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WORKING PAPERS AS FEDERAL RECORDS: The Need for New Legislation to Preserve the History of National Policy

Philip G. Schrag¹

The United States is In Danger of Losing Its Memory²

In January 1993, senior assistants to President George Bush planned to purge the White House computer. This action would have eliminated the electronic mail records created during the President's term.³ The planned computer purge might have destroyed information of great public interest regarding who knew what, and when, during its search for Bill Clinton's passport application records, and how strongly the administration supported Iraq before the Persian Gulf War.⁴ It also would have erased many electronic inter-office memoranda reflecting the reasons for policy decisions made by the National Security Council and other White House offices. The administration's effort was foiled, however, by Federal

1. Professor of Law, Georgetown University Law Center. Copyright 1994 by Philip G. Schrag. I appreciate the encouragement of Lisa G. Lerman, David C. Vladeck, and Michael E. Tankersley, who initially suggested that I write on this topic. I am grateful to Anna Kasten Nelson, Page Miller, Edward Berkowitz, Dan Ernst, Frank B. Evans, Donald A. Ritchie, William Slany, Karen Dawley Paul, Gary Brooks, Bill Leary, Walter Baumann, and Otis L. Graham, Jr., who allowed me to interview them in the course of my research. I appreciate the able research assistance of Jill Aranson, the support of a Georgetown University Law Center writing grant, and the comments on earlier drafts of this manuscript offered by Edward D. Berkowitz, Edwin C. Bridges, Robert Gellman, Lisa G. Lerman, David A. Koplou, Anna Kasten Nelson, James Oldham, Susan Girardo Roy, Roy Schotland, Michael E. Tankersley, Mark Tushnet, and Robin West. Non-profit organizations may copy any or all of this article *for educational purposes* without further permission or the payment of any fee, with credit to the American Bar Association and the *Administrative Law Review*.

2. COMMITTEE ON THE RECORDS OF GOV'T, REPORT 9 (1985) [hereinafter REP. ON RECORDS]. The Committee was a privately sponsored project, created by the American Council of Learned Societies, the Council on Library Resources, and the Social Science Research Council, and funded by foundations, to make recommendations for the preservation of important government records. The Committee was chaired by Professor Ernest R. May of Harvard University; the other members were former Representative Richard W. Bolling, Smithsonian Institution Undersecretary Phillip S. Hughes, Attorney Philip W. Buchen, former Attorney General Edward H. Levi, former Secretary of Health, Education and Welfare Joseph A. Califano, Jr., and industrialist Franklin A. Lindsay. *Id.* at 10.

3. Michael York, *Court Bars Destruction of Records*, WASH. POST, Jan. 7, 1993, at A1.

4. *All Things Considered* (Nat'l. Pub. Radio, Jan. 15, 1993).

District Judge Charles R. Richey, who issued a Temporary Restraining Order.⁵ Judge Richey then required the National Archives to preserve the records.⁶ In its final week, the administration was denied a stay pending appeal of the restraining order.⁷

During the night of January 19, 1993, President Bush's last full day in office, the White House staff collected 4000 to 5000 backup tapes and removed the hard disk drives from the personal computers used by staff members.⁸ The drives were "thrown in a box with no padding," and apparently some of them were damaged.⁹ Through the night, the tapes and drives were taken in "rushed trips" by truck to the Archives, a process that continued even while President Bill Clinton was riding in the inaugural parade after having taken the oath of office.¹⁰ When the material was inventoried at the Archives, backup tapes for "many dates [were] missing."¹¹ Judge Richey subsequently held the government in contempt of his preservation order for damaging the backup tapes while transferring them, among other conduct; he noted that "by failing to preserve these tapes, the Defendants are failing to preserve history and the lessons to be learned from it."¹²

Meanwhile, unbeknownst to the plaintiffs in the litigation over the restraining order, Don W. Wilson, the Archivist of the United States, had been negotiating for months with George W. Bush, the President's son, to be appointed as executive director of the George Bush Center for Presidential Studies at Texas A&M University.¹³ At 11:30pm on January 19, 1993, even while the tapes were being loaded onto the Archives's truck, and while still engaged in employment negotiations, the Archivist signed an agreement that had been drawn up by lawyers from the White House Counsel's office, the National Security Council, and the Justice Department.¹⁴ In the agreement, he purported to give the President "exclusive legal control of all presidential information on the tapes" and prohibited public access to the records until President Bush was satisfied that everything he consid-

5. *Armstrong v. Executive Office of the President*, 810 F. Supp. 335, 338 n.4 (D.D.C. 1993); see also *Armstrong v. Bush*, 139 F.R.D. 547 (D.D.C. 1991) (granting protective order in part).

6. *Armstrong v. Executive Office*, 810 F. Supp. at 349.

7. *Armstrong v. Executive Office of the President*, 1993 U.S. Dist. LEXIS 356, at *12 (D.D.C. 1993).

8. John O'Neil, *Republican White House Tapes Missing, Archives Inventory Finds*, N.Y. TIMES, Mar. 13, 1993, at 9.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Armstrong v. Executive Office of the President*, 821 F. Supp. 761, 769 (D.D.C. 1993). The Court of Appeals remanded the contempt finding for reconsideration because Judge Richey had imposed it not only because the defendants failed to safeguard the records, but also because they had failed to issue new regulations. However, Judge Richey had never ordered it to issue such regulations. *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1288-90 (D.C. Cir. 1993).

13. George Lardner, Jr., *Lawmakers Ask Probe of Archivist's Actions On White House Files*, WASH. POST, Feb. 17, 1993, at A4; *Justice Dept. Probes Bush-Archivist Deal*, CHI. TRIB., Feb. 24, 1993, at 15. The yearly salary for the Texas position was \$129,000. George Lardner, Jr., *Bush White House Purges Computers*, HOUS. CHRON., Mar. 15, 1993, at A2.

14. *Archivist Says He Talked to Bush About Job Before Deal on Tapes*, N.Y. TIMES, Mar. 3, 1993, at A22.

ered "presidential information,"¹⁵ had been segregated.¹⁶ Shortly thereafter, the Archivist was awarded the job in Texas.¹⁷

I was appalled when I read about these efforts to destroy unique documentation of some of the history of the United States. Then I realized, with still greater dismay, that I myself had not only attempted to destroy federal documents of potential historical interest, but unlike the President, I probably had succeeded.

In 1977, I began four years of service as the Deputy General Counsel of the United States Arms Control and Disarmament Agency. Lawyers in the office worked on almost every international arms control issue. Among other things, they proposed policy positions to be taken by the United States's representatives in ongoing negotiations to limit nuclear, chemical, and other weapons; they wrote comments on and legal analyses of proposals written in other bureaus and agencies; and they helped to draft the actual language of arms control treaties.¹⁸ This work generated quite a lot of paper. Each lawyer had two or three file cabinets, which nearly always were full, and the office also had a central file room with perhaps fifteen file cabinets, also full. The agency's director of administration, a career civil servant, took the position that the only way he could ever control the needless storage of obsolete paper was to refuse to allow agency officials to acquire any more file cabinets.

Accordingly, when a new project generated a few inches of paperwork, older less important paperwork had to be jettisoned; since most of this documentation was classified, it was shredded. As my filing cabinets filled up, I tended to throw out early and intermediate drafts of policy papers that had become final, along with all the comments on those drafts that had been received from other officials and taken into account in later versions of these papers. But even retaining only final drafts and other obviously important documents required the movement of paper from lawyers' offices to the file room and, as a consequence, periodic pruning of the cabinets in the file room. About once a year, a small group of us would assemble in that small, windowless room and make our best judgments about which of the older documents in storage probably would not be needed by anyone in the agency. Virtually all documents recording final decisions, many other papers from extremely important projects that had never produced final decisions or actions, and most papers younger than about six years old, were retained. Others could no longer be kept in our office. Some of the older papers were boxed for storage in a federal records repository in Suitland, Maryland, a kind of halfway

15. Under an earlier appellate court decision, the preservation of "presidential records" (a limited class of documents written by officials who had no statutory duties other than to advise the President) was governed by federal preservation laws but not subject to judicial review. *Armstrong v. Bush*, 924 F.2d 282, 285-86 (D.C. Cir. 1991).

16. George Lardner, Jr., *Archivist: 'No Role' in Drafting Bush Pact; Wilson Says He Merely Signed Agreement Ceding Control of Records*, WASH. POST, Feb. 18, 1993, at A7.

17. George Lardner, Jr., *Laumakers Ask Probe Of Archivist's Actions on White House Files*, WASH. POST, Feb. 17, 1993, at A4.

18. A major function of the United States Arms Control and Disarmament Agency is the "preparation for and management of United States participation in international negotiations in the arms control and disarmament field." 22 U.S.C. § 2551 (1988). The agency's director has "primary responsibility within the Government for arms control and disarmament matters." *Id.* § 2562.

house for documents that *might* end up, decades later, in the National Archives.¹⁹ Other working papers, still less likely to be needed by officials, were consigned for immediate destruction.

We were not entirely unaware of the existence of archivists and historians. We diligently preserved, for example, papers that might reflect discussions between Soviet and American negotiators in strategic arms negotiations. But the documents that we sent to the shredder undoubtedly included many early and intermediate working drafts that had ultimately contributed to the development of an American government policy.²⁰ I do not recall any time, in my four years in the office, during which an archivist or historian, from within or outside the government, ever visited us and asked or told us to preserve certain kinds of materials. Our collective decisions to keep mostly final copies of policy memoranda and to destroy early drafts resulted from common sense, or common error, not from any guidance from the National Archives of which I was aware.²¹

19. Unfortunately, the emphasis here is on the word "might." The Archives will not take control of records until they have been arranged and described. "[T]he systematic identification and processing of records of value from the vast collections of executive documents in records centers is labor intensive and hence very expensive. Therefore, most of these records continue to be largely inaccessible." REP. ON RECORDS, *supra* note 2, at 24. In fact, less than two percent of federal records are currently in the Archives. *Id.* at 40. An historian who works on the history of federal programs reports that the records center in Suitland "is crammed with material that is lost both to the public and to the agencies themselves. In my case, I have written about disability policy and used records related to the vocational rehabilitation program. Some of these records date back to the 1920s, yet, so far as I know, they are still not [at] the National Archives. Instead, they languish in Suitland. . . . Someone in from Kansas for a limited amount of time stands no chance of finding the records. The practical result is that it would be nearly impossible to write an account of, for example, welfare reform or the implementation of Medicare from government records." Letter from Edward D. Berkowitz, Chair, Department of History, George Washington University, to the author (July 6, 1993) [hereinafter Berkowitz Letter] (on file with author). By the end of 1993, the Suitland facility consisted of twenty rooms, each "the size of a football field. Inside, from floor to ceiling and wall to wall, sit tattered brown boxes, tens of thousands of them, all stuffed with documents. . . . [a]nd every day, truckloads of new boxes arrive—at a rate 50 percent faster than old ones are being destroyed." Liz Spayd, *Computers Whet Appetite for Paper; Electronic Age Offers No Haven From Avalanche of Documents*, WASH. POST, Nov. 14, 1993, at 1.

20. Since we sent at least some of our surplus central records to the Suitland repository, I may have done more damage to potential historical records by pruning my own files on a weekly basis than we lawyers did collectively in our annual attacks on the file room. However, my former colleague Walter Baumann shares my recollection that in these forays, "early drafts and comments, which might have given a clue about why a memo finally ended up as it did, ended up getting thrown out." Telephone Interview with Walter Baumann, former Assistant General Counsel, United States Arms Control and Disarmament Agency (June 29, 1993).

21. Apparently my experience was not unique. Edward D. Berkowitz reports that "when I ended my work with the President's Commission for a National Agenda for the Eighties, I took with me letters from prominent people, such as Daniel Moynihan. So far as I know, there was no attention given to sending things to the archives." Berkowitz Letter, *supra* note 19. "One half of the officials interviewed by [our] study team did not consider intermediate drafts important; for them what counts is the final document—the one that embodies policy, and that is signed by the head office." NATIONAL ACADEMY OF PUB. ADMIN., *THE EFFECTS OF ELECTRONIC RECORDKEEPING ON THE HISTORICAL RECORD OF THE U.S. GOV'T* 39 (1989).

At present, the National Archives believes that "[a]gencies should periodically brief supervisors and other employees on their records responsibilities, particularly those relating to records disposition." National Archives and Records Administration, *Disposition of Federal Records: A Records Management Handbook I-6* (1992). Archives personnel make serious efforts to educate agency records officers who in turn try to guide operating officials, but the volume of work is so great that the "application

While I was helping to dig out more space from overcrowded filing cabinets, I was unaware that what I was doing was a typical response to the practical problem of a paper explosion,²² or that the loss of what could someday be historical records was beginning to be recognized as a national problem. Nor did I know that officials and non-governmental organizations were even then struggling to formulate sensible changes in national record-keeping law and practice.²³ Unfortunately, despite official attention to the problem and some strengthening of the relevant law since then, several factors have continued to undercut the prospects for preservation of documents revealing the history of federal policies and actions, and particularly for the retention of drafts and comments reflecting the evolution of federal policy decisions. These factors include the proliferation of information being created by the federal government, the advent of electronic communications to replace memorandum-writing, bureaucratic resistance to concern for the historical record, continuing ambiguity in the statutes and regulations governing what records must be retained and, to the extent that such laws require judgmental decisions, uncertainty about which officials may exercise those judgments.

In this article, I am particularly concerned with historical preservation, to the extent possible, of the "complete"²⁴ record²⁵ of the making of federal policy.²⁶ The federal government generates many other important records, including statistical surveys, scientific reports, financial accounts, and case adjudications, but the preservation of the history of policy seems particularly essential. Such records provide "both the executive agencies and legislatures with information necessary for planning future programs, evaluating past performance, and assuring clarity and continuity."²⁷ "To the historian, the 'quick and dirty' policy sketch [such as an early draft] may be acutely revealing of certain riveting contextual matters that are obscured by the final product."²⁸ Historians "need to see the policy process when it

of records schedules to every office is an impossible task [and records officers often have an] indirect or incomplete relationship to the offices that create or take action on the most important agency programs." REP. ON RECORDS, *supra* note 2, at 19.

22. "[S]tories abound of old files being summarily emptied into trash bags to make room for new ones. . . ." REP. ON RECORDS, *supra* note 2, at 26.

23. See *infra* notes 141-65 and accompanying text.

24. Of course the historical record will never really be complete, because some communications will take place orally, without records; some records will be lost; and some records will consist of self-serving falsehoods. The historians' response to the suggestion that records should not be opened to the public because incomplete records actually distort history, however, is that they "get paid good money for dealing with problems in the 'distortion of the historical record.' Don't worry, . . . we can handle it." Ronald H. Spector, *Historians Can Handle Data*, WASH. POST, July 16, 1993, at A19.

25. Federal legislation over more than fifty years has evinced Congress's "evident concern with preserving a *complete* record of government activity for historical and other uses." *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1285 (1993).

26. I intend a rather broad definition of policy. That is, I use the word to refer to any deliberate attempt by senior federal officials to affect aspects of human relations or natural resources in the United States or abroad, whether ultimately embodied in a statute, executive order, regulation, policy statement, initiation of a lawsuit, military action, diplomatic contact, or other official statement or activity. However, although I recommend that legislative changes be enacted, I am not attempting in this article to draft a formal definition of "policy" or any other proposed statutory language.

27. REP. ON RECORDS, *supra* note 2, at 13.

28. NATIONAL ACADEMY OF PUB. ADMIN., *supra* note 21, at 40.

is in a malleable state if we are to understand the options available to policymakers. Drafts of documents, transcripts of meetings and the like help us to do that.”²⁹ When eventually made available to the public, these records also explain why programs were started or actions taken, and they provide a basis for judging the effectiveness of policymaking processes.³⁰ In addition, since policy records are only a small part of the documentation produced by the government, their long-term preservation may be more feasible than preservation of all federal records.³¹

This article deals with policy records at the “front end” of their lives; that is, preserving them from destruction by federal agencies in the decades immediately after their creation.³² It does not deal with the destruction of archived documents by Archives officials themselves. It discusses only in passing³³ the related question of how long a policy record should be sealed off from public inspection;³⁴ the

29. Letter from Edward D. Berkowitz, Chair, Department of History, The George Washington University, to the author (Aug. 23, 1993) (on file with author).

30. For example, a complete historical record can help citizens to judge whether governmental actions were undertaken rationally to achieve deliberate results, or whether they resulted primarily from the bureaucracies’ desire to increase their budgets and expand their “turf.” See generally GRAHAM T. ALLISON, *ESSENCE OF DECISION* (1971). Understanding the real bases for past policy decisions can help citizens to develop more sensible policymaking processes. For example, the literature over the last twenty years about the impact of bureaucratic politics, based in part on case studies, may help future policymakers to control distorting influences on policy. See, e.g., MORTON H. HALPERIN ET AL., *BUREAUCRATIC POLITICS AND FOREIGN POLICY* (1974). Of course, the value of preserving government records depends in considerable measure on the existence of future historians interested in sifting through them. The current trend among historians appears to be to dismiss government institutions as merely “secondary forces (to economic and class interests and other large-scale forces) in the shaping of society.” Hugh Davis Graham, *The Stunted Career of Policy History: A Critique and an Agenda*, 15 *PUB. HISTORIAN* 15, 27 (1993). Accordingly, very few historians currently are interested in the traditional political historian’s work of combing through archives. Graham reports that between 1970 and 1992, the proportion of papers on political history given at meetings of the Organization of American Historians fell from 52% to 12%, while the proportion of papers on the history of social groups (“racial and ethnic minorities, women, peasants and workers, gays and lesbians, et cetera”) rose from less than a third to 75%. *Id.* at 30. For a call to arms in favor of more political history that nevertheless acknowledges that “by the mid-1980s the status of the political historian within the profession had sunk to somewhere between that of a faith healer and a chiropractor,” see William E. Leuchtenburg, *The Pertinence of Political History: Reflections on the Significance of the State in America*, 73 *J. AM. HIST.* 585, 587 (1986). Some historians believe that the difficulty of finding the necessary public documents is a significant factor in driving their colleagues away from the history of government and toward social history. Telephone Interview with Anna Kasten Nelson, Adjunct Professor of History, American University, Project Director of the Committee on the Records of Government (Sept. 2, 1993).

31. All of the documentation produced annually by the United States Congress (which preserves virtually all policy material, including drafts and memoranda, see *infra* note 237) takes up less space than the documentation produced each year just by the Department of Agriculture. Interview with Donald A. Ritchie, Associate Historian of the Senate, in Washington, D.C. (June 25, 1993).

32. That is, it deals with the preservation of documents, including electronic documents, between their creation and the time, usually several decades later, at which, if they have survived that long, they are turned over to the National Archives.

