

ONE HUNDRED TENTH CONGRESS
Congress of the United States
House of Representatives
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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

Full Committee Hearing on “Electronic Records Preservation at the White House”

Tuesday, February 26, 2008 at 10:00 a.m. in 2154 RHOB

REPUBLICAN STAFF BRIEFING MEMORANDUM

This hearing reflects several unfortunate trends in the Committee majority’s oversight practices. First, the premise of this hearing perpetuates a habit of overstating and distorting limited evidence to leap to spurious, if newsworthy, conclusions. (“White House Study Found 473 Days of E-Mail Gone”). See also, State Department Inspector General (unsupported claims of close White House and senior State Department ties based primarily on a “hunch” and a “perception, right or wrong”) and Medicare Part D (unsupported claims of high administrative costs -- comparing administrative costs as a percentage of high cost doctors and hospitals with relatively low cost prescription drugs).

Second, it is another hearing that could be helpful to plaintiffs in pending litigation. Lawsuits are pending seeking to compel the White House to comply with the Presidential Records Act. (See also, Blackwater and California Waiver hearings/investigations.)

Finally, broad, poorly focused oversight can become so intrusive as to impede the functions of the executive branch. The Committee has sought broad categories of documents and information from the White House on a number of topics (Abramoff, Tillman, political briefing) and now seeks e-mails about emails so that we can be sure, at least in part, that we are getting all the emails. At some point, seeking access to such broadly described categories of executive branch records ceases to be oversight and crosses the line into gratuitous intrusion and needless conflict with a coordinate branch of government.

Brief Introduction to Technology Infrastructure at the White House

The technology infrastructure at the White House is managed by the Office of the Chief Information Officer (CIO) which is part of the Office of Administration (OA). In 1994, the White House began using a system called the automated record management system, referred to as ARMS, for record-keeping and archiving of electronic mail messages (emails). This system was compatible with Lotus Notes, the email system in

use at the White House at the time. Between 2002 and 2004 the CIO engaged in a slow and lengthy migration to Microsoft Exchange (Exchange). Messages generated by users of Exchange were archived in a different manner, using personal storage table files (PST). Although the CIO sought to use ARMS with Exchange, at some point, it became apparent that ARMS was not compatible with Microsoft Exchange.¹

In addition to the archiving system, the White House has maintained disaster recovery back-up tapes (DRBT) since October 2003. Beginning in April 2001, after approval and according to industry best practices the White House began recycling DRBT.² However, out of an abundance of caution, and at the behest of counsel the CIO halted the recycling of DRBT in October 2003. It was out of an abundance of caution because the emails were already being saved on an archiving system. It is important to point out that the archiving system which uses PST files and the DRBT have two wholly distinct purposes, but if necessary, the DRBT can be used to recover potentially missing emails.

The So Called “Missing Emails”

As early as the first part of 2006, media reports brought to light the potential for emails missing from the White House computer archives.³ Special Counsel Patrick Fitzgerald sent a letter to I. Lewis “Scooter” Libby’s defense team noting among other things “not all e-mail of the Office of Vice President and the Executive Office of the President for certain time periods in 2003 was preserved through the normal archiving process on the White House computer system,”⁴ in connection with his investigation into the leak of Valerie Plame Wilson’s identity. **However, the Committee has no evidence that Special Counsel Fitzgerald’s subpoenas and inquiries were not satisfied or that emails were intentionally destroyed.**⁵

More recently the issue of potentially missing emails and more broadly the issue of the electronic record archiving system employed by the White House have come up in lawsuits filed in September 2007 by Citizens for Responsibility and Ethics in Washington

¹ Theresa Payton, Chief Information Officer [hereinafter CIO], The White House, Briefing to Staff of H. Comm. on Oversight and Gov’t Reform [hereinafter the Committee] (Feb 6, 2008).

² In addition to it being industry best practice, it also reduces costs to recycle disaster recovery back-up tapes [hereinafter DRBT]. It can cost anywhere between \$60,000-\$120,000 a month to save the DRBT.

³ Joel Seidman and Norah O’Donnell, With House E-Mails Missing in CIA Case, MSNBC, Feb. 2, 2006, <http://www.msnbc.msn.com/id/11150000/print/1/displaymode/1098/>

⁴ Letter from Spec. Counsel Patrick J. Fitzgerald, Office of the Spec. Counsel, to William Jeffress, Esq., Theodore V. Wells, Esq., Joseph A. Tate, Esq., (Jan. 23, 2006).

