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CORRECTING THE RECORD: REFORMING FEDERAL AND PRESIDENTIAL RECORDS MANAGEMENT

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

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TUESDAY, MARCH 15, 2022

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:15 a.m., via Webex and in room SD–342, Dirksen Senate Office Building, Hon. Gary Peters, Chairman of the Committee, presiding.

Present: Senators Peters, Carper, Hassan, Sinema, Ossoff, Portman, Johnson, Lankford, Scott, and Hawley.

OPENING STATEMENT OF CHAIRMAN PETERS[1]

Chairman PETERS. The Committee will come to order.

I would first like to thank our witnesses for joining us today to help examine gaps in existing Federal records laws, and to discuss how lawmakers can ensure the National Archives and Records Administration (NARA), can adequately maintain and preserve Presidential and Federal records.

The Federal Government produces and receives an absolutely enormous volume of documents and records every single day. These are essential to keeping an accurate account of what activities the government engages in, as well as ensuring that Americans, such as former servicemembers, are able to get to the benefits they have so rightly earned.

Accurate Federal records are also critical to helping Congress hold the Executive Branch accountable, ensure appropriate use of taxpayer dollars, and make sure the Federal Government is working effectively for the American people. However, officials in previous administrations of both parties have failed to adhere to current Federal recordkeeping requirements, and in some cases, have blatantly disregarded them.

Whether administrations avoided creating records of meetings, used personal emails and devices, disappearing message apps, or attempted to obscure their decisionmaking processes, these failures to appropriately handle Presidential and Federal records have limited transparency for the American people, and risked letting critical moments in our nation's history slip through the cracks. This has left the door wide open for historical misrepresentations and distortion.

[1] The prepared statement of Senator Peters appears in the Appendix on page 23.

Most recently, we saw alarming reports that Presidential records from the Trump administration were destroyed inside the White House, and others were taken to the former President's private residence, rather than being turned over to NARA. Although some of these records have been recovered, it is impossible for Congress to tell whether additional records have been destroyed or improperly handled, or if NARA has received all appropriate records from that administration.

This lack of transparency, and other challenges related to enforcing our existing Federal records laws have made it difficult for NARA to ensure it is receiving all relevant Presidential records.

Other challenges, including inadequate resources and technology, and the rapid proliferation of electronic records, have also complicated NARA's responsibility to preserve these essential documents.

For example, the National Personnel Records Center within NARA, which is responsible for storing military personnel records, faces a serious backlog of requests from veterans. This backlog, along with limited accessibility during the pandemic, has left veterans unable to obtain critical documents that help them access benefits they depend on each and every day. This is simply unacceptable, and a key reason that Congress must urgently reform and modernize this process.

Additionally, the outdated computer systems and outdated laws that regulate Federal recordkeeping have also made the mishandling of sensitive and important documents more common. This can have serious consequences for government transparency and could conceal fraud, waste, and abuse from Congress as we work to provide oversight of the Federal Government.

Despite these deficiencies, I remain confident that if this body works together, on a bipartisan basis, we can work to improve the Federal recordkeeping process. I am currently working on legislation that will increase visibility, it will strengthen existing laws, update regulations, and modernize this process by using emerging technologies so we can ensure NARA can adequately preserve, and provide appropriate access to both Presidential and Federal records.

As we mark the 17th annual Sunshine Week, a nationwide initiative dedicated to educating the public about the importance of transparency in government, I look forward to discussing how Congress can further strengthen Federal records processes and improve transparency for all Americans. Today, I am grateful to welcome a panel of experts, who can discuss our Federal records management in much greater detail, help us identify gaps in the law as well as its implementation, and broadly discuss what actions Congress can take to better protect the public record.

Thank you again for being here. We look forward to a robust discussion.

Ranking Member Portman, you are now recognized for your opening comments.

OPENING STATEMENT OF SENATOR PORTMAN[1]

Senator PORTMAN. Thank you, Mr. Chairman, and thanks to our witnesses for being here. Transparency in government is obviously a pillar of our democracy and something we should all ensure continues into the digital age, because it is harder and harder, in some of the respects that we will talk about today.

It is an area I have worked on a lot. I have sponsored the Data Act, the Access to Congressionally Mandated Reports Act, the Open Courts Act, the Regulatory Accountability Act, and a lot of others. When I was at the Office of Management and Budget (OMB) I put all earmarks online, which had an interesting effect in terms of transparency.

But in order to have that transparency and accountability we need a record of what the government is doing, day in and day out, what government is doing right and what government is doing wrong. That way citizens can learn and hold their government and officials accountable.

Having a fulsome record of government activity is also important to the future. It is important to historians. It is important to media. It is important to citizens to have that. Think tanks can play an important role only if they have access to information, as an example.

It is good that we are having this hearing today on how to look at the Presidential Records Act (PRA) and the Federal Records Act (FRA). It is a bipartisan issue, by the way. I can see from the prepared comments that some of our witnesses will reference our previous Presidential controversies, but will note, as I do, that administrations of both parties have had records-related issues, and lack of clarity has caused some of that.

As a member of this Committee back in 2014, I worked on the 2014 amendments to the Presidential Records Act and Federal Records Act. Among other things, we tried to streamline the process for making Presidential records available to the public after they go to the National Archives. We prohibited the use of non-official electronic messaging accounts by covered workers unless they copy or forward communications to official accounts, clarified the definition of government records so that it covers them regardless of what format they are in, and provided an enforcement scheme for violations. In 2014 we went through this and made a number of amendments, but the world has actually changed quite a bit since 2014. Records have become much more digitized. There are apps that make messages disappear. There is also technology that automatically categorizes documents.

I agree that we as a Committee should look into these and other changes and see how the law might need updating to account for changes since 2014. I am glad these three witnesses are with us today to help us do just that. I see they have all spent time dealing with records-related issues, so I want to thank them in advance for testifying, and I look forward to hearing what they have to say and engaging in a good dialog about these issues.

Thank you, Mr. Chairman.

Chairman PETERS. Thank you, Senator Portman.

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[1] The prepared statement of Senator Portman appears in the Appendix on page 25.

It is the practice of the Homeland Security and Government Affairs Committee (HSGAC) to swear in witnesses, so if each of you would please stand and raise your right hand.

Do you swear that the testimony that you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BARON. I do.

Ms. WEISMANN. I do.

Mr. TURLEY. I do.

Chairman PETERS. Thank you. You may be seated.

Our first witness is Jason Baron. Mr. Baron serves as the Professor of the Practice at the University of Maryland's College of Information Studies, or iSchool, where he taught the first graduate-level seminar on e-discovery, a form of digital investigation, here in the United States.

Mr. Baron brings 33 years of experience in public service, including 13 years as the first appointed director of litigation at NARA, and previously served as a trial attorney and senior counsel at the U.S. Department of Justice (DOJ).

Mr. Baron regularly writes and speaks on subjects involving preservation of and access to electronic records, and he has also served as co-chair of the Working Group on Electronic Document Retention and Production at the Second Conference.

Mr. Baron, welcome to the Committee. You may proceed with your opening comments.

TESTIMONY OF JASON R. BARON,[1] PROFESSOR OF THE PRACTICE, COLLEGE OF INFORMATION STUDIES, UNIVERSITY OF MARYLAND

Mr. BARON. Thank you. Chairman Peters, Ranking Member Portman, Members of the Committee, thank you for the opportunity to testify here today regarding amending the Presidential and Federal Records Acts. As the Senator mentioned, during a 33-year career in Federal service I saw first-hand the introduction of new communications technologies that have transformed the way Federal employees create records. Based on my experience in government and after, I believe that further amendments to the PRA and the FRA are needed to keep up with recent changes in technology.

As a recent Government Accountability Office (GAO) report stated, "Records are the foundation of open government, supporting the principles of transparency, participation, and collaboration."

One form of communications technology now poses what I see is an existential threat to government recordkeeping, namely forms of ephemeral messaging which self-destruct after messages are sent. Such messages, when used by officials on matters relating to government business simply vanish from history.

As the Committee is well aware, there have been numerous instances of attention-grabbing headlines involving the use of WhatsApp, Wickr, Confide, and Signal by White House staff and other Federal officials. The popularity of these forms of messaging apps effectively means that anyone in the Federal Government can

[1] The prepared statement of Mr. Baron appears in the Appendix on page 28.

communicate in ways that amount to an end run around the records laws that otherwise require adequate documentation of government business.

I believe Federal employees, including in both the White House and throughout the Executive Branch, should be prohibited from using non-preservable electronic messaging apps to transact government business. However, employees should still be able to use messaging apps that are authorized for use by the White House or by each agency, provided those messages are captured in an official recordkeeping system.

Beyond that gap in current law, I believe we are at an inflection point in the history of government recordkeeping. Starting with the Reagan Administration and going through the Trump administration, NARA now holds an estimated 600 million emails, representing 3 billion pages. Can the American people get access to most of those records? Theoretically yes, but as a practical matter less than one-tenth of one percent of these records have been opened.

Pursuant to policies put into effect in 2019, starting on December 31, 2022, the end of this year, NARA will no longer take in newly created paper records. All this means NARA should expect to receive literally billions of electronic records over the coming decades, a huge challenge that calls for new advanced search technologies to provide access to the American people.

Looming perhaps even larger, by the same end of 2022 date, all Federal agencies will be required to preserve both their temporary and permanent records in electronic form. Without employing advanced search technologies and advanced analytics, agencies are going to be under an increasingly huge burden in categorizing their records, disposing of their records in accordance with records schedules, and providing access to those records to Congress and to the American people.

For these reasons I support two further policy initiatives to be codified in current law that will assist in recordkeeping, given the new reality. First, I believe the current voluntary policy known as Capstone for the archiving of senior official emails should be codified in statute, not only to ensure that all agencies preserve these records but that electronic messaging, including ephemeral apps, also be captured for permanent preservation.

Second, I believe the government could learn from industry and academia how machine learning and advanced data analytics are used in the private sector to manage, categorize, search, and provide access to electronic records. That is why I believe a high-level advisory committee consisting of subject matter experts would be helpful in jump-starting records management and records access throughout the government. New forms of communications technology have led us to this moment, and new forms of advanced artificial intelligence (AI) software can help address the profound records management challenges the government faces.

Thank you, and I look forward to the discussion here today.

Chairman PETERS. Thank you, Mr. Baron.

Our next witness is Anne Weismann. Ms. Weismann is a public interest lawyer and the former Chief Counsel and Chief Freedom of Information Act (FOIA) Counsel at Citizens for Responsibility

and Ethics in Washington (CREW), a nonprofit organization committed to deterring unethical government conduct.

Ms. Weismann has handled a wide range of high-profile litigation lawsuits which sought public access to White House visitor records and the recovery and restoration of millions of missing White House emails.

Previously, Ms. Weismann has served as an assistant branch director at the Department of Justice, where she oversaw the Department's government information litigation.

Ms. Weismann, welcome to the Committee. You may proceed with your opening comments.

TESTIMONY OF ANNE WEISMANN,[1] OUTSIDE COUNSEL FOR CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON AND THE PROJECT ON GOVERNMENT OVERSIGHT

Ms. WEISMANN. Thank you. Chairman Peters, Ranking Member Portman, and Members of the Committee, thank you for the opportunity to testify today about needed reforms to the Presidential Records Act and the Federal Records Act. I am testifying on my own behalf.

I have spent many years seeking to enforce these statutes through litigation, to ensure the preservation of our nation's history and the accountability that comes from public access to government information. In that capacity, I have experienced the frustrating limitations of these laws. Today I highlight some proposed reforms to address those limitations and ensure the statutes' continued vitality in a digital age.

Both the PRA and the FRA fall short in two significant respects. First, neither contains sufficiently effective enforcement mechanisms, which has placed the preservation of our historical record at considerable risk. Second, as products of an era when the government operated exclusively in paper, neither has kept pace with changing technologies. Recent events highlight these problems, but their origins date back decades, accelerated by the transition to a digital environment.

In my written testimony I outline the disturbing and ongoing trend of administrations from both political parties of ignoring or outright flouting their recordkeeping responsibilities. This is a bipartisan problem that demands a bipartisan solution.

I also testified in my written testimony about my unsuccessful attempts through litigation to redress these recordkeeping violations. In each case the judicial system provided no relief, believing it lacked any authority to enforce the terms of the PRA. Why did Congress enact such a toothless law? It assumed Presidents would voluntarily comply, both because they would surely recognize the rule of law that is so fundamental to our democracy and because they would want to preserve their place in history through a full historical record.

We now have reason to question the efficacy of the norm-based system that underlines the PRA. It is, therefore, up to Congress to transform the PRA to a statute that achieves its intended purpose—preserving our history.

[1] The prepared statement of Ms. Weismann appears in the Appendix on page 41.

As a first step, Congress should establish a bright-line rule that all Presidential records, given their inherent value, merit preservation by eliminating the disposal provision of the PRA.

Congress should require the White House Counsel to certify to the Archivist on a quarterly basis those PRA-covered employees who are in compliance with the law. Certification affords a level of accountability and transparency currently absent in the statute.

Congress should require the Office of Administration to report to Congress and the Archivist at least annually on Executive Office of the President (EOPs) implementation of the recordkeeping laws. This can serve as an early warning system to avoid learning of recordkeeping violations after an administration has left office and remediation may not be possible.

The PRA should impose a mandatory reporting requirement on the White House Counsel to advise the Archivist and the Attorney General (AG) about the threatened or actual destruction of a record or systemic problems, and should charge the White House Counsel with fixing those problems.

Congress should require the White House Counsel to share with the Archivist at the beginning of a new administration recordkeeping guidance for the Executive Office of the President, to be posted on NARA's website.

Finally, Congress should conform the PRA with the technical realities of the 21st century by prohibiting the use of any technology that does not enable the preservation of records created by that technology.

I will refer to my written testimony for needed reforms to the Federal Records Act.

But let me close with this. The PRA and the FRA rest on the central proposition that government records, as the records of the people, play an essential role in creating a stronger democracy. But both statutes have proven to be no match for the advances of technology and individuals intent on operating in secrecy and without accountability. The recent revelations raised the concern that this important issue will be dismissed as nothing more than partisan politics in Washington. I hope this is not the case. Absent a legislative fix, the gap in our historical record will continue to widen, and government officials, including those at the highest levels, will feel empowered to ignore their recordkeeping obligations at will.

I look forward to working with the Committee on this issue. Thank you.

Chairman PETERS. Thank you, Ms. Weismann.

Our final witness is Jonathan Turley. Mr. Turley is Professor of Public Interest Law at the George Washington University (GWU) Law School, and is a nationally recognized legal scholar who has written extensively in areas ranging from constitutional law to legal theory to tort law.

Professor Turley is also a recognized legal commentator, whose articles on legal and policy issues regularly appear in national newspapers. Professor Turley has also served as counsel in a variety of national security and terrorism cases.

Professor, welcome to the Committee. We look forward to hearing your testimony.

TESTIMONY OF JONATHAN TURLEY,[1] J.B. AND MAURICE C. SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. TURLEY. Thank you, Chairman Peters, Ranking Member Portman, and Members of the Homeland Security and Governmental Affairs Committee. It is a great honor to appear before you to talk about efforts to reform Federal and Presidential record management.

Twenty years ago, I testified on the Presidential Records Act and the need, even then, to create reforms to protect and preserve the records of our country. The FRA and PRA were transformative laws that guaranteed not only greater transparency but accountability for the actions taken in the name of the public. It is said that those who cannot remember the past are condemned to repeat it. These laws are meant to stop that from being a reality for this republic.

While I am happy to discuss other proposals, my written testimony talks about six areas of possible reforms. There is great overlap with my colleagues on the panel, and I am greatly honored to appear with them, and particularly Anne Weismann, who is one of the graduates of George Washington Law School, one of our more esteemed graduates. I also commend the Committee for guaranteeing that any panel should have a majority of people connected to George Washington Law School.

The first area that I address is addressing new technology, that has been discussed already by some of our panel. The Congress has attempted to deal with that with the Presidential and Federal Records Act, and more importantly the Electronic Message Preservation Act. But ambiguity still exists, and those ambiguities exacerbate the erosion of the standards in the face of new social media technology.

That technology is now dominant as a form of communication, with three billion social media users. Officials in government, like all citizens, move casually between platforms, and that creates much of the problems that we are seeing. One of the problems that I focus on, as do some of my colleagues, is the use of message-deleting technology—Telegram, WhatsApp, Wickr, and Confide—those types of platforms that immediately destroy messaging.

One of the things I suggest is that the use of these apps should be treated as a disposal decision. Since they automatically dispose of these messages they should be banned unless the apps are modified, as noted by Jason.

I also address deterring the use of unofficial accounts and mandating agency adoption of Capstone policies, another issue that Jason has taken a lead in. I do not understand why we do not make the Capstone policies a mandatory obligation on agencies. I have never heard an explanation why we do not codify that standard.

I also suggest, and this is consistent with Anne's testimony, the elimination of disposal discretion in Presidents. Again, I have never seen a particularly compelling argument in today's digitized age for

[1] The prepared statement of Mr. Turley appears in the Appendix on page 50.

leaving that authority under 2203(c)(e) with the White House. Perhaps one could be made, but I have not seen it.

It seems to me that given the thrust of our laws, the Archivist is in an excellent position to make those types of decisions. It is often the case that you do not realize the importance of a record until many years later, and it just seems odd to me that we give that discretion under Section 2203.

