Michigan Law Review

Volume 93 | Issue 4

1995

White House Electronic Mail and Federal Recordkeeping Law: Press "D" To Delect History

James D. Lewis
University of Michigan Law School

White House Electronic Mail and Federal Recordkeeping Law: Press "D" To Delete History

James D. Lewis

INTRODUCTION

In the past two decades, the Watergate and Iran-Contra scandals have produced far-reaching inquiries into the activities and decisions of the President and his White House staff. In both cases, investigators have tried to determine what the President knew and when he knew it.[1] The Watergate scandal spawned extensive litigation over the issue of access to presidential materials[2] and ultimately led Congress to enact the Presidential Records Act of 1978 (PRA),[3] which asserts public ownership of presidential records and establishes presidential record management procedures.[4] The difficulties encountered during investigation of the Iran-Contra affair,[5] however, suggest that the PRA fails to ensure the preservation and availability of historically significant White House materials.

Indeed, the PRA cannot possibly regulate all White House recordkeeping practices, because the statute covers only those records created or received by the President, the Vice President, and immediate presidential staff and advisors.[6] As a result, if

1. For an account of the Watergate scandal, see CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974). A joint report issued by the House and Senate Select Committees that investigated the Iran-Contra affair provides a detailed factual summary of that scandal. *See* H.R. REP. NO. 433, 100th Cong., 1st Sess. 3-11 (1987). For an examination of the constitutional dimensions of the Iran-Contra scandal, see HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

2. *See, e.g.,* Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); United States v. Nixon, 418 U.S. 683 (1974). *See generally* Carl Bretscher, *The President and Judicial Review Under the Records Acts,* 60 GEO. WASH. L. REV. 1477, 1482-83 (1992) (surveying Watergate litigation).

3. Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at 44 U.S.C. §§ 2201-2207 (1988)).

4. 44 U.S.C. §§ 2202-2203 (1988); *see also* H.R. REP. NO. 1487, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5732, 5733 ("The purpose of [the PRA] is (1) to establish the public ownership of records created by future Presidents and their staffs . . . and (2) to establish procedures governing the preservation and public availability of these records . . . ."). *See generally* Bretscher, *supra* note 2, at 1481-84 (reviewing the history of ownership of presidential records).

5. *See, e.g.,* H.R. REP. NO. 433, *supra* note 1, at xvi ("[M]embers of the [National Security Council] staff shredded relevant contemporaneous documents in the fall of 1986. Consequently, objective evidence that could have resolved the inconsistencies and overcome the failures of memory was denied to the Committees — and to history.").

6. *See* 44 U.S.C. § 2201(2) (1988) (defining "Presidential records"); 44 U.S.C. § 2207 (1988) (subjecting vice-presidential records to the provisions of the PRA); *see also infra* note 82 and accompanying text.

National Security Council (NSC) officials improperly destroyed Iran-Contra materials that they created or received while acting outside their roles as direct presidential advisors, the PRA would not apply to such transgressions.[7] Unless federal law imposes uniform recordkeeping duties on White House officials regardless of the presidential or nonpresidential status of particular White House materials, those officials will be able to evade their recordkeeping responsibilities by expediently designating records to fit under the most lenient statutory regime.[8]

Accordingly, because the PRA does not reach beyond presidential records, any attempt to reform White House recordkeeping must reconcile the PRA with the two additional statutes that bear upon White House recordkeeping and record disclosure practices: the Federal Records Act (FRA)[9] and the Freedom of Information Act (FOIA).[10] The PRA and the FRA both regulate *recordkeeping practices*, but they govern mutually exclusive sets of records: the FRA covers records "made or received by an agency of the United States Government,"[11] including White House agencies such as the NSC, while the PRA covers only presidential records, which are explicitly defined as excluding "official records of an agency."[12] In contrast to the recordkeeping focus of the PRA and the FRA, the FOIA governs *public disclosure* of agency records[13] but sets no re-

7. *See* Armstrong v. Bush, 924 F.2d 282, 286 n.2 (D.C. Cir. 1991) (suggesting that some, but not all, White House entities create presidential records covered by the PRA and suggesting that the NSC might create both presidential and nonpresidential records).

8. For example, because the PRA grants an incumbent president great discretion in recordkeeping decisions, *see Armstrong*, 924 F.2d at 286, the Reagan Administration would have been motivated to claim, for recordkeeping purposes, that NSC officials were acting as presidential advisors when creating documents that described Iran-Contra operations, regardless of President Reagan's direct knowledge of those operations. Such documents would then have been presidential records, and the President would have been free to dispose of them. In fact, the Clinton Administration appeared to be taking advantage of this malleable distinction between presidential and nonpresidential records when it recently asserted that, contrary to prior practice and to the aforementioned dicta in *Armstrong*, *see supra* note 7, the NSC's "sole role [is] to advise and assist the President," and thus the discretionary features of the PRA apply to *all* NSC records. *See* Douglas Jehl, *White House Curbs Access to Security Council's Data*, N.Y. TIMES, Mar. 26, 1994, at A6.

Moreover, because White House scandals such as Iran-Contra generally raise the question of presidential knowledge of improper activities, it makes no sense to have the recordkeeping responsibilities of a White House official turn on whether that official was performing presidential or nonpresidential duties; such a distinction would beg a key question in a White House scandal.

9. 44 U.S.C. §§ 2101-2118, 2501-2506, 2901-2909, 3101-3107, 3301-3324 (1988). The FRA actually consists of several related acts, but this Note adopts and expands upon the convention of the district court in Armstrong v. Bush, 721 F. Supp. 343, 345 n.2 (D.D.C. 1989), referring to all such related acts jointly as the Federal Records Act.

10. Pub. L. No. 90-23, 81 Stat. 54 (1967) (codified as amended at 5 U.S.C. § 552 (1988)).

11. 44 U.S.C. § 3301 (1988).

12. 44 U.S.C. § 2201(2)(B)(i) (1988).

13. 5 U.S.C. § 552(a)(3) (1988).

cordkeeping standards.[14] Although the FOIA refers only to agency records, the PRA explicitly provides for eventual public disclosure of *presidential* records under the FOIA as well.[15] Because each statute has a distinct role — the PRA and the FRA governing presidential and agency recordkeeping practices and the FOIA controlling public disclosure of White House records — any congressional or judicial response to the problems presented by the Iran-Contra scandal must consider the interaction of these federal statutes.

In addition to highlighting this statutory interplay, the Iran-Contra scandal also introduced another novelty not present in Watergate: evidence of White House plans and activities might have been captured in electronic mail (e-mail) messages exchanged among White House officials.[16] When journalist Scott Armstrong, the National Security Archive, and other private citizens and public interest groups brought suit on the final day of the Reagan Presidency to prevent destruction of any information still remaining in the White House e-mail system and on backup computer tapes,[17] they faced not only the typical legal obstacles that block access to presidential records[18] but also the task of convincing a court that e-mail should be regulated by the same recordkeeping and record disclosure laws that govern more traditional White House documents.[19] Armstrong and his fellow plaintiffs argued that the PRA and the FRA limit the power of White House officials to dispose of e-mail and that at least some e-mail retained under the PRA or the FRA should be available to the public under the FOIA.[20]

Having twice reached the D.C. Circuit Court of Appeals, the *Armstrong* litigation has addressed some basic issues of federal re-

14. *See Armstrong*, 721 F. Supp. at 345 ("FOIA . . . is a disclosure statute, and a disclosure statute only; it imposes no obligations and provides no guidance for the creation or disposal of particular records.").

15. 44 U.S.C. § 2204(c)(1) (1988).

16. *See Armstrong*, 721 F. Supp. at 345 n.1; Bretscher, *supra* note 2, at 1479.

17. *Armstrong*, 721 F. Supp. at 347; *see also* Bretscher, *supra* note 2, at 1479-80.

18. These obstacles include the assertion of executive privilege, *see, e.g.*, United States v. Nixon, 418 U.S. 683 (1974), lack of private party standing to bring a suit, *see, e.g.*, Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 148-49 (1980); *see also infra* note 151, and lack of judicial review of presidential actions, *see, e.g.*, Armstrong v. Bush, 924 F.2d 282, 289-91 (D.C. Cir. 1991); *see also infra* notes 157-61, 190-94 and accompanying text.

19. *See* Armstrong v. Executive Office of the President, 810 F. Supp. 335, 340-42 (D.D.C. 1993).

20. 721 F. Supp. at 347. The district court ordered that all computer tapes containing White House e-mail be preserved pending resolution of the lawsuit. 721 F. Supp. at 348. The court later held the White House defendants in contempt of court for, among other reasons, damaging the computer tapes during their transfer to the Archivist on the final days of the Bush Presidency. Armstrong v. Executive Office of the President, 821 F. Supp. 761, 768-69 (D.D.C. 1993). This contempt order was, however, vacated by the D.C. Circuit on other grounds. Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289-90 (D.C. Cir. 1993).

cordkeeping law. First, *Armstrong v. Bush (Armstrong I)*[21] considered the availability and extent of judicial review of White House compliance with the PRA and the FRA. The court concluded that the FRA permits limited judicial review of White House agency compliance with recordkeeping law but that the PRA precludes judicial review of presidential recordkeeping decisions.[22] Next, *Armstrong v. Executive Office of the President (Armstrong II)*[23] considered whether the recordkeeping statutes cover electronic mail. The court affirmed that e-mail is not intrinsically beyond the reach of federal recordkeeping law[24] and that existing White House agency guidelines for managing e-mail failed to meet FRA requirements.[25]

Despite this extensive litigation, *Armstrong* has left several White House recordkeeping issues unresolved. *Armstrong* has not yet established the right of eventual public access to White House electronic communications, and the courts have not yet ordered any FOIA disclosures of Reagan Administration e-mail.[26] Nor has the litigation ensured that similar communications will be preserved in the future because the *Armstrong* courts have yet to determine the necessary features of a White House electronic mail guideline that would satisfy the dictates of federal recordkeeping law.[27] Thus the

---

21. 924 F.2d 282 (D.C. Cir. 1991).

22. 924 F.2d at 297. In determining the scope of review under the FRA, *Armstrong I* first established that courts may review the adequacy of White House agency recordkeeping guidelines, including NSC guidelines that control the disposition of electronic mail messages. 924 F.2d at 291-94. The court next distinguished between the White House agency staff at large, whose compliance with recordkeeping guidelines cannot be challenged by private parties, and a select few officials, including the Archivist of the United States and White House agency heads, who are subject to judicial review because of their special enforcement duties under the FRA. 924 F.2d at 294-96.

23. 1 F.3d 1274 (D.C. Cir. 1993).

24. 1 F.3d at 1282-84.

25. 1 F.3d at 1284-87. On remand, the district court is reviewing the adequacy of new White House guidelines for the retention of e-mail and is also considering the plaintiffs' request for disclosure of White House e-mail under the FOIA. 1 F.3d at 1296; Armstrong v. Executive Office of the President, 830 F. Supp. 19, 20 (D.D.C. 1993).

26. Because White House e-mail has yet to be disclosed under the FOIA, the only indications that these mail messages may contain valuable historical information have come from investigations that have successfully subpoenaed portions of the mail preserved on computer tapes. *See* Armstrong v. Executive Office of the President, 821 F. Supp. 761, 768-69 (D.D.C. 1993) (noting the use of the computer tapes in Iran-Contra investigations and in the investigation of the State Department's search for information about President Clinton during the 1992 presidential campaign). The government's Iran-Contra investigations may indirectly lead to speedier public disclosure of some White House e-mail; for example, the district court granted the *Armstrong* plaintiffs' motion to compel preparation of a so-called Vaughn index, which itemizes and describes the contents of records being withheld by the government, *see* Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973), as a first step toward FOIA disclosure of e-mail messages already printed out for use in the criminal case against Caspar Weinberger. *Armstrong*, 830 F. Supp. at 21, 24.

27. In part as a response to the *Armstrong* litigation, the National Archives and Records Administration (NARA) recently proposed standards for electronic mail management that

Armstrong litigation, spanning three presidential administrations and with no end in sight, demonstrates how federal law has so far failed to facilitate straightforward judicial evaluation of White House electronic mail management practices and procedures.

Specifically, the Iran-Contra scandal and the *Armstrong* litigation reveal three major weaknesses in the current statutory scheme that governs maintenance of and access to White House computer-based information. First, current law attempts to serve two purposes, administrative efficiency[28] and preservation of a historical record,[29] that may suggest conflicting recordkeeping priorities and practices. Second, Congress has opted to weaken some enforcement provisions of the recordkeeping statutes in deference to separation of powers concerns that arise whenever Congress or the courts attempt to regulate or review executive branch activities.[30] Finally, current law often fails to resolve the issues raised by the evolution from paper-based to electronic government communications; for example, the statutes focus on "records," but information can be electronically represented in various forms that may not be precisely analogous to records.[31] These statutory infirmities cast doubt upon the congressional claim that under the PRA "the preservation of the historical record of future Presidencies [is] assured."[32]

This Note argues that federal recordkeeping law should promote the preservation of history above all other concerns. First, courts should construe and apply the recordkeeping statutes with this goal in mind. Second, Congress should amend the recordkeep-

---

would apply to all federal agencies. 59 Fed. Reg. 13,906 (1994) (to be codified at 36 C.F.R. pt. 1234) (proposed Mar. 24, 1994). These standards will be considered *infra* in section III.B.

28. *See* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 149 (1980) (citing a Senate report to support the argument that the FRA is meant to facilitate effective government records management rather than private-party access to those records).

29. *See* H.R. REP. NO. 1487, *supra* note 4, at 2, *reprinted in* 1978 U.S.C.C.A.N. at 5733 (stating that under the PRA "the preservation of the historical record of future Presidencies would be assured"); H.R. REP. NO. 876, 93rd Cong., 2d Sess. 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6269 (stating that the Freedom of Information Act "guarantees the right of persons to know about the business of their government").

30. *See* H.R. REP. NO. 1487, *supra* note 4, at 6, *reprinted in* 1978 U.S.C.C.A.N. at 5737 (noting congressional separation of powers concerns when enacting the PRA); *see also* Bretscher, *supra* note 2, at 1495-1508 (discussing separation of powers difficulties in the context of *Armstrong I*). The extent to which Congress may permissibly regulate executive branch recordkeeping activities is discussed *infra* at notes 223-46 and accompanying text.

31. *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFORMING THE NATION: FEDERAL INFORMATION DISSEMINATION IN AN ELECTRONIC AGE 8 (1988) [hereinafter OTA, INFORMING THE NATION] ("[E]lectronic technology is changing or even eliminating many distinctions between reports, publications, databases, records, and the like, in ways not anticipated by existing statutes and policies." (emphasis omitted)); Jamie A. Grodsky, *The Freedom of Information Act in the Electronic Age: The Statute is Not User Friendly*, 31 JURIMETRICS J. 17, 17-19 (1990).

32. H.R. REP. NO. 1487, *supra* note 4, at 2, *reprinted in* 1978 U.S.C.C.A.N. at 5733.

ing statutes to correct enforcement deficiencies that leave irresponsible recordkeeping practices unchecked and risk the loss of a historical record of White House decisionmaking. Finally, executive officials should adopt guidelines that identify and preserve historically significant materials regardless of the medium in which they are captured.

Part I of this Note examines the statutes that currently regulate the management and public disclosure of White House information and argues that this existing scheme dictates that the preservation of history should generally prevail over administrative convenience. Next, Part II finds that the enforcement mechanisms available under current recordkeeping law leave the historical record overly vulnerable to irresponsible government recordkeeping practices and concludes that Congress can augment the existing enforcement scheme without offending separation of powers principles. Part III then argues that the regulatory framework should be applied to modern means of communication such as electronic mail because such means are increasingly used to relay historically significant information among government officials. This Note concludes that the overall recordkeeping regime can and should be reshaped — through judicial interpretation, legislative revision, and executive guidelines — to ensure that White House recordkeeping practices serve the public interest in historical preservation.

I. The Existing Statutory Framework

The current federal statutory framework divides government information-related responsibilities into two distinct functions regulated by separate and exclusive laws.[33] On the one hand, the government must *manage* information, which includes the creation, retention, and disposal of records in order to carry out and document government activities; the FRA and the PRA regulate these information management practices. On the other hand, the government must also *disclose* information to the public; the FOIA regulates this duty to disclose. Though separate statutes govern these management and disclosure duties, the duties themselves are clearly interrelated: a duty to *disclose* a particular type of information is meaningless without a corresponding duty to *retain* the information in the first place.[34] This relationship between information

33. *See* Armstrong v. Bush, 721 F. Supp. 343, 345 (D.D.C. 1989) (noting the distinction between the FOIA, which is a disclosure statute, and the FRA and the PRA, which control the creation, retention, and disposal of records).

34. Reflecting the dual nature of government information responsibilities, the *Armstrong* plaintiffs submitted FOIA requests to various White House entities calling for disclosure of the contents of their e-mail systems and also filed a lawsuit seeking injunctive and declaratory relief based on their claim that the White House had failed to manage e-mail in accordance with the PRA and the FRA. 721 F. Supp. at 347.

retention and disclosure suggests that weaknesses in one element of the statutory framework could undermine the effectiveness of other elements. Accordingly, this Part examines the provisions and purposes of the FRA, the PRA, and the FOIA, and it argues that courts should interpret and reconcile these statutes with the principal goal of ensuring the preservation of a historical record of government activity.

A. *The Federal Records Act*

1. *The Procedures and Scope of the FRA*

The FRA is a series of statutes that govern the creation, management, and disposal of federal records.[35] This collection of statutes defines general standards and procedures for record retention and disposal, requires particular executive officials to develop more specific guidelines and procedures, and establishes a scheme of administrative oversight to enforce recordkeeping duties.

Under the FRA, the basic unit of government information is the *record.* The FRA explicitly defines *records* as "includ[ing] all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics."[36] The FRA dictates that such materials qualify as records if they serve as "evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them."[37] By limiting its coverage to records "made or received by an agency,"[38] the FRA regulates only the recordkeeping activities of federal government agencies. Finally, the FRA provides exclusive procedures for disposal of records; once a record comes into existence, it may not be "alienated or destroyed" except in accordance with the FRA.[39]

The provisions of the FRA define two key federal recordkeeping roles. First, the head of each agency has several statutory duties, including "mak[ing] and preserv[ing] records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the

35. 44 U.S.C. §§ 2101-2118, 2501-2506, 2901-2909, 3101-3107, 3301-3324 (1988); *see supra* note 9; *see also* American Friends Serv. Comm. v. Webster, 720 F.2d 29, 36 (D.C. Cir. 1983) ("[T]hese laws establish a unified system for handling the 'life cycle' of federal records — covering their creation, maintenance and use, and eventually their disposal by either destruction or deposit for preservation.").

