

**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)

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

**PLAINTIFF CREW’S OPPOSITION TO DEFENDANTS’ MOTION FOR
RECONSIDERATION AND DEFENDANTS’ LOCAL RULE 72.3(b)
OBJECTIONS TO THE MAGISTRATE JUDGE’S FIRST REPORT
AND RECOMMENDATION**

STATEMENT

Defendants’ latest filings in this case bring to mind the oft-repeated fairy tale of *The Emperor’s New Clothes*. Like the charlatans hired by the emperor to provide him the finest suit of clothes, the White House here appears to believe that by saying something again and again this Court will believe it to be so. Thus, in its objections to Magistrate Judge Facciola’s First Report and Recommendation the White House repeats the mantra at least eight times that its collection of backup tapes -- admittedly and glaringly incomplete -- “should” contain all of the

emails sent between 2003 and 2005. Defendants' request for reconsideration of the First Report and Recommendation contains similar incantations that are similarly divorced from reality. Quite simply the emperor has no clothes and the story that the White House tells is yet another fairy tale.

The heart of this matter is the preservation order entered by this Court last November based on the conclusion that, absent such an order, "CREW would remain threatened with irreparable harm." Report and Recommendation at pp. 2-3 (Document 11); Order of November 12, 2007 (Document 18) (adopting Report and Recommendation). As issued, the preservation order requires the White House to preserve *all* media in its possession and control and created for purposes of data preservation "in the event of its inadvertent destruction." *Id.* The White House never appealed that order and, accordingly, is bound both by its terms and the premise on which it is based.

Newly available information, including the declarations of White House employee Theresa Payton, has now exposed the degree to which the preservation order fails to adequately protect the interests of the plaintiffs and, by proxy, the public. The backup tapes that the White House is preserving -- the only data it claims falls within the scope of the Order -- are critically incomplete. Just as troubling, we have no idea whether the backup tapes are even readable; White House efforts to extract information from backup tapes several years ago were stymied by unreadable tapes. As a result, even with the existing preservation order in place, plaintiffs "remain threatened with irreparable harm."

The White House in response, having failed twice previously to demonstrate why expanding the preservation order would be unduly burdensome, argues that the central premise

for *any* injunctive relief is lacking: proof that any emails are missing. Moreover, the White House claims, all of the existing backup tapes *should* contain emails sent or received in the 2003-2005 time frame.

This supposition, however, is completely unsubstantiated and contradicted by the limited publicly available evidence. Also unsubstantiated is the White House's claim that expanding the preservation order will impose on it a burden that outweighs any harm to the plaintiffs from not having in place a more comprehensive and effective preservation order. In short, the White House asks the Court to accept rank speculation as a substitute for the evidence that this Court has properly demanded of it.

The resistance of the White House to an expanded preservation order suffers from many flaws. A White House that has little or no interest in safeguarding important historical evidence belonging to the American public and that shows a patent disdain for the rule of law and the orders of this Court is entitled to little or no deference. Ultimately, however, this Court can readily and properly conclude that an expanded preservation order is warranted based on several unassailable facts. First, plaintiffs will suffer irreparable harm absent the requested relief, a conclusion that this Court has already reached and that is not subject to further challenge by the White House. Second, the existing collection of backup tapes is critically incomplete. And third, there is no evidence in the record that expanding the preservation order would impose a burden on the White House. Taken as a whole these facts amply justify the expanded preservation order that Judge Facciola has recommended.

FACTUAL BACKGROUND¹

On October 19, 2007, after full briefing and a hearing on the merits, Judge Facciola issued a Report and Recommendation recommending that CREW's motion for a temporary restraining order be granted. Weighing the legal questions presented, the irreparable harm to CREW absent the requested relief and "the clear absence of any harm to the government," Judge Facciola recommended that the Court issue an order preventing the destruction of "backup media." Report and Recommendation, pp. 4-5 (Document 11).