I also commend the effort to create certifications regular, whether annual or quarterly. The importance of that is that it reminds officials to be cautious and careful. I also commend the use of citizen lawsuits, although I do have some concerns with the citizen lawsuit provision in the law. It seems to me that we have to have a better idea of the standard and basis for those types of actions to avoid constitutional problems.

Finally, while the first five proposals effectively cut against the Executive Branch, the sixth one suggests the possibility of accommodating the Executive Branch. I think that the basis for overwriting President Trump's privilege assertions was warranted. It was certainly lawful. The question is whether we want, in the future, to have a more clear standard and the possibility of a bicameral solution to overriding Presidents in those first critical years after they leave office. I suggest among those standards the one used under shield laws, to establish a need that cannot be accomplished elsewhere.

I will end, as a Madisonian scholar, that I will note that tomorrow is James Madison's birthday. He would be 271, and if he were alive today we would all be better for it.

But I will also note, as is often talked about, with his quote, "The popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy." He was actually referring to public education, not public access to information, but if you read him more closely what he is really talking about is an educated and informed public. Therefore I have no reservations to appropriate his quote and to say that these laws and these reforms can help us avoid both that farce and that tragedy.

Thank you very much.

Chairman PETERS. Thank you, Mr. Turley.

My first question is going to be to all of you. I will start with Mr. Baron and then we will work down the table there.

In all of your testimony you highlighted a number of challenges that we have with both Presidential and Federal management records. I want to try to bring this down to what you think is the most important challenges, each of you, of the number of things that you have said. If you were going to give me one or two most important, Mr. Baron, what would that be?

Mr. BARON. I think recordkeeping is all about accountability. The American people deserve to know what their government is up to. The way to do that, in 2022, is to update the law to take into account there are so many new technologies that are out there, both ones that the government is struggling to deal with in terms of like ephemeral communications, but also there are technologies that could help the government in meeting its challenges. We want to talk about that, in terms of managing access records, including with artificial intelligence and machine learning.

Chairman PETERS. Great. Ms. Weismann.

Ms. WEISMANN. I think the lack of an effective and robust enforcement scheme, in both statutes, is a problem. I have outlined in my written testimony how we can beef up the enforcement system in the FRA, which I think is really called for because the enforcement scheme, as it currently exists, really is responding to operating in a paper world, and we do not anymore.

With the PRA, I agree with Professor Turley that there are potential constitutional problems, but I do not think we have to go that far, and that is why I placed the emphasis, and think it needs to be placed, on building in certain guardrails, whether it is annual or quarterly reporting requirements, making sure that Congress and the Archivist are up to date about what is going on in the White House, so we do not have a situation that after a President leaves office we find that, in fact, there were systemic violations and records may have been lost.

Chairman PETERS. Thank you, Ms. Weismann. Mr. Turley.

Mr. TURLEY. Thank you, Mr. Chairman. I guess I would rank them as, first and foremost, dealing with ephemeral messaging systems. It seems to me that that has to be a priority. It should be barred, absent a modified system that allows recording of that messaging. A simple approach is that the use of those types of apps should be viewed as a destruction decision, a disposal decision, on contravention of Federal law.

Second, I would like to see the Capstone system codified. I do not see why it is not. It is one of those things where I looked it to see, I must be missing something. But NARA has pushed for many years for Capstone to be adopted by agencies.

Finally, I do think that this Committee should consider the recent controversy with the override of President Trump's privilege assertions, not because that was the wrong decision. But I am a little worried about overrides in the future, from President Biden on. Politics has become incredibly bitter and divided today. It seems to me that there could be an accommodation by Congress to make sure that we have a bicameral approach or to have a more detailed standard that pushes committees to find material by other sources before they take this critical step.

Chairman PETERS. Thank you. I am going to ask all of you again, and this time I will start with Professor Turley and work the other way, in fairness.

I think all of you have seen draft language of legislation that I am working on to deal with this situation, and Professor Turley, I think you referenced it in your testimony as well. I would like to go down the panel, what are your thoughts on that legislation? Does it address some of these key issues? Just generally, what do you think about the draft as you have seen it so far? Professor Turley.

Mr. TURLEY. I think it is an excellent platform to address many of the issues that we have been talking about. The one area that I, quite frankly, am a little bit concerned with is the citizen lawsuit provisions, the private cause of action. I am a huge advocate of what are called private attorneys general provisions. It is just that I am a little bit uncertain as to the standard and how that would be used.

As you know, researchers and historians have sued in the past, and successfully have brought actions. I like the idea of empowering that further. It is just that we have to be a little bit careful with the Nixon case as to how far that would go without triggering a separation of powers fight and the other constitutional concerns.

Chairman PETERS. The other aspects or the other parts of the legislation you support?

Mr. TURLEY. I really like the certification requirements, particularly, in some ways because it reminds officials not to use these unofficial platforms and devices. I think there are two groups of officials we are dealing with, the sort of clueless and conspiratorial, right. A lot of people are just clueless. They move so casually between devices, you can forget. Certification sort of is a shot across the bow saying "this is not allowed." It also is a formal Federal statement that could be used against you if you say something false.

Chairman PETERS. All right. Thank you. Ms. Weismann, your thoughts.

Ms. WEISMANN. I think it is an excellent start, and actually more than a start. I really applaud how comprehensive it is. I think that it is really dealing with the major issues that we have seen and we have commented on. I support it wholeheartedly.

Chairman PETERS. Great. Thank you. Mr. Baron.

Mr. BARON. I support the provisions that I have seen. In particular, though, I think the bill addresses the fact that ephemeral messaging apps should be prohibited except when they are captured or archived in what I would hope to be in the same place that the Capstone email repositories are. I like that a lot.

I like the codification of Capstone being statutory or mandatory instead of voluntary. From my written testimony you know that I am a big advocate of new ways of dealing with search and with providing access to the American people, and the only way to do that is what the bill suggests, is have experts talk to the government. The government could learn from academia and industry about artificial intelligence, machine learning, and other analytics. I am a big proponent of that for the government.

Chairman PETERS. Thank you, Mr. Baron.

Ranking Member Portman, you are recognized for your questions.

Senator PORTMAN. Great. Thanks, Chairman. Thank you to the witnesses.

We talked about ambiguity a little, and earlier I mentioned that clarification is needed, and Professor Turley, you talked about how ambiguity can lead to problems. I think complexity can too, which is part of ambiguity, I suppose, but specifically, keeping it as simple as possible.

I was Associate Counsel to the President under President George H. W. Bush, the first Bush, and one of my jobs was to try to help interpret the rules at the time, which were actually far different than they are now. Then I served in the second Bush Administration as well, including at the Office of Management and Budget, so I had the same sort of issues with some of my team, which is just confusion about what the rules are. People come in and out of the Executive Branch, particularly at the White House, with some fre-

quency. Maybe in some of the agencies people stay longer. A lot of them are younger and a lot of them really do not have an intuitive sense of what this is about because it does not make sense, given their private lives and their work lives, where they are free to be able to destroy records that might be sensitive or even embarrassing.

What do you all think about that? Maybe start with you first, Professor Turley, since you talked about ambiguity, and I would add complexity there as an issue. You talked about the Capstone system as an example, which is not mandated, and that is confusing to people, I think. What are your thoughts on that?

Mr. TURLEY. Senator Portman, I think that your concern is more than justified in the sense that real people have to use these rules, and you do not want rules that only the White House Counsel and his experts understand. You need rules that your average official, sitting there, knows where that line is.

It may be one of the most unique hearings of my life. This actually would simplify things. Usually things get more complex around here. But we would simplify it in a couple of ways. One is by codifying Capstone you would have a consistent approach across the agencies, and it actually takes away a lot of decisions. It just goes ahead and preserves records.

By getting rid of the disposal authority in the White House, I do not really think the White House loses much. I have never understood why it was so necessary to have that, instead of just preserving it, leaving it for the archives. Then banning ephemeral systems once again creates a bright-line rule, as do these regular certifications.

In those terms I think this does create bright lines and actually simplifies things, because I readily agree with you that the only way that we will be able to successfully accomplish this mission is for people to understand where those lines are.

Senator PORTMAN. Yes, and the other part of this is—and I understand we are working on some legislation here to try to create brighter lines. But if the bright lines do not make sense to people, in other words, if it seems counterintuitive, that is an issue as well. And so personal communication as an example, how do you delineate that? Then this broader issue, that maybe all of the panel can talk about, which is really the balance of preserving records and the value of public disclosure, which we talked about, and the importance of confidentiality of certain sensitive, particularly Presidential communications. Where is that line?

Maybe Mr. Baron and Ms. Weismann, you could talk about that.

Mr. BARON. Thank you, Senator. I do want to say that your point about confusion is well taken, but there is a larger issue about compliance in the government. One of the reasons that Capstone is so successful, even though voluntary, on the part of about 200 Federal agencies, is because it automates the process. It takes the burden away from people so that the computer system, can basically take senior-level officials' emails and put them into an archive without anybody having to manually do anything. That is that point.

The rules of confidentiality, well, in one sense it is very important at the White House for every record is going to be perma-

nently preserved, and so FOIA does not apply. But FOIA does apply five years after a President leaves office, and so subject to restrictions. Records are confidential in some sense, but they need to be made. They need to be created. If ephemeral communications are essentially acting as an end run around normal recordkeeping, at the White House or in the Executive Branch, those records will not be preserved.

Senator PORTMAN. Yes. By "ephemeral" you mean using the apps that destroy the message after it is sent?

Mr. BARON. That is right.

Senator PORTMAN. Ms. Weismann.

Ms. WEISMANN. On the issue of confidentiality, we have a rich history and tradition of protecting that through the assertion of executive privilege, and in this respect I respectfully disagree with Professor Turley. I think the recent example with the assertion by former President Trump and the refusal of President Biden to recognize that assertion illustrates exactly that we have the right processes in place.

President Trump had the ability to fully explain his position and assert his interest in several courts, as did the President, and several courts weighed those assertions and made a decision, and they did so based on, a well-developed body of case law. Privilege claims are really the bread and butter of what courts do.

I think there are definitely protections already in place to ensure confidentiality. The PRA itself has those protections in place by providing for confidentiality for a set number of years. But we also now know that there are processes that a former President can use in order to protect interests that they believe need to be protected.

I am of the view that there are adequate protections already in the judicial system that we have.

Senator PORTMAN. Mr. Turley, a response to that?

Mr. TURLEY. I would respectfully disagree, and I do not think we are that far apart. I think we share many of the same values with regard to these laws, and I think we share the same conclusion as to this particular controversy.

What I was suggesting in my testimony is that there is an ambiguity here. I do not agree that the standard is so clear for Presidents that when they go to court that they can really address the full scope of the concerns here. If you procedurally are correct in the use of this act, the only thing that really a court can balance is a type of Nixon criteria as to separation of powers, and that is a standard that is largely still favoring disclosure in many of these cases.

All I am suggesting is that Congress can consider, in addition to these other proposals that cut back on the Executive Branch, it can consider articulating a clearer standard. It seems to me the standard on the shield laws fits sort of nicely with these issues. That if you take, for example, the Trump controversy and the override, I expect you could have gotten a bicameral vote to get access.

But putting that aside, the standard itself is simply suggesting that if you can get this information from another source, as we do under shield laws, that should be the first course that you would case. Because I think there is room for mischief in the future, and I am worried, because we see the terrible divisions in our politics

today. I am worried about President Biden and other successors in being able to feel confident that their communications will be confidential, particularly for that period immediately after they leave office.

Senator PORTMAN. Yes. I think that is a good point.

My time has expired, but if you all could make sure all three of you give us your specific views on the private right of action issue and whether there is a necessary standard and basis that you would think would be necessary in order for people to be able to pursue a private right of action. I have concerns about that, but I want to hear from each of you. If you could provide your written comments on that, that would be great.

Thank you, Mr. Chairman.

Chairman PETERS. Thank you, Ranking Member Portman.

Senator Carper, you are recognized for your questions.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thanks so much, Mr. Chairman, and to our witnesses, good morning and thank you all for joining us today.

I have three questions I am going to try to get to. One of those deals with the importance of Federal records management for accountability and transparency, and the second one deals with how the Presidential and Federal Records Act amendments of 2014 helped to improve transparency across the Executive Branch, and the gaps that still remain. The third question will focus on improving our role in records management through enhanced support.

I will start off, for each of our three witnesses, on the importance of Federal records management for accountability and transparency. Ms. Weismann, Professor Baron, and Mr. Turley.

I was fortunate enough to be Chairman of this Committee in 2014. Our Ranking Member was Tom Culvert. He and I took on the very important issue of modernizing the Presidential and Federal records to try to capture and archive electronic records, among other things. The legislation was bipartisan, and I am proud to say it was bicameral, because we all recognized that as public servants our duty was to provide transparency and to deliver results to the American people, for whom we work.

Ms. Weismann, followed by Professor Baron and Mr. Turley, for some the issue of Federal record reform can be pretty dry or even boring, in fact. Briefly, can you provide more context as to why every American should pay attention to this conversation? Why is this important?

Ms. WEISMANN. It is important because this is our history. These records tell our story, as a Nation. We cannot possibly understand how to chart a course forward if we do not understand what happened in the past.

They are also important for accountability. This Committee and other committees depend on the availability of records that explain what happened and why it happened. It is important for public accountability. Laws like the Freedom of Information Act would have no utility whatsoever if there were no records. Journalists would not be able to do their job if there were no records.

So, information is really the cornerstone of our democracy, and that is why it is so critical that this Committee act to take steps to ensure that records are preserved.

Senator CARPER. OK, great. Thanks so much. Professor Baron, the same question, if you would please. Why is this important to the American people?

Mr. BARON. Sure. Thank you, Senator. We are talking today about the Presidential Records Act and the Federal Records Act, when it was enacted in 1978, it made clear that the President's records, records of the White House, are not owned by a President. They are owned by the American people. That is the first point about accountability.

Second, with the Federal Records Act, ever since 1950, there has been a requirement that every agency in the government adequately document its activities. Ms. Weismann is exactly right. You have to create records and manage the records, preserve the records so that you can provide access to the American people of those records, and the Freedom of Information Act has been with us since 1966.

The problem in 2022, is that we are literally talking about billions of records in electronic form, something that agencies have not dealt with and the National Archives has not dealt with on that scale. It is a very timely hearing here, to be able to discuss what to do to move forward in the next decade so that we can continue to have accountability for the American people.

Senator CARPER. Good. Thank you, Mr. Baron. Mr. Turley, please.

Mr. TURLEY. Thank you, Senator. There is, as usual, much agreement between the three of us. Notably outside of the National Archives is a statute that says the past is prologue, and that is the premise of much of these laws, that we will repeat the errors of the past if we do not understand them, and we will not understand them unless we preserve the record of what has been done in the public's name. That is the reason, I think, all three of us share a natural default for preservation and a faith in the archives to make proper decisions.

But I also wanted to note that as we look at how these things work interstitially, between these laws, there are significant differences, surprisingly so, between the FRA and the PRA, on issues like disposal policies, that we can simply. I agree with Mr. Baron that by some of the things that all three of us are supporting here would actually bring greater clarity, and to Senator Portman's view, greater simplicity in we deal with these issues. I am a huge advocate for simplifying these rules so that people understand them.

Senator CARPER. OK, great. Thank you. My second question will be for Ms. Weismann and for Professor Baron. Former Senator Coburn and I set out to reform the Presidential Records Act, eight years ago, to establish a clear process by which incumbent and former Presidents could review Presidential records prior to their release and to improve the Federal Government's ability to capture and archive electronic records.

What are some lessons learned from these reform efforts, both Federal and Presidential recordkeeping, and what did Congress

miss that we should prioritize addressing now? Two questions. What are some lessons learned from these reform efforts for Federal and Presidential recordkeeping, and second, what did Congress miss that we should prioritize addressing now? That would be for Ms. Weismann and Professor Baron. Ms. Weismann, go ahead.

Ms. WEISMANN. I think one of the lessons learned is the need to keep pace with technology. Technology, as Jason Baron has been emphasizing, is both our savior and could eventually be the downfall of us all. We cannot keep pace with it.

I think the amendments that Congress has already made have been an important first step but they are a first step only. We need to deal in a more comprehensive and decisive way, especially with ephemeral messages.

Senator CARPER. Thank you. Professor Baron, same question, please.

Mr. BARON. I think the 2014 amendment did some important things. It modernized the definition of a Federal record in acknowledging expressly digital or electronic records were part of the world of recordkeeping.

But the lesson learned, I think, especially in the provisions related to non-official accounts and using them, is that there is a very difficult problem with compliance in government. If you leave individuals to copy or forward their electronic messages, they are very busy. You all understand that. Not everybody can copy or forward 100 messages a day. That is why I have been advocating for a long time that we automate the process. So between 2014 and 2022, because of compliance concerns, I think it is time to spend a moment here to talk about automation of recordkeeping and moving forward in that way.

Senator CARPER. All right. Thank you very much.

My time has expired, Mr. Chairman. I want to mention my third question, for the record. What does the National Archives and records administration require to ensure that agency can fulfill its mission, particularly in the digital age. I will ask that one for the record.

Again, our thanks to all of you for being with us today and helping us take up the issue that was important eight years ago when Senator Coburn and I led the effort on this, and it is important still today. Thank you very much.

Chairman PETERS. Thank you, Senator Carper.

Senator Lankford, you are recognized for your questions.

Senator LANKFORD. Mr. Chairman, thank you. Thanks to all of our witnesses in this conversation. Let me get to the human side of this as well, because the more you pull on people to say you have to give us every scrap of every piece, the more you incentivize people to work off the record, because they want to have private conversations. These are human beings as well.