33. See *infra* notes 34-36, 247.

34. The Freedom of Information Act (FOIA) makes government documents generally available for public inspection and copying, but it exempts from disclosure “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.” Freedom of Information Act, 5 U.S.C. § 552 (b)(5)(1988). This section has been interpreted to protect, among other things, predecisional information reflecting on the government’s deliberative policy process. *Jordan v. United States Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978). The purpose of this exclusion is to prevent releases that could “stifle honest and frank communication within the agency.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

literature includes a variety of opinions on that subject.³⁵ I am content to leave to others the problem of just where to draw the balance between making historical documentation available soon enough so that it can offer relevant lessons to citizens, but not so soon as to discourage officials from putting their candid thoughts and recommendations on paper or disk, for fear of public exposure and pressure.³⁶ I focus, instead, on the *preservation* of governmental records, and particularly of drafts, comments, and other working papers. Of course the issues of preservation and access are intimately linked: if records are routinely destroyed as soon as they are no longer needed by their creators, public access—even much delayed public access—becomes altogether impossible.³⁷

The exemption does not, however, dictate that working papers, if preserved, will never be made available to historians. An agency may waive the exemption. JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* §§ 7.11, 15.17 (2d ed. 1990 & Supp. 1993). In fact, after many years have passed, these predecisional documents are often made public, presumably because the chilling effect of disclosure on frank policy discussions is minimal after an intervening period of a decade or more. See sources cited *infra* notes 55-61. When the Department of State declassifies its records after 27-30 years, it selects the most important documents for publication in *Foreign Relations of the United States*, and it simultaneously makes all of the supporting documents—the “full State Department archives”—available in the National Archives for scholars to use. *THE RECORDS OF FEDERAL OFFICIALS* 351 (Anna Nelson Kasten, ed., 1978) (statement of historian Robert Divine). Formal declassification of the major papers is a screening device for sensitive information; once that is accomplished, “everything else can kind of be let slipped through.” *Id.* at 350.

The State Department's ancillary papers that are turned over to the Archives include many working files, such as desk officers' files that contain proposed alternative policies that were never adopted, and even newspaper clippings that may have influenced a policy decision. Telephone Interview with Dr. William Slany, Head of the State Department's Historical Office (July 19, 1993). These papers are “essential to historians” because often they are “the only place where the papers relevant to the development of an issue are together in one place.” *Id.* When this declassification process occurs, no one ever proposes to invoke the FOIA exemption for predecisional documents; once it has been determined that national security would not be impaired by release (and therefore the documents are not exempt under a narrower FOIA exemption), they are released without an additional inquiry or decision based on their predecisional nature. *Id.* It should also be noted that the FOIA exemption for predecisional deliberations is expressly made inapplicable to presidential records, which are released (unless some other FOIA exemption, such as national security, applies) no later than 12 years after a President's term ends. 44 U.S.C. § 2204(c)(1)(1988).

35. See, e.g., NATIONAL STUDY COMM'N ON RECORDS AND DOCUMENTS OF FED. OFFICIALS, *FINAL REP.* 6-8 (1977) [hereinafter NATIONAL STUDY COMM'N FINAL REP.] (recommending a maximum 30-year withholding period for most federal records but a maximum 15-year withholding for “working papers reflecting the decision-making process”); *THE RECORDS OF FEDERAL OFFICIALS*, *supra* note 34, at 55 (statement of Arthur Schlesinger, Jr., that “for most purposes an interval of ten years would be about right for both domestic and foreign policy, leaving out certain deeply sensitive [records] of national security.”)

36. In the case of foreign policy records, Congress has determined that “all records needed to provide a comprehensive documentation of the major foreign policy decisions and actions of the United States Government, including . . . records providing supporting *and alternative* views to the policy position ultimately adopted,” must be published within 30 years after the events recorded. 22 U.S.C. § 4351 (a)(Supp. IV 1992) (emphasis added). The emphasized portion of this statute makes it clear that Congress intended to make working papers available under this law, because while policy documents, such as presidential speeches, often include justifications for the policy adopted, they do not include the arguments against the policy or those supporting a different policy.

37. The article also does not deal with preservation of congressional or judicial branch records; special considerations (such as the fact that courts of record must arguably preserve their own papers for long periods of time) may affect those branches of government. For a discussion of records preservation by Congress and the judiciary, see NATIONAL STUDY COMM'N FINAL REP., *supra* note 35, at 19-27, 34-42.

I. Our Vanishing Public History

Long ago, before telephones, conference calls, electronic mail, or fax modems, people used to write letters. Policymakers, no less than citizens pursuing social relationships, wrote letters; exchanges of letters were the principal medium through which policymakers refined and exchanged ideas before settling on a plan of action. Very often, the letters were preserved, either as a result of a tradition of preserving official correspondence or because letters were the only records of how policies had been shaped.³⁸ In history books tracing the development of governmental policies before the Second World War, preserved letters are often a major source of knowledge.³⁹

Although the tradition of letter writing has faded away,⁴⁰ other types of instruments, such as electronic mail, continue to record the thoughts of officials as they try to devise sound governmental policies.⁴¹ These vehicles are various forms of working papers comprising the predecisional and postdecisional documents through which government policies are crafted. By 1945, if not earlier, the memorandum or draft policy paper had become a principal instrument in which thoughts were set forth and clarified. The memorandum in response to a draft policy paper (sometimes consisting of the respondent's proposed changes interlined on a copy of the original version) became a standard medium for communicating the reactions of other policymakers to proposed policy initiatives. Minutes were often made to record the decisions of large or particularly important agency and interagency meetings and, at least some of the time, the thoughts of the participants, as reflected by their oral comments in the meetings.⁴² Small meetings and telephone calls leave

38. See, e.g., *THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS* (Lester J. Cappon, ed., 1959); *ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION* (reprint 1986)(1950).

39. See, e.g., *FOR THE PRESIDENT—PERSONAL AND SECRET: CORRESPONDENCE BETWEEN FRANKLIN D. ROOSEVELT AND WILLIAM C. BULLITT* (Orville H. Bullitt ed., 1972) [hereinafter *CORRESPONDENCE*]. The Introduction to *CORRESPONDENCE* is written by George F. Kennan, who notes that the "record of [Ambassador Bullitt's] activities and reactions, as embodied in these letters, represents an important contribution to the history of the period," and suggests that a particular 1943 letter is "among the major historical documents of the time." *Id.* at v, xiv.

40. [W]ritten memoranda are still produced by the truckload, but in many cases they have been prepared more to protect the writer than to record an honest assessment of an issue. And few modern-day politicians or high-ranking officials keep diaries or write long, discursive letters such as those that enrich the records left by Theodore Roosevelt, Robert Taft, and Felix Frankfurter.

Donald A. Ritchie, *Oral Histories May Help Scholars Plow Through the Rapidly Accumulating Mass of Federal Paper*, *CHRON. HIGHER EDUC.*, Nov. 2, 1988, at A44.

41. An examination of electronic mail used by Navy laboratories during a 1985 study of the historical value of such mail revealed that "[e]lectronic mail is the nearest written equivalent to the correspondence of the pre-World War II era, when decisionmakers committed their thoughts, feelings and judgment to discursive prose in official letters." Carole Elizabeth Nowicke, *Managing Tomorrow's Records Today: An Experiment in Archival Preservation of Electronic Mail*, 13 *THE MIDWESTERN ARCHIVIST* 67, 73 (1988). "The messages were not constrained by the formality of official Navy correspondence. Instead, they were marked by spontaneity, directness, and candor." Declaration of Carole Nowicke at 4, *Armstrong v. Executive Office of the President* (No. 89-0142), 821 F. Supp. 761 (D.D.C. 1993) (on file with author). Ms. Nowicke was the Archivist of Navy Laboratories during the study. *Id.* at 1.

42. See 5 *FAM* 423.2-3 (1982). The State Department notes that "decisions . . . on U.S. foreign policy are reached through participation in Departmental, interdepartmental, and international committees" and requires documentation through "agenda[s] and minutes of each meeting [and] documents considered or presented for consideration." *Id.*

no official written record,⁴³ but officials have developed the practice of circulating written “talking points” to enable other officials to know what they plan to say, to allow those in other bureaus and agencies the opportunity to comment in advance on proposed oral communications, and to preserve records of the contacts.⁴⁴ Similarly, the memorandum of conversation, or “memcon,” a memorandum to the file summarizing the contents of an oral communication, has evolved into an important instrument through which officials keep track of what has actually transpired in oral discussions.⁴⁵ Telephone logs have helped officials keep track of whom officials have talked to and when.⁴⁶ Tape recorders, overt or surreptitious, also have preserved records of the impetus for governmental action.⁴⁷ As the computer age has taken hold, disks and back-up tapes have become increasingly significant embodiments of official thought, and more recently, back-up tapes reflecting electronic mail messages have become major repositories of the historical record.⁴⁸

43. NATIONAL ACADEMY OF PUB. ADMIN., *supra* note 21, at 38. “[I]t seems generally accepted that since the advent of the telephone, and certainly since the 1930s, records have become thinner in content and are of reduced historical value.” *Id.* at 42.

44. Secretary of State George Shultz’ “talking points” for a meeting with Ronald Reagan corroborated his claim of having opposed a trade of arms for hostages held in Iran. SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION AND HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REP. ON THE IRAN-CONTRA AFFAIR, S. REP. NO. 216, 100th Cong., 1st Sess. 605 (1987) (testimony of George Shultz) [hereinafter IRAN-CONTRA CONG. REP.].

45. The State Department, at least, has for decades required its officials to make permanent records of all oral “discussions of any significance.” 5 FAM § 423.2-1 (1974), *cited in* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 163 n.4 (1980) (Stevens, J., concurring); 5 FAM § 423.2-1 (1982) (revision requires recording all oral discussions “which are appropriate for preservation”). This requirement may reflect State Department officials’ “assumption that what they are doing and saying is crucial to the country,” causing them to have a “particular propensity for [preserving] drafts, working papers, telephone memoranda, letters and official records.” Anna Kasten Nelson, *Foreign Policy Records and Papers: A Case Study of the Preservation and Accessibility of One Group of Documents*, in THE RECORDS OF FEDERAL OFFICIALS 359, 370 (Anna Kasten Nelson, ed. 1978). Memcons were among the types of evidence scrutinized and cited by the congressional committees that investigated the Iran-Contra scandal. *See, e.g.*, IRAN-CONTRA CONG. REP., *supra* note 44, at 243 n.37, 264 n.7, 265 n.139 (1987).

46. Officials so commonly keep records of making and receiving telephone calls that when a scandal breaks, one of the investigators’ first acts is to seek access to the subject’s telephone logs. *See, e.g.*, Alan C. Miller, *Passport Office Probe Seeking Baker Records*, L.A. TIMES, Dec. 15, 1992, at 1; Stephen Kirkjian, *Bush Counsel Failed to Ask How Former Aide Got Contract*, BOSTON GLOBE, Nov. 3, 1991, at 2. Telephone logs “may be very, very valuable historical records.” John T. Fawcett, Assistant Archivist of the United States, *quoted in* Robert Pear, *Bush’s Lawyer Says Aides May Destroy Records*, N.Y. TIMES, Nov. 21, 1992, at 7.

47. *See infra* note 57 and accompanying text. *See also* Walter Pincus, *Transcripts Show LBJ’s Maneuvers in Setting up Warren Commission*, WASH. POST, Sept. 23, 1993, at A6 (archived transcripts of telephone calls between President Johnson and FBI Director J. Edgar Hoover, and between President Johnson and Senator Richard Russell, revealing Johnson’s opposition to creation of the Warren Commission and the arguments he eventually used to persuade Chief Justice Earl Warren to chair it); John M. Berry, *What the Fed Hadn’t Said*, WASH. POST, Oct. 27, 1993, at F1 (The Federal Reserve revealed that it had preserved transcripts from 17 years of Federal Open Market Committee meetings, and, “if released, the documents would provide a rare glimpse into the discussions of top Fed policy makers.”).

48. *See* TOWER COMM’N, REP. OF THE PRESIDENT’S SPECIAL REVIEW BD. (1987) [hereinafter TOWER COMM’N REP.]. The Report reveals that officials conferred extensively through the White House electronic mail system as they decided that the United States should make covert arms sales to Iran and to give secret aid to the Contras in Nicaragua. In addition, they used the system to collaborate on a series of false chronologies to help cover up their actions. *Id.* at D3-D11; IRAN-CONTRA CONG. REP., *supra* note 44, at 299 (NSC staff members editing together by inserting electronic mail messages

Many historians of American government believe that the working papers such as draft policy papers, memoranda reacting to them, minutes of meetings, memcons, telephone logs and electronic mail messages will, if preserved for future scholars and citizens, make important contributions to understanding the evolution of the federal government policies of our age. Professor Otis L. Graham, Jr., of the University of California, states that

my study of the history of the Industrial Policy idea⁴⁹ informed readers that Jimmy Carter announced the nation's first Industrial Policy in August, 1980. But because the Carter Library files contained the memos and drafts of a "Deputies Group" from several Federal agencies working to prepare the President's position, I was able to trace the internal politics and intellectual history of this emerging idea. Even so, the files were incomplete: I never found the key staff memo upon which Carter made his decision. Yet I found enough to sketch the real story behind the final Presidential announcement. . . . Imagine how thin and misleading the story⁵⁰ would have been if the preliminary staff papers had been destroyed.⁵¹

"It's of vital importance for historians," adds Arthur M. Schlesinger, Jr., "that such materials [as notes detailing who was present at what meetings] be retained."⁵² Of course much of this documentation may never be consulted by anyone, but preservation must be overbroad because it is impossible to predict in advance which materials historians or citizens will want to consult. As historians recognized long ago, "a great deal is said by some people about 'rubbish,' but one investigator's 'rubbish' may be precious to another, and what appears valueless to-day may be found highly important tomorrow."⁵³

Indeed, working papers have already significantly increased our understanding of public institutions and important twentieth century events. The Pentagon Papers illustrated the decision-making processes of the United States government as it moved to commit large numbers of American troops to the war in Vietnam.⁵⁴ Working files helped to advance understanding of how and why the United States

into electronically written chronologies). By 1993, electronic mail messages by senior government officials had become "indistinguishable from letters or memoranda." *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1279 (D.C. Cir. 1993).

49. OTIS L. GRAHAM, JR., *LOSING TIME: THE INDUSTRIAL POLICY DEBATE* 3 (1992).

50. *Id.* at 38-45.

51. Letter from Otis L. Graham, Jr., to the author (July 29, 1993) (on file with the author).

52. Neil A. Lewis, *Government Told to Save Messages Sent by Computer*, N.Y. TIMES, Aug. 14, 1993, at 1. For an example of the significant controversy that can arise in the absence of records of who was present at a meeting, see WILLIAM BROAD, *TELLER'S WAR* 224, 305 n.64 (1992) (contradictory recollections about whether Edward Teller was present at a crucial White House meeting fail to resolve whether he misled General Accounting Office investigators about his role in overselling the X-ray laser program of anti-missile defense).

53. JUSTIN H. SMITH, *ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION* 312 (1910), quoted in T.R. SCHELENBERG, *MODERN ARCHIVES: PRINCIPLES AND TECHNIQUES* 149 (5th ed. 1971).

54. See *THE PENTAGON PAPERS AS PUBLISHED BY THE NEW YORK TIMES* (Quadrangle Books ed. 1971). The types of working papers in this history included State Department cables (*e.g.*, *id.* at 27, 39, 120), memoranda for the record (*e.g.*, *id.* at 33, 41), handwritten notes on scratch paper (*Id.* at 100), task force and agency memoranda to the President (*Id.* at 124, 130) and other officials (*Id.* at 135, 160), talking papers (notes from which officials would plan to speak) (*Id.* at 144), letters (*Id.* at 428) and drafts of memoranda (*Id.* at 372, 374, 382, 554).

became a modern welfare state⁵⁵ and how President Reagan stumbled into authorizing an arms-for-hostages plan that his Secretaries of State and Defense opposed.⁵⁶ President Nixon's tape recordings, some of which he supplied to Congress during investigation of the Watergate scandal, provided important insights into the driving forces for governmental action.⁵⁷ Confidential staff memoranda, correspondence, options memos and telephone logs contributed to a measured assessment of Lyndon Johnson's commitment to promoting civil rights;⁵⁸ similar papers revealed that Mrs. Johnson had a "significant role in providing a foundation for the environmental movement that burgeoned during the 1970s."⁵⁹ One of the definitive histories of the origins and early years of the Atomic Energy Commission draws heavily on memoranda, minutes of formal and informal meetings, handwritten notes, and draft and final letters.⁶⁰ The documents published by the State Department (thirty years after the events in question), comprised largely of working

55. See generally EDWARD BERKOWITZ & KIM MCQUAID, *CREATING THE WELFARE STATE* (1980). This book draws on such sources as "Minutes of the Dinner Meetings" of the Industrial Advisory Board, June, 1934-June, 1935; minutes of the advisory council to the Social Security Board; and letters between officials. *Id.* at 94 n.16, 115 n.37, 116 n.46. The authors note that to "analyze social welfare events of the 1950s, the researcher needs to go beyond the standard accounts of Eisenhower's presidency. . . . Less accessible [than the Social Security Bulletin] but still informative are the memos and other musty papers in Record Groups 290 and 363, records of the vocational rehabilitation program, both stored in the Washington National Records Center." *Id.* at 176.

56. The congressional investigation of the Iran-Contra scandal, documented in the IRAN-CONTRA CONG. REP., *supra* note 44, quoted an unsigned draft National Security Finding (*Id.* at 186), the signed copy of which had been deliberately destroyed (*Id.* at 197), showing that the motivation for arms sales to Iran was the obtaining of a release of hostages, and not the "opening [of] a diplomatic channel with Iran," as later claimed (*Id.* at 186). The IRAN-CONTRA CONG. REP., *supra* note 44, also compared successive drafts of a subsequent Finding to show what various officials understood at particular times. *Id.* at 202. Finally, the Report cited an unsigned cover memorandum and draft Finding to support its conclusion that President Reagan launched the arms-for-hostages deal when he erroneously signed the draft Finding "not realizing that [it] was only a proposal for discussion." *Id.* at 203, 211 n.138.

57. See, e.g., the 1971 conversation between President Nixon and his assistant, John Ehrlichman, during which the President called the Deputy Attorney General and personally ordered him to drop the Justice Department's appeal of an antitrust action to prevent the merger of ITT and Grinnell Corp. See R. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 153 (1979) (transcript of the conversation). The tapes more generally showed the atmosphere in President Nixon's White House Oval Office to be that of "the back room of a second-rate advertising agency in a suburb of hell." Columnist Joseph Alsop, *quoted in* NEW YORK TIMES, *THE WHITE HOUSE TRANSCRIPTS* 3 (1974).

58. See Steven F. Lawson, *Civil Rights*, in *EXPLORING THE JOHNSON YEARS* 93, 117, 118-125 (Robert A. Divine ed., 1981) (list of sources including working papers). Lawson adds that Johnson's "predilection for conducting important business over the telephone" challenges the historian, although the combination of telephone logs, staff memos, "Diary Backup Files" and oral histories helps to fill in the gaps. *Id.* at 117.

59. Lewis L. Gould, *Lady Bird Johnson and Beautification*, in *THE JOHNSON YEARS*, 150, 151, 173-80 (Robert A. Divine ed., 1987) (footnotes include references to inter-office memos; marginal notations handwritten by Secretary of the Interior Stewart Udall and Lyndon Johnson onto memos written by others; and stenographic reports of committee meetings).

