My statement before this committee today concerns freedom of information policy, which, for the federal government of the United States, is expressed in statutory law. The Freedom of Information Act (FOIA), first enacted in 1966, provides for any person — individual or corporate, regardless of citizenship — presumptive access to unpublished, existing, and identifiable records of the agencies of the federal executive branch without having to demonstrate a need or even a reason for such a request. Specified in the law are nine categories of information that may permissively be exempted from the rule of disclosure. The burden of proof for withholding records sought by the public is placed upon the government. Denials of requests may be appealed to the head of the agency holding the sought records, and ultimately pursued in the federal courts.

Each year, the federal government publishes a large amount of literature through the Government Printing Office, and such materials are made available to the public through free distribution, sales, and inspection at depository libraries throughout the nation. These publications, produced on the initiative of the government, are not subject to the access procedures of the FOIA, which is designed to provide the public, on its initiative, access to unpublished agency records. Federal agencies respond to FOIA requests with existing records — there is no obligation to create records in order to respond to a request — and with identifiable records, which obligates requesters to be specific about the information they are seeking.

For historical and constitutional reasons, the FOIA is not applicable to the records of the federal legislative and judicial branches. At the time Congress initially developed the FOIA, the availability of information to the public from the executive branch was the issue of focus. While Congress has a long tradition of publishing its records, it was also recognized that the Constitution contained provisions — the secret journal clause and the speech or debate clause — which afforded protection for certain records of the Senate and the House of Representatives. Court dockets, including filings and final determinations of cases, have long been open to public inspection.

Historical Development

There is, as well, another historical aspect of the development of the FOIA that has affected its functioning. The product of 11 years of investigation and deliberation in the House of Representatives and half as many years of consideration in the Senate, the FOIA was legislated in the face of considerable opposition by the executive branch. No agency or department supported the legislation, and the President signed it into law with considerable reluctance. This climate of opinion resulted in a hostile environment for the initial administration of the statute. As a result, portions of the law were subjected to a high judicial gloss for reasons of both clarification and interpretation. To maintain faithful administration of the FOIA and to preserve its purpose, congressional
committees found it necessary to conduct vigorous oversight of its implementation and, on occasion, to take remedial action by amending its provisions.

Reporting in 1972 on the implementation of the law, a House oversight committee concluded that the “efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy . . . of two administrations.” To improve FOIA operations, the following amendments to the statute were enacted in 1974.

- A request need only “reasonably describe” the material being sought;
- Only the direct costs of searching for, and the duplication of, responsive records could be recovered by agencies;
- Records could be provided without charge or at a reduced cost if doing so would be in the public interest;
- A court might inspect records in camera when making a determination concerning their exemption from disclosure;
- The response to an initial request must be made within 10 working days, and response to an administrative appeal of a request must be made within 20 working days;
- Responsive pleading to an FOIA lawsuit must be made within 30 days;
- Complainants who substantially prevail in FOIA lawsuits may be awarded court costs and attorney fees; and
- Any segregable portion of a responsive record shall be disclosed after exempt parts are redacted.

In 1976, the FOIA was amended a second time. This brief modification overturned a Supreme Court interpretation of the statute’s third exemption to the rule of disclosure. It also clarified the language of that exemption to indicate that statutory provisions specifically requiring that certain kinds of information be withheld from the public must do so in such a manner as to leave no discretion on the issue or establish particular criteria for withholding or refer to particular types of matters to be withheld. It was attached to the Government in the Sunshine Act, a new transparency law designed to make the policymaking deliberations of collegially headed federal agencies presumptively open to public scrutiny.

Additional amendments to the FOIA were enacted in 1986 as a rider to an omnibus anti-drug abuse law. These modifications strengthened protections for law enforcement records and revised the fee and fee waiver provisions of the FOIA. In this latter regard, separate fee arrangements were prescribed when records are requested (1) for commercial use, (2) by an educational or noncommercial scientific institution or a news media representative, and (3) by all others besides these types of requesters. The Office of Management and Budget was mandated to issue government-wide FOIA fee and fee waiver guidelines.