The White House duly filed objections to the report and recommendation (Document 12). Among other things, the White House argued that plaintiff had failed to demonstrate harm and the proposed order swept too broadly. After considering these objections and the full record before it, this Court on November 12, 2007 issued an order (Document 18) requiring defendants to "preserve media, no matter how described presently in their possess[ion] or under their custody or control, that were created with the intention of preserving data in the event of its inadvertent destruction." *Id.* at p. 2. The Court also ordered defendants to "preserve the media under conditions that will permit their eventual use" and mandated that defendants "not transfer [this] media out of their custody or control without leave of this court." *Id.* Defendants never appealed this Order or sought reconsideration.

Subsequently plaintiff National Security Archive (the "Archive") filed an emergency motion to extend the preservation order and to permit the Archive to conduct depositions (Document 58). Specifically, the Archive requested that the preservation order be expanded to

¹ This background section addresses only the most pertinent facts surrounding the present controversy.

require the White House to also preserve “[h]ard or external drives, CDs or DVDs, jump, zip, hard, or floppy disks, and any other media that may contain emails or email data.” Proposed Order (Document 58-3), p. 2.

In response, Judge Facciola issued a Memorandum Order on March 18, 2008 (Document 62) requiring the White House to “show cause . . . why it should not be ordered to create and preserve a forensic copy of any media that has been used or is being used by any former or current employee who was employed at any time between March 2003 and October 2005.”² Memorandum Order at 3 (footnote omitted). In issuing this order Judge Facciola expressly recognized the possibility that granting the requested relief “could have a significant effect on EOP.” *Id.* at 2. Accordingly, he directed defendants to include in their response “an affidavit describing the costs that would be incurred and any other facts that would bear on the burden of such an obligation.” *Id.* at 3. At the same time, however, Judge Facciola also recognized “that if e-mails have not been properly archived as plaintiffs allege, and copies of those e-mails do not exist on back-up tapes, then the obliteration of data upon which those e-mails may be reconstructed threatens the plaintiffs with irreparable harm.” Memorandum Order at p. 2.

In response, the White House submitted another declaration by Office of Administration (“OA”) Chief Information Officer Theresa Payton (Document 64-2). Ms. Payton did not describe the costs that would be incurred by expanding the preservation order, as Judge Facciola ordered. Instead she stated only that OA would have to outsource the project of making forensic copies, which she described without explanation as “likely to be a lengthy and costly

² References herein to the “relevant time period” denote the period March 2003 to October 2005.

government procurement process . . .” Second Declaration of Theresa Payton (“2d Payton Decl.”) at ¶ 7. Ms. Payton offered the alternative of copying the hard drives, a process that OA can perform but one that she described, again without explanation, as “complex and time consuming . . .” *Id.* at ¶ 8. The only other detail Ms. Payton offered was her “understand[ing]” that copying “all active data on workstations containing profiles from the relevant time period would require hundreds of hours of work . . .” *Id.* at ¶ 10.

Following this submission Judge Facciola issued a Memorandum Order and First Report and Recommendation on April 24, 2008 (Document 67) (“First Report”). Judge Facciola first noted that expanding the preservation order would not, as the White House contends, exceed the jurisdictional bounds of the Federal Records Act (“FRA”) or alter the status quo. First Report at p. 2. An expanded preservation order, “[l]ike the preservation order requiring EOP to preserve back-up tapes, which EOP concedes does not violate the [FRA],” simply maintains the status quo “by further preserving the *res* of this litigation so that the relief sought by plaintiffs, if they are ultimately held to be entitled to it, is not illusory.” *Id.*³

Second, Judge Facciola noted the “lack of precision” in the White House’s response to his order to describe the costs that the White House would incur as a result of an expanded preservation order. *Id.* at p. 3. Therefore, Judge Facciola was “unable to conduct the necessary

³ This conclusion fully accords with the D.C. Circuit’s opinion in Armstrong v. Exec. Off. of the President, 1 F.3d 1274, 1288 (D.C. Cir. 1993), where in the face of a challenge similar to that raised by the White House here, the Court upheld an injunctive order requiring the defendant agencies to preserve all of their electronic records. As the Court found, “the district court used its discretion appropriately in insisting upon a full-scale method for preventing the records’ destruction until the agencies came up with new, adequate records management guidelines to replace the ones voided by the district court’s declaratory order.” *Id.* at n.12. See also CREW v. Dep’t of Homeland Security, Civil Action No. 06-883, 2007 U.S. Dist. LEXIS 91901, at *30 n.15 (D.D.C. 2007).

balancing test,” and accordingly ordered defendants once again to provide “more precise information concerning the costs of the proposed preservation order . . .” Id. In addition, Judge Facciola ordered defendants to answer two specific questions:

1. How many current EOP employees were employed at any time between March 2003 and October 2005?
2. How many hard drives are in the possession or custody of EOP that were in use between March 2003 and October 2005?