36. 44 U.S.C. § 3301 (1988).

37. 44 U.S.C. § 3301 (1988).

38. 44 U.S.C. § 3301 (1988).

39. 44 U.S.C. § 3314 (1988); *see also* Armstrong v. Bush, 924 F.2d 282, 285 (D.C. Cir. 1991).

agency"[40] and "establish[ing] safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Archivist."[41] Second, the FRA requires the Archivist of the United States, a presidential appointee subject to Senate confirmation,[42] to "provide guidance and assistance to Federal agencies,"[43] to "promulgate standards, procedures, and guidelines with respect to records management,"[44] and to "conduct inspections or surveys of the records and the records management programs and practices within and between Federal agencies."[45]

The FRA also specifies exclusive procedures for the disposal of federal records. Both the agency head and the Archivist participate in the threshold decision whether to preserve a record; records may only be disposed of if they "do not appear to have sufficient administrative, legal, research, or other value to warrant their further preservation."[46] If an agency believes that certain records warrant disposal, the agency head must submit a list of those records to the Archivist.[47] If the Archivist agrees that the records need not be preserved, then the agency may dispose of the records but only "after publication of notice in the Federal Register and an opportunity for interested persons to submit comment thereon."[48] The Archivist may consult with Congress regarding a record disposal decision if the Archivist thinks a set of records "may be of special interest to Congress," or when "consultation with the Congress regarding the disposal of those particular records is in the public interest."[49] Finally, the Archivist may empower an agency to dispose of records of a specified "form or character" when such records are "common to several or all agencies"[50] or when that agency has previously been authorized to dispose of such records.[51]

If records are being disposed of contrary to the provisions of the FRA, the Archivist and the agency head assume enforcement roles. If either the Archivist or the agency head learns of "any actual, impending, or threatened unlawful removal, defacing, alteration, or

40. 44 U.S.C. § 3101 (1988).

41. 44 U.S.C. § 3105 (1988).

42. 44 U.S.C. § 2103(a) (1988).

43. 44 U.S.C. § 2904(a) (1988).

44. 44 U.S.C. § 2904(c)(1) (1988).

45. 44 U.S.C. § 2904(c)(7) (1988).

46. 44 U.S.C. § 3303(2) (1988) (listing the criteria to be applied by the agency head); 44 U.S.C. § 3303a(a) (1988) (listing the criteria to be applied by the Archivist).

47. 44 U.S.C. § 3303 (1988).

48. 44 U.S.C. § 3303a(a) (1988).

49. 44 U.S.C. § 3303a(c) (1988).

50. 44 U.S.C. § 3303a(d) (1988).

51. 44 U.S.C. § 3308 (1988).

destruction of records,"[52] then the one learning of the violation must notify the other, and the Archivist must "assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law."[53] If the agency head fails to pursue an action through the Attorney General as required, then the Archivist must ask the Attorney General to initiate the action and must also notify Congress.[54] The FRA specifies only these enforcement roles; it does not expressly provide a private cause of action to prevent or redress the unlawful removal or destruction of agency records,[55] nor does it explicitly authorize judicial review of the recordkeeping duties it imposes on the agencies and the Archivist.

2. *The Purposes of the FRA*

Given the piecemeal enactment of the various provisions of the FRA,[56] courts have looked to legislative history to identify overriding purposes that might unite the FRA and lead to consistent interpretation.[57] Unfortunately, because the legislative history is fragmented, courts disagree about the relative importance of two basic yet potentially contradictory FRA purposes. On the one hand, the FRA may serve primarily to facilitate administrative efficiency in government recordkeeping and may therefore simply be seen as providing clear-cut criteria and mechanisms for creating and retaining records that will help the government do its work. On the other hand, the FRA's main purpose may be to ensure the preservation of a historical record of governmental decisionmaking. In that case, the FRA would provide standards that emphasize the historical significance of information and safeguards that prevent self-serving record management and disposal — even if such measures might hinder administrative efficiency to some extent.

---

52. 44 U.S.C. § 2905(a) (1988).

53. 44 U.S.C. § 2905(a) (1988) (archivist duties); 44 U.S.C. § 3106 (1988) (agency head duties). The FRA does not specify the range of actions the Attorney General may pursue after being notified of the unlawful removal or destruction of records, but the FRA clearly contemplates that the Attorney General may file a lawsuit. *See* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 148 (1980) ("[T]he Attorney General may bring suit to recover the records.").

54. 44 U.S.C. § 2905(a) (1988).

55. *See Kissinger,* 445 U.S. at 148 (noting that the FRA "establishes only one remedy for the improper removal of a 'record' from the agency:" notification of the Attorney General). The availability of an implied private cause of action alleging FRA violations is considered *infra* at notes 154-56, 172-89 and accompanying text.

56. *See supra* note 9.

57. *See, e.g., Kissinger,* 445 U.S. at 149; American Friends Serv. Comm. v. Webster, 720 F.2d 29, 55-57 (D.C. Cir. 1983).

In *Kissinger v. Reporters Committee for Freedom of the Press,*[58] the Supreme Court came down on the side of administrative convenience. The Court found that the FRA's legislative history "reveals that [its] purpose was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole."[59] The Court cited a Senate report stating that "records come into existence, or should do so, not . . . to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them."[60] The FRA provision that requires "the establishment of standards and procedures to assure efficient and effective records management"[61] lends additional support to the analysis in *Kissinger.*

Considering the fragmented nature of the FRA, however, the *Kissinger* Court's statement of the FRA's primary purpose should be limited to the particular facts and FRA provisions involved in that case. As the D.C. Circuit pointed out in *American Friends Service Committee v. Webster,*[62] the Senate report relied upon in *Kissinger* accompanied the Federal Records Act of 1950,[63] but many key FRA provisions were enacted separately from the 1950 Act.[64] For example, the 1950 Act did not include the FRA's record disposal provisions, one of which broadly calls upon the Archivist to consider "administrative, legal, research, or other value" in deciding which records to preserve.[65] In addition, the Senate report cited in *Kissinger* did not claim that administrative efficiency was the *sole* purpose served by the FRA but rather only the "first interest" among others.[66]

---

58. 445 U.S. 136 (1980).

59. 445 U.S. at 149.

60. 445 U.S. at 149 (quoting S. REP. No. 2140, 81st Cong., 2d Sess. 4 (1950)).

61. 44 U.S.C. § 2902 (1988).

62. 720 F.2d 29 (D.C. Cir. 1983).

63. Federal Records Act of 1950, Pub. L. No. 81-754, § 6, 64 Stat. 578, 583-90 (codified as amended in scattered sections of 40, 41, 44, and 50 U.S.C.).

64. *American Friends,* 720 F.2d at 53. *Armstrong I* amplifies this point by noting the enactment dates of the various parts of the FRA; for example, some disposal provisions were enacted as part of the 1943 Disposal of Records Act, Pub. L. No. 78-115, 57 Stat. 380 (codified as amended at 44 U.S.C. §§ 3301-3314 (1988)), and others were added in the Government Records Disposal Amendments of 1970, Pub. L. No. 91-287, 84 Stat. 320 (codified as amended in scattered sections of 44 U.S.C.). *See* Armstrong v. Bush, 924 F.2d 282, 284 n.1 (D.C. Cir. 1991).

65. 44 U.S.C. § 3303a(a) (1988). The court in *American Friends* found it particularly significant that the disposal provisions were not a part of the 1950 Act, because this provided a way to distinguish the wrongful *destruction* claim made in *American Friends* from the wrongful *removal* claim made in *Kissinger. See* 720 F.2d at 40, 52.

66. *See American Friends,* 720 F.2d at 53 (construing S. REP. No. 2140, 81st Cong., 2d Sess. 4 (1950)). Apart from *Kissinger*'s limited analysis of the FRA's legislative history, that case also featured two peculiar elements that limit the reach of its reasoning about the FRA's purposes. First, the plaintiffs were seeking to establish an implied cause of action directly

Indeed, examination of the entirety of the FRA and its legislative history shows that it is clearly intended to serve the needs of historical preservation as well as administrative convenience. For example, the same section of the FRA that speaks of "efficient and effective records management" also mentions "[a]ccurate and complete documentation of the policies and transactions of the Federal Government."[67] In addition, the court in *American Friends* undertook a thorough study of the legislative history accompanying the various acts that comprise the FRA, and the court concluded that it "supports a finding that Congress intended, expected, and positively desired private researchers . . . to have access to the documentary history of the federal government."[68]

More recent legislation enacted under the umbrella of the FRA manifests an even greater recognition of the need to preserve historically significant agency information. In the National Archives and Records Administration Act of 1984,[69] Congress transformed the National Archives and Records Service (NARS) from a branch of the General Services Administration (GSA) into an independent agency, designated as the National Archives and Records Administration (NARA) and headed by the Archivist of the United States.[70] The Act removed the Archivist, the National Archives that the Archivist manages, and all federal government recordkeeping functions from the control of the GSA,[71] based on a congressional determination that the GSA is best suited to perform "housekeeping functions," as opposed to the "cultural activities" of the National Archives.[72] Congress perceived that "[t]he mission of

under the FRA, *see Kissinger,* 445 U.S. at 147-48, but the Supreme Court has been increasingly reluctant to imply private causes of action under federal statutes that do not expressly authorize such suits, *see, e.g.,* Karahalios v. National Fedn. of Fed. Employees Local 1263, 489 U.S. 527, 536 (1989) (observing that the Court has "departed from its prior standard for resolving a claim urging that an implied statutory cause of action should be recognized"); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 358 (2d ed. 1994) (finding a trend "for the Supreme Court to be less willing to create private rights of action"). Next, rather than alleging widespread or systematic agency violations of the FRA, the *Kissinger* plaintiffs complained only that the State Department had not done enough to secure the return of the documents Henry Kissinger had allegedly wrongfully removed when he left the Department. *See* 445 U.S. at 148-51. *Armstrong I* later relied on this aspect of *Kissinger* to conclude that private-party claims of individual noncompliance with the FRA's provisions are not judicially cognizable. *See Armstrong I,* 924 F.2d at 294-95.

67. 44 U.S.C. § 2902 (1988); *see also American Friends,* 720 F.2d at 42 n.17, 53-55 (listing various other provisions that show that the FRA serves historical as well as administrative purposes).

68. 720 F.2d at 55-57.

69. Pub. L. No. 98-497, 98 Stat. 2280 (codified as amended in scattered sections of 44 U.S.C.).

70. 44 U.S.C. § 2102 (1988); S. REP. No. 373, 98th Cong., 2d Sess. 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3865, 3866.

71. S. REP. No. 373, *supra* note 70, at 2, *reprinted in* 1984 U.S.C.C.A.N. at 3866.

72. *Id.* at 6, *reprinted in* 1984 U.S.C.C.A.N. at 3870. The Senate report accompanying the Act described the GSA mission as "public buildings management and maintenance; federal

the National Archives — the storage, disposition, preservation, and use for further Government and private scholarly research of the records of enduring value of the United States Government . . . — is fundamentally incompatible with the mission of its parent agency, GSA."[73] By freeing the NARA from GSA control, Congress intended to create a viable independent agency that could "ensure that our precious documentary heritage receives the care and attention demanded in a democracy."[74]

This 1984 legislation clearly demonstrates congressional awareness of the occasional conflict between historical preservation and administrative expediency, and it also reflects a desire to protect historical materials from claims of mere convenience. A Senate report accompanying the Act illustrates the dangers of expediency by recounting and criticizing a series of record management decisions made during the period of GSA control over the National Archives that failed to recognize the need to preserve a historical record.[75] These incidents led the Senate report to conclude that "[w]ithout effective 'records management,' the Archivist comes in after the fact to a situation where it may be too late to ensure a rich historical record."[76] Seeking to prevent this situation, Congress transferred control over government record management from an agency that places highest priority on bureaucratic efficiency to an agency headed by a historian. In short, this recent legislation demonstrates that when the competing purposes served by the FRA come into conflict, the historical record must not be sacrificed for administrative efficiency.

---

property and services procurement and disposition; transportation; traffic; stockpiling of strategic materials; and management of the Government's data processing systems." *Id.* at 2, *reprinted in* 1984 U.S.C.C.A.N. at 3866.

73. *Id.* at 1-2, *reprinted in* 1984 U.S.C.C.A.N. at 3865-66. The Senate report also quotes former Archivist James Rhoads's elaboration of this point:

> The central problem is that many of the objectives, priorities and motivations of GSA and NARS [the predecessor to NARA] are simply incompatible. There is no way that an agency dedicated to encouraging scholarly research and other educational and cultural objectives can function effectively as a subordinate component of a business-oriented conglomerate whose primary responsibilities are for construction and maintenance of public buildings, procurement of supplies, and management of motor pools and stockpiles of strategic materials.

Id. at 6, *reprinted in* 1984 U.S.C.C.A.N. at 3870.

74. *Id.* at 23, *reprinted in* 1984 U.S.C.C.A.N. at 3887.

75. *Id.* at 6-17, *reprinted in* 1984 U.S.C.C.A.N. at 3870-81. For example, the Senate report discusses in detail the 1974 agreement between President Nixon and the head of GSA that gave the former President broad powers to dispose of records created during his administration. *Id.* at 2, 11-12, *reprinted in* 1984 U.S.C.C.A.N. at 3866, 3875-76. By vesting record management powers in the head of GSA rather than the Archivist, the then-existing law had permitted a situation in which "the Archivist had not even been consulted while an arrangement of major impact on our documentary history was worked out." *Id.* at 3, *reprinted in* 1984 U.S.C.C.A.N. at 3867.

76. *Id.* at 21, *reprinted in* 1984 U.S.C.C.A.N. at 3885.

B. *The Presidential Records Act*

1. *The Procedures and Scope of the PRA*

In contrast to the FRA's regulation of agency recordkeeping, the PRA[77] governs only the recordkeeping practices of the President and members of the presidential staff.[78] The PRA provides general standards and procedures for the retention and disposal of presidential records, grants the incumbent President broad discretion over day-to-day recordkeeping practices, and establishes a process for eventual public disclosure of the materials a president has chosen to preserve.

Like the FRA, the PRA establishes a record-based regulatory scheme. The PRA defines *presidential records* as "documentary materials,"[79] which are in turn defined as "all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audiovisual, or other electronic or mechanical recordations."[80] Having established the broad sweep of *documentary materials,* the PRA then limits the scope of *presidential records* in various ways. First, the definition of *presidential records* explicitly excludes "personal records."[81] In addition, the PRA covers only records that are "created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President," and such records must have been created or received "in the course of conducting activities which relate to or have an effect upon the carrying out of" presidential duties.[82] Finally, the statute's plain language shows that the records regulated under the PRA are mutually exclusive of those regulated under the FRA; the PRA definition of *presidential records* explicitly *excludes* documentary materials that are "official records of an agency,"[83]

77. 44 U.S.C. §§ 2201-2207 (1988).

78. *See generally* Bretscher, *supra* note 2, at 1481-87 (providing a detailed description of the background and provisions of the PRA).

79. 44 U.S.C. § 2201(2) (1988).

80. 44 U.S.C. § 2201(1) (1988).

81. 44 U.S.C. § 2201(2)(B)(ii) (1988). The PRA defines *personal records* as "all documentary materials . . . of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." 44 U.S.C. § 2201(3) (1988). As examples of personal records, the PRA cites "diaries, journals, or other personal notes . . . which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business," 44 U.S.C. § 2201(3)(A) (1988), and "materials relating to private political associations," 44 U.S.C. § 2201(3)(B) (1988).

82. 44 U.S.C. § 2201(2) (1988).

83. 44 U.S.C. § 2201(2)(B)(i) (1988). This section of the PRA cites the definition of *agency* provided by the FOIA at 5 U.S.C. § 552(f) (1988).

while the FRA covers *only* agency records.[84] Consequently, the FRA regulates White House records if they are created or received by a White House agency, but the PRA controls White House records created or received by the President or immediate presidential staff as they carry out presidential duties.

The PRA, however, lacks the FRA's executive enforcement scheme. Specifically, in contrast to the enforcement role dictated by the FRA, the Archivist plays only an advisory role in record management decisions made by an incumbent president under the PRA.[85] While in office, a president makes the determination whether to dispose of records "that no longer have administrative, historical, informational, or evidentiary value."[86] The Archivist may only offer a written opinion of the proposed disposal[87] and, if desired, request the advice of Congress regarding the proposed disposal.[88] Regardless of whether the Archivist approves or disapproves of the President's disposal plans and regardless of whether the Archivist seeks the advice of Congress, the President may proceed with a planned disposal, having to wait at most sixty days so that Congress has a chance to respond.[89] The PRA therefore lacks one of the FRA's key enforcement provisions: the Archivist may not initiate any sort of legal action against an incumbent president or presidential staff in order to prevent the improper disposal of presidential records.[90] Finally, just as the FRA does not expressly provide for judicial review of agency recordkeeping,[91] the PRA includes no provision for court oversight of an incumbent president's recordkeeping decisions.[92]

Nevertheless, the PRA does provide the Archivist some control over the records of former presidents. Once a president leaves office, decisionmaking power over that president's records shifts to the Archivist, who then "assume[s] responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President."[93] The PRA circumscribes the Archivist's discretion by dictating that public access to certain presidential records be

84. *See supra* note 38 and accompanying text.

85. *See* Armstrong v. Bush, 924 F.2d 282, 290 (D.C. Cir. 1991) (describing the differences in the role of the Archivist under the FRA and the PRA).

86. 44 U.S.C. § 2203(c) (1988).

87. 44 U.S.C. § 2203(c)(1) (1988).

88. 44 U.S.C. § 2203(e) (1988).

89. 44 U.S.C. § 2203(c)-(d) (1988).