Amendments in 1996 addressed perceived shortcomings in FOIA administration as well as new challenges posed by electronic forms and formats, inclusively defined covered records, required
responsive materials to be provided in the form or format requested, increased the initial response period from 10 to 20 days, encouraged agencies to maintain multitrack processing systems based upon the complexity of requests received, established expedited processing in cases where a “compelling need” is demonstrated, and modified agency reporting requirements, among other changes.

Recent Developments

Historically, the FOIA generally was neither supported as legislation nor enthusiastically received as law by the federal departments and agencies. During the initial years of implementing the FOIA, many of them had been far less than faithful in their administration of the statute, which contributed significantly to the 1974 remedial amendments that the House and the Senate crafted and approved in the face of a presidential veto. Distaste for the requirements of the law slowly dissipated with leadership changes, staff turnover, and better training. In many agencies, the assumption of FOIA responsibilities by their public affairs offices brought legitimization to personnel who had long labored in the shadow of a statutory prohibition on using appropriated funds to pay a “publicity expert.” The American Society of Access Professionals (ASAP), an independent, nonprofit association with a membership largely of federal employees who administer the FOIA and related transparency laws, was launched in 1980 and remains active, serving as an educational forum and a means of outreach to the requester community.

Federal information access and open government law and policy was, of course, much affected by the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon. These events prompted rethinking, as well as continuing concern, about various aspects of the internal security — or homeland security — of the United States, not the least of which included the public availability of information of potential value to terrorists for either the commission of their acts or forewarning them of ways of their being detected.

The FOIA policy of the administration of President George W. Bush, which had been in formulation before the September 11 terrorist attacks, was expressed in a October 12, 2001, memorandum from Attorney General John Ashcroft to the heads of all federal departments and agencies. While appearing to ignore the statute’s presumptive right of records access and to regard the application of its exemptions to the rule of disclosure to be mandatory rather permissive, the memorandum apprised readers that the Department of Justice and “this Administration,” in addition to being “committed to full compliance with the Freedom of Information Act,” were “equally committed to protecting other fundamental values that are held by our society,” including “safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.” The Attorney General encouraged each agency “to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA.” Furthermore, the agencies were advised, when “making these decisions, you should consult with the Department of Justice’s Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters.” They were also assured that “the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”

Because Congress had championed the FOIA and had continued to perfect it to overcome bureaucratic resistance, congressional reaction to the FOIA policy of the Bush Administration was not surprising. The House Committee on Government Reform, in its March 2002 version of A Citizen’s Guide on Using the Freedom of Information Act, pointedly noted that “the statute requires
Federal agencies to provide the fullest possible disclosure of information to the public.” Continuing, it said:

The history of the act reflects that it is a disclosure law. It presumes that requested records will be disclosed, and the agency must make its case for withholding in terms of the act’s exemptions to the rule of disclosure. The application of the act’s exemptions is generally permissive — to be done if information in the requested records requires protection — not mandatory. Thus, when determining whether a document or set of documents should be withheld under one of the FOIA exemptions, an agency should withhold those documents only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by the exemption. Similarly, when a requestor asks for a set of documents, the agency should release all documents, not a subset or selection of those documents. Contrary to the instructions issued by the Department of Justice on October 12, 2001, the standard should not be to allow the withholding of information whenever there is merely a “sound legal basis” for doing so.11

What was surprising was the notable waning of congressional oversight of not only FOIA administration, but also executive branch operations generally during the 107th, 108th, and 109th Congresses (2001-2006). As a result, the processing of FOIA requests, among other difficulties, slowed. According to a July 2006 survey by the Coalition of Journalists for Open Government, delays in agency responses to FOIA requests in FY2005 increased by 11 percent over those in FY2004, and the backlog of unprocessed FOIA requests grew from 20 percent in FY2004 to 31 percent in FY2005, despite a drop in the total number of requests.12

During 2005, some legislative attempts were made to improve the situation, with one modest proposal receiving Senate approval. Late in the year, President Bush issued a directive, E.O. 13392, promoting agency disclosure of information.13 Agencies were required to designate, from existing personnel, a Chief FOIA Officer by mid-January 2006. While many agencies already had an official who was responsible, in whole or in part, for FOIA administration, they were not at the Assistant Secretary or equivalent level prescribed for the new Chief FOIA Officers. Officials at the Assistant Secretary or equivalent level, however, were usually presidential appointees and might have a brief tenure. Also, those designated as the Chief FOIA Officer likely would have other duties that would compete for attention.