60. 1 RICHARD G. HEWLETT & OSCAR E. ANDERSON, JR., *A HISTORY OF THE UNITED STATES ATOMIC ENERGY COMMISSION: THE NEW WORLD, 1939/1946*, at 667-713 (heavily footnoting those sources, among others) and 657-59 (discussing the importance and locations of archives) (1962); 2 RICHARD G. HEWLETT & FRANCIS DUNCAN, *A HISTORY OF THE UNITED STATES ATOMIC ENERGY COMMISSION, ATOMIC SHIELD, 1947/1952*, at 607-718 (notes) and 595-99 (discussion of archives) (1969). The authors of Volume 2 note that the Commission's files include "internal memorandums and

papers,⁶¹ are “the most important records that a scholar needs [to understand] the past foreign relations of the United States.”⁶²

In addition to their long-term historical value, working papers may be of use to citizens or government officials, such as departmental inspectors-general, seeking to hold the government accountable.⁶³ Record-keeping requirements may deter illegal and unethical governmental activity because officials contemplating such activity run a greater risk of being prosecuted on the basis of the records or for destroying them unlawfully.⁶⁴ And to the extent that they clarify the processes of governmental decisionmaking (perhaps particularly in the case of failed poli-

reports, staff papers, correspondence with other Government agencies, contractors and private individuals, summaries of Commission action, and implementing papers. From the subject files alone, the historian can easily trace at least the broad outlines in the evolution of policy.” *Id.* at 595-96.

61. *See, e.g.*, DEPARTMENT OF STATE, XVI FOREIGN RELATIONS OF THE UNITED STATES 1958-1960, EAST ASIA-PACIFIC REGION; CAMBODIA; LAOS 223 (memorandum from Deputy Assistant Secretary of State to Deputy Under Secretary of State), 271 (letter from Director of Bureau of Intelligence and Research to Ambassador in Vietnam), 430 (telegram from Chief of Program Evaluation Office, Laos, to Commander in Chief, Pacific), 610 (informal notes of a telephone conversation between the Secretary of Defense and the Acting Secretary of State), 649 (unsigned memorandum for the record regarding constitutional reform in Laos) (1992); DEPARTMENT OF STATE, XIX FOREIGN RELATIONS OF THE UNITED STATES 1955-1957, NATIONAL SECURITY POLICY 39 (diary entry by President’s Press Secretary), 79 (outline for a speech by the Secretary of State), 154 (undated State Department memorandum on United States and Soviet ballistic missiles (unsigned, but “preliminary drafts” and “internal memoranda,” which obviously were also preserved, “reveal its primary author”), 268 (memorandum of discussion at National Security Council meeting), 299 (memorandum of a luncheon conversation among three cabinet members) (1990).

62. THE RECORDS OF FEDERAL OFFICIALS, *supra* note 34, at 348, 350 (statement of Professor Robert Divine).

63. “Government information . . . is a means to ensure the accountability of government, to manage the government’s operations, to maintain the healthy performance of the economy. . . . Because the public disclosure of government information is essential to the operation of a democracy, management of Federal information resources should protect the public’s right of access to government information.” Revision of OMB Circular A-130, 58 Fed. Reg. 36,071 (1993). Some archivists believe that public accountability, rather than historical value, is the principal argument in favor of long-term preservation of working papers. The desires “of scholars who would like more documentation to understand the development of some particular policy, important as such research needs may be, do not build a case of moral force or urgency. The accountability of public officials for the authority they are given—and through that accountability system the assurance that such authority is always used in the public interest—is a public policy concern that is also affected by the inadequacy of our current laws and regulations.” Letter from Edwin C. Bridges, Director, Alabama Dep’t of Archives and History, to the author (Nov. 3, 1993) (on file with the author). A dramatic example of Dr. Bridges’s point is the recent exhumation of the 1950 memorandum from Dr. Joseph G. Hamilton, an Atomic Energy Commission biologist, to Dr. Shields Warren, then the director of the Commission’s biology and medicine division, warning that the Commission’s experimental administration of radioactive substances to unwitting human subjects has “a little of the Buchenwald touch.” Keith Schneider, *1950 Note Warns About Radiation Test*, N.Y. TIMES, Dec. 28, 1993, at A8.

64. Internal memoranda and electronic mail messages are among the basic raw materials from which extensive histories of the Iran-Contra scandal were constructed. *See, e.g.*, TOWER COMM’N REP., *supra* note 48, at B75-B79, B116-B119, D3-D11 (Feb. 26, 1987); IRAN-CONTRA CONG. REP., *supra* note 44, at 124-25, 182, 298-300. Dr. Edwin C. Bridges says that accountability is not entirely diminished by delayed public access to records, because “people who are participating in or authorizing any action understand that, ultimately, they will be accountable and that the records by which they are accountable will be preserved and opened, whether the [statutory] time frame for that is immediate, in six weeks, or in twenty years [and the time period is always subject to foreshortening by court order].” Letter from Edwin C. Bridges to the author (Nov. 19, 1993) (on file with the author).

cies), records can contribute to the government's own ability to avoid disasters,⁶⁵ even if decades pass before they are opened to general public scrutiny.⁶⁶

Many factors make the destruction of working papers increasingly common. The sheer volume of federal records is probably the biggest problem. By the late 1980s, the paper records of the federal government would have filled a line of four-drawer filing cabinets a thousand miles long,⁶⁷ and the federal government was producing, every four months, as large a volume of records as those produced by all American administrations spanning from George Washington to Woodrow Wilson.⁶⁸ According to one authority, the "main reason" that so many records are discarded is that no one knows what to do with so much paper.⁶⁹ The National Archives, already swamped by the tide of older agency records now beginning to lap at its front door, sends agencies conflicting signals about the preservation of working papers; it is already beginning to receive more material than it can store or process.⁷⁰ National Archives personnel have argued, for example, that the State Department should destroy working files that the Department's historians want to preserve, and the Archives often wins such arguments, resulting in the documents disappearing forever.⁷¹ Requiring agencies to keep and eventually contribute all of their working papers to the Archives might burden future archivists to an even greater extent.⁷²

A second factor contributing to the destruction of working papers is the advent of electronic mail. The arrival of computers and word processing in government

65. See generally RICHARD E. NEUSTADT & ERNEST R. MAY, *THINKING IN TIME: THE USES OF HISTORY FOR DECISION-MAKERS* (1986). The book is a series of case studies that "qualify as horror stories" in which the government officials who were the participants themselves "feel something went wrong [and] looked back and asked, 'How in God's name did we come to do that?'" *Id.* at xiii. "Given that opening, we can ask of each case: If routine staff work had brought into view historical evidence overlooked or not sought, might 'that' not have occurred?" *Id.* The principal academic history of governmental involvement in one notorious disaster, the Three Mile Island nuclear reactor accident, draws heavily both on interview and on government working papers. Its authors note that available records include the Department of Energy's flight logs, Emergency Operations Center logs, duty officer logs, transcripts of taped discussions of Nuclear Regulatory Commission members, and other "raw materials." PHILIP L. CANTELON & ROBERT C. WILLIAMS, *CRISIS CONTAINED: THE DEPARTMENT OF ENERGY AT THREE MILE ISLAND 127-28* (1982).

66. Additionally, preserved working papers may contribute to "protect[ing] the legal . . . rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101 (1988). By providing insight into the meaning of final agency policy decisions, preserved papers can illuminate government policies, much as legislative history can help to illuminate the meaning of a statute.

67. REP. ON RECORDS, *supra* note 2, at 40.

68. *Id.*

69. Interview with Donald A. Ritchie, *supra* note 31.

70. *Id.*

71. Telephone Interview with William Slany, Head of the State Department Historical Office (July 19, 1993). In this interview, Dr. Slany recounted to the author that very recently, the Archives directed the State Department to destroy working files created by desk officers who contributed to United States policy toward Africa. Professor Anna Kasten Nelson believes that the Archives's records managers do not want the Archives to accession working papers. Interview with Anna Kasten Nelson, *supra* note 30.

72. Interview with Donald A. Ritchie, *supra* note 31. On the other hand, electronic storage of most documentation may eventually alleviate this problem significantly. See *infra* text accompanying note 201.

agencies did not by itself present an entirely new set of problems because for the first few years of the computer generation, memoranda written on computers were generally reduced to hard copies which were then sent by messenger, mail, or fax to other offices.⁷³ But direct computer-to-computer communications made it possible for agency officials not only to send drafts and comments between offices without ever reducing them to paper,⁷⁴ but also to delete these drafts with the push of a button. An official holding a paper document has to choose between filing and discarding it, and at least so long as file space remains in a cabinet, might as well save it as throw it away.

In principle, an official looking at an electronic file has the same choices as an official looking at paper files—except that some electronic mail systems give their users very little disk storage space—but deleting an electronic document is actually somewhat easier than figuring out where to store it electronically.⁷⁵ A deletion is not only easier, but more private; the user can eliminate the documents quietly, in the privacy of her office, without even looking at them, whereas paper documents have to be physically taken to the shredder, and a co-worker might question the destruction of a very large volume of documents. Also, for many users it is more difficult to retrieve documents from a large collection of electronic files, most of which have short file names, than from a filing cabinet whose documents can be physically examined. Accordingly, there is a greater tendency to make “obsolete” electronic drafts vanish.⁷⁶

This tendency to destroy records is magnified greatly when the documents are

73. As early as 1984, officials recognized that “unless we get some firm rules in place pretty quickly, a lot of information is going to go down the P.C. [personal computer] rat hole.” William Price, Director of the State Department’s Foreign Affairs Information Center, *quoted in* David Burnham, *Computers Worry Historians*, N.Y. TIMES, Aug. 26, 1984, at A1. On the other hand, the fact that the memos were written on computers potentially made storage of working papers easier, in that the paper copies could be discarded and the drafts preserved on small computer disks. The word “potentially” in this sentence is important, however, because most people who revise texts on computers tend to edit a master draft as they go along and tend not to save successive snapshots of the evolving product. By reflecting the demands of officials who favored policies different from those articulated in the initial draft, those snapshots become windows into the intra-agency and interagency debates that produce the final policy. For most drafters in and out of government, preservation of intermediate drafts is not important. However it is likely that historians will crave the records of officials who develop governmental policies affecting millions of people. Historians will probably also want the intermediate drafts of many non-governmental writers, such as novelists who have won National Book Awards or Pulitzer prizes. These authors, too, might be well-advised to store their early drafts, first on disk, and, perhaps later, in a more durable electronic medium, for posterity. Shakespeare scholars might well shudder at what would have been lost to the world if the bard had revised all of his work on a personal computer.

74. Final decisions, in addition to drafts, may soon be made and distributed electronically. “Soon some agency officials may make choices by electronically checking a box on an electronic option paper sent by electronic mail.” Henry H. Perritt, Jr., *Electronic Records Management and Archives*, 53 U. PITT. L. REV. 963, 974 (1992).

75. “For the first time since the widespread use of the typewriter, officials will have to think about saving or keeping records rather than establishing regulations for their destruction.” REP. ON RECORDS, *supra* note 2, at 31.

76. “End users who have personal computers . . . often do not retain interim drafts, nor multiple versions of policy documents. Marginalia and attachments are also disappearing.” NATIONAL ACADEMY OF PUB. ADMIN., *supra* note 21, at 38.

politically sensitive. In the Iran-Contra scandal in the late 1980s, it turned out that the most important policy communications involving National Security Council staff member Oliver North had been exchanged electronically, and that North had attempted to delete them, only to be foiled because he did not realize that the system automatically backed them up and preserved them for a period of time.⁷⁷ Similarly, at the end of the Reagan and Bush administrations, White House officials intended to purge the White House computer of all electronic mail messages, an activity that would have denied these messages not only to the incoming administrations but also to future historians.⁷⁸ Only the intervention of federal court orders prevented this purging.⁷⁹

When an issue is extremely sensitive, some officials may even attempt to affect policy entirely through oral communication, without making any written or electronic records.⁸⁰ They fear that anything on paper or disk may be discovered by or leaked to journalists or to the officials' opponents within the government.⁸¹

The result of all of these anti-preservation tendencies is that "the government's records are in a near chaotic state. Things get saved randomly."⁸² The Committee on Records of Government has noted that

77. Peter W. Rodman, *Memos to Cover Your Trail*, WASH. POST, July 2, 1993, at A19. The President's National Security Advisor, John Poindexter, deliberately destroyed at least one important document, in violation of records preservation laws, in order to avoid possible incrimination. IRAN-CONTRA CONG. REP., *supra* note 44, at 419.

78. National Security Council officials apparently encouraged staff members to use electronic mail rather than paper for communications precisely because they believed that such records could legally be destroyed. Stephen Labaton, *Preserving History, and Trivia, in Computer Files*, N.Y. TIMES, Jan. 8, 1993, at B14.

79. *Armstrong v. Executive Office of the President*, 810 F. Supp. 335, 338 n.4 (D.D.C. 1993).

80. The Tower Commission discovered that when National Security Council members met to discuss the matters that later became the Iran-Contra scandal, "no formal written minutes seem to have been kept [and] decisions subsequently taken by the President were not recorded." This attitude perhaps reflected the participants' implicit agreement with the view of Stuart Spencer, a campaign strategist for George Bush, who stated "I don't believe in paper. Paper always falls into the wrong hands." Donald A. Ritchie, *Oral Histories May Help Scholars Plow Through the Rapidly Accumulating Mass of Federal Paper*, CHRON. OF HIGHER EDUC., Nov. 2, 1988, at A44. Oliver North may not have known about the backup tapes that were automatically copying his electronic mail (E-mail) messages, but now many people are aware that even deleted E-mail can be recovered, at least for a short while until the backup tape or disk is overwritten. "After Iran-Contra, it is to be doubted whether anyone thinking any untoward or even unconventional thoughts would be so foolish as to communicate them on E-mail, and even less so on paper. [The discovery of the North memos] is a coup that was achievable only once." Peter W. Rodman, *Memos to Cover Your Trail*, WASH. POST, July 2, 1993, at A19.

81. Some observers believe that the tendency to avoid making records is overstated. They suggest that, even at the highest levels, people will not rely on oral conversations because nearly all of them lack complete access to the most senior officials and must communicate by writing or E-mail, and because they want a record to protect themselves from criticism. See THE RECORDS OF FEDERAL OFFICIALS, *supra* note 34, at 40-41 (remarks of General Andrew Goodpaster, Staff Secretary to President Dwight D. Eisenhower); Ronald H. Spector, *Historians Can Handle Data*, WASH. POST, July 16, 1993, at A19. On the other hand, a friend of the author's who is a senior agency official says that he and the other senior officials with whom he communicates type their most sensitive memoranda themselves, leave their names off their work, and throw away similar memoranda that they receive as soon they have read them. He reports that they particularly want to avoid these documents being read by White House staff members; for example, the memoranda sometimes deal with how to obtain the President's or other agencies' backing for policies that White House staff officials (who are sometimes named in the documents) will probably disfavor.

82. Letter from Edward D. Berkowitz, *supra* note 19.

[The government keeps] valueless records haphazardly and at a high annual cost . . . [while] failing to create or retain records which would help them in their current business and permit future generations to reconstruct our nation's history.⁸³ [F]uture historians may know less about the Reagan Administration's 1985 arms control initiatives than about . . . those of 1921 which led to the Washington naval treaties . . . [and] the condition of federal executive branch records is, with rare exceptions, deplorable.⁸⁴

In sum, the "records that document the major plans, programs, policies and technical achievements or failures of agencies frequently do not get identified, processed, and preserved."⁸⁵

II. The Legal Framework

Achieving adequate record-keeping involves (1) developing an adequate legal framework that requires government officials to retain records of historical importance, (2) educating officials regarding the applicable requirements, and (3) enforcing the laws where necessary.⁸⁶ This article deals primarily with the important first step of improving the legal framework so that it more clearly requires preservation of working papers pertinent to the development of significant policies. Once such requirements are in place, they can be implemented by programs of education⁸⁷ and enforcement.⁸⁸

83. REP. ON RECORDS, *supra* note 2, at 10.

84. *Id.* at 9.

85. SOCIETY OF AMERICAN ARCHIVISTS, UNDERSTANDING PROGRESS AS PROCESS, FINAL REP. OF THE JOINT COMM. ON ARCHIVES OR SCIENCE AND TECHNOLOGY 14 (1983), *quoted in* REP. ON RECORDS, *supra* note 2, at 19.

86. My shredding activities in the 1970s, *see supra* notes 18-20 and accompanying text, probably resulted in part from ambiguous law and in part from inadequate education. At that time, the law required continued retention of documents that had been "preserved," but the term "preserved" was not further defined until 1990, and it was not until that year that any laws or regulations were written to govern the preservation of working papers. *See infra* text accompanying notes 167-71. If the law had been less unclear, perhaps the officials in the Archives and the records management officials of my own agency would more easily have guided me and my colleagues.

87. At present, the head of each federal agency is supposed to establish "safeguards" to inform all employees that agency records are not to be destroyed except as permitted by law. 44 U.S.C. § 3105 (1988). In practice, the task of educating employees is delegated to records management officers, but they "have come to occupy relatively low level positions within agencies and many have lacked training," and experienced "greater isolation" and official disregard. REP. ON RECORDS, *supra* note 2, at 20-23. In addition to increasing the status and training of records management officials, the government should routinize the methods through which all employees are given at least minimum orientation to record-keeping. For example, Federal officials who receive security clearances are given security briefings before they are allowed to see any classified documents; similarly, federal officials who help make policy could be given records preservation briefings during their first working day, before they shred or delete any documents. At least minimum training, at the very highest ranks of government, is essential because "[t]op officials . . . rarely, if ever, think about records. Relying upon oral briefings or written memoranda from staff for information, policymakers are isolated from the recordkeeping process." *Id.* at 37. My colleague David Koplow points out that the government's experience with entry briefings for officials who classify documents may betray the limited utility of this type of training. Although officials are told that classified documents must show the name of the classifier and that classification must be injected on a paragraph-by-paragraph rather than document-by-document basis, these procedures are often ignored in practice, particularly with respect to drafts.

88. At present, enforcement of the records preservation laws is the work of appraisers of the National Archives, who sample and survey the record-keeping practices of federal agencies. These appraisers, however, cannot be very effective because there are only 18 of them to monitor the entire

The problem of mandating record-keeping requirements is not a new one. Gradually, Congress has created and modified legislation to make the preservation of the history of American government a systematic and formal requirement, rather than a matter of officials' discretion, and to apply record-keeping requirements to the changing media and formats through which important official information is exchanged. But despite sixty years of frequent legislative effort, Congress still has not written a statute that effectively mandates the retention of all important policy documentation, or even informs officials which working papers should be retained for archival preservation.

WHICH DOCUMENTS SHOULD BE RETAINED?

In 1934, Congress created the National Archives as an independent agency of the United States Government.⁸⁹ This original legislation provided that all agency "records" be "under the charge and superintendence of the Archivist to this extent: [he could inspect records, and he could] requisition for transfer to the National Archives Establishment such archives, or records" as were approved for transfer by a committee of executive, legislative, and judicial officials.⁹⁰ But it did not define "records," either by content or media. Furthermore, the language authorizing the Archivist to "requisition [records] for transfer" did not clearly address the question of whether the Archivist could require agencies to retain in their files particular types of records that they generated, pending an archival requisition, or whether the Archivist could only requisition such records as the agencies saw fit to keep.

In 1943, Congress passed the Federal Records Disposal Act,⁹¹ which permitted the disposal of government documents that appeared to be without "sufficient administrative, legal, research, or other value to warrant their further preservation by the Government."⁹² The Disposal Act permitted document destruction, but agencies that desired to eliminate records had to overcome a presumption in favor of retaining them. The Disposal Act combined what seemed to be a sweeping definition of what constituted a "record" with an arduous procedural mechanism for permitting destruction. Its definition of "records," which is still the principal legal standard for what must be preserved,⁹³ included all "books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics" if they were made in pursuance of law or "in connection with the

federal government. Agency records management officials might fill the gap, but they are concerned primarily with the effective current use of agency records, not with historical preservation. Interview with Frank B. Evans, Deputy Assistant Archivist for Records Administration, National Archives and Records Administration, in Washington, D.C. (Aug. 10, 1993). Empowering the agencies' official historians or providing some public rights of judicial review might increase effective enforcement of the laws. See *infra* text accompanying notes 248-53.