Regardless of the administration or the perspective, every administration is looking for a way that we can actually just talk to each other without having to have everything that we have get pulled into this record, whether hit is Hillary Clinton and her private server, whether it is others that are trying to be able to pull into it and say, "I have to find some way to be able to have off-the-

record conversations for things," or whether it was Gmail originally, with multiple administrations now, or now messaging apps, to be able to make messages disappear.

My question to you is a larger, broader question. How do we process through a private conversation, that is a purely private conversation between two peers or two individuals, or even the President and his staff that is a private conversation and a public conversation, or would you define it as you are the President, you are on the President's staff, and everything you have should be actually gathered, you have no such thing as a private life?

Ms. Weismann, do you want to start with that? Mr. Turley, do you want to jump in?

Ms. WEISMANN. Yes. The Presidential Records Act itself defines Presidential record very broadly, and essentially you are correct—the President has no private life. That is as long as the President is acting in an official, constitutional, or ceremonial capacity, the records that are generated must be preserved.

Now I think the degree to which a President or an agency official can have a private conversation or keep certain records confidential is a separate issue that should be kept separate from the issue of preservation, because if you do not even have preservation, issues about potential privileges fall out altogether.

But I think the Presidential Records Act, at its heart, recognizes that because someone is the President, everything they do and say is relevant and important and needs to be preserved, unless they are acting in a purely personal capacity—a letter to a grandchild, for example—or in a purely political way—they are head of their political party. Those records are not preserved under the PRA, but otherwise it is all fair game.

Senator LANKFORD. Right. Mr. Turley, my question. Is this defined overly broad and it actually encourages people to be able to push outside the box?

Mr. TURLEY. It is exceptionally broad, but it is designed to be broad to have the natural default toward preservation. But I think your point is well taken, and more importantly, the Supreme Court views your point as well taken. The Supreme Court has repeatedly said that there is a danger when you chill communications in the White House. This is not for personal stuff. This is on official material, that you can have a chilling effect on people being willing to be open about issues.

When it comes to personal matters, my colleagues is correct, that technically, on a purely personal matter, it is not an official record. But because you are President of the United States there are very few things that people consider to be entirely personal.

The real gatekeeper there, for the White House, is the fact of the White House Counsel and the Archivist, who can help sort of delineate those lines, to create some breathing space.

I do think that it is important not to discount this, that is, yes, Presidents are political animals, but living in a fishbowl, on every level of your life, is not healthy. This goes back to what Senator Portman was talking about as well, that is we have to try, at least, to create these bright-line rules.

But I think the key role here is with the White House Counsel and the Archivist to make that as clear as possible, of what subjects can be done without that falling under the PRA.

Senator LANKFORD. Right. The clearest example of that is Congress does not live under that same rule. None of us here have the rule that we have no document, no scrap of paper, no anything that we have that cannot be destroyed and has to be preserved. Congress gets to choose what they are doing as far as what is private and what is public on that, and that does not seem to be so with the Executive Branch.

What I am trying to figure out is how do we create a system where we are incentivizing the preservation of records, because people want to know, they want to study it, they want to look back on the history. All of us are still upset with Martha Washington for burning every one of those papers, 250 years ago. We get that. But there is a whole series of things that are also dealing with the humanity of people that we also have to acknowledge on this and try to figure out how to be able to create a system where we are incentivizing keeping records rather than incentivizing actually trying to be able to work outside the system by a long term.

We have a challenge here with Congress as well in trying to be able to get documents from agencies, period, on this. For some reason, of late, it is faster to FOIA a record than it is for Congress to actually request a record. That has become a very significant issue where administrations are saying, "Yes, we have those records but we are not going to turn those over," but if there is a FOIA record, amazingly, of late, the records get turned over to Congress the same day the FOIA is released to an outside entity. That is a separate issue that we have to be able to determine what happens.

I have seen this even in requests that we made. Agencies are creating a new standard for religious accommodation for the vaccines. This has existed in agencies before, and so they released, out on the Federal Register, we are going to keep track of people that work in the Federal Government, what their religious preference is, and we are going store that in their records. We are going to request that from individuals and store it in their records. Suddenly now we have a record that I would assume would be FOIA-able at some point, or it would become a permanent part of record that people could actually get access to, that has personal information on their religious preferences. That gets into the mix of this. That is a different issue on records, but it becomes a pretty significant issue.

Professor Turley, do you have a comment on that?

Mr. TURLEY. No. I think that is absolutely true. I have another default, as a Madisonian scholar, and that is I tend to favor Congress and fights like this. I totally agree with you that there continues to be a lack of responsiveness, and this is not a Republican or Democratic issue. I do not know how many times I have testified about this.

Congress can do more to be aggressive enforcing disclosures. When they have gone to court they have largely prevailed, asserting their right to information. I do think that is something we have to look at very closely.

I also want to note something else. When you raised the fact that these laws can encourage, give sort of perverse incentive for people to go offline, that is well documented. We have previous administrations where officials admitted that they were meeting at Starbucks and finding ways to avoid creating paper records. Your concern is well founded, I think, in history.

Senator LANKFORD. Mr. Chairman, thank you.

Chairman PETERS. Thank you, Senator Lankford.

OPENING STATEMENT OF SENATOR LANKFORD

Mr. Baron, as you mentioned in your testimony, after 2022, NARA is going to no longer accept Executive Branch records in paper form. Could you explain to this Committee the magnitude of this policy change and the challenges it is going to pose to NARA and, quite frankly, the rest of the Executive Branch?

Mr. BARON. Senator, it is transformative. The fact that NARA will no longer take paper but only digital or electronic records means that over the course of this decade and beyond there will be tremendous amounts of records—I have said billions—that are coming. I am afraid that because of personal information in those records it is going to be very difficult to use current processes for the American people to get access to them. That is a very big challenge.

But the 2022 mandate from Archivist and OMB also means that after this year every Executive Branch agency is also going electronic. They are transitioning so that all of their records are being managed electronically, and that means that they need to categorize them in a certain way, and they need to dispose of them, and they need to search them for FOIA purposes. All of that is very difficult if you have tremendous amounts of electronic records that are there. We already see that in Capstone repositories, which I support wholeheartedly because it is an archive of emails that otherwise would never have been printed out and saved as government files.

We have to orient ourselves. We have to reimagine Federal recordkeeping to deal with these volumes that are coming.

Chairman PETERS. You talked about, in some of your previous technology, about technological advances in resources. Could you tell us more exactly what we are going to need to do and what sort of resources may be necessary to be able to get a handle around these documents?

Mr. BARON. Senator, as I stated in my written testimony, I have been a lawyer involved in e-discovery, electronic discovery, for the last couple of decades. The legal community knows what state-of-the-art machine learning can do for finding responsive documents and filtering them for privilege.

There seems to be a gap. There is the private sector that has some experience now with really state-of-the-art artificial intelligence, and not so much in government. There are some agencies that know about these tools from a litigator's perspective, but no one in the FOIA community and no one in the records management community are using machine learning for records management purposes, or if they do, they are very small numbers throughout the government.

We really need to have a conversation and have experts lead that conversation so that recordkeeping can deal with these large volumes of records. There are ways. There are tools that I know well about and lawyers know about in the community I practice in that can really be helpful to the government. Why not use them?

Chairman PETERS. Mr. Baron, NARA has sometimes been unable to keep up with the pace necessary to digitize records in a timely way, and certainly the pandemic has exacerbated this problem. The agency has struggled to reopen research rooms all across the country and has amassed considerable backlogs of requests as a result of that.

One particularly glaring example that I have noticed is the backlog of requests for veterans' records from the National Personnel Records Center. My question to you, sir, is, from your perspective, what is the primary reason behind these extensive backlogs and delays?

Mr. BARON. I could tell you that I am not at NARA anymore and so I cannot speak for them. But my understanding is that this is, as you say, a very big challenge, especially with veterans' records. Because of what NARA has done, which is to follow the Center for Disease Control and Prevention (CDC) guidelines on Coronavirus Disease 2019 (COVID–19), they have essentially not been able to get to the backlog, and that is unfortunate.

I do have good news about researchers and research rooms. I heard Archivist David Ferriero say, last week, that NARA is essentially giving limited appointments to researchers to come in to do their research, and hopefully that will expand to both, on a larger scale for research rooms to be open and for citizens be able to use NARA. We all want that.

I hear you. I understand that it is a large problem, but I think NARA is working on it.

Chairman PETERS. Ms. Weismann, current law does not set any requirements for the transfer of Presidential records to NARA at the end of the administration, beyond making NARA responsible for the records at the end of the President's term.

My question for you, does this lack of requirement around the transfer of Presidential records to NARA create some real problems for both preservation and access?

Ms. WEISMANN. Absolutely, and I think recent events really highlight this. From public reporting I can identify at least two problems that occurred at the end of the Trump presidency. First, according to public reports, because the President refused to accept the results of the election he delayed implementing the transfer of his records to NARA. This is not a job that can be kept to the last minute.

I think, in fact, what this Committee should consider legislatively is mandating that at the beginning of an administration the White House work with the Archivist to develop an accession plan with specific timeframes and goalposts in place, and that the Archivist be charged with monitoring that, the White House's compliance with such a plan, and that it advise Congress when there are problems.

The second very well documented or well-reported-on problem at the end of the Trump presidency was the fact that the President

took with him we now know at least 15 boxes of Presidential records, some classified at the highest levels. Now because of the volume of Presidential material that an individual President leaves behind, it is my understanding that quite commonly a lot of Presidential records remain at the White House, even though the President has left, but they are still considered to be under the legal custody and control of the Archivist.

Again, through legislation, Congress could make it clear that no record that is under the legal custody and control of the Archivist can leave the White House unless it has the express approval of the Archivist.

Those are two problems that we have recently experienced and two proposed fixes that I offer.

Chairman PETERS. Thank you, Ms. Weismann.

I would like to thank Ranking Member Portman for holding this hearing with me here today, and I would certainly like to thank each of our witnesses for joining us today in this important discussion and for providing your expert insights as to how we improve Federal records management.

The preservation of Presidential and Federal records is critical to preserving transparency and ensuring the Federal Government is working efficiently and effectively for the American people, and protecting our nation's historical record as well. I think as we heard from today's panel, the laws and the systems we count on to preserve these important documents are incredibly outdated, and Congress needs to take action not only to strengthen the records preservation process but to also ensure that Americans get timely and appropriate access to these important resources.

As I mentioned in my opening comments I am continuing to work on legislation that will modernize our recordkeeping practices, strengthen enforcement of our records laws, and bring the law up to date with the emerging technologies that we see on the horizon.

While NARA and the entire Federal Government have faced some serious challenges due to the lack of resources and accessibility, I certainly remain confident that we can address these challenges and increase transparency for every American. Again, thank you to our witnesses for helping us walk down that very important road to accomplish these ends.

With that the record for this hearing will remain open for 15 days, until 5 p.m. on March 30, 2022, for the submission of statements and questions for the record.

This hearing is now adjourned.

[Whereupon, at 11:09 a.m., the hearing was adjourned.]

APPENDIX

Chairman Peters Opening Statement As Prepared for Delivery
Full Committee Hearing: Correcting the Public Record: Reforming Federal and Presidential Records Management
March 15, 2022

I'd like to thank our witnesses for joining us today to help examine gaps in existing federal records laws, and to discuss how lawmakers can ensure the National Archives and Records Administration, or NARA, can adequately maintain and preserve presidential and federal records.

The federal government produces and receives an enormous volume of documents and records every day. These are essential to keeping an accurate account of what activities the government engages in, as well as ensuring that Americans, such as former servicemembers, are able to get to the benefits they have so rightly earned.

Accurate federal records are also critical to helping Congress hold the executive branch accountable, ensure appropriate use of taxpayer dollars, and make sure the federal government is working effectively for the American people.

However, officials in previous administrations of both parties have failed to adhere to current federal record-keeping requirements, and in some cases, blatantly disregarded them.

Whether administrations avoided creating records of meetings, used personal emails and devices, disappearing message apps, or attempted to obscure their decisionmaking processes, these failures to appropriately handle presidential and federal records have limited transparency for the American people, and risked letting critical moments in our nation's history slip through the cracks. This has left the door wide open for historical misrepresentations and distortion.
Most recently, we saw alarming reports that presidential records from the Trump Administration were destroyed inside the White House, and others were taken to the former president's private residence, rather than turned over to NARA.

And, although some of these records have been recovered, it is impossible for Congress to tell whether additional records have been destroyed or improperly handled, or if NARA has received all appropriate records from that Administration.

This lack of transparency, and other challenges related to enforcing our existing federal records laws, have made it difficult for NARA to ensure it is receiving all relevant presidential records.

Other challenges, including inadequate resources and technology, and the rapid proliferation of electronic records, have also complicated NARA's responsibility to preserve these essential documents.

For example, the National Personnel Records Center within NARA, which is responsible for storing military personnel records, faces a serious backlog of requests from veterans.

This backlog, along with limited accessibility during the pandemic, has left veterans unable to obtain critical documents that help them access benefits they depend on every day. That is unacceptable, and a key reason that Congress must urgently reform and modernize this process.

Additionally, outdated computer systems and outdated laws that regulate federal record-keeping have also made the mishandling of sensitive and important documents more common. This can have severe consequences for government transparency and could conceal fraud, waste, and abuse from Congress as we work to provide oversight of the federal government.

Despite these deficiencies, I remain confident that if this body works together, on a bipartisan basis, we can work to improve the federal record-keeping process.

I am currently working on legislation that will increase visibility, strengthen existing laws, update regulations, and modernize this process by using emerging technologies so we can ensure NARA can adequately preserve, and provide appropriate access to, presidential and federal records.

As we mark the 17th annual Sunshine Week, a nationwide initiative dedicated to educating the public about the importance of transparency in government, I look forward to discussing how Congress can further strengthen federal records processes and improve transparency for all Americans.

Today, I am grateful to welcome a panel of experts, who can discuss our federal records management in greater detail, help us identify gaps in the law and in its implementation, and broadly discuss what actions Congress can take to better protect the public record.

Opening Statement [as prepared]

Ranking Member Rob Portman

Homeland Security and Governmental Affairs Committee Hearing:

"Correcting the Public Record: Reforming Federal and Presidential Records Management"

Tuesday, March 15, 2022

Thank you, Chairman Peters.

There's a lot said these days about the pillars of democracy. I think one of those pillars is government transparency. That's an area I care about and work on a lot, such as when I sponsored the *Access to Congressionally Mandated Reports Act*, the *Open Courts Act*, and the *Regulatory Accountability Act*. But in order to have government transparency and accountability, we need a record of what the government is doing every day, both of what it's doing right and doing wrong. Then citizens can learn and hold their government and officials accountable. Having a fulsome record of government activity is also important to future generations of citizens, including journalists, historians, and thinks tanks, so they can learn and advocate for

improvement. So it's good that we're having this hearing today on reforming the Presidential Records Act and Federal Records Act.

This is bipartisan issue, by the way. I see from the prepared statements that some of our witnesses will reference our previous President's controversies, but will note, as do I, that administrations of both parties have had records-related controversies.

As a member of this Committee back in 2014, I worked on the 2014 Amendments to the Presidential Records Act and Federal Records Act. Among other things, it streamlined the process for making presidential records available to the public after they go to the National Archives; prohibits the use of non-official electronic messaging accounts by covered workers unless they copy or forward communications to official accounts; clarified the definition of government records so that it covers them regardless of what format they're in; and provided an enforcement scheme for violations.

But I recognize that the world has changed since 2014. Records have become more digitized. There are apps that make messages disappear. There's also technology that automatically categorizes documents. So I agree that we as a Committee should look into these

and other changes and see how the law might need updating to account for them.

And I'm glad we have these three experts here today to help us do that. I see they have all spent time dealing with records-related issues. So I thank them for testifying, and look forward to hearing what they have to say and engaging in discussion with them. Thank you.

STATEMENT OF JASON R. BARON, PROFESSOR OF THE PRACTICE,
UNIVERSITY OF MARYLAND, COLLEGE OF INFORMATION STUDIES

SUBMITTED TO THE U.S. SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS

"CORRECTING THE PUBLIC RECORD: REFORMING FEDERAL AND PRESIDENTIAL RECORDS MANAGEMENT"

March 15, 2022

Chairman Peters, Ranking Member Portman, and distinguished members of the Committee, thank you for the opportunity to submit testimony regarding proposed amendments to the Presidential Records Act (PRA) and the Federal Records Act (FRA). During a 33-year career in federal service, I served as a trial attorney and senior counsel in the Department of Justice (DOJ), and as the first appointed Director of Litigation at the National Archives and Records Administration (NARA). While at DOJ, I acted as the lead lawyer in litigation involving the preservation of White House email.[1] During my time both at DOJ and NARA, I have seen first-hand the introduction of new communications technologies that have transformed presidential and federal recordkeeping. I also became deeply involved in providing legal and policy guidance to federal agencies throughout the Executive branch on various aspects of recordkeeping policies and practices. Based on my experience in government, I believe that further amendments to the PRA and FRA are needed both to take into account recent changes in technology, and to generally improve the preservation of and access to presidential and federal records in electronic form.

