

ELECTRONIC MESSAGE PRESERVATION ACT

—————
JUNE 11, 2008.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed
—————

Mr. WAXMAN, from the Committee on Oversight and Government
Reform, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 5811]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 5811) to amend title 44, United States Code, to require preservation of certain electronic records by Federal agencies, to require a certification and reports relating to Presidential records, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

| | Page |
|--|------|
| Purpose and Summary | 3 |
| Background and Need for Legislation | 4 |
| Legislative History | 4 |
| Section-by-Section | 5 |
| Explanation of Amendments | 6 |
| Committee Consideration | 6 |
| Rollcall Votes | 6 |
| Application of Law to the Legislative Branch | 6 |
| Statement of Oversight Findings and Recommendations of the Committee | 6 |
| Statement of General Performance Goals and Objectives | 7 |
| Constitutional Authority Statement | 7 |
| Federal Advisory Committee Act | 7 |
| Unfunded Mandates Statement | 7 |
| Earmark Identification | 7 |
| Committee Estimate | 7 |
| Budget Authority and Congressional Budget Office Cost Estimate | 7 |

| | |
|---|----|
| Changes in Existing Law Made by the Bill, as Reported | 10 |
| Additional Views | 14 |

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Electronic Message Preservation Act”.

SEC. 2. PRESERVATION OF ELECTRONIC MESSAGES.

(a) **REQUIREMENT FOR PRESERVATION OF ELECTRONIC MESSAGES.**—

(1) **IN GENERAL.**—Chapter 29 of title 44, United States Code, is amended by adding at the end the following new section:

“§ 2911. Electronic messages

“(a) **REGULATIONS REQUIRED.**—Not later than 18 months after the date of the enactment of this section, the Archivist shall promulgate regulations governing agency preservation of electronic messages that are records. Such regulations shall, at a minimum—

“(1) require the electronic capture, management, and preservation of such electronic records in accordance with the records disposition requirements of chapter 33 of this title;

“(2) require that such electronic records are readily accessible for retrieval through electronic searches;

“(3) establish mandatory minimum functional requirements for electronic records management systems to ensure compliance with the requirements in paragraphs (1) and (2);

“(4) establish a process to certify that Federal agencies’ electronic records management systems meet the functional requirements established under paragraph (3); and

“(5) include timelines for agency compliance with the regulations that ensure compliance as expeditiously as practicable but not later than four years after the date of the enactment of this section.

“(b) **COVERAGE OF OTHER ELECTRONIC RECORDS.**—To the extent practicable, the regulations promulgated under subsection (a) shall also include requirements for the capture, management, and preservation of other electronic records.

“(c) **COMPLIANCE BY FEDERAL AGENCIES.**—Each Federal agency shall comply with the regulations promulgated under subsection (a).

“(d) **REVIEW OF REGULATIONS REQUIRED.**—The Archivist shall periodically review and, as necessary, amend the regulations promulgated under this section.

“(e) **REPORTS ON IMPLEMENTATION OF REGULATIONS.**—

“(1) **AGENCY REPORT TO ARCHIVIST.**—Not later than four years after the date of the enactment of this section, the head of each Federal agency shall submit to the Archivist a report on the agency’s compliance with the regulations promulgated under this section.

“(2) **ARCHIVIST REPORT TO CONGRESS.**—Not later than 90 days after receipt of all reports required by paragraph (1), the Archivist shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a report on Federal agency compliance with the regulations promulgated under this section.”.

(2) **CLERICAL AMENDMENT.**—The table of sections for chapter 29 of title 44, United States Code, is amended by adding after the item relating to section 2910 the following new item:

“2911. Electronic messages.”.

(b) **DEFINITIONS.**—Section 2901 of title 44, United States Code, is amended—

(1) by striking “and” at the end of paragraph (14);

(2) by striking the period at the end of paragraph (15) and inserting a semicolon; and

(3) by adding at the end the following new paragraphs:

“(16) the term ‘electronic messages’ means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals; and

“(17) the term ‘electronic records management system’ means a software system designed to manage electronic records within an information technology system, including by—

“(A) categorizing and locating records;

“(B) ensuring that records are retained as long as necessary;

“(C) identifying records that are due for disposition; and

“(D) the storage, retrieval, and disposition of records.”.

