether NARA is considered to be a truly independent agency or not, there is a great deal that distinguishes NARA from the General Accounting Office. The General Accounting Office is an instrumentality of the United States Government, independent of the executive departments. It was created by Congress to be an officer that checked upon the application of funds in accordance with appropriations and is subservient to Congress. *See, e.g.*, *Walker*, 230 F. Supp. 2d at 53.

General.[238] For these reasons, *Walker* is irrelevant to the argument presented herein.

Thus, Congress has authority to issue legislation regulating executive branch documents. This role gains importance when considering that the PRA and subsequent court decisions have made it difficult for private litigants to challenge presidential record-keeping practices.[239] Therefore, the current statutory framework endows Congress with the sole responsibility to see that the White House is preserving records for eventual use by other Administrations and the citizens of the United States.[240] The EMPA's certification requirement would have allowed Congress to exercise this responsibility by utilizing its investigative powers to apply political checks on the White House by publicizing any lack of compliance with the Archivist's standards.[241] This type of law would enable the early detection, or even the preemption, of electronic record-keeping

238. While the Archivist may be removed by the President without cause, the Comptroller General is removable only by Congress. *See* Bowsher v. Synar, 478 U.S. 714, 714–15 (1986) (holding that the Comptroller General's role in exercising executive functions "violated the constitutionally imposed doctrine of separation of powers because the Comptroller General is removable only by a congressional joint resolution or by impeachment, and Congress may not retain the power of removal over an officer performing executive powers").

239. *See* Armstrong v. Bush, 924 F.2d 282, 291 (D.C. Cir. 1991) ("Allowing judicial review of the President's general compliance with the Act at the behest of private litigants would substantially upset Congress's carefully crafted balance of presidential control of records creation, management, and disposal during the President's term of office and public ownership and access to records after expiration of the President's term."). *But see* Am. Historical Ass'n v. Peterson, 876 F. Supp. 1300, 1313 (D.D.C. 1995) (interpreting that precedent limits judicial review of Presidential record-keeping decisions to "guidelines outlining what is and what is not a 'Presidential record'").

240. *See* Carl Bretscher, *Presidential Records Act: The President and Judicial Review Under the Records Acts*, 60 GEO. WASH. L. REV. 1477, 1480 (1992) (noting that the *Armstrong* court decided that Congress was willing to rely on administrative enforcement and political checks, rather than judicial review, to ensure that the Office of the President complied with statutory record-keeping obligations applicable to other parts of the executive branch).

241. The Supreme Court has acknowledged the value of public knowledge as a check that both verifies and encourages good government. *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595 (1980) (arguing that trials should be open because they "assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice."); Buckley v. Valeo, 424 U.S. 1, 66 (1976) (noting that campaign finance disclosure requirements may serve to deter public officials from using campaign contributions either improperly both before and after an election).

problems, whereas retention problems in the past have been revealed only through unrelated investigations.[242]

2. The EMPA would have addressed the overriding need to ensure the existence of presidential records for future Administrations and for United States citizens

The overriding need that justifies legislation like the EMPA is that it helps to ensure that America's future Presidents will be able to take note of the factors and complexities that have gone into previous decisions—an objective that the *Nixon II* Court explicitly approved.[243] However, without the guidance and certification of the Archivist, various Administrations have not implemented satisfactory electronic record-keeping systems that are able to consistently preserve and segregate White House records.[244]

Enabling the Archivist to issue standards and then certify compliance will likely decrease the probability of subpar record-keeping policymaking that seems to have afflicted White House administrations in the digital age. This conclusion stems from the knowledge that a systematic lack of collegial consultation between information technology professionals, legal professionals, and functional departments within an organization often results in record-keeping systems that lack the features that enable compliance with legal standards.[245] In the case of the White House, these failures resulted in systems that are not able to comply with statutes, such as

242. *See supra* Part II.B (referring to how the public became aware of the White House's inadequate record-keeping during an unrelated Congressional investigation of "Scooter" Libby and the termination of eight U.S. Attorneys).

243. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 452–53 & 452 n.14 (1977) (approving the Congressional attempt to improve the "hit-or-miss" approach that had characterized previous efforts to preserve historically important materials, and noting the public interests served by the "rubric of preservation of an accurate and complete historical record" (quoting United States v. Nixon, 408 F. Supp. 321, 348–49 (D.D.C. 1976))).

244. *See supra* Part II.A (giving a timeline of the White House's use of problematic document archiving systems, starting with ARMS in conjunction with the Lotus Notes e-mail system and then the resort to manual archiving with the subsequent migration to Microsoft Exchange).

245. This lack of collaboration has been termed "silo behavior." *See* Jean-Luc Chatelain & Daniel B. Garrie, *The Good, The Bad and The Ugly of Electronic Archiving: An Essay on the State of Enterprise Information Management*, 2 J. LEGAL TECH. RISK MGMT. 90, 93 (2007) (noting that silo behavior consists of two subparts: "[t]he first, silo thinking, results in archiving projects that lack necessary business and legal features and functionalities because their design and implementation is largely driven by the information technology department without sufficient collegial consultation with functional and legal departments. The second silo implementation, results in multiple electronic archiving implementation silos within a given corporation with no overall enterprise-wide thinking, which multiplies asset and management costs and increases the complexity of handling information search and retrieval").

the PRA and the Federal Records Act, which aim to preserve important records.[246]

The lack of meaningful collaboration regarding record-keeping within the Bush Administration is plainly apparent when considering the process by which the Bush White House implemented Microsoft Exchange *without* an adequate archiving system in 2002.[247] While White House information technology professionals were concerned by the rash transition from Lotus Notes to Microsoft Exchange, it does not appear that their views were adequately considered.[248] Moreover, NARA officials only were informed about this deficiency in January of 2004.[249] NARA officials then warned the Executive Office of the President that it "was operating at risk by not capturing and storing messages outside the email system,"[250] but NARA did not have express statutory authority to bring Congressional attention to the issue.[251] Meanwhile, White House information technology professionals in the White House were warned not to speak candidly with professionals from NARA.[252] Finally, the promising ECRMS system that had been under development for almost five years was nixed at the final possible moment by the Chief Information Officer for reasons that are still unclear.[253]

A lack of meaningful collaboration during the development of electronic record-keeping systems can lead to increased costs. If and when record-keeping problems finally gain attention, the subsequent record retrieval process from back-up systems is often complex and

246. Under the PRA, the President is statutorily required to retain records which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties. *See supra* Part II.A.

247. *See* Letter, *supra* note 75, at 5–7 (noting that the migration from Lotus Notes to Microsoft Exchange had started by September 2002, while planning for the migration had begun prior to 2002).

248. *See id.* at 7–8 (relating that while there were meetings to discuss staff concerns with the transition, the transition continued regardless).

249. *See supra* note 103 and accompanying text (emphasizing how NARA could only recommend to the Executive Office of the President that the White House needed to improve their record-keeping practices, but could not effectuate any plans).

250. *See supra* note 103 and accompanying text.

251. The record-keeping statutes indicate that the Archivist is directed to report to Congress regarding Presidential record-keeping management decisions only when the President has made a decision to dispose of records. *See supra* Part I.A.

252. *See supra* note 104 and accompanying text (pointing out how during the summer of 2006, the Chief Information Officer directed an Information Specialist to not discuss potential e-mail retention problems with NARA).

