

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND)
ETHICS IN WASHINGTON,)
)
Plaintiff,)

v.)

Civil No. 07-01707 (HHK/JMF)

EXECUTIVE OFFICE OF THE)
PRESIDENT, et al.,)
)
Defendants.)

NATIONAL SECURITY ARCHIVE,)
)
Plaintiff,)

v.)

Civil No. 07-01577 (HHK)(JMF)

EXECUTIVE OFFICE OF THE)
PRESIDENT, et al.,)
)
Defendants.)

**PLAINTIFF CREW’S¹ RESPONSE TO DEFENDANTS’
NOTICES OF COMPLIANCE**

STATEMENT

From the outset of this litigation defendants have resisted all judicially imposed preservation obligations and all of plaintiffs’² efforts to bring transparency to the conduct of the Bush administration in its response to the discovery that millions of emails appear to be missing from White House servers for a two and one-half year period. This resistance continues to the

¹ CREW is the acronym for Citizens for Responsibility and Ethics in Washington.

² Plaintiffs here are CREW and the National Security Archive.

present day, as evidenced by defendants' objections to the order issued by Magistrate Judge John Facciola on January 15, 2009, and their notices of compliance that, far from offering assurances of full compliance, suggest defendants may have directly defied the Court's orders.

Conspicuously absent from defendants' compliance notices is any affirmation they have collected and preserved *all* media that may contain emails sent or received between March 2003 and October 2005, as ordered by the Court (Document 102). Instead, defendants appear to have limited their obligations to hard drives only, despite language in the Court order expressly mandating broader action. Defendants' compliance notices also fail to address their obligations to assemble an administrative record and to collect additional records beyond the administrative record that may be relevant or lead to relevant evidence. And documentation submitted in support of defendants' recently filed motion to dismiss suggests the backup tapes subject to the Court's original preservation order may have been moved, despite the Court's most recent order requiring court approval to move the tapes from their present location to another location.

For many of these failures defendants appear once again to have taken a "roll of the dice" approach, hoping the Court would either vacate the most recent preservation and collection requirements based on defendants' stated objections or conclude it is simply too late to unscramble the proverbial egg when it comes to locating and preserving documents from Presidential Records Act ("PRA") components of the Executive Office of the President ("EOP"). Now that the Court has adopted Magistrate Judge Facciola's latest Report and Recommendation,³ defendants' only option is full compliance.

³ See Order of January 26, 2009 (Document 116) (treating Magistrate Judge Facciola's Order (Document 104) as a Report and Recommendation and adopting it in toto.

BACKGROUND⁴

In April 2008, Magistrate Judge Facciola recommended that the Court issue an order requiring the EOP to take two actions: (1) “search the workstations, and any .PST files located therein, of any individuals who were employed between March 2003 and October 2005, and to collect and preserve all e-mails sent or received between March 2003 and October 2005”; and (2) “issue a preservation notice to its employees directing them to surrender any media in their possession -- irrespective of the intent with which it was created -- that may contain e-mails sent or received between March 2003 and October 2005, and for EOP to collect and preserve all such media.” First Report and Recommendation (Document 67), pp. 4-7.

Defendants objected to each proposed recommendation, arguing the recommended requirement that defendants search for and collect .pst files on hard-drives or portable media was “unwarranted because the disaster recovery back-up tapes contain email information sufficient to obviate any claims of harm.” EOP Defendants’ Local Rule 72.3(b) Objections (Document 72) at p. 16. Defendants also objected to the burdens such actions would impose, which they characterized as “extensive and time consuming.” at 17. And defendants argued collecting and copying the .pst files as Magistrate Judge Facciola recommended “would exceed the jurisdictional bounds of the FRA [Federal Records Act].” Id. at 18.

In his Second Report and Recommendation (Document 84) Magistrate Judge Facciola, characterized the foundation for defendants’ objections -- that preservation of the backup tapes obviates the need for any further relief -- as “fundamentally flawed because it presumes that all

⁴ CREW offers here background most relevant to the issues raised by defendants’ notice of compliance.

e-mails sent or received between March 1, 2003, and May 22, 2003, remained on the EOP network on May 23, 2003, when the earliest existing back-up tape was created.” Memorandum Opinion and Second Report and Recommendation, p. 4. Accordingly, he stressed the continuing need to make “every reasonable effort . . . to preserve the *res* of this lawsuit, *i.e.* the historical records that the plaintiffs may establish were required by law to have been preserved.” *Id.* at 4-5.

In response defendants renewed their earlier objections (Document 89) and took issue with Magistrate Judge Facciola’s expressed need to preserve the *res* of this lawsuit based on their claim of a purported lack of evidence that any emails were missing for the period prior to May 23, 2003. On January 14, 2009, the Court entered an Order (Document 102) adopting the recommendations of Magistrate Judge Facciola in their entirety. As a result, EOP was required to (1) search workstations and .pst files for all individuals employed between March 2003 and October 2005 and collect and preserve all emails sent or received during that time period, and (2) issue a preservation notice requiring employees to “surrender *any* media in their possession” that may contain emails for other period in question. Order of January 14, 2009, p. 2 (emphasis added).

In light of the presidential transition on January 20, 2009, CREW requested an immediate status conference (Document 98), which was held on January 14, 2009, before Magistrate Judge Facciola. During the conference defendants admitted they interpreted the Court’s latest preservation order, issued that same day, to require them to search only those components of the EOP subject to the FRA (so-called “EOP FRA components”). Defendants also described the preservation notice they had issued as “instructing of -- all the employees to preserve all the .pst

files on their workstations.” Transcript of Status Conference, Jan. 14, 2009 (“Trans.”) at 6 (attached as Exhibit 1). In response to the Court’s specific question whether employees had been directed to search not only workstations but other portable media, defendants’ counsel responded simply “[t]he preservation notice has been issued . . .” Id. at 7. When pressed further on their interpretation of the Order, defendants’ counsel again referenced only proposed searches of workstations, id. at 19-20, 21, ignoring entirely the newly imposed requirement to search other media as well.

Turning to the issue of the backup tapes, the Court inquired whether their status would change after January 20, 2009. Defendants responded as follows:

They will remain in the secure off-site facility. NARA, however, will obtain legal custody of those tapes, as well as physical custody of those tapes. Those tapes will remain in the same facility, off-site data center that they are in right now.

Trans. at 24. See also id. at 28 (“They [the backup tapes] will remain in the facility that they are in now.”).

On the issue of the administrative record CREW explained to the Court its concern that once the transition was completed there would be no one with sufficient knowledge to assemble the administrative record, particularly if all the documents were with the National Archives and Records Administration (“NARA”). Trans. at 47-48. Accordingly, CREW requested that defendants be ordered to assemble during the last days of the Bush administration a complete administrative record, a copy of which would remain with the White House to assist the incoming administration in defending against this lawsuit. Id. at 48. In response defendants’ counsel asked the Court to accept instead defendants’ blanket assurances that “all of the hard copy records from the Office of Administration will be preserved here in Washington, D.C. by

the National Archives, and accessible, if required.” Id. at 51. Defendants also advised the Court of their intent to transfer electronic records of PRA components to NARA. Trans. at 51.

On January 15, 2009, Magistrate Judge Facciola issued a Memorandum Opinion (Document 105) (“1/15 Mem. Op.”) and Order (Document 104). Attempting to balance “cost and burden against benefit,” he recognized the “profound societal interest” in the preservation of the emails that “are, after all, the most fundamental and useful contemporary records of the recent history of the President’s office.” 1/15 Mem. Op. at 3. Cognizant of what now had to be done “under emergency conditions,” id., Magistrate Judge Facciola also noted defendants’ failure to seek clarification of the recommendation he issued in April 2008 regarding the extent to which it covered PRA EOP components. Id. at 3-4. His Order accordingly directs defendants to: (1) construe Judge Kennedy’s Order of January 14, 2009, as applying to all components of the EOP, whether or not they are subject to the PRA; (2) transfer all collected emails to a secure, accessible portable medium that the Archivist shall receive and preserve separately; (3) retain the backup tapes in their present location, not to be removed without further order of the Court; (4) retain in their present location additional media “bearing the results of the restoration of those backup tapes”; (5) deliver to the archivist and the Court an inventory of all backup tapes and additional media collected pursuant to the January 14, 2009 Order; (6) collect all records comprising the administrative record, to be preserved in their present location; and (7) collect all additional records relevant to any claim or defense in this lawsuit or likely to lead to relevant evidence, to be preserved in their present location. Order of Jan. 15, 2009, at 1-2. In addition, Magistrate Judge Facciola granted the archivist leave to move the Court at any time for permission to move any records subject to his Order to another location. Id. at 2.