The new Chief FOIA Officers were directed to conduct a review of their agency’s FOIA operations and draft a plan for improvement, with concrete milestones for FY2006 and FY2007. By mid-June 2006, the Chief FOIA Officers were to submit to the Department of Justice, with a copy to the Office of Management and Budget and another posted on their agency’s website, a summary of the agency review and FOIA improvement plan. Additional reports on the agency’s performance in meeting the milestones of its FOIA improvement plan were to be made in February 2007 and 2008. Each agency was to establish one or more FOIA Requester Service Centers to enable those seeking information pursuant to the statute to learn about the status of their request and the agency’s response, and to place contact information for the Center on the agency’s website. Finally, the Chief FOIA Officers were also to designate at least one Public Liaison to serve as a supervisory official to whom a FOIA requester could express concerns about the service received from the Center.

Some critics of existing FOIA administrative conditions regarded the reforms mandated by E.O. 13392 as an attempt by the Bush Administration to preclude legislative attempts to improve the situation. A July 2006 assessment of a sample of agency plans for improving FOIA operations found it “surprising how many of the improvement areas were either not addressed or rated as poorly addressed, especially for the non-Cabinet agencies.”14 Seven months later, a Government Accountability Office representative, testifying at a House subcommittee hearing, discussed a sample
of agency “improvement plans that mostly included goals and timetables addressing the four areas of improvement emphasized by the Executive Order.”

Out of 25 plans, 20 provided goals and timetables in all four areas. In some cases, agencies did not set goals for a given area because they determined that they were already strong in that area. For the first area of improvement, reducing backlog, all agencies with reported backlog planned activities aimed at such reduction, and (with minor exceptions) all included both measurable goals and milestones for the other areas of improvement emphasized by the Executive Order (that is, increasing public dissemination, improving status communications, and increasing public awareness of FOIA processing); for example, to increase public awareness, agencies generally planned to ensure that their FOIA reference guides were comprehensive and up to date. The exception was the Department of the Treasury, whose review and plan addressed only activities to reduce backlog, omitting the other three areas of improvement.

Such revelations did not satisfy congressional overseers, once again galvanized into action to seek statutory improvements in FOIA administration at the beginning of the 110th Congress. A reform bill (H.R. 1309) was introduced in the House with bipartisan support on March 5, 2007. Subcommittee consideration, markup, and forwarding of the measure to the full committee occurred the following day. Committee consideration, markup, and reporting of the bill to the House took place on March 8. The House considered the bill and, under a suspension of the rules, approved it on March 14.

A counterpart Senate bill (S. 849) was introduced with bipartisan support on March 13. The measure was referred to the Committee on the Judiciary, which held a hearing on it on March 14. The committee approved the bill on a voice vote on April 12, with a report on the legislation filed and ordered to be printed on April 30. The bill was held up for floor consideration and a final vote due to concerns arising from Department of Justice objections, which were resolved just before the Senate adjourned for the August recess. The measure came before the Senate by unanimous consent on August 3, was amended, and passed by unanimous consent.

Negotiations to resolve differences between the House-approved and Senate-passed bills continued through the fall. One of the more contentious issues concerned the Senate bill’s failure to specify the source for the payment of attorney fees to FOIA requesters, who would be entitled to payments if an agency changed its position concerning the release of records after a requester challenged an agency denial in court. While the House bill provided that such payments would come from annually appropriated agency funds, the lack of such specificity in the Senate bill posed the strong possibility that it would trigger so-called “pay-as-you-go” objections in the House. On December 6, a revised version of the Senate bill was introduced with bipartisan support (S. 2427). The new Senate bill contained the language of the House bill concerning the source of attorney fees payments. A slightly revised version of this bill, addressing other House concerns, was introduced with 17 bipartisan cosponsors on December 14 (S. 2488). That same day, the Senate considered the bill, and approved it without amendment by unanimous consent.