First Report at 3 (footnote omitted).

Third, Judge Facciola outlined an additional method of preservation that would not require outsourcing and that would cause “minimal burden or disruption to EOP and its employees.” Id. at 4. Specifically, remotely querying workstations and copying .pst files, which can be done using an automated process that “could be constructed so as to copy only those e-mails sent or received between March 2003 and October 2005,” would result in only a “minimal” burden on the White House “in terms of cost, labor, and employee downtime . . .” Moreover, “no e-mails preserved as a result of this procedure would be read or produced unless the plaintiffs prevail.” Id. Accordingly, Judge Facciola recommended

that EOP be ordered to 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.

Id. at pp. 5-6.

Fourth, Judge Facciola noted that notwithstanding the common practice “for employees to copy data from their workstations onto portable media,” the White House had interpreted the existing preservation order as excluding such data. First Report at p. 6. Accordingly, he

recommended that a preservation order issue “requiring the White House to collect from its employees any and all media that may contain emails sent or received in the March 2003 to October 2005 time period and to preserve all such media. Id. at p. 7. As Judge Facciola noted, “[t]his process is a common feature of modern litigation.” Id. (footnote omitted).

Fifth, Judge Facciola discussed the lack of clarity as to “which back-up tapes are being preserved and stored by EOP.” Id. at p. 8. This uncertainty stems from two contradictory assertions in Theresa Payton’s first declaration: (1) that prior to October 2003 OA recycled backup tapes; and (2) that notwithstanding this backup tape destruction, “emails sent or received in the 2003-2005 time period should be contained on existing back-up tapes.” First Report at pp. 7-8, *quoting* Payton Decl. at 6. Further adding to the confusion is the White House’s subsequent proffer that it has backup tapes that predate October 2003. First Report at 8. Accordingly, Judge Facciola ordered the White House

to inform the Court on or before May 5, 2008 whether all back-up tapes created between March 2003 and October 2003 have been preserved -- and, to the extent that they have not, to state the specific dates within that period for which no back-up tapes exist.

Id.⁴

The White House filed two responses to this report and recommendation. First, on May 5, 2008, the White House filed a response and request for reconsideration together with the Third Declaration of Theresa Payton (“3d Payton Decl.”) (Document 69). The White House characterized the expansions to the preservation order that Judge Facciola recommends as

⁴ Judge Facciola also recommended that the Archive not be given leave to take its requested depositions. First Report at pp. 8-9.

“additional extreme injunctive relief.” Defendants’ Responses to and Request for Reconsideration of the First Report and Recommendation on Plaintiff NSA’s Motion to Extend TRO/Preservation Order (“Ds’ Resp.”), p. 7. The request for recommendation is based on the blanket assertion of the White House that “[t]here is no factual or legal basis for granting additional injunctive relief.” *Id.* at p. 8. Going even further, the White House now claims that the Court lacks *any* ability to afford relief because plaintiffs have produced no “evidence . . . that there are missing emails . . .” *Id.* at p. 4 (emphasis in original). According to the White House, the ability of this Court to expand its preservation order “rise[s] and fall[s] on the validity of the Court’s assumption that the disaster recovery backup tapes do not contain email data from March 2003 to October 2003.” *Id.* at p. 10.

The White House also challenged the “remote query” option because it could yield only “quadruplicate copies . . .” Ds’ Resp. at 13. As for the proposed requirements that the White House search .pst files and collect portable media devices with email during the relevant time period, the White House claimed they would impose “significant” and “onerous burdens.” Ds’ Resp. at 15, 16. The White House argued further that “[e]ven a minimal burden” would not be justified here because it is likely to yield only duplicate copies. *Id.* at 17.