On January 16, 2009, defendants filed objections to this Order (Document 111). By Order dated January 26, 2009, the Court construed Magistrate Judge Facciola's Order as a Report and Recommendation, which the Court adopted in full. Order, Jan. 26, 2009 (Document 116).

On January 21, 2009, defendants filed a motion to dismiss the first four counts of plaintiffs' complaints (Document 112), arguing they were moot based on an ongoing email recovery process the White House had initiated. As an exhibit to their motion defendants included a memorandum of understanding between NARA and the Office of Administration "Regarding the Work to Complete Transfer of George W. Bush Electronic Records." ("MOU") (Document 112-6). The MOU was executed on January 16, 2009, one day after Magistrate Judge Facciola's latest preservation order, and includes the following provision:

As soon as possible, and no later than January 20, 2009, OA shall transfer to NARA three sets of backup physical media, which are being maintained for any necessary recovery purposes and as required by continuing litigation: (1) a complete set of disaster recovery back-up tapes, (2) copies of the subset of those tapes made by the OA email restoration vendor, and (3) workstation hard drives removed from PRA EOP component workstations (from which all Presidential record information has also been copied and transferred to NARA on other media), along with requisite documentation to accomplish a full and complete recovery should it be required . . .

MOU at 2. The MOU further provides "all PST files containing federal records shall be transferred into NARA's physical custody until the email sorting process mentioned above is completed." *Id.* at 3. The MOU also asserts affirmatively that "[a]ny access to PRA records by OA staff, OA contractors, or any other party shall be controlled *exclusively* by NARA . . ." *Id.* at 2 (emphasis added). The MOU contains no references to any orders of this Court.

In addition, defendants have now filed two separate notices of compliance (Documents 110, 114). In their first notice, filed on January 16, 2009, defendants described the process they implemented to collect and preserve .pst files located on hard drives of workstations. For EOP FRA components, defendants described a process of sending out notices, setting up storage space, and transferring .pst files and emails from the relevant time period to the storage space. Defendants' Notice of Compliance at 4. This process applies exclusively to emails "located on the hard drives of [] workstations." Id.

This first notice described in a very limited way steps defendants have taken to implement the other requirements imposed by the Court. Defendants note the EOP PRA components have received "preservation notices consistent with the requirement that defendants 'issue a preservation notice to its employees directing them to surrender any media in their possession . . . that may contain emails'" sent during the relevant time period "and for EOP to collect and preserve all such media." Defendants' Notice of Compliance at 2 n.1. As to EOP FRA components, defendants stated only they were "in the process of issuing such preservation notices and collecting media." Id.

In Defendants' Second Notice of Compliance, filed on January 22, 2009, defendants described the inventory of backup tapes they have now delivered to the Court. Defendants also claimed "all of the disaster recovery back up tapes remain in the same secure facility they were in when under OA's control." Defendants' Second Notice of Compliance at 2 n.1.

1. Defendants Have Failed To Demonstrate Compliance With The Requirement They Search And Collect Specified Emails From All Portable Media.

The relief ordered by Magistrate Judge Facciola on January 15, 2009, clearly contemplated full compliance before the change of administrations on January 20, after which

access to emails preserved in other media would be hampered by the departure of personnel and the transfer of legal custody and control over all Bush presidential records to NARA.

Recognizing the burden his emergency relief would impose on the White House defendants during their last days in office, Magistrate Judge Facciola nevertheless concluded such burden was outweighed by the critical need to ensure preservation of emails from the Bush presidency.

It now appears, however, defendants failed to fully shoulder that burden and instead merely initiated the very first step toward locating emails preserved on other media. Defendants' first notice of compliance simply references the issuance of preservation notices, with no details regarding the deadline for collecting such media or how the media will be handled and stored once collected. See Defendants' Notice of Compliance at 2 n.1. It also appears defendants issued their preservation notices only to current EOP staff even though by January 16, 2009, the vast majority of staff employed during the relevant time period (March 2003 through October 2005) likely had long left White House employment. Defendants have provided no additional details, raising a strong likelihood they have yet to collect and preserve all other media containing the relevant emails, and instead are relying on the claimed sufficiency of their search of hard drives on workstations and their pending motion to dismiss.

Given defendants' failure to provide essential information demonstrating full compliance with the Court's mandate to collect and preserve emails on other media, defendants should be directed to update the Court immediately on all steps they have taken in compliance.

2. Defendants' Apparent Failure To Assemble A Full Administrative Record And To Collect All Relevant Documents Violates The Court's Order.

Defendants' failure to provide any details about whether and how they are complying with the mandate to assemble a full administrative record and to collect and preserve all relevant

evidence is best explained by the objections they filed on January 16, 2009 (Document 111). First, defendants for the first time advised the Court that some unidentified number of relevant documents have already been shipped to NARA's facilities in Dallas, Texas and defendants apparently have no intention of seeking their return, notwithstanding the Court's Order. See Defendants' Local Civil Rule 72.2(b) Objections at 6.

Second, defendants construe an order issued in CREW v. Office of Administration on January 15, 2009 -- hours *after* Magistrate Judge Facciola issued the order at issue here⁵ -- as preventing them from assembling the "significant majority of records that are relevant to plaintiffs' claims." Id. at 6-7. Defendants, however, have seriously distorted the meaning and intent of Judge Kollar-Kotelly's stay order and directed their concerns to the wrong court. It is clear from the memorandum opinion accompanying her order that Judge Kollar-Kotelly limited access to certain documents of the Office of Administration ("OA") *after* the Bush presidency ended on January 20, leaving intact defendants' ability to access those records while still in the custody and control of the Bush White House. She imposed this restriction to address defendant OA's concern that allowing the incoming president full access to President Bush's records would interfere with the outgoing president's claimed statutory and constitutional right to dictate which of his records would remain at the White House, a concern that would not arise until after President Bush left office on January 20.

Moreover, given that the stay order was issued after this Court's order, any tension defendants perceive between the two orders arises from the later-issued order, not that of

⁵ The Court's ECF filing system documents Magistrate Judge Facciola's Order as entered at 10:30 a.m. on January 15, 2009, while Judge Kollar-Kotelly's Order in CREW v. Office of Administration was entered at 3:48 p.m. on January 15.

Magistrate Judge Facciola. Thus, defendants' concerns are properly addressed to the Court in CREW v. Office of Administration, not this Court. Tellingly defendants have yet to raise the purported conflict with Judge Kollar-Kotelly, preferring instead to use it to justify their failure here to assemble a full administrative record and all relevant documents. But far from an adequate excuse, it merely documents their non-compliance with a direct Order of this Court.

Indeed, this conflict is part of a larger pattern of conduct by defendants as they have resisted repeatedly any call to assemble a full administrative record. An administrative record would confirm what defendants knew about the missing emails, when they knew it, and why they did nothing until the very end of the Bush administration. An administrative record would reveal why the Bush White House made the affirmative decision several years ago not to restore the missing emails and not to activate one of the two electronic record keeping systems it had developed after discontinuing the system used by the Clinton administration. In short, an administrative record would document defendants' culpability and apparently, they would rather risk violating a direct Court order than disclosing the truth behind the missing email scandal.

3. Defendants Appear To Have Violated The Court's Order Requiring Further Leave Of The Court To Move The Physical Location Of Certain Records.

An important component of the Court's Order is the requirement that specified documents and collections of documents remain in their present location absent further leave of the Court to be moved. This restriction addresses CREW's concern that if critical documents were moved, plaintiffs would lose ready access to them thereby impairing their ability to effectively litigate this lawsuit. Accordingly, the Court ordered that both "the backup tapes from which defendants have restored e-mails" and "additional media bearing the results of the restoration of those backup tapes" "shall remain in their present location." Order, Jan. 15, 2009

at 2. Similarly defendants were ordered to preserve the full administrative record, including electronically stored information, and all other relevant documents “in their present location.”

Id. at 2, 3.

In their objections to this Order, however, defendants made clear their intent to transfer to NARA all of OA’s electronic records and emails, notwithstanding the requirement they remain in their present location (the White House). Defendants’ Local Civil Rule 72.2(b) Objections at 8. Defendants also indicated certain hard copy records would continue to be transferred. Id. As for the backup tapes and additional media bearing the restoration results, the MOU defendant OA entered into with defendant NARA one day after the Court’s January 15, 2009 Order reflects the intent to transfer backup media to NARA “no later than January 20, 2009. See MOU at 2.⁶ None of these transfers is permissible under the Court’s Order without leave of the Court, which defendants have yet to seek. Accordingly, to the extent defendants proceeded with these planned transfers they are in violation of the Court’s Order.