SEC. 3. PRESIDENTIAL RECORDS.

(a) **ADDITIONAL REGULATIONS RELATING TO PRESIDENTIAL RECORDS.—**

(1) **IN GENERAL.—**Section 2206 of title 44, United States Code, is amended—

(A) by striking “and” at the end of paragraph (3);

(B) by striking the period at the end of paragraph (4) and inserting “; and”; and

(C) by adding at the end the following:

“(5) provisions for establishing standards necessary for the economical and efficient management of Presidential records during the President’s term of office, including—

“(A) records management controls necessary for the capture, management, and preservation of electronic messages;

“(B) records management controls necessary to ensure that electronic messages are readily accessible for retrieval through electronic searches; and

“(C) a process to certify the electronic records management system to be used by the President for the purposes of complying with the requirements in subparagraphs (A) and (B).”.

(2) **DEFINITION.—**Section 2201 of title 44, United States Code, is amended by adding at the end the following new paragraphs:

“(5) The term ‘electronic messages’ has the meaning provided in section 2901(16) of this title.

“(6) The term ‘electronic records management system’ has the meaning provided in section 2901(17) of this title.”.

(b) **CERTIFICATION OF PRESIDENT’S MANAGEMENT OF PRESIDENTIAL RECORDS.—**

(1) **CERTIFICATION REQUIRED.—**Chapter 22 of title 44, United States Code, is amended by adding at the end the following new section:

“§ 2208. Certification of the President’s management of Presidential records

“(a) **ANNUAL CERTIFICATION.—**The Archivist shall annually certify whether the records management controls established by the President meet requirements under sections 2203(a) and 2206(5) of this title.

“(b) **REPORT TO CONGRESS.—**The Archivist shall report annually to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives on the status of the certification.”.

(2) **CLERICAL AMENDMENT.—**The table of sections for chapter 22 of title 44, United States Code, is amended by adding at the end the following new item:

“2208. Certification of the President’s management of Presidential records.”.

(c) **REPORT TO CONGRESS.—**Section 2203(f) of title 44, United States Code, is amended by adding at the end the following:

“(4) One year following the conclusion of a President’s term of office, or if a President serves consecutive terms one year following the conclusion of the last term, the Archivist shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a report on—

“(A) the volume and format of Presidential records deposited into that President’s Presidential archival depository; and

“(B) whether the records management controls of that President met the requirements under sections 2203(a) and 2206(5) of this title.”.

(d) **EFFECTIVE DATE.—**The amendments made by this section shall take effect one year after the date of the enactment of this Act.

PURPOSE AND SUMMARY

H.R. 5811, the Electronic Message Preservation Act of 2007, was introduced by Rep. Henry A. Waxman, Rep. William Lacy Clay, the Chairman of the Subcommittee on Information Policy, the Census, and the National Archives, and Rep. Paul Hodes on April 15, 2008. H.R. 5811 modernizes the requirements of the Federal Records Act and the Presidential Records Act to ensure the preservation of e-mails and other electronic messages.

BACKGROUND AND NEED FOR LEGISLATION

Investigations by the Oversight Committee have revealed significant deficiencies in the preservation of e-mail by the White House and federal agencies. Committee investigations have revealed that during the Bush Administration, numerous White House officials—including Senior Advisor Karl Rove—used e-mail accounts maintained by the Republican National Committee, which regularly deleted the e-mails from its servers. E-mails sent by White House officials over these RNC accounts included e-mails concerning official government business. In addition, the White House cannot account for hundreds of days' worth of official White House e-mails sent and received between 2003 and 2005. At the time of these losses, the White House used an e-mail archiving system that a former White House information technology officer described as “primitive.”

While the problems have been particularly acute under the Bush Administration, other administrations, including President Clinton's, have encountered problems preserving e-mail records.