89. Act of June 19, 1934, ch. 668, 48 Stat. 1122.

90. *Id.* at 1122.

91. Pub. L. No. 115, ch. 192, 57 Stat. 380 (1943).

92. *Id.* at 381.

93. *Id.* at 380. The current version differs from the original only in clarifying that records include "machine readable material." 44 U.S.C. § 3301 (1988).

transaction of public business” and “preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data contained therein.”⁹⁴ In order to destroy records subject to the Disposal Act, an agency head would have to list them for the Archivist; the Archivist would have to submit the list to a committee composed of two Senators and a standing House Committee, and this legislative committee would have to approve the destruction or fail to act before the end of the life of its Congress.⁹⁵

At first blush, it is hard to imagine a piece of paper generated in the course of policy development that could be discarded without the permission of the Archivist. If “preserved” means “preserved for any length of time in the user’s files rather than destroyed before filing,” any document that was ever filed would become a “record” under the first clause of this law, and even a document that was never filed would become a federal record, if only as a result of the catchall phrase at the end of the second clause. But “actually filed” is not the only possible interpretation of the word “preserved.” “Preserved” might refer, for example, to the act of keeping a document for a period of time longer than that needed for operational use—preserved, for instance, for possible future or even historical reference. In fact, for nearly fifty years most agencies believed that this statutory language required them to retain only those documents that they chose to retain;⁹⁶ only in 1990 did the Archivist define a “preserved” record to include any record that an official had filed.⁹⁷

Before then, in the absence of official guidance, most officials probably did not think that they were creating federal records governed by preservation statutes whenever they put draft documents into file cabinets or sent electronic messages into computer files, and even today, in the absence of statutory clarification, many officials probably do not know that the act of filing turns a paper or electronic document into a protected record. Working papers are likely to be destroyed hours, days, weeks, or months after their creation, as soon as they are superseded by a subsequent draft or at least when superseded by the issuance of a final paper, report, or policy decision of the government.⁹⁸

94. 57 Stat. at 380.

95. *Id.* at 381-82. The Archivist is no longer required to consult with members of Congress before authorizing agencies to dispose of records. If the Archivist determines that records lack “sufficient administrative, legal, research, or other value to warrant their continued preservation,” he may, after notice in the *Federal Register* and an opportunity for public comment, authorize their destruction. 44 U.S.C. § 3303a.

96. Interview with Frank B. Evans, *supra* note 88. Mr. Evans was the Chair of the Task Force on NARA Responsibilities for Federal Records and Related Documentation. *See infra* note 108.

97. *See infra* text accompanying note 167.

98. In his years in government, the author frequently participated in conversations that went something like this:

“What’s the status of this paper?”

“Oh, that. That’s the August 5 draft of the policy paper. But there’s an August 9 draft, a reworking after we got the August 7 comments from the Defense Department. So that draft is OBE [overtaken by events]. You can put that one in the burn bag [a large paper bag marked ‘BURN,’ although obsolete classified materials were actually shredded rather than burned]. I’ll make you a copy of the new draft.”

In addition, drafts, comments, and electronic messages that are distributed but never filed are not actually “preserved;” for such documents, the next phrase of the statutory definition, requiring retention of material “appropriate for preservation” is critically important. People may reasonably disagree, however, about whether particular drafts and other working papers are appropriate for preservation.

How can an official know whether preservation is appropriate? The rest of the statutory definition seems to set forth two categories of materials that are appropriate, but these parts of the definition have always been subject to a considerable degree of interpretation. First, the materials should be preserved if they are “evidence” of “policies, decisions, procedures, operations or other activities of the government.” Assuming that a final decision document has been retained, it seems difficult to conclude that intermediate drafts and comments (as opposed to the final version) on them are “evidence” of the “policies” and “decisions” that were actually adopted (although, like legislative history, they could at least sometimes shed light on the meaning of the final policy statement). On the other hand, working documents often produce insight about the processes, that is, about the “procedures” and “operations” of the government, even if they do not contribute additional information about the final outcome of such a process. Is the prospect of such insight sufficient to convert the documents into the “evidence” that triggers the preservation requirement? The statute provides no further guidance on this issue.

A second ambiguity in the statute pertains to its requirement that agencies keep documents, whether or not they provide evidence about government policies or procedures, if they are appropriate for preservation “because of the informational value of data contained therein.” This statutory phrase is at least as ambiguous—or as circular—as the “evidence of policies” test. While it can provide an administrator with a rationale for preserving virtually any document he or she thinks should be kept, it fails to establish a standard for an administrator who is unsure about holding onto a document, or for one who is inclined to discard it.

The statutory definition enacted in 1943 raises an additional problem.⁹⁹ It explicitly excludes three types of material: library and museum material acquired solely for reference or exhibition, extra copies of documents, and stocks of publications. These three rather narrow exceptions do not by their terms undercut the government’s duty to preserve its working papers, but they create a conceptual category of “nonrecord” governmental materials, an idea that has fostered an area of dispute.¹⁰⁰

WHO SHOULD DECIDE? THE DECLINE OF THE ARCHIVES’S AUTHORITY

The 1943 Disposal Act leaves ambiguous not only the question of what should be retained, but also the question of who, in doubtful cases, should make that decision. As between the Archivist of the United States and the agency in which

99. Federal Records Disposal Act of 1943, Pub. L. No. 115, ch. 192, 57 Stat. 380 (1943).

100. See *infra* text accompanying notes 126-27, 142, 154-57.

a document was created, who should determine when a document was actually "preserved" or whether it was "appropriate for preservation?" Despite, or perhaps because of, legislation on this subject, a quiet struggle for control has been waged for decades within the executive branch.

In 1949, Congress made the National Archives a part of the General Services Administration; the Archivist, who had been appointed by the President since 1934,¹⁰¹ was now to be appointed by the General Services Administrator.¹⁰² The following year, Congress authorized the Administrator to "establish standards for the selective retention of records of continuing value."¹⁰³ For the first time, it appeared that someone in the government had authority to interpret the ambiguous statutory test and thereby require other government agencies to retain certain kinds of materials. Of course this statutory change did not by itself require the preservation of working papers, but it appeared to allow the Administrator to promulgate standards that could clarify which, if any, working papers would have "continuing value." At the same time, agency heads were directed to create programs for "management" of their records.¹⁰⁴

A few years later, new legislation seemed to give the Administrator "final authority" over various aspects of this management, but considerable confusion ensued about the exact nature of this authority. The 1955 Supplemental Appropriation Act provided funds for "expenses . . . in connection with conducting surveys of Government records, and records creation, maintenance, management and disposal practices," and it also assigned the Administrator final authority over "the conduct of surveys and the implementation of recommendations" based on them.¹⁰⁵ When this language was inserted into the United States Code shortly thereafter, the "records creation" clause of the appropriation was transposed into the "authority" clause. According to the Code, the Administrator had "final authority in all matters involving the conduct of surveys of Government records, and records creation, maintenance, management, and disposal practices in Federal agencies . . . and the implementation of recommendations based on such surveys."¹⁰⁶ In this statute, Congress apparently intended to give the Administrator only the power to conduct surveys of records creation and maintenance.¹⁰⁷ However, by reading the operative clause of the Code version of this language,

101. Act of June 19, 1934, ch. 668, 48 Stat. 1122.

102. Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377, 381 (1949).

103. Federal Records Act of 1950, § 505(b), 64 Stat. 583 (codified at 44 U.S.C. § 2905 (1980)); the Administrator's authority to establish standards was transferred to the Archivist by National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(b)(15)(B), 98 Stat. 2280, 2288 (1984).

104. 64 Stat. at 586 (codified as amended at 44 U.S.C. § 3102 (1984)).

105. Act of Aug. 26, 1954, ch. VIII, 68 Stat. 800, 816 (1954).

106. 44 U.S.C. § 396a (1952 & Supp. V 1958).

107. "It is the intention of the committee that the Administrator contract with private records management specialists for surveys of Government agencies to cover the creation, management and disposal of Government records. . . . [T]he administrator . . . should have broad authority in handling *this program*." S. REP. NO. 2034, 83d Cong., 2d Sess. 38 (1954) (emphasis added). Additionally, the "such surveys" language at the end of the sentence strongly suggests that the "records creation" language was intended to describe the surveys, not to create additional powers.

and particularly the comma after “[g]overnment records,” to mean that the Administrator could perform surveys of records creation, and also exercise authority over records creation, the Administrator interpreted the law to assign him the duty of deciding how records should be created and maintained.¹⁰⁸ In 1968, when Title 44 of the United States Code was enacted as positive law,¹⁰⁹ this language was retained in what became Section 2910 of Title 44 of the United States Code.¹¹⁰

Thus, between 1954 and 1976, the Administrator not only had power to issue standards requiring the retention of records of “continuing value,” but also interpreted Section 2910 to grant him “final authority” over records creation and maintenance. Four developments, however, undercut the Administrator’s power.

First, the “final authority” atrophied because the Administrator never used or invoked it.¹¹¹ Second, the Administrator construed his power to issue standards for “selective retention” to apply only to records at the point at which they ceased to be of any continuing operational interest to the agencies that had created them. In other words, the Administrator believed that the selective retention law applied only to records that had already survived through years or decades and were candidates for metamorphosis into archives, and not to younger records, between the moment of their creation and the time when their creators proposed to dispose of them. As a result, the Administrator never tried to use the “selective retention” power to insist that agencies retain certain types of records.¹¹²

108. National Archives officials, reconstructing the agency’s history, found that “[a]n explicit statement of *final* authority in records practices [as expressed in this section of the U.S. Code] was perceived as crucial even though this authority had never been exercised either by the Administrator of GSA or, through delegation, by the Archivist.” NATIONAL ARCHIVES, NARA AND FEDERAL RECORDS: LAWS AND AUTHORITIES AND THEIR IMPLEMENTATION, A REP. OF THE TASK FORCE ON NARA RESPONSIBILITIES FOR FED. RECORDS AND RELATED DOCUMENTATION 9 (1987) [hereinafter TASK FORCE REP.] (emphasis in original).

109. Public Printing and Documents, Pub. L. No. 90-620, 82 Stat. 1238 (1968).

110. See 44 U.S.C. § 2910 (1971). No legal change was intended either by the original codification (which did not itself have the force of law) or by the 1968 codification into positive law. See S. REP. NO. 1621, 90th Cong., 2d Sess. (1968) reprinted in 1968 U.S.C.C.A.N. 4438, 4440. (“there are no substantive changes made in this bill enacting title 44”).

111. See TASK FORCE REP., *supra* note 108, at 9.

112. Interview with Frank B. Evans, *supra* note 88. In its Report, the Task Force on NARA Responsibilities for Federal Records and Related Documentation considered numerous ways to strengthen the Archives’s authority over record-keeping practices, with and without legislation. TASK FORCE REP., *supra* note 108, at 11-21. At no point, however, did it consider invoking or even amending the “selective retention” statute. 44 U.S.C. § 2905. Mr. Evans attributes this omission to a “myopia” caused by the culture of the archival profession; to an archivist, the concept of “retention” is synonymous with “archival retention,” and “continuing value” means “value that continues after an agency no longer needs a document.” By contrast, to a lay person, and perhaps to Congress, “retention” of an object means simply holding on to it, and “continuing” can pertain to any point of time after creation. Dr. Evans’s colleague, Gary L. Brooks, the lawyer on the Archives’s Task Force on NARA Responsibilities for Federal Records and Related Documentation, recalls that the Task Force thought of the term “selective retention” as giving the Archivist power to determine only the length of time that a document had to be kept, and not providing any authority to establish standards regarding whether documents had to be retained at all. Telephone Interview with Gary L. Brooks, National Archives and Records Administration (Aug. 24, 1993). Congress apparently intended this section to be used by the Administrator, and later the Archivist, to establish standards for selective retention by agencies during their dominion over documents, rather than by the Archives at the time that the agencies intended to dispose of records, and intended it to permit the promulgation of categorical rather than only durational standards. See HOUSE COMM. ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, AMENDING THE FEDERAL PROPERTY AND AD-

The third limitation on the Administrator's authority emerged from a dispute that arose in 1976. As part of a general overhaul of federal records management law, Congress repealed Section 2910, the "final authority" provision.¹¹³ The Administrator, who had erroneously interpreted the law to provide a power that Congress never intended, and one that was in any event redundant, promptly interpreted the repeal, perhaps also erroneously,¹¹⁴ as a divestment of power.¹¹⁵

Notwithstanding the legislative history of the repeal of Section 2910 or his continuing authority to establish standards for selective retention, the Administrator concentrated on trying to regain the apparently lost statutory authority, rather than on treating the new legislation as a mere recodification or trying to use his other powers. In 1982, and in 1984, he circulated legislative proposals within the government to clarify his authority, but "[b]oth efforts were abandoned . . . as a result of real or anticipated opposition by Federal agencies."¹¹⁶

Meanwhile, a few years after repeal of the "final authority" language, the Administrator's power to define federal records was further clouded by the fourth development, a blow to the Administrator delivered by the Department of Justice. While Henry Kissinger served as Secretary of State, his staff monitored and tape recorded his telephone conversations and made summaries or verbatim transcripts of his calls.¹¹⁷

MINISTRATIVE SERVICES ACT OF 1949, H.R. REP. NO. 2747, 81st Cong., 2d Sess. 13 (1950); SENATE COMM. ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, AMENDING THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, S. REP. NO. 2140, 81st Cong., 2d Sess. 14 (1950) (purpose of Administrator's standards was to guide "agencies" in determining the classes and types of records that should be retained). On the Archives's lack of reliance on this authority, see also 36 C.F.R. pt. 1222 (1990) (in the note after the table of contents, § 3905 is not cited as authority for Archives's 1990 issuance of regulations to require creation and maintenance of federal records).

113. Federal Records Management Amendments of 1976, Pub. L. No. 94-575, §§ 2(a), (4), 90 Stat. 2723, 2726 (1976) (repealing 44 U.S.C. § 2910).

114. The impetus for this repeal was not a congressional desire to divest the Administrator of power to control federal document retention policy, but rather to recodify or even to "strengthen" the Administrator's authority over federal records. The repeal was part of a larger overhaul of the Administrator's powers; it was entitled a bill to "amend title 44, United States Code, to strengthen the authority of the Administrator of General Services with respect to records management by Federal agencies, and for other purposes." Federal Records Management Amendments of 1976, Pub. L. No. 94-575, 90 Stat. 2723, 2723 (1976). The committees of both houses of Congress reported that § 2910 "can now be deleted because the authority of the Administrator is stated clearly in the new section 2904." HOUSE COMM. ON GOV'T OPERATIONS, FEDERAL RECORDS MANAGEMENT AMENDMENTS OF 1976, H.R. REP. NO. 1426, 94th Cong., 2d Sess. 9 (1976); SENATE COMM. ON GOV'T OPERATIONS, FEDERAL RECORDS MANAGEMENT AMENDMENTS OF 1976, S. REP. NO. 1326, 94th Cong., 2d Sess. 10 (1976). If Congress really did intend to "strengthen" the Administrator's power in this regard, it did a poor job of it; § 2904 of the new law gave the Administrator power to "provide guidance and assistance" to agencies "with respect to records creation [and] records management." Federal Records Management Amendments of 1976, Pub. L. No. 94-575, 90 Stat. 2723, 2725 (1976), 44 U.S.C. § 2904 (1984). The Administrator's belief that Congress had taken something away, rather than adding something, may also have been fostered by a misleading codifier's note after the repealed § 2910, erroneously stating that the repealed section had "provided for final authority of Administrator in records practices." 44 U.S.C.A. § 2910 (1991) ("Historical and Statutory Notes").

115. "Subsequent action by [the Archives] suggests a lack of confidence in the view that the remaining sum of parts of Chapter 29 might, in fact, be equated with the omitted whole section 2910. . . . [The agency perceived] a need to restore a lost authority." TASK FORCE REP., *supra* note 108, at 9-10.

116. *Id.* at 12.

117. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 140 (1980).

His immediate staff read these documents to follow up on his discussions.¹¹⁸ In 1976, as he was leaving the government, Kissinger removed the documents from the State Department's building,¹¹⁹ granted them to the Library of Congress (which is not subject to the Freedom of Information Act),¹²⁰ and precluded public access to them for at least 25 years.¹²¹ In removing the documents and deeding them to the Library with this restriction, Kissinger did not consult with the Archivist or the Administrator of General Services, and he denied the Archivist's request to inspect the documents to determine whether Kissinger had any right to remove them from the State Department.¹²² Organizations of journalists, historians (the American Historical Association), and political scientists (the American Political Science Association) sued for access to the documents under the federal records legislation and the Freedom of Information Act. After some initial victories,¹²³ they lost in the Supreme Court on the grounds that even if Kissinger did unlawfully remove the documents from the State Department, the exclusive remedy is for the Department of Justice, not private parties, to sue him for their return, and that a Freedom of Information suit could not be used to seek access to records that had already been removed, even if improperly, from agency control.¹²⁴ The Department of Justice did not attempt to require return of the documents to the State Department.¹²⁵

After the Supreme Court dismissed the Freedom of Information lawsuit, Kissinger and the State Department worked out a plan for review of the documents by a special team of State Department officials and retired officials. The team would first separate out "personal and private" information and then further separate the remaining materials, all of which related to official business, into information that had "record value" and information lacking "record value." This distinction, very loosely based on the existence of three explicit statutory

118. Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Allie B. Latimer, General Counsel, General Services Administration (Jan. 13, 1981) (on file with author) [hereinafter OLC Memorandum].

119. Secretary Kissinger's removal of records appears not to have been unique. In 1991, the General Accounting Office (GAO) studied document removal by President Reagan's last two Secretaries of Defense, Justice, State, and Treasury. The GAO found that all of the Secretaries had removed documents when they left office; that two of the four agencies did not know whether records had been removed; and that half of the officials' document collections reviewed included original (and sometimes classified) material. GENERAL ACCOUNTING OFFICE, GAO/GGD-91-117, FEDERAL RECORDS: DOCUMENT REMOVAL BY AGENCY HEADS NEEDS INDEPENDENT OVERSIGHT (Aug. 1991).

120. *Kissinger*, 445 U.S. at 145.

121. Public inspection was precluded until the later of 25 years after the transfer, 5 years after Kissinger's death, or the death of the other parties to any particular conversation. *Id.* at 141-42.

122. *Id.* at 140, 144. Note that although Kissinger chose to transfer the documents to the Library of Congress with restrictions, if he had a right to remove and dispose of them in this manner he could also have destroyed them altogether. No analysis of the arrangement, by the courts or by the Justice Department, cited the deed to the Library of Congress as whole or partial justification for Kissinger's actions. To the extent he could remove the materials from the State Department and make his own decisions about their disposition, the justification had to be based on a determination that the materials were not covered by records preservation legislation, or that the government had lawfully waived its right to them, or that no one who could invoke a remedy against Kissinger had elected to do so.

123. Reporters Comm. for Freedom of the Press v. Vance, 442 F. Supp. 383 (D.D.C. 1977), *aff'd*, 589 F.2d. 1116 (D.C. Cir. 1978).

124. *Kissinger*, 445 U.S. at 148, 154.