CONCLUSION

Defendants’ conduct to date and their various representations to the Court raise serious questions about their full compliance with the Court’s Order of January 15, 2009, as adopted in full on January 26, 2009. Accordingly CREW respectfully requests that the Court immediately order defendants to submit to the Court a notice outlining all the steps defendants have taken to comply with all aspects of the Court’s Order.

⁶ In their objections defendants claimed they are “contractually obligated” to return the results of the restoration. Yet during the hearing on January 14, 2009, defendants’ counsel made no mention of any such contractual obligation or planned intent to transfer the backup tapes, instead stating unequivocally “[t]hey will remain in the secure off-site facility.” Trans. at 24.

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY	.	Case No. 1:07-CV-01707
	.	1:07-CV-01577
AND ETHICS IN WASHINGTON,	.	
	.	Washington, D.C.
ET AL.,	.	January 14, 2009
	.	
Plaintiffs,	.	
	.	
v.	.	
	.	
EXECUTIVE OFFICE OF THE	.	
	.	
PRESIDENT, ET AL.,	.	
	.	
Defendants.	.	
.	

STATUS CONFERENCE
BEFORE THE HONORABLE JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff Citizens for Responsibility and Ethics in Washington:	By: ANNE L. WEISMANN, ESQ. 1400 Eye Street, NW Suite 450 Washington, DC 20005
For Plaintiff The National Security Archive/George Washington University: For the Defendants:	MEREDITH FUCHS, ESQ. 2130 H Street, NW Gelman Suite 701 Washington, DC 20037
	Jones Day By: SHEILA SHADMAND, ESQ. 51 Louisiana Avenue, NW Washington, DC 20001

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APPEARANCES (CONT'D)

For the Defendants:

U.S. Department of Justice
By: HELEN H. HONG, AUSA
TAMRA T. MOORE, AUSA
20 Massachusetts Avenue, NW
6th Floor
Washington, DC 20530

1 (Proceedings commenced at 2:20 p.m.)

2 THE COURT: Civil matter counsel, come to the
3 bench. Come to the podium, I should say, into the well
4 of the court.

5 THE CLERK: Civil Case Number 07-1707 and 07-
6 1577.

7 This is the matter of Citizens for
8 Responsibility and Ethics in Washington, et al., v.
9 Executive Office of the President, et al..

10 Can I have one representative for each side
11 announce who's present in the courtroom.

12 MS. WEISMANN: Good morning, Your Honor.

13 I'm Anne Weismann with CREW.

14 With me, as well, is our Executive Director,
15 Melanie Sloan, and the National Security Archive is
16 here, and they're represented by separate counsel,
17 Sheila Shadmand and Meredith Fuchs.

18 THE COURT: Thank you.

19 MS. HONG: Good afternoon, Your Honor.

20 Helen Hong on behalf of the defendants, from
21 the Department of Justice.

22 With me today are Tamara Moore, John Tyler,
23 Elizabeth Shapiro, and Jason Barry (phonetic) and Gary
24 Stern from the National Archives.

25 THE COURT: Thank you.

1 MS. SHADMAND: Sheila Shadmand for the
2 National Security Archive.

3 With me is my client, Meredith Fuchs, and an
4 associate with Jones Day, Tom Bednar.

5 Thank you.

6 THE COURT: Thank you very much. All right.

7 Counsel for the defendants, please come to
8 the podium.

9 Well, there's been a seat change, I take it
10 in -- at least this morning I understand that Judge
11 Kennedy accepted my report and recommendation -- my
12 second report and recommendation. It was accompanied
13 by a memorandum of opinion. So that puts this in a
14 somewhat different posture, at least to my immediate
15 first question.

16 If you mend your attention to page 3 of that
17 memorandum opinion, in which I specified the
18 recommendation I was making to His Honor, to the
19 Executive Office of the President to:

20 "Search the work statements and any .pst
21 files located therein, of any individuals who
22 were employed between March 2003 and October
23 2005, to collect and preserve all e-mails
24 sent or received between March 2003 and
25 October 2005, issue a preservation notice to

1 its employees directing them to surrender any
2 media in their possession, irrespective of
3 the intent in which it was created, and may
4 contain e-mails sent or received between
5 March 2003, October 2005, for EOP to collect
6 and preserve all such media."

7 That's my opinion on page 3.

8 Between the time of the issuance of that
9 opinion and today, when Judge Kennedy accepted my
10 report and recommendation, were any efforts made by any
11 of the defendants, to comply with those -- that
12 recommendation?

13 MS. HONG: There were efforts that -- There
14 were preservation notices that were sent out to all
15 employees within the EOP/FRA components, as well as
16 within OA, to preserve any .pst files on their
17 workstations, as well as any .pst files that may exist
18 on other media.

19 So, yes, Your Honor, there were efforts.
20 There weren't -- The media wasn't collected because of
21 the burdens that we had described in our opposition to
22 the initial motion, but the .pst files have been
23 instructed to be preserved by each of the employees
24 within the EOP/FRA components.

25 THE COURT: Well, the opinions -- roughly

1 speaking, the opinion looks in two directions.

2 The first one is the workstations themselves,
3 which would be the computer that are on the desk of the
4 people there, were they searched which -- for e-mails,
5 between March 2003 and October 2005, after the issuance
6 of my recommendation in April?

7 MS. HONG: They were not searched, Your
8 Honor.

9 THE COURT: Have they ever been searched?

10 MS. HONG: Actually, I should amend that. I
11 should say that statement -- for the Office of
12 Administration, it's my understanding that if there
13 were any .pst files on workstations, each of the
14 employees was instructed to copy those .pst files onto
15 the network.

16 For the EOP/FRA components, the preservation
17 notice has been issued, instructing of -- all the
18 employees to preserve all the .pst files on their
19 workstations.

20 THE COURT: But the opinion spoke of two
21 possible locations of such -- of the information. One
22 would be the workstation itself, and then the other
23 would speak to the possibility of a more portable
24 medium in which, for example, a particular user may
25 have copied the e-mails, any e-mails for that matter,

1 in question, onto a floppy or to a flash drive, or onto
2 a portable hard drive.

3 So what I intended to do was to cause a search
4 of the workstations themselves, to look for that
5 information, and then to make sure that employees who
6 may have caused the medium -- the media to be taken
7 from the workstation, and placed on a separate and
8 portable media, that both of those media were
9 preserved.

10 Is that what, in fact, occurred?

11 MS. HONG: The preservation notice has been
12 issued, yes, Your Honor.

13 THE COURT: Okay.

14 But has anyone collected them?

15 MS. HONG: The media has not. The second
16 recommendation, which is now an order this morning from
17 the Court, the collection has not occurred.

18 THE COURT: Is the collection going to go to
19 each workstation and remove therefrom, the .pst files
20 that fall within the order? Is that's what's going to
21 happen?

22 MS. HONG: We will comply fully with the
23 terms of the order, Your Honor, yes.

24 THE COURT: All right.

25 And there will then be a collection point to

1 which employees will be directed to deliver any
2 portable media they have?

3 MS. HONG: We haven't had time this morning,
4 Your Honor, in order to come up with the logistics of
5 how we will implement the order.

6 We do have the order, and will consider it
7 and will consider the best way to comply with the
8 order.

9 THE COURT: Okay. Thank you.

10 From the defendants' perspective, are those
11 assurances satisfactory, or are there any deficiencies
12 in them?

13 MS. WEISMANN: From the plaintiffs'
14 perspective? I have concerns, in addition, --

15 THE COURT: All right. Let's talk a little
16 bit about those, please.

17 MS. WEISMANN: Your Honor,--

18 THE COURT: Please bear in mind something
19 when you speak. There is no reporter here. This is
20 being recorded, so you should say your names.

21 MS. WEISMANN: Okay. Thank you, Your Honor.

22 Anne Weismann on behalf of CREW.

23 Your Honor, we have an initial concern. As I
24 understood defendants' counsel to state, they have
25 construed the order as applying only to EOP/FRA

1 components, and yet the Court's order of this morning
2 is not so limited. So that is the first concern we
3 have.

4 As you know --

5 THE COURT: Well, Ms. Weismann, I'm looking
6 at page 3. Now, I may have --

7 MS. WEISMANN: I'm sorry, page --

8 THE COURT: -- I may have been the first
9 person to misquote himself but --

10 MS. WEISMANN: Oh, I'm looking at the order
11 that the Court issued this morning. I apologize.

12 THE COURT: Take a step back with me, if you
13 would.

14 Look at my memorandum and opinion, and second
15 report of recommendation.

16 MS. WEISMANN: Yes.

17 (Pause.)

18 THE COURT: If you look at page 3 you will
19 see that I said, of my own first report:

20 "In its first report, this Court recommended
21 that Judge Kennedy order the Executive Office
22 of the President (EOP) to search the
23 workstations," et cetera.

24 Is that my failing, to not realize that it
25 should have gone both to EOP and another division, or

1 subdivision, or agency?