90. Recall that the FRA *requires* the Archivist to request that the Attorney General take action to prevent improper disposal of agency records if the agency head fails to do so. *See supra* note 54 and accompanying text.

91. *See supra* note 55 and accompanying text.

92. *See* Armstrong v. Bush, 721 F. Supp. 343, 346 (D.D.C. 1989).

93. 44 U.S.C. § 2203(f)(1) (1988).

restricted even after a president leaves office.[94] The PRA defines six categories of restricted records, including those with national defense or foreign policy implications, confidential communications among presidential staff seeking or giving advice, and various files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[95] Just prior to leaving office, a president must specify a term of up to twelve years for each of the six restricted categories; during these terms, the Archivist must prohibit public access to the records in each of these categories.[96] After consulting with the former President, the Archivist determines whether records fall into one or more of the restricted categories and whether the PRA expressly exempts this determination from judicial review.[97] Once the Archivist decides that a record fits into one of the restricted categories, that record may not be disclosed until the term of years specified for that category expires, until the former President waives the restriction, or until the Archivist determines that the former President has placed the record in the public domain through publication.[98] Under the PRA, then, public access to presidential records may be delayed, but eventually the public may invoke the FOIA to gain access to all records that a president has seen fit to preserve while in office.[99]

2. *The Purposes of the PRA*

In contrast to the piecemeal enactment of the FRA and its attendant conflicting purposes, Congress enacted the PRA as a single piece of legislation, and its straightforward provisions and legislative history reveal a pair of clearly articulated purposes. First, the PRA asserts public ownership of presidential records.[100] Second, the PRA evinces a congressional intention that historically significant presidential materials must be preserved, even at the price of some lost administrative recordkeeping convenience. The PRA directs an incumbent president to consider a record's historical value

94. 44 U.S.C. § 2204 (1988).

95. 44 U.S.C. § 2204(a) (1988).

96. 44 U.S.C. § 2204(a) (1988).

97. 44 U.S.C. § 2204(b)(3) (1988). The PRA is otherwise almost completely silent on judicial review. The statute does not expressly provide for judicial review of an incumbent president's recordkeeping decisions, *see supra* note 92 and accompanying text, but does permit a former president to initiate a suit "asserting that a determination made by the Archivist violates the former President's rights or privileges," 44 U.S.C. § 2204(e) (1988). Finally, a court may review an archivist's decision to dispose of a former president's records. *See* 44 U.S.C. § 2203(f)(3) (1988).

98. 44 U.S.C. § 2204(b)(1) (1988).

99. 44 U.S.C. § 2204(c)(1) (1988).

100. 44 U.S.C. § 2202 (1988); *see also* H.R. REP. NO. 1487, *supra* note 4, at 2, *reprinted in* 1978 U.S.C.C.A.N. at 5733.

when making disposal decisions.[101] Moreover, the House report accompanying the PRA states that the legislation assures "the preservation of the historical record of future Presidencies"[102] and that one of the main purposes of the PRA is "to establish procedures governing the preservation and public availability of [presidential] records."[103] Even when the House report acknowledges the efficiency motive for recordkeeping procedures, it argues for careful preservation of records, noting that presidential administrations are sometimes handicapped by lack of availability of records from prior administrations.[104]

Furthermore, the legislative history emphasizes that the PRA's restrictive provisions — those that limit the definition of *presidential records* and delay public access to those records — should work to enhance rather than to diminish the historical record. First, Congress indicated that the "personal records" exception to the definition of *presidential records* is narrow; the House report states that "a great number of what might ordinarily be construed as one's private activities are, because of the nature of the presidency, considered to be of a public nature."[105] Next, the House report explains that the Archivist, rather than the outgoing President, is given the power to determine whether records lie within the PRA categories of delayed public access[106] so that an outgoing president may not arbitrarily invoke these restrictions to thwart the public interest.[107] Finally, even while acknowledging the "chilling effect" on free ex-

101. 44 U.S.C. § 2203(c) (1988).

102. H.R. REP. NO. 1487, *supra* note 4, at 2, *reprinted in* 1978 U.S.C.C.A.N. at 5733.

103. *Id.* at 2, *reprinted in* 1978 U.S.C.C.A.N. at 5733.

104. *Id.* at 8 n.12, *reprinted in* 1978 U.S.C.C.A.N. at 5739 (citing NATIONAL STUDY COMMN. ON RECORDS AND DOCUMENTS OF FED. OFFICIALS, MEMORANDUM OF FINDINGS ON EXISTING CUSTOM OR LAW, FACT AND OPINION 39 (1977)); *see also id.* at 4, *reprinted in* 1978 U.S.C.C.A.N. at 5735 (noting that materials from former presidents to which public access has been restricted are available to the incumbent President when "necessary to conduct the ongoing business of Government").

105. *Id.* at 11-12, *reprinted in* 1978 U.S.C.C.A.N. at 5742-43.

106. *See supra* note 97 and accompanying text; *see also* H.R. REP. NO. 1487, *supra* note 4, at 3, *reprinted in* 1978 U.S.C.C.A.N. at 5734 (noting that the outgoing President's options are limited to deciding whether each of the six restrictive categories should be invoked at all and deciding what terms of years should apply to the chosen restrictive categories).

107. As the House report states:

> Some form of statutory access provisions, rather than leaving the choice entirely up to the former President, was considered necessary to shield the Archivist from unnecessary pressure. The Archivist, it was felt, would be susceptible to possible pressure from the incumbent President to release embarrassing and inappropriate material concerning a predecessor or rival, and from the predecessor to withhold materials when no sound policy reason for doing so would be evident. The unlimited right to restrict access would also allow the outgoing President to close availability entirely during a set period; to permit trusted researchers to view the materials to the exclusion of others; and set mandatory restrictions which would be akin to assertions of privilege over the materials against the public.

H.R. REP. NO. 1487, *supra* note 4, at 8-9, *reprinted in* 1978 U.S.C.C.A.N. at 5739-40.

change among White House staff members that might result from premature disclosure of presidential records,[108] the House report reveals a clear commitment to the preservation of history, stating that a great danger of premature disclosure would be "less candid advice being placed on paper [resulting in] a depleted historical record."[109] In short, Congress intended that the PRA should principally serve the needs of historical preservation.

C. *The Freedom of Information Act*

In contrast to the FRA and the PRA, which dictate record management policies and procedures, the FOIA[110] regulates only the public disclosure of government records.[111] Accordingly, the FOIA defines procedures for disclosure of records and enumerates specific exemptions that the government may invoke to prevent disclosure.

The FOIA's procedures for disclosure of government information encompass both agency and presidential records. First, like the FRA, the FOIA explicitly governs "agency records,"[112] although the FOIA does not define *records,*[113] and only a 1974 amendment defines the term *agency.*[114] Next, the PRA widens the scope of records available for disclosure through the FOIA by stipulating that the FOIA governs access to presidential records once the PRA's restriction period has expired.[115]

The FOIA specifies the scope of materials that agencies must make available to the public. First, the FOIA provides that an agency must disclose certain basic information, such as a description of its organization and statements of policy, regardless of whether anyone has requested it.[116] Next, the FOIA requires agen-

108. *Id.* at 8, *reprinted in* 1978 U.S.C.C.A.N. at 5739.

109. *Id.* at 14-15, *reprinted in* 1978 U.S.C.C.A.N. at 5746.

110. 5 U.S.C. § 552 (1988).

111. *See* Armstrong v. Bush, 721 F. Supp. 343, 345 (D.D.C. 1989) ("FOIA . . . is a disclosure statute, and a disclosure statute only; it imposes no obligations and provides no guidance for the creation or disposal of particular records.").

112. *See, e.g.,* 5 U.S.C. § 552(a)(3) (1988) (providing that "each agency, upon any request for records . . . shall make the records promptly available").

113. *See* Forsham v. Harris, 445 U.S. 169, 183 (1980) (noting that the FOIA does not define *record,* and choosing to apply the FRA definition).

114. Pub. L. No. 93-502, 88 Stat. 1564 (codified as amended at 5 U.S.C. § 552 (1988)); *see also* H.R. REP. NO. 876, *supra* note 29, at 8, *reprinted in* 1974 U.S.C.C.A.N. at 6274 (discussing the 1974 amendment to the FOIA that explicitly defines *agency* to include, among other entities, establishments within the Executive Office of the President).

115. *See supra* note 99 and accompanying text. Without this express PRA provision, presidential records arguably would be outside the reach of the FOIA, because by statutory definition *presidential records* are distinct from *agency records. See supra* note 83 and accompanying text.

116. 5 U.S.C. § 552(a)(1)-(2) (1988).

cies to make their records available to any person upon request unless one of nine exemptions from disclosure applies.[117] Some of these exemptions are comparable to the restrictions the PRA places on materials of an outgoing president to delay public access;[118] for example, the PRA and the FOIA share exemptions from disclosure for materials relating to national defense and for personnel and medical files.[119] The FOIA exemption from disclosure for "interagency or intra-agency memorandums or letters"[120] differs, however, from the PRA restriction covering "confidential communications requesting or submitting advice."[121] Whereas courts have held that the FOIA exemption applies only until the agency decision discussed in the "memorandums or letters" has been made,[122] Congress intended the PRA restriction to apply throughout the period of restriction specified by the outgoing President.[123] The FOIA exemptions also differ from the PRA restrictions in a more fundamental way. The PRA restrictions leave no room for discretion, but they only *delay* public access.[124] In contrast, the FOIA gives agencies discretion to decide whether to invoke exemptions,[125] but it places *no limit* on the length of time exempt materials may be withheld from the public.[126]

By submitting FOIA requests for disclosure of government information, private individuals "enforce" the FOIA; the statute provides no executive enforcement scheme. In addition, the FOIA explicitly provides for judicial review: courts may review an agency's decision not to comply with a FOIA request,[127] and they may also review an agency's failure to respond to a FOIA request in a timely fashion.[128]

The legislative history of an amendment to the FOIA clearly expresses the FOIA's purpose: guaranteeing "the right of persons

---

117. 5 U.S.C. § 552(a)(3) (1988); 5 U.S.C. § 552(b) (1988).

118. *See supra* notes 94-98 and accompanying text.

119. *Compare* 5 U.S.C. § 552(b)(1) (1988) (FOIA national defense exemption) *and* 5 U.S.C. § 552(b)(6) (1988) (FOIA personnel and medical file exemption) *with* 44 U.S.C. § 2204(a)(1) (1988) (PRA national defense restriction) *and* 44 U.S.C. § 2204(a)(6) (1988) (PRA personnel and medical file restriction).

120. 5 U.S.C. § 552(b)(5) (1988).

121. 44 U.S.C. § 2204(a)(5) (1988).

122. *See, e.g.,* NLRB v. Sears Roebuck & Co., 421 U.S. 132, 150-54 (1975) (distinguishing between predecisional and postdecisional agency documents); Access Reports v. Department of Justice, 926 F.2d 1192, 1194-95 (D.C. Cir. 1991) (surveying judicial interpretations of the "deliberative process" exemption).

123. H.R. REP. No. 1487, *supra* note 4, at 14, *reprinted in* 1978 U.S.C.C.A.N. at 5745.

124. *See supra* notes 94-99 and accompanying text.

125. *See* Yeager v. Drug Enforcement Admin., 678 F.2d 315, 326 (D.C. Cir. 1982).

126. 5 U.S.C. § 552(b) (1988).

127. 5 U.S.C. § 552(a)(4)(B) (1988).

128. *See* 5 U.S.C. § 552(a)(6)(C) (1988).

to know about the business of their government."[129] Many provisions of the FOIA support this goal. First, in court proceedings that follow an agency's denial of a FOIA request, the agency bears the burden of proving that one of the exemptions applies.[130] Next, the FOIA imposes strict limits on the amount of time agencies have to respond to requests.[131] In addition, the FOIA explicitly limits the reasons for withholding information to the statute's nine exemptions.[132] The FOIA therefore stands for the ideal that free flow of information from the government to the citizenry is crucial to a well-functioning democracy.[133]

D. *Reconciling the Purposes of Recordkeeping and Record Disclosure Law*

The three statutes examined in this Part were enacted separately, and they arguably reflect different congressional concerns and priorities. Moreover, the FRA alone consists of distinct enactments that seem to serve conflicting purposes.[134] Although this Part has thus far argued that the language, structure, and history of each individual statute evince a congressional intent to emphasize the preservation of historical records, this section argues in addition that courts should read these statutes together and thereby interpret federal recordkeeping law as a unified whole that mandates the preservation of a historical record of government policymaking.

Several arguments support judicial reference to the broad historical preservation mandate of the PRA as a way of helping to reconcile the conflicting purposes of the FRA. First, courts sometimes resolve statutory ambiguities by consulting related statutes that provide straightforward solutions to the problem at hand;[135]

---

129. H.R. REP. No. 876, *supra* note 29, at 3, *reprinted in* 1974 U.S.C.C.A.N. at 6269.

130. 5 U.S.C. § 552(a)(4)(B) (1988).

131. 5 U.S.C. § 552(a)(6)(A) (1988).

132. 5 U.S.C. § 552(d) (1988).

133. The House and Senate Select Committees that investigated the Iran-Contra affair echoed this ideal in their joint report:

> Officials who make public policy must be accountable to the public. But the public cannot hold officials accountable for policies of which the public is unaware. Policies that are known can be subjected to the test of reason, and mistakes can be corrected after consultation with the Congress and deliberation within the Executive branch itself. Policies that are secret become the private preserve of the few, mistakes are inevitably perpetuated, and the public loses control over Government. That is what happened in the Iran-Contra Affair . . . .

H.R. REP. No. 433, *supra* note 1, at 16. Compare New York Times Co. v. United States, 403 U.S. 713, 720-24 (1971) (Douglas, J., concurring), in which Justice Douglas, arguing that publication of the Pentagon Papers should not be enjoined, stated: "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health." 403 U.S. at 724.

134. *See supra* notes 56-76 and accompanying text.

135. *See, e.g.*, Forsham v. Harris, 445 U.S. 169, 183 (1980) (looking to the FRA definition of *records* to resolve the ambiguity left by the FOIA's failure to define *agency records*). *See*

clearly the PRA and the FRA concern the same subject matter, federal recordkeeping. Second, because the PRA was enacted more recently than most of the FRA's provisions, it can be seen as part of an evolving congressional recognition that administrative efficiency must ultimately yield to the preservation of government history.[136] Accordingly, some of the older legislative history of the FRA that places greater emphasis on administrative convenience can perhaps be given less weight because it is based on outdated congressional concerns.

Additionally, interpreting the FRA to require a lesser historical preservation burden than that imposed by the PRA leads to the anomalous result that two distinct recordkeeping mandates apply within the White House itself — depending on whether a given record is *presidential* or is instead traceable to an *agency*.[137] Such a result would be needlessly confusing, particularly because the language of the two statutes is similar enough to support a unified mandate.[138] Moreover, this result would imply that presidential staff must be held to a *stricter* standard of preservation than that required of agency officials, based solely on a clearer congressional statement of the supremacy of the goal of historical preservation in the PRA's legislative history.[139] But a claim that presidential records have greater historical significance than agency records ignores substantial public interest in the roles agencies might have played at key moments in the nation's history.[140] Finally, given the

---

generally 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION §§ 51.01-03 (4th ed. 1984) (describing the general rules for construing related statutes).

136. *See supra* notes 69-76 and accompanying text (describing the trend toward preservation of history in more recent FRA legislation); *cf.* Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commn., 626 F.2d 1020, 1022 (D.C. Cir. 1980) (finding that a "latter law" implicitly restricts an inconsistent earlier statute); 2A SINGER, *supra* note 135, § 51.02 ("If there is an irreconcilable conflict between the new provision and the prior statutes, the new provision will control as it is the later expression of the legislature.").

137. *See supra* notes 83-84 and accompanying text (noting that the FRA governs some White House recordkeeping practices while the PRA controls others).

138. *Compare supra* notes 36-37 and accompanying text (describing the FRA definition of *records*) *with supra* notes 79-82 and accompanying text (describing the PRA definition). Indeed, the House report accompanying the PRA explicitly states an intention that the PRA and the FRA be uniformly applied: "[I]t was felt important that once having declared the President's papers to be Government records, they be governed to the extent feasible by the same statutory standards controlling Cabinet members' records and all other Government records. Consistency in application of the rules seemed critical." H.R. REP. NO. 1487, *supra* note 4, at 8, *reprinted in* 1978 U.S.C.C.A.N. at 5739.

139. *See supra* notes 100-103 and accompanying text.

140. *See, e.g.,* American Friends Serv. Comm. v. Webster, 720 F.2d 29, 54 n.44 (D.C. Cir. 1983) (noting congressional interest in FBI records that might be relevant to assassination investigations).

Furthermore, the facts surrounding the *Armstrong* litigation refute any claim that agency records should be subject to a lesser standard of preservation than presidential records, because a major question in the Iran-Contra affair was whether questionable policies were formulated by agency officials or by the President himself. *See* Armstrong v. Bush, 721 F. Supp. 343, 345 n.1 (D.D.C. 1989). Indeed, regardless of what the President knew about the extent

unique separation of powers issues raised by legislation that regulates presidential activities,[141] Congress could hardly have intended that the President should meet a higher or more burdensome recordkeeping standard than federal agencies. In short, many arguments support interpreting the FRA in light of the PRA's broad mandate to preserve historical materials, particularly in cases in which White House recordkeeping responsibilities are at issue.

In addition to clarifying the FRA, there are other reasons courts should examine the FRA, the PRA, and the FOIA together to arrive at a unified and coherent statement of federal recordkeeping policy under current law. For example, courts can apply a key principle of the FOIA — namely, public disclosure of records pertaining to government decisionmaking[142] — to impose a duty that the government retain at least some records that will eventually be subject to disclosure under the FOIA.[143] Courts can also resolve any conflicts based upon differing or nonexistent definitions of *records* by considering the broad purposes served by all three statutes viewed as a whole.[144] A global strategy for interpreting federal recordkeeping and record disclosure law would thus ensure more consistent treatment of records, whether agency or presidential, and would also ensure that courts apply only standards chosen by Con-

---

of the NSC's Iran-Contra activities, historians and the public would certainly want to learn about those activities at some point. *Cf.* KOH, *supra* note 1, at 53-57 (describing the NSC's increasing role in policymaking, which culminated in that agency's pivotal role in the Iran-Contra scandal). Notwithstanding this equal importance of presidential and agency records, however, the *Armstrong* courts have not yet used the PRA's clearer statement of purposes as an aid to construction of the FRA.

