

# Eleventh-Hour Covenant: Lost Memory

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When President Clinton's top aides moved into the White House in January, many of them had trouble getting their computers to work.

That's because during the night of Jan. 19 and into the next morning—President George Bush's last hours in office—officials wiped out the computerized memory of the White House machines.

The hurried operation was made possible only by an agreement signed close to midnight by the archivist of the United States, Don W. Wilson. The ensuing controversy has added to allegations that the archives, beset for years by political pressures and slim resources, is prone to mismanagement and ineptitude in its mission of preserving for the public the nation's documentary history.

It also has raised strong doubts about the efficacy of a 15-year-old law that says a former president's records belong to the people.

Just what information was purged remains unknown, but it likely ranged from reports on the situation in Bosnia-Herzegovina to details about Bush's Iran-contra pardons, to evidence concerning the preelection search of Clinton's passport files. In the warrens of the secretive National Security Council, only a month's worth of foreign cable traffic was retained to help enlighten the incoming administration.

Bush and his lawyers had wanted to leave no trace of the electronic files, arguing they were part of an internal communications system, not a records system. But court orders issued a few days earlier required that the information be preserved if removed from the White House.

So backup tapes were made of the data on mainframe computers and carted off to the National Ar-

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## Computes to Gain for Bush

chives by a special task force. Hard disk drives were plucked out of personal computers and loosely stacked into boxes for the trip. Despite such measures, there are indications some material may have been lost.

The transfer had been authorized by Wilson, who at 11:30 p.m. on Jan. 19 put his signature on what would prove to be a highly controversial "memorandum of agreement." It gave Bush "exclusive legal control" over the computerized records of his presidency as well as "all derivative information."

Critics have denounced Wilson's agreement with Bush as a clear violation of a post-Watergate law that made presidential records public property. And they fear that the authority granted Bush is far broader than officials so far have acknowledged.

For their part, archives officials say they did the best they could under difficult circumstances and contend they deserve some credit for getting physical custody of the electronic material. Chided days later about the broad scope of the agreement in a meeting with outside historians, Wilson protested that they just did not appreciate "the political environment in which I was operating."

On Feb. 12, Wilson compounded his difficulties by announcing that he was taking a \$129,000-a-year

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job as executive director of the George Bush Center for Presidential Studies at Texas A&M University. The Justice Department has said it is considering a criminal investigation of a possible conflict of interest by Wilson.

In seeking to purge their computers without leaving a trace of the data, Bush White House officials contended that the electronic materials were not records but internal communications. To the distress of a number of outside historians and researchers, the archivist and his agency agreed with that position. But a federal judge did not.

Acting in a four-year-old case brought by the nonprofit National Security Archive and several other plaintiffs at the end of the Reagan administration, U.S. District Judge Charles R. Richey ruled Jan. 6 that much of the information on the White House computer systems not only "fit into an everyday understanding" of what a record is, but also met the statutory definition set out in the Federal Records Act. Richey said he was worried that the administration was about to destroy information "of tremendous historical value." He also said that making paper copies of the electronic data would not be sufficient because the paper copies would not necessarily show who had received the information and when.

"The question of what government officials knew and when they knew it has been a key question in not only the Iran-contra investigations, but also in the Watergate matter," Richey observed.

The judge ordered the defendants, including Wilson and the Bush White House, not to delete or alter any of the electronic records systems until archivists could preserve the material protected by the Federal Records Act.

Critics of the Bush-Wilson agreement contend that the arrangement violated the 1978 Presidential Records Act, but under a 1991 appellate court decision, Richey has no power to enforce that law. He can, however, enforce the Federal Records Act.

Richey's Jan. 6 order obliged the archives to make sure that the "federal" or "agency" records on White House computers were preserved, even though they might be commingled with "presidential records." Figuring out the difference is a chore affecting primarily NSC com-



*Archivist Don W. Wilson, who signed an agreement giving Bush exclusive control over computerized records of his presidency as well as "all derivative information."*

puter files.

The distinctions can be tricky. A memo to Bush from his national security adviser, Brent Scowcroft, about what to do in Somalia is a presidential record. But if Bush signs it and Scowcroft sends it to the Pentagon to be implemented,

the memo becomes a federal or agency record too. The game also works in reverse. A note to Scowcroft from one of his NSC aides is a federal record—unless Scowcroft uses it to advise the president.

According to records churned up by the lawsuit, Richey's Jan. 6 order precipitated numerous meetings of archives officials, often with Justice Department and White House representatives. Government lawyers, meanwhile, went to Richey to ask if they could make backups and purge the computers before Clinton moved in.