To ensure the retention of these important records, H.R. 5811 directs the archivist to establish standards for the capture, management, and preservation of White House e-mails and other electronic messages and to certify that the system meets the requirements established by the archivist.

Under current law, federal agencies have broad discretion to determine how electronic records and electronic communications are preserved. Committee investigations and the Government Accountability Office have found that many agencies rely on unreliable “print and file” systems for preserving electronic records, including e-mails. As a result, many e-mails that should be saved as federal records may be lost.

H.R. 5811 directs the Archivist to issue regulations requiring agencies to preserve electronic messages that are records in an electronic format. These regulations must cover, at a minimum, the capture, management, preservation, and electronic retrieval of these electronic records, and must be implemented within four years of the enactment of the Act.

LEGISLATIVE HISTORY

H.R. 5811 was introduced by Reps. Waxman, Clay, and Hodes on April 15, 2008, and referred to the Committee on Oversight and Government Reform.

The Subcommittee on Information Policy, the Census, and the National Archives held a hearing on H.R. 5811 on April 23, 2008. The witnesses were Linda Koontz, Director, Information Management Issues, U.S. Government Accountability Office; Gary M. Stern, General Counsel, National Archives and Records Administration; Paul M. Wester, Director, Modern Records program, National Archives and Records Administration; and Patrice McDermott, Director, OpenTheGovernment.org. The Subcommittee also received written testimony from Dr. Anna Nelson, Distinguished Historian in Residence at American University representing the National Coalition for History.

The Committee on Oversight and Government Reform held a business meeting on May 1, 2008, to consider H.R. 5811 and ordered the bill to be reported as amended by voice vote.

SECTION-BY-SECTION

Section 1: Short title

The short title of the bill is the Electronic Message Preservation Act of 2008.

Section 2: Preservation of electronic messages

Section 2(a) mandates the electronic preservation of electronic messages that are federal records. Subsection (a) of this new section directs the archivist to promulgate regulations governing agency preservation of these records no later than 18 months after the enactment of the act. These regulations would require, at a minimum, the electronic capture, management, and preservation of these records in accordance with the requirements of the Federal Records Act and the accessibility of these records through electronic searches. In addition, the regulations would need to establish mandatory minimum functional requirements for electronic records management systems to be used by federal agencies for these purposes and to establish a process to certify that agency systems meet these functional requirements. The Committee's intent is that the National Archives could conduct this certification on its own, or work with other entities that have developed expertise in this area. And finally, the regulations would need to establish timelines for agency compliance with the regulations within four years of the enactment of the Act.

Subsection (b) of the new section directs the Archivist, to the extent practicable, to include requirements for the capture, management, and preservation of other electronic records in these regulations. The Committee recognizes that, at some future date, federal agencies will be managing all of their electronic records electronically. While this legislation focuses on electronic messages, agencies should be encouraged to implement records management systems that encompass a broader range of records where appropriate.

Subsection (c) of the new section directs federal agencies to comply with the regulations promulgated by the Archivist. Subsection (d) directs the Archivist to periodically review and amend the regulations promulgated under the section. And subsection (e) directs each federal agency to report to the Archivist, and the Archivist to report to Congressional Committees, on agency compliance with the regulations four years after the enactment of the Act.

Section 2(b) defines electronic messages and electronic records management systems.

Section 3: Presidential records

This section directs the Archivist to establish standards for the management of presidential records during the president's term of office, including specific standards for the management and preservation of electronic messages. The Archivist is further directed to annually certify whether the records management controls put in place by the president meet the existing requirements of the Presi-

dential Records Act as well as the standards developed by the Archivist.

The section calls on the Archivist to report annually to congressional committees on the status of the certification. In addition, one year following the end of a president's term, the Archivist is directed to report to these same congressional committees on the volume and format of presidential records provided by that president to the National Archives, and whether the records management controls of the president met the requirements of the Presidential Records Act as well as the standards developed by the Archivist. The one year delay in filing this report is intended to give the Archivist the opportunity to review the records received and make an independent determination of whether the law and the standards governing records preservation were met.