141. *See* Armstrong v. Bush, 924 F.2d 282, 292 (D.C. Cir. 1991) (distinguishing the FRA from the PRA by noting that "[i]n drafting the FRA, Congress did not have to worry about the stark separation of powers questions implicated by legislation regulating the conduct of the President's daily operations"). Separation of powers concerns are also discussed *infra* in notes 223-46 and accompanying text.

142. *See supra* notes 129-33 and accompanying text.

143. Justice Brennan suggested this approach in *Kissinger:*

> If FOIA is to be more than a dead letter, it must necessarily incorporate some restraint upon the agency's power to move documents beyond the reach of the FOIA requester. Even the Court's opinion implies — as I think it must — that an agency would be improperly withholding documents if it failed to take steps to recover papers removed from its custody deliberately to evade an FOIA request. Beyond that minimal rule, I would think it also plainly unacceptable for an agency to devise a records routing system aimed at frustrating FOIA requests in general by moving documents outside agency custody with unseemly haste.
>
> Indeed, I would go further. If the purpose of FOIA is to provide public access to the records incorporated into Government decisionmaking, then agencies may well have a concomitant responsibility to retain possession of, or control over, those records.

Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 159 (1980) (Brennan, J., concurring in part and dissenting in part) (citations omitted); *see also Kissinger,* 445 U.S. at 161-65 (Stevens, J., concurring in part and dissenting in part) (explicitly adopting this approach); *American Friends,* 720 F.2d at 42 n.16 (construing Justice Brennan's opinion in *Kissinger*).

144. *See infra* notes 249-72 and accompanying text (arguing that despite differences in language, all three statutes support a functional definition of *records*).

gress, regardless of which particular statute enunciates the standard.[145]

II. Enforcement of Federal Recordkeeping Law

As Part I demonstrated, the FRA, the PRA, and the FOIA together create a complex statutory scheme for regulating federal government information management and disclosure. Because the government cannot disclose information it has not retained, its recordkeeping and record disclosure duties are clearly intertwined; nonetheless, separate statutes control these related responsibilities.[146] Similarly, even though White House *agency* and *presidential* staff may share communications facilities, recordkeeping systems, and a common mission of presidential policymaking, the federal statutory scheme distinguishes between *agency* and *presidential* records within the White House.[147] Given this complex scheme, it is no simple matter to ensure White House compliance with recordkeeping law or even to determine the precise contours of White House recordkeeping responsibilities.

This Part examines the enforcement of White House recordkeeping responsibilities. First, this Part considers the extent to which private parties may bring suit alleging that the government has failed to meet its recordkeeping responsibilities.[148] In particular, because neither the PRA nor the FRA explicitly provide for

---

145. Of course, Congress could also address this problem by enacting unified recordkeeping legislation that eliminates the distinction between agency and presidential records, and by explicitly reconciling the duties under this unified legislation with government record disclosure responsibilities under the FOIA. *See* Henry H. Perritt, Jr., *Electronic Records Management and Archives,* 53 U. Pitt. L. Rev. 963, 995 (1992) ("The absence of explicit linkage between the FOIA and records statutes creates problems for sound records management.").

It must be conceded that the unified approach described in the text would not have substantially changed the results thus far in the *Armstrong* litigation. First, the court in *Armstrong I* found a limited power of judicial review of FRA duties without needing to appeal to the agency's ultimate duty to disclose information. *See* 924 F.2d at 291-96. In addition, although the court found no power to review individual compliance with the FRA, *see* 924 F.2d at 294-95, no language in either the PRA or the FOIA clearly supports a different result. Next, a court could not plausibly carry over the implied power of judicial review from the FRA to the PRA, especially in light of the clear and intentional differences between the FRA and the PRA. *See infra* note 161 and accompanying text. Finally, it would do little good to review the Archivist's actions with respect to an incumbent president, because the PRA explicitly limits the Archivist to an advisory rather than an enforcement role in the President's recordkeeping decisions. *See supra* notes 85-90 and accompanying text. As the *Armstrong* litigation moves to scrutiny of White House recordkeeping guidelines, however, a unified approach may aid evaluation of those guidelines. *See infra* section III.B (proposing guidelines for management of White House electronic mail).

146. *See supra* notes 33-34 and accompanying text.

147. *See supra* notes 83-84 and accompanying text.

148. Because the FOIA explicitly provides for judicial review of agency refusals to disclose information, *see supra* note 127 and accompanying text, this Part considers only judicial review of government recordkeeping pursuant to the FRA and the PRA.

judicial review by way of private suit,[149] a court must decide whether, and to what extent, either of those statutes permit such review by implication. Section II.A surveys cases that have considered the availability and extent of judicial review of PRA and FRA compliance and finds that court rulings have generally reflected the statutory scheme's sharp distinction between agency and presidential records — namely, courts have found that agency recordkeeping practices are reviewable but presidential practices are not. Section II.B then argues that Congress should amend recordkeeping law to provide more comprehensive enforcement roles and judicial review. The existing combination of severely limited judicial review and the PRA's broad grant of discretion to the incumbent presidential staff to decide which records to retain[150] leaves historically valuable presidential materials acutely vulnerable to irresponsible recordkeeping in contravention of the mandate established by federal recordkeeping law. This Part concludes that Congress can address these problems without offending separation of powers principles.

A. *The Private Right To Seek Judicial Enforcement of Recordkeeping Duties*

A court that is presented with a private-party claim of government recordkeeping violations must address two issues. First and foremost, given that Congress did not *expressly* empower courts to review government compliance with the terms of the PRA or the FRA, a court must determine whether Congress nonetheless *intended* that judicial review be available. Assuming such a congressional intention exists, the court must then decide which particular statutory provisions give rise to reviewable duties.[151] This section

149. *See supra* notes 55, 92 and accompanying text.

150. *See supra* notes 86-89 and accompanying text.

151. The court must also determine whether the private plaintiff has standing to challenge government recordkeeping practices. Both American Friends Serv. Comm. v. Webster, 720 F.2d 29, 57 (D.C. Cir. 1983), and Armstrong v. Bush, 924 F.2d 282, 288 (D.C. Cir. 1991), hold that private researchers and historians satisfy the "zone of interests" standing test. This test requires a court to "discern whether the interest asserted by a party in the particular instance is one intended by Congress to be protected or regulated by the statute under which the suit is brought." Control Data Corp. v. Baldrige, 655 F.2d 283, 293-94 (D.C. Cir. 1981); *see also American Friends*, 720 F.2d at 49-52 (reviewing the history and content of the "zone of interests" test).

The *American Friends* court found that both the language and the legislative history of the FRA show a clear congressional intent to benefit researchers and historians by preserving a documentary history of government. 720 F.2d at 53-57. For example, the court cited both the FRA provision that calls for consideration of a record's research value prior to its disposal, 720 F.2d at 53-54 (citing 44 U.S.C. § 3303a(a) (1988)), and a statement in the FRA's legislative history that a 1978 amendment was intended to simplify researcher access to government records, 720 F.2d at 56 (citing H.R. REP. No. 1522, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2288, 2289). Finally, the court supported its holding that researchers have standing to challenge improper record disposals by observing "the simple,

considers the viability of judicial enforcement of recordkeeping law at the behest of private parties by surveying cases that have determined the availability and extent of judicial review of recordkeeping duties.

In particular, the *Armstrong* decisions have established the precise scope of judicial review under the FRA and the PRA. Courts may consider whether agency recordkeeping guidelines and directives meet the mandate of the FRA. In addition, although courts may not entertain private-party actions alleging that an individual agency official is violating recordkeeping guidelines, they may review the failure of the Archivist or an agency head to initiate an enforcement action against such an agency official. Finally, although the PRA generally precludes judicial review of presidential recordkeeping practices, a court may review whether White House guidelines properly classify records as presidential.

1. *The Lack of a Private Cause of Action Under the PRA and the FRA*

Neither the FRA nor the PRA explicitly allows a private plaintiff to seek judicial review of government recordkeeping practices.[152] Furthermore, although courts may find an implied power of review based on congressional intent,[153] the courts have found that neither the FRA nor the PRA evinces an intent to permit private suits. First, in *Kissinger v. Reporters Committee for Freedom of*

---

practical fact that government records can only be accepted by the Archives, where they may be made available to the public, if the agency that creates them has not destroyed them first." 720 F.2d at 55.

Perhaps because the PRA explicitly calls for consideration of a presidential record's historical value prior to its disposal, 44 U.S.C. § 2203(c) (1988), the *Armstrong I* court had no trouble extending the result in *American Friends* to cover both the FRA and the PRA. *Armstrong I*, 924 F.2d at 287-88. The government argued that *American Friends* had only established that private researchers and historians were within the "zone of interests" of the FRA's *disposal* provisions, not its record *management* provisions. 924 F.2d at 288. The court, however, found such a distinction untenable; whether an agency official deletes an e-mail message because he disregards the FRA's disposal provisions or because he believes it fails to qualify as a *record*, his action results in a message "lost forever to history." 924 F.2d at 288. The court concluded that private researchers and historians have standing to challenge an alleged failure to comply with either PRA or FRA recordkeeping provisions. 924 F.2d at 288.

Taken together, these decisions on the issue of standing clearly show that one of the purposes of both the PRA and the FRA is "to ensure that private researchers and historians . . . have access to the documentary history of the federal government." *Armstrong I*, 924 F.2d at 287. These rulings therefore support the claim that federal recordkeeping law should principally serve the needs of history. *See supra* section I.D.

152. Recall that the FRA authorizes the Attorney General to bring an action to prevent the wrongful destruction of records. *See supra* notes 52-54 and accompanying text. This section of this Note is concerned only with private causes of action.

153. *See generally* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (discussing the factors to be considered when determining whether Congress intended judicial review to be available under a statute).

the Press,[154] the Supreme Court declined to imply a private right of action from the terms and legislative history of the FRA.[155] Because the FRA provides only administrative enforcement mechanisms and because the Court interpreted the FRA's legislative history to support a congressional preference for administrative mechanisms, *Kissinger* concluded that the FRA does not demonstrate the requisite congressional intent to permit judicial review.[156]

In *Armstrong I,*[157] the D.C. Circuit similarly concluded that the PRA does not provide an implied private cause of action to review presidential recordkeeping.[158] Ironically, the court relied on the *absence* of administrative enforcement mechanisms in the PRA to conclude that Congress did not intend to permit judicial review of presidential recordkeeping practices or decisions.[159] The court noted that the PRA grants the incumbent President great discretion in making record disposal decisions[160] and saw this discretion as an indication of congressional concern that extensive oversight of presidential recordkeeping — whether by the Archivist, Congress, or the courts — would unduly encroach upon the President's day-to-day operations, thereby upsetting the balance of power among branches of government.[161] Thus *Kissinger* and *Armstrong I* foreclose the possibility of judicial review implied directly from the terms of either the FRA or the PRA.

2. *The Availability and Extent of Judicial Review Under the APA*

Despite the absence of an express or implied cause of action under the FRA or the PRA, limited judicial review is nonetheless available to a private plaintiff under the Administrative Procedure Act (APA).[162] The APA provides for judicial review of the action of an administrative agency unless a statute clearly precludes such

154. 445 U.S. 136 (1980).

155. 445 U.S. at 148-50.

156. 445 U.S. at 147-50. The Court reasoned that "regardless of whether Kissinger has violated the [FRA], Congress has not vested federal courts with jurisdiction to adjudicate that question upon suit by a private party. That responsibility is vested in the administrative authorities." 445 U.S. at 149-50.

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

158. 924 F.2d at 291.

159. 924 F.2d at 290-91.

160. 924 F.2d at 290; *see also supra* notes 86-89 and accompanying text.

161. 924 F.2d at 290-91 ("Congress was . . . keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations.").

162. 5 U.S.C. §§ 551-559, 701-706, 3105, 3344 (1988). The *Kissinger* Court explicitly left open the possibility of review under the APA: "We need not decide what remedies might be available to private plaintiffs complaining that the administrators and the Attorney General have breached a duty to enforce the [FRA], since no such action was brought here." Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 n.5 (1980).

review or the action is left to the agency's discretion.[163] Moreover, the APA generally creates a presumption in favor of the availability of judicial review of agency actions, even if the statute that defines agency duties is silent on the subject of court review.[164] Accordingly, in *American Friends Service Committee v. Webster*,[165] the D.C. Circuit held that the APA did indeed permit judicial review of the compliance of the FBI and the National Archives and Records Service (NARS)[166] with the record disposal provisions of the FRA.[167] The court found that record disposal issues are appropriate for judicial review, in part because the FRA provides specific criteria for record retention that agencies and the NARS are bound to follow.[168] The *American Friends* court also offered a pragmatic argument in favor of judicial review, reasoning that judicial oversight would counteract the tendency of agencies to exercise their "built-in incentive to dispose of records relating to 'mistakes.' "[169]

---

163. *See* 5 U.S.C. § 701(a) (1988) (prohibiting judicial review where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law"); 5 U.S.C. § 702 (1988) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *see also* Armstrong v. Bush, 721 F. Supp. 343, 349 (D.D.C. 1989) (considering the availability of judicial review under the APA when no private cause of action can be implied directly from the PRA or the FRA); Bretscher, *supra* note 2, at 1491-93 (discussing judicial review under the APA).

164. *See* Abbott Lab. v. Gardner, 387 U.S. 136, 141 (1967) (holding that "only upon a showing of 'clear and convincing' evidence of a contrary legislative intent should courts restrict access to judicial review"). *But see* Heckler v. Chaney, 470 U.S. 821, 831-33 (1985) (finding that judicial review is presumptively unavailable in the context of an agency refusal to take enforcement action).

165. 720 F.2d 29 (D.C. Cir. 1983).

166. At the time of *American Friends*, the NARS was still a component of the General Services Administration (GSA). *See supra* notes 69-74 and accompanying text. Because the NARS was part of a federal agency (the GSA), its actions were potentially subject to judicial review under the APA. 720 F.2d at 38-45.

167. 720 F.2d at 38-45. The fact situations in *American Friends* and in *Armstrong* are similar. The *American Friends* plaintiffs claimed that the FBI and the NARS had failed to carry out their statutory duties to manage and properly dispose of records. 720 F.2d at 35. Protracted litigation followed, resulting in the FBI and the NARS developing new record retention plans and disposal schedules. 720 F.2d at 35-36.

168. 720 F.2d at 42-43, 45. The court reconciled its holding with *Kissinger*'s refusal to permit judicial review by noting that *Kissinger* explicitly leaves unanswered the question of judicial review under the APA and by distinguishing *Kissinger*'s allegations of improper removal of records from allegations that the agencies were destroying records in violation of the FRA. 720 F.2d at 40-41. The court also found that judicial oversight would not undermine the ability of the FBI and the NARS to carry out their core functions and that the congressional oversight role provided by the FRA was an inadequate substitute for judicial review. 720 F.2d at 44-45.

169. 720 F.2d at 41. The court emphasized the self-policing difficulty that would result if judicial review were not available:

> In a situation where GSA and the FBI (part of the Justice Department) are the allegedly guilty parties that have agreed to the destruction of the records, it is highly unlikely that Congress intended the exclusive remedy to be a Justice Department suit to recover the records (and to have the remedy triggered by FBI or GSA notification of improper records removal).

Having determined that the APA authorizes judicial review of agency and archivist compliance with the FRA, a court must next decide precisely *which* agency and archivist duties are subject to review.[170] Broadly speaking, the FRA defines three recordkeeping roles.[171] First, each individual agency official must comply with recordkeeping law and agency guidelines. Next, if an individual fails to comply, the agency head and the Archivist assume special enforcement roles. Finally, the agencies and the Archivist must work together to formulate recordkeeping guidelines.

In *Armstrong I*,[172] the D.C. Circuit held that the individual recordkeeping role is not subject to judicial review under the APA.[173] Despite the FRA's explicit command that no agency records may be "alienated or destroyed" except in accordance with its provisions,[174] the court invoked *Kissinger*'s reasoning[175] to find that Congress did not intend to supplement the FRA's administrative enforcement mechanisms with private suits.[176] Instead, the court concluded that Congress left the task of ensuring individual compliance with agency recordkeeping guidelines to the Archivist and the agency head.[177]

---

720 F.2d at 41. Congress addressed this FRA weakness in a 1984 amendment that requires the Archivist to request the Attorney General to initiate an action to prevent wrongful removal of records when an agency head fails to do so. 44 U.S.C. § 2905(a) (1988). In the legislative history of this amendment, Congress noted "the anomalous situation created by current [pre-1984] law whereby an agency head has a duty to initiate action to recover records which he himself has removed." H.R. CONF. REP. No. 1124, 98th Cong., 2d Sess. 28 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3894, 3903; *see also* Armstrong v. Bush, 924 F.2d 282, 292 (D.C. Cir. 1991) (rejecting the government's argument that the 1984 FRA amendments showed congressional intent to preclude judicial review by opting instead to strengthen administrative enforcement mechanisms).

170. The APA provides two mechanisms for shielding particular agency actions from review. First, an agency can overcome the general presumption that judicial review of an agency action is available by showing that Congress intended to preclude such review; such a showing typically involves a claim that the statutory scheme governing the agency action leaves no room for judicial oversight. *See American Friends*, 720 F.2d at 39. Second, because the APA states that courts may not review actions that are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2) (1988) courts determining the extent of judicial review must find that an agency's duties are defined with sufficient precision to permit a judgment on whether the agency properly carried out those duties. *See* Heckler v. Chaney, 470 U.S. 821, 830 (1985) (construing APA § 701(a)(2) and finding that "even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion"); *see also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (formulating the "law to apply" test, under which judicial review of an agency action is unavailable where a statute only broadly defines the agency's role).

171. *See supra* notes 40-55 and accompanying text (describing the duties the FRA imposes on individuals, agencies, and the Archivist).

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

173. 924 F.2d at 294-95.

174. 44 U.S.C. § 3314 (1988).

175. *See supra* notes 154-56 and accompanying text.