As a recent GAO report stated:

> Records are the foundation of open government, supporting the principles of transparency, participation, and collaboration. Effective management of federal agency records is important for efficient government operations: it ensures that sufficient documentation is created; that agencies can efficiently locate and retrieve records needed in the daily performance of their missions; and that records of historical significance are identified, preserved, and made available to the public.[2]

In November 2011, President Obama issued a presidential memorandum on "Managing Government Records," that recognized the fact that

> [d]ecades of technological advances have transformed agency operations, creating challenges and opportunities for agency records management. Greater reliance on

[1] *Armstrong v. Executive Office of the President*, 810 F. Supp. 335 (D.D.C. 1993), *aff'd in relevant part*, 1 F.3d 1274 (D.C. Cir. 1993).

[2] Government Accountability Office, "Selected Agencies Need to Fully Address Federal Electronic Recordkeeping Requirements," GAO-20-59 (Feb. 2020), at 4, https://www.gao.gov/assets/gao-20-59.pdf.

> electronic communication and systems has radically increased the volume and diversity of information that agencies must manage. With proper planning, technology can make these records less burdensome to manage and easier to use and share. But if records management policies and practices are not updated for a digital age, the surge in information could overwhelm agency systems, leading to higher costs and lost records.[3]

The 2011 memorandum directed the Archivist to work with the Office of Management and Budget (OMB) in spearheading recordkeeping reforms aimed at recognizing and incorporating technological progress. To that end, the Archivist and the Acting Director of OMB jointly issued a "Managing Government Records Directive" (M-12-19),[4] instructing agencies (i) that after 2019, they were to manage their permanent records in electronic formats, for eventual transfer to NARA; and (ii) that after 2016, agencies were to manage electronic mail (e-mail) in electronic formats. This memorandum was in turn updated in 2019, again by a joint directive of the Archivist and OMB (M-19-21), entitled "Transition to Electronic Records."[5] The latter issuance extended the date until after December 31, 2022, for agencies to manage permanent records in an electronic format with appropriate metadata for eventual transfer to NARA. It also required agencies to manage all temporary records electronically to the fullest extent possible.

What have these memoranda meant for recordkeeping reform? First, NARA will no longer take in paper records created after 2022, meaning that over the coming decades NARA will face the need to preserve and provide access to literally billions of Executive branch records in electronic or digital formats. Second, agencies no longer have been able to continue outdated print-and-file methods for managing email, but instead must now provide for their electronic preservation. Third, agencies themselves are expected to manage *all* forms of electronic records electronically. These policy changes are to be applauded.

However, as salutary as these actions have been, the accumulation of electronic records that NARA and the government as a whole are experiencing, coupled with the need for agencies to incorporate new forms of communications technologies into their records management policies, together create unprecedented recordkeeping and access challenges. Failure to confront the gaps in current practices, combined with failure to seize the opportunity to use new technologies in support of recordkeeping, may have profound detrimental implications for the future of government accountability and transparency.

In what follows, I wish to address three of the specific legislative proposals under discussion.

(1) *Preserving Ephemeral Communications*

The accelerating growth in the use by government officials of ephemeral messaging poses a serious threat to traditional recordkeeping practices. Ephemeral messages

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[3] *See* https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records.
[4] *See* https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2012/m-12-18.pdf.
[5] *See* https://www.archives.gov/files/records-mgmt/policy/m-19-21-transition-to-federal-records.pdf.

> are intended to be short-lived, [with] the applications used to generate these communications . . . designed to enable automatic disposition or expiration of the messages. The specialized functionality of ephemeral messaging applications to delete these messages automatically or after a predefined duration (most often a very short time) also eliminates the message and (in some cases) the underlying metadata residing on the user's application *and* on the applications of those who either sent or received the messages in question.[6]

For example, the Confide website states that the app allows the user to "Discuss sensitive topics, brainstorm ideas or give unfiltered opinions without fear of the Internet's permanent, digital record and with no copies left behind."[7] That is because "Confide messages self-destruct. After they are read once, they are gone."[8] In similar fashion, Wickr's ephemeral messaging page titled "How private are my Wickr messages" states that Wickr "deletes all metadata from its communications and our Secure File Shredder cleans the RAM [its military application collaborative tool] after each message or picture is opened."[9] These forms of ephemeral messaging essentially contain a "self-destructive" feature that leads to the vanishing of those messages from history.

As the Committee is well aware, there have been numerous instances of attention-grabbing headlines involving the use of WhatsApp, Wickr, Confide, and Signal by White House staff,[10] by federal officials and employees,[11] as well as by State governors and other public officials.[12] A lawsuit by the public interest group Citizens for Responsibility and Ethics in Washington was filed, challenging White House recordkeeping practices over the use of Confide and Signal.[13] In 2017, Chairman Chaffetz of the House Oversight Committee sent a letter to 55 federal agencies

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[6] The Sedona Conference, *Commentary on Ephemeral Messaging*, 22 SEDONA CONF. J. 435 (2021) (emphasis in original).
[7] Confide, "Your Confidential Messenger," https://getconfide.com.
[8] *Id.*
[9] *Wickr*, https://support.wickr.com/hc/en-us/articles/115005145108-How-private-are-my-Wickr-messages
[10] *See* A. Parker & P. Rucker, "Upheaval is now standard operating procedure inside the White House," *Wash. Post* (Feb. 13, 2017), http://wapo.st/2ll71cl ("Staffers, meanwhile, are so fearful of being accused of talking to the media that some have resorted to a secret chat app—Confide—that erases messages as soon as they're read."); N. Fandos, "Jared Kushner and Ivanka Trump Use Private Accounts for Official Business" (March 3, 2019), https://www.nytimes.com/2019/03/21/us/politics/jared-kushner-whatsapp.html; *see also* Letter from Elijah Cummings, Chairman, H. Comm. On Oversight and Reform to Pat A.Cipollone, Counsel to the President (March 21, 2019), https://apps.npr.org/documents/document.html?id=5777681-Cummings-Letter-To-White-House-On-Kushner.
[11] A. Restuccia, et al., Federal workers turn to encryption to thwart Trump, *Politico*, Feb. 2, 2017, http://politi.co/2km4Qrb.
[12] S. Thompson, "Maryland lawmakers target Governor Hogan's self-destructing messages,: *Wash. Post* (Feb. 11, 2022), https://www.washingtonpost.com/dc-md-va/2022/02/11/hogan-wickr-deleting-messages/; C. Farivar, Judge Should Order Governor to Stop Using Ephemeral App, Lawyers Say, *Arstechnica* (Feb. 1, 2018, 6:03 AM), https://arstechnica.com/tech-policy/2018/02/lawyers-governors-secret-messaging-app use-violates-public-records-laws/; Nicole Galloway, CPA, Missouri State Auditor, Office of Attorney General, Review of Whether State Resources Were Used for Political Purposes," Report No. 2020-006 (Feb. 2020) at 5, 16, 17 & 146, https://app.auditor.mo.gov/Repository/Press/2020006600987.pdf; C. Dil, "D.C. mayor's WhatsApp use spurs stronger public records law," https://www.axios.com/local/washington-dc/2022/03/01/dc-mayor-whatsapp-public-records.
[13] *Citizens for Responsibility and Ethics in Washington v. Trump*, 302 F.Supp.3d (D.D.C. 2018), *aff'd*, 924 F.3d 602 (D.C. Cir. 2019).

on the subject of WhatsApp, Signal and Confide, stating that their use "could result in the creation of federal records that would be unlikely or impossible to preserve" and that they might end up "circumventing requirements establishing by federal recordkeeping and transparency laws."[14]

Notwithstanding the alarms that have been raised, some government agencies are continuing to go out of their way to promote the use of specific ephemeral apps. For example, a recent Customs and Border Protection (CBP) Inspector General report found that agency personnel used WhatsApp to share and then delete the information they shared with groups of hundreds of U.S. and Mexican officials.[15] And senior officials of the State Department were reported as using WhatsApp to discuss Ukraine policy in the last administration.[16] This is not surprising given that in prior years State Department officials have been quoted as giving encouragement to the use of WhatsApp to conduct diplomacy generally.[17]

It should be clear that in 2022 the ubiquity of smart phones used by ordinary federal employees, coupled with the popularity of messaging apps, effectively has enabled anyone in the federal government to communicate about government business in ways that amount to an "end-run" around the use of e-mail.[18] Yet despite Congress' best efforts to address the subject of electronic messaging generally, the emergence of the use of ephemeral apps as a substantial channel of communications nevertheless remains ineffectively regulated under existing law.

In enacting the Presidential and Federal Records Act Amendments of 2014,[19] Congress included a provision in each Act titled "Disclosure requirement for official business conducted using non-official electronic messaging accounts." Section 2911 of Title 44 provides that federal agency officers and employees "may not create or send a record using a non-official electronic messaging account unless" they copy (cc) the message to an official ".gov" account, or forward a copy of the message to a ".gov" account within 20 days of creation or sending of the message. Section 2209 of Title 44 contains parallel language governing the conduct of White House officials with respect to presidential electronic messages sent from non-official accounts.

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[14] Letter from Rep. Jason Chaffetz, Chairman & Rep. Elijah Cummings, Ranking Member, H. Comm. On Oversight & Gov't Reform, to Kathleen McGettigan, Acting Dir., Office of Personnel Mgmt. (Mar. 8, 2017), quoted in D. Stewart, "Killer Apps: Vanishing Messages, Encrypted Communications, and Challenges to Freedom of Information Laws When Public Officials 'Go Dark'," J. OF LAW, TECH. & THE INTERNET, 10:1 (2019), at 1-2.

[15] CBP Inspector General Report, OIG-21-62 (Sept. 20, 2021), at 29 & n.73, https://www.oig.dhs.gov/sites/default/files/assets/2021-09/OIG-21-62-Sep21.pdf (also noting that CBP officials "used WhatsApp to send and receive substantive messages that may be subject to recordkeeping requirements); *see also* Joseph Cox, "Customs and Border Protection to Use Encrypted App Wickr Widely," *Vice* (Sept. 28, 2021), https://www.vice.com/en/article/dyvmjm/customs-and-border-protection-cbp-wickr.

[16] T. Robinson, "Diplomats used WhatsApp personal phones to discuss Ukraine policy," SC Media (Oct.10, 2019), https://www.scmagazine.com/news/security-news/diplomats-used-whatsapp-personal-phones-to-discuss-ukraine-policy.

[17] A. Sandre, "WhatsApp for Diplomats," *Digital Diplomacy (*Aug. 13, 2018), https://medium.com/digital-diplomacy/whatsapp-for-diplomats-c594028042f1.

[18] *See, e.g.*, U.S. Environmental Protection Agency, Office of Inspector General Report No. 17-P-0062, "Congressionally Requested Audit: EPA Needs to Improve Processes for Preserving Text Messages as Federal Records" (Dec. 21, 2016), https://www.epa.gov/sites/default/files/2016-12/documents/_epaoig_20161221-17-p-0062.pdf.

[19] Pub. L. 113-187, 128 Stat. 2014 (Nov. 26, 2014).

There are two material weaknesses in the present language of sections 2911 and 2209. First, beyond the high-profile examples noted above, reporting shows that these provisions have largely been ignored with respect to various types of electronic messaging.[20] Second, these provisions have relied entirely on self-enforcement by individuals themselves, i.e., officials and employees are expected to take on the job of ensuring that every electronic message sent is accounted for through additional steps including either copying or forwarding of messages. Yet it is completely unrealistic to rely on individuals -- especially senior officials at the White House and at the top levels of the government -- to take the time to copy or forward every one of their government-business related messages. The growing use of "non-preservable" types of electronic messaging represented by WhatsApp, Confide, Signal, and the like, only heightens the risk that individuals will fail to comply with their recordkeeping obligations before those messages self-destruct.

Sections 2911 and 2209 do allow for disciplinary actions by an appropriate supervisor at the White House or at a federal agency. However, to my knowledge, few if any disciplinary actions for violations of these provisions have taken place in the seven years since their enactment. Given the importance of memorializing presidential communications, I support creating some kind of certification and reporting process being put in place to better ensure that all White House staff are aware of their recordkeeping obligations.

As a general matter, I am against wholesale prohibitions on the use of technology out of concern for cases of misuse. As NARA has stated, "[s]imply prohibiting the use of electronic messaging accounts to conduct agency business is difficult to enforce and does not acknowledge the way employees communicate."[21] In my experience, the vast majority of federal employees simply wish to use the latest means of communicating so as to be efficient in carrying out their official business -- not to evade their legal responsibilities. It must be recognized that electronic messaging in all its forms -- including on ephemeral apps -- has become near ubiquitous; these apps are just too easy and convenient to ignore. In my view, it would be a step backward to impose an across-the-board statutory ban on federal personnel using messaging apps for the transaction of government business.

There is, however, a way to control the use of such new technologies in a manner that promotes the recordkeeping laws and improves government accountability. Agencies should proceed to designate one (or two or three) specific ephemeral apps that can be used by staff for the conduct of official business. Those apps would be configured on both government-issued and personal phones so as to capture all communications sent or received on those apps, for retention consistent with existing recordkeeping requirements including for e-mail.[22] Use of other ephemeral messaging apps would be prohibited for government business.

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[20] *See, e.g.,* "Gone in an Instant: How Instant Messaging Threatens The Freedom of Information Act," Americans for Prosperity Foundation (2020), https://edu.americansforprosperityfoundation.org/gone-in-an-instant/; *see also* EPA OIG Report, *supra* n.18.

[21] NARA Bulletin 2015-02, https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html.

[22] *See* Everlands Sutherland, "Enforcement appears as messages disappear: The perils of personal and ephemeral messaging" (Jan. 6, 2022) ("Enterprise versions may allow companies to customize features, such as security and data retention settings, for users within the organization and may assist companies in maintaining control over communications."), https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/247357/Enforcement-

One further note: I am aware that in 2021 Congress enacted the Electronic Message Preservation Act (EMPA), codified in section 2912 of Title 44.[23] Section 2912 directs the Archivist to issue regulations regarding agency preservation of electronic messages constituting records, which would "require the electronic capture, management, and preservation of such electronic records . . . ." When NARA issues the regulations contemplated under EMPA,[24] they will be expected to play a positive role in ensuring that electronic messages in .gov accounts are further preserved. Section 2912 does not, however, go further in providing NARA with a mandate to prohibit federal employees from creating non-preservable records; nor is it clear whether NARA regulations will require that electronic messaging be archived in a manner consistent with its existing Capstone policy for email, as discussed in the next section.

A recent Americans for Prosperity Foundation report states the matter well: "The mechanisms that capture and preserve records must keep pace with technology for the system to be an effective tool to enforce executive branch integrity."[25] Without further legislative fixes, the accelerating growth of ephemeral applications and other forms of electronic messaging used as alternative channels of communications to "traditional" e-mail threaten to remove important records memorializing government decision making, including both in the White House and throughout the Executive branch.

Based on the above, I support making modest revisions to the existing language of sections 2209 and 2914 of Title 44 to make clear that federal officials and employees be prohibited from using non-preservable electronic messaging, unless such messages are forwarded to an official (i.e., ".gov") message account. These changes will fill in a gap in current law and promote government accountability. As stated, I also support building in a greater oversight mechanism in the case of presidential electronic messages, in the form of an enhanced certification or reporting process on the use of ephemeral communications by White House staff.

(2) *Codifying and Expanding Capstone Approach to Recordkeeping*

I have long advocated automating records management to relieve federal employees of the burden of having to take additional steps on a per-message basis to accomplish proper recordkeeping.[26] As of 2014, NARA agreed:

> [I]in many agencies, employees manage their own email accounts and apply their own understanding of Federal records management. This means that all employees are required to review each message, identify its value, and either delete it or move it to a recordkeeping system . . . NARA recognizes that placing the responsibility on employees to make decisions on an email-by-email basis

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appears-as-messages-disappear-The-perils-of-personal-and-ephemeral-messaging.

[23] Pub. L. 116-283, div. H, title XCVI, § 9602(b)(1), 134 Stat. 4828 (Jan 1, 2021).

[24] By its terms, EMPA required NARA to issue regulations one year after its enactment, with subsequent agency reports and reports to Congress to follow. *See id.*, §§ 9602(b)(2) & (3), 134 Stat. 4828 (44 U.S.C. 2912 note).

[25] Gone in An Instant at 19, *supra* n.20.

[26] Acceptance Remarks, 2011 Emmett Leahy Award Presentation, https://emmettleahyaward.org/2011-jason-r-baron.

can create a tremendous burden.[27]

The "Capstone Approach" or "Capstone policy" for managing email was developed in response to a growing recognition that alternative strategies relying on human involvement were not working.[28] A federal agency that chooses to adopt Capstone designates those senior officials within the agency whose e-mail accounts will be deemed "permanent records" of the federal government, for eventual transfer to NARA. Those agency designations are then approved by NARA.[29] As dictated by General Records Schedule 6.1,[30] full implementation of Capstone means that senior officials' emails will automatically be archived for permanent preservation, and all other employees within a Capstone agency or agency component will have their program-related emails archived for seven years.

The Capstone Approach can be improved and expanded upon through legislative action. First, as it is currently formulated, adoption of the policy remains voluntary. Thus, there is no guarantee that agencies will continue to adhere to a policy of permanent preservation of the email records of their most senior level officials. Refraining from further continuing under Capstone would, however, be an unfortunate blow to government transparency, as Cabinet level officials, their principal deputies, and a wide variety of other agency officials create and receive emails with attached policy memoranda that provide documentation of the most important agency business in each administration.

Second, not every agency has chosen to adopt Capstone as a means for managing their email. To date, over 200 agencies and components of agencies have submitted forms to NARA indicating the senior officials being designated as Capstone account holders.[31] In the case of other agencies, while presumably they are managing electronic records pursuant to the 2012 and 2019 Directives, it isn't clear to what extent those agencies are relying on senior officials themselves to preserve their own records -- a failed policy that Capstone was intended to supersede.