EXPLANATION OF AMENDMENTS

Mr. Waxman offered an amendment in the nature of a substitute. The amendment clarified that the legislation applies to electronic messages rather than electronic communications and provided a definition of electronic messages. Similarly, based on comments from the National Archives that the term "electronic records management applications" may limit agencies' ability to adapt to changing technologies, the amendment clarified that agencies and the White House should rely on broadly defined electronic records management systems to manage records. In addition, the amendment corrected a drafting error in the bill as introduced; it revised Section 2(a) of the bill to add a new section to Chapter 29 of Title 44, rather than Chapter 31.

The Waxman amendment in the nature of a substitute passed by voice vote.

COMMITTEE CONSIDERATION

On Thursday, May 1, 2008, the Committee met in open session and favorably ordered H.R. 5811 as amended to be reported to the House by a voice vote.

ROLLCALL VOTES

No rollcall votes were held.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1 requires a description of the application of this bill to the legislative branch where the bill relates to terms and conditions of employment or access to public services and accommodations. The bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report, including the fact that the e-mail

archiving system was described as “primitive” by a former White House information technology officer.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee’s performance goals and objectives are reflected in the descriptive portions of this report, including the need to ensure the preservation of government e-mails and other electronic messages.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 5811. Article I, Section 8, Clause 18 of the Constitution of the United States grants the Congress the power to enact this law.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATES STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement on whether the provisions of the report include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

H.R. 5811 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 5811. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the

Committee has received the following cost estimate for H.R. 5811 from the Director of the Congressional Budget Office:

JUNE 10, 2008.

Hon. HENRY A. WAXMAN,
*Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5811, the Electronic Message Preservation Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

PETER R. ORSZAG.

Enclosure.

H.R. 5811—Electronic Message Preservation Act

Summary: H.R. 5811 would amend federal law regarding the preservation and storage of electronic communications. The legislation would direct the National Archives and Records Administration (NARA) to issue regulations governing the preservation of e-mail and other electronic records in electronic format. The bill also would require federal agencies to manage and preserve their e-mail records electronically. Finally, H.R. 5811 would amend the Presidential Records Act to give NARA additional oversight of electronic Presidential records.

CBO estimates that implementing H.R. 5811 would cost \$13 million in 2009 and about \$155 million over the 2009–2013 period, assuming appropriation of the necessary amounts. The legislation could also affect direct spending by agencies not funded through annual appropriations (such as the Tennessee Valley Authority) or by agencies considered off-budget (such as the U.S. Postal Service). CBO estimates, however, that any net increase in spending by those agencies would not be significant.

H.R. 5811 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 5811 is shown in the following table. The costs of this legislation fall within all budget functions that contain salaries and expenses.

| | By fiscal year, in millions of dollars— | | | | | |
|--|---|------|------|------|------|-----------|
| | 2009 | 2010 | 2011 | 2012 | 2013 | 2009–2013 |
| CHANGES IN SPENDING SUBJECT TO APPROPRIATION | | | | | | |
| Estimated Authorization Level | 15 | 25 | 35 | 45 | 40 | 160 |
| Estimated Outlays | 13 | 24 | 34 | 44 | 40 | 155 |

Basis of Estimate: For this estimate, CBO assumes that the bill will be enacted near the start of fiscal year 2009 and that spending would follow historical patterns for similar activities.

Most of the provisions of H.R. 5811 would expand the current practices of the federal government. Under the Federal Records

Act, each federal agency is required to make and preserve records of its activities. To accomplish this, agencies are required to develop programs to ensure that they have appropriate systems to manage and preserve their records. The act also gives NARA the responsibility to oversee and issue guidance on managing federal records, including e-mail messages. Although current NARA regulations specifically require that e-mails be stored electronically, NARA allows agencies to print and file paper copies of e-mail records. H.R. 5811 would require agencies over the next four years to move exclusively to a system that would electronically manage all e-mail records.