In addition, the White House challenged its obligation to respond to the Court’s questions based on “defendants’ view that such responses are not required in order for the Court to conclude that forensic copying or imaging is unjustified . . .” *Id.* at 18. Relying on Ms. Payton’s Third Declaration, defendants then offered truncated and wholly inadequate responses to the Court’s questions. First, as to the question of how many EOP employees there were between March 2003 and October 2005, the White House answered only as to individuals working at “an

EOP FRA agency,” *id.* at 19, a limitation not included in the Court’s order.⁵

As to the second question -- the number of hard drives in EOP’s possession or custody during the relevant time period -- the White House claimed an inability to answer the question, but stated that 545 workstations”may have been used in an EOP FRA component . . .” Ds’ Resp. at 19.⁶ Again, the White House answered only as to workstations used by an “EOP FRA component,” notwithstanding that the Court’s order sought information as to all of EOP.

The White House’s response to the third question -- whether all backup tapes created during the relevant time period exist and, if not, the specific dates for which there are no backups -- was equally incomplete. According to Ms. Payton, OA is preserving 438 disaster recovery backup tapes, the earliest of which is for May 23, 2003 and the latest of which is for September 29, 2003. 3d Payton Decl., ¶ 11. Unstated is whether there are any dates between May 23, 2003 and September 29, 2003, for which the White House has no backup tapes. Also unstated is whether there are any backup tapes for September 30, 2003.

One week after filing its request for reconsideration, the White House filed its Local Rule 72.3(b) objections to the First Report and Recommendation (“Ds’ Objec.”) (Document 72), largely repeating many of the arguments and rhetoric contained in its request for

⁵ Moreover, as the Court is well aware, there is ongoing litigation about the agency status of OA. See CREW v. Off. of Administration, Civil No. 07-0964 (CKK). By unilaterally excluding those EOP components that the White House considers not to be subject to the FRA, the White House likely also has excluded information about OA.

⁶ This limitation of workstations used in “EOP FRA components” was actually added by defendants’ counsel; Ms. Payton’s declaration refers only to EOP components. See 3d Payton Decl. at ¶¶ 5-8.

reconsideration.⁷ Again the central premise of the White House's objections is that the admittedly incomplete body of backup tapes "should" contain emails sent or received between March 2003 and October 2005.

ARGUMENT

I. THAT PLAINTIFFS ARE THREATENED WITH IRREPARABLE INJURY ABSENT AN EXPANDED PRESERVATION ORDER IS ESTABLISHED HERE AS A MATTER OF LAW AND FACT.

A. The White House's Failure to Preserve Backup Copies of The Missing Email Constitutes Irreparable Harm.

According to the White House, plaintiffs are not entitled to additional injunctive relief in the form of an expanded preservation order because they cannot satisfy the irreparable injury requirement for such relief. In essence defendants seek to relitigate an issue this Court has already resolved and that defendants failed to challenge in a timely manner. The law of the case doctrine forbids such a challenge.

As this Circuit has recognized, the "[l]aw of the case doctrine' refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided . . ." Crooker v. Piedmont Aviation, Inc., 49 F.3d 735, 739 (D.C. Cir. 1995). Intended to foster judicial economy, the rule "forc[es] parties to raise issues whose resolution might spare the court and parties later remands and appeals." U.S. v. Rashad, 396 F.3d 398, 404 (D.C. Cir. 2005). See also In Defense of Animals v. Nat'l Inst. of Health, 2008

⁷ It is not at all clear why EOP filed two separate pleadings other than to avail itself of two bites of the proverbial apple. LCvR 72.3(b) contemplates only the filing of objections to recommendations of a magistrate judge. Moreover, given that Judge Facciola was charged only with issuing a report and recommendations and not a final order, a motion to reconsider makes no sense.

U.S. Dist. LEXIS 31978, *7 (D.D.C. 2008) (“‘where litigants have once battled for the court’s decision, they should neither be required, nor without good reason permitted, to battle for it again.’”) (*quoting Singh v. The George Washington Univ.*, 383 F.Supp.2d 99, 101 (D.D.C. 2005)).