253. *See supra* notes 95–100 and accompanying text (highlighting CIO Payton's obscure reasons, including the time commitment required to implement the ECRMS system to the backlog of e-mails and the system's inability to distinguish between federal records and presidential records).

costly.[254] In the case of the Bush White House, for example, the Administration asserted that complying with a court order to preserve certain e-mails by searching individual workstations would entail "significant" cost and would be "extensive and time consuming."[255]

More important than mere costs and burdens, a lack of collaboration can be expected to raise the probability that future Presidents will be prevented from accessing the desired records of past Administrations.[256] The complete loss of historically invaluable records is possible because back-up systems are not always reliable.[257] It is certainly reasonable to assert that future Presidents would be hampered by the possible absence of White House e-mail records for the period between March 1, 2003 and May 22, 2003[258]—a span of weeks that includes the invasion of Iraq, one of the most contested decisions the Bush Administration has made. The EMPA attempted to preempt such losses by empowering an executive branch official to issue standards that take into account the requirements of modern, capable electronic record-keeping systems.[259]

The American public also has an interest in the existence of presidential records.[260] The public's ability to understand the

254. *See* Chatelain & Garrie, *supra* note 245, at 93–94 (arguing that many decisions in choosing between differing technologies in the archiving field focus on the acquisition cost of the hardware, while ignoring the potentially high costs of retrieval in the event of litigation or regulatory compliance requests).

255. *See* Defendants' Responses to and Requests for Reconsideration of the First Report and Recommendation on Plaintiff NSA's Motion to Extend TRO/Preservation Order at 14–15, Citizens for Responsibility & Ethics in Washington v. Executive Office of the President, No. 07-1577, 2008 WL 2932173 (D.D.C July 29, 2008) (arguing that there is no indication that irreparable harm will result from a decision not to conduct burdensome inspection of individual workstations in the White House because "disaster recovery back-up tapes *should* contain substantially all relevant emails" between 2003 and 2005 (emphasis added)).

256. The Supreme Court has explicitly stated that future Presidents have an interest in the existence of the records of their predecessors. *See supra* note 216 and accompanying text (expressing the view that future Presidents should be guaranteed access to all previous presidential records, instead of relying on the discretion of their predecessors).

257. *See* Chatelain & Garrie, *supra* note 245, at 91 (noting that enterprises that operate without implementing archiving systems often are forced to rely on media as unsecured and unregimented as CDs or DVDs "in some employees' desk drawers").

258. *See supra* Part II.A (explaining the past and continuing inadequacies of White House record-keeping systems).

259. *See supra* Part II.C (summarizing the EMPA's expansion of the Archivist's role in the White House's record-keeping practices).

260. The Presidential Records Act defined presidential records as publicly owned. *See supra* Part I.A. Prior to that legislative enactment, the Supreme Court in *Nixon II* had also acknowledged the public's interest in the historical record. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 452 (1977) (noting that the American people's ability to reconstruct their history should not be limited by an overly broad principle of executive privilege).

workings of the elected government is an interest that the Founders[261] and the Supreme Court[262] have confirmed as legitimate and important to a functioning democracy.[263] Once again, however, it is important to note the distinction between the *existence* and *disclosure* of records. Private citizens may not be able to demand disclosure of presidential records, as considerations of executive privilege may prevent the release of certain records at certain times;[264] however, since the records belong to the United States, private citizens have an interest in the very existence of the records.[265] Without key portions of this publicly-owned record, the ability to piece together and comprehend disparate documents and e-mails will be irreparably damaged.[266] Just as the EMPA will cater to the overriding need of future presidents to access past presidential documents by lessening the probability of unsatisfactory White House record-keeping practices, it will also address citizens' interest in the existence of a completely documented presidency.

261. *See, e.g.*, Letter from James Madison to W. T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED, at 103 (Gaillard Hunt ed., G.P. Putnam's Sons 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or, perhaps both."); John Adams, *A Dissertation on the Canon and the Feudal Law*, BOSTON GAZETTE, Sept. 30, 1765, *available at* http://www.indiana.edu/~h105swrd/readings/H105-documents-web/week06/Adams1765.html (writing that the people "have a right, an indisputable, unalienable, indefeasible divine right to that most dreaded, and envied kind of knowledge, I mean of the characters and conduct of their rulers").