176. 924 F.2d at 294-95.

177. 924 F.2d at 294.

In contrast, *Armstrong I* holds that courts *may* consider whether the Archivist and agency heads have properly performed their FRA enforcement duties.[178] Having just found that record destruction by individuals can only be halted by the Archivist and the agency head acting in their enforcement roles, the *Armstrong I* court recognized that judicial review constitutes the last line of defense in the event that neither the Archivist nor the agency head takes enforcement action.[179] Moreover, because the FRA includes provisions that *require* the Archivist and the agency head to take enforcement steps,[180] the court reasoned that initiation of an enforcement action involves no exercise of discretion by the Archivist or the agency head.[181] The court concluded that the APA permits judicial review of the enforcement roles defined by the FRA.[182]

Next, the D.C. Circuit ruled in *Armstrong I* that courts may consider whether agency recordkeeping guidelines and directives meet the mandate of the FRA.[183] Contrasting the PRA's "stark separation of powers questions" — and the resulting congressional intent "to minimize outside interference with the President's recordkeeping practices" — with the FRA's "more detailed and comprehensive agency recordkeeping provisions,"[184] the court found that Congress did not intend to preclude review of the adequacy of an agency's recordkeeping guidelines.[185] Instead, the court held that "the FRA reflects a congressional intent to ensure that agencies adequately document their policies and decisions"[186] and that judicial review of guidelines would not frustrate this intent.[187] The court also determined that development of recordkeeping guidelines is not left to agency discretion; just as the FRA defines clear enforcement duties, the statute also specifically requires each agency head to develop recordkeeping guidelines and procedures in cooperation with the Archivist.[188] Finally, the court found that the FRA's de-

178. 924 F.2d at 296.

179. 924 F.2d at 295. The need for judicial review is underscored by the fact that neither an archivist nor an agency head has ever invoked the FRA's provisions that require the initiation of action through the Attorney General if necessary to block improper destruction of records. Moreover, the court's pragmatic assessment of the dire consequences of a complete lack of judicial review of the FRA's enforcement roles evokes Justice Brennan's similar concern with *Kissinger's* conclusion that judicial review of improper record removal cannot be implied from either the FRA or the FOIA. *See supra* note 143.

180. *See supra* notes 52-54 and accompanying text.

181. 924 F.2d at 295-96.

182. 924 F.2d at 296.

183. 924 F.2d at 291-94.

184. 924 F.2d at 292.

185. 924 F.2d at 292-93.

186. 924 F.2d at 292.

187. 924 F.2d at 292-93.

188. 924 F.2d at 293.

tailed specification of the types of records agencies must retain enables courts to evaluate the adequacy of agency recordkeeping guidelines and directives.[189]

Turning to the PRA, however, the *Armstrong I* court ruled that the APA does not provide a mechanism for judicial review of presidential recordkeeping practices.[190] Because the APA only authorizes review of *agency* actions,[191] the court first had to consider whether the President could be considered an agency. The court recognized that the APA does not explicitly exclude the President from its definition of *agency* and that some earlier cases had suggested in dicta that the President is an *agency*.[192] The court nevertheless concluded that congressional silence on the issue, as demonstrated in the APA's language and legislative history, should not be construed as granting power to review presidential actions, particularly given the separation of powers issues such review might raise.[193] Consequently, *Armstrong I* found that the APA does not empower courts to review presidential compliance with the PRA.[194]

Finally, in *Armstrong II*,[195] the D.C. Circuit allowed very limited review of presidential recordkeeping. The court's ruling in *Armstrong I* had raised a troubling question: If White House agencies such as the NSC are subject to review but the President is not,[196]

189. 924 F.2d at 293-94.

190. 924 F.2d at 288-89.

191. *See* 5 U.S.C. § 701(b)(1) (1988) (defining *agency* for purposes of judicial review).

192. 924 F.2d at 288-89; *see also* Bretscher, *supra* note 2, at 1492-93 (discussing cases that consider whether the President is an agency for purposes of review under the APA).

193. 924 F.2d at 288-89; *see also* Franklin v. Massachusetts, 112 S. Ct. 2767, 2775 (1992) (holding that the President is not an agency under the APA).

194. 924 F.2d at 289.

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

196. It is unclear exactly which White House entities count as *agencies* under recordkeeping law. Recall that the FOIA explicitly defines the term *agency* to include White House entities, including establishments within the Executive Office of the President. 5 U.S.C. § 552(f) (1988); *see also supra* note 114 (discussing this provision of the FOIA and its legislative history); *cf.* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 155-56 (1980) (holding that notes of Kissinger's telephone conversations while he was serving as a presidential advisor are not subject to disclosure under the FOIA because the Office of the President is separate from the Executive Office of the President and thus is not included within the FOIA definition of *agency*); Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993) (finding that the Task Force on Regulatory Relief, which was created by the President, headed by the Vice President, and composed of various cabinet members, was not an *agency* for purposes of the FOIA). In addition, the PRA explicitly incorporates the FOIA definition of an *agency* when excluding "official records of an agency" from its definition of *presidential records*. 44 U.S.C. § 2201(2)(B) (1988); *see also supra* note 83 and accompanying text. The *Armstrong I* court clarified the distinction between White House records subject to the PRA and those subject to the FRA:

> Because the various components of the Executive Office of the President ("EOP") perform different functions, they create different kinds of records. The President, the Office of Vice President, and the components of the EOP whose sole responsibility is to advise the President are subject to the PRA and create "presidential records." The components of the EOP that have statutory responsibility (such as the Office of Management

what would prevent an across-the-board, unreviewable presidential declaration that all White House information is properly viewed as presidential rather than as agency records?[197] In order to escape this dilemma, the *Armstrong II* court found that the PRA permits a limited form of review: "[C]ourts may review guidelines outlining what is, and what is not, a 'presidential record' to ensure that materials that are not subject to the PRA are not treated as presidential records."[198]

B. *Improving Enforcement of Recordkeeping Law*

The enforcement scheme established under existing federal recordkeeping law has proved inadequate. Particularly in the area of presidential records, the existing mechanisms for administrative and judicial oversight of government recordkeeping practices and procedures cannot protect historically significant materials from arbitrary, careless, or reckless recordkeeping decisions. Accordingly, this section suggests that Congress should amend the recordkeeping statutes both to grant the Archivist a more comprehensive enforcement role and to provide explicitly for limited judicial oversight. This section also argues that Congress would not violate separation of powers principles by adding an enforcement scheme to the PRA.

1. *Weaknesses in the Existing Enforcement Scheme*

The events leading to the *Armstrong* litigation demonstrate the problems that result from the inadequate enforcement scheme under current recordkeeping law. Over a period of several years, the Archivist remained idle while the Executive Office of the Presi-

---

> and Budget and Council on Environmental Quality) are subject to the FRA and create "federal records." Because NSC advises the President and has statutory obligations, it creates both presidential and federal records.

924 F.2d at 286 n.2; *see also* Bretscher, *supra* note 2, at 1487-88 ("The intersection of the PRA and the FRA within the White House is defined by the nature of the record in question and the character of the White House office responsible for the record.").

197. *See* Bretscher, *supra* note 2, at 1506-08 (noting the PRA-FRA line drawing problem raised by the *Armstrong I* decision and anticipating *Armstrong II*'s solution to this problem). This problem is particularly evident in the case of White House entities such as the NSC that can create both presidential and federal records. Of course, the Clinton Administration has shown that this is no mere hypothetical issue by declaring that *all* NSC records count as presidential records. *See supra* note 8.

198. 1 F.3d at 1294. The court distinguished its *Armstrong I* holding that the PRA precludes review by stating that the earlier opinion dealt with record creation, management, and disposal decisions, rather than the "initial classification" decisions currently under consideration. 1 F.3d at 1293-94. The court also demonstrated the practical necessity of its ruling by conjuring up a hypothetical guideline defining *presidential records* as "all records produced or received by, or in the possession or under the control of, any government agency or employee of the United States." 1 F.3d at 1293. The court observed that "[r]eading the PRA to forbid judicial review of such a guideline for conformity with the PRA definition of presidential records would be tantamount to allowing the PRA to functionally render the FOIA a nullity." 1 F.3d at 1293.

dent (EOP) and National Security Council (NSC) staff exercised virtually complete discretion in deciding whether to preserve or delete electronic mail messages.[199] The Archivist thus failed to carry out duties required under the FRA, including inspecting agency record management practices[200] and notifying the head of the agency of any FRA violations.[201] In addition, if agency records were indeed being destroyed in contravention of the FRA, the Archivist failed to request that the Attorney General take action.[202] As a result, by the time the *Armstrong* litigation commenced on the last day of the Reagan Administration, the only remaining e-mail messages were those that individual White House officials chose not to delete and those that were captured on backup tapes that were recycled every few weeks.[203] The *Armstrong* case thus shows that insufficient administrative oversight of recordkeeping practices can subvert the preservation of a complete record of government decisionmaking. Moreover, *Armstrong* amply demonstrates the need for judicial oversight of officials who fail to carry out their enforcement duties under the FRA.

The poor performance of the FRA's enforcement scheme, with its requirement that the Archivist oversee agency recordkeeping responsibilities, suggests that the PRA's purely discretionary scheme cannot succeed. Although the FRA at least holds out the hope that proper administrative enforcement will lead to appropriate agency recordkeeping practices, the PRA offers no such prospect. While a president is in office, neither the Archivist nor any other executive branch official may interfere with decisions to dispose of presidential records.[204] At most, Congress may pass legislation to prevent destruction of presidential records,[205] assuming that the Archivist has first exercised the discretionary power to notify Congress of the President's record disposal plans.[206] Thus the PRA offers no administrative enforcement mechanism to block the inappropriate

199. *See* 1 F.3d at 1288 n.12 (noting that the Archivist "has never reviewed [NSC or EOP] recordkeeping guidelines, and has never surveyed or inspected their e-mail systems"); Armstrong v. Executive Office of the President, 810 F. Supp. 335, 344-46 (D.D.C. 1993) (finding that prior to 1988, EOP and NSC guidelines failed to instruct staff in proper handling of e-mail information).

200. 44 U.S.C. § 2904(c)(7) (1988).

201. 44 U.S.C. § 2115(b) (1988).

202. *See* 44 U.S.C. § 2905(a) (1988) (requiring the Archivist to ask the Attorney General to take action "for the recovery of records unlawfully removed and for other redress provided by law" when the agency head fails to do so).

203. *See* Armstrong v. Bush, 721 F. Supp. 343, 345, 347 (D.D.C. 1989).

204. *See supra* notes 86-90 and accompanying text.

205. H.R. REP. NO. 1487, *supra* note 4, at 13, *reprinted in* 1978 U.S.C.C.A.N. at 5744.

206. 44 U.S.C. § 2203(c)-(e) (1988).

disposal of presidential records, and *Armstrong I* holds that courts also lack the power to prevent such action.[207]

This weakness defeats the PRA's purpose of ensuring the preservation of a documentary history of the presidency.[208] Particularly within the White House, where the line between presidential and agency records is somewhat arbitrary[209] and where there is no indication that one class of records is more valuable than the other,[210] there is no justification for a legislative distinction that permits essentially unchecked destruction of some records but not others.

2. *Strengthening the Enforcement Scheme*

a. Administrative Oversight of Presidential Recordkeeping. In order to preserve a complete record of presidential decisionmaking, Congress should add an enforcement scheme to the PRA. First and foremost, Congress should ensure that existing recordkeeping duties are performed by amending the PRA to provide administrative oversight of presidential recordkeeping. In order to effectuate this administrative oversight, Congress should grant the Archivist the same power to safeguard presidential records as is currently granted by the FRA to safeguard agency records — namely, the power to request that the Attorney General take action if presidential records are being unlawfully removed or destroyed.[211]

b. Requiring Presidential Recordkeeping Guidelines. Congress should also amend the PRA to require the establishment of presidential recordkeeping guidelines. The Archivist is more likely to abuse or arbitrarily exercise the power to involve the Attorney General in presidential recordkeeping practices if presidential recordkeeping standards are vague or uncertain. Accordingly, in order to clearly delimit the Archivist's enforcement role, the PRA must ensure that the Archivist can readily determine whether a decision to dispose of presidential records is proper. The FRA solves this problem by thoroughly integrating the Archivist into the agency recordkeeping process; for example, the FRA requires the Archivist to issue guidelines to regulate agency record management.[212] Congress should similarly amend the PRA to dictate that the President must develop recordkeeping guidelines in coopera-

---

207. *See supra* notes 190-94 and accompanying text.

208. *See supra* notes 101-03 and accompanying text.

209. *See supra* note 196.

210. *See supra* note 140 and accompanying text.

211. *See supra* notes 52-54 and accompanying text (discussing the Archivist's duty under the FRA to request that the Attorney General take action); *see also infra* notes 239-40 and accompanying text (considering and rejecting separation of powers objections to this proposal).

212. *See supra* note 44 and accompanying text.

tion with the Archivist.[213] This approach offers the advantage of ensuring that *all* White House officials are subject to consistent recordkeeping guidelines, whether they work with presidential or agency records.[214]

c. Private Causes of Action To Ensure Enforcement. Next, Congress should amend both the PRA and the FRA to provide explicitly a private right to challenge archivist inaction through the courts. As noted earlier, the Archivist failed to invoke the FRA's administrative enforcement mechanisms over the course of the events leading to the *Armstrong* litigation;[215] a private cause of action may therefore be necessary to spur enforcement action. The D.C. Circuit has found that the APA grants private parties the right to obtain review of recordkeeping and enforcement duties under the FRA.[216] Congress should explicitly affirm this judicial precedent, and thus prevent any chance of its being overturned, by amending the FRA to authorize private-party suits challenging the failure of an agency head or the Archivist to initiate an enforcement action.

Similarly, if Congress amends the PRA as suggested to enable the Archivist to seek the Attorney General's assistance when presi-

---

213. Existing PRA language not only fails to involve the Archivist in the development of presidential record management guidelines, it also falls short of mandating specific recordkeeping practices that, if not followed, could trigger enforcement action. Instead the PRA simply requires,

> Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records pursuant to the requirements of this section and other provisions of law.

44 U.S.C. § 2203(a) (1988). This provision seems to leave the establishment of recordkeeping guidelines largely to the President's discretion, and it thus does not provide a sufficient basis for the Archivist to conclude that presidential records are being improperly destroyed.

As an alternative to involving the Archivist in development of presidential recordkeeping guidelines, Congress could limit archivist enforcement responses to the occasions on which presidential record disposals fail to follow existing PRA procedures. Because the PRA currently requires the President to obtain a written statement of the Archivist's views concerning a proposed record disposal, 44 U.S.C. § 2203(c)(1) (1988), Congress could permit the Archivist to initiate enforcement action only when the President fails to follow this procedure. Although this limited administrative enforcement mechanism might at least address the situation presented in *Armstrong,* Congress should go further and impose a duty to formulate guidelines that comport with the PRA.

214. This approach would also defeat the apparent attempt of the Clinton Administration to claim that many White House officials are *not* bound by recordkeeping guidelines. *See* Douglas Jehl, *White House Curbs Access to Security Council's Data,* N.Y. TIMES, Mar. 26, 1994, at A6 (reporting the White House position that all NSC materials are presidential rather than agency records, based on the claim that the *Armstrong* decisions "had forced [the White House] to choose between a legal position that would protect all its documents and one that would protect none of them").

215. *See supra* notes 199-202 and accompanying text.

216. *See supra* notes 165-89 and accompanying text.

dential records are being wrongfully removed or destroyed,[217] then private parties should be granted the right to seek review of the Archivist's failure to perform this PRA enforcement duty.[218] Both *Armstrong* and *American Friends* demonstrate the reluctance of the Archivist to correct improper agency recordkeeping practices; absent a judicially enforceable duty, the Archivist is surely even less likely to challenge presidential recordkeeping abuses. Moreover, such limited review would likely render more searching review of presidential recordkeeping practices unnecessary; the *Armstrong* courts have been forced to carefully consider White House recordkeeping practices only because White House officials and the Archivist took virtually no action to preserve historically significant electronic mail.[219]

In addition to authorizing review of archivist inaction, Congress should also codify judicial review of agency guidelines under the FRA and presidential guidelines under an amended PRA. Again, both *Armstrong* and *American Friends* demonstrate the careless tendency of agencies and the Archivist to permit widespread recordkeeping abuses, many of which were caused by inadequate instruction or oversight of agency officials.[220] As the court in *American Friends* observed, judicial review need not be overly burdensome; instead, "the papers NARS and an agency prepare in the course of reaching records disposal decisions should make their actions easily reviewable with little or no extra work for them."[221] Explicit provision for judicial review of recordkeeping guidelines would signal a clear congressional intention that the historical preservation mandate of recordkeeping law should be aggressively enforced.[222]

---

217. *See supra* text accompanying note 211.

218. The separation of powers concerns raised by this proposal are addressed *infra* at notes 241-43 and accompanying text.

219. *See supra* notes 199-202 and accompanying text.

220. *See* American Friends Serv. Comm. v. Webster, 720 F.2d 29, 57 (D.C. Cir. 1983) (reporting the district court's finding that "the Archivist rarely exercised any review over FBI records disposal practices during [a] thirty-year period"); Armstrong v. Executive Office of the President, 810 F. Supp. 335, 344-45 (D.D.C. 1993) (noting various deficiencies in White House recordkeeping guidelines and finding that "the EOP's record keeping guidance to the staff . . . was not reasonably calculated to achieve the goals of the FRA").

221. 720 F.2d at 44.

222. Although Congress might also consider providing a private cause of action to challenge an individual's failure to comply with either the FRA or the PRA, such a change in the enforcement scheme would raise numerous problems. As an initial matter, one might question whether private suits could effectively block unlawful individual recordkeeping practices, particularly considering the time it would typically take for a private citizen to discover the unlawful activity and initiate legal action. Furthermore, although private-party challenges to individual compliance might potentially catch more transgressors, they would undercut the preferred and congressionally sanctioned administrative enforcement roles, thereby preventing the Archivist, a historian with particular record management expertise, from working within the executive branch to ensure compliance without need for litigation. *See* Armstrong

3. *Congressional Power To Strengthen the Enforcement Scheme*

Congress cited separation of powers concerns in the PRA's legislative history,[223] and presumably these concerns led Congress to grant incumbent presidents nearly complete discretion over presidential recordkeeping practices.[224] These concerns, however, do not justify the failure to give the Archivist any oversight or enforcement role under the PRA.[225] Rather, Supreme Court decisions in two cases suggest that the PRA amendments proposed above — the grant of power to the Archivist to request that the Attorney General take action in the event of unlawful removal or destruction of presidential records and the involvement of the Archivist in formulating guidelines for presidential recordkeeping — would withstand a separation of powers challenge.