125. *Id.* at 148.

exclusions from the definition of “records,”¹²⁶ mirrored the efforts, after enactment of the Freedom of Information law, through which a “number of agencies attempted to exclude certain types of information from disclosure by labeling the materials containing such information as nonrecord.”¹²⁷ Copies of the material with “record value” would be provided for State Department files, and the remainder could be disposed of as Kissinger desired.¹²⁸ The General Services Administrator objected to this negotiated arrangement, which excluded him from reviewing the papers or from establishing applicable preservation guidelines. The Administrator may have been particularly skeptical of the State Department’s commitment to historical preservation, because the Department’s Records Management Handbook explicitly stated that “rough drafts and working papers [may be] disposed of as soon as they have served their purpose.”¹²⁹

The dispute between the State Department and the Administrator was referred for resolution to the Office of Legal Counsel in the Justice Department.¹³⁰ The outcome at the Office of Legal Counsel was foreshadowed by a position taken by the Justice Department in a brief in the Freedom of Information Act litigation, on an issue the court never reached because of its holding that private parties lacked standing to sue.

In that brief,¹³¹ Justice had urged that agencies such as the State Department had discretion to decide whether materials were “appropriate for preservation” within the meaning of federal records laws.¹³² Similarly, in its opinion excluding the General Services Administrator from reviewing the Kissinger documentation, the Jus-

126. See *supra* text accompanying note 99-100.

127. TASK FORCE REP., *supra* note 108, at 6. In this period, when the Archives had no regulations regarding preservation of working papers, some officials also believed that writing the word “draft” on a document would prevent it from becoming a federal record subject to preservation and disclosure laws. Telephone Interview with Anna Kasten Nelson, *supra* note 30.

128. OLC Memorandum, *supra* note 118, at 3-4.

129. *Id.* at 7 (quoting DEPARTMENT OF STATE, RECORDS MANAGEMENT HANDBOOK, ¶ 271-272).

130. In a Supplemental Memorandum of Law submitted by the General Services Administrator to the Justice Department, the Administrator conceded, in response to a question from the Justice Department regarding whether the Archives’ position was consistent with the Justice Department’s brief in the *Kissinger* case, that “working drafts prepared prior to a final product are nonrecord and may be disposed of without the consent of [the Archivist].” Letter from Allie B. Latimer, General Counsel, General Services Administration, to John M. Harmon, Assistant Attorney General 2 (Dec. 23, 1980) (on file with author) and accompanying memorandum. Perhaps the General Services Administration (GSA) took this position to try to salvage something from what seemed to be a losing case. The GSA then unsuccessfully staked its argument on the claim that the Kissinger transcripts were neither “working drafts” or “working files.” *Id.* The GSA concession was consistent with the emerging theory that “nonrecord” documents could exist in categories other than those explicitly created by Congress. See *supra* text accompanying note 126. It may have represented the lowest point of the Archives’ assertion of authority over working papers. Ten years later, the Archives took the opposite position on this issue. See *infra* note 170 and accompanying text.

131. Brief for the Federal Parties, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980).

132. See *supra* text accompanying note 98. In its brief, the Justice Department argued that “[w]hat is ‘appropriate for preservation’ by one agency may be waste paper for another [so each] agency head must determine the proper balance . . . and must determine the extent to which rough notes and work aids should be retained as agency records.” Brief for the Federal Parties, *supra* note 131, at 27-28.

tice Department concluded that “GSA is not authorized to promulgate standards or guidelines that have binding effect on the agency’s determinations as to whether a document constitutes a ‘record.’”¹³³ The Justice Department quoted a House Report¹³⁴ stating that the purpose of the original records disposal law was to “place the responsibility in the first instance upon the agencies for determining what documentary materials should and what should not be preserved.”¹³⁵ When the Administrator accepted this view for purposes of argument but nevertheless claimed a supervisory role, the Department distinguished between the Administrator’s authority to issue “regulations” governing interagency transfers of records and its power only to promulgate “standards, procedures and guidelines” with respect to records management.¹³⁶ The Department summarily concluded, without any further analysis, and without considering the possibility that the authority to issue “standards” might be more compelling than the authority to issue “guidelines,”¹³⁷ that “[s]uch *guidelines* are without binding effect,” and that “nothing . . . requires an agency to follow GSA’s decisions as to whether documents are ‘records,’ or even to allow GSA to participate in the identification process.”¹³⁸

133. OLC Memorandum, *supra* note 118, at 6. The Department cited the fact that when the definition of a “record” became law in 1943, the Archivist did not yet have any authority to determine what records should be maintained, and it did not consider whether the Archivist’s duties might have been expanded by the subsequent legislation.

134. H.R. REP. NO. 559, 78th Cong., 1st Sess. 1 (1943).

135. OLC Memorandum, *supra* note 118, at 6.

136. *Id.* at 12. Curiously, the memorandum referred only to the standard-issuing authority of 44 U.S.C. § 2904 (1988) (standards with respect to records *management*) and not to the standard-issuing authority of § 2905 (standards for the *selective retention* of records of continuing value). However, the Department’s analysis presumably would have been the same, since neither section uses the word “regulation.”

137. Congress has often granted agencies the power to issue binding regulations by using language empowering them to promulgate “standards.” The Consumer Product Safety Commission promulgates consumer product safety “standards.” 15 U.S.C. § 2056(a)(1) (1988). The Secretary of Transportation issues federal motor vehicle safety “standards.” 45 U.S.C. § 1392(a) (1988). The Secretary of Labor promulgates occupational safety and health “standard[s].” 29 U.S.C. § 655 (1988). Of course Congress could have meant something different by the word “standards” in its grant of the Archivist’s authority under § 2904 than it did in these other statutes. But the Justice Department did not explore the issue at all.

138. OLC Memorandum, *supra* note 118, at 12 (emphasis added). The Justice Department refrained from going so far as to conclude that an agency could agree to regard notes of important conversations as “nonrecords” that could be discarded. It construed the State Department’s existing records management regulations to require Kissinger to have made substantially complete contemporaneous permanent Departmental records of his telephone conversations, and it concluded that if he did not do so, “either the notes themselves or extracts thereof [sic] must be returned to the Department of State. Employees are not permitted to prepare extracts of existing records and then to discard the records.” *Id.* at 8 n.6. The Kissinger-State agreement, giving Kissinger control over material lacking “record value,” had to be interpreted in this light, making it unnecessary for the Justice Department to consider whether the State Department would abuse its discretion by allowing Kissinger to keep, dispose of, or restrict access to the only copies of significant information. *Id.* Accordingly, if, after the Justice Department’s determination, the State Department’s review team adhered faithfully to the guidance from Justice (and if, despite the ambiguity noted above, Kissinger was not allowed to write post-facto “extracts” of his conversations for the Department’s files), any important information in the Kissinger records was preserved for the Department, and the principal result of the Justice Department’s opinion was to cast doubt on the authority of the General Services Administrator and Archivist of the United States to play a future role in defining what agency documents had to be retained by the government.

WHO SHOULD DECIDE? REASSERTION OF THE ARCHIVES'S AUTHORITY

After its loss of explicit legislative "final authority" and the apparent blow dealt to its residual authority by the Justice Department, the General Services Administration went into a period of withdrawing from any effort to determine federal record-keeping policy.¹³⁹ Nevertheless, Congress was already in the process of again addressing federal records law, and its activities enhanced the status and assertiveness of the National Archives.

The new spurt of congressional activity resulted from another scandal involving the Archives. In 1969, President Richard Nixon gave a quantity of his pre-presidential papers to the Archives and claimed a tax deduction of \$482,018. The Archivist believed that a fraud might have been committed and reported that suspicion to Nixon's General Services Administrator, Arthur Sampson, who did not take action. During the Watergate investigation, the tax deduction claim was revealed by the *Washington Post*, and it was eventually disallowed. Sampson believed that the office of the Archivist had leaked the information to the *Post*, and he divested the Archivist of duties previously delegated to him. Then, after Nixon resigned, and without consulting the Archivist (who objected when he learned about it), Sampson signed a letter of agreement with Nixon in which he agreed, among other things, to the eventual destruction of the White House tapes that Nixon had clandestinely recorded while President.¹⁴⁰

Congressional outrage at Nixon's attempt to control and even destroy records he had generated while President led to passage of a law invalidating the agreement and establishing a "blue ribbon" National Study Commission on Records and Documents of Federal Officials.¹⁴¹ The Commission surveyed current records practices and recommended new legislation. It found that

- Presidents leaving office traditionally removed from the White House files virtually all incoming correspondence from heads of state, United States officials, members of Congress and members of the public, as well as all the correspondence, memoranda, reports and other papers written by the President and his staff, and whatever papers the President regarded as most "politically sensitive";
- they also removed many records generated by the National Security Council staff, including 'briefing materials for the President, records of negotiations with foreign governments [and] directives to agencies . . . on foreign affairs;'
- recent Presidents had given most but not all of their papers to Presidential libraries, although, except for the Nixon papers which had been regulated by Congress, no President had an obligation to refrain from destroying his papers, and no law precluded

139. See TASK FORCE REP., *supra* note 108, at 9-11.

140. Bruce F. Adams, *A Study of the Relationship Between the General Services Administration and the National Archives and Records Service*, in THE RECORDS OF FEDERAL OFFICIALS 285 (Anna Kasten Nelson ed., 1978).

141. The Nixon-Sampson agreement was invalidated by Title I of Pub. L. No. 93-526, 88 Stat. 1695 (1974), which was upheld against Nixon's constitutional challenge in *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425 (1977). Title II established the Commission. For a more detailed history of the creation of the Commission, see NATIONAL STUDY COMM'N FINAL REP., *supra* note 35.

Presidents from imposing severe restrictions on public access when donating papers to libraries;

- the preservation of most non-presidential (that is, agency) records was already mandated by law, but the Code of Federal Regulations provided that “preliminary worksheets and similar papers that need not be made a matter of record” are non-record material.’’¹⁴²

With respect to presidential and vice-presidential records, the Commission made ten recommendations, and these proposals generated new legislation that, for the first time, regulated the disposition of presidential records.¹⁴³ With respect to records made by other executive branch personnel, however, the Commission concluded that “existing laws and regulations have, in general, led to the retention in agency files of those materials which are required for the conduct of ongoing government business and which will adequately provide the public with information concerning governmental organization and activities.”¹⁴⁴ It therefore made only one “recommendation” regarding records retention by agencies, and this “recommendation” proposed no changes to clarify the law or regulations.¹⁴⁵

The Representative of the Librarian of Congress on the Commission took issue with the majority’s statement in the Final Report (not embodied in a recommendation), to the effect that “personal” papers should be narrowly defined. In the course of urging the Commission to suggest a new category of documents (official papers to which an official could nevertheless restrict access for a period of years),¹⁴⁶ she

142. NATIONAL STUDY COMM’N FINAL REP., *supra* note 35, at 14-19. The Commission was referring to 41 C.F.R. § 101-11.401-3(d) (1976), which provided that “nonrecord materials, such as . . . preliminary worksheets, and similar papers that need not be made a matter of record, shall not be incorporated in the official files of the agency . . . [and] shall be disposed of; it should not be sent to file.” The Commission did not comment on the fact that the *legislation*, with its three specific exempted categories of nonrecord material, *see supra* text accompanying note 99, did not provide an exemption for “preliminary worksheets and similar papers.” Nor did it comment on how broadly it construed this exception to extend; that is, whether all working drafts, comments, and correspondence preliminary to the issuance of a government policy were “similar” to preliminary “worksheets.” If the term “worksheets” was intended to refer primarily to the preparatory work attendant on filling out forms, such as the worksheets contained in the instruction manual for filling out federal income tax forms, it is hard to see how draft *policy* statements or early drafts of proposed legislation, for example, could be regarded as “similar.” Eventually, resolving this ambiguity was rendered unnecessary by elimination of the regulation after the creation of the National Archives and Records Administration.

143. Presidential Records Act of 1978, Pub. L. 95-591, 95 Stat. 2523 (1978) (codified at 44 U.S.C. §§ 2201-2207 (1988)).

144. NATIONAL STUDY COMM’N FINAL REP., *supra* note 35, at 33.

145. The “recommendation” was that “[a]ll documentary materials produced or received by appointed officials in Federal agencies and concerning official agency business are Federal records, and are subject to all laws and regulations applying thereto.” *Id.* at 32. The problem with this “recommendation” was, of course, that the existing laws and regulations were extremely ambiguous, giving officials little guidance about what working papers, if any, were valuable enough to warrant retention. In defense of the Commission, it should be noted that it had been created as a result of the Nixon scandal, involving the issue of who *owned* a record rather than what *constituted* such a record or who *determined* what constituted a record. On the other hand, in view of the dissenting comments by the Commission members from the Library of Congress, *see infra* notes 146-48, the majority might have been more attentive to the problem that to the extent that documents are excluded from the definition of “records,” their creators or others are free to remove or destroy them.

146. The dissenter’s recommendation is not explicit, but it can be discerned from the majority’s response. *See* NATIONAL STUDY COMM’N FINAL REP., *supra* note 35, at 33.

called attention to the fact that vagueness in existing definitions of public records had led to "the administrative caprice that exists today."¹⁴⁷ She specifically cited (apparently with approval) a 1972 letter from the Archives to federal officials, urging them to donate their "working drafts and notes, used and unused; notebooks . . . [a]ppointment calendars; [and] logs of telephone calls" to the proposed Nixon Library.¹⁴⁸ Of course, if an official had the right to donate such papers, the official had dominion over them, and they could not be public property. Accordingly, they could be donated to a private manuscript collection under a deed of gift limiting public access for generations,¹⁴⁹ and they could even be destroyed.

Although the Commission did not accept this challenge to clarify the definition of public records, electing to rely, instead on prevailing regulations, it did make an additional recommendation that ultimately led to a further tilt in the direction of archival preservation. Reflecting the fact that the agreement between President Nixon and his General Services Administrator had been only the latest episode in which the Archives had been made to serve the interests of political leaders, it urged that the Archives be made "independent of the General Services Administration and insulated from partisan political influences."¹⁵⁰

Congress eventually accepted this suggestion; in 1985, it liberated the National Archives from the General Services Administration, creating the National Archives and Records Administration, headed by a presidentially appointed and senatorially confirmed Archivist.¹⁵¹ Two years later, the Archivist appointed a task force to review, among other things, the Archives's responsibilities for "interpreting the definition of records."¹⁵² The task force found that "particularly after 1950," the Archives had encouraged agencies to discard rather than preserve the records they were not using, basing this advice on the statutory distinction between records and papers that were not records.¹⁵³ Although the statutory exclusions were very explicit and limited,¹⁵⁴ the Archives had "cautioned against cluttering up office files with extra copies and 'other' nonrecord materials."¹⁵⁵ After enactment of the Freedom of Information Act, agencies had increased the rate at which they characterized documents as "nonrecords," in order to facilitate destruction and avoid public disclosure.¹⁵⁶

147. *Id.* at 47.

148. *Id.* at 48 (quoting National Archives and Records Service, Donation of Personal Papers to the Richard Nixon Library, November, 1972).

149. The Library of Congress honors donors' intentions and is therefore willing to accept manuscript collections with restrictions on access for as long as fifty years. Telephone Interview with Anna Kasten Nelson, *supra* note 30.

150. NATIONAL STUDY COMM'N FINAL REP., *supra* note 35, at 43.

151. Pub. L. 98-497, 98 Stat. 2280 (1984) (codified in 44 U.S.C. § 2101-03 (1988)). The legislation became effective in April, 1985.

152. Memorandum from Frank B. Evans to the acting Archivist of the United States, transmitting *First Report of Task Force on NARA Responsibilities for Federal Records and Related Documentation* (Oct. 19, 1987) (citing July 23, 1987 Memorandum from the Archivist establishing the Task Force), *reprinted in* TASK FORCE REP., *supra* note 108.

153. TASK FORCE REP., *supra* note 108, at 6.

154. See *supra* note 99 and accompanying text.

155. TASK FORCE REP., *supra* note 108, at 6.

156. *Id.*

In 1981, the task force found, the Archives had published a records management handbook for federal agencies in which it had said that certain materials “may” be nonrecord, including working papers and drafts of reports.¹⁵⁷ But the handbook had offered no guidance to the agencies to enable them to distinguish working papers and drafts that should be regarded as records and those that should not.¹⁵⁸ A draft revision circulating within the Archives in 1987 had apparently deleted even this degree of specificity.¹⁵⁹

The task force made two kinds of recommendations. First, it claimed that the Archives already had power to “prescribe or promulgate regulations” to obtain adequate documentation.¹⁶⁰ It suggested that it use that authority to write new guidance to agencies regarding which records were “appropriate for preservation.”¹⁶¹ The task force proposed issuing, in the Code of Federal Regulations, an “authoritative interpretation” that “this phrase refers to documentary materials that, because of the evidence or information they contain, should be filed, stored or otherwise systematically maintained”¹⁶² Of course this “authoritative interpretation” would have begged the basic question of who should be the judge of whether the information justified storage of a document, or by what criteria. It is not clear why the task force, so clearheaded in other respects, failed to perceive the circularity of its proposal.

In addition, despite its view that the Archives continued to have sufficient legal power, the task force realized that as a practical matter, the repeal of the “final authority” language and the opinion of the Office of Legal Counsel on the Kissinger transcripts had reduced the Archives’s clout within the government.¹⁶³ It therefore recommended new statutory language under which the Archivist could “promulgate regulations . . . establishing standards for interpreting the definition” of “records.”¹⁶⁴ The Archives subsequently endorsed the call for new legislative authority to permit it to issue binding regulations.¹⁶⁵

THE NEW REGULATIONS

No legislation to enhance the Archives’s defining power was enacted, but the Archives did promulgate regulations to define the statutory terms “preserved”

157. *Id.* at 7.

158. *Id.*

159. *Id.* at 7. In 1992, the Handbook was finally revised. See *infra* note 171.

160. TASK FORCE REP., *supra* note 108, at 12.

161. *Id.* at A-2.

162. *Id.*

163. *Id.* at 10-11.

164. TASK FORCE REP., *supra* note 108, at 15. The task force regarded this change as “the single most important addition that can be made to existing authority” and suggested (perhaps erroneously, because the proposal never became law) that “[t]here is reason to believe that it may meet with only minimal opposition by executive agencies.” *Id.* at 15.

165. The Archives agrees that “responsibility to make specific determinations is appropriately vested in agency heads. . . . Nevertheless, we believe that [the Archives] could more effectively carry out its statutory responsibilities if the Archivist had authority to issue binding regulations providing criteria which agency heads must apply in making determinations of record status.” National Archives and Records Administration, Management, Preservation and Access for Electronic Records with Enduring Value, Response to Recommendations (on file with the author) as they were made in HOUSE COMM. ON GOV’T OPERATIONS, TAKING A BYTE OUT OF HISTORY: THE ARCHIVAL PRESERVATION OF FED. COMPUTER RECORDS, H. REP. NO. 101-978, at 19 (1991).

and "appropriate for preservation."¹⁶⁶ The new regulations provided that materials were preserved when they were filed.¹⁶⁷ For the first time, it was clear as a matter of law that a document became a federal record, subject to the laws against unauthorized disposition, when first filed.¹⁶⁸

In addition, for the first time in its history, the Archives explicitly issued guidance on "working files,"¹⁶⁹ requiring them to be maintained if they were circulated for comment or action and contained unique information, such as comments, that added "to a proper understanding" of policy formulation or execution.¹⁷⁰ To emphasize its policy change, the Archives issued a bulletin to all agency records officers, calling their attention to the fact that the "new regulations . . . for the first time provide detailed *mandatory* guidance about how to determine what informational materials are federal records Included are guidelines about when to regard 'working papers' as Federal records."¹⁷¹

In its new regulations, the Archives came close to avoiding the circularity of

166. 36 C.F.R. § 1222.12(b)(5) (1993).