262. *See* Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) (noting that "informed public opinion is the most potent of all restraints upon misgovernment" in the course of holding that a tax abridged the freedom of the press and was, thus, unconstitutional).

263. *See generally* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 140–47 (2006) (connecting the importance of the contemporary right of access to government information to the guarantees of the First Amendment because those guarantees are "weak rights if government officials withhold information necessary to a complete understanding of the issue in controversy").

264. *See supra* notes 35–38 (explaining how the PRA shields presidential records from the public for numerous reasons, including if the records relate to national security, trade secrets, personal medical files, or requests for advice).

265. *Cf.* Armstrong v. Bush, 924 F.2d 282, 287 (D.C. Cir. 1991) ("We find that the statutory language and legislative history of both [the PRA and the FRA] indicate that one of the reasons that Congress mandated the creation and preservation of federal and presidential records was to ensure that private researchers and historians would have access to the documentary history of the federal government.").

266. *Cf.* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 452–53 (1977) (affirming the interest of both future Presidents and the public to understand American history).

IV. CONCLUSION

The White House's rationale for threatening to veto the EMPA is not aligned with presidential record-keeping jurisprudence. The EMPA would not have hampered the President's ability to perform his or her constitutional functions because the bill did not transfer record-keeping authority away from the executive branch. Moreover, even if the legislation did cause limited intrusions, Congress has constitutional authority to promote the important objective of preserving presidential records for use by future Administrations and the American public.

It is important to note that even though legislation like the EMPA may be facially constitutional, it is not guaranteed to better preserve presidential records. While the NARA's lack of independence enabled the EMPA to pass constitutional muster, it may also have limited the true effectiveness of record-keeping standards and certification carried out under the EMPA. Indeed, since the President does not need to point to specific reasons in order to dismiss the Archivist,[267] the Archivist would have possibly been hesitant to promulgate tough standards or make harshly critical certifications to Congress.

The Citizens for Responsibility and Ethics in Washington ("CREW"), for instance, criticized the bill because it contained "no effective enforcement mechanisms," leading the group to believe that "a president [could] ignore his record keeping responsibilities with impunity."[268] CREW recommended, instead, that the legislation incorporate either a private right of action to challenge record-keeping practices or noncompliance penalties. However, placing further pressure on the President, such as enabling judicial review of White House record-keeping by private litigants,[269] may implicate the very burdens that the EMPA so carefully avoided by keeping record-keeping policymaking, implementation, and appraisal within the

267. The President does not have to cite inefficiency, neglect of duty, or malfeasance in office as reasons for dismissing the Archivist, as he or she must in order to fire leaders of other independent agencies. *See supra* Part III.A.2 (arguing that NARA resembles a traditional executive branch agency more than an independent agency). In the case of Archivist John Carlin, who served from 1995 to 2005, the White House did not give *any* explanation for his ouster. *See also* Bruce P. Montgomery, *Their Records, Our History*, WASH. POST, Mar. 6, 2005, at B04 (asserting that "Carlin's dismissal was just the latest episode in the ongoing politicization of NARA").

268. Citizens for Responsibility and Ethics in Washington, CREW's Analysis of Electronic Communications Preservation Act (2008), http://www.citizensforethics.org/files/Leg%20Fact%20Sheet.pdf.

269. *See supra* note 239 (citing the decision in *Armstrong*, which held that the PRA precluded judicial review of the President's record-keeping policies).

executive branch.[270] Thus, the House of Representatives crafted a bill that would not have upset the balance of powers—but in so doing, Congress may have denied it the sufficient muscle to overcome the White House tradition of ineffective electronic record-keeping.

270. *See supra* Part III.A (arguing that despite the White House's stance on the EMPA, the EMPA places all White House record-keeping power within the executive branch).