As applied here, the law of the case doctrine precludes the White House from relitigating the issue of whether the “obliteration” of copies of the missing emails stored on “backup media” threatens plaintiffs with irreparable harm. See Report and Recommendation at p. 3; Order of November 12, 2007(adopting Report and Recommendation). This Court has already determined that such a threat is a “text book example of irreparable harm” that satisfies the harm requirement for injunctive relief. Report and Recommendation at 3. Having failed to appeal that order, the White House is barred from relitigating it here under the guise of a motion to reconsider and/or objections to the First Report and Recommendation.

For the same reasons, defendants cannot challenge what they have termed “the predicate condition for any concern about the Court’s ability to afford relief,” namely whether or not emails are even missing. Ds’ Resp. at 4 n.3. The allegations of missing White House emails detailed in the plaintiffs’ complaints are as yet unrebutted; defendants have not yet filed an answer or offered affirmative evidence that there are no missing emails.⁸ This is not surprising given the multiple past admissions by the White House that emails are, in fact, missing. See,

⁸ What the White House has offered falls far short of “evidence,” specifically the statements of some Republican Committee members that they were told that some email may not be missing but “just filed in the wrong digital drawer.” Ds’ Resp. at 6 n.4. And while Theresa Payton testified months ago about “‘promising trends’ of being ‘able to identify and locate e-mails’ previously identified as missing, id., the White House has offered no update. Perhaps the “promising trends” proved not to be quite so promising.

e.g., Letter from Special Counsel Patrick Fitzgerald to Counsel, January 23, 2006, p. 7 (attached as Exhibit 5 to Plaintiff CREW's Response to Defendants' Notice of Filing (Document 32-2)) ("we have learned that not all email of the Office of Vice President and the Executive Office of President for certain time periods in 2003 was preserved through the normal archiving process on the White House computer system."); Committee on Oversight and Government Reform, Memorandum to Members of the Committee, Supplemental Information for Full Committee Hearing on White House E-mails, February 26, 2008 (Exhibit 3 to Plaintiff CREW's Memorandum of Points and Authorities in Support of Plaintiff's Motion to Show Cause Why Defendants Should Not Be Held In Contempt), pp. 19-20 (describing multiple briefings from the White House on missing email problem).

B. The Harm That Plaintiffs Will Suffer If Additional Sources of Backup Copies Are Not Preserved Is Sufficiently Likely To Justify Expanding The Preservation Order.

The White House also challenges the sufficiency of the factual record that establishes the "obliteration" threat plaintiffs face absent an expansion of the preservation order. That the White House's limited collection of 438 backup tapes is incomplete is not, however, a matter of uncertainty or speculation. The backup tapes definitively do not contain all of the missing email.

First, as outlined in CREW's memorandum in support of its motion to show cause why defendants should not be held in contempt (Document 57-2) ("CREW's Show Cause Mem."), the White House discovered several years ago that not only were all emails from the Office of the Vice President missing on the server for the period September 30, 2003 to October 6, 2003, but they were missing as well from backup tapes. According to the White House's own internal memorandum, OA used "a backup that was performed on 10/21/2003" to attempt to locate

emails for the period of September 30, 2003 to October 6, 2003 in response to a document request from the Department of Justice. Id. at 13. In the end, the only emails the White House could locate were those in the personal email accounts of officials in the vice president's office that had not yet been deleted by the individual users by the time the backup was created. Id. at pp. 12-14. Of note, those missing backup tapes include the date September 30, 2003, a date that was conspicuously unaccounted for in Ms. Payton's Third Declaration. See 3d Payton Decl. at ¶ 11 ("the latest date that data was written was September 29, 2003.").

Second, despite multiple demands for more information, the White House has refused to describe with more precision the contents of the backup tapes, insisting that the Court instead accept defendants' speculation that the 438 tapes "should" capture emails sent or received between March 2003 and October 2003. Speculation, however, is no substitute for the facts that the Court has requested defendants to provide, particularly in view of defendants' admission that almost three months worth of backup tapes are missing (from March 1 through May 22, 2003) and the inherent limitations of backup tapes.