Richey, uneasy about past foul-ups and what he called "inconsistencies" in the backup taping plan, turned them down on Jan. 14. But the Bush administration promptly appealed and the next day, U.S. Court of Appeals here said backups would be acceptable "so long as the information is preserved in identical form" until the appeal could be decided on its merits.

But the inventories given to the archives task force were not com-

plete. "Many dates are missing," an after-action archives memo said of the backup tapes, and more than 100 had no dates. It was impossible to tell how many erasures might have been made after Richey's ruling. And according to a certificate from the White House Communications Agency, six tapes packed with NSC messages and memos were "overwritten due to operator error."

In all, more than 5,000 tapes and hard disk drives were delivered to the archives. Most had to be preserved because of the lawsuit, but a number of hard drives were added at the last minute because of a grand jury subpoena related to the preelection search of Clinton's passport files. Once that investigation is

over, the grand jury materials, under the Bush-Wilson agreement, will become "the personal records of George Bush."

Wilson, a 1987 Reagan appointee who had been director of the Gerald R. Ford Presidential Library, declined to be interviewed for this article. But in a deposition taken March 2 by Public Citizen lawyer Michael Tankersley, Wilson said he had delegated the task of complying with the court orders to acting deputy archivist Raymond A. Mosley. Wilson said he never saw the Bush agreement until the night of Jan. 19, was unfamiliar with its terms

and signed it only "upon advice or counsel," archives general counsel Gary L. Brooks. White House officials refused to release any materials to the archivists until this was done.

The Bush-Wilson agreement went far beyond the presidential records law. It gave the ex-president exclusive legal control of all "presidential information, and all derivative information in whatever form" that was on the computers. And it gave Bush the veto power in retirement to review all the backup tapes and hard drives at the archives and make sure that all the information he considers "presidential" is kept secret. He can even order the archivist to destroy it.

"It's history repeating itself almost 20 years later," one official close to the case said, alluding to the September 1974 agreement that gave former president Richard M. Nixon, who had just been pardoned, ownership and control of his White House tape recordings and papers and allowed him to destroy the tapes over a five-year period. Congress quickly canceled that agreement in a law that applies only to Nixon, but to this day most of the

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4,000 hours of Nixon's tapes remain tied up by the maneuvering of Nixon and his lawyers.

"Bush could have protected the 'presidential material' legally by having it sorted out before he left office," protested Scott Armstrong, founder of the National Security Archive and one of the plaintiffs in the suit. "This rewards him for being a scofflaw. Our fear all along has been that the Bush administration would commingle 'presidential' and 'agency' records and then say almost everything is 'presidential.'"

Under questioning by Rep. Steny H. Hoyer (D-Md.) at a recent House hearing, Mosley left the impression that the Bush agreement contained nothing new or surprising, but was simply a device "to provide for orderly and systematic access to materials covered by court order." He said the archives had already entered into an agreement with Reagan that was "essentially the same."

In fact, the agreement Reagan signed said nothing about giving him "exclusive legal control" over the covered materials. It said access to them, once the Iran-contra

investigations are over, should be governed by the applicable laws covering presidential and federal records.

The archivist's agreement with Bush was not disclosed to the courts, Congress or the public until Jan. 28 when the last batch of tapes was delivered to the archives. A few days later, outside historians who attended a meeting with Wilson on long-range plans for the archives say he seemed annoyed at being questioned about the arrangement.

They say Wilson told one questioner, Page Miller, that she did not appreciate "the political environment in which I was operating," having been called "to the White House late at night," with "all these lawyers from the Justice Department and the White House there," telling Wilson that it was all "legal and proper."

In fact, Wilson signed the agreement at the archives, apparently in the presence of lawyers from the White House and the National Security Council, but not the Justice Department. Several who heard him say what was attributed to him suggested he may have been engaging in a bit of hyperbole to make a point.

"I think what he was saying was he didn't feel he had the authority to stand up to them," said Charlene Bickford, a George Washington University historian who was at the Feb. 2 meeting. "What concerns me is that these political things embroil the institution and make it look bad

when the place is full of good staff. . . . The archives should be an agency of all three branches of government and hopefully an agency above the politics of the executive branch."

Miller, who is director of the National Coordinating Committee for the Promotion of History, a coalition of about 50 historical and archival groups, said she brought up the agreement because she was concerned about its broad wording, particularly the phrase giving Bush control of "all derivative information."

"That seems to me a slippery term that could give an enormous amount of authority to Bush," she said.