167. 36 C.F.R. § 1222.12(b)(5) (1993) now states that "[p]reserved means the filing . . . [of] documentary materials." This regulation was preceded two years earlier by a "Bulletin" from the Archives containing essentially the same definition, but the Bulletin was not at that time published in the *Federal Register* as a binding regulation. NATIONAL ARCHIVES AND RECORDS COMM'N, BULL. No. 89-2, DISPOSITION OF FED. RECORDS AND PERSONAL PAPERS 3 (1988).

168. Bold as this step was, the Archives was more cautious in dealing with documents that were never filed, such as documents that went directly from a bureaucrat's desk to her wastebasket or shredder. Documents considered "*appropriate for preservation*" included only those materials "which *in the judgment of the agency* should be filed, stored, or otherwise systematically maintained by an agency. . . ." 36 C.F.R. § 1222.12(b)(6) (1993) (emphasis added).

169. As the Archives uses the term, "working files" are "[a]lso called working papers." NATIONAL ARCHIVES AND RECORDS ADMIN., A FED. RECORDS MANAGEMENT GLOSSARY (2d ed. 1993). As originally proposed in the *Federal Register*, the regulation governed "working papers." 55 Fed. Reg. 740 (1990) (to be codified at 36 C.F.R. §§ 1220, 1222, and 1224). However, the Archives "changed the term 'working papers' to 'working files' to highlight that working copies of electronic records are also covered." 55 Fed. Reg. 27,422 (1990) (to be codified at 36 C.F.R. § 1220, 1222, and 1224).

170. 36 C.F.R. § 1222.34(c) (1993). The full text reads:

Working files, such as preliminary drafts and rough notes, and other similar materials shall be maintained for purposes of adequate and proper documentation if: (1) They were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and (2) They contain unique information, such as substantive annotations or comments included therein, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities.

Id. In addition, the Archives issued a "Management Guide," in which it stated that "diaries, journals, notes, and personal calendars and appointment schedules" comprise a category of papers that is "difficult to distinguish from records because of its work-related content." NATIONAL ARCHIVES & RECORDS ADMIN., PERSONAL PAPERS OF EXECUTIVE BRANCH OFFICIALS: A MANAGEMENT GUIDE 6 (1992). It said that determination of the record status of these documents would have to be made on a case-by-case basis, taking into account such factors as whether they were created on agency time with agency materials; whether they were created solely for the employee's personal convenience, whether they were used or shown to anyone else, and whether they were placed in agency files. *Id.* at 6-8. This pamphlet was not issued through publication in the *Federal Register* and does not purport to have the status of a binding regulation.

171. Memorandum from James W. Moore, Assistant Archivist for Records Administration, to Agency Records Officers (July 24, 1990) (on file with the author). The Archives also revised its Handbook to reflect the new regulation. NATIONAL ARCHIVES AND RECORDS ADMIN., DISPOSITION OF FED. RECORDS, A RECORDS MANAGEMENT HANDBOOK II-3 (1992).

previous definitions, but it missed by two whiskers. The new provision on working files was a big step forward, in that at least the Archives specified that something in addition to final versions of documents was valuable for historical purposes. But the Archives was apparently unable to avoid a critical fudge word that significantly reduced the value of the new provision as guidance: the word “proper.”

Without this word, the new regulation would have required agency personnel to try to preserve all working papers that contributed to understanding the formulation of policy. Thus, most early drafts of a policy paper and the comments received when it was circulated would have been required to have been preserved because (except when the changes merely correct typographical errors or are otherwise trivial) such documents add, even if only incrementally, to an “understanding” of policy formulation. The insertion of the word “proper” meant that only some papers had to be saved. Papers or electronic records that, in the judgment of some unspecified person (presumably the person who wrote or circulated the document)¹⁷² might *misguide* a historian’s understanding of the development of the policy, or papers that, in the opinion of the drafter *added little because the final document would serve as sufficient explanation* could be discarded. Certainly these rationales would be available to a bureaucrat inclined to jettison drafts that did not reflect well on him or her, or on a superior, or that made the final document look poor by comparison.

Although the inclusion of this fudge word may have resulted only from the “normal bureaucratic propensity for verbosity,”¹⁷³ it was more likely influenced by the ambivalence felt by Archives personnel with respect to the propriety of dictating to agencies. According to the drafter of this language, “in the back of my mind there was a reluctance on the part of some policymakers in the Archives about saying anything on the subject of records maintenance, so I may have wanted to write in a loophole for those who wanted to see loopholes.”¹⁷⁴

172. This is not a necessary interpretation. A regulation could require a person who writes and circulates a document to submit all drafts and comments to someone else—a superior or a records officer—and leave to that other person’s judgment whether the drafts and comments should be retained. But that is not how the process is likely to work, at least without a specific requirement for independent review. In practice, unless the people who generate documents take some responsibility for preserving their own work for history, no one else is likely to do it for them. In fact, no one is likely to get the chance to do so, because the drafts will be discarded as soon as they start clogging up the originator’s file cabinet.

173. Telephone Interview with Bill Leary (Aug. 12, 1993) (drafter of NARA regulation).

174. *Id.* Documentation of the drafting of the regulation might shed further light on why the word “proper” was included, but the Archives’s file on the regulation begins with a full-blown draft that was circulated to senior Archives officials on July 28, 1989. This draft already includes the word “proper,” and the entire “working files” section had very few changes thereafter, with no other official questioning this word. Memorandum from John A. Constance, Director, Policy and Program Analysis Division, to Office Heads and Staff Directors, File 102-1, NARA Regulation Case File, Creation and Maintenance of Records.

The drafter’s first drafts or other notes on the drafting process may not have been discarded immediately, but, in any event, they are not part of the case file, and the drafter does not know where they are. Interview with Frank B. Evans, Deputy Assistant Archivist for Records Administration, in Washington, D.C. (Aug. 11, 1993); Telephone Interview with Bill Leary, *supra* note 173. Thus the National Archives apparently lacks the early drafts of its regulation requiring the retention of early drafts of regulations, although to be fair to the Archives, its regulation would not require preservation of these drafts unless they were “made available to employees, other than the creator, for official purposes such as . . . comment. . . .” 36 C.F.R. § 1222.34(c)(1) (1993).

In addition, the new explanation of “appropriate for preservation” was no help at all, not only because it left all decisions on what to file or store entirely up to the agencies,¹⁷⁵ but also because the “should be filed” test has no objective referent; a bureaucrat wanting to know whether a particular draft memorandum, not yet filed and therefore “preserved,” is “appropriate for preservation” is not better informed when told that the answer to the question depends on whether it “should be filed.”¹⁷⁶

THE ARMSTRONG LITIGATION

The most recent chapter in the legal history of the regulation of destruction of federal historical records consists of the flurry of orders and opinions in the *Armstrong* litigation, challenging the efforts of senior Reagan and Bush administration officials to destroy the electronic mail records of the White House.¹⁷⁷ In 1989, after President Reagan had indicated his intention to purge the White House electronic mail system of its entire contents, a non-profit privately operated public records library sued to require that this information be transferred (subject to the statutory access restrictions) to the Archivist and therefore saved from destruction.¹⁷⁸ The plaintiff invoked two sets of laws: the legislation described above (collectively known as the Federal Records Act),¹⁷⁹ which governs record preservation by federal agencies, and the Presidential Records Act,¹⁸⁰ which had been

Still, the disappearance of these drafts is perhaps a harbinger of how difficult it will be for the Archives to train the entire federal government to retain drafts that may be of interest only far in the future. As one senior Archives official put it, “we have 18 appraisers to cover the entire government. We have to rely on the agencies [to comply] but their records managers are not really concerned about historical documentation; they are concerned with current usage.” Interview with Frank B. Evans, *supra* note 88.

175. In this respect, the regulation was entirely at odds with the thrust of the task force report that had recommended clarifying this definition. See TASK FORCE REP., *supra* note 108, at 2, A-2 (similar language proposed, but without the explicit language referring to agency judgment).

176. Ironically, the regulations through which the Archivist set standards for retaining papers, including working papers that were actually filed, was issued simultaneously with the new definition of “appropriate for preservation,” through which agencies themselves, not the Archivist, were to decide what to keep and what to discard with respect to records, including working papers, that were not yet filed. The Archives’s compromise between regulating and deferring to agency discretion may reflect the fact that, as the regulation’s drafter put it, “there has long been an ambivalence in [the Archives] about how to deal with this material.” Telephone Interview with Bill Leary, *supra* note 173.

177. See *supra* text accompanying note 5. The series of reported decisions consists of *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993); *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991); *Armstrong v. Executive Office of the President*, 823 F. Supp. 4 (D.D.C. 1993); *Armstrong v. Executive Office of the President*, 821 F. Supp. 761 (D.D.C. 1993); *Armstrong v. Executive Office of the President*, No. 89-412, 1993 U.S. Dist. LEXIS 356 (D.D.C. Jan. 14, 1993); *Armstrong v. Executive Office of the President*, 810 F. Supp. 335 (D.D.C. 1993), *aff’d*, 1 F.3d 1274 (D.C. Cir. 1993); *Armstrong v. Bush*, 807 F. Supp. 816 (D.D.C. 1992); *Armstrong v. Bush*, 721 F. Supp. 343 (D.D.C. 1989).

178. The moving force behind the litigation was the National Security Archive, founded by Scott Armstrong, who earlier had co-authored a well-known book purporting to describe the inner workings of the Supreme Court. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979).

179. See 44 U.S.C. §§ 2101-2118, 2901-2909, 3101-3107, and 3301-3324 (1988).

180. 44 U.S.C. §§ 2201-2207 (1988).

passed by Congress in 1978 in reaction to President Nixon's attempt to exercise complete control over the records of his presidency.¹⁸¹ Under the Presidential Records Act, when a President's term expired, the Archivist was to take custody of his presidential records, although public access to major categories of those records, including "confidential communications requesting or submitting advice" could be restricted by the outgoing President for twelve years.¹⁸² The Reagan administration was the first to which the new law applied.¹⁸³

During the Bush administration, the Justice Department interposed several procedural objections to the lawsuit, but the case continued to move through the courts. In 1991, the Court of Appeals held that White House personnel or offices that only advised the President and had no statutory duties were subject to the Presidential Records Act but could not be sued under either that Act or the Administrative Procedure Act. However, other White House offices, including the Office of Management and Budget and the National Security Council (NSC), generated ordinary federal records and could be sued under the Administrative Procedure Act for violations of the Federal Records Act.¹⁸⁴ As a result of a stipulation in the litigation, the NSC and other tapes were preserved while the lawsuit lurched forward.¹⁸⁵

In January 1993, for the first time, the court reached the merits of the controversy about whether computer tapes were federal records. Federal District Judge Charles R. Richey disagreed with the government's claim that if it printed out the records, it could lawfully wipe out the corresponding electronic data.¹⁸⁶ In a decision subsequently affirmed on appeal,¹⁸⁷ he held that electronic mail records, unlike paper copies, show not only their content, but also "who has received the information and when the information was received," which could be of "tremendous historical value."¹⁸⁸ He also found that the Archivist had "breached his statutory duty to prevent the destruction of federal records."¹⁸⁹

181. See *supra* notes 140-43 and accompanying text.

182. 44 U.S.C. § 2204(a)(5) (1988).

183. Presidential Records Act of 1978, Pub. L. No. 95-591, § 3, 92 Stat. 2526 (codified as amended at 44 U.S.C. § 2201 (1978)).

184. *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991).

185. During a four year period, the parties "developed an extensive record" that facilitated eventual judicial resolution of the legal issues. *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1280 (D.C. Cir. 1993).

186. *Armstrong v. Executive Office of the President*, 810 F. Supp. 335 (D.D.C. 1993). In this litigation, the Justice Department's opinion that ended the *Kissinger* case, *supra* note 133 and accompanying text, cast a long shadow. The Archivist noted that "the National Security Council and the Office of Administration [determined that the full electronic record of communication need not be preserved]. Under Justice's 1981 ruling, [they] were fully within their authority to do this." Letter from Don W. Wilson, Archivist of the United States, to Dr. Page Putnam Miller (Feb. 2, 1993).

187. *Armstrong v. Executive Office*, 1 F.3d 1274 (D.C. Cir. 1993).

188. *Armstrong v. Executive Office*, 810 F. Supp. at 341. "The question of what government officials knew and when they knew it has been a key question in not only the Iran-Contra investigations, but also in the Watergate matter." *Id.* at 341 n.12. The Court of Appeals added that "[t]exts alone may be of quite limited utility to researchers and investigators studying the formulation and dissemination of significant policy initiatives at the highest reaches of our government." *Armstrong v. Executive Office*, 1 F.3d at 1285.

189. *Armstrong v. Executive Office*, 810 F. Supp. at 348.

The controversy over the Bush administration's effort to destroy its tapes, and particularly the Court of Appeals decision affirming Judge Richey's decision, established that at least one type of working papers—electronic records containing unique information such as distribution lists—were subject to the record preservation statutes.¹⁹⁰ The decisions also implicitly supported the Archivist's asserted authority to promulgate binding records-preservation regulations.¹⁹¹ In addition, the controversy provoked a new round of calls by historians and legislators for a close examination of the effectiveness of the statutes governing preservation of federal records.¹⁹² Preservation of presidential records was the most immediate focus of renewed interest in the issue, but historians noted that the Archives's inability to preserve White House documentation was only part of the problem; the history of federal agency programs and policies was also being lost. For example, in a letter to the Equal Employment Opportunity Commission, historians complained that the Commission had given the Archives only one case to preserve out of the thousands it had handled in its first seventeen years of operation. "If the records have been destroyed according to the approved schedule, no scholar or journalist will be able to reconstruct the work of the E.E.O.C. under any of its directors from 1965 throughout the 1980's," these historians said.¹⁹³ A House staff member predicted that as a result of the public controversy over the Bush administration records, an effort to pass new legislation was "all but certain."¹⁹⁴

190. *Armstrong v. Executive Office*, 1 F.3d at 1282. The case continued after the Bush administration left office because the Clinton administration did "not want a succeeding, potentially unfriendly administration pawing over its computer memos" and therefore agreed with the Bush administration view that printed copies of electronic mail messages could substitute for the electronic records. See George Lardner, Jr., *Justice Officials Back Transfer of Bush Records*, WASH. POST, May 18, 1993, at A6; Neil A. Lewis, *Government Told to Save Messages Sent by Computer*, N.Y. TIMES, Aug. 14, 1993, at 1. The Court of Appeals affirmed Judge Richey's holding that the electronic records had to be preserved under the Federal Records Act, noting that "important information present in the [electronic mail] system, such as who sent a document, who received it, and when that person received it, will not always . . . be preserved on the paper print-out" and that Congress desired to preserve "a complete record of government activity for historical and other uses." *Armstrong v. Executive Office*, 1 F.3d at 1284-85.

191. Judge Richey wrote that the Archives regulations "are persuasive authority in considering what is reasonable conduct" under the preservation statutes and cited one such regulation for the proposition that agencies' records management programs must be in compliance with the Archivist's regulations. *Armstrong v. Executive Office*, 810 F. Supp. at 342, 343. The Court of Appeals cited and relied on several sections of the Archivist's regulations. *Armstrong v. Executive Office*, 1 F.3d. at 1284-85, 1287-88. However, neither court explicitly addressed the possibility that the Archivist might lack power to impose binding records preservation rules, as the Office of Legal Counsel had claimed a decade earlier, *supra* text accompanying note 138, and neither court relied explicitly on the working files regulation, 36 C.F.R. 1222.34 (1993).

192. The controversy also produced consequences for the individuals who were involved. The Justice Department began looking into the possibility of a criminal investigation of the Archivist. Eliza Newlin Carney, *At the Archives, Controversy's Routine*, NAT'L J., Mar. 13, 1993, at 628. The court held that notwithstanding the agreement between President Bush and the Archivist for Bush's "exclusive 'legal control'" of presidential information, the tapes should "not be transferred to the custody of a third party" until the merits of the suit had been resolved. *Armstrong v. Executive Office*, 821 F. Supp. at 761, 769. It also threatened criminal contempt proceedings against the government officials who had contributed to the erasure of six backup tapes. *Id.* at 771.

193. Karen DeWitt, *Historical Groups Battling to Spare Government Files From Delete Key*, N.Y. TIMES, April 11, 1993, at 21.

194. Carney, *supra* note 192, at 630. Of course, even "certain" legislative reform may take years.

III. Proposals for Reform

Legislators who enact the next round of reforms of the preservation laws should work from three principles. First, although the problems of preservation of and access to presidential records are very important (because White House officials deal with the most important national and international issues), attention must also be given to the policy records of the entire executive branch. The recent focus on White House records should not obscure the need for altering the applicable standards for preservation of important documents located elsewhere in the government. In many cases, the documents that eventually get to the White House reveal only the final distillations from months or years of development and debate within the agencies.¹⁹⁵ Historians will need the working papers from the relevant agencies to piece together the process by which policy was shaped and to know about the disputes that, having been resolved at lower levels of government, never reached the President.¹⁹⁶ In addition, the value of preserving working papers for the purpose of public accountability may be as great for agency documents as for presidential documents, because journalists generally keep the White House in a perpetual spotlight, while agency activities receive relatively less public scrutiny.¹⁹⁷

195. In the author's own government experience, it was not uncommon for months of debate, which generated thousands of pages of heated written arguments and comments, to result in a three page options memorandum for the President, with each argument boiled down to a sentence or two of "pros" and "cons."

196. Historian Hugh Davis Graham, writing the history of civil rights policymaking from 1960 to 1972, found that the White House files were so "rich . . . that their availability in the presidential libraries reinforces the danger of viewing the policy-making process excessively from the White House perspective." HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-72* at 478 (1990). Therefore he needed to consult, as well, "the files of the mission agencies and their heads" revealing "debates that were screened from the White House." *Id.*

197. Some of my colleagues who work for executive branch agencies believe that the possibility of more accountability is a good argument *against* further preservation requirements, and indeed that some of the existing laws and regulations, such as the Archives's 1990 working papers regulation, should be repealed. They assert that preservation requirements chill straightforward, candid advice to superiors, because even though predecisional policy documents are exempt from public disclosure under an exception to the Freedom of Information Act, *see supra* note 34, they can always be obtained by members of Congress (who can hold up agency appropriations, if necessary, to overcome a possible claim of executive privilege). Therefore, mid-level policy officials who are aware of the preservation rules will avoid putting on paper or disk any advice, such as the political ramifications of a recommended policy, that would perturb even a few members of Congress, or that members of Congress might leak to the press for political reasons.