The Senate-approved bill (S. 2488) was received in the House on December 17, and was referred to the Committee on Oversight and Government Reform. The following day, the measure was considered by the House under a suspension of the rules, agreed to by voice vote, and cleared for the President. The legislation was signed into law by President Bush on December 31, 2007, without a statement.

The amendments, denominated in The OPEN (Openness Promotes Effectiveness in our National) Government Act of 2007, made, among others, the following modifications in the FOIA.
- Defines “representative of the news media” and “news” for purposes of awarding reduced request processing fees, and regards a freelance journalist as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity;

- Provides that, for purposes of awarding attorney fees and litigation costs, a FOIA complainant has substantially prevailed in a legal proceeding to compel disclosure if such complainant obtained relief through either (1) a judicial order or an enforceable written agreement or consent decree, or (2) a voluntary or unilateral change in position by the agency if the complainant’s claim is not substantial;

- Prohibits the Treasury Claims and Judgment Fund from being used to pay reasonable attorney fees in cases where the complainant has substantially prevailed, and requires fees to be paid only from funds annually appropriated for authorized purposes for the federal agency against which a claim or judgment has been rendered;

- Directs the Attorney General to (1) notify the Special Counsel of civil actions taken for arbitrary and capricious rejections of requests for agency records, and (2) submit annual reports to Congress on such civil actions, while also directing the Special Counsel to submit an annual report on investigations of agency rejections of FOIA requests;  

- Requires the 20-day period during which an agency must determine whether to comply with a FOIA request to begin on the date the request is received by the appropriate component of the agency, but no later than 10 days after the request is received by any component that is designated to receive FOIA requests in the agency’s FOIA regulations; and prohibits the tolling of the 20-day period by the agency, except (1) that the agency may make one request to the requester for clarifying information and toll the 20-day period while awaiting such information, or (2) if necessary to clarify with the requester issues regarding fee assessment, and ends the tolling period on the agency’s receipt of the requester’s response;

- Prohibits an agency from assessing search or duplication fees if it fails to comply with time limits, provided that no unusual or exceptional circumstances apply to the processing of the request, and requires each agency to make available its FOIA Public Liaison (see below), who shall assist in the resolution of any disputes between the agency and the requester;

- Requires agencies to establish (1) a system to assign an individualized tracking number for each FOIA request received that will take longer than 10 days to process, and (2) a telephone line or Internet service that provides information on the status of a request;

- Revises annual reporting requirements on agency compliance with the FOIA to require information on (1) FOIA denials based upon particular statutory provisions, (2) response times, and (3) compliance by the agency and by each principal component thereof; and requires agencies to make the raw statistical data used in reports electronically available to the public upon request;
Redefines “record” under the FOIA to include any information maintained by an agency contractor;

Establishes within the National Archives and Records Administration an Office of Government Information Services (OGIS) to (1) review compliance with FOIA policies, (2) recommend policy changes to Congress and the President, and (3) offer mediation services between FOIA requesters and agencies as a non-exclusive alternative to litigation; and authorizes the OGIS to issue advisory opinions if mediation fails to resolve a dispute;

Requires each agency to designate a Chief FOIA Officer, who shall (1) have responsibility for FOIA compliance, (2) monitor FOIA implementation, (3) recommend to the agency head adjustments to agency practices, policies, personnel, and funding to improve implementation of the FOIA, and (4) facilitate public understanding of the purposes of the FOIA’s statutory exemptions; and requires agencies to designate at least one FOIA Public Liaison, who shall be appointed by the Chief FOIA Officer to (1) serve as an official to whom a FOIA requester can raise concerns about service from the FOIA Requester Center, and (2) be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes;

Requires the Office of Personnel Management to report to Congress on personnel policies related to the FOIA; and

Requires the identification of the FOIA exemption(s) relied upon to redact information from records provided in response to a FOIA request.