For these reasons, codification of the existing voluntary Capstone Approach to managing email is desirable.

Additionally, in conjunction with the proposed amendments on electronic messaging, the Capstone policy affords a straightforward means of capturing those messages in a way that enhances government accountability. As stated above, agencies should designate specific electronic messaging apps to be used for government business. In the case of Capstone account holders (i.e., designated senior government officials), the messages they send over officially approved channels would be captured and archived for permanent preservation as part of their Capstone account.

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[27] NARA Bulletin 2014-06, "Guidance on Managing Email," https://www.archives.gov/records-mgmt/bulletins/2014/2014-06.html.
[28] NARA, "White Paper on The Capstone Approach and Capstone GRS" (April 2015), https://www.archives.gov/files/records-mgmt/email-management/final-capstone-white-paper.pdf.
[29] NARA, "Capstone Forms," https://www.archives.gov/records-mgmt/rcs/schedules/capstone-forms
[30] NARA, "General Records Schedule 6.1: Email Managed under a Capstone Approach," https://www.archives.gov/files/records-mgmt/grs/grs06-1.pdf.
[31] NARA, "Capstone Forms," *supra* n.29.

My understanding is that NARA is open to the idea of issuing new guidance about expanding Capstone policies to include electronic messaging, and that one or more agencies may even be in the process of implementing such an expansion. However, for the same reasons as given above, I believe a statutory provision that locks in the Capstone Approach to include all forms of electronic messaging as used by senior officials will best ensure that important records across the entirety of government are permanently preserved, in furtherance of Congressional oversight, government accountability, and public access now and for future generations.

(3) *Improving Search Automation In Government*

a) *Using Machine Learning To Perform Better Searches*

The preceding discussion has been largely focused on shoring up gaps in current recordkeeping practices, especially with respect to electronic messaging. Paradoxically, at the same time there are pressing challenges the government faces due to the *abundance* of electronic records being accumulated. Two of the most important challenges are:

--first, a growing inability to search through electronic archives on a timely basis, including in response to Congressional requests, litigation demands, and citizen access under the Freedom of Information Act (FOIA). This includes the need to efficiently isolate exempt material from public access; and

--second, a failure to categorize and dispose of unstructured information across agency networks and shared drives, in accordance with legacy agency records schedules.

I believe an opportunity exists for Congress to greatly help modernize federal recordkeeping by making federal agencies aware of the latest software, services and expertise offered by industry and academia in the fields of artificial intelligence, machine learning and data analytics. Technology continues to move fast in these areas, and it is worth having an advisory body of experts explore how such cutting-edge tools can help solve the recordkeeping and access challenges the federal government faces.

Perhaps the most looming challenge involving government records is the need to use machine learning to search for responsive records on a timely basis.

Consider this: as a result of the *Armstrong* case,[32] first through backup tape restoration, and then after 1994 through email archiving, White House presidential emails from the Reagan Administration through the Trump Administration have been preserved and are in the legal custody of NARA. This collection spanning all administrations is estimated at this point to consist of around 600 million e-mails, comprising on the order of three billion pages.[33] Of this vast amount of records, to date less than 1/10 of a percent have been made accessible online.[34]

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[32] *See supra* n.1.

[33] Estimates are based on conversations with NARA staff.

[34] This estimate is based on personal knowledge and a review of NARA's websites. Emails that are publicly available include those released in response to various litigation and FOIA requests, as well as Congressional requests for the records of John Roberts, Elana Kagan, and Brett Kavanaugh in connection with their nomination

Given the enormous size of these collections, it is not surprising that NARA had difficulty searching records in time to meet a Congressional deadline to turn over all responsive documents in connection with the Kavanaugh nomination.[35]

Presidential emails at NARA are, of course, not the only enormously large and growing corpus of electronic records that need to be searched for Congressional, litigation-related, FOIA, and other access requests. As discussed above, the Archivist's call for federal agencies to transition to electronic recordkeeping by the end of 2022, coupled with what is already widespread adoption of the Capstone Approach for email preservation, all are resulting in a tidal wave of electronic records being stored within agency repositories. These repositories will grow into the tens and hundreds of millions, if not billions of records, during the next decade -- especially at the larger Cabinet departments. In my view, the time has come for federal records managers, FOIA officers, and other stakeholders throughout the Executive branch to actively consider adoption of machine learning-based search methods that are widely in use in the private sector.

It has been well known to the legal community for the past 15 years that manual or keyword searching of large amounts of electronically stored information is extremely time consuming and fails to achieve accurate results, both in terms of producing a huge number of false positive "hits" that need to be reviewed, as well as missing responsive documents to requests (false negatives).[36] Based on what was then cutting-edge research,[37] starting around 2012 courts gave their blessing to the use of machine learning methods in e-discovery -- as an alternative to keyword searching -- for the purpose of parties' finding responsive records in response to document requests.[38]

Machine learning (ML) "refers to a software programming technique that uses algorithms to autonomously improve decisions through analysis. The algorithms use statistical methods that enable machines to improve correlations as more data is used. This facilitates the machine's ability to automatically discover patterns in data which can be used to make predictions. The algorithms generally perform better as the volume of data available to analyze increases."[39]

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hearings to the Supreme Court.

[35] Letter from Gary M. Stern to Sen. Charles Grassley, dated August 2, 2018, https://www.archives.gov/files/foia/stern-letter-to-grassley-8-2-2018.pdf (stating that NARA could not meet the deadline for turning over all responsive documents in time for the hearing in light of the need to search through 900,000 emails).

[36] *Victor Stanley, Inc. v. Creative Pipe, Inc.,* 250 F.R.D. 260, 262 (D. Md. 2008) ("there are well-known limitations and risks associated with" keywords); "The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval in E-Discovery," 15 SEDONA CONF. J. 217 (2014) (J.R. Baron & M.Grossman, eds. in chief), https://thesedonaconference.org/sites/default/files/publications/217-264%20Search%20and%20Information_0.pdf

[37] See J.R. Baron, D. Lewis, D. Oard, "TREC-2006 Legal Track Overview," https://trec.nist.gov/pubs/trec15/papers/LEGAL06.OVERVIEW.pdf; M. Grossman & G. Cormack, "Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review," 17 RICHMOND J. LAW & TECHNOLOGY art. 11 (2011), http://jolt.richmond.edu/v17i3/article11.pdf.

[38] *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012) (Peck, Mag. J.), *adopted sub nom. Moore v. Publicis Groupe SA*, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

[39] NARA, "Cognitive Technologies White Paper: Records Management Implications for Internet of Things, Robotic Process Automation, Machine Learning, and Artificial Intelligence" (Oct. 2020) at 11, https://www.archives.gov/files/records-mgmt/policy/nara-cognitive-technologies-whitepaper.pdf.

Lawyers refer to these machine learning methods under various names, including "predictive coding" and "technology assisted review" (TAR).[40] Using TAR methods, lawyers in complex litigation are able to train algorithms to find responsive records in large universes of data much more efficiently and more accurately than using older methods. This is done by training the algorithm to recognize documents containing similar word patterns throughout the document.[41]

While there are legal offices across a number of federal agencies that have access to TAR-related software for purposes of meeting litigation demands, to date few if any personnel in records management or FOIA offices have ever employed this type of technology. As the 2018-2020 FOIA Advisory Committee report made clear

> The 2019 CFO [Chief FOIA Officer] Reports show that federal agency FOIA staff do not appear to be well-versed in how AI and machine-learning technologies may improve the efficiency of FOIA searching in ever-growing digital repositories. This software has not been generally deployed in the context of FOIA searches, nor has it been developed with an eye toward the types of record content with a range of sensitivities (e.g., personally identifiable information) found within components of the federal government.[42]

Based on my own recent experience over the past year in filing FOIA requests to over 25 agencies, I can also personally attest that agencies perform searches against their growing Capstone email repositories solely using keywords. So far as I am aware, no agency employs machine learning software to search for responsive records, or to ferret out exempt material within those records for purposes of withholding.[43] With respect to the latter point, recent research I have been involved in holds the promise that machine learning methods may be used to isolate FOIA exempt material in a way that will expedite human review.[44] This type of research should be promoted.

In sum, Executive branch agencies would do well to understand the power of machine learning search tools, which hold the potential to expedite searches while making them less labor-intensive. In 2020, the FOIA Advisory Committee to the Archivist made the following recommendation:

> The Archivist should work with other governmental components and industry in promoting research into using artificial intelligence, including machine learning

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[40] Thomson Reuters, "How to make the e-discovery process more efficient with predictive coding," https://legal.thomsonreuters.com/en/insights/articles/how-predictive-coding-makes-e-discovery-more-efficient

[41] M. Grossman & G. Cormack, "A Tour of Technology-Assisted Review," chap. 3 in J.R. Baron, R. Losey & M. Berman, PERSPECTIVES ON PREDICTIVE CODING AND OTHER ADVANCED SEARCH METHODS FOR THE LEGAL PRACTITIONER (ABA 2016), draft version of chap. 3 available at https://cormack.uwaterloo.ca/tour/tour.pdf.

[42] 2018-2020 FOIA Advisory Committee Report at 35, https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf.

[43] *See id.* at 22 (finding "no express mention by any agency [in their Chief FOIA Officer Reports] regarding the use of 'predictive coding' or 'technology assisted review' in conducting FOIA searches").

[44] J.R. Baron, M. Sayed, D. Oard, "Providing More Efficient Access to Government Records: A Use Case Involving Application of Machine Learning to Improve FOIA Review for the Deliberative Process Privilege," 15 JOURNAL ON COMPUTING AND CULTURAL HERITAGE, vol.1, art. 5: 1-19 (2022), https://dl.acm.org/doi/abs/10.1145/3481045 (pre-print at https://arxiv.org/abs/2011.07203)

> technologies, to (i) improve the ability to search through government electronic record repositories for responsive records to FOIA requests and (ii) identify sensitive material for potential segregation in government records, including but not limited to material otherwise within the scope of existing FOIA exemptions and exclusions.[45]

It is long past time to tap the expertise of private industry and academia in improving the capabilities of agencies to perform better searches in response to Congressional and public requests.

b) *Automating the Categorization of Records*

"In order to effectively address NARA regulations, agencies are to establish policies and procedures that provide for appropriate retention and disposition of their electronic records." A key part of retention is through the use of federal agency record schedules.[46] These differentiate records into permanent and temporary categories of records. In turn, "[d]isposition involves transferring records of permanent, historical value to NARA for the archiving of records (preservation) and the destruction of all other records that are no longer needed for agency operations."[47]

One longstanding challenge in the area of records management is the widespread existence of legacy records schedules from as far back as the 1980s, that are still being used by agencies despite the fact that "they do not reflect current business practices."[48] There are thousands and thousands of records schedules used government-wide.[49] Many of these contain a large number of records series, each differing in their assigned retention periods. This is out of sync with what NARA and private industry consider to be best practices in records management (including with respect to flexible scheduling of records into "bigger buckets").[50] As noted by NARA's Inspector General in 2019, NARA provides guidance to agencies on the subject of updating records schedules periodically, but the agency has declined to issue regulations specifying agency time frames for doing so.[51]

The result of a failure to update records schedules is not simply one of updating forms. As an Office of Personnel Management (OPM) Inspector General Report found, outdated records schedules lead to any number of undesirable outcomes, including increased storage costs,

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[45] 2018-2020 FOIA Advisory Committee Report at 35, *supra* n.42.
[46] 44 U.S.C. § 3303a; 36 C.F.R. § 1225.12.
[47] GAO 20-59, at 7-8, *supra* n.2.
[48] NARA Inspector General Audit of NARA's Oversight of Electronic Records Management in the Federal Government (OIG Audit Report No. 19-AUD-10) (June 11, 2019), at 24, https://www.oversight.gov/sites/default/files/oig-reports/audit-report-19-aud-10.pdf.
[49] *See* J.R. Baron, "The PROFS Decade: NARA, E-mail, and the Courts," chap. 6 in B. Ambacher, ed., THIRTY YEARS OF ELECTRONIC RECORDS (Scarecrow Press 2003), at 118 (citing to 17,000 records schedules in the Department of Defense alone).
[50] W. Saffady, "Big Bucket Retention: Objectives, Issues Outcomes," *ARMA Magazine* (Dec. 7, 2018), https://magazine.arma.org/2018/12/big-bucket-retention-objectives-issues-outcomes/; NARA, "Flexible Scheduling" (Jan. 2004), https://www.archives.gov/records-mgmt/initiatives/flexible-scheduling.html.
[51] OIG Audit Report No. 19-AUD-10 at 24, *supra* n.48. According to this report, NARA committed to notifying agencies that they were required to review schedules approved prior to 1990, but it is unclear how many agencies have taken such actions. *Id.*

decreased security where agencies keep records containing personally identifiable information (PII) longer than required, and increased FOIA response times due to the retention of unnecessary records.[52]

These problems are greatly compounded where agencies fail to enforce the specified retention periods in existing records schedules, regardless of the schedules' age. This is understandable given the volumes of electronic records that must be accounted for, and their numerous locations including on agency network and shared drives. In particular, most information on shared drives is unstructured (e.g., textual documents in Word or PDF, spreadsheets, etc.), and has been informally classified at the whim of individual employees through idiosyncratic naming conventions. But only a limited number of federal agencies have automated the disposition of electronic records on shared drives or elsewhere in accordance with their records schedules.

Although the above material weaknesses involving records schedules can be partially addressed through greater human involvement, consideration should be given to using machine learning and advanced analytical techniques in pursuit of modernizing and making electronic recordkeeping more efficient. The private sector is well-versed in using these technologies to automatically categorize records during their entire lifecycle, from creation through disposition. Using these tools, records can be initially classified based on document type and content, consistent with records schedule categories. Such tools also provide functionality for identification of sensitive or exempt material within records (e.g., PII), determining which records are subject to legal holds, and executing defensible disposition on an automatic basis in accordance with records schedules.

In Australia, at least one agency has adopted a machine learning and advanced analytics approach to records classification. According to one report, the Australian Human Rights Commission

> created a statistical model that can classify records against . . . the Commission's agency-specific records disposal authority. . . . The statistical model is developed by taking a set of records that have been manually classified and applying Natural Language Processing techniques to normalize the document content into vectors. The model is then trained using algorithms. After an initial training period, the . . . statistical model can categorize individual records with an accuracy of 80%. The Commission expects this accuracy will increase over time. [The model] also re-categorizes records each time they are edited, ensuring the classification is always current.[53]

NARA is aware of the potential of machine learning being used to further automate categorization and disposition of records. In a 2020 White Paper, NARA stated that it and records professionals should consider "[l]everaging AI and ML to identify records eligible for disposition and automating their destruction or transfer into NARA's Electronic Records

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[52] Inspector General Final Evaluation Report of the U.S. Office of Personnel Management's Preservation of Electronic Records, Report No. 4K-CI-00-18-009 (Dec. 21, 2018) at 5, https://www.opm.gov/our-inspector-general/publications/reports/2018/evaluation-of-the-us-office-of-personnel-managements-preservation-of-electronic-records.pdf.

[53] IDM Information & Data Manager, "Australian Human Rights Commission adopts machine learning" (June 7, 2019), https://idm.net.au/article/0012509-australian-human-rights-commission-adopts-machine-learning.

Archives (ERA)."[54] However, so far as I am aware, there has only been limited engagement by federal agencies in working towards putting in place automated methods that will satisfy federal recordkeeping requirements. That is why use cases regarding the applications of these techniques are deserving of further serious study and analysis.

In recent years the use of artificial intelligence in government operations and services has received high-level attention, including through the issuance of an "Executive Order on Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government."[55] Consistent with the aspirational goal of using forms of AI and advanced analytics across all government operations, I strongly support the convening of an advisory committee with the expertise to advise the Executive branch on what constitute state-of-the-art machine learning and advanced analytics tools to help address the profound recordkeeping issues that the government faces, especially due to the astronomical numbers of electronic records now being created.

Additional Thoughts

I wish to congratulate the outgoing Archivist of the United States, David Ferriero, who deserves enormous credit for his role in advancing the cause of electronic records management. I would also be remiss in failing to point out that NARA provides a great amount of guidance to agencies on issues relating to electronic records management, including in recent years setting up providing best practice frameworks for agencies to follow.[56] NARA is well aware of the challenges I have addressed in my remarks here today, including a vision of the government using various forms of artificial intelligence in the future.[57] I was proud to work for 13 years at NARA, and I remain close to many of my former colleagues. My testimony today is not in any way intended to be critical of NARA's heroic efforts to reform electronic records management.

Congress can, however, play an important role in enacting recordkeeping reform measures that take into account new technologies and the evolving nature of government business. I believe that the modifications to the PRA and FRA as outlined here are a needed step to address the looming recordkeeping challenges that the government faces over the remainder of this decade.

Thank you for the opportunity to address the Committee and I look forward to answering your questions.

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[54] NARA Cognitive Technologies White Paper at 21, *supra* n.39.

[55] EO 13960 (Dec. 3, 2020), https://www.federalregister.gov/documents/2020/12/08/2020-27065/promoting-the-use-of-trustworthy-artificial-intelligence-in-the-federal; *see also* "Executive Order on Maintaining American Leadership in Artificial Intelligence" (EO 13859), dated Feb. 11, 2019, https://www.federalregister.gov/documents/2019/02/14/2019-02544/maintaining-american-leadership-in-artificial-intelligence (calling for AI efforts within government to be coordinated).