Each backup tape that OA creates captures only those emails on the EOP Network "at the point in time of the back-up." Declaration of Theresa Payton ("Payton Decl.") (Document 48-2), ¶ 7. Accordingly, email erased from individual mailboxes, that never made its way into .pst files and/or that was erased from the server itself would not be captured on a backup tape. And, of course, any emails sent or received after a backup tape is created will not be on that tape. See id.

Here, the Court mandated preservation of backup tapes because of the millions of emails missing during a two and one-half year period and the hopes that at least some of those missing emails would be on backup tapes. Unknown at this point, however, is at what point those emails

went missing. If they were erased or not captured *before* they were placed on the server, backup tapes would clearly be incomplete. The likelihood of this is high. For example, Steve McDevitt, a former OA employee who led the investigation into the missing emails, told the House Oversight Committee that “[i]n mid-2005, prior to the discovery of the potential email issues, a critical security issue was identified and corrected. During this period it was discovered that the file servers and the file directories used to store the retained email .pst files *were accessible by everyone on the EOP network.*” Exhibit 5 to CREW’s Show Cause Mem. at p. 11 (emphasis added). In other words, anyone with access to the EOP network would have been able to delete any or all of the .pst files on the server that contained the so-called “archived” email. Thus, preservation of just one set of backup tapes does not offer sufficient assurances that should plaintiffs prevail they will be able to attain full relief.

Also unknown is the extent to which the existing backup tapes are readable. As outlined above, in at least one instance the White House was unable to use three weeks of backup tapes to locate documents in response to a Department of Justice document demand. See Exhibit 4 to CREW’s Show Cause Mem. at pp. 44-46. It is CREW’s understanding that the backup tapes for the period September 30, 2003 to October 20, 2003 were unreadable, which is why the first backup tape OA used was for the date October 21, 2003, notwithstanding the fact that the request sought emails from September 30, 2003. OA has not been able to assure the Court that the existing collection of 438 tapes is not similarly unreadable and therefore useless in locating the missing emails.

Third, the responses of the White House to the Court’s questions about the existing backup tapes are glaringly incomplete. While confirming the existence of 438 tapes for the

requested time period, the White House has not confirmed whether those tapes were made *for each day* between May 23, 2003 and September 29, 2003. Nor has the White House accounted for September 30, 2003, the date that the Department of Justice informed the White House it was conducting its leak investigation and demanded that all potentially relevant documents be preserved.

C. The Public Faces Extraordinary And Irreparable Harm Absent An Expanded Preservation Order.

Also glaringly absent from the White House's two briefs is any consideration of the public interest, beyond its bald statement that "the public interest is ill-served by imposing onerous burdens on the EOP defendants . . . and by enmeshing this Court in the wasteful task of issuing duplicative orders." Ds' Objec. at p. 3 n.2. Completely unaddressed is the historical significance of the missing emails and the considerable harm to the public if all steps are not taken to restore and preserve this historical legacy.

Distinguished historian Stanley Kutler, whose lawsuit was responsible for the public release of President Nixon's tapes, explains that "[w]hat is at stake is the integrity and completeness of the historical record." Letter from Stanley Kutler to Anne Weismann, May 15, 2008 ("Kutler Letter") (attached as Exhibit 1). These interests go well beyond "partisan or personal considerations"; "we owe a complete record to future generations." *Id.* In Professor Kutler's prophetic words, "[o]ur history counts, and everything must be done to preserve the documentary record, and make it accessible to all." *Id.* See also Oral Statement of Paul Brachfeld, Inspector General, National Archives and Records Administration, before the Senate Homeland Security and Government Affairs Committee's Subcommittee on Federal Financial Management, Government Information, Federal Services, and Information Security, May 14,

2008 (“NARA Oversight Hearing”) (attached as Exhibit 2): “The consequences of failed record keeping in Federal agencies today will adversely impact our nation tomorrow.”