Less than a month after the legislation was signed into law, Senator Patrick Leahy, the principal Senate proponent of the FOIA reform legislation, complained to his colleagues that officials at the Office of Management and Budget (OMB) had indicated that all of the funding authorized by the new law for the Office of Government Information Services (OGIS) within the National Archives and Records Administration would be placed within the Department of Justice budget for FY2009. This arrangement was viewed as seemingly giving the Department control over the new Office, perhaps to the point of euthanizing it, or allocating the OGIS funds to its own Office of Information and Privacy, which oversees FOIA compliance by federal agencies. In creating the OGIS, legislators had deliberately located it outside of the Department of Justice, which represents agencies sued by FOIA requesters. Calling the OMB tactic “not only contrary to the express intent of the Congress, but . . . also contrary to the very purpose of this legislation,” Leahy expressed hope “that the administration will reconsider this unsound decision and enforce this law as the Congress intended.”

OMB declined to comment on the matter prior to the formal presentation of the President’s budget to Congress on February 4.

What the President’s budget offered regarding the OGIS was a proposed new section for enactment as part of Title V, General Provisions, of the Commerce, Justice, Science, and Related Agencies Appropriations legislation for FY2009. The new section states that the Department of Justice shall carry out the responsibilities of the OGIS using funds from its general administration account. The President’s budget otherwise made no request for funds for the OGIS. Appropriations bills are currently being formulated by House subcommittees. It is most unlikely at present that the President’s proposed section transferring the responsibilities of the OGIS to the
Department of Justice would be included in appropriations legislation or, if offered as a floor amendment, would be accepted by either house of Congress.

**Related Legislative Developments**

In concluding my statement, consideration is given briefly to three related legislative developments in records access and transparency policy. The first of these concerns public access to the records of former Presidents. In 1978, Congress enacted the Presidential Records Act, ending a long-standing practice of former Presidents taking away with them their records and papers upon departing office. The statute made all official presidential records, created on or after January 20, 1981, federal property that was to remain under the custody of the Archivist of the United States when each incumbent President left the White House. Jimmy Carter was the last President who could freely depart with his records.

The Presidential Records Act authorized former Presidents to restrict public access to their records, consistent with the disclosure exemptions of the FOIA, for a period of time not to exceed 12 years. Thereafter, access to such records as had not as yet been made available for public inspection by the Archivist could be sought pursuant to the FOIA. Provision was also made for former Presidents to seek a court order to stop the disclosure of particular records by the Archivist as a violation of their constitutional rights and privileges.

After President George W. Bush became President, he issued a directive, E.O. 13233, on November 21, 2001, effectively expanding the constitutional rights and privileges that an incumbent President and a former President could exert to stop the disclosure of certain records of former Presidents. It also extended the assertion of such rights and privileges to former Vice Presidents and to a representative or group of representatives of a former President. Finally, it reversed the statutorily prescribed judicial process, requiring persons seeking access to the records of a former President, which were restricted from disclosure for reasons of constitutional right or privilege, to seek a court order overturning the objections of the former President.

Opposition to the Bush directive was expressed by historians, political scientists, journalists, and lawyers, among others. A November 6, 2001, Los Angeles Times editorial, for example, indicated that the order “would nudge the nation’s highest office back toward democracy’s dark ages, when history effectively could be kept from the public.” Three days later, the Washington Post editorially characterized the order’s procedures as “a flawed approach on records.” USA Today, in a November 12 editorial, regarded the order’s arrangements as having a strong potential for “self-serving secrecy.” In a November 15 editorial, the New York Times commented that the order “essentially ditches the law’s presumption of public access in favor of a process that grants either an incumbent president or a former president the right to withhold the former president’s papers from the public,” and concluded that, if a remedy for the situation was to be realized, “Congress must pass a law doing so.”

An attempt at remedial legislation was made in 2002, but the bill did not receive a floor vote in the House of Representatives prior to the final adjournment of Congress late that year. No counterpart measure was introduced in the Senate. The sponsor of the House bill did not stand for reelection to the next Congress, and no successor legislation was subsequently proposed until 2007. On March 1, Representative Henry Waxman introduced the Presidential Records Act Amendments (H.R. 1255), which would revoke E.O. 13233, allow the Archivist to resume control of access to the records of recent former Presidents, and limit the exercise of claims of constitutional right or privilege to restrict access to certain records of former Presidents. It was reported from the
Committee on Oversight and Government Reform on March 8, 32 and the House approved it on March 14 under a suspension of the rules on a 333-93 vote. 33 A companion bill was introduced by Senator Jeff Bingaman (S. 886) on March 14, 2007, and was referred to the Committee on Homeland Security and Governmental Affairs, which reported the measure (no written report) without amendment on June 20, when it was placed on the Senate legislative calendar, and awaits final approval by that body. 34