Possible abuse of congressional oversight power is an issue to be taken seriously, but, for several reasons, occasional improprieties should not reverse the trend toward greater preservation. First, while of course members of Congress should not misuse access to public documents for political reasons, we *do* live in a democracy in which Congress both makes the ultimate rules on document preservation and access and may need to consult working papers in the course of legitimate investigations, as it did during its inquiry into the Iran-Contra scandal. Second, the risk of leaks through Congress can be dealt with in less drastic ways than rapid document destruction. For example, the President could more frequently assert executive privilege with respect to predecisional policy memoranda, or Congress could regulate itself by requiring at least a Committee vote before an individual member asks an agency for such documents. (Acquaintances of mine in the administration are skeptical that congressional committees will ever curb the right of individual members to obtain agency records, because the culture of Congress supports individual member initiative). Third, facilitating quick destruction of working papers does not necessarily eliminate congressional access to the advice contained in those papers, because members of Congress can ask the authors what they had

Second, the records preservation problem is too big to be solved immediately in a single legislative act. A major part of the problem is that the federal government is being swamped by an excess of records. In the long run, perhaps fifty years at most, the volume problem may be solved by a relatively inexpensive technical fix.¹⁹⁸ Virtually every important policy-related document written by a government official will be generated on a computer,¹⁹⁹ and new data storage technologies will make it possible to save all of it, including every draft,²⁰⁰ in durable, compact memories, devices that are significantly more efficient than today's already remarkable optical disks (CD roms).²⁰¹ All versions of proposed policy papers, if properly named by their creators,²⁰² could be automatically backed up for long-

advised. *See, e.g.*, Jerry Seper, *House to Question Prosecutors on Bush-era Environment Cases*, WASH. TIMES, Aug. 19, 1993, at A1 (discussing how Justice Department ordered its lawyers to submit to congressional interviews about alleged lack of vigorous prosecution; former Attorney General William P. Barr said the interviews "will have a chilling effect on their ability to perform their responsibilities"). Finally, no matter what the document preservation laws say, some of the *most* sensitive advice to superiors will probably continue to be transmitted orally, as in the past. *See supra* note 80. Some officials also believe that record-keeping requirements excessively chill candid advice to an immediate superior because the records may be obtained by people who oppose the superior's policies, including people in other agencies and even White House staff members who may have views that are not entirely congruent with those of the President. *See supra* note 81.

198. My recommendations in this article propose modest additions to the federal archival data base in the short term, rather than the substantial changes that would accompany the long-range solution forecast here, and I do not attempt to quantify the costs of saving all governmental information using technologies that have not yet been developed or proved. My view that the cost of saving all such information on disk may be "relatively inexpensive" is based on my assumption that the largest part of the cost of archiving is the cost of organizing and indexing documents for archives, and that electronic searching programs make it possible to minimize that cost and to pass it along to future users of the information (who would organize the data electronically as they retrieve it) rather than to the United States government. The cost to the government would be only the cost of purchasing and warehousing the disks full of data, which might be considerably less than the cost of warehousing and organizing the records and archives that are of no current use to government agencies. Of course even my more limited short term proposals have some price tag, raising the general question of whether taxpayers are currently paying too little, the right amount, or too much for preserving the history of government, a subject as to which citizens may reasonably disagree.

199. Already, nearly 80% of the information generated by the federal government is created on computers. James Gregory Bradsher, *A Brief History of the Growth of Federal Government Records, Archives, and Information 1789-1985*, 13 GOV'T PUB. REV. 491, 498 (1986). Much of this information is still printed out and stored on paper, although in the future it could be stored exclusively in machine-readable form.

200. I am not arguing, even with respect to the long run, that all government documents should be retained permanently, but only all policy-related documents. About 98% of Federal records are regarded as temporary in nature, including tax returns, returned government checks, vouchers, and other routine documents having no relationship to policy. James Gregory Bradsher, *Discussion Forum: Federal Records and Archives*, 4 GOV'T INFO Q. 127, 129 (1987). Even if the 98% estimate is slightly too high, and more material should be saved and could be saved if stored by computer rather than on paper, the vast majority of federal records will always be temporary and can be discarded when no longer needed for operational purposes.

201. A standard 5 1/4 inch optical disk today can store 550 million bytes (300,000 printed pages), or about a third of the Encyclopedia Britannica. Patrick Gibbins, *Multimedia Discs at the Heart of a Revolution*, THE INDEPENDENT, Oct. 13, 1992, at 14. But IBM scientists recently demonstrated a technology, called the blue laser optical recording system, that can hold 6.5 billion bytes on a single disk, the equivalent of "a stack of double spaced typewritten paper 1080 feet high—nearly twice as tall as the Washington Monument." *IBM's Blue Laser Gives Record Optical Data Density: 2.5 Billion Bits/Square Inch—Five Times Current Products*, Bus. Wire, July 1, 1993, available in LEXIS, Nexis Library, BWIRE File. A newer technology now under development, based on the principle of the scanning

term storage in these devices.²⁰³ Archivists are already considering the possibilities of moving to electronic rather than paper storage of federal documents;²⁰⁴ this approach not only saves space but also facilitates information retrieval, because electronic records, even on very large databases, can be searched quickly and automatically for particular words or phrases.²⁰⁵

tunneling microscope, promises a 3,000 to 10,000 gain in storage capacity, compared with current optical disks. Dennis Normile, *Shrinking Memory Beams*, POPULAR SCI., Dec., 1992, at 34 (factor of 3,000 gain); *Hitachi's New Electron Microscope to Aid Disk Research*, Kyodo News Service, Japan Economic Newswire, Nov. 2, 1992, available in LEXIS, Nexis Library, JEN File (factor of 10,000 gain). Large corporations already "store huge amounts of data (up to 5 trillion bytes) on scores of optical disks that are held in refrigerator-sized automated access units." Bus. Wire, July 1, 1993, available in LEXIS, Nexis Library, BWIRE File. Using disks even 3000 times better than today's standard optical disks in such units would enable archivists of the future to pack into one machine, in the corner of a small room, a staggering 15 quadrillion bytes of information. Currently, the National Archives consists of 1.4 million cubic feet of records. Bradsher *supra* note 199, at 491. One cubic foot is equivalent to 1200 standard 8 1/2 x 11 inch pages. Interview with Frank B. Evans, *supra* note 88. So the Archives's holdings amount to about 1.7 billion pages. A double-spaced page contains less than 3000 bytes (about 37 lines with up to 80 bytes per line). This number is easily halved with current compression programs that remove the blank spaces from text files for storage purposes and reconstitute them for display. See Peter H. Lewis, *Personal Computers: Of Data Compression and Decompression*, N.Y. TIMES, Dec. 12, 1992, § C, at 13; Erik Sandberg-Dement, *Personal Computers: Squeezing Stored Data*, Feb. 24, 1987, § C, at 8. So the Archives's entire present holdings, comprising approximately 2.5 trillion bytes, would use only about half of the capacity of an existing access unit, and only about a 5000th of the capacity of the storage capacity of a machine using the next generation of technology. Note that this database would be only five times larger than the NEXIS/Lexis database, which can be searched for words or combinations of words in less than a minute. See *infra* note 205. Using similar calculations, all of the existing records of the entire federal government, which Bradsher puts at 40 million cubic feet (72 trillion bytes), could in principle be packed on optical disks into about 15 "refrigerator-sized" units, using existing technology.

202. Documents are named when stored on computer disks. Future historians will be aided immeasurably by the adoption of a standard system for identifying successive drafts, such as including the letter "A" in a suffix to the name of the first draft. Of course, the use of computers makes this problem more difficult than it seems, because many documents are in a state of constant revision, and it may be difficult to identify any moment at which a document becomes a "draft" or a "version." In such cases, a backup program could take a "snapshot" of the document, for historical purposes, every few days, or every time a certain number of characters were changed or added.

203. It may be necessary for this purpose to define a "version," because many drafters of documents save their work on a disk each time they make a minor change, and thus generate a dozen or more "versions" a day. It would undoubtedly be sufficient if policymakers saved on disk each "version" of a document that was shown for comment or action to at least one other person, so that the historical record included the drafts reflecting possible interpersonal interaction and excluded interim changes reflecting the thoughts of an official that were never shared with another person. This is in fact a key element of the definition of a working file in the current regulations. 36 C.F.R. § 1222.34(c) (1988). To enable the archiving computers to distinguish between the two types of drafts, policymakers would have to be trained to use different keys to save the two types of drafts.

204. See generally NATIONAL ACADEMY OF PUB. ADMIN., *supra* note 21. However, a cultural change may be necessary before most people are satisfied with storage of information exclusively in electronic form. "People like to hold paper; they like printouts," says Professor Clifford Nass of Stanford University, a psychologist who studies the relationship of technology to social trends. "If the information only exists in the computer, where is it? You can't tell people it's being stored as a bunch of ones and zeros. They want to touch it." Liz Spayd, *Computers Whet Appetite for Paper*, WASH. POST, Nov. 14, 1993, at A1. As a result, the use of computers by government officials has so far increased, rather than decreased, the rate of accumulation of paper records. *Id.*

205. More than 350,000 people use the Mead Data Central Corporation's LEXIS and NEXIS research services to search quickly for what they need among a huge set of databases. Letter from Mead Data Central, Inc., Office of Public Relations, to the author 1 (July 16, 1993) (on file with the author). The services' databases include more than 408 billion characters online, in more than

However, even if today's optical disks were dense enough to handle the government's data preservation needs, they are an incomplete solution to the storage problem. First, they are not sufficiently durable; an optical disk is believed to have a storage life expectancy of only three to twenty years.²⁰⁶ This part of the problem can be addressed by copying the data on every disk to a fresh disk before the disk expires, but that will require some time and expense.²⁰⁷ Second, electronic data are easier than paper records to alter, without leaving traces of the alteration. Third, data storage technology is changing rapidly, and there is no assurance that the optical disk readers in use today will be manufactured or repairable in a hundred or two hundred years; if all of the government's archives were on such disks, the National Archives would have to preserve and keep in working order a sufficient number of perhaps archaic "turn of the century" optical disk readers, or, in the alternative, arrange to transfer the data to the technology of the future.²⁰⁸ Finally, optical disks can be read only with a machine, which may not pose a significant problem for government officials or scholars of the future, but which may impose at least something of a burden on other citizens. Congress should therefore defer any attempt to solve the long-term problem at least until data storage technology enters a period of somewhat greater stability.²⁰⁹

Third, in formulating more limited short-term reforms, Congress should take into account the fact that although many different kinds of federal records have historical value, records of policy development are likely to be of particularly

188 million documents. *Id.* Every week, more than half a million documents are added to the databases. *Id.* These databases include the full texts of virtually all of the statutes and court decisions of the United States and its 50 States; the full texts of *The New York Times* and many other newspapers; news services from around the world, and specialized features such as the full transcripts of daily White House and State Department briefings. *Id.* at 2. Users search for words and phrases limited or expanded by logical connectors such as "and" and "or," and in the author's experience, most searches, even of years of stories in dozens of newspapers, take only about 15 seconds to complete.

206. Perritt, *supra* note 74, at 992 (citing his interview with a representative of the National Institute of Standards and Technology). Perritt is skeptical that the shelf life is so short. *Id.*

207. Recopying, at some cost, is the National Archives's current solution to the problems of disk impermanence and the "technological obsolescence" of every generation of computer equipment. Perritt, *supra* note 74, at 994.

208. Thousands of North Vietnamese documents were captured and photographed, producing more than a hundred rolls of microfilm. Each roll has a thin strip of machine-readable bar codes that index the content of each page. But only 20 years after the War in Vietnam, no bar code reader exists, so the microfilm cannot be used by historians. REP. ON RECORDS, *supra* note 2, at 31.

209. For discussion regarding the general problems of archiving electronic records, see HOUSE COMM. ON GOV'T OPERATIONS, TAKING A BYTE OUT OF HISTORY: THE ARCHIVAL PRESERVATION OF FED. COMPUTER RECORDS, H.R. DOC. NO. 24, 101st Cong., 2d Sess. (1990). Of course it is possible that data storage hardware and software will be in a state of rapid evolution forever. Perhaps the rate of technological change will diminish within a generation, however, after devices for "writing" data become able to encode information on a single molecule of a disk or other storage medium, which may represent a limit. See Normile, *supra* note 201, at 34. Some experts believe that storing all government data electronically, through automatic backups, would result in "a deluge of undifferentiated documents that would stop researchers and historians dead in their tracks . . . [by raising] formidable retrieval problems." NATIONAL ACADEMY OF PUB. ADMIN., *supra* note 21, at 42. The author, a very frequent user of the massive data bases on LEXIS/Nexis, disagrees; in his experience, well constructed searches of full texts can overcome the problem of large volume, and having a wide range of sources available far outweighs the possible advantages of more easily searching a small database. See *supra* note 205.

great interest to the nation's future historians and important to our descendants. Therefore, improving the system for retention and preservation of policy records should receive priority attention.²¹⁰

PRESIDENTIAL RECORDS

Applying these principles, Congress should revise both the Presidential Records Act and the Federal Records Act.²¹¹ To begin with, it should take additional steps to ensure that *all* presidential records are preserved for history. The White House is at the apex of all national policy making, and although White House records do not by any means tell the whole story of the development of virtually any policy, those records are likely to contain the best information about the give and take in the final stages of the policy process.²¹² Presidential records are therefore likely to contain, in a relatively small amount of paper, disks and tape, a large quantum of historically useful material. It is therefore shocking that even after enactment of a Presidential Records Act that was supposed to end the debate about whether presidential records belonged to the public or to the former President,²¹³ disputes and lawsuits continue to rage about dominion over these records.

Litigation has not resolved the problems satisfactorily. The Court of Appeals for the D.C. Circuit ruled that historians could sue to require federal officials to enforce the Federal Records Act and thereby achieve the preservation of some of the records of some White House offices (those with functions other than advising the President).²¹⁴ But it also held that "Congress presumably relied on the fact that subsequent Presidents would honor their statutory obligations to keep a complete record of their administrations."²¹⁵ According to the court, Congress therefore intended to limit judicial review under the Presidential Records Act to the question of whether a type of record *is* a presidential (rather than an agency) record,²¹⁶ while precluding review of whether a concededly presidential record may lawfully be destroyed.²¹⁷ Unfortunately, even if Presidents can be trusted not to violate a clear statutory requirement, they are quite capable of finding ambiguity in the meaning of virtually

210. Records of how federal programs are actually administered are also of great interest to historians of government, but agencies tend to keep such records for their own purposes, even as predecisional policy papers tend to vanish. Telephone Interview with Anna Kasten Nelson, *supra* note 30.

211. See *supra* notes 179-80 and accompanying text.

212. The relative term "best" is used because in many cases, especially at the highest levels of government, the final arguments about policy are likely to be oral discussions among cabinet members or other very senior officials, behind closed doors and without written traces. Even before the enactment of freedom of information legislation, which some people think compounded the problem, "officials were careful about what they placed in the official record. Knowledge of past decisions on sensitive matters is often based on diaries or private letters." REP. ON RECORDS, *supra* note 2, at 37 n.44.

213. "The United States shall reserve and retain complete ownership, possession, and control of Presidential records. . . ." 44 U.S.C. § 2202 (1980).

214. Private litigants may challenge the validity of agency document destruction guidelines and may also sue "to require the agency head and Archivist to fulfill their statutory duty to notify Congress and ask the Attorney General to initiate legal action." *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991).

215. *Id.* at 290.

216. *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1294 (D.C. Cir. 1993).

217. *Armstrong v. Bush*, 924 F.2d at 291.

any legislation; preclusion of judicial review therefore enables them to interpret the Presidential Records Act in bizarre ways, and to destroy historically important documents without fear of a challenge to their statutory construction. Even a presidential interpretation that electronic mail messages are not "correspondence, [or] memorandums . . . including, but not limited to . . . electronic or mechanical recordings,"²¹⁸ is apparently immune from judicial review.²¹⁹

Some of the electronic mail messages from the Reagan and Bush administrations were in fact preserved, but only because those administrations did not operate their electronic mail systems so as to separate presidential messages (for example, advice regarding presidential duties given by offices exclusively devoted to presidential advice) from other official messages (involving other offices within the Executive Office of the President or statutory duties). Judge Richey ordered all existing electronic mail records of the Bush National Security Council to be retained until segregation of the presidential records could be accomplished,²²⁰ but after that segregation is achieved, President Bush may be able to dispose of all of the presidential records on those tapes.²²¹ Furthermore, the Bush administration apparently already erased many such electronic messages, for the only ones that were preserved by court order were those that happened to be on the backup tapes of November 20, 1992, when Judge Richey entered a temporary restraining order requiring preservation of all "current and existing computer backup tapes."²²² Backup tapes preserved only those messages that were on the system as of a Saturday night and had not been deleted by the author and then overwritten by the computer. Every two weeks, the backup tapes were "recycled and their contents permanently flushed."²²³ Therefore, some, perhaps most, of the electronic messages generated within the National Security Council between January 1989 (the date of a similar restraining order) and early November 1992, were apparently destroyed.²²⁴

218. 44 U.S.C. § 2201 (1988). This is the definition of "documentary material." The Presidential Records Act defines presidential records to mean "documentary material" created or received by the President relating to the carrying out of official duties; precludes presidential destruction of such material with out notification of the Archivist; and, requires the President to turn all such material over to the Archivist when he leaves office. *Id.* §§ 2201, 2203.

219. In the *Armstrong* case, the Justice Department claimed that the electronic mail messages sent within the Executive Office of the President were not required to be preserved by the Presidential Records Act. *Armstrong v. Bush*, 721 F. Supp. 343, 353 (D.D.C. 1989). Although the second decision of the Court of Appeals may reduce the number of White House electronic mail messages that can properly be regarded as presidential records, *Armstrong v. Executive Office*, 1 F.3d. at 1292, it left undisturbed its earlier holding that destruction of the messages that are presidential records cannot be challenged in court. *Id.* at 1293-94

220. *Armstrong v. Executive Office of the President*, 821 F. Supp. 761, 769 (D.D.C. 1993). Even Judge Richey termed the Court of Appeals' preclusion of judicial review "unfortunate." *Id.*

221. Whether or not he can do so at that point may depend on the meaning and validity of his January 1993 agreement with the Archivist. *See id.* The question (particularly if a new Archivist regards the agreement as invalid) will be whether the Archivist can validly agree to delegate to a President the "control" of his presidential documents officially assigned by statute to the Archivist. *See* 44 U.S.C. § 2203(f) (1988). It is difficult to see how a conflict between an Archivist and a former President could be resolved in the absence of judicial review; surely the outcome should not depend on which of them had physical control.

222. *Armstrong v. Executive Office of the President*, 810 F. Supp. 335, 338 n.4 (D.D.C. 1993).

223. *Armstrong v. Bush*, 721 F. Supp. at 345.

224. *See Armstrong v. Executive Office*, 810 F. Supp. at 338 n.4.

Congress should amend the Presidential Records Act to permit additional judicial review,²²⁵ at least to prevent planned document destruction based on a generic interpretation of the Act.²²⁶ But that will not be a sufficient solution, because a President might persuade the courts that certain kinds of policy documents are not subject to the ambiguous preservation requirements of the current law.²²⁷ Congress should therefore prevent the next controversy, and not just react to the last one. It should also amend the Presidential Records Act's definition of "documentary material"²²⁸ to make it clear that this term encompasses not only final versions of documents but also all pre-decisional and post-decisional material, including preliminary drafts, comments, memoranda of conversations, draft and final versions of talking points, and other notes reflecting either the policies of the administration or the processes through which those policies were put or attempted to be put into place. The White House should also reprogram its computers so that all drafts of policy documents are permanently preserved.²²⁹

This is not an argument that the White House should be required to operate in a "fish bowl."²³⁰ It may be appropriate, if this change is made, to lengthen the maximum period of time during which public disclosure can be barred from twelve years²³¹ to twenty years or even longer. However, it is not good policy to allow Presidents to undercut the spirit of the Presidential Records Act, and to affect the historical record, by destroying such important policy records of their administrations as they see fit,²³² merely because the law ex-

225. The D.C. Circuit has determined that the Act already permits judicial review to challenge a President's claim that a type of document is in fact a presidential record rather than an agency record. *Armstrong v. Executive Office of the President*, 1 F.3d. 1274, 1290 (D.C. Cir. 1993).