First, in *Nixon v. Administrator of General Services*,[226] the Supreme Court held that congressional regulation of presidential materials, standing alone, does not violate separation of powers principles.[227] Former President Nixon challenged legislation that took over custody and control of his presidential materials and authorized an executive branch official to regulate public access to those materials.[228] The Court rejected this challenge, reasoning

---

v. Bush, 924 F.2d 282, 296 n.12 (D.C. Cir. 1991) (noting that under the FRA, the Archivist and the agency head may attempt to prevent unlawful disposal of records through means other than initiating legal action, such as "disciplining the staff involved in the unlawful action, increasing oversight by higher agency officials, or threatening legal action"). Thus it is unclear whether a private right of action against individual violators would increase overall compliance with recordkeeping law. Additionally, judicial oversight of the recordkeeping practices of individual government employees raises separation of powers concerns by offering an opportunity for judicial disruption of executive branch functions at the behest of private parties.

Finally, private-party challenges to individual compliance with recordkeeping law might impair preservation of a complete history of government decisionmaking. In the legislative history of the PRA, Congress recognized that recordkeeping regulations can have a "chilling effect" on the frank exchange of advice. H.R. REP. NO. 1487, *supra* note 4, at 8, *reprinted in* 1978 U.S.C.C.A.N. at 5739; *see also* Sandra E. Richetti, Comment, *Congressional Power vis a vis the President and Presidential Papers*, 32 DUQ. L. REV. 773, 796-97 (1994) (expressing a similar concern that excessive regulation of presidential recordkeeping could lead presidents to "screen their own communications and less readily speak openly and freely"). The threat of private lawsuits over individual recordkeeping practices could similarly chill open communications within the executive branch or could even lead to quicker and less thoughtful destruction of potentially embarrassing materials in order to prevent their premature disclosure to parties outside the executive branch.

223. *See* H.R. REP. NO. 1487, *supra* note 4, at 6, *reprinted in* 1978 U.S.C.C.A.N. at 5737.

224. *See* Armstrong v. Bush, 924 F.2d 282, 290 (D.C. Cir. 1991).

225. *But see* Richetti, *supra* note 222, at 796-97 (suggesting that even as currently enacted, the PRA might not properly defer to a president's need for communications unchecked by any outside influence).

226. 433 U.S. 425 (1977).

227. 433 U.S. at 441-45.

228. 433 U.S. at 429-30. The former President argued that "Congress is without power to delegate to a subordinate officer of the Executive Branch the decision whether to disclose Presidential materials and to prescribe the terms that govern any disclosure," because such a

that the Constitution does not "contemplate[ ] a complete division of authority between the three branches."[229] Instead, "the proper inquiry focuses on the extent to which [the challenged legislation] prevents the Executive Branch from accomplishing its constitutionally assigned functions."[230] Moreover, the Court noted that custody and control of the presidential materials remained within the executive branch, and it concluded that Congress was not impermissibly disrupting executive branch functions.[231]

Similarly, in *Morrison v. Olson,*[232] the Supreme Court upheld legislation authorizing the appointment of independent counsel against a separation of powers challenge.[233] As in *Nixon,* the Court focused on the control retained by the executive branch. The Court noted various means by which the Attorney General could exercise control over the independent counsel; for example, the statute granted the Attorney General unreviewable discretion in deciding whether to seek appointment of an independent counsel and authorized the Attorney General to remove the counsel for "good cause."[234] The Court also observed that because Congress retained only the power to impeach an independent counsel, "this case does not involve an attempt by Congress to increase its own power at the expense of the Executive Branch."[235]

The *Morrison* Court also found that the independent counsel statute did not impermissibly transfer executive functions to the judiciary.[236] Although the statute granted the judicial branch the power to appoint an independent counsel, the Court noted that this power could only be exercised "upon the specific request of the Attorney General."[237] Finally, the Court upheld the statute's provi-

---

delegation would constitute "an impermissible interference by the Legislative Branch into matters inherently the business solely of the Executive Branch." 433 U.S. at 440.

229. 433 U.S. at 443.

230. 433 U.S. at 443. The Court found that mere interference with executive functions does not invalidate the legislation; rather, "only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." 433 U.S. at 443. The Court then cited several statutes, including the FRA and the FOIA, that permissibly regulate materials in the possession of the executive branch. 433 U.S. at 445.

231. 433 U.S. at 443-45. The Court also found that the executive branch "became a party to the Act's regulation when President Ford signed the Act into law." 433 U.S. at 441. Finally, the Court rejected a claim that the legislation violated the confidentiality of presidential communications, finding that "Congress can legitimately act to rectify the hit-or-miss approach that has characterized past attempts to protect these substantial interests by entrusting the materials to expert handling by trusted and disinterested professionals." 433 U.S. at 453.

232. 487 U.S. 654 (1988).

233. 487 U.S. at 693-96.

234. 487 U.S. at 696.

235. 487 U.S. at 694.

236. 487 U.S. at 695.

237. 487 U.S. at 695.

sion for judicial review of the Attorney General's decision to remove an independent counsel, reasoning that such review "is a function that is well within the traditional power of the Judiciary."[238]

Nixon and *Morrison* therefore indicate that Congress may grant the Archivist, an executive branch official appointed by the President,[239] the power to request that the Attorney General take action if presidential records are being improperly removed or destroyed. Like the legislation upheld in *Nixon* and *Morrison,* a PRA provision that grants the Archivist a limited enforcement role leaves control over the executive function of presidential recordkeeping within the executive branch. The Archivist can only *request* that the Attorney General take action, and the Attorney General retains the discretion to decide whether to initiate legal action.[240] Furthermore, as the *Morrison* Court emphasized, Congress would gain no additional control over recordkeeping practices in the executive branch.

Nor would the courts be guilty of undue interference with executive branch functions. First, as in *Morrison,* the judicial branch would only be called upon to consider the propriety of presidential recordkeeping practices when requested to do so by two executive branch officials, the Archivist and the Attorney General. Next, as the *Morrison* Court emphasized, a reviewing court would be performing a purely judicial function — namely, determining whether allegedly wrongful recordkeeping practices violate the PRA and should therefore be enjoined. Finally, if the Archivist and the Attorney General need to initiate legal action to prevent improper destruction of presidential records, the presidential staff can hardly respond that such an action disrupts the exercise of *legitimate* executive functions. Thus a PRA amendment that brings its enforcement mechanisms up to the level provided by the FRA should survive a separation of powers challenge.

The proposed congressional authorization of a private cause of action challenging the Archivist's failure to assume an enforcement role,[241] however, raises a different separation of powers issue. Unlike a case in which the Archivist and the Attorney General challenge presidential recordkeeping practices, a private challenge to archivist inaction would vest control over litigation outside the ex-

238. 487 U.S. at 695.

239. *See supra* note 42 and accompanying text.

240. Moreover, the Supreme Court's decision in Heckler v. Chaney, 470 U.S. 821, 831-33 (1985), indicates that the Attorney General's decision whether to take legal action would be presumptively unreviewable. Thus the Attorney General would be free to distinguish between charges of PRA noncompliance lodged against the President versus, for example, against an NSC official who is acting without presidential authorization.

241. *See supra* notes 218-19 and accompanying text.

ecutive branch. But given that *Armstrong I* already permits private suits against the Archivist under the FRA,[242] the same Archivist duty ought not be exempt from review simply because the Archivist allegedly is violating the PRA rather than the FRA. Of course, presidential recordkeeping practices would inevitably be subject to judicial scrutiny in such a suit; otherwise, a court could not decide whether the Archivist had improperly failed to seek the Attorney General's involvement. But so long as courts ensure that the primary focus of a private suit remains on the Archivist's inaction, the resulting minimal interference with presidential recordkeeping is offset by the substantial interest in ensuring that a history of presidential decisionmaking is preserved.[243]

Finally, a PRA provision that authorizes private challenges to presidential recordkeeping guidelines[244] would not violate separation of powers principles, provided that the courts are not involved in the initial development of those guidelines. Although a PRA amendment that requires the Archivist and the President to formulate presidential recordkeeping guidelines would obviously subject the executive branch to additional regulation, *Nixon* makes clear that such regulation is permissible as long as executive branch officials remain in control of the process of formulating guidelines.[245] Particularly considering the strong public and congressional interest in seeing that historically significant presidential records are properly preserved, *Nixon* indicates that Congress may impose additional recordkeeping duties on the executive branch. Moreover, *Armstrong II* already establishes the right of private parties to claim that White House recordkeeping guidelines improperly classify records as presidential.[246] Given these precedents, the slightly more expansive review of presidential recordkeeping guidelines proposed here ought not to violate separation of powers principles.

III. Regulating Electronic Mail Under the Current Statutory Scheme

This Note has thus far examined the existing statutory framework that governs federal recordkeeping and record disclosure, and

242. *See supra* notes 178-82 and accompanying text.

243. *See supra* note 230 (discussing *Nixon's* balancing test for legislation that is found to disrupt executive functions). In addition, the court in *American Friends* suggested that judicial review of the Archivist's actions generally will not be burdensome. *See supra* note 221 and accompanying text.

244. *See supra* notes 220-22 and accompanying text.

245. *See supra* notes 230-31 and accompanying text (discussing *Nixon's* test for whether legislation violates separation of powers principles and noting that *Nixon* cites numerous examples of legislation that permissibly regulates materials in the possession of the executive branch).

246. *See supra* notes 195-98 and accompanying text.

has surveyed the enforcement schemes that attempt to ensure compliance with recordkeeping law. Part I identified the broad and unified purpose behind the recordkeeping and record disclosure statutes, and Part II proposed additional enforcement mechanisms to achieve that purpose. But even assuming universal agreement that recordkeeping law principally seeks to preserve historical materials, a record of White House decisionmaking will not be preserved if the Archivist and White House officials fail to identify properly and manage historically significant White House materials. Accordingly, this Part addresses a fundamental substantive question: What attributes render government materials subject to regulation under federal recordkeeping and record disclosure law? This in turn raises a procedural question: What guidelines will best identify and manage those materials that are subject to regulation?

This Part argues that government officials use electronic mail to exchange historically significant information and concludes that e-mail must therefore be managed under recordkeeping law. Because the statutes all speak of "records" as the basic unit of information subject to regulation, this Part first considers the scope of the term *records* under federal law. Section III.A argues that a test for determining whether materials qualify as *records* should focus on the government's *use* of those materials; alternative tests that consider the content or form of government materials fail to identify information of historical value properly. Next, section III.B proposes recordkeeping guidelines that address the specific challenges e-mail poses to historical preservation.

A. *The Scope of Records Under the Existing Statutory Scheme*

A case such as *Armstrong* that considers a novel form of government information[247] will inevitably confront the question whether such information counts as *records* and thereby qualifies for regulation under the FRA and the PRA and for disclosure under the FOIA. There are at least two ways to determine what constitutes *records:* according to content or according to function.[248] Under a

247. *See supra* notes 16-20 and accompanying text (observing that the *Armstrong* litigation raises unique issues because the plaintiffs are seeking preservation and disclosure of e-mail).

248. A third alternative, a form-based approach to identifying records, has been resoundingly rejected by statutory language, courts, and commentators. First, the FRA's disposal provisions define *records* as various "documentary materials, regardless of physical form or characteristics." 44 U.S.C. § 3301 (1988). Similarly, the PRA defines *presidential records* as "documentary materials," 44 U.S.C. § 2201(2) (1988), and then defines *documentary materials* by means of a laundry list of various collections of information that ends with the proviso that the list "includ[es], but [is] not limited to, audio, audiovisual, or other electronic or mechanical recordations," 44 U.S.C. § 2201(1) (1988).

Courts have also recognized that the transition from paper-based to computer-based government records does not bar public access via the FOIA. *See* Long v. IRS, 596 F.2d 362, 364-65 (9th Cir. 1979) (holding that the FOIA applies to computer tapes that contain the

content-based approach, materials qualify as *records* when they contain valuable information — of course, the notion of "value" must be separately defined. In contrast, a functional approach to defining *records* inquires whether the government has used the candidate materials in the conduct of its business.

This section first argues that the recordkeeping statutes provide definitions of *records* that suggest a functional approach to identifying records. Next, this section considers whether a functional approach properly handles two problematic types of information — personal materials and computer software. After comparing the functional approach with a content-based alternative, this section argues that the functional approach better identifies historically significant information. Finally, after applying the functional approach to e-mail, this section concludes that e-mail is subject to regulation under recordkeeping law.

1. *A Functional Approach To Identifying Records*

Because both the FRA and PRA definitions of *records*[249] refer to the government's *use* of materials, both statutes suggest a func-

---

same information as IRS documents); *see also* Grodsky, *supra* note 31, at 21-23 (surveying cases that apply the FOIA to electronic records); Leo T. Sorokin, *The Computerization of Government Information: Does it Circumvent Public Access Under the Freedom of Information Act and the Depository Library Program?*, 24 COLUM. J.L. & SOC. PROBS. 267, 271-73 (1991) (arguing that court cases, legislative history, and other government materials support treating electronic records as within the scope of the FOIA). Nor is this rejection of a form-based test unique to computer-based information. As technology advances, government information is inevitably recorded on new media, and courts have accordingly found that motion pictures, audio recordings, and videotapes are subject to disclosure under the FOIA. *See* Grodsky, *supra* note 31, at 23.

However, the form of the information may present logistical problems that block its disclosure. For example, when electronic data must be processed in some way before a FOIA request can be satisfied, a court may deny the request if it finds that the processing amounts to creation of new records. *Compare Long*, 596 F.2d at 366 (finding that "the mere deletion of names, addresses, and social security numbers" from computer-based IRS records prior to their disclosure did not constitute record creation) *with* Yeager v. Drug Enforcement Admin., 678 F.2d 315, 327 (D.C. Cir. 1982) (holding that an agency need not " 'compact' or 'collapse' " computer-based data in order to meet its FOIA duty to provide "reasonably segregable" nonexempt portions of records). *See generally* Grodsky, *supra* note 31, at 24-25 (surveying Supreme Court cases bearing on the issue of record creation); Sorokin, *supra*, at 276-77 (arguing that processing of computer data should not be equated with record creation). Depending on how future courts construe the agency duty to disclose "reasonably segregable" information under the FOIA, *see* 5 U.S.C. § 552(b) (1988), computer-based data could be effectively shielded from FOIA disclosure because such data will frequently require some processing to be both useful and nonexempt. *See* Grodsky, *supra* note 31, at 25-31 (analyzing cases that consider the issues of agency effort and expense in responding to FOIA requests and citing agency FOIA regulations that establish extremely limited duties to process data in response to FOIA requests); Sorokin, *supra*, at 276-77 (also surveying cases and agency FOIA guidelines, and expressing concern that agencies might "arbitrarily suppress data by structuring their electronic retrieval systems to prevent public access to embarrassing information").

249. Recall that the FOIA does not define *records* at all, and that the Supreme Court decided in one FOIA case to apply the FRA's definition. *See supra* note 113 and accompanying text.

tional approach to identifying *records.* First, the FRA stipulates that materials qualify as *records* only if they are "made or received by an agency . . . in connection with the transaction of public business."[250] Similarly, the PRA's definition of *presidential records* includes only those materials that are created or received by presidential staff "in the course of conducting activities which relate to or have an effect upon the carrying out of the . . . duties of the President."[251]

By explicitly excluding "personal records" from its definition of *presidential records,*[252] however, the PRA might appear to support a content-based approach to identifying *records.* Moreover, a content-based test of *records* might be an effective way to sift out purely personal information that arguably does not belong in the government's documentary history — surely recordkeeping law should dictate preservation of policy statements but not invitations to lunch. A content-based approach solves this problem by permitting disposal of those materials that contain personal information.

Nevertheless, the language of the PRA's personal information exemption is more consistent with a functional approach. The PRA defines *personal records* as materials "of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."[253] By focusing on the *connection* between the materials in question and the performance of presidential duties, rather than attempting to classify the *content* of the materials, this PRA language shows that a functional approach identifies personal information just as effectively as a content-based approach.[254] For example, if the government has not used an invi-

250. 44 U.S.C. § 3301 (1988).

251. 44 U.S.C. § 2201(2) (1988).

252. *See* 44 U.S.C. § 2201(2)(B)(ii) (1988).

253. 44 U.S.C. § 2201(3) (1988). This definition also provides illustrative examples of *personal records,* such as "diaries . . . which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business." 44 U.S.C. § 2201(3)(A) (1988). See, for example, United States v. North, 708 F. Supp. 402, 403-04 (D.D.C. 1989), in which the government sought production of Oliver North's spiral notebooks as part of a criminal proceeding. The government argued that the notebooks were covered by the PRA and that consequently they were government documents in the custody of North. 708 F. Supp. at 403. The court rejected this argument, stating that "[a]t best, North's notebooks are governmental only to the extent that segregable portions are shown to have aided him in performing his activities while he was working at the National Security Council." 708 F. Supp. at 403. Because the government could not specifically show that portions of the notebooks were both relevant and used by North in his official capacity and because "the statutes are unclear and in a state of flux regarding which government workers are custodians, what documents are governmental or Presidential, and what the duties of government officials are regarding documents containing both notes of official matters and more personal material," the court declined to order North to produce the notebooks. 708 F. Supp. at 404.

254. The House report accompanying the PRA amplifies this point by discussing materials used by the President in conducting political activities; although records of political activi-

tation to lunch in the conduct of its business, then the invitation need not be preserved, regardless of whether its contents are considered "personal."

Similarly, a functional test of *records* solves the dilemma presented by FOIA requests for disclosure of arguably personal information. The FOIA does not explicitly exempt personal information from disclosure,[255] and it also provides that requests for disclosure may only be denied on grounds "specifically stated" within the statute.[256] Yet courts may be reluctant to order the disclosure of materials that reveal the purely personal thoughts of agency officials.[257] Accordingly, they must develop a threshold test of *agency records* that excludes personal information without resort to the FOIA's nine statutory exemptions.