The second related legislative development concerns amendments to the Federal Advisory Committee Act. 35 Originally enacted in 1972, this statute establishes presumptively open meetings of all executive branch advisory committees composed in whole or in part of private citizens having expertise regarding the subject matter of a panel. Exemptions to the rule of open meetings are prescribed in the law and parallel the exemptions of the FOIA. Other provisions address meeting notice and recordkeeping requirements, as well as the need for balance in the membership of such committees. In order for an advisory committee to be exempt from the requirements of the law, an explicit statement of exception must be included in its statutory mandate.

In the course of overseeing the administration of, and compliance with, the Federal Advisory Committee Act, a subcommittee of the House Committee on Oversight and Government Reform held an April 2, 2008, hearing on the statute. 36 The following day, the chairman of the subcommittee, Representative William Lacy Clay, introduced legislation (H.R. 5687) designed to strengthen the provisions of the statute. These amendments would establish the following requirements.

- That appointments to advisory committees be made without regard to political affiliation or activity, unless required by statute;

- Each agency head insure that (1) no individual is appointed who has a relevant conflict of interest, unless the conflict is unavoidable and the need for the individual’s service outweighs the potential impacts of the conflict, and (2) advisory committee reports are the result of independent judgment;

- Public disclosure of (1) any such conflict of interest (see above); (2) any communication between an interagency committee or task force established by the President or Vice President and a person who is not a federal officer or employee; (3) charters of advisory committees; (4) the process used to establish and appoint committee members; (5) specified information about current committee members; (6) each committee’s decisionmaking process; (7) transcripts or recordings of committee meetings; and (8) determinations to close meetings;

- That this publicly disclosable information (see above) be made available electronically by agency heads 15 days before each meeting (or seven days after for meeting transcripts or recordings);

- That the Administrator of General Services (1) provide access to this publicly disclosable information made electronically available; (2) promulgate regulations defining “conflict of interest”; and (3) issue guidance for agencies and advisory committees on procedures and best practices for ensuring that advisory committees provide independent advice and expertise;
That an individual who is not a full-time or permanent part-time federal officer or employee be regarded as a committee member if the individual regularly attends and participates in committee meetings, even if the individual does not have the right to vote on or veto committee advice or recommendations; and

The Comptroller General shall review agency compliance with the amended statute and submit to specified congressional committees, not later than one year after the date of the promulgation of the regulations required of the Administrator of General Services, an initial report on the results of such review and, not later than five years after the date of the promulgation of the regulations required of the Administrator of General Services, a second such report.

The bill was amended in committee and, by voice vote, ordered to be reported to the House on April 9. No counterpart legislation has been introduced in the Senate.

The third related legislative development concerns amendments to two records management laws — the Federal Records Act and the Presidential Records Act.37 Introduced on April 15, 2008, by Representative Henry Waxman, chairman of the House Committee on Oversight and Government Reform, the Electronic Communications Preservation Act (H.R. 5811) would modernize federal recordkeeping by requiring agencies to begin preserving electronic records in electronic form or formats. While it would require such electronic preservation for electronic communications such as email, the legislation would encourage more broadly that agencies electronically preserve all electronic records. Furthermore, the bill establishes oversight of the maintenance and preservation of presidential records, including email sent and received by presidential aides in the Executive Office of the President, and requires the Archivist to establish standards for the management and preservation of these records and to certify that the President is complying with those standards.

Congressional investigators became aware of problems with the management and preservation of the email of presidential assistants in 2006 when it was discovered that some senior White House staff who were close to the President were sometimes using non-governmental email accounts — such as the ones provided by the Republican National Committee (RNC), a party organization — for their official communications, and that the communications to and from these accounts had not been preserved. Adding to this dilemma was the discovery that Executive Office of the President email accounts used by senior presidential assistants had not been properly backed up to enable the preservation of email communicated to and from them. A June 2007 majority staff report of the House Committee on Oversight and Government Reform offered the following observation.