⁵ Transcribed Interview of David McCrosky [hereinafter McCrosky Interview] (Feb. 7, 2008); Transcribed Interview of Carlos Solari [hereinafter Solari Interview] (Feb. 7, 2008); Transcribed Interview of Tim Campen (Feb. 14, 2008); Transcribed Interview of John Straub (Feb. 15, 2008); (all witnesses are former White House IT employees).

(CREW) and the National Security Archive (NSA).⁶ The Minority is concerned this investigation and hearing is a partisan attempt to bolster the plaintiffs' cases.

These issues are not new to the presidency. During the Clinton Administration this Committee held hearings on whether emails pertinent to the Lewinsky investigation had been intentionally destroyed.⁷ The Clinton-era inquiry involved allegations that White House staff were participating in a cover-up to destroy potentially incriminating emails. Here, there is no such evidence or allegation.

In 2001, the then-Government Accounting Office (GAO) concluded that during the Clinton Administration "e-mail system malfunctions and management weaknesses prevented archiving of some e-mail records for EOP components, including the Office of the Vice President (OVP)."⁸

The second of two malfunctions "prevented incoming e-mail to users with first names starting with the letter D from being captured by ARMS."⁹ In March 2000, EOP was forced to undertake a back-up tape restoration project that carried over into President George W. Bush's first term.

The restoration project was necessary because GAO found that "[Vice President Gore's Office] did not implement adequate records management practices to ensure that all e-mail records generated or received were preserved in accordance with applicable law and best practices.... The OVP could not demonstrate that all e-mail records had been preserved by acceptable methods until May 2000, when ARMS began capturing all OVP e-mail records."¹⁰ According to the National Archives and Records Administration (NARA), approximately two million Clinton Administration emails had to be restored at a cost of approximately 12 million dollars.¹¹

Efforts by the Majority to Publicize Unfounded Conclusions

On December 20, 2007, Chairman Waxman wrote to White House Counsel Fred Fielding and the Archivist Allen Weinstein expressing concern that "the White House has

⁶ CREW describes itself as: "Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit 501(c)(3) organization dedicated to promoting ethics and accountability in government and public life by targeting government officials -- regardless of party affiliation -- who sacrifice the common good to special interests." See <http://www.citizensforethics.org/about>. NSA describes itself as: "An independent non-governmental research institute and library located at The George Washington University, the Archive collects and publishes declassified documents obtained through the Freedom of Information Act." See http://www.gwu.edu/~nsarchiv/nsa/the_archive.html.

⁷ H.R. Rep. No. 106-1023, at 20 (2000).

⁸ U.S. Gen. Accounting Office, *Electronic Records: Clinton Administration's Management of Executive Office of the President's E-Mail System*, GAO-01-446 (2001).

⁹ *Id.* at 2.

¹⁰ *Id.* at 2.

¹¹ Gary Stern, General Counsel, NARA, Sharon Fawcett, Assistant Archivist for Presidential Libraries, NARA, Briefing to Staff of the Committee (Feb 13, 2008). See also GAO-01-446.

not implemented a robust system for archiving e-mails and other electronic records despite several efforts to do so.”¹² In his letters, the Chairman also requested a broad range of documents related to, among other things, the White House email system, the transfer of presidential records to NARA, and the electronic records archiving systems at the White House.

Prior to the letter, Committee staff had been informed by the White House Counsel’s office that during a 2005 review of White House servers, the White House found [473 separate] days with few or no e-mails for certain White House components.¹³ Nobody believes the 2005 review was accurate. In meeting notes produced by the National Archives concerning the so-called missing emails OA officials knowledgeable of the situation described the dubious nature of this review as follows:

In 2005, [Microsoft] used a Visual Basic tool to count the messages and generate reports. This is the report which first generated results indicating that there were problems with the email collection systems, i.e., all emails were not being [counted] . . . Visual Basic is known to have problems . . . so they believe this counting/analysis tool they have been using is faulty.¹⁴

The CIO – Theresa Payton – explained the flaws in the 2005 review at length. Some of the most obvious flaws include:

- The technology tool used in the review skipped PST folders that were not named in a recognizable format. This resulted in those messages not being counted.
- The tool did not flag which PST folders were counted or not. As a result, some folders may be skipped or counted twice.
- The tool did not count PST folders that exceed a certain volume of records. As a result, PST folders were likely skipped over.