2 MS. WEISMANN: I mean, our -- Well, we are at
3 a distinct lack here because we have so little
4 information.

5 As you know, our Complaint alleges a
6 commingling of both FRA and PRA e-mail, and we don't
7 know if that same commingling is also present on
8 workstations. I think it's reasonable to assume that
9 it is, and therefore, we don't think that the
10 defendants have explained why it is appropriate to
11 construe the Court's order, or to have a court order
12 that goes only to the workstations of those FRA
13 components that are Record Act components of the EOP.

14 THE COURT: Would you be so kind as to let me
15 see Judge Kennedy's order?

16 MS. WEISMANN: Yes, absolutely, Your Honor.

17 (Pause.)

18 THE COURT: Okay. It too uses the words,
19 "The Executive Office of the President."

20 MS. WEISMANN: Yes, it does, Your Honor.

21 THE COURT: So what you're saying is that
22 those -- both of those orders, to be consistent with
23 the Complaint you filed, should have extended not
24 merely to the EOP, but to the OA.

25 MS. WEISMANN: To the OA, and also to the

1 entirety of the EOP, to the extent it would have e-
2 mails that fall within the scope of the order, absent a
3 showing, which we do not have, from the defendants,
4 that it should be otherwise limited, and so that is the
5 first concern that we have with what we are hearing
6 this -- today -- this afternoon.

7 THE COURT: You'll have to help me here, Ms.
8 Weismann.

9 Does the greater include the lesser? Is OA a
10 division of EOP --

11 MS. WEISMANN: Yes, it --

12 THE COURT: -- or is --

13 MS. WEISMANN: -- it is a component of EOP.

14 As you know, or probably will --

15 THE COURT: Well, then wouldn't you have to
16 construe the order to pertain to EOP and the
17 constituent element, OA?

18 THE COURT: How could OA disobey an order
19 that its superior was obeying?

20 MS. WEISMANN: I don't disagree, but I don't
21 think it's limited only to the OA, is my point.

22 The named defendants here, are the EOP and
23 the OA, and what I understood defendant's counsel to
24 say now, is that they construe this order as requiring
25 them to do a search of all of the FRA components of the

1 EOP.

2 The EOP, as you know, is made up of a number
3 of FRA and PRA components, and we agree, first of all,
4 that they need to search more than the records of OA,
5 because the missing e-mails encompass more than e-mails
6 of the OA. OA just happened to be the administrator of
7 the system on which the e-mails reside.

8 And so the issue I'm -- you know, just to be
9 clear for the record, the issue we're concerned about
10 is the fact that they have limited their search to
11 only those components of EOP that are so-called "FRA"
12 components.

13 And, of course, as you know, there is a
14 dispute between the parties about OA status, but as you
15 point out, OA is a party, and so I think there's no
16 question the obligation on the -- the obligation runs
17 to them.

18 The real issue is, "Can they appropriately
19 limit their search to only those workstations that are
20 FRA components?", and we submit, on this record
21 absolutely not, that there is just as likely to be
22 commingling, as there is in the e-mails that are at
23 issue, that are missing.

24 THE COURT: So you would -- If you had to
25 draft an order, it would read -- how would it read,

1 that the Executive Office of the Presidency and OA
2 shall "search the workstations"? Is that what it is?

3 MS. WEISMANN: Shall search workstations in
4 all components, correct.

5 We do have an additional concern that I need
6 to highlight.

7 THE COURT: Just a second, please.

8 MS. WEISMANN: Absolutely.

9 THE COURT: I just want to make sure I
10 understand.

11 (Pause.)

12 THE COURT: Okay. Go ahead.

13 MS. WEISMANN: We do not think that this
14 Court should accept the representations of counsel as
15 sufficient, that they will simply perform an adequate
16 search. There have been any number of times in this
17 litigation where defendants were asked to provide
18 assurances, and they have come back with the blanket
19 statement, basically, "Trust us. We'll comply with the
20 law," and we don't think that's sufficient.

21 It's certainly not sufficient, Your Honor, at
22 this late date. We are less than a week away from the
23 transition. This issue has been flagged. They've been
24 on notice of this issue for many months, and I think it
25 was -- to the extent that they chose to rely only on

1 the fact that they had pending objections to Your
2 Honor's recommendations is just not good enough, and so
3 we would like to see an order from the Court that
4 required them to directly and specifically advise the
5 Court of how they were going to do the search, of what
6 is searched, of when the search is performed, and then,
7 of course, we have the issue of what to do with all the
8 materials that are located in response to the search,
9 and we also think that until that search is -- until
10 they have complied fully with this Court's order of
11 this morning, none of those materials should be
12 transferred to the archives.

13 THE COURT: So your objections, or your point
14 would be, number one, make sure that OA is searched
15 just as likely (phonetic), despite the contention now
16 before the court of appeals, I understand, that OA is
17 not --

18 MS. WEISMANN: OA and all EOP components.

19 THE COURT: Yes.

20 (Pause.)

21 THE COURT: So you would ask that they do the
22 search and --

23 MS. WEISMANN: Yes.

24 THE COURT: -- and then you want
25 documentation of how they've done it, and then you want

1 them to be collected into a place, and you want that
2 correction to remain there to await, I guess, further
3 order of the Court, before the transfer is made to the
4 National Archives; is that --

5 MS. WEISMANN: Yes.

6 And if there is to be a transfer, Your Honor,
7 we think a written inventory of the materials should be
8 prepared, a copy of which is -- would remain with the
9 White House, and a copy of which would go to NARA. I
10 mean, we're talking, after all, about maintaining a
11 chain of custody on what is evidence in this case.

12 And I would add, and I don't want to jump
13 ahead, but we think those same kind of measures need to
14 be taken for the materials that are subject to the
15 Court's original preservation order.

16 In other words, if there's going to be a
17 transfer --

18 THE COURT: We're getting to those.

19 MS. WEISMANN: All right.

20 THE COURT: I think your co-counsel had --

21 MS. WEISMANN: Okay.

22 THE COURT: -- something she wishes --

23 MS. WEISMANN: Okay. Thank you, Your Honor.

24 THE COURT: Thank you.

25 MS. SHADMAND: Thank you, Your Honor.

1 Sheila Shadmand on behalf of the National
2 Security Archive.

3 I agree with Ms. Weismann's comments, and I
4 would like to add another concern that the National
5 Security Archive has, in statements that we've heard
6 from defendants previous to today and today, given
7 Judge Kennedy's order of this morning.

8 I believe your reports and recommendations
9 also included that defendants were to collect other
10 media, and I don't believe that I heard Ms. Hong saying
11 that defendants have taken any steps to do that.

12 We believe that since your reports and
13 recommendations in April, they were obligated to take
14 measures to do that, knowing that you had recommended
15 it twice, in the face of the same objections that they
16 say now, didn't apply to them then and, as you know, we
17 have survived a motion to dismiss, and we have grave
18 concerns at this point, that given the time that has
19 passed between April and today, and the impending
20 transition, that we will have difficulty in proving our
21 case if those records have since walked out the door,
22 when we believe they should have been collecting them
23 since April.

24 I believe a number of people in the
25 administration have left, if not already, and I would

1 like to make sure that the Court understands we reserve
2 all of our rights in that regard.

3 THE COURT: Thank you very much, Counsel.

4 MS. SHADMAND: Thank you.

5 MS. WEISMANN: Your Honor, may I be heard on
6 one additional point --

7 THE COURT: Sure.

8 MS. WEISMANN: -- related to this issue?

9 Anne Weismann again.

10 And we sent a letter to counsel raising this
11 issue.

12 We had understood that at least in some
13 offices, the computer -- the entire office was getting
14 new computers, and then Dana Perino stated publicly,
15 about a week ago, that when the Obama administration
16 came in, it would have an entire new system, and so in
17 light of the order related to workstations, we share
18 the National Security Archives' concern, and we --
19 again, we asked for assurances, and all we got back
20 was, you know, "Rest assured we're doing what we need
21 to do legally."

22 We think that we need something very express,
23 as to what the EOP is doing with all of the replaced
24 computers, with those hard drives, for example, and so
25 I just -- I don't want that to get lost either.

1 THE COURT: Well, I -- I was just about to
2 get to that.

3 Ms. Hong?

4 MS. HONG: Yes, Your Honor?

5 THE COURT: What of this business? Are you
6 reading Judge Kennedy's order, which incorporates my
7 order, to impose an obligation only on the entity known
8 as the "Executive Office of the President"?

9 MS. HONG: And to answer that question, Your
10 Honor, I think it's important to understand that the
11 Executive Office of the President includes many
12 components.

13 There are five components that are governed
14 by the Federal Records Act, and other components that
15 are governed by the Presidential Records Act.