In *Bureau of National Affairs, Inc. (BNA) v. United States Department of Justice,*[258] the D.C. Circuit found that a functional test of *agency records* most appropriately shields personal materials from disclosure.[259] The plaintiff in *BNA* sought disclosure of telephone message slips, appointment calendars, and daily agendas.[260] Because the telephone message slips and appointment calendars simply helped individuals organize and conduct their own daily business and were not distributed among agency officials, the court concluded that they were exempt from disclosure.[261] In contrast, the court found that the daily agendas, which were circulated among agency staff, were *agency records* subject to disclosure be-

---

ties might ordinarily be viewed as "personal," the report states that "an examination of the nature of political activities in which a President becomes involved shows that few are truly private and unrelated to the performance of his duties." H.R. REP. NO. 1487, *supra* note 4, at 12, *reprinted in* 1978 U.S.C.C.A.N. at 5743.

255. Although one of the FOIA's nine statutory exemptions from disclosure speaks of "intra-agency memorandums or letters," 5 U.S.C. § 552(b)(5) (1988), and another exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6) (1988), the FOIA does not flatly exempt personal information from disclosure.

256. 5 U.S.C. § 552(c) (1988).

257. *See, e.g.,* Porter County Chapter of the Izaak Walton League v. United States Atomic Energy Commn., 380 F. Supp. 630, 633 (N.D. Ind. 1974) (expressing concern that disclosure of handwritten notes "would invade the privacy of and impede the working habits of individual staff members").

258. 742 F.2d 1484 (D.C. Cir. 1984).

259. 742 F.2d at 1493-94.

260. 742 F.2d at 1486-88. Noting that the *Kissinger* case involved a similar FOIA request for transcripts of telephone conversations, the *BNA* court invoked four factors suggested by the Supreme Court to determine what counts as an agency record: "whether the document was generated within the agency, has been placed into the agency's files, is in the agency's control, and has been used by the agency for an agency purpose." 742 F.2d at 1494 (construing Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 157 (1980)). The *Kissinger* Court did not decide whether transcripts of telephone conversations qualify as agency records. 445 U.S. at 147.

261. 742 F.2d at 1495-96.

cause the agendas were created not for "personal convenience, but for the convenience of [the] staff in their conduct of official business."[262] By focusing on the use of the materials within the agency rather than their content, the court adopted a functional approach to identifying *agency records*.[263]

Finally, a functional test of *records* properly identifies nontraditional collections of information — for example, computer software — as candidates for preservation and disclosure. Because such novel materials do not fit within a traditional notion of *records*, agencies have argued that they need not be disclosed.[264] But any approach that categorically denies that software is a *record* would lead to disclosure of agency data without disclosure of the agency software that is often essential to understanding the data and the agency's use of them.[265] In contrast, a functional approach would identify as *records* any computer software used by agency officials to analyze data as part of their decisionmaking process,[266] and it thus would avoid fruitless inquiry into the informational value or *record*-like form of the software.

---

262. 742 F.2d at 1495.

263. *See* 742 F.2d at 1494. Moreover, the court explicitly rejected a content-based test for identifying *agency records*, finding that the presence of personal information "does not, by itself, take material outside the ambit of FOIA, for personal information can be redacted" prior to disclosure. 742 F.2d at 1496. Rather, the presence of personal information may simply indicate the "author's intended use of the documents at the time he or she created them," and thus should be considered only as a factor in determining whether materials were used for agency purposes. 742 F.2d at 1496.

264. *See, e.g.*, Cleary, Gottlieb, Steen & Hamilton v. Department of Health & Human Servs., 844 F. Supp. 770, 781 (D.D.C. 1993) (noting the agency's claim that computer programs are not records because "each program is merely a list of instructions for a computer to manipulate a database"); *see also* Grodsky, *supra* note 31, at 34 ("Some agencies have suggested that software is a *tool* used to manipulate information rather than a record . . . .").

265. A variation on this problem was presented in Yeager v. Drug Enforcement Admin., 678 F.2d 315 (D.C. Cir. 1982), in which the D.C. Circuit considered a FOIA request for both computer-based data compiled by the Drug Enforcement Administration (DEA) and technical information describing the format and encoded content of the computer data. 678 F.2d at 317. The DEA argued that the FOIA's "intra-agency memorandums or letters" exemption, 5 U.S.C. § 552(b)(5) (1988), should apply to the technical information because it was only used within the agency to store its data. 678 F.2d at 326. The court did not decide the issue but noted the district court's finding that if the plaintiff's request for computer-based data were granted, then the data itself would no longer be solely "intra-agency," and consequently " 'the codes necessary to read and use the tapes would become more than intra-agency records.' " 678 F.2d at 326 (quoting Yeager v. Drug Enforcement Admin., No. 76 Civ. 973, slip op. at 9 (D.D.C. May 1, 1979) (memorandum order)). This suggests that agency data and the agency software used to analyze that data should be considered together, especially because the data might be virtually worthless if disclosed without the technical information necessary to decode it. *See* Henry H. Perritt, Jr., *Federal Electronic Information Policy*, 63 TEMP. L. REV. 201, 233 (1990) ("Assuming the electronic form of the underlying data is a record, there is no apparent reason why software and indices are not records also." (footnotes omitted)); *see also* Grodsky, *supra* note 31, at 33-34 (discussing treatment of computer software as *agency records* under the FOIA); Sorokin, *supra* note 248, at 275 n.66 (same).

266. Of course, even if computer software qualifies as *agency records*, it might still be exempt from disclosure under an FOIA exemption or, if it is a commercial product, under copyright law. *See* Perritt, *supra* note 265, at 233.

An agency's computer software might also qualify as *records* under a content-based approach if the software incorporates substantive information about agency activities. In fact, the court in *Cleary, Gottlieb, Steen & Hamilton v. Department of Health & Human Services*[267] adopted this content-based approach in finding that computer programs used by a government researcher qualified as *agency records*.[268] Because the computer programs had been specifically developed by the researcher in order to analyze agency data, the court found that they fell within a "common-sense definition" of *agency records* that includes any materials "written or transcribed to perpetuate knowledge or events."[269] This definition enabled the court to distinguish between "generic word processing or prefabricated software" and software designed by an agency researcher to analyze particular agency data; only the latter can be said to embody government knowledge.[270]

This "common-sense" definition's admirable distinction between agency and generic software, however, is outweighed by its overbreadth in other contexts. For example, diaries and other personal documents clearly are intended to "perpetuate knowledge or events," yet *BNA* properly holds that they are not *agency records* unless they are used for agency purposes.[271] By ignoring the agency's use of materials, *Cleary*'s content-based approach improperly treats as *agency records* any materials in the possession of agency officials that include any useful information whatsoever.[272]

2. *Electronic Mail Under a Functional Approach*

Electronic mail systems promise the ability to exchange information easily, conveniently, and freely within a community. When an individual sets out to communicate with a colleague, e-mail offers certain advantages. First, the colleague need not be in the office, near a phone, or otherwise available to receive the message, because the mailbox is always available.[273] Second, communication

---

267. 844 F. Supp. 770 (D.D.C. 1993).

268. 844 F. Supp. at 781-82.

269. 844 F. Supp. at 781-82 (relying on a definition of *record* from Diviaio v. Kelley, 571 F.2d 538, 542 (10th Cir. 1978)).

270. 844 F. Supp. at 782. Although the programs at issue in the case qualified as *agency records*, the court held them exempt from disclosure under the FOIA's "intra-agency memorandums or letters" exemption, 5 U.S.C. § 552(b)(5) (1988), also known as the "deliberative process privilege." 844 F. Supp. at 782-83. Because "the computer programs reflect their creator's mental processes," the court found that they comprised a part of the deliberative process by which the researcher analyzed her data. 844 F. Supp. at 783.

271. *See* 742 F.2d at 1496.

272. Moreover, *Cleary*'s approach is not necessarily required to prevent disclosure of generic or commercial software, because such software may be exempt from disclosure for other reasons. *See supra* note 266.

273. MATTHEW RAPAPORT, COMPUTER MEDIATED COMMUNICATIONS 2 (1991).

via e-mail is generally reliable and trackable; electronic messages are less easily lost in transit than their paper counterparts, and several e-mail systems offer the option of notifying the sender when the message has been received.[274] Third, if the sender has a computer within reach, no other equipment or personnel is required: no printer, no secretary to take dictation and type the message, no messenger.[275] Finally, assuming availability of a computer network, messages can be delivered almost instantaneously to remote locations.[276] In addition to these "user-friendly" attributes, e-mail systems also provide behind-the-scenes management features, such as immediate capture of all messages in an electronic form suitable for long-term storage and maintenance of separate, private mailboxes for each individual.[277]

Because the convenience of e-mail has led to heavy use by government officials,[278] e-mail generally qualifies for preservation and disclosure under a functional test of *record* status.[279] Extensive governmental communication via e-mail, however, also implies that the content of e-mail can vary widely from one message to the next. As content moves from one end of the substantive spectrum, where the message is essentially equivalent to a paper memorandum but is simply sent through a different medium, to the other, where the message is perhaps an off-the-cuff equivalent to a remark made while passing in the hallway, the demand for historical preservation diminishes. E-mail thus presents a concrete and substantial challenge for a functional approach to identifying records. In particular, in order to handle e-mail effectively, a functional approach must both screen out purely personal e-mail messages and solve the problem presented by preliminary policy musings.

---

274. *See* THOMAS B. CROSS & MARJORIE B. RAIZMAN, NETWORKING: AN ELECTRONIC MAIL HANDBOOK 5-7 (1986).

275. *Id.* at 10.

276. *Id.* at 3.

277. *See* Armstrong v. Executive Office of the President, 1 F.3d 1274, 1279-80 (D.C. Cir. 1993) (describing the e-mail systems in use in the White House).

278. *See Armstrong II*, 1 F.3d at 1279 (noting the heavy use of the EOP and NSC e-mail systems); *see also* OTA, INFORMING THE NATION, *supra* note 31, at 34 (showing that over 40% of the federal agencies responding to a 1987 survey used e-mail systems).

279. *Cf. Armstrong II*, 1 F.3d at 1279 (observing that White House e-mail systems have been used "to relay lengthy substantive — even classified — 'notes' that, in content, are often indistinguishable from letters or memoranda"); Perritt, *supra* note 145, at 974 (predicting that government policymaking will increasingly be done electronically).

Closer to home, however, the University of Michigan recently denied that its electronic communications systems were being used for official purposes. *See* Dan Gillmor, *Privacy on the Line: U-M Defends Sanctity of Electronic Exchanges*, DETROIT FREE PRESS, Apr. 15, 1994, at 1A, 9A. Although the University, as the target of a lawsuit brought under Michigan's open meetings law, voluntarily released transcripts of an electronic conference in which University regents had participated, the University denied that it was legally obligated to do so. *Id.* Moreover, a University official made the dubious claim that "[t]he regents would never conduct business by electronic means — have never and will never." *Id.*

A functional test of record status not only properly identifies personal e-mail messages, it also provides an easily applied method of distinguishing between personal and governmental messages. This screening capability is essential because e-mail systems, by offering a convenient mode of communication, frequently capture personal information. If it were too burdensome to identify personal e-mail messages, an agency could argue that an e-mail system permeated with personal information should be shielded from disclosure[280] and perhaps even immune from recordkeeping law. As exemplified in *BNA,* however, a functional approach repudiates any broad claim that certain types of materials are inherently personal and hence not *records.*[281] Instead, a functional approach demands that the record status of each e-mail message be determined by its role in government decisionmaking. Moreover, a functional test enables government officials to determine easily the *record* status of e-mail messages as they are being composed; if a message contributes to a decisionmaking process, it qualifies as a *record* without need to decide whether it is personal.[282]

Similarly, a functional approach solves the problem presented by e-mail messages that include preliminary policy formulations. Although such messages deal with matters of substantive policy, the need to preserve them arguably diminishes as they move toward more transitory or preliminary policy musings.[283] The failure to

280. *See supra* notes 248, 253 (observing that courts have shielded records from disclosure based on the difficulty of segregating exempt from nonexempt information).

281. *See supra* note 263 (noting *BNA*'s rejection of a content-based test for personal materials).

282. Indeed, the inquiry in an e-mail message case will be easier than when, for example, diaries or personal calendars are under consideration, because e-mail messages will nearly always be circulated among government officials rather than used by a single individual. Thus the inquiry reduces to the question whether a message relates to government business.

283. Various government guidelines suggest different solutions to this dilemma. On the one hand, the NARA recordkeeping guidelines for federal agencies dictate that "[w]orking files, such as preliminary drafts and rough notes" must be maintained if they were "made available . . . for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business," and if "[t]hey 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." 36 C.F.R. § 1222.34(c) (1992). On the other hand, a Department of Defense (DOD) FOIA regulation contends that "internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decisionmaking process of an agency" are generally exempt from FOIA disclosure. 32 C.F.R. § 286.13(a)(5) (1994). This DOD regulation does not flatly contradict the NARA guideline, because the DOD regulation simply interprets the FOIA "inter-agency or intra-agency memorandums or letters" exemption from disclosure, 5 U.S.C. § 552(b)(5) (1988); *see also* Perritt, *supra* note 145, at 975 (asserting that "predecisional electronic transactions likely are protected" by the intra-agency memorandums exception), rather than contending that such preliminary records need not even be preserved. The DOD statement, however, does represent another possible approach to preservation of e-mail, under which final agency decisions must be preserved but messages reflecting interim deliberations may be discarded. *See* OTA, INFORMING THE NATION, *supra* note 31, at 234

preserve interim policy formulations, however, would remove the nuances of government decisionmaking from the historical record and thus would arguably fail to meet the historical preservation mandate of recordkeeping law. In particular, the policies the government considers and rejects are often just as significant a part of history as the policies the government ultimately pursues.[284] Accordingly, by making no distinction between interim and final policy statements, a functional approach to identifying *records* properly ensures that e-mail messages that contribute to policy formulation at any stage qualify for preservation under recordkeeping law.[285]

B. *Proposed Guidelines for Management of Electronic Mail*

By endorsing a functional approach to identifying *records,* the previous section argued that the technology used to communicate information is irrelevant to determining whether that information qualifies as *records* under the federal statutory scheme. But even if an agency recognizes that its use of a particular technology results in *records,* that technology may still present difficult record management issues. This section examines e-mail as an example of a technology that captures information in a form that resists management under a traditional record-based approach. Yet because e-mail systems *do* capture historically significant government information, officials who formulate record management guidelines must find a way to fit e-mail into the existing scheme. Accordingly, this section outlines the necessary features of guidelines that address the record management difficulties presented by e-mail and

(suggesting that for both FOIA disclosure and record retention purposes, it might be necessary to "distinguish[] between deliberations and final orders"); *see also* Perritt, *supra* note 145, at 987-88 (stating that "the goal of capturing draft documents in order to record the process of policy-making is, to a considerable extent, unrealistic," but noting that the NARA staff disagrees with this conclusion).

284. For example, the events of the Cuban missile crisis seem all the more compelling when augmented with the historical record that shows that Kennedy Administration officials contemplated the use of nuclear weapons. *See* Peter Kornbluh & Sheryl Walter, *History Held Hostage; 30 Years Later, We're Still Learning the Secrets of the Cuban Missile Crisis,* WASH. POST, Oct. 11, 1992, at C2.

285. These deliberations need not be immediately disclosed. The FOIA exempts deliberative materials, *see supra* note 270, thus leaving disclosure to agency discretion. *Cf.* American Friends Serv. Comm. v. Webster, 720 F.2d 29, 57 (D.C. Cir. 1983) (noting that a time delay might be appropriate before releasing the historical record to private researchers). In addition, the PRA permits delayed disclosure of "confidential communications requesting or submitting advice," 44 U.S.C. § 2204(a)(5) (1988), but authorizes neither disposal of such communications nor continued withholding once the restrictive period has expired. *See* H.R. REP. NO. 1487, *supra* note 4, at 14, *reprinted in* 1978 U.S.C.C.A.N. at 5745; *see also supra* notes 94-99 and accompanying text (describing the PRA categorical restrictions that delay public disclosure of presidential materials).

contrasts these proposals with e-mail guidelines recently developed by the NARA.[286]

In particular, guidelines for appropriate management of e-mail should include the following five features. First, guidelines should provide nuanced yet clear instruction to government employees, rather than prescribing broad rules such as "save everything." Second, guidelines should evince the historical preservation mandate of recordkeeping law. Third, the Archivist should be given the opportunity to express an opinion in difficult cases. Fourth, guidelines should seek to integrate e-mail systems into computer-based archival systems. Fifth, and finally, guidelines should encourage immediate segregation of nonrecord information such as personal materials.

1. *The Need for Specificity in Electronic Mail Guidelines*

Federal government electronic mail guidelines must avoid the pitfalls of either a "save all" or a "save nothing" approach and instead should stake out a middle ground that encourages judicious preservation of historically significant e-mail messages. As noted earlier, e-mail systems tend to be heavily used and therefore tend to capture information of varying historical importance.[287] Accordingly, appropriate retention and disposal of the information within e-mail systems demands recognition of both administrative needs and historical value. A guideline that simply dictates that everything be saved serves neither of these needs. Indeed, unguided government use and retention of e-mail would not only exhaust limited resources,[288] but would also threaten the goal of historical preservation by facilitating the collection of an undifferentiated and largely unmanageable mass of information without regard for its importance.[289] Conversely, a guideline that grants individuals wide discretion to dispose of e-mail fails to meet the mandate of federal recordkeeping law that historically valuable materials must be pre-

286. *See* 59 Fed. Reg. 13,906 (1994).

287. *See supra* notes 273-78 and accompanying text.

288. *See* Perritt, *supra* note 145, at 983-84 (noting that although electronic technologies can store more information in less space, electronic storage systems still "have finite capacities").