Without consulting with the Minority, late on January 17, 2008, staff for Chairman Waxman sent a second letter to Fielding. This letter challenged statements made by Deputy Press Secretary Tony Fratto regarding whether or not there are emails missing from the White House servers. The letter contained the sensational – but deeply flawed – charge that 473 days of emails had gone missing. The letter was immediately sent to the *Washington Post*. The January 18, 2008, paper contained a page one story on

¹² Letter from Rep. Henry A. Waxman, Chairman, the Committee to the Honorable Allen Weinstein, Archivist, NARA and Counsel to the President, Mr. Fred Fielding (Dec. 20, 2007).

¹³ Letter from Rep. Henry A. Waxman, Chairman, the Committee to the Counsel to the President, Mr. Fred Fielding (Jan. 17, 2008).

¹⁴ Meeting Notes by NARA officials concerning a conference call between NARA, OA and the White House Counsel’s office, Sept. 25, 2007.

the missing emails. According to one *Washington Post* reporter covering the story, the information from Majority staff was communicated so late on the evening of January 17, the newspaper did not have time to contact the Minority for comment. The article from January 18, 2008, is attached to this memo. **Again, it must be stressed that White House officials have never certified to the Committee that the 2005 review and chart are accurate.** Presently, the White House is attempting to recreate the original analysis depicted in the 2005 review and its results in order to verify its accuracy and get a baseline of how many emails there are for each day, during a specified period, for each EOP component. This is a complex and technical process.

What we do know is the 2005 review, and the sensational claim that 473 days of missing email was demonstrably flawed. The White House knew this; the Majority staff knew this; but it makes a great headline – “White House Study Found 473 Days of E-Mail Gone.”

On February 22 – last Friday – Payton provided the staff with updated numbers. Although their work is not complete, the CIO’s office has identified email for a substantial portion of the 473 days. At present, the number of days with unidentified email is 202. The CIO’s staff work is not complete. It is conceivable all email will be identified and recovered.

The Committee’s Investigation

The staff interviewed six witnesses.

- David McCrosky, former branch chief of systems infrastructure and support at the White House
- Carlos Solari, former White House CIO
- Tim Campen, former White House CIO and former Director of Administration
- John Straub, former Deputy Director of Administration & former Director of Administration
- Robert Spangler, currently an IT Specialist at NARA, former IT specialist at the White House
- Jim Estep, outside contractor to the White House (Microsoft).

The Committee has no evidence – testimonial or otherwise – that shows the intentional destruction or deletion of email. All witnesses, to one extent or another, believe the emails are somewhere on the system.

Carlos Solari testified:

Q Okay. And just a little bit more about that. I am sure you have read in the media the allegations of the missing e-mails. So would you -- on a scale of likelihood of deletion, do you think it is likely that somebody manually deleted e-mails?

A No. And I read that, and I don't know where –

Q Actually, I should ask you, do you even believe the allegations?

A The straight answer is no.¹⁵

Moreover all witnesses agree that any searches of electronic records conducted by the White House at the behest of the Department of Justice, were performed with the utmost integrity and care. David McCrosky explained:

Q You sound very confident in your search. And it's my understanding that Mr. Fitzgerald was ultimately satisfied. I mean, that's -- I'm reading that correctly, right?

A As far as I know. Now, we did do some pretty innovative things, things to make sure, because once again, everybody from on top down, everybody wanted to make sure that this went well. Because once again, you know, that Clinton ghost of the missing e-mails and the congressional hearings -- did you order her or did she order these people to destroy these e-mails? You know that was -- that was in our rear-view mirror. And certainly we didn't want that. We wanted to do the right thing.¹⁶

With regard to the searches related to the leak of the identity of Ms. Valerie Plame Wilson, Solari testified:

Q Well, and my understanding is that Mr. Fitzgerald, Special Prosecutor Fitzgerald, was ultimately satisfied with the production you all gave him. Would that be a fair statement as far as you know?