CBO is unaware of any comprehensive information on the current status of the electronic recordkeeping capabilities of the federal government or the costs to create an e-mail records system. Information from the Office of Management and Budget (OMB), the Government Accountability Office (GAO), some federal agencies, and NARA suggests that very few federal agencies currently archive all e-mail messages electronically as the bill would require. Most agencies currently maintain a print and file system of e-mail records.

While most government documents are created in a computer format, GAO has reported that financial constraints and technical challenges associated with electronic recordkeeping have hampered the development of electronic systems to archive records. GAO also reports that federal agencies generally have little experience with acquiring and operating an electronic filing system for e-mail records. The cost to create such a system would depend upon the current status of each agency's system, the size of the agency, and the volume of work it performs.

Currently the federal government spends about \$24 billion a year on information technology, including mission support, infrastructure, and enterprise architecture and planning. Using information from GAO, NARA, OMB, selected federal agencies, and private-sector vendors about the current status of government e-mail systems and the costs to enhance those systems to archive e-mail, CBO estimates that implementing H.R. 5811 would cost \$13 million in 2009 and about \$155 million over the 2009–2013 period, assuming appropriation of the necessary amounts. Those amounts would cover the initial costs of purchasing software products for archiving and disk-storage devices, and conducting training. Those initial expenses would total \$60 million and would be incurred over the first four years. Ongoing costs (which would total about \$40 million a year when the new systems would be fully implemented in 2013) would total about \$95 million over the 2009–2013 period, mostly for renewal of software licenses and additional data storage.

Electronically archiving e-mail could reduce the administrative costs agencies incur to print and file paper copies and to perform other retrieval-based tasks, such as Freedom of Information Act requests. CBO expects that any such savings over the next five years would be negligible.

Intergovernmental and private-sector impact: H.R. 5811 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal costs: Matthew Pickford; Impact on state, local, and tribal governments: Elizabeth Cove; Impact on the private-sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 44, UNITED STATES CODE

* * * * *

CHAPTER 22—PRESIDENTIAL RECORDS

Sec.
2201. Definitions.

* * * * *

2208. *Certification of the President’s management of Presidential records.*

§ 2201. Definitions

As used in this chapter—

(1) * * *

* * * * *

(5) *The term “electronic messages” has the meaning provided in section 2901(16) of this title.*

(6) *The term “electronic records management system” has the meaning provided in section 2901(17) of this title.*

* * * * *

§ 2203. Management and custody of Presidential records

(a) * * *

* * * * *

(f)(1) * * *

* * * * *

(4) *One year following the conclusion of a President’s term of office, or if a President serves consecutive terms one year following the conclusion of the last term, the Archivist shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a report on—*

(A) *the volume and format of Presidential records deposited into that President’s Presidential archival depository; and*

(B) *whether the records management controls of that President met the requirements under sections 2203(a) and 2206(5) of this title.*

* * * * *

§ 2206. Regulations

The Archivist shall promulgate in accordance with section 553 of title 5, United States Code, regulations necessary to carry out the provisions of this chapter. Such regulations shall include—

(1) * * *

* * * * *

(3) provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have; **[and]**

(4) provisions for establishing procedures for consultation between the Archivist and appropriate Federal agencies regarding materials which may be subject to section 552(b)(7) of title 5, United States Code~~].~~; and

(5) provisions for establishing standards necessary for the economical and efficient management of Presidential records during the President's term of office, including—

(A) records management controls necessary for the capture, management, and preservation of electronic messages;

(B) records management controls necessary to ensure that electronic messages are readily accessible for retrieval through electronic searches; and

(C) a process to certify the electronic records management system to be used by the President for the purposes of complying with the requirements in subparagraphs (A) and (B).

* * * * *

§ 2208. Certification of the President's Management of Presidential records

(a) ANNUAL CERTIFICATION.—The Archivist shall annually certify whether the records management controls established by the President meet requirements under sections 2203(a) and 2206(5) of this title.