16 For example, the National Security Council,
17 the Office of Vice President, the National Security
18 Council, the President's Foreign Intelligence Advisory
19 Board, the Council of Economic Advisers, those are all
20 PRA entities within the Executive Office of the
21 President. They are not named defendants in this
22 lawsuit, nor could they be because of the judicial
23 limitations on review under the Presidential Records
24 Act.

25 What plaintiffs -- Or who plaintiffs have

1 named as defendants in this lawsuit, the EOP
2 defendants, are the USTR, OMV, ONDCP, OSTP, CEQ, and we
3 have interpreted, at least for the purposes of this
4 suit and the order, EOP to include OA, as being bound
5 by the requirements of the order.

6 THE COURT: Okay. Thank you.

7 MS. HONG: What -- Plaintiffs have not,
8 however, requested relief from the EOP/PRA components,
9 and so in construing the order, and I believe that
10 Judge Kennedy, in his motion -- in his memorandum
11 opinion on the motion to dismiss, made clear that he
12 did not intend either, to include those EOP/PRA
13 components within the scope of his order, nor can the
14 Complaints be read to include them.

15 THE COURT: Well, the search that has to be
16 conducted, to put aside all the alphabet soup of all
17 these abbreviations, what will be searched?

18 MS. HONG: The search -- And again, the
19 logistics have not been worked out. I need to speak
20 with each of the component general counsel, but the
21 order requires us to search the workstations for
22 potential FRA-covered .pst e-mails, because that is the
23 limitation of the Complaint in plaintiffs' suit.

24 They claim that there are FRA-covered e-mails
25 that are missing, and that the White House must recover

1 those e-mails. As a result, this Court has now ordered
2 the defendants preserve any media from which those FRA
3 e-mails could potentially be recovered.

4 So the workstations that would be searched
5 would be the FRA/EOP components, as well last OA
6 workstations, to look for FRA-covered e-mails, as well
7 as OA .pst files.

8 THE COURT: .PST files? What does that mean?

9 MS. HONG: That's the Personal Storage
10 Table --

11 THE COURT: Oh, I'm sorry. I thought you
12 were using still another abbreviation of an agency.

13 MS. HONG: Yes, Your Honor.

14 THE COURT: Okay.

15 MS. HONG: And so we believe that when you
16 interpret the order, in view of the Complaint, as well
17 as the defendant that the plaintiffs have named in this
18 action, that searching --

19 THE COURT: But you appreciate plaintiffs
20 have consistently argued, from the very inception of
21 the case, that there has been a melding and a
22 commingling in one place, of the two types of records,
23 and one cannot now, as it were, unscramble the omelet.

24 MS. HONG: The EOP network -- Plaintiffs have
25 alleged that the network that serves each of the EOP

1 components, they have alleged that there is commingling
2 there.

3 The workstations -- The employees within each
4 of the EOP components don't wear two hats. They cannot
5 be both an FRA and a PRA employee. They are either PRA
6 or FRA, and therefore, either create PRA or FRA e-
7 mails.

8 To the extent that we're preserving media in
9 order to allow the attorney general to cover any e-
10 mails, those would be for the FRA e-mails, from FRA
11 components and FRA employees.

12 That said, for hard drives, hard drives from
13 the EOP/PRA components are being transferred to the
14 National Archives, and will be preserved in a secure
15 facility for the duration of this litigation.

16 THE COURT: Thank you.

17 Yes?

18 MS. WEISMANN: May I respond, Your Honor?

19 THE COURT: Yes.

20 MS. WEISMANN: I think on this point -- This
21 is Anne Weismann -- of EOP/PRA/FRA components, not to
22 get too alphabet soup, it's important to take a step
23 back and remember why it is this preservation order is
24 -- was issued in the first place.

25 It's not a question of what the final relief

1 in this case is. We're trying to preserve likely
2 repositories of copies of the missing e-mail, and I
3 haven't heard anything from counsel that can negate, I
4 think, the obvious fact that whether or not you work in
5 a PRA component, you receive e-mail from FRA and PRA
6 employees, and for that reason, the question becomes
7 not who are the individually-named defendants here. It
8 is true that we are not naming PRA components of EOP,
9 but there is no reason why this kind of injunctive
10 preservation order of relief should be so limited,
11 because it is just as likely that there are e-mails on
12 PRA workstations that originated from FRA components,
13 and after all, that's what we're all about here, which
14 is to get a -- cast the widest possible net within
15 reason, to gather up the missing e-mails, or to gather
16 up the sources for the missing e-mails, and so I would
17 submit, Your Honor, that it makes no sense to build in
18 a limitation.

19 And counsel misspoke. The Court did not use
20 that language. It did not add the FRA gloss. I
21 recognize that Your Honor can certainly recommend that
22 that be offered -- added to the order, but we would
23 strenuously object and urge you not to, because we
24 think, given the purpose of this preservation order
25 which, as I said, this does not go to the ultimate

1 relief, it goes to maintaining, during the pendency of
2 the lawsuit, you know, as many copies of the missing e-
3 mail as can be located.

4 Thank you.

5 THE COURT: All right. Thank you.

6 Now, let's turn to this attention --
7 attention to the next question, which involves the
8 backup tapes, and here are my questions.

9 Where are they?

10 MS. HONG: They're in a secure, off-site
11 facility, Your Honor. For security purposes, I can say
12 that they're in Maryland.

13 THE COURT: All right. That's fine.

14 But they are -- They -- In other words, my
15 concern is this.

16 Once the backup tape is restored, is the
17 backup tape then reused for some other purpose?

18 MS. HONG: They -- Because of the injunctive
19 order that has been in place in this case since
20 November, no backup tapes have been recycled.

21 THE COURT: So they are all available?

22 MS. HONG: There is --

23 THE COURT: So if Judge Kennedy should ever
24 audit, or require an audit against the backup tapes,
25 they will be available to him, as they have been

1 available up to this point?

2 MS. HONG: Yes, Your Honor.

3 THE COURT: Now, as to those backup tapes,
4 under the applicable statute, what will happen to them
5 the day after the inauguration?

6 MS. HONG: They will remain in the secure
7 off-site facility. NARA, however, will obtain legal
8 custody of those tapes, as well as physical custody of
9 those tapes. Those tapes will remain in the same
10 facility, off-site data center that they are in right
11 now.

12 NARA will hold onto those tapes and will take
13 possession of those tapes, and they will continue to be
14 accessible if the Court requires. In that --

15 THE COURT: Now, --

16 MS. HONG: In that --

17 THE COURT: Go ahead.

18 MS. HONG: I should note that one of the
19 questions you asked is, "If there is a restore from
20 backup tapes, will they be recycled?"

21 In this -- Or in -- In -- During the course
22 of this lawsuit, those backup tapes have been used.
23 They have been copied and used for a restore process,
24 in order to confirm that there are no missing a e-
25 mails, as plaintiffs have alleged.

1 Defendants have taken action and initiated
2 action in a three-phase process. Notwithstanding the
3 use of those backup tapes, none of them have been
4 recycled, and they've been maintain and preserved.

5 THE COURT: If -- Is it likely, given the
6 distinction you had drawn, I take it then, the backup
7 tapes must contain information that is subject to both
8 the Presidential Records Act and the Federal Records
9 Act.

10 Isn't that true?

11 MS. HONG: The backup tapes do not
12 necessarily -- I mean, I should say that to the extent
13 that those -- the information on the backup tapes is in
14 the archives and has been stored, that the information
15 is both PRA and FRA-covered material, yes.

16 There are e-mails that were sent on that EOP
17 network, that were both Federal Records Act and
18 Presidential Records Act e-mails. I shouldn't say
19 both, either one of the other.

20 THE COURT: But there is not one tape for one
21 purpose, and another tape for another purpose, there is
22 commingling on each of those tapes, --

23 MS. HONG: The --

24 THE COURT: -- so I can be assured that if
25 the tape is preserved, everything that is potentially

1 subject to additional order by Judge Kennedy will be in
2 one place at one time, and can be retrieved therefrom?

3 MS. HONG: The over -- approximately 60,000
4 disaster recovery backup tapes are being preserved, and
5 will continue to be preserved and available if
6 necessary. However, defendants will submit that it
7 won't be necessary, given the results of the e-mail
8 recovery --

9 THE COURT: Well, okay. That's --

10 MS. HONG: -- recovery process.

11 THE COURT: That's far from where I want to
12 be, but I take it that the process of restoration, in
13 itself, does not modify the contents of the tapes in
14 any way?

15 MS. HONG: No, Your Honor, and --

16 THE COURT: In other words, when the backup
17 tape is restored, the output of the restoration goes to
18 another device or medium to be captured?