A As far as I know. Now, obviously, I didn't have any firsthand conversations with him, but through the attorneys on the White House side who were dealing with that, yeah, otherwise we would still be busy at it answering questions, or there would have been questions come back to us that says, you know, we don't have the confidence that you are providing us with everything that we have asked for. But that wasn't the case at all.¹⁷

¹⁵ Solari Interview at page 55.

¹⁶ McCrosky Interview at 53-55.

¹⁷ Solari Interview at 56.

McCrosky reiterated the same point regarding the Plame electronic search(es) on at least three occasions during his interview when he said:

They [the DOJ] were always asking for more. And to my knowledge, the whole time I was there, we always had everything they asked for. In fact, I'm certain of it.¹⁸

The only thing I know is that there were no tapes missing -- I do know that -- and that everything that DOJ wanted, we gave them, while I was there.¹⁹

* * *

A And everything that they [DOJ] asked us for, we [the White House IT offices] gave them. And all the feedback that I ever got was, "Thank you. This is a ton of stuff. We appreciate it." Now, of course, maybe it takes a long time to realize that there's a big gap in dates. Maybe that's what he's referring to.

Q Okay.

A And that could be, because maybe we just missed something, although we did it two and three times and we had people double-check because, once again, we were very concerned to do this right and make sure that he got everything that they [DOJ] had asked for.²⁰

These interview excerpts are just a few examples illustrating the White House technical employees' opinions that there was no nefarious plan to delete emails from the White House system.

Presidential Records Act

According to the Majority, the stated purpose of the investigation is to "determine whether the Executive Office of the President has complied with Federal laws requiring the preservation of Presidential . . . records" ²¹

The Presidential Records Act (PRA) requires each president to "take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or

¹⁸ McCrosky Interview at 35-38.

¹⁹ McCrosky Interview at 40.

²⁰ McCrosky Interview at 84-85.

²¹ Transcribed Interview of Robert Spangler [hereinafter Spangler Interview] (Feb. 19, 2008) at 4.

ceremonial duties are **adequately documented** and that such records are maintained as Presidential records.”²²

The White House is NOT required to preserve and retain every communication or piece of paper ever created. The PRA merely requires presidential decision making to be adequately documented. It should be noted there is no penalty for violating the PRA and it is arguable whether there is a judicial enforcement mechanism.

Witnesses interviewed by the Committee are confident they complied with the PRA. Moreover, they are not aware of a plan or scheme to subvert the PRA. When asked about the PRA and the Federal Records Act, Solari explained:

Q Do you feel like in hindsight that you and the folks working under you complied with both those acts to the best of your ability?

A I would even say it stronger than that. We complied, and we were meeting those requirements. And I would even go so far as to say that these were not sort of self-serving thoughts; we actually again went to the archivists, and we agreed this was the method by which we were going to do these things. So we didn't do it in isolation.²³

McCrosky testified:

Q And so you're confident that your team was satisfying [the PRA]—

A Oh, yeah, absolutely.

Q Or you had every intent, at least, to satisfy the Presidential Records Act, correct?

A Oh, absolutely.²⁴

Summary

To date, the White House CIO's office and the White House Counsel's office have cooperated with the Committee's investigation in a manner that exceeds expectations. The White House Counsel's office, the CIO, and/or the Director of OA have briefed Committee staff on no less than six occasions. At this point, the White House is aware of the Committee's concerns and is working to satisfy those concerns.

²² 44 U.S.C § 2203 (emphasis supplied).

²³ Solari Interview at 47-48.

²⁴ McCrosky Interview at 57.

Oversight should not be a pretext for Congressional micromanagement of executive branch functions. From the comprehensive review they are currently undertaking, it is clear that the current administration has learned from IT mistakes of previous administrations. The extravagant allegations of missing emails have not been proven and in fact have been refuted at every turn. Sadly, this hearing can be seen as an attempt by the majority to bolster pending litigation against the White House, not a constructive look at the White House IT infrastructure.

Witness List

Alan R. Swendiman

Director, Office of Administration
The White House

Theresa Payton

Chief Information Officer, Office of Administration
The White House

The Honorable Allen Weinstein

Archivist of the United States
National Archives and Records Administration

Gary M. Stern

General Counsel
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