DARRELL ISSA'S BURNING CONCERN ABOUT WHITE HOUSE EMAILS? NOT SO HOT…

Last Thursday, Darrell Issa wrote an urgent letter to Greg Craig, expressing concern about reports that White House staffers, in the days after Bush left the White House IT system in perma-crash mode, were temporarily resorting to Gmail.

> Dear Mr. Craig:
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> Last month, several media outlets reported the existence of Gmail accounts issued to incoming members of the White House staff.[1] According to Politico, Deputy Press Secretary Bill Burton was "rocking three BlackBerrys . . . one for his Gmail, one for the transition and one for the White House."[2]
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> As you know, any e-mail sent or received by White House officials may be subject to retention under the Presidential Records Act (PRA).[3]
>
> [snip]
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> The challenges posed by retaining e-mail as required under the PRA have proved vexing for the last two White Houses. You may recall the extraordinary problems the Clinton White House had with its e-mail archiving system.[6] Such problems have led to costly expenditures of taxpayer dollars. For example, earlier this month it was disclosed that the Bush White House reportedly spent "more than $10 million to locate 14 million e-mails reported missing."[7] These e-mails were restored after a costly search of approximately 60,000 back-up server tapes.[8]

> In order to prevent similar taxpayer-funded e-mail restoration projects, it is incumbent that the new White House implement policies and processes to minimize the risk of losing e-mail subject to the Presidential Records Act.
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> I ask that you answer the following questions for the Committee by March 4, 2009.

One day after Issa sent that urgent letter calling for strict adherence to the Presidential Records Act, the National Security Archive and CREW announced that the Obama Administration would not deviate from Bush's legal strategy on lost White House emails, which was basically to argue that the Federal Records Act requires only that an agency found to have allowed destruction of Federal Records must initiate efforts to restore those records. Neither a court nor an NGO can force an agency to completely restore records, Bush (and now Obama) argued, they can only order an agency to initiate attempts to restore them.

> This administrative scheme is exclusive; a court cannot itself order the recovery or retrieval of records that may have been removed or destroyed, but must instead rely on the detailed processes set forth in the FRA and initiated by the agency heads, Archivist and Attorney General. See Armstrong, 924 F.2d at 294 ("Because it would clearly contravene this system of administrative enforcement to authorize private litigants to invoke federal courts to prevent an agency official from improperly destroying or removing records, we hold that the FRA precludes judicial review of such actions."). Thus, relief under the FRA would trigger, at most, obligations for defendants to initiate action through the Attorney General, who would, in

> turn, determine what action was appropriate under the circumstances. 44 U.S.C. § 3106; see also Armstrong, 924 F.2d at 296. A court, therefore, cannot order the recovery or retrieval of any records.

And, as NSA and CREW pointed out in their response, the Bush (and now Obama) Administration were effectively sticking their fingers in their ears and chanting "you can't make me … lalalalalalalala … you can't make me completely restore the emails I lost" all while admitting that some of the emails remained lost.

> First, Defendants claim they studied the 2005 Statistical Analysis and recreated that study with "better" technology. Id. at 17-20. In this first Phase, Defendants claim to have located millions of emails previously rendered effectively lost because they had been mislabeled or misallocated to the wrong EOP components, but provide no explanation of what caused the mislabeling or misallocation, or any facts that would establish the accuracy or completeness of their claim.
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> In Phase II, Defendants claim they analyzed the .PST file inventory contained in the email archive by using a new scanning and indexing tool that reallocated messages to their respective EOP components. Id. at 20-21. Defendants state they also used a new statistical model in Phase II, ARIMA, to calculate days that were "low," that is, that had fewer emails compared to other days for which ARIMA had data. Id. at 22-23. At the end of Phase II, despite the reallocation and new statistical model, there were still 7 "zero" message days in the email archive and 76 "low" message days in the Archive. Id. Defendants provide no explanation in their motion for what caused this now-

> acknowledged loss of emails from the servers.
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> In Phase III, Defendants claim they identified and restored 125 additional .PST files which "had been identified in previous work as existing at one point," but which then could not be located in Phase II. Id. at 24. This restoration resulted in an increase in the number of "low" days to 106. Id. No explanation is offered as to why Defendants did not locate these 125 additional .PST files during phases I and II. Moreover, while Defendants contend that they searched "other repositories" of emails that resulted from "searches or mailbox restorations due to file corruption," id. at 21, no explanation is given as to whether all such "other repositories" have been searched. Furthermore, at the end of Phase III, Defendants claim they had identified 106 "low" and 7 "zero" days.8 Id. at 24. Defendants then used the backup tapes to restore only 21 calendar days, covering only 48 of the "low" or "zero" component days. Id. at 24-25. Inexplicably, Defendants did not restore the remaining 65 "low" or "zero" days. This decision not to restore all "low" or "zero" days is not explained by Defendants. [my emphasis]

On Sunday, the AP covered the Obama stance, declaring,

> The Obama administration, siding with former President George W. Bush, is trying to kill a lawsuit that seeks to recover what could be millions of missing White House e-mails.

While the Obama White House maintains that its adherence to Bush's strategy does not mean it really wants to "kill" this lawsuit, that's effectively a distinction without a difference

until such time as Obama's White House either restores the still missing emails or at least admits that "initiate" is not the same as "restore." For now, at least, Obama maintains that if a White House somehow loses massive amounts of email (some of them pertinent to a criminal investigation) the no one—not CREW, not the Courts, and not Darrell Issa—can make them fully restore those emails.

Given Congressman Issa's documented concern about the potential for lost White House emails, I contacted his office to get a statement on the Obama support for the Bush position. I spoke with Kurt Bardella, Issa's press person, and emailed more details on the Obama stance. I called back to follow-up.

Crickets.

Darrell Issa apparently has nothing to say about Obama's refusal (thus far) to restore all those emails Bush lost.

Gosh. The deadline Issa gave Craig to answer all those questions hasn't even passed, and already Congressman Issa has lost his interest in White House emails.