19 MS. HONG: I'm not sure about the mechanics,
20 Your Honor, but what I --

21 THE COURT: Well, let's try this.

22 MS. HONG: -- do know is that --

23 THE COURT: We have a backup tape and we look
24 at it, and we can tell -- a forensic scientist can tell
25 there are e-mails on it because of the -- usually the

1 file designation at the end.

2 When that person then restores that
3 information to Microsoft Outlook, where does the output
4 of the restoration go?

5 MS. HONG: And I should -- Just to back up.

6 Before the backup tapes, I'll use the e-mail
7 restore process the defendants have completed, as an
8 example. What they have done is made copies of the
9 backup tapes before the backup tapes were used.

10 They used the copies of the backup tapes, and
11 in this process recovered, for example, 12.2 terabytes
12 of database information. That information is now in
13 the process of being de-duplicated, but has been used
14 to restore both FRA and PRA e-mails.

15 As a result, I'm not sure, mechanically, how
16 it works, but the backup -- the integrity of the backup
17 tapes, as I understand it, remains, but nonetheless, a
18 copy of the backup tape has been used for the restore
19 process.

20 THE COURT: Okay.

21 So we have the original of the backup tape.
22 Then we have a second instrument, whatever it may be,
23 medium, that is capturing the restoration, but there
24 will always be a time when Judge Kennedy, if he sees
25 fit, can search the original backup tape in the format

1 in which it was originally created by the machine when
2 it backed the e-mail up; is that right?

3 MS. HONG: Sixty-thousand -- Approximately
4 60,000 disaster recovery backup tapes have been
5 preserved and will be available, if necessary.

6 THE COURT: And they will be handed over to
7 the archivist?

8 MS. HONG: They will remain in the facility
9 that they are in now. The keys will be turned over to
10 the National Archives and Records Administration on or
11 before January 20th.

12 THE COURT: Thank you.

13 Any questions or concerns about that aspect?
14 Again, state your name please.

15 MS. WEISMANN: Anne Weismann, Your Honor.

16 We certainly have no concerns with the
17 continued preservation of these materials while they're
18 in the hands of the archives, however, there are a
19 couple of steps that we think are prudent and necessary
20 here.

21 One, consistent with our view that we do need
22 a chain of custody that's clear, we believe an -- a
23 written inventory, before January 20th, should be
24 prepared, that a copy of that inventory should remain
25 with the White House defendants, and a copy be turnover

1 to NARA.

2 In addition, we believe that it would be
3 prudent --

4 THE COURT: Wouldn't you imagine that already
5 exists, because they must a been inventoried in the
6 first place?

7 How is it -- Is a backup tape identified by a
8 number or serial number on it, Ms. Hong?

9 MS. HONG: Your Honor, there's a media
10 database that inventories all of the backup tapes, and
11 keys the backup tapes to the date on which information
12 was backed up onto that tape.

13 THE COURT: And you have that in your
14 possession?

15 MS. HONG: The media -- Not in my possession,
16 the Office of Administration currently has that media
17 database, and will be providing that information to the
18 National Archives before the transfer is effected.

19 THE COURT: Is there any objection to making
20 a copy of it available to the Court?

21 MS. HONG: I'm not -- Again, I don't know
22 exactly what format that media database comes in. I
23 don't know how -- if you hit a "Print" button, or if
24 it's on the database itself.

25 THE COURT: But it can be preserved with

1 integrity, in case Judge Kennedy ever wants to see it?

2 MS. HONG: Yes. It has been and it will
3 continue to be, when it's transferred to the National
4 Archives.

5 MS. WEISMANN: I mean, again, --

6 THE COURT: If a copy of that is filed with
7 the Court, what can --

8 MS. WEISMANN: Oh, we have no objections if a
9 separate copy is filed with the Court. Absolutely,
10 Your Honor.

11 I think to have the only copy remain with the
12 tapes, we think, is --

13 THE COURT: That's not going to happen.

14 MS. WEISMANN: Okay.

15 And the other thing that we would recommend
16 the Court consider for all of this material that's
17 going to the archives, is that the Archives designate a
18 custodian of record, so we have an identifiable person
19 who can -- you know, is -- who can attest to, you know,
20 the proper -- that this stuff is being maintained
21 appropriately, and who essentially is the go-to person,
22 should we -- the parties or the Court need access to
23 this material. I think that would be the prudent
24 thing, as well.

25 THE COURT: Isn't that done in the ordinary

1 course anyway?

2 MS. HONG: That there be a custodian --

3 THE COURT: Well, how do you establish the
4 chain of custody?

5 MS. HONG: The national --

6 THE COURT: Is there a sign-out proceeding?
7 Suppose somebody comes in and says, "You know, I need
8 that backup tape for another purpose"? Can that person
9 just walk into the room, get the backup tape, and go?

10 MS. HONG: Right --

11 THE COURT: I imagine no?

12 MS. HONG: Right now, no, Your Honor.

13 THE COURT: Okay.

14 MS. HONG: They're in a secure facility.

15 How -- When they're transferred to --

16 THE COURT: Is there one person who is their
17 custodian, who is responsible for their maintenance and
18 preservation?

19 MS. HONG: There are individuals --

20 THE COURT: All right.

21 MS. HONG: -- individual employees for the
22 new CIO (phonetic).

23 THE COURT: Well, one or more, but those
24 people, I take it, have the fundamental responsibility
25 to not permit access to those backup tapes, without

1 permission from someone else?

2 MS. HONG: As a matter of course, as well as
3 the terms of this Court's orders.

4 To suggest that the National Archives,
5 because a custodian is not named, would not maintain
6 these tapes with integrity, borders on absurd, Your
7 Honor.

8 THE COURT: I understand. Well, certainly
9 not.

10 I just wanted to know if -- The restoration
11 process, I take it, is that being done by an
12 independent vendor?

13 MS. HONG: The restoration process is
14 concluded, Your Honor.

15 THE COURT: When it was in operation, how did
16 the vendor get the backup tape to be restored? What
17 did that person have to do?

18 MS. HONG: Officers within the office -- the
19 OCIO in OA, as well as contractors, worked at that
20 offsite location in order to do the restoration, Your
21 Honor.

22 THE COURT: Thank you.

23 I think your -- Your friend there keeps
24 jumping up and down. There's --

25 MS. WEISMANN: Yes. I just want to close on

1 this custodian --

2 THE COURT: You're standing in front of her
3 so I can only see the top of her head.

4 MS. SHADMAND: If I were standing you could
5 only see the top of my head, Your Honor.

6 THE COURT: Yes.

7 Why don't you change seats with one of your
8 colleagues here, so at least I can see when you have
9 something you want to say.

10 MS. SHADMAND: Of sure. Yeah sure. I'm
11 sorry.

12 MS. WEISMANN: I just want to close the loop
13 on this custodial thing and, I mean, I would draw the
14 Court's attention, and we put this in our papers, to
15 the model that Judge Lamberth used at the end of the
16 Clinton administration, and I think there is value in
17 having a named individual. I would leave it to the
18 Archives to identify that person.

19 This is not a question of challenging
20 anybody's integrity at the Archives, but I just think
21 it's prudent, under these circumstances, especially
22 because were talking about a transfer that's happening
23 as part of a much, much larger transfer of records, and
24 we just -- I think it's prudent, as I said, to be
25 careful and to have an identifiable person so that

1 nothing gets lost, because we haven't seen the so-
2 called evidence of the tape restoration project, but we
3 continue to have a very, very high degree of concern
4 about the number of missing e-mails, what this
5 represents to our history, et cetera, and I think given
6 sort of the critical importance here, it is appropriate
7 to have an identified person. I think we can safely
8 leave it to NARA to say who that is, but I submit that
9 it would be a prudent course to follow here.

10 THE COURT: Thank you.

11 Yes?

12 MS. SHADMAND: Thank you, Your Honor.

13 I agree with Ms. Weismann's sentiments, and
14 the copy of an inventory being provided to the Court.

15 We would ask that that inventory also
16 include, for backup tapes as well as the additional
17 media that has been ordered to be collected this
18 morning, that, for chain of custody purposes,
19 identification about when a particular source of media
20 was checked out, when it was restored, who had it,
21 when.

22 With respect to the media that was collected
23 by any employee of any EOP component from whom it was
24 collected, that a date be attached to the day that it
25 was collected, and other information like that, that

1 would enable us to move forward on our Complaints, in
2 proving the merits of our case.

3 THE COURT: Yes.

4 Yes, Counsel, did you want to say something?

5 MS. HONG: Your Honor, I just want to again
6 step back and we need to understand why it is this
7 media has been collected.