[56] *See, e.g.,* the Federal Electronic Records Modernization Initiative (FERMI), https://www.archives.gov/records-mgmt/policy/fermi.

[57] NARA Strategic Plan 2018-2022, § 1.1 ("Explore cutting-edge technologies such as advanced search to automate processing of large volumes of electronic records"), https://www.archives.gov/about/plans-reports/strategic-plan/strategic-plan-2018-2022; *see also* A. Boyd, "National Archives Wants to Use AI to Improve 'Unsophisticated Search' and Create 'Self-Describing Records'," Nextgov (Apr. 16, 2021), https://www.nextgov.com/analytics-data/2021/04/national-archives-wants-use-ai-improve-unsophisticated-search-and-create-self-describing-records/173417 (AI methods to assist searches of publicly available online records).

HEARING OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
United States Senate

"Correcting the Public Record: Reforming Federal and Presidential Records Management"

March 15, 2022

STATEMENT OF ANNE L. WEISMANN

Chairman Peters, Ranking Member Portman and distinguished members of the Committee thank you for the opportunity to testify today about needed reforms to the Presidential Records Act of 1978 (PRA) and the Federal Records Act (FRA).

I have spent many years seeking to enforce the provisions of both statutes through litigation to ensure the preservation of our nation's history and the accountability that comes from public access to government information. In that capacity I have experienced the frustrating limitations of these laws. Today I highlight some proposed reforms to address those limitations and ensure the statutes' continued vitality in a digital age.

Both the PRA and the FRA fall short in two significant respects. First, neither law contains sufficiently effective enforcement mechanisms, which has placed the preservation of our historical record at considerable risk. Second, as products of an era when the government operated exclusively in paper, neither has kept pace with changing technologies. Recent events highlight these problems, but their origins date back decades, accelerated by the transition to a digital environment.

Congress enacted both statutes at a time when the government conducted business almost exclusively using paper (with the notable exception of President Nixon's pervasive use of a sound-activated taping system). Today's technological advances include technology that "Richard Nixon could only have dreamed of . . . message-deleting apps that guarantee confidentiality by encrypting messages and then erasing them forever once read by the recipient."[1] As we unfortunately have seen, government officials have taken advantage of these ephemeral messaging apps to conduct business in secrecy. In some instances, such as at the State Department where U.S. diplomats often use WhatsApp to communicate, officials are following the business practices of the international diplomatic community. But even if there is no intent to avoid creating a record the result may be the same—a gaping hole in our historical record.

Through the PRA Congress sought to "promote the creation of the fullest possible documentary record" of a president and ensure its preservation for "scholars, journalists, researchers and citizens of our own and future generations."[2] The PRA establishes the duty of a president to both create and maintain records while in office and the public's ownership of and eventual right to

[1] *Citizens for Responsibility and Ethics in Washington v. Trump*, 924 F.3d 602, 604 (D.C. Cir. 2019).
[2] 124 Cong. Rec. 344,894 (daily ed. Oct. 10, 1978) (statement of Rep. John A. Brademas).

access those records "under standards fixed in law."[3] Toward that end, the PRA directs presidents to

> take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records[.][4]

A key impetus for the law was President Nixon's efforts to retain ownership of and control over his presidential records after leaving office, including the right to destroy those records. Without a statute mandating preservation "[e]vidence vital to ongoing criminal investigations could have been permanently lost."[5] But while Congress intended the PRA to prevent this destruction, it omitted any enforcement mechanism. The legislators instead placed their faith in the commitment by future presidents to the rule of law, a faith that has been tested by recent revelations concerning President Trump's recordkeeping violations.

President Trump is by no means the first president to engage in practices that violate the PRA. Upon assuming the office of president many have felt the tug between a desire to shield their decisions from public view and the preservation requirements that the PRA imposes. President Reagan, for example, sought to protect from disclosure emails concerning the Iran-contra arms deal.[6] During Bill Clinton's presidency some of his staff, in response to advice from his White House Counsel about the risk of disclosure because of the PRA, stopped keeping diaries and conducted government business through private email accounts.[7] Vice President Dick Cheney's actions and statements suggested he believed the vast majority of his vice presidential records fell outside the reach of the PRA, which prompted a lawsuit by Citizens for Responsibility and Ethics in Washington. In response, the White House and the National Archives argued—unsuccessfully—that the court lacked authority to review that classification determination.[8] Staff from the Obama White House met at coffee shops to avoid having a record of their meetings created. These off-the-record coffee shop meetings undermined the agreement of the Obama White House to make visitor logs publicly available in settlement of a lawsuit brought by Citizens for Responsibility and Ethics in Washington.

This trend has only continued. From the earliest days of the Trump administration reports described top White House officials using ephemeral messaging apps to conduct government business in secret. I served as one of the lead attorneys in a lawsuit filed on behalf of historians and good government groups challenging this use of self-deleting messaging apps.[9] The U.S. District Court Judge hearing the matter noted that "[t]he use of automatically-disappearing text

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[3] H.R. No. 94-1487, 95th Cong. 2d Sess. § 2 (1978).
[4] 44 U.S.C. § 2203(a).
[5] 124 Cong. Rec. 36,845 (daily ed. Oct. 13, 1978) (statement of Sen. Charles H. Percy).
[6] *See* John Langford, Justin Florence, Erica Newland, Trump's Presidential Records Act Violations: Short-and-Long-Term Solutions, *Lawfare*, Feb. 18, 2022, https://www.lawfareblog.com/trumps-presidential-records-act-violations-short-and-long-term-solutions.
[7] *Id.*
[8] *Citizens for Responsibility and Ethics in Washington v. Cheney*, 593 F. Supp. 2d 194, 216 (D.D.C. 2009).
[9] *Citizens for Responsibility and Ethics in Washington v. Trump,* 302 F.3d 127 (D.D.C. 2018).

messages to conduct White House business would almost certainly run afoul" of the PRA.[10] Ultimately, however, judicial precedent forced him to conclude that the statute left no role for a court to enforce its provisions. The D.C. Circuit agreed, which left the White House, like predecessor administrations, free to continue its use of message deleting apps even though their use runs "afoul" of the PRA.

Subsequent reporting documented that President Trump was affirmatively refusing to create records of his bi-lateral meetings with Vladimir Putin and Kim Jong-un. Not only did President Trump insist that no recordkeeper be present for those meetings, but after one with Putin he seized the translator's notes and ordered the interpreter not to disclose to anyone what the translator had heard, including to administration officials.[11] Again, we filed suit on behalf of good government groups and historians arguing the PRA imposed on the President an affirmative duty to create records documenting how he exercised his constitutional authority.[12] And again the District Court concluded that it lacked "authority to oversee the President's day-to-day compliance with" the PRA.[13] The Court noted, however, that it was up to Congress "to revisit its decision to accord the executive such unfettered control."[14] It also emphasized that its opinion "should not be interpreted to endorse, the challenged practices; nor does it include any finding that the Executive Office is in compliance with its obligations."[15] The implication was clear: even if the President were in violation of the law the court's hands were tied.

Near the end of President Trump's term in office these same groups brought a third lawsuit seeking to ensure preservation of presidential records during the transition to a new president.[16] The District Court declined our request for an interim order requiring the White House to preserve all documents until it resolved our lawsuit. The Court took the White House and its Justice Department counsel at its word that there was "absolutely no need for a preservation order" because the Justice Department had conveyed "preservation instructions" to the White House.[17] Subsequent events show that trust was misplaced.

After President Trump left office new details emerged about the extent of his recordkeeping violations in the face of repeated admonitions that his conduct violated the PRA. He tore up his memos, leaving White House records officers to tape them back together for accession to the National Archives. After leaving office President Trump took with him to Mar-a-Lago at least 15 boxes of records, many classified at the highest levels and including his letters with North Korean dictator Kim Jong Un.[18] It took a year for the National Archives to get these presidential records back, and we still do not know whether others remain in President Trump's possession.

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[10] *Id.* at 129.
[11] Peter Baker, Trump and Putin Have Met Five Times. What Was Said Is a Mystery, *New York Times*, Jan. 15, 2019, https://www.nytimes.com/2019/01/15/us/politics/trump-putin-meetings.html.
[12] *Citizens for Responsibility and Ethics in Washington v. Trump*, 438 F. Supp. 3d 54 (2020).
[13] *Id.* at 66.
[14] *Id.* at 64.
[15] *Id.* at 57.
[16] *National Security Archive v. Trump*, No. 20-3500 KBJ (D.D.C. Dec. 1, 2020).
[17] National Security Archive v. Trump, Transcript of Dec. 7, 2020 Hearing (Dkt. 12).
[18] *See, e.g.*, Jacquelihne Alemany, Josh Dawsey, Tom Hamburger & Ashley Parker, National Archives had to retrieve Trump White House records from Mar-a-Lago, *Washington Post*, Feb. 7, 2022, https://www.washingtonpost.com/politics/2022/02/07/trump-records-mar-a-lago/.

This history reflects a clear pattern by administrations from both political parties of ignoring the recordkeeping obligations that the PRA imposes. But I must emphasize that former President Trump's PRA violations far exceed those of previous administrations in both scope and severity. Throughout his time in office President Trump showed a brazen disregard for the PRA. But, as my litigation experiences demonstrate, the judicial system provided no relief, believing it lacked any authority to enforce the terms of the PRA. To be fair, courts are relying in part on the complete absence in the PRA of any enforcement mechanism either within or outside the executive branch. Why did Congress enact such a toothless law? It assumed presidents would voluntarily comply with the law both because they would surely recognize the rule of law as fundamental to our democracy and because they would want to preserve their place in history through a full historical record. We now have reason to question the efficacy of the norm-based system that underlies the PRA.

It is therefore up to Congress to transform the PRA from a toothless statute to one that achieves its intended purpose—preserving our history. Constitutional concerns may constrain how far Congress can go,[19] but they do not prevent Congress from enacting sensible reforms and, in the words of District Court Judge Amy Berman Jackson, "revisit[ing] its decision to accord the executive such unfettered control."[20] As a first step, Congress should establish a bright-line rule that all presidential records, given their inherent value, merit preservation by eliminating the disposal provision of the PRA, 44 U.S.C. §§ 2203(c)(e). The risk that historically valuable records will not otherwise be preserved far outweighs the risk that a president will be required to preserve records of limited value. And once a president's records have been accessioned to NARA, the Archivist would retain the authority to dispose of those with "insufficient administrative, historical, information, or evidentiary value[.]"[21]

Congress should further amend the PRA to require the White House Counsel to certify to the Archivist on a quarterly basis those PRA-covered employees who are in compliance with the statutory requirement to create and preserve their presidential records. Certification affords a level of accountability and transparency currently absent in the statute. Some of the recordkeeping abuses of past administrations might have been avoided had the White House Counsel been required to monitor and report on employee compliance.

Along these same lines, Congress should amend the PRA to require the Office of Administration—the entity within the Executive Office of the President that provides administrative and technical support EOP-wide—to report to Congress and the Archivist at least annually on EOP's implementation of the PRA and for those agency components their implementation of the FRA. This reporting mechanism can serve as an early warning system to avoid learning of recordkeeping violations after a president has left office and remediation may not be possible.

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[19] *But see Nixon v. Administrator*, 433 U.S. 425, 444 (1977) (upholding constitutionality of predecessor statute to PRA where the "Executive Branch remains in full control of the presidential materials" and executive privilege was available to project president's interests).
[20] *Citizens for Responsibility and Ethics in Washington v. Trump*, 438 F. Supp. 3d at 64.
[21] 36 C.F.R. § 1270.32(a).

The PRA should also impose a mandatory reporting requirement on the White House Counsel to advise the Archivist and the Attorney General of any actual, impending, or threatened unlawful removal or destruction of presidential records as well as persistent recordkeeping violations that the Counsel has not been able to resolve. The PRA should direct the White House Counsel, with assistance from the Archivist, to recover or restore unlawfully removed or destroyed presidential records and require the Archivist to notify and update Congress and the Attorney General on the violations and what actions the White House has taken to address them. This would leave control of a president's records within the Executive Branch while still providing an internal enforcement mechanism to ensure maximum preservation.

Through amendments to the PRA Congress should require the White House Counsel to share with the Archivist at the beginning of a new administration recordkeeping guidance for the EOP, and the Archivist should be required to post that guidance on its website. The public deserves to know and evaluate for itself whether a president has put in place adequate recordkeeping guidance to ensure the public's records are preserved.

Finally, Congress should conform the PRA with the technical realities of the 21st century by prohibiting the use of any technology that does not enable the preservation of records created by that technology. Correspondingly, Congress should mandate that all electronic messages no matter the system on which they were created or received should be preserved in an official White House recordkeeping system within 20 days of their creation and transmission.

These reforms are a small but necessary first step toward a more robust enforcement process and recordkeeping system at the White House in future administrations. They place critical restraints on an otherwise unfettered White House with respect to creating and preserving all presidential records—the ultimate goals of the PRA. And they ensure that technology does not outpace or threaten the viability of the statute.

Like the PRA the Federal Records Act also seeks to ensure the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government."[22] The FRA directs agency heads to document through agency records the "organization, functions, policies, decisions, procedures, and essential transactions of the agency."[23] Unlike the PRA, however, the FRA requires the Archivist to take action to remediate certain FRA violations by notice to the agency head and, unless corrected, a report of the problem to the President and Congress.[24] The FRA specifically directs agency heads, with the assistance of the Archivist, to initiate action through the Attorney General to recover unlawfully removed records.[25] When the agency head fails to act, the FRA directs the Archivist to request initiation of an action by the Attorney General with notice to Congress.[26]

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[22] 44 U.S.C. § 2902.
[23] 44 U.S.C. § 3301.
[24] 44 U.S.C. § 2115.
[25] 44 U.S.C. § 3106(a).
[26] 44 U.S.C. § 3106(b).

Courts have construed these enforcement provisions narrowly to limit suits by private parties to two types: (1) challenges to the refusal of the agency head or the Archivist to seek the initiation of an enforcement action by the Attorney General and (2) challenges to an agency's recordkeeping directives and guidelines.[27] In addition one court has recognized a narrow claim under the Administrative Procedure Act to challenge an agency's aggregate practice and policy as inconsistent with the FRA's legal requirements.[28]

These limitations may have made sense when the government functioned exclusively in a paper environment in which a destroyed document could not be recovered. By contrast, many digital records such as emails, leave a footprint that usually allows for their recovery. And digital methods of communication, including ephemeral messaging apps, provide additional ways to skirt the FRA's preservation requirements. The FRA, however, has not been sufficiently updated to reflect this new reality. As a result, compelling compliance with a large swath of the FRA essentially remains beyond the reach of the courts.

To address this gap in the FRA's enforcement scheme, Congress should amend the statute to require agency heads to create an administrative process to hear and remedy claims of unlawfully destroyed or removed documents and any other repeated violation of the agency's recordkeeping requirements. Such a process should permit the filing of administrative complaints by anyone harmed by the unlawful actions, which if supported by substantial evidence should trigger an administrative investigation. Congress should provide for judicial review of any administrative complaint on which the agency head, the Archivist, or the Attorney General fails to act after the passage of a specified time-period, provided the complainant can satisfy the standing requirements of Article III. Congress should limit a court's jurisdiction to only those claims supported by substantial evidence of unlawful conduct. This type of enforcement provision would strike the right balance between the need for additional remedies and the concern that courts would be clogged by lawsuits whenever an individual disagrees with an agency's records-related decision. And it would not place the onus on NARA alone, which has demonstrated an inability if not unwillingness to take on a more aggressive enforcement role.

The FRA, like the PRA, needs to be updated to reflect changing technology. Congress should impose an outright ban on the use of private devices and ephemeral messaging apps unless there is a system in place to automatically back up their content on federal recordkeeping systems. No business reason justifies the use of technology that does not permit a record copy to be created and preserved.

To combat the ever-growing problem of over classification—and the multi-year backlog of records awaiting declassification—Congress should require agencies with original classification authority to establish a "drop dead" date for declassification at the time of original classification, not to exceed 25 years. Upon reaching the drop-dead date the information should be automatically declassified, with limited and specified exceptions. Those exceptions should include information that clearly and demonstrably will reveal the identity of a confidential

[27] *See, e.g., Armstrong v. Bush*, 924 F.2d 282, 293, 294-95 (D.C. Cir. 1991).
[28] *Citizens for Responsibility and Ethics in Washington v. Pruitt*, 319 F. Supp. 3d 252, 258–60 (D.D.C. 2018).

human source or a human intelligence source or key design concepts of weapons of mass destruction. [29]

The PRA and FRA rest on the central proposition that government records, as the records of the people, play an essential role in creating a stronger democracy. They allow us to understand how and why our government has behaved. Despite their worthy goals, both statutes have proven to be no match for the wonders of technology and individuals intent on operating in secrecy and without accountability. The recent revelations raise a concern that this important issue will be dismissed as nothing more than partisan politics in Washington. I hope this is not the case. Absent a legislative fix, the gap in our historical record will continue to widen and government officials—including those at the highest levels—will feel empowered to ignore their recordkeeping obligations at will. How can we hope to chart a path for our future if we do not know what came before? As Thomas Jefferson noted, "Information is the currency of democracy." We must preserve and spend that currency carefully.

I look forward to working with the Committee on these important issues. I am happy to answer any questions you have.

[29] These are just some of the reforms that a broad spectrum of non-profit organizations has recommended. A full list of those recommendations is enclosed with this testimony.