226. Congress might not want to permit any citizen to sue agencies within the Executive Office of the President every time a White House official discarded a piece of paper, but it might nevertheless allow challenges in court to presidential determinations that classes of documents or electronic records were not covered by the Presidential Records Act. It would not be sufficient to permit the Archivist or the Attorney General to initiate a suit for review. Both of those officials are appointed by the President, and the controversies involving the records of Presidents Nixon, Reagan and Bush, and Secretary of State Kissinger, suggest that the government cannot be counted on to enforce its own rules against itself, particularly through public litigation by one agency against another.

227. The Presidential Records Act does not include any language, such as the provisions of 36 C.F.R. 1222.34(c), that is applicable to non-presidential agency records or explicitly covering working papers, and no agency has statutory authority to write regulations interpreting the Presidential Records Act. *See* 44 U.S.C. §§ 2201-2207 (1988).

228. *See* 44 U.S.C. § 2201 (1988). The present definition includes "all . . . memorandums, documents [and] papers," but a President might argue, in the absence of more explicit wording, that Congress intended to cover only final versions of these documents and not drafts, or that ancillary types of records such as telephone logs, calendars, comments on memoranda, or informal notes on informal meetings were not intended to be covered by these terms.

229. *See supra* note 202 (regarding the need to distinguish between minor changes and new versions of draft policy documents).

230. "The fishbowl image has been a negative term for excessive scrutiny . . . [but] at least one court has balanced the metaphor by recognizing that the citizen seeking information need not operate in a darkroom." 2 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 15.02, at 15-4 (1990).

231. 44 U.S.C. § 2204(a)(4), (b)(1)(A) (1988).

232. Because Presidents are human, they would presumably, if "left to themselves, have a built-in incentive to dispose of records relating to [their] 'mistakes.'" *American Friends Serv. Comm'n v. Webster*, 720 F.2d 29, 41 (D.C. Cir. 1983) (referring to agency incentives to destroy documents selectively).

empts their decisions from judicial review and does not clearly require them to retain working papers.²³³

AGENCY RECORDS

The Federal Records Act, governing records generated in most agencies, must also be changed, but a somewhat different solution is necessary for the agencies. The volume of records is so large, and their historical value so mixed that requiring preservation of all records, as should be done for presidential records, is impractical, unnecessary, and excessively costly, at least for the next few decades. As in the past, some method must be found to "separate wheat from chaff."²³⁴ The circular definitions that Congress has always used to indicate what should be preserved should be replaced by meaningful judgment. In addition, agencies should have some authority to require that documentation be retained, but the National Archives should also be empowered by an explicit statute to require preservation of specified categories of agency records.²³⁵

A four-part plan is called for, until new technologies make a better system feasible. First, Congress should require retention of all records, paper or electronic, regarding the formulation of significant policies.²³⁶ For purposes of this requirement, it should make clear that with respect to those policies, the records that must be preserved for eventual transfer to the Archives include all working papers.²³⁷ It

233. Whether working papers necessary to carry out criminal investigations should be subject to subpoena or disclosure before general public access is permitted is a separate issue, involving the outer boundaries of the doctrine of executive privilege. Some of the documents preserved by the civil court order in the *Armstrong* case were subpoenaed by Independent Counsel Joseph E. diGenova for his investigation of the Bush administration's search of presidential candidate Bill Clinton's passport records. *Armstrong v. Executive Office of the President*, 821 F. Supp. 761, 768-69 (D.D.C. 1993). It is possible that the federal interest in criminal justice outweighs the "chilling" effect that possible disclosure would have on communications within the White House, particularly since this narrow exception to non-disclosure rules would affect a very small number of documents. On the other hand, perhaps knowledge that documents might be made available to a criminal prosecutor would deter record-keeping in some of the most interesting, controversial White House policymaking, such as the decisions leading up to the Iran-Contra scandal.

234. REP. ON RECORDS, *supra* note 2, at 33.

235. A recent revelation illustrating the need for clearer laws governing predecisional federal records is the admission of Steven Axilrod, a senior official of the Federal Reserve Board, that he had tried to dispose of the accumulated transcripts of years of meetings of the Board's Open Market Committee. These transcripts were saved from destruction only because "I could not get any chairman to agree to destroy them, and I wasn't willing to do it . . . [because of the adverse] publicity [that had accompanied erasure of portions] of the Nixon tapes." John M. Berry, *What the Fed Hadn't Said*, WASH. POST, Oct. 27, 1993, at F1. Officials should be able to resolve this kind of question by reference to the text of the Federal Records Act, not by vague fears of adverse publicity.

236. Professor Henry Perritt considers the very goal of recording the process of policymaking unrealistic, because many early drafts are not taken seriously by senior officials, much important work is oral rather than written, and even officials who work on computers will probably not comply with minimal archiving requirements. Perritt concedes, however, that National Archives officials disagree with his assessment, and he also recognizes that the advent of electronic mail may actually decrease the fraction of policymaking that involves face-to-face or telephone encounters. Perritt, *supra* note 74, at 987-88.

237. Current practice in the United States Senate suggests that preservation of these materials by policy officials is feasible. For Senate Committees and offices, policy development is a major activity, and most staff members work on several policy initiatives simultaneously. Yet Senate committee staff members are now required to retain, on a "permanent" basis, not only bills and supporting materials

could use the definition of working papers that is already part of federal law, deleting only the fudge word "proper" that defeats the whole purpose of the provision,²³⁸ or it could use a definition like the one suggested above with respect to presidential policy records.²³⁹ In any event, the legal requirement that working papers be preserved should appear in a statute rather than in a National Archives regulation, to ensure that all officials understand it to be a reflection of national policy and not the embodiment of a minor bureaucratic ritual.

Second, because not all policies are so significant as to justify permanent retention of all documents, Congress must empower some officials to designate which policies are significant for purposes of records preservation. All documents, including all paper and electronic working files, relating to such policies would by law be kept for posterity; in the case of other policies, records would be scheduled for temporary or permanent retention, and the schedules reviewed by Archives personnel, as at present.²⁴⁰

In designating significant policies, it is safe to err on the side of retaining too much rather than too little, because a focus on policy records, as opposed to all federal records, will greatly restrict the universe of documents with which officials and historians will have to contend. Congress should therefore confer concurrent power on several people to make a binding prospective determination that a policy under development is significant for this purpose.²⁴¹ The officials in whom this authority could be concurrently vested include: (a) any presidential appointee with whole or partial authority over development of the policy,²⁴² (b) the official

as introduced and amended, but also committee prints "(one copy of each, marked to show the sequence of development in the proposal)," press releases, correspondence with the executive branch and other Senate offices, memoranda to and from committee and subcommittee staff, minutes and memoranda of meetings, polling records, correspondence with the public, preliminary drafts of bills, unpublished transcripts of hearings, consultant studies, briefing books, and even articles, clippings, and library material. KAREN D. PAUL, RECORDS MANAGEMENT HANDBOOK FOR UNITED STATES SENATE COMMITTEES 20-23 (United States Senate, 1988) (S. Pub. No. 100-5). Individual Senators are urged to retain similar records on a permanent basis. KAREN D. PAUL, RECORDS MANAGEMENT HANDBOOK FOR UNITED STATES SENATORS AND THEIR ARCHIVAL REPOSITORIES, 19, 24-28 (United States Senate, 1992) (S. Pub. No. 102-17). The Archivist of the Senate Historical Office believes that compliance with record-keeping requirements and guidelines is in the 90% range with respect to both committees and Senators' offices. Telephone Interview with Karen Dawley Paul, Archivist, Senate Historical Office (Aug. 12, 1993).

238. See *supra* text accompanying note 172.

239. See *supra* note 228 and accompanying text. Congress might also draw on the list of types of working papers used by the U.S. Senate. See *supra* note 237.

240. See 44 U.S.C. §§ 3303, 3303a (1980).

241. A similar distinction between the important and the trivial is embedded in the regulation that currently governs working files and requires retention of those that add to a proper understanding of the agency's formulation and execution of "basic" policies and decisions. 36 C.F.R. § 1222.34(c) (1993). Unlike this suggestion, however, the regulation provides no mechanism for making the distinction, opening the way for any agency to argue, after documents have already been destroyed, that the policy to which they related was not "basic."

242. Thus, if two bureaus of the Department of the Interior were cooperating to develop a new policy, the Assistant Secretary in charge of either bureau, the Undersecretary to whom either reported, or the Secretary of the Interior could make the designation. Similarly, for a policy being developed jointly by more than one department, a presidential appointee from either department could make the designation.

historian of the relevant department or agency, if it has one,²⁴³ (c) the Archivist of the United States, and (d) the President.²⁴⁴ Although these determinations would obviously involve exercises of judgment about which people could reasonably disagree, it should not be exceedingly difficult to identify, at any given time, many of the major national policies under development. As this article is being written in 1993, for example, a quick scan of the newspapers reveals that these policies currently include, among others, a national health care plan; the treatment of homosexuals in the armed forces; the determination not to intervene in the military conflict in Bosnia; deficit reduction; aid to Russia; a new balance between timber harvesting and species preservation in the Northwest; efforts to end nuclear weapons testing; new programs for immunization of children; free trade; welfare reform; and the creation of a National Service Corps.²⁴⁵

Third, although adopting this recommendation should preserve all records pertinent to the making of major policies, Congress should not leave responsibility for determining what *other* non-presidential records should be preserved in its present state of chaos.²⁴⁶ It should by law clarify that the Archivist of the United

243. Many government departments and agencies have historians. See SOCIETY FOR HISTORY IN THE FED. GOV'T ET AL., *DIRECTORY OF FEDERAL HISTORICAL PROGRAMS AND ACTIVITIES* (1987). Vesting statutory authority in agency historians would not be unprecedented, as the Historian of the Department of State now has statutory responsibility for preparing the public history of United States foreign policy. 22 U.S.C. § 4352(a)(1)(A) (Supp. III 1991). Some major departments of the federal government do not have historians; in these departments, some other official close to the secretary or other agency head, such as the department's executive director, might be assigned the function suggested here.

244. In addition, Congress could provide that even if a policy under development had not been deemed significant by any of these officials, a civil servant participating in policy development could not be considered to be violating any records management regulation by preserving in his or her agency a copy of the documents reflecting its evolution.

245. The fact that some policies will appear significant only decades later does not detract from the possibility of saving at least some records from destruction through contemporaneous designation. Such designation may prove a satisfactory way to address the concerns of those who believe that "[i]t's probably too much to expect public officials to save papers solely because they might be historically useful to someone at some time, because . . . this would mean saving every paper." THE RECORDS OF FEDERAL OFFICIALS, *supra* note 34, at 42 (remarks of Stephen Hess, Special Assistant to President Dwight D. Eisenhower). Contemporaneous designation could also be used to preserve records of major, interesting examples of policy execution, as opposed to policy-formation. Recent examples might include the raid on the compound in Waco, Texas; the federal response to record flooding in the Midwest; and the use of United States peacekeeping forces in Somalia. Because records of policy execution are probably much more voluminous than records of policy formation, designations might have to be made with more care, and here, too, contemporaneous designations are likely to be useful even if underinclusive. Matching particular documents to designated policies would also involve some judgment calls, but little harm would be done by encouraging all officials to err on the side of preservation when in doubt.

246. The regulations promulgated by the Archives in 1990 to define the term "preserved" and to require preservation of working files might in principle require that agencies retain copies of virtually all policy documents, but the meaning and validity of these regulations has never been tested in court. In *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1283 (D.C. Cir. 1993), the Court of Appeals found it unnecessary to consider whether the electronic messages of the National Security Council had been "preserved," and found that, in any event, the National Security Council lacked discretion to determine that, as a class, they were not "appropriate for preservation." The court added that "[n]ot all scribbles and off-the-cuff comments will qualify as federal records." *Id.* at 1287. While literally true, this statement will undoubtedly open an issue regarding whether an agency official's handwritten disagreement with some aspect of another agency's proposed policy statement

States may promulgate binding regulations, not inconsistent with the rules established by Congress itself, to define the types of records that agencies must preserve for eventual accession by the Archives.²⁴⁷

Finally, with respect to non-presidential agency records, too, Congress should consider imposing some sort of external review or enforcement mechanism. One possibility would be to give each federal department an official historical advisory committee with statutory power to examine all records and to make recommendations to the department head and to Congress in the event that a proposed destruction of records or deletion of certain records from accumulated material threatens the accuracy of the body of material that is intended for permanent retention and eventual public release.²⁴⁸

was a record, as suggested by 36 C.F.R. § 1222.34(c), or an "off-the-cuff comment" within the dictum of the court. Legislation could eliminate this ambiguity by giving the Archivist express authority to make the rules.

247. At least during the Bush administration, the Archives itself supported this recommendation. See *supra* note 165. H.R. REP. NO. 5356, 102d Cong., 2d Sess. § 5, introduced in 1992, would have given the Archivist authority to make regulations, "binding on all Federal agencies [establishing] . . . standards for determining if records are appropriate for preservation [and] . . . standards for establishment . . . of adequate and proper documentation of the . . . policies . . . of the agency." But after release of the movie "J.F.K.," the relevant House subcommittee became preoccupied with passing legislation, now codified at 44 U.S.C. § 2107 (1988), to open to the public the archives on the assassination of President John F. Kennedy, and the bill died. Telephone Interview with Robert Gellman, House Government Information Subcommittee (July 16, 1993). Although the Archives appears to believe that it already has this authority, as evidenced by its 1990 promulgation of the "working files" regulation, its power is clouded by the fact that the Justice Department has never retracted the restrictive view of the Archives's power that it expressed in the *Kissinger* opinion. See *supra* note 133. The Office of Legal Counsel should, of course, now withdraw that portion of its 1981 opinion.

Congress should also rationalize the laws regulating public release of whatever records are preserved. As noted earlier, *supra* text accompanying note 33, this article does not attempt to determine how long these records should be withheld from scrutiny so as not to chill policy makers from providing frank advice. However, it should be noted that, peculiarly, the Freedom of Information Act provides no time frame after which the exemption from disclosure for policy memoranda expires, 5 U.S.C. § 552(b)(5) (1983), although more recently enacted legislation governing presidential records and foreign policy records requires disclosure in 12 and 30 years, respectively, unless national security would thereby be jeopardized. See 44 U.S.C. § 2204 (1983); 22 U.S.C. § 4351 (Supp. III 1991). It is "unlikely that any Federal official would produce materials more sensitive than those of a President." NATIONAL STUDY COMM'N FINAL REP., *supra* note 35, at 7 (1977) (recommending a fifteen year maximum period during which public papers including working papers as that term is used in this article could be sealed, with judicially reviewable exceptions only for national security and unwarranted invasions of privacy).

248. This is similar to the approach recently taken by Congress with respect to records of foreign relations. See 22 U.S.C. § 4353(b) (Supp. III 1991). The statute is apparently concerned with inter-agency conflict; e.g., where the State Department historical office desires to release a record after 30 years but other offices within the State Department, or the Department of Defense or the Central Intelligence Agency, continue to regard the document as one of continuing sensitivity. An advisory committee of historians may play a useful, though not identical role, where the problem is one of agency officials who do not care about history, or an agency director who wants to destroy policy records because they might leak, as opposed to a threatened interagency conflict. For a historical background of the 1991 legislation, see Page P. Miller, *The Integrity of the U.S. Department of State's Historical Series Is at Stake*, 18 GOV'T PUBLICATIONS REV. 317 (1991) (professional historians publicly challenged the continued accuracy of the State Department's historical documentation after the Department published a volume on United States-Iran relations in the early 1950s that did not mention the well-known involvement of the Central Intelligence Agency in the coup against Prime Minister Mohammed Mosadeq).

The alternative, more traditional approach would be to provide for some degree of judicial review. Although the Court of Appeals for the D.C. Circuit held that historians could sue under the Administrative Procedure Act²⁴⁹ to challenge the promulgation of arbitrary and capricious records management policies, it ruled that if the formal policies are within the law, private citizens and organizations may not sue to require actual compliance with those policies.²⁵⁰ Instead, citizens may sue only to require the Archivist or an agency head to enforce the law by requesting the Attorney General to sue the offender.²⁵¹ This procedure may work well enough in the case of occasional attempts by low-level officials to destroy documents in violation of agency regulations, but as in the recent past, some future cases in which document destruction may be most egregious and controversial might involve extremely sensitive issues and very senior officials. In view of the historically weak position of the Archivist within the government and the doubtful effectiveness of ordering senior agency officials to ask the Justice Department to bring suits against themselves, Congress might want to create at least a limited private right of action to preserve official records.²⁵² Then, when records documenting the development of important federal policies are threatened with destruction, historians and their professional associations could become the watchdogs of last resort.²⁵³

249. 5 U.S.C. § 702 (1988).

250. Notwithstanding the Court of Appeals decision, federal trial courts in the District of Columbia have saved records, at least temporarily, by invoking their powers to issue temporary injunctions to preserve the status quo. Judge Charles R. Richey issued two such orders in the *Armstrong* litigation, and Judge Royce C. Lamberth issued a similar order to preserve the files of the White House task force that helped to develop President Bill Clinton's national health care proposal. Michael York & George Lardner, Jr., *Preserve Health Files, Judge Tells White House*, WASH. POST, June 16, 1993, at A18.

251. *Armstrong v. Bush*, 924 F.2d 282, 297 (D.C. Cir. 1991).

252. To avoid excessive litigation, this right might be limited to permit challenges to unlawful practices involving the actual or threatened destruction of federal records or the unlawful destruction of groups of records, as opposed to episodes involving the actual or threatened destruction of single documents. *Cf.* 42 U.S.C. § 2000e-6 (1988) (in a case involving alleged "patterns or practice" of employment discrimination, the Equal Employment Opportunity Commission may sue in federal court, without going through the complex procedures, involving written charges and investigations, required by § 2000e-5 for routine employment discrimination cases). Judicial review has many severe limitations and problems (e.g., an official bent on destroying records of advice she had given could eliminate documents one by one rather than announcing a policy of destroying a class of documents). Nevertheless, occasional suits to challenge document preservation practices may have great value. During my research on this article, several officials of the Archives told me, off the record, that one court order usually had more effect in getting an agency to adopt good records preservation practices than decades of regulating and cajoling by National Archives personnel.

253. Statutory reforms alone are not enough to solve the problem of our disappearing historical record. Once clear rules are in place, better training of federal officials would help to sensitize them to the value of historical preservation and to familiarize them with the new rules. *See supra* note 87. Similarly, if Congress adopts the recommendations of this article with respect to designating important policies for special record-keeping attention, the computers of officials who work on those policies (and those of their secretaries) should be programmed to preserve all drafts of all relevant documents, making compliance with new record-keeping requirements virtually effortless. The officials would only have to remember to keep paper copies of handwritten documentation (such as interlined comments from other agencies) and to identify policy documents with a designator so that the computer could distinguish between those to be backed up for archival purposes and those that need not be saved. Federal standards for electronic retention of "official file" copies (as opposed to drafts) already require such designators. *See* 36 C.F.R. § 1234.22(b) (1993).