8 Again, 60,000 backup tapes exist, and as
9 we've represented in this case throughout the
10 proceedings, those 60,000 backup tapes, disaster
11 recovery tapes, should contain all of the e-mail data
12 at issue in this litigation and, in fact, based on the
13 restore process the defendants have completed and
14 conducted, we know that those backup tapes could have
15 been used, were used, and were successfully used to
16 restore data from those backup tapes.

17 The other media that defendants are --
18 plaintiffs are asking for collection here, are in the
19 event those backup tapes do not contain .pst files of
20 e-mails sent between March 2003 and October 2005.

21 THE COURT: Uh-huh.

22 MS. HONG: But we're coming down a chain of
23 contingencies that, based on the evidence that we will
24 be providing this week about the e-mail to restore
25 process, the over \$10 million that defendants have

1 spent in order to engage in this three-phase e-mail
2 process, to locate 14 million e-mails that existed in
3 2005, that were not counted in that 2005 chart that
4 ground (phonetic) plaintiff's Complaint --

5 THE COURT: Well, I'm sure your opponents
6 will say, as my father used to say -- One thing you can
7 say about a man who wears a belt and suspenders, he's a
8 pessimist, and they're gonna say, if the backup process
9 didn't work, the other media that I've ordered be
10 preserved, and Judge Kennedy has now affirmed, would be
11 your only hope.

12 MS. HONG: And no matter the --

13 THE COURT: So why not collect them at the
14 same time?

15 MS. HONG: And it's -- In part because of the
16 burdens that are imposed on collecting all of that
17 media, but putting that aside, Your Honor, we will be
18 presenting this Court with evidence that those backup
19 tapes even, let alone the secondary, tertiary forms of
20 relief for repositories of e-mails, are necessary --
21 are not necessary because the e-mail count in inventory
22 for 2008 has shown that the 2005 chart is flawed, one,
23 that 14 million e-mails that existed in 2005 were not
24 counted, and that they do exist here in our inventories
25 in 2008; that backup tapes were used --

1 THE COURT: But you appreciate it's
2 impossible to assess the validity of your contention
3 until you have asserted it, right?

4 MS. HONG: And we will be presenting it -- We
5 endeavor to present it to you this week, which makes
6 all of --

7 THE COURT: Well, not to me. That goes to
8 Judge Kennedy. You're making a motion for summary
9 judgment on a dispositive motion; isn't that right?

10 MS. HONG: That's correct. We will be
11 presenting it to the Court, as well as plaintiffs, --

12 THE COURT: Okay.

13 MS. HONG: -- this week.

14 As a result, Your Honor, in this time when
15 defendants are engaging in transition-related
16 activities, I mean -- by "defendants" I mean the Office
17 of Administration, the potential burdens that would be
18 imposed, not the potential, the burdens that are
19 contemplated --

20 THE COURT: Going back to our friend who
21 wears a belt and suspenders, is it unfair of me to
22 point that out? You could have done that in April.
23 You rolled the dice that you'd win, and you lost, so
24 that we're in emergency conditions is not my fault.

25 MS. HONG: Well, the burdens that would have

1 been posed back in April would've been great, as we
2 explained in our --

3 THE COURT: Not his great as they're -- the
4 burdens that you're facing right now.

5 MS. HONG: Particularly in light of the
6 results of the e-mail restore process, where defendants
7 have, in fact, initiated action, restored e-mails from
8 the backup tapes and, in effect, mooted plaintiffs'
9 claims, depriving this Court of subject matter
10 jurisdiction on those first four --

11 THE COURT: That all remains to be seen. All
12 right.

13 Now, the third category of information to
14 which I want to direct my attention may be a bit
15 premature, but it deals with the records that came into
16 existence, and I hope we all understand I'm using the
17 words "record" to include, of course, electronically-
18 stored information that has come into existence, that
19 will constitute the administrative record which will be
20 assembled.

21 I appreciate that the briefing on the issue of
22 a time for the filing of the administrative record has
23 not yet expired, and will not expire until Friday
24 afternoon, but what I would like the attorneys for the
25 plaintiffs to come to the podium and address, is some

1 concerns I have.

2 I'm afraid the courthouse has been littered
3 with lawsuits, and I'm not sure I have them all
4 straight, but as I understand the situation now, and I
5 hope -- and correct me if I'm wrong, Ms. Weismann, do
6 you understand your opponents to be asserting that the
7 FOIA information you sought before Judge Kotelly in the
8 anticipated administrative record, or expected
9 discovery you will get in (unintelligible), are the
10 same, and have to be the same?

11 MS. WEISMANN: I honestly don't know, Your
12 Honor. I mean, they certainly are implying that by
13 their suggestion that the identification of 38 boxes of
14 documents should be adequate assurances.

15 We have, in the other lawsuit, the Office of
16 Administration lawsuit, you know, we had a stay in
17 place.

18 THE COURT: Understand.

19 MS. WEISMANN: It expired. We've renewed our
20 stay, and we have claimed there, as we claim here, that
21 the so-called evidence they offer, this exchange of
22 letters, isn't sufficient, but I do not -- I -- Even if
23 that is their position, it is certainly not our
24 position. We would --

25 THE COURT: I understand that, but --

1 MS. WEISMANN: -- absolutely dispute that.

2 THE COURT: I was wondering if we could come
3 to an understanding, as follows.

4 It seems to me that there must have come into
5 existence during the proceedings in this case and other
6 ones, an administrative record.

7 If that administrative was -- record was
8 collected in the way I anticipated it was, initially a
9 decision was made that this record, again using
10 electronically-stored information, to include -- to be
11 included, this record belongs in the administrative
12 record, this doesn't.

13 Now, in that situation, has the government
14 preserved the information which it has excluded from
15 the administrative record in this case, and if the
16 answer is "Yes," where is it now?

17 In other words, what will you do if they come
18 in and say, as they are, consistent with the circuit's
19 precedent in cases like Esch v. Yeutter, that their
20 administrative record is deficient, it doesn't contain
21 X Y and Z? How will you prove to them, and more
22 importantly, to the satisfaction of Judge Kennedy, that
23 everything that ever came into existence does exist,
24 and it's in Place A, and from that, you created an
25 administrative record which is now in the court?

1 MS. WEISMANN: Your Honor, just for purposes
2 of clarity, I assume we're talking about an
3 administrative record on all eight counts?

4 THE COURT: Indeed.

5 MS. WEISMANN: Thank you.

6 THE COURT: Your -- Ms. Weismann, you're
7 cutting it a little finer than I have, but I see your
8 point.

9 MS. WEISMANN: Well, I say that because
10 they've announced their intention to file a motion to
11 dismiss, which we think is a clear ruse. It's clearly
12 a merits argument dressed up as a jurisdictional
13 argument.

14 We survived their motion to dismiss. It's
15 time to move forward. It's time --

16 THE COURT: But motion for summary judgment
17 (unintelligible).

18 MS. WEISMANN: No, they're talking about two
19 separate motions.

20 THE COURT: I understand that.

21 MS. WEISMANN: They have told us they're
22 going to file a motion to dismiss this week, on
23 mootness grounds, and a motion for summary judgment
24 sometime in early February.

25 THE COURT: But I've always understood those

1 to really be saying the same thing at the same time,
2 i.e. we have now found everything you were looking for,
3 therefore --

4 MS. WEISMANN: Right, and I think that --

5 THE COURT: -- therefore, it's moot and the
6 court lacks jurisdiction over issues that are moot.

7 Isn't that saying the same thing the same way?

8 MS. WEISMANN: Well, I think it's a merits
9 argument because the Court would have to assess the
10 legality and reasonableness --

11 THE COURT: May be one of those cases where
12 you have to peak at the merit --

13 MS. WEISMANN: Right.

14 But the problem, Your Honor, is at the same
15 time they have said to us, because of that motion they
16 do not intend to produce an administrative record for
17 the first four counts, which is why I wanted that --
18 for purposes of this discussion, the record to be clear
19 as to --

20 THE COURT: I understand. Thank you.

21 I'm glad you did that. I didn't understand
22 that -- I -- You may be aware of the distinction I did
23 not understand, because obviously I'm not as familiar
24 as -- with this case as -- with Judge Kotelly's case,
25 as I am with this one.

1 Do you understand my point?

2 MS. HONG: Yeah.

3 And to the extent that there are any concerns
4 that there are documents out there that will not be
5 provided to the plaintiffs if this Court rules that an
6 administrative record must be produced on all eight
7 counts, all of the hard records for the Office of
8 Administration, except for a small subset, travel
9 service records, will be maintained here in Washington
10 D.C., and accessible.

11 The boxes have file labels, file folder
12 names, names of the employees from whom those boxes
13 were boxed, and they -- the search can be conducted.

14 THE COURT: All right.

15 Have those -- During the process of the
16 correction of that information, was there a
17 simultaneous process going on, in which certain
18 documents were removed because they are privileged, or
19 claimed to be privileged?