(b) REPORT TO CONGRESS.—The Archivist shall report annually to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives on the status of the certification.

* * * * *

CHAPTER 29—RECORDS MANAGEMENT BY THE ARCHIVIST OF THE UNITED STATES AND BY THE ADMINISTRATOR OF GENERAL SERVICES

Sec.
2901. Definitions.

* * * * *

2911. Electronic messages.

§ 2901. Definitions

As used in this chapter, and chapters 21, 25, 31, and 33 of this title—

(1) * * *

* * * * *

(14) the term “Federal agency” means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Supreme Court, the Senate, the House of Representatives, and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol); **[and]**

(15) the term “Administrator” means the Administrator of General Services**[.]**;

(16) the term “electronic messages” means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals; and

(17) the term “electronic records management system” means a software system designed to manage electronic records within an information technology system, including by—

- (A) categorizing and locating records;
- (B) ensuring that records are retained as long as necessary;
- (C) identifying records that are due for disposition; and
- (D) the storage, retrieval, and disposition of records.

* * * * *

§2911. Electronic messages

(a) *REGULATIONS REQUIRED.*—Not later than 18 months after the date of the enactment of this section, the Archivist shall promulgate regulations governing agency preservation of electronic messages that are records. Such regulations shall, at a minimum—

- (1) require the electronic capture, management, and preservation of such electronic records in accordance with the records disposition requirements of chapter 33 of this title;
- (2) require that such electronic records are readily accessible for retrieval through electronic searches;
- (3) establish mandatory minimum functional requirements for electronic records management systems to ensure compliance with the requirements in paragraphs (1) and (2);
- (4) establish a process to certify that Federal agencies’ electronic records management systems meet the functional requirements established under paragraph (3); and
- (5) include timelines for agency compliance with the regulations that ensure compliance as expeditiously as practicable but not later than four years after the date of the enactment of this section.

(b) *COVERAGE OF OTHER ELECTRONIC RECORDS.*—To the extent practicable, the regulations promulgated under subsection (a) shall also include requirements for the capture, management, and preservation of other electronic records.

(c) *COMPLIANCE BY FEDERAL AGENCIES.*—Each Federal agency shall comply with the regulations promulgated under subsection (a).

(d) *REVIEW OF REGULATIONS REQUIRED.*—The Archivist shall periodically review and, as necessary, amend the regulations promulgated under this section.

(e) *REPORTS ON IMPLEMENTATION OF REGULATIONS.*—

(1) *AGENCY REPORT TO ARCHIVIST.*—Not later than four years after the date of the enactment of this section, the head of each Federal agency shall submit to the Archivist a report on the agency's compliance with the regulations promulgated under this section.

(2) *ARCHIVIST REPORT TO CONGRESS.*—Not later than 90 days after receipt of all reports required by paragraph (1), the Archivist shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a report on Federal agency compliance with the regulations promulgated under this section.

* * * * *

ADDITIONAL VIEWS

I appreciate this opportunity to comment briefly on the topic of preserving our Nation's history. I could not agree more with Ms. Anna Nelson, Director of History from American University about having to rely on unreliable memoirs, scattered agency records and the New York Times to reconstruct the history of policymaking records. Our historians should not rely on events as reported by the New York Times or from memoirs, whose authors may embellish the facts.

To make federal agencies comply, I believe this legislation should include enforceable repercussion language. Ms. Patricia McDermott of OpenTheGovernment.org suggests this is the only way to make federal agencies comply with the Federal Records Act. Ms. McDermott states that she does not "think anyone has ever been prosecuted for destroying, much less failing to preserve federal records." Just ask former Clinton EPA Director Carol Browner. She supposedly oversaw the destruction of her computer files in violation of a judge's order requiring the agency to preserve its records.

In this bill, however, we seem to be elevating actions by a small number of staffers, who allegedly deleted private email accounts years ago, to the level of the former EPA Director.

The purpose of this legislation should be on preserving our nation's history and not on political gamesmanship. The American people deserve better from their Representatives.

BILL SALI.