289. *See* Grodsky, *supra* note 31, at 26 ("[A]s federal agency communication via electronic mail and other electronic vehicles intensifies, government records may have the potential to become 'buried' within computer systems."); *cf.* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 160 (1980) (Brennan, J., concurring in part and dissenting in part) ("We could hardly assume that Congress intended agencies to be prevented from surrendering all documents that might be of interest to [FOIA] requesters — so broad a rule would not only swamp the agencies with paper, but would also seem incompatible with the records management goals of the [FRA].").

served.[290] The NARA's e-mail guidelines recognize this, stating that "[b]ecause of the widespread use of E-mail for conducting agency business, many E-mail documents meet the definition of a 'record' under the Federal Records Act."[291] E-mail guidelines therefore should explicitly direct staff to retain those e-mail messages that have been circulated in the conduct of government business.[292]

Nor should government officials attempt to avoid their e-mail management responsibilities by declaring that e-mail systems may not be used for government business.[293] This approach fails to recognize the inevitable move toward policymaking through the means of electronic mail, particularly given its inherent convenience.[294] Worse yet, it actually *creates* work for government officials who wish to preserve historical materials because they must incorporate any substantive information initially included in e-mail messages into separate documents that fit within a narrow conception of *records.* Such an approach thus offers a choice between forsaking the full power of e-mail as an efficient and convenient communication tool and wasting effort by duplicating all substantive information communicated through e-mail. Under either option, the government sacrifices *both* administrative efficiency and preservation of history. Guidelines that discourage policymaking via e-mail are therefore inconsistent with both bases of recordkeeping law.

Finally, in light of the considerable power of individuals to destroy e-mail records, guidelines must be clear and specific in order to be effective and enforceable. With each individual able to au-

290. Unfortunately, the White House initially adopted this approach to e-mail management, granting its agency staff complete discretion to determine which messages to save and which to delete. *See* Armstrong v. Executive Office of the President, 810 F. Supp. 335, 342-43 (D.D.C. 1993). In fact, the district court found that NSC recordkeeping guidelines *encouraged* staff to treat electronic mail as nonrecord materials. 810 F. Supp. at 343.

291. 59 Fed. Reg. 13,907 (1994); *see also* Armstrong v. Executive Office of the President, 1 F.3d 1274, 1282-83 (D.C. Cir. 1993) (finding that White House agency e-mail systems create *records* under the FRA and that the agencies must therefore apply the FRA's disposal standards before destroying e-mail messages).

292. *See* 59 Fed. Reg. 13,908 (1994) (discussing the *record* status of e-mail messages in light of the FRA definition of *records*); *see also supra* section III.A (arguing for a functional test of record status).

293. For example, the White House Office of Administration, a component of the Executive Office of the President, issued a guideline dictating that "[e]lectronic mail should not be used to convey official records information." *Armstrong,* 810 F. Supp. at 345. If a staff member nonetheless sent or received a message that included *record*-like information, the guideline dictated that "the message should either be incorporated into a memorandum, or reduced to paper." 810 F. Supp. at 345. An NSC memorandum included a similar instruction: "Electronic mail *should not* be used to convey substantive information about policy issues when such information is not already contained or will not otherwise be contained in a written federal or presidential record." 810 F. Supp. at 347 n.27.

294. *See supra* note 278 and accompanying text; *cf.* Perritt, *supra* note 145, at 964 ("President Bush reportedly used a personal computer to sketch American policy goals in the early hours of the Soviet coup.").

tonomously manage her own mailbox, a convenient system means convenient deletion of messages.[295] This capacity for destruction is substantial; an entire mailbox of e-mail messages can typically be emptied with a few simple keystrokes and without opportunity for anyone to intercede or for the perpetrator to reflect further. Because recordkeeping law depends on administrative oversight to ensure individual compliance,[296] executive officials charged with enforcement of recordkeeping law must rely on guidelines that clearly articulate and explain the criteria to be applied when judging whether an e-mail message must be preserved.[297] Detailed guidelines ensure that individuals who make day-to-day recordkeeping decisions are properly informed about the historical preservation mandate of recordkeeping law, and they also provide a concrete basis for taking enforcement action should an individual fail to comply.

2. *Serving the Historical Preservation Mandate of Recordkeeping Law*

When establishing specific criteria for e-mail management, government officials must evaluate each criterion in light of the overarching historical preservation goal of recordkeeping law. The district court in *Armstrong II* articulated an overall principle that any guideline should recognize: "[G]iven the FRA's goal of the preservation of records for historical purposes, the Defendants should err, if at all, on the side of preservation."[298] Similarly, in *American Friends,* the D.C. Circuit found that the FBI's record disposal criteria did not sufficiently account for historical value; rather, the FBI's record disposal schedules demonstrated "that the FBI was only concerned about preserving records that might serve its own institutional needs."[299] The court also rejected the FBI's treatment of so-called transitory documents, documents that were substantively incorporated into more "permanent" documents; the court found that such perfunctory characterization of documents could not be used to short-circuit a proper inquiry into a document's "administrative, legal, or research value."[300] Accordingly,

295. *See* Perritt, *supra* note 145, at 984.

296. *See supra* notes 52-55 and accompanying text.

297. The NARA's proposed e-mail standards emphasize that "[i]t is critical . . . that agencies provide sufficient information for users to distinguish Federal records from nonrecord materials." 59 Fed. Reg. 13,908 (1994); *see also* American Friends Serv. Comm. v. Webster, 720 F.2d 29, 65 (D.C. Cir. 1983) (finding that the FRA requires agencies to provide a "reasoned justification" for recordkeeping decisions).

298. Armstrong v. Executive Office of the President, 810 F. Supp. 335, 343 (D.D.C. 1993).

299. 720 F.2d at 65.

300. 720 F.2d at 67-68; *see also* 59 Fed. Reg. 13,908 (1994) (requiring preservation of draft documents circulated via e-mail if "they contain unique information, such as annotations or comments, that helps explain the formulation or execution of agency policies, decisions, ac-

rather than providing categorical rules stating that certain types of materials need not be preserved, guidelines should incorporate a test of *record* status that identifies historically significant materials.

3. *Giving the Archivist a Voice in Recordkeeping Decisions*

Government e-mail management guidelines should seek to take advantage of the Archivist's unique perspective and expertise as a historian. As justification for the PRA provision that requires the President to obtain the views of the Archivist prior to disposing of records,[301] a House report noted "the maxim that 'those closest to the making of history are often the least able to judge the si[gn]ificance of their actions.' "[302] Accordingly, guidelines should give the Archivist an opportunity to provide a second opinion in recordkeeping decisions, particularly in borderline cases. For example, a guideline could instruct staff that "when in doubt, forward the record to the Archivist for an independent determination of its preservation value."

4. *Preserving Electronic Mail in Computer-Based Archival Systems*

In order to establish an easily accessible and comprehensive historical record of government decisionmaking, government e-mail guidelines should advocate the integration of electronic communications into true archival systems.[303] On the one hand, e-mail systems offer the promise of easy archiving because they capture information in electronic form. On the other hand, e-mail systems are designed for communication, not for archival purposes. A guideline must therefore reconcile e-mail's automatic capture of information with its threat of information diffusion.

Because the government has a well-established system for archiving paper-based records, recordkeeping officials might be tempted to archive e-mail by reducing all historically significant messages to paper. Indeed, the White House initially adopted this solution to e-mail management by instructing staff to print "hard-

---

tions, or responsibilities"); *supra* notes 283-85 and accompanying text (demonstrating that a functional test of *record* status requires preservation of e-mail messages that include interim policy formulations).

301. *See supra* note 87 and accompanying text.

302. H.R. REP. NO. 1487, *supra* note 4, at 13, *reprinted in* 1978 U.S.C.C.A.N. at 5744.

303. This section uses *archival* to describe a system that is designed to capture and preserve information in an organized and coherent form that permits straightforward searches and retrievals by researchers. For example, a database is an archival computer system. *See* Perritt, *supra* note 145, at 986 (contrasting an archival approach with the approach traditionally taken by the National Archives, under which agencies simply forwarded information to the Archives in whatever format was best for its original use).

copy" versions of any e-mail messages that qualified as *records.*[304] This approach would be defensible, however, only if the original electronic message and its paper form were informationally equivalent. But as the D.C. Circuit found in *Armstrong II,* paper printouts of e-mail messages are not sufficiently duplicative to justify deletion of the underlying electronic messages.[305] The court identified two important differences between the hard copies and the underlying messages. First, a hard copy may identify senders and lists of recipients through codes that can only be translated by means of additional information not captured in the hard copy.[306] Second, the sender of a message may request an "acknowledgement," consisting of a return receipt of the date and time the recipient viewed the message, but this acknowledgement information is not captured in the hard copy.[307] The court concluded that the FRA's broad recordkeeping mandate does not "grant agencies the discretion to automatically lop off a predesignated part of a whole series of documents that qualify as records."[308]

In addition to the deficiencies noted by the court, the hard-copy approach to e-mail preservation fails to take advantage of the fact that the information contained in e-mail messages has already been captured within a computer. Historians stand to lose in two ways if the government preserves initially computer-based information in paper form. First, under a paper-based scheme, the Archivist would face the difficult task of sifting through paper records and retaining only those that are appropriate for preservation; the difficulty of this job suggests that the historical record will suffer as a consequence. This task would be far easier if the Archivist could use advanced computer technology to examine government information that was created, and continues to exist, in electronic form.[309] Second, a historian who files a FOIA request generally would prefer — and, with the proliferation of computer technology, will increasingly prefer — that the information be disclosed in a

304. *See* Armstrong v. Executive Office of the President, 810 F. Supp. 335, 340 (D.D.C. 1993).

305. Armstrong v. Executive Office of the President, 1 F.3d 1274, 1282-87 (D.C. Cir. 1993). The White House defense of this approach was based on the FRA definition of *records,* which excludes "extra copies of documents preserved only for convenience of reference." 44 U.S.C. § 3301 (1988). The White House claimed that the hard copies rendered the original messages mere "extra copies" that could be deleted. 1 F.3d at 1284.

306. 1 F.3d at 1284.

307. 1 F.3d at 1284.

308. 1 F.3d at 1286. The court also rejected the White House claim that the FRA requirement that materials be "appropriate for preservation," 44 U.S.C. § 3301 (1988), grants agencies the discretion to decide that the information lost in reducing e-mail to hard copies does not merit preservation. 1 F.3d at 1285-86.

309. *See* Perritt, *supra* note 145, at 987-88 (discussing the more sophisticated information archiving made possible by the underlying records existing in electronic rather than paper form).

computer-based format, because that format makes organization and analysis of the information easier.[310] Saving only hard copies of e-mail messages obviously frustrates such a desire. E-mail guidelines should therefore take advantage of technological advances rather than rebelling against them.[311]

In addition to providing that e-mail should remain in electronic form, guidelines must ensure the preservation of all information necessary to understand the underlying messages. Even if messages are faithfully preserved in individual mailboxes and even if those mailboxes are regularly copied to long-term storage, such as computer tapes, a historian who obtains the contents of an e-mail system will still face the daunting task of trying to interpret the data. As the *Armstrong II* court observed, e-mail messages often contain embedded codes — for example, a code name of a list of message recipients that the sender uses as a shorthand in lieu of having to type in the name of each individual recipient.[312] The information necessary to translate these codes is often maintained separately from the mailboxes within the computer[313] and thus might be overlooked when the contents of an e-mail system are backed up on computer tape, archived, or disclosed. If the government fails to preserve this code-related information, the historical value of the e-mail messages will be diminished.[314]

Finally, e-mail guidelines should encourage the transfer of e-mail from individual mailboxes to a true archival system, because the failure to do so will impede historical analysis of the information captured in e-mail systems. A historian who gains access to an e-mail system would have to sift through a collection of messages that is typically not integrated beyond the level of individual mailboxes. Furthermore, the software available to gain access to e-mail messages will, again, be geared exclusively toward management of individual mailboxes and consequently will be of little use to a historian who is more interested in examining the mail from *all* mailboxes that pertains to a particular subject. Unlike databases that can often be exchanged among different types of computer systems,

310. *See* Grodsky, *supra* note 31, at 32 ("Paper printouts and other customary means of distributing computer-stored information may no longer satisfy public access needs."); Sorokin, *supra* note 248, at 277-78 (noting that by disclosing computer-based information in paper form, "[t]he agency has actually denied the [FOIA] requester one of the attributes of its records: that they can be easily analyzed on a computer").

311. *See* 59 Fed. Reg. 13,909 (1994) ("Agencies should consider the advantages of maintaining their records electronically.").

312. 1 F.3d at 1280.

313. *See, e.g.,* Armstrong v. Executive Office of the President, 810 F. Supp. 335, 341 (D.D.C. 1993) (noting that this is true of the White House electronic mail systems).

314. In fact, the *Armstrong II* court suggested that the information necessary to interpret e-mail messages itself qualifies as records and therefore *must* be preserved under record-keeping law. 1 F.3d at 1284 n.8.

e-mail systems are usually hardware- and operating system-dependent, meaning that a historian must match an agency's computer system in order to read that agency's e-mail.[315] For example, in order to read tapes containing White House e-mail messages, the *Armstrong* plaintiffs would very likely either have to purchase a computer system that is compatible with the one used in the White House or develop custom computer software that translates the e-mail into a more useful form. These potential pitfalls all demonstrate the need for a guideline that encourages the transfer of electronic communications to true archival systems, rather than one that simply calls for preservation of raw e-mail data that will be of limited use to historians.[316]

5. *Segregating Nonrecord Electronic Mail*

Finally, government e-mail guidelines should require that nonrecord information such as personal materials be quickly segregated from those e-mail messages that qualify as records. Expeditious segregation of nonrecord information makes the Archivist's job easier by reducing the amount of material that must be processed. Furthermore, the PRA dictates that materials must, "to the extent practicable," be designated as either presidential or personal records and must thereafter be separately maintained.[317] The NARA's e-mail guidelines suggest that this can be achieved by adding a feature to e-mail systems that allows staff to "tag messages as record or nonrecord";[318] any messages tagged as records could immediately be copied to an archival system, rendering the original messages redundant and subject to deletion.[319] E-mail guidelines should also emphasize that government officials may not simply label e-mail messages as "personal" and thereby end the inquiry into the preservation value of each message.[320] Indeed, guidelines

315. *See* Perritt, *supra* note 145, at 993.

316. *See* Perritt, *supra* note 145, at 965 ("An idea shared widely among information systems professionals is that the best way to ensure retention of electronic records having archival value is to design information systems with inherent archival features.").

317. 44 U.S.C. § 2203(b) (1988). Similarly, NARA recordkeeping regulations dictate that personal papers be maintained separately from agency records. 36 C.F.R. § 1222.36(b) (1992). The NARA regulation also states that if a document contains both personal and agency information, "the document shall be copied at the time of receipt, with the personal information deleted, and treated as a Federal record." 36 C.F.R. § 1222.36(c) (1992).

318. 59 Fed. Reg. 13,908 (1994).

319. *See* 59 Fed. Reg. 13,910 (1994). Compliance with such a guideline would also avoid a difficulty confronted by courts in FOIA cases — namely, whether the information subject to disclosure is "reasonably segregable" from exempt information. *See supra* note 248.

320. *See supra* notes 280-82 and accompanying text (arguing for a functional test of record status that avoids the question whether materials include personal information).

should emphasize the presumption that messages do not contain personal information.[321]

CONCLUSION

Electronic mail systems offer their users the ability to communicate as much as they want whenever they want. Accordingly, when e-mail systems were introduced into the White House, officials took advantage of them, presumably for the entire gamut of communications that such systems allow. White House e-mail messages have undoubtedly replaced some communications that formerly would have taken place in memos and some communications that formerly would have occurred in face-to-face conversations. The Watergate scandal, with its presidential tape recordings, serves as a powerful reminder that decisions made through conversations can have just as much of an impact on the nation's history as weighty policy formulations committed to paper. Unless the citizenry is willing to forgo the greater insight into government decisionmaking that access to White House e-mail would provide, the substantive content of White House electronic messages must be made available for public scrutiny.

Unfortunately, current law does not ensure this availability. Instead, the enforcement and oversight provisions of recordkeeping law remained uninvoked while White House officials deleted whatever e-mail messages they wanted whenever they wanted.[322] When private citizens stepped in to halt these arbitrary recordkeeping practices, they were forced to confront many legal hurdles: issues of judicial review and standing,[323] the claim that e-mail messages presumptively fail to qualify as records,[324] and the contention that current law grants White House officials the discretion to delete any messages they want without need to consult recordkeeping guidelines.[325]

The *Armstrong* plaintiffs have negotiated these initial obstacles but have yet to gain access to any White House electronic mail. Moreover, courts are still investigating whether new White House

321. *See* H.R. REP. NO. 1487, *supra* note 4, at 11-12, *reprinted in* 1978 U.S.C.C.A.N. at 5742-43 (stating that the scope of the phrase *presidential records* is very broad and that the scope of *personal records* is correspondingly very narrow "since a great number of what might ordinarily be construed as one's private activities are, because of the nature of the presidency, considered to be of a public nature"); *id.* at 12, *reprinted in* 1978 U.S.C.C.A.N. at 5743 (observing that due to the public nature of the presidency, the duty to separate presidential from personal records will "involve relatively little burden because the volume of truly personal material is considered minuscule").

322. *See supra* notes 199-203 and accompanying text.

323. *See supra* section II.A.

324. *See supra* note 19 and accompanying text.

325. *See supra* note 290 and accompanying text.

recordkeeping guidelines ensure appropriate preservation of e-mail messages. Finally, given the current scheme's limited enforcement mechanisms and their history of nonuse, one must wonder how further arbitrary destruction of White House information can be prevented.

This Note has proposed three paths to pursue. First, courts should insist that recordkeeping guidelines are formulated and enforcement duties are discharged in accordance with the needs of history.[326] Second, Congress should strengthen the law by enhancing the Archivist's participation in presidential recordkeeping and by codifying limited judicial review.[327] Third, White House officials and the Archivist should develop recordkeeping guidelines that mandate preservation of historically significant information regardless of the medium used to create or transmit it.[328] Through these means, White House officials will be able to use any effective method of communication that technology can provide, yet deficient White House recordkeeping practices can be either prevented or more quickly corrected, thereby ensuring a rich historical record of modern White House decisionmaking.

---

326. *See supra* section I.D.

327. *See supra* section II.B.2.

328. *See supra* section III.B.