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Presidential Records Act and Federal Records Act Reform
OVERVIEW

PRA Reforms

1. Eliminate the disposal provisions of the PRA to establish a bright-line rule that all presidential records merit preservation given their inherent value and the likelihood that few, if any, presidential records of a sitting president could accurately be characterized as being of no public interest.
2. Ban the use of private devices and disappearing messaging apps (on any device) unless there is a system in place to automatically back up content to a federal system.
3. Require the President to issue records preservation policy, including definition of records to be preserved, at start of administration to be reviewed by NARA.
4. Require the White House Office of Administration to monitor and report to NARA and Congress on EOP's compliance with the PRA.
5. Put proactive disclosure in PRA codifying that the White House is in charge of visitor logs.
6. Require an executive branch entity (such as the Office of Science and Technology Policy or Office of Administration, and/or NIST) to issue regular reports to NARA and Congress regarding the technological landscape to ensure that guidelines keep up with rapidly evolving technology and enable identification of systemic noncompliance.
7. Mandate the Archivist's disclosure of NARA's database on all foreign gifts received by the former President as soon as practicable and no later than three months after a President leaves office.

FRA Reforms

1. Ban the use of private devices and disappearing messaging apps (on any device) unless there is a system in place to automatically back up content to a federal system.
2. Establish a private right of action to allow private parties to bring enforcement actions to remedy FRA violations and give the Act's requirements teeth, while allowing agencies to set up an administrative process for recovering removed records or otherwise remedying violations.
3. Require proactive disclosure of all agency records retention schedules.
4. Increase funding for NARA to obtain advanced search software for the purpose of more efficiently searching presidential and federal records in their custody, in response to

Congressional inquiries, subpoenas, FOIA access requests, and other types of reference requests.

5. Create opportunities for external subject matter experts to assist NARA with reviewing, and providing guidance on, proposed records retention schedules.
6. Prohibit the National Archives and Records Administration (NARA) from censoring or otherwise altering exhibition materials in a misleading manner, whether or not the materials are official government records or content obtained from private entities.
7. Create summary record on retention schedules to assist with document identification.
8. Require NARA, with input from OSTP, to review advancements in communications technology and issue guidance every five years on approved technologies and how to appropriately use them.
9. Mandate that an automatic, "drop-dead" declassification date be embedded in newly created electronic records.
10. Establish an advisory committee charged with the responsibility of issuing specific recommendations on automating all aspects of electronic recordkeeping, including with respect to the management and preservation of records, as well as providing access to records.
11. Codify the Capstone approach to email, requiring that the email accounts of designated government officials at each agency be preserved permanently, and also to require capture of electronic messages sent by those officials in a Capstone account in line with FRA Reform #1.

Statement for the Record
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"Correcting the Public Record:
Reforming Federal and Presidential Records Management"

Committee on Homeland Security and Governmental Affairs
United States Senate

March 15, 2022

Chairman Peters, Ranking Member Portman, members of the Homeland Security and Governmental Affairs Committee, thank you for inviting me to testify today on reforming federal and presidential records management. Twenty years ago, I testified on the Presidential Records Act (PRA) and the need for reforms of our system for the preservation of presidential papers.[1] As demonstrated by recent controversies, these problems persist decades after the enactment of the PRA and the Federal Records Act (FRA).[2] The passage of time should demonstrate not only the need for substantial reforms, but also the bipartisan interests in supporting and strengthening these laws. The FRA and PRA are transformative laws that guarantee not only greater transparency but accountability for actions taken in the name of the public as a whole. It is said that those who cannot remember the past are condemned to repeat it. These laws guarantee that we will not just remember but understand our history so that we do not repeat past errors.

Forcing transparency in government has been a struggle for centuries. In the United States, both Democratic and Republican administrations have shown the same reflexive opposition to public disclosures and record preservation. Governments are risk adverse and public disclosures can fuel public questions and public criticism. It is particularly hard for citizens to prevail against the government when information is withheld. That is why citizen suit provisions and mandatory certifications are so essential. For those seeking transparency in government, it often seems like trying to move the world out of the way. Yet, the Greek mathematician Archimedes famously said, "give me a lever long enough and a fulcrum on which to place it, and I shall move the world." Laws like FOIA, FRA, PRA, and the Freedom of Information Act (FOIA) create a lever long enough to move government out of the way of

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1 United States House of Representatives, Committee on Government Reform, Subcommittee on Government Management, Information, and Technology, "H.R. 4187: The Presidential Records Act Amendments of 2002," April 24, 2002 (testimony of Professor Jonathan Turley). *See also* Jonathan Turley, *Presidential Records and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Control and Ownership of Presidential Records*, 88 Cornell Law Review 651-732 (2003).

2 *See generally* Presidential Records Act, 44 U.S.C. §§ 2201-09; Archival Administration, 44 U.S.C. §§ 2101-20; Records Management by the Archivist of the United States and by the Administrator of General Services, *Id.* §§ 2901-09; Records Management by Federal Agencies, *Id.* §§ 3101-07 (1988); Disposal of Records, *Id.* §§ 3301-14.

information. That lever rests on the fulcrum of Congress. Despite our many political disagreements, this is an area where people of good faith can come together in the interest of good government. It is possible to reach a balanced accommodation of both transparency and confidentiality while addressing new technologies and challenges under the PRA and FRA.

I have already written on the history of the Presidential Records Act, and I will not repeat that earlier academic work.[3] The PRA represented a clean break from the flawed view of past presidents that official papers were their own private property. The days have long past when presidents carry off records for private use or personal gain.[4] The struggles with Richard Nixon over his records proved transformative when Congress finally called the bluff of the White House and passed The Presidential Recordings and Materials Preservation Act of 1974. Four years later, Congress went further in the enactment of the PRA, requiring that the government "reserve and retain complete ownership, possession, and control of Presidential records."[5] That material includes:

> "All books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including but not limited to, audio and visual records, or other electronic or mechanical recordations, whether in analog, digital or any other form."[6]

For its part, the FRA defines "records" to include "all recorded information...made or received by a Federal agency under Federal law or in connection with the transaction of public business."[7] That broad scope, however, does not include personal materials, which can create uncertainty with new communication technologies and platforms.[8]

There was a reasonable accommodation for presidents in keeping material sealed to assure allies and aides that they do not operate in a fishbowl of exposure in dealing with the challenges of governance. Accordingly, prior to the conclusion of a president's term of office, a president can "specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record."[9] That authority, however, is not absolute and there are compelling reasons to override the assertions of a former president in the interest of disclosure.

The PRA has long met with presidential resistance. Starting most famously with Richard Nixon, presidents have used executive authority to modify access to the papers of their predecessors. George Bush did so in limiting access to the papers of Ronald Reagan. I was highly critical of that executive order,[10] which was later rescinded by President Barack Obama in his first executive order.[11]

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3 *See supra* note 1, Turley, Presidential Records and Popular Government.

4 See generally Bruce P. Montgomery, *Presidential Materials: Politics and the Presidential Records Act*, 66 The Am. Archivist 102-104 (2003).

5 Presidential Records Act, 44 U.S.C. § 2202 (1978) (amended 2014).

6 *Id.*at § 2201.

7 4 U.S.C. § 3301(a)(1)(A).

8 *Id.*at § 2201(excluding "official records of an agency ... personal records ... stocks of publications and stationary ... or extra copies of documents produced only for convenience of reference.").

9 44 U.S.C. § 2204.

10 Jonathan Turley, *An Odious Roadblock to History*, L.A. Times, May 5, 2002, available at https://www.latimes.com/archives/la-xpm-2002-may-05-oe-turley5-story.html.

11 Executive Order 13489, available at https://www.govinfo.gov/content/pkg/FR-2009-01-26/pdf/E9-1712.pdf.

The recent controversy over the removal of material by former President Donald Trump, including possible classified material, has magnified those concerns. As I stated publicly, such a removal would be in violation of not just the PRA but classification laws.[12] While, as president, Trump held the ultimate declassification authority, he had no authority to remove such documents after the inauguration of his successor. There were vulnerabilities highlighted in the controversy. The process took too long, roughly one-year, and the removal of some of these documents clearly should never have occurred. Still, we should not allow the perfect to be the enemy of the good. As concerning as these stories are, they show that the PRA did ultimately work in retrieving and protecting the material that was flagged. Classified material is subject to separate statutes and regulations in terms of unauthorized removal, storage, and access. We should address what occurred in this controversy, but it is equally important to address long-standing shortcomings in the federal law. The more important work under the Act can be found on issues relating to social media, electronic records, and contemporary recordkeeping.

The Committee should also review how the recent conflict over access to Trump records may warrant additional changes to the process. That is not to say that the actions were unwarranted. To the contrary, the recent overriding of President Trump's objections to the release of material sought in the investigation of January 6th was both lawful and justified.[13] January 6th remains one of the most traumatic and disgraceful days in our national history; a desecration of our Constitutional process.[14] Nevertheless, Congress should be concerned how such overrides could be used in the future and how this threat might chill communications by current or future presidents. It is possible that future committees or presidents will seek similar overrides to release records soon after the departure of a president. The PRA was designed to hamper such efforts, but the Committee may want to consider whether the balancing of these interests can be clarified and strengthened.

The greater focus, however, should be on new technological challenges and realities. The new communication technology that is so popular in our society has served to undermine the public-private distinction that is so central to the administration of the PRA and FRA. Indeed, social media and other dominant forms of communication have brought us full circle where we are again debating whether material is the personal property of a president or staff. This is not a unique problem to the PRA. Repeated scandals involving unsecure servers and e-mail systems have presented challenges to our laws and regulations governing classified information. Likewise, new media platforms used by federal employees have raised questions under the FRA and state preservation laws. This includes the use of WhatsApp and other platforms to deal with issues ranging from Customs and Border Protection communications,[15] to district business in

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[12] *See, e.g.,* Jonathan Turley, *Trump Accused of Taking Top Secret Material to Mar-A-Lago*, Res Ipsa (JonathanTurley.org), Feb. 11, 2022.

[13] H.R. 503, § 4(a), 117th Cong. (2021) (empowering the special committee to "investigate the facts, circumstances, and causes relating to" the January 6 attack; "identify, review, and evaluate the causes of and the lessons learned from" the attack; and "issue a final report to the House containing such findings, conclusions, and recommendations for corrective measures . . . as it may deem necessary.").

[14] *See* Jonathan Turley, *A Desecration of Democracy,* The Hill, Jan. 7 2021, available at https://thehill.com/opinion/judiciary/533084-a-desecration-of-our-democracy; Jonathan Turley, *The Case for Censuring Trump*, The Hill, Jan. 11, 2021, available at https://thehill.com/opinion/white-house/533693-the-case-for-censuring-trump.

[15] *Crew Sues for Records of CBP Contract with Wickr*, *"Auto-burn" Encrypted Messaging App,* CREW, March 2, 2022, available at https://www.citizensforethics.org/legal-

Washington.[16] The use of such technology is a personal choice by federal employees in their private communications. However, it also allows for easy evasion of both the PRA and FRA.

While I would be happy to discuss other proposals and issues, I would like to briefly discuss six possible areas of reform that would further advance the purposes of these laws.

1. Addressing New Technology. The PRA was first enacted when records were almost entirely reduced to paper form. Electronic and digital forms created major challenges for the Archives. The Congress enacted the Presidential and Federal Records Act Amendments of 2014, in part, to address such technology. The PRA expressly states that:

> (a) IN GENERAL.—The President, the Vice President, or a covered employee may not create or send a Presidential or Vice Presidential record using a non-official electronic message account unless the President, Vice President, or covered employee—
> (1) copies an official electronic messaging account of the President, Vice President, or covered employee in the original creation or transmission of the Presidential record or Vice Presidential record; or
> (2) forwards a complete copy of the Presidential or Vice Presidential record to an official electronic messaging account of the President, Vice President, or covered employee not later than 20 days after the original creation or transmission of the Presidential or Vice Presidential record.[17]

However, "adverse actions" only applies to intentional acts and are left to "an appropriate supervisor" for appropriate "disciplinary action."[18] The FRA has a similar standard.[19] The result is a loosely defined and loosely enforced standard.

Likewise, in 2021, Congress enacted the Electronic Message Preservation Act (EMPA), which requires the Archivist to promulgate regulations regarding agency preservation of electronic messages to "require the electronic capture, management, and preservation of such electronic records."[20] It adds that the Archivist "to the extent practicable" should extend these efforts to "other electronic records," a vague standard on the scope and mandate.[21]

This ambiguity magnifies the erosion of these standards in the face of new social media technology. Social media has become the dominant means of communication today, including for political speech.[22] There are over three billion social media users, each of whom spend an

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action/lawsuits/crew-sues-for-records-on-cbp-contract-with-wickr-auto-burn-encrypted-messaging-app/.

16 Martin Austermuhle, *D.C. Officials Using WhatsApp For City Business May Skirt Open Records Law*, National Public Radio, Oct. 9, 2019, available at https://www.npr.org/local/305/2019/10/09/768529012/d-c-officials-using-whats-app-for-city-business-may-skirt-open-records-laws?t=1570705980449.

17 44 U.S.C 2209 (a).

18 Id. at 2209 (b).

19 44 U.S.C. 2911 (a, b).

20 44 U.S.C. 2912 (a).

21 44 U.S.C. 2912 (b).

22 *See generally* Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 Harvard Journal of Law and Public Policy (2021).

average of two hours and twenty-four minutes a day on such sites.[23] That includes politicians and, most famously, former President Donald Trump, who had almost 90 million followers on Twitter before he was banned.[24] These platforms are now the primary form of communication, surpassing telephonic and mail communications by an overwhelming and growing margin.[25] Social media platforms have combined with a common desire of some officials to evade the requirements of the PRA, to effectively go "offline" in their communications. That risk is most evident in ephemeral messaging that is designed to delete itself like Telegram, WhatsApp, Wickr, and Confide.[26] Confide specifically markets the lack of a record in the use of its app.[27] One state report explained the challenge by Confide:

> "Confide is a messaging application or 'app' for smart phones. While messaging over Confide is substantially similar in many ways to ordinary text messaging, Confide has three principal features that distinguish it from ordinary texting. First, Confide immediately and automatically deletes messages once the recipient has read them, and those messages cannot be recovered. Second, the recipient of a Confide message cannot view the entire message at once but instead can view only several words at a time by scrolling his or her finger over the text. This feature is intended to prevent the retention of Confide messages by taking screen shots of the messages. Third, Confide advertises that it uses powerful encryption methods to preserve the security of messages." [28]

The use of such sites could effectively gut the PRA and FRA by creating off-grid options for officials seeking to evade disclosure or retention rules. As the Court in *Citizens for Responsibility and Ethics in Washington v. Trump*, stated "Richard Nixon could only have dreamed of . . . message-deleting apps that guarantee confidentiality by encrypting messages and then erasing them forever once read by the recipient."[29] It would be impractical and illogical to

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[23] *How Much Time Do People Spend on Social Media in 2021*? TechJury, Nov. 1, 2021 (available at https://techjury.net/blog/time-spent-on-social-media/).

[24] *Twitter Permanently Suspends Trump's Account*, BBC, available at https://www.bbc.com/news/world-us-canada-55597840.

[25] *Id.*

[26] These apps have been defined as "[a] messaging application that causes the sent message or video to disappear in the recipient's device after a short duration." PC MAG, *Definition of Ephemeral Message App*, available at https://www.pcmag.com/encyclopedia/term/ephemeral-message-app. *See also* Caroline Madison Pope, *Ephemeral Messaging Applications and the Presidency: How To Keep the President From Blocking the Sunshine*, 23 N.C. J.L. & Tech. 166 (2021).

[27] CONFIDE, https://getconfide.com/ ("Discuss sensitive topics, brainstorm ideas or give unfiltered opinions without fear of the Internet's permanent, digital record and with no copies left behind.").

[28] DARRELL MOORE ET AL., FINAL REPORT: AGO INQUIRY INTO USE OF CONFIDE BY STAFF OF THE GOVERNOR'S OFFICE (2018); *see also Kurt Starman, Now You See It, Now You Don't: The Emerging Use of Emerging Messaging Apps By State and Local Officials,* 4 Concordia L. Rev. 213 (2019). These apps have also raised similar issues on corporate governance. *See* Laura Palk, *Gone But Not Forgotten: Does (or Should) The Use of Self-Destructing Messaging Applications Trigger Corporate Governance Duties*, Harvard Bus. L. Rev. 115 (2017).

[29] *Citizens for Responsibility and Ethics in Washington v. Trump*, 924 F.3d 602, 604 (D.C. Cir. 2019).

ban all electronic messaging despite the challenge for the Archives.[30] However, Congress can bar the use of message-deleting or ephemeral messaging apps unless they are approved by NARA as modified to allow for preservation of messaging. The use of such an app to send a covered communication should be treated as a "creation decision" that documents "presidential activities"[31] and an automatic "disposal decision."[32] Absent such modified apps, the use of ephemeral systems for covered communications should be treated as an act of destruction of official records.

2. Deterring the Use of Unofficial Accounts for Official Business. On May 18, 2015, President Barack Obama sent out the first presidential tweet when he declared "Hello, Twitter! It's Barack. Really! Six years in, they're finally giving me my own account."[33] It has only been roughly seven years, but the plethora of social media sites and apps have created a nightmare for archivists. This problem is magnified by the casual use of such sites by people in their private lives. The movements between private and public systems can blur the status and protections governing certain messaging. Moreover, with the courts,[34] foreign powers,[35] and the White House[36] treating social media postings by a president as official statements, there is no categorical exclusion of such messaging by their conveyance in social media. Indeed, agencies now use social media and various messaging apps to explain policies and notify the public of important governmental decisions and programs.[37] Most individual officials move between private and public messaging systems repeatedly in any given day.