Complaints about the arrangement intensified when Wilson announced he was leaving his

\$123,100-a-year post to head the Bush center at Texas A&M, which also will serve as home of the Bush Presidential Library. Texas A&M spokesman Rene Henry said Wilson was picked for the job by university president William H. Mobley and Bush's son, George W. Bush, president of the Bush Foundation.

"We've been interested in him because nobody else has his qualifications," Henry told a reporter.

The Justice Department subsequently disclosed it is considering a criminal investigation in response to complaints by three Democrats on the Senate Governmental Affairs Committee: Chairman John Glenn of Ohio, David Pryor of Arkansas and Joseph I. Lieberman of Connecticut. They charged that Wilson had been "engaged in interviews, discussions and negotiations for his future employment at Texas A&M" since Election Day last November.

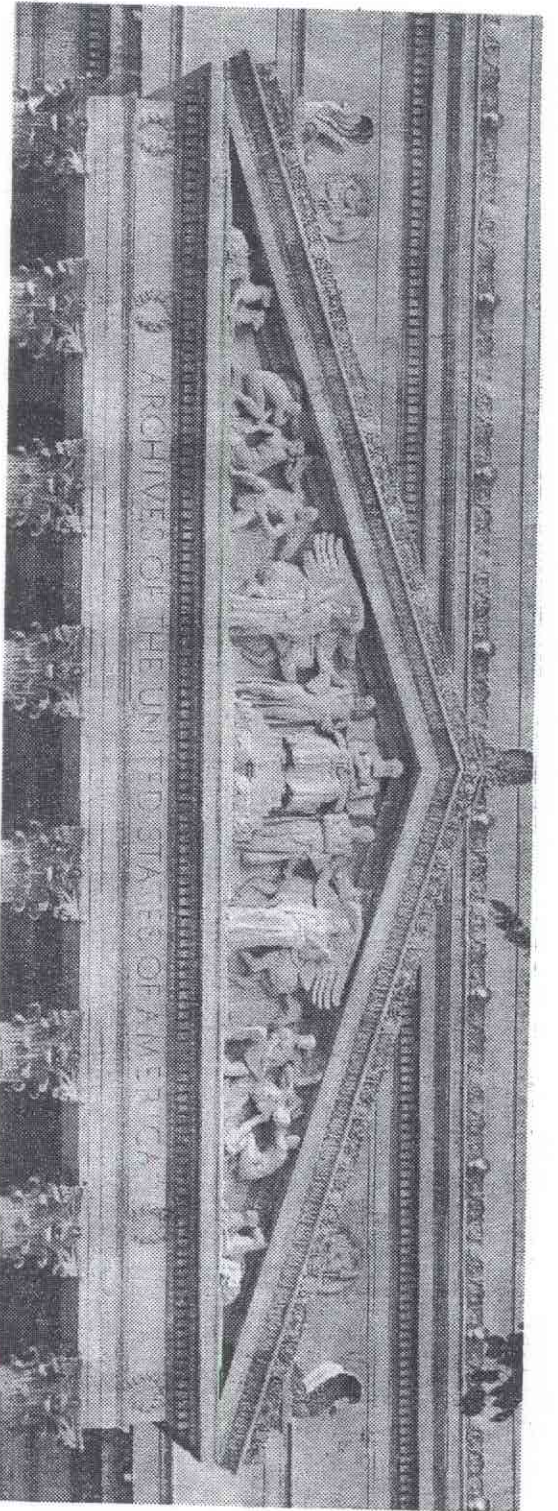
In a Feb. 17 statement, Wilson said neither he nor archives lawyers saw any conflict of interest between his signing the agreement with Bush "and any potential employment or future negotiations with Texas A&M University."

Asked when the negotiations began, Texas A&M spokesman Henry said it was not until Jan. 26 that "anyone at Texas A&M had contact with Don Wilson about being executive director of the Bush center." Henry said Texas A&M senior vice president E. Dean Gage telephoned Wilson then "to see if he would be interested," and an official offer was mailed on Jan. 29.

Wilson, however, acknowledged at his deposition that discussions about the job dated to mid-December when George W. Bush and another official of the Bush Foundation, James W. Cicconi, asked him if he would be interested. Cicconi, Wilson testified, told President Bush himself about the possibility on Jan. 4 at a White House meeting about the Bush library.

With Wilson preparing to leave, upper management at the archives is taking the position that the dispute has been blown out of proportion. They say the real record of the Bush presidency is in the huge volume of paper and other records already shipped to an archives-controlled facility near Texas A&M and the computer tapes are only a tiny portion of that.

Skeptics are still wondering



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what's in the tapes." "There must be something important in them," Miller said. "You don't have agreements late at night just like that."

*Staff researchers Lucy Shackelford and Lynn Davis contributed to this report.*