20 MS. HONG: No, Your Honor. These are all of
21 the records from the Office of Administration.

22 THE COURT: Uh-huh.

23 So, since you intend to keep these, it would
24 be no great burden to simply order you to keep them,
25 would it?

1 MS. HONG: Well It -- They're transferring
2 over to the National Archives --

3 THE COURT: Oh, but --

4 MS. HONG: -- under the PRA, and the National
5 Archives has --

6 THE COURT: I understand.

7 MS. HONG: -- has provided assurances that it
8 will keep them segregated.

9 THE COURT: You appreciate my concern. I
10 don't want to create still another legal issue. If you
11 don't prevail, and Judge Kennedy concludes that this
12 case -- an administrative record must be filed, that we
13 then not -- don't have another scramble as to where it
14 is.

15 MS. HONG: All of the (unintelligible),
16 including the 38 boxes that are at issue --

17 THE COURT: You have to --

18 MS. HONG: -- in --

19 THE COURT: -- appreciate something, Ms.
20 Hong. This is not the ordinary case. I've got 48
21 hours, since the court is closed Monday and Tuesday, to
22 assemble this in a way that everything is preserved, so
23 that Judge Kennedy is not bothered six months by now,
24 by concerns about where things are. That's the last
25 thing on Earth he should be worried about.

1 So, as you can tell, I'm not particularly
2 delighted that you didn't do anything after April, and
3 we are in the fix we're in, but life is tough, okay?
4 But that's what I'm trying to do.

5 MS. HONG: Yes, and we are providing the
6 assurances that even if documents transfer over to the
7 National Archives and Records Administration, they will
8 be preserved and accessible, if ultimately required by
9 court order.

10 THE COURT: Thank you.

11 You see my -- Do you have any concerns, share
12 any -- still have some concerns? I mean, as I --

13 MS. WEISMANN: Yes. We have multiple
14 concerns, Your Honor, for multiple reasons.

15 (Laughter.)

16 MS. WEISMANN: I wish I could be more
17 accommodating, but I have an obligation to my client,
18 as well.

19 THE COURT: No. No. No. It's -- No one is
20 criticizing you. I -- But I -- Maybe I misunderstood,
21 but I thought what counsel was just telling us is that
22 she is sensitive to the concern that if she loses,
23 Judge Kennedy is going to say, "I'm sorry, you lost.
24 Where is the administrative record?" And she certainly
25 is not going to run the risk of getting up and saying,

1 "Well, Judge, we were so certain we were going to win,
2 we didn't bother to keep it." She's not going to do
3 that.

4 MS. WEISMANN: Well, from our perspective,
5 first of all, we don't think she's shown why the
6 administrative record necessarily is limited to the
7 records of OA.

8 THE COURT: Uh-huh.

9 MS. WEISMANN: We have alleged that there are
10 other components, such as White House counsel, that
11 were the ultimate decision makers in some of the
12 decisions made here, such as the decision not to have a
13 recordkeeping system, an effective one; such as the
14 decision not to do a restore.

15 So, we do not accept the notion that the only
16 possible repository for an administrative record would
17 be within the records of OA.

18 Second, what she referred to were only the
19 hard copy documents. She didn't talk about electronic
20 records.

21 THE COURT: Well no, I said four times, "The
22 word 'record' includes electronically-stored
23 information."

24 MS. HONG: Well, I guess I would want that
25 assurance because her initial statement in response to

1 your question, referenced only hard copies.

2 And third, --

3 THE COURT: No. Didn't I just say, "'Record'
4 includes electronically-stored" --

5 MS. WEISMANN: Yes. Right.

6 THE COURT: That's the promise of everything
7 we said today, all right?

8 MS. WEISMANN: With that understanding,
9 there's -- But the problem here, and we agree with you
10 that this is an unusual case. I've been dealing with
11 the statutes of other administration changes, but I've
12 never seen such a complicated situation as I think this
13 case presents, and here's why.

14 We're talking about litigation that, when this
15 administration leaves, will continue, and there will
16 continue to be White House defendants that are named
17 defendants, both the OA and the EOP, and yet, it
18 appears, unless there is some intervention with the
19 Court, that they will not have an administrative record
20 from which to defend this lawsuit. The records will be
21 with NARA, and then what?

22 Let's say that we are successful, either in
23 compelling the production of an administrative record
24 now or later, who's going to put the record together?
25 Is NARA going to have a clue as to what this

1 administration was thinking?

2 And that is why, Your Honor, what we think
3 should happen, and I will add again, on timing, the
4 administrative record issue has been on the table for a
5 long time. We asked for discovery nearly a year ago.
6 It was not merits-related discovery, and their response
7 at that time was, "APA review record case, we have to
8 put together in a record."

9 We believe what should happen now, they
10 should assemble an absolutely complete record, under
11 guidelines, perhaps, that the Court may wish to issue.
12 A copy of it should remain which the White House so
13 that when the new administration comes in, they at
14 least have some basis on which to see in what we will
15 now say is an APA review case, and then if they
16 believe, consistent with their obligations under the
17 PRA, they have to send the -- their originals to NARA,
18 that's what they should do.

19 And I do have to say here, we're all
20 operating, for these purposes, on the assumption that
21 the Office of Administration is a PRA component,
22 however, it is possible, I continue to have hope, that
23 even before January 20th the D.C. circuit could rule to
24 the contrary, and I presume that the White House has
25 some contingency plans in place for that eventuality,

1 because in that instance, these would not be
2 presidential records, and they would not be going to
3 the custody and control of the archives.

4 So, the concerns, as I said, just to recap on
5 the administrative record, it doesn't sound to us like
6 we're talking about a complete administrative record,
7 and we think our ability to effectively litigate this
8 case is going to be very seriously compromised unless
9 an administrative record is assembled and preserved
10 now.

11 Either a copy -- If they object to a copy
12 being left with the White House, which we don't think
13 would be appropriate -- an appropriate objection, a
14 copy can be lodged with the Court.

15 We think we should have an administrative
16 record. We've been demanding one for months, and it's
17 ridiculous, frankly, that we don't have one.

18 Thank you.

19 THE COURT: Let's hear from counsel.

20 Yes?

21 MS. SHADMAND: Thank you, Your Honor. Sheila
22 Shadmand again, for the National Security archive.

23 The concern that I have about her -- that we
24 have about the administrative record, and unfortunately
25 I've been wearing a belt and suspenders in this case,

1 it seems like every day, but I think we are definitely
2 going to have a disagreement about what comprised the
3 record and what doesn't, and I don't know what those 39
4 boxes that defendants keep alluding to were compiled
5 for. I don't know that they were compiled as the
6 administrative record, let's keep them aside.

7 From what I've heard previously from
8 defendants, is that those 39 boxes were compiled for
9 other things, and that they're hoping that that also
10 includes the administrative record, but I don't believe
11 that the administrative record has been compiled by
12 plaintiffs -- or defendants, and is in one place for
13 this situation, and in addition to that, I agree with
14 all of the other of Ms. Weismann's comments, and add on
15 to that, as well.

16 Thank you.

17 THE COURT: Final word, Ms. Hong?

18 MS. HONG: Yes, Your Honor.

19 The motion to compel the administrative
20 record is pending. We will be filing our opposition
21 tomorrow by noon, so some of these issues may be more
22 fleshed out in our opposition, which you will be able
23 to review, but to the extent that -- It seems that in
24 one sense plaintiffs are asking that there be an
25 administrative record that is compiled, and then in

1 another sentence they're suggesting, "But that's not
2 going to be enough anyway, because we won't have
3 assurances that that contains the complete record."

4 Well, what we have provided are assurances
5 that all of the -- and Ms. Weismann is correct, I spoke
6 of hard copy records, all of the hard copy records from
7 the Office of Administration will be preserved here in
8 Washington D.C. by the National Archives, and
9 accessible, if required.

10 Electronic records, similarly, will be
11 transferred, for PRA components, to the National
12 Archives, and available, if necessary, by court order.

13 As a result, to the extent that there are
14 ever any disputes that arise, there will be relief that
15 is permissible -- that will be -- that the courts can
16 provide, based on the National Archives' mission to
17 preserve records when they come into their custody, as
18 well as the Office of Administration, and there is
19 agreement to maintain all of the Office of
20 Administration's hard copy records here in Washington,
21 D.C.

22 THE COURT: All right.

23 I think the time is most profitably spent by
24 me getting to work, so I appreciate your excellent
25 arguments, and we shell act on this very expeditiously,

1 I assure you.

2 Thank you.

3 (Proceedings concluded at 3:12 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings
in the above-entitled matter.

/s/ _____

January 18, 2008

STEPHEN C. BOWLES