It is perhaps not surprising that a president facing unprecedented low approval ratings, whose major policy initiatives have been widely repudiated, and who has resisted congressional and judicial oversight and scrutiny of many of his administration’s actions should be so impervious to the historical importance of the records the plaintiffs seek to preserve. This Court stands on a different footing, however, and must consider the harm to the public if the most complete set of records of this administration is not preserved. As George Mason University Professor Martin J. Sherwin, testifying at the NARA Oversight Hearing on behalf of the National Coalition for History, stated: “A president’s papers are the property of the American people. Historians should have the greatest access to these records to present to future generations the most accurate account possible of our nation’s past, warts and all.” (Written testimony attached as Exhibit 3).⁹

In sum there is a clear factual and legal predicate for Judge Facciola’s recommendation that the preservation order be expanded.

II. THE WHITE HOUSE HAS FAILED TO DEMONSTRATE IT WILL SUFFER HARM FROM AN EXPANDED PRESERVATION ORDER.

While the record is clear that absent an expanded preservation order plaintiffs face the threat of irreparable harm, defendants have not demonstrated they will suffer harm of such a

⁹ Professor Sherwin, testifying specifically about the missing emails at issue here, also described the problems that the loss of these documents presents: “If these records are indeed lost, imagine the difficulties that future historians of the Iraq War will have in presenting a full picture of the decisions that led us into this conflict. A nation inflicted by a White House induced case of historical Alzheimer’s disease cannot expect to face future international challenges with the added wisdom that historical understanding contributes.” *Id.*

magnitude that it should outweigh the clear harm to plaintiffs and the public. Despite two opportunities to present evidence of any resulting harm, the White House relies only on sweeping and unsubstantiated claims of harm that, on their face, are highly suspect.

First, the White House provided significantly incomplete answers to the Court's questions, which sought information relating to the entirety of the EOP. In response to the question of how many current employees were at the White House during the relevant time period, the White House responded with the number of individuals "who presently work at *EOP FRA components* . . ." 3d Payton Decl. at ¶ 4 (emphasis added). Similarly, in response to the question of the number of hard drives in EOP's possession or custody during the relevant time period the White House, while claiming an inability to answer this question, provided the number of "workstations that may have been used in an *EOP FRA component* in the relevant time period." Ds' Resp. at p. 19 (emphasis added). Yet neither of Judge Facciola's questions was limited to EOP FRA components.¹⁰ Moreover, CREW has ongoing litigation with OA over its agency status, CREW v. Off. of Administration, Civil No. 07-0964 (CKK), and it is entirely unclear from the White House's answers which components it has unilaterally considered to be "EOP FRA components."

Second, and most significantly, the White House failed to provide the requested evidence of the burden that an expanded preservation order would pose. Its claim that the "financial and staff burdens" of ascertaining what is on the 545 workstations "are extraordinary" is not

¹⁰ While the White House has challenged the Court's ability to issue relief that extends to presidential records covered by the Presidential Records Act, it has not disputed that the missing emails, like all of the emails currently stored on White House servers, included co-mingled presidential and federal records. Thus, the Court's inquiry properly focused on the entire universe of emails.

substantiated by any details beyond its statement that it would require the participation of “numerous OCIO employees.” Payton Decl. at ¶¶ 7, 8. Likewise, its claim that providing “more detailed information regarding the content on the 438 tapes is extraordinary,” *id.* at ¶ 13, lacks any support or detail beyond the generalized statement that the burden would include “financial resources,” “[s]ignificant senior management oversight” and the diversion of “OA personnel” from “core mission and Presidential transition planning activities.” *Id.* Equally nonspecific is the claim of the White House that “the Court’s proposals . . . would divert OA from its comprehensive, measured, process-driven, and cost-effective approach to address Federal Records Act compliance,” *id.* at ¶ 14, a statement that in any event is nearly incomprehensible.

At bottom, the White House has offered nothing of substance to balance against the clear harm to the plaintiffs and the public absent an expanded preservation order. Inflated rhetoric is simply no substitute for the evidence that the Court properly demanded of defendants. Having failed twice to meet their burden, defendants’ objections to the expanded relief recommended by Judge Facciola ring especially hollow and are entitled to no weight.

CONCLUSION

For the foregoing reasons, defendants’ motion to reconsider should be denied and defendants’ objections to the First Report and Recommendations should be rejected.

Respectfully submitted,

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