The Committee has obtained evidence of potentially extensive violations of the Presidential Records Act by Senior White House officials. During President Bush’s first term, momentous decisions were made, such as the decision to go to war in Iraq. Yet many e-mail communications during this period involving the President’s most senior advisors, including Karl Rove, were destroyed by the RNC. These violations could be the most serious breach of the Presidential Records Act in the 30-year history of the law.38

The proposed Electronic Communications Preservation Act seeks to remedy the situation by strengthening the Presidential Records Act. However, one watchdog group, Citizens for Responsibility and Ethics in Washington (CREW), criticized the legislation for being “anemic,” saying it “fails to make the substantial changes necessary to bring the federal government into the 21st century.”39 A National Archives official worried about the breadth of the legislation, including its cost — “likely . . . in the billions of dollars” — and possible unconstitutional intrusion into the
White House. Nonetheless, after an April 16 subcommittee hearing, the bill was marked up and, by voice vote, ordered to be reported to the House on May 1. No counterpart legislation has been introduced in the Senate.

This concludes my statement. I thank you for your invitation to be here today, and I thank you, as well, for your consideration of my remarks. I would be pleased to respond to your questions.
Endnotes

1. Dr. Harold C. Relyea is a Specialist in American National Government with the Congressional Research Service of the U.S. Library of Congress. A biographical profile accompanies this statement. The views offered in this statement are his own and are not attributable to any other source. He previously testified before the committee on March 27, 2001. Contact: hrelyea@crs.loc.gov.


3. Article I, Section 5, of the Constitution specifies: “Each House [of Congress] shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their [Member’s] Judgement require Secrecy.” Article I, Section 6, of the Constitution states that, “for any Speech or Debate in either House [of Congress], they [Members] shall not be questioned in any other Place.” These provisions have been interpreted in congressional and judicial determinations to allow the protection, by extension, of certain kinds of information.


15. Established in 1921, the Government Accountability Office (formerly named the General Accounting Office) — a nonpartisan, independent agency within the legislative branch — assists Congress by evaluating government policies and programs, auditing agency operations and accounts, investigating allegations of illegal and improper activities, and providing legal decisions and opinions.


26. The Office of Special Counsel, an independent agency within the executive branch, investigates allegations of certain activities prohibited by civil service laws, rules, or regulations and litigates before the Merit Systems Protection Board, another independent agency, which protects the integrity of the federal personnel merit systems and the rights of federal employees.


29. The Presidential Records Act may be found in the *United States Code* at 44 U.S.C. §2201-2207.


34. Ibid., pp. S3140-S3141.


37. The relevant portion of the Federal Records Act may be found in the *United States Code* at 44 U.S.C. §3101-3107; regarding the Presidential Records Act, see the citation at note 29 supra.


41. U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on Information Policy, Census, and National Archives, “H.R. 5811, the Electronic
Biographical Profile

Harold C. Relyea is a Specialist in American National Government with the Congressional Research Service (CRS) of the Library of Congress. A member of the CRS staff since 1971, he has held both managerial and research positions during his career. His principal areas of research responsibility include the presidential office and powers, executive branch organization and management, executive-congressional relations, congressional oversight, and various aspects of government information policy and practice. He has testified before congressional panels on various occasions, and has served as an expert resource for other organizations. In addition to his CRS duties, Dr. Relyea has authored numerous articles for scholarly and professional publications in the United States and abroad. Currently preparing a book on national emergency powers, his recently published titles include Silencing Science: National Security Controls and Scientific Communication (1994), Federal Information Policies in the 1990s (1996), The Executive Office of the President (1997), United States Government Information: Policies and Sources (2002), and Comparative Perspectives on E-government (2006). He serves on the editorial board of Government Information Quarterly, the International Journal of Electronic Government Research, and the Journal of Information Technology and Politics, and has held similar positions with several other journals in the past. An undergraduate of Drew University, he received his doctoral degree in government from The American University. His biography appears in Who’s Who in America and Who’s Who in the World.