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30 NARA itself acknowledged this point: "Simply prohibiting the use of electronic messaging accounts to conduct agency business is difficult to enforce and does not acknowledge the way employees communicate." NARA Bulletin 2015-02, available at https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html.

31 44 U.S.C. § 2203(a).

32 44 U.S.C. §§ 2203(c)-(e).

33 President Obama, (@POTUS44), Twitter (May 18, 2015 11:38 AM), https://twitter.com/potus44/ status/600324682190053376?lang=en.

34 Jonathan Turley, *Supreme Court Upholds Travel Ban*, Res Ipsa (www.jonathanturley.org), June 26, 2018 (discussing the reliance on President Trump's tweets as official statements), available at https://jonathanturley.org/2018/06/26/supreme-court-rules-in-favor-of-travel-ban-in-major-victory-for-the-trump-administration/.

35 Sabra Ayres, *When Trump Tweets, Putin Is Briefed*, L.A. TIMES (Dec. 12, 2017, 9:30 PM), available at https://www.latimes.com/politics/washington/la-na-pol-essential-washington-updates-when-trump-tweets-putin-is-briefed-1513094902-html.

36 Elizabeth Landers, *White House: Trump's Tweets are 'Official Statements'*, CNN (June 6, 2017, 4:37 PM) ("The President is the President of the United States, so they're considered official statements by the President of the United States.") available at https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html.

37 *See* AI-MEI CHANG & P.K. KANNAN, IBM CTR. FOR THE BUS. OF GOV'T, LEVERAGING WEB 2.0 IN GOVERNMENT 28 (2008), http://www.businessofgovernment.org/sites/default/files/LeveragingWeb.pdf.

Despite scandals involving various prior officials from Hillary Clinton[38] to Jared Kushner,[39] officials continue to use unapproved servers and platforms for conducting of official business. While laws governing classified information bar such use, those laws have rarely been enforced in terms of criminal charges against officials in egregious cases.[40] There is clearly a lack of deterrence for high-ranking officials who seem to operate on the theory that it is always better "to ask forgiveness than permission." We need to strengthen the monitoring and reporting of such uses, including placing the onus on federal officials to disclose the use of such accounts for official business. This can be done by requiring annual certifications from top officials that they are not using such accounts. Such certifications not only remind officials to be wary of such practices but constitute a statement to federal officials that can be the basis for legal action if it contains false or misleading information.

3. Mandating Agency Adoption of Capstone Policies. NARA has long advocated the use of systems in which senior officials have their messages automatically preserved under what are commonly known as "Capstone" policies.[41] Under that system, "retention periods are determined by the role or position of the individual, rather than by the content of each email message."[42] Capstone would impose a tiered system under which the communications of high-level (or "capstone") officials would be maintained permanently by the agency while mid-level officials would be preserved for seven years, and lower-level officials would be preserved for shorter periods.[43] NARA and the General Accounting Office have pushed for the adoption of Capstone policies.[44] It is not clear why such systems should remain optional rather than mandatory. There

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38 Roselind S. Helderman & Tom Hamburger, *Clinton, on her Private Server, Wrote 104 Emails the Government Says are Classified*, Wash. Post, March 5, 2016, available at https://www.washingtonpost.com/politics/clinton-on-her-private-server-wrote-104-emails-the-government-says-are-classified/2016/03/05/11e2ee06-dbd6-11e5-81ae-7491b9b9e7df_story.html.

39 Philip Bump, *But Their Emails: Seven Members of Trump's Team Have Used Unofficial Communication Tools*, Wash. Post, March 21. 2019, available at https://www.washingtonpost.com/politics/2019/03/21/their-emails-seven-members-trumps-team-have-used-unofficial-communications-tools/.

40 Jonathan Turley, *Trump Accused of Taking Top Secret Material to Mar-o-Lago*, Res Ipsa (www.jonathanturley.org), Feb. 11, 2022, (discussing past controversies), available at https://jonathanturley.org/2022/02/11/trump-accused-of-removing-top-secret-material-to-mar-a-lago/.

41 *See, e.g.,* NARA, *White Paper on The Capstone Approach and Capstone GRS* (April 2015), available at https://www.archives.gov/files/records-mgmt/email-management/final-capstone-white-paper.pdf.

42 NARA, "Capstone Forms," available at https://www.archives.gov/records-mgmt/rcs/schedules/capstone-forms.

43 *Id.*

44 General Accounting Office, *Information Management: Selected Agencies Need to Fully Address Federal Electronic Recordkeeping Requirements*,
Report to the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Feb. 2020, 24 ("NARA's Capstone approach offers agencies the option of using a more simplified and automated approach to managing email that allows for the categorization and scheduling of email based on the work and/or position of the email account owner"), available at https://www.gao.gov/assets/710/706782.pdf.

should be a consistent system for senior officials across the various agencies in preserving electronic messages and records covered under either the PRA or FRA.

4. Eliminate Disposal Discretion. The role of the archivist on disposal policies remains more limited under the PRA than the FRA. Under the FRA, an Archivist not only has greater unilateral powers to address improper disposal plans but can enlist the Attorney General to stop such practices.[45] Much of the PRA still relies to an uncomfortable degree on the good intentions and actions of a president. A president is required to "assure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records."[46] However, a president can negate these protections and "dispose of those Presidential records ... that no longer have administrative, historical, informational, or evidentiary value."[47] The most the PRA does is force a delay of 60 days and notice to Congress.[48] While the schedule for such disposal is noticed under federal law with the Archivist, there remains a degree of fluidity in the protection of such material.[49]

Just as mandating a Capstone approach can produce greater uniformity and compliance, Congress can close the loophole under 44 U.S.C. §§ 2203(c)(e) for the designation of records as unworthy of preservation. That provision allows presidents to dispose of records that he or she deems as lacking significance. Under the current law, the Archivist can seek intervention from Congress on such disposal but that is no guarantee of preservation.[50] Given the easy storage of such records, it is not clear why these records should not be preserved and left to the Archivist to make such decisions. The historical or informational value of material may not be fully evident until years later. Indeed, it may not be evident to a president or White House staff. It is not clear why preservation is such a burden to risk the loss of potentially valuable records. The whole purpose of the PRA is to allow archivists to protect records and not leave such preservation determinations to presidents. This is loophole that only undermines that purpose.

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45 44 U.S.C. 2905(a) ("In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made."); *see also Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980) ("The Attorney General may bring suit to recover the record").

46 44 U.S.C. § 2203.

47 *Id.* at § 2203(c)(e).

48 *Id.* at 2203(c)-(d).

49 *Id.* at § 2203. The provisions states:

> (c)During the President's term of office, the President may dispose of those Presidential records of such President that no longer have administrative, historical, informational, or evidentiary value if—
>
> (1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and
>
> (2) the Archivist states that the Archivist does not intend to take any action under subsection (e) of this section.

50 *Id.* at § 2203 (d) ("copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date").

5. Greater Transparency and Enforcement. One of the most helpful aspects of the *American Records Act of 2022* is the increased requirements of quarterly certifications, as well as the availability of a private right of action for citizens. Ironically, the PRA is based on the important principle that presidential records are public, not personal, property. Yet, the public does not have the clear ability to protect its interests in such preservation. Instead, it must largely rely on Congress or NARA for disclosures and enforcement. The use of private attorneys general has long been vital in assuring enforcement of federal laws and negating any partisan bias or administrative reluctance within the government. That is particularly valuable in laws designed to inform the public. The D.C. Circuit noted in *American Friends Service Committee v. Webster* that the legislative history of the FRA "supports a finding that Congress intended, expected, and positively desired private researchers...to have access to the documentary history of the federal government."[51]

This private right of action, however, is only meaningful if citizens are given a basis for a lawsuit. Courts routinely reject complaints deemed speculative or based on mere conjecture.[52] These laws were not conceived for citizen enforcement. As the Supreme Court noted in *Kissinger v. Reporters Committee for Freedom of the Press*, the FRA's legislative history "reveals that [its] purpose was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole."[53] For private actions to have a true deterrent effect, the law must require the publication of evidence of possible violations. Otherwise, a complaint could be opposed as insufficiently supported in a motion to dismiss. Clearly, there must be some ability for NARA and a White House or agency to "work things out" without turning every disagreement into a public controversy. Yet, if the private right to action is to succeed, reports and policies must be more readily available to the public if private legal actions are to function effectively.

6. Strengthening Protections for Former Presidents. The five prior suggestions largely add restrictions to the Executive Branch in terms of compliance and reporting. It is also possible to balance those changes with added safeguards against legislative overreach. While I agree with the demand for records to investigate what occurred on January 6th, I have reservations on the scope of some of those demands and have concern for the use of this rationale in the future. There is a legitimate concern over political opponents in Congress or the White House using the statute to strip away needed confidentiality protections or nondisclosure periods. The PRA was designed to conform to the constitutional concerns laid out in *Nixon v. GSA* in protecting the need for presidential confidentiality and conferral.[54] The tension over such privilege claims has continued in dealings between incumbent presidents, former presidents, and the Archivist. During the Reagan Administration, the Office of Legal Counsel at the Department of Justice triggered litigation when it took that deference to an extreme degree in arguing that both the Archivist and an incumbent president must yield to the views of a former president on the status of documents and need for disclosure. That opinion would have gutted the NARA interpretation giving the Archivist the authority to reject such arguments. The Archivist's authority ultimately prevailed in court in *Public Citizen v. Burke*, which also reaffirmed that the incumbent president

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51 720 F.2d 29, 55 (D.C. Cir. 1983).

52 However, researchers have been successful in establishing standing in some critical cases on issues like disposal policies. *See American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 57 (D.C. Cir. 1983), and *Armstrong v. Bush*, 924 F.2d 282, 288 (D.C. Cir. 1991).

53 445 U.S. 136, 149 (1980).

54 *Nixon v. General Services Administration*, 433 U.S 425 (1977).

"is the constitutional superior of the Archivist" and "has the constitutional power to direct the Archivist, not [the former president]."[55]

Incumbent presidents have tended to support their predecessors, regardless of party affiliation, in the withholding of records under claims of privilege. In *Nixon v. General Services Administration*, the Supreme Court rejected the control of these records from a former president but did recognize that a former president can raise privilege assertions over the release of such material. It, however, stressed that "[t]he expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office." NARA itself recognizes its legal obligation not "[to] disclose any presidential record without first providing notice to both the former and incumbent presidents, through their designated representatives, so that they both have the opportunity to review the records in order to decide whether to assert a constitutionally based privilege."[56]

President Biden departed from that pattern but emphasized that the January 6th investigation represented an extraordinary circumstance. The question is whether Congress should consider a further protection to limit such exceptions and encourage that such extraordinary demands be based on broad support within Congress.

Under current law, access may be given to "either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available."[57] If Congress wanted to add an accommodation for former presidents, it could require a vote of both houses to override a former president's privilege assertion in the first four years following the end of his or her administration. As the Supreme Court noted, privilege concerns are at their apex in the years immediately after an administration and erode with time.

Congress could also require a greater showing for such overrides of presidential privilege assertions. Such standards are common in areas where constitutional values collide with oversight or investigative demands. A good example is the typical shield law protecting journalistic privilege where prosecutors must show that the material sought is "(i) is highly material and relevant; (ii) critical or necessary to the maintenance of a party's claim . . . and (iii) is not obtainable from any alternative source."[58] Unlike presidential privilege, journalistic privilege was largely rejected in court conflicts before the creation of shield laws. I have supported such shield laws on the state and federal levels for that reason.[59] If such protection is warranted for journalists, former presidents could argue that they should be afforded the same deference – at least for a defined period after they leave office.

A requirement of a bicameral override would simply add greater deliberation and consensus on such a move, even if both houses are controlled by the same party. To be sure, this is a significant accommodation, and it is not compelled by the Constitution. However, if Congress wanted to preserve the original effort to balance transparency and confidentiality, such a bicameral vote requirement would advance that purpose.

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55 *Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988).

56 National Archives and Records Administration, *Background on the Presidential Records Act*, available at https://www.archives.gov/files/foia/background%20on%20PRA.pdf.

57 44 U.S.C. 2205 (2)(c).

58 *See, e.g.,* New York Shield Law, N.Y. Civil Rights Law 79-h(c).

59 United States House of Representatives, Permanent Select Committee on Intelligence, *The Media and The Publication of Classified Information*, May 26, 2006 (testimony of Professor Jonathan Turley).

In conclusion, as a Madisonian scholar, I would like to claim a point of personal privilege and end by noting that tomorrow is the birthday of James Madison, our greatest Framer, and the genius behind our Constitution. If he were alive today, he would be 271 and we would all be the better for it. In his absence, however, I will appropriate his famous observation that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[60] In reality, Madison was speaking of the importance of public education, not public information per se, but he was drawing a nexus between a fully educated public and popular government.[61] These laws are premised on the belief, as stated in Shakespeare's *The Tempest*, that "what is past is prologue" – words inscribed at the very entrance of the National Archives.[62] Like an uneducated public, an uninformed public promises little more than the replication of past mistakes. That is a farce and a tragedy that we should all strive to avoid.

Thank you for the opportunity to speak with you today. I am happy to answer any questions that you might have at this time.

Jonathan Turley
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[60] *Letter from James Madison to W.T. Barry* (August 4, 1822), in The Writings of James Madison (Gaillard Hunt ed.), available at https://founders.archives.gov/documents/Madison/04-02-02-0480.

[61] The quote is taken from a letter to William T. Barry, the Lieutenant Governor of the State of Kentucky, and the line before his famous quote makes clear the context of Madison's remarks: "The liberal appropriations made by the Legislature of Kentucky for a general system of Education cannot be too much applauded." Thus, it cannot be said that it was a prophetic statement on the need for public information guarantees like the Freedom of Information Act. However, I do not agree that it is not relevant to such public information debate. Madison was speaking of the need to have an educated and informed electorate:

> "The American people owe it to themselves, and to the cause of free Government, to prove by their establishments for the advancement and diffusion of Knowledge, that their political Institutions…are as favorable to the intellectual and moral improvement of Man, as they are conformable to his individual & social Rights."

He also stresses how "Learned Institutions ought to be favorite objects with every free people. They throw that light over the public mind which is the best security against crafty & dangerous encroachments on the public liberty." When Madison was writing, not only was government much smaller with only a few agencies but such governmental information was exceptionally limited. However, Madison spent his life advocating for means to keep governments in check to protect individual liberty. In a separate letter on education, Madison referred to the "diffusion of knowledge" as "the only Guardian of true liberty." *Letter From James Madison to George Thompson*, June 30, 1825, available at https://founders.archives.gov/documents/Madison/04-03-02-0562. I expect, like public education, Madison would view public information as the same guardian, or at least a co-guardian, of true liberty.

[62] National Archives, Blog, *Larger Than Life Statues*, May 22, 2018.

THE NATIONAL COALITION FOR HISTORY

March 14, 2022

The Honorable Gary C. Peters
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman,

Thank you for the opportunity to submit our comments for the record on the issue of presidential and federal records management. The National Coalition for History (NCH) is a consortium of over forty organizations that advocates on federal, state, and local legislative and regulatory issues. The coalition comprises a diverse set of organizations representing historians, archivists, researchers, teachers, students, documentary editors, preservationists, genealogists, political scientists, museum professionals, and other stakeholders.

Recent allegations regarding the mishandling and destruction of presidential records by former President Trump and members of his administration have underscored the inherent weaknesses in the Presidential Records Act (PRA) of 1978 (44 U.S.C. ß2201-2209). We believe it is vital that the PRA be strengthened to ensure that such abuses of the law never reoccur. Effective enforcement measures, including appropriate penalties for noncompliance, are essential to establishing and maintaining sound record keeping practices.

Historians depend on the preservation of presidential records to educate the public and inform future generations. These records are also essential to smooth transitions in presidential administrations, which have traditionally taken place regardless of political party. Further, the preservation of records by any public entity is essential to democratic processes that depend upon appropriate public accountability.

This is not a partisan issue. We are not trying to redress actions that have already occurred. In fact, there may be no legal repercussions for the former president or members of his staff. Our concern is that this sort of behavior never be allowed to occur again, whether under a Democratic or Republican administration. Without access to the full record and routine business of an administration, future historians will lack the primary source material to present a full, rich, and accurate account of what occurred during this tumultuous time in our nation's history.

Unfortunately, while the PRA requires the preservation of presidential records, it fails to provide an effective means of enforcing compliance with the law. The role of the Archivist of the United States is strictly an advisory one. NARA provides incoming White House staff with extensive

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training on their obligations under the PRA.[1] In addition, NARA constantly reminds them of their compliance responsibilities.[2] Therefore, White House staff cannot claim they are unaware of their obligations to preserve records under the PRA.

We are equally concerned about the alleged use by senior White House staff of non-official electronic message accounts to conduct official federal government business. The PRA's charge includes the preservation of memoranda, letters, emails, and other written and electronic records related to the president's official duties. The 2014 amendments to the PRA mandate that any non-official electronic messages be copied or forwarded by the individual to their federal government account no later than 20 days after the creation or transmission of the message. Again, mechanisms must be in place to ensure these requirements are being met.

Reliance on so-called "guardrails" such as administrative procedures, legal norms, and precedents that have been established by previous administrations has been ineffective. These values are just that: values. They have no bearing on those in power and their staff if they are determined to undermine the process of preserving the factual record of their administration. The law does not discriminate and requires the preservation of ALL records, including those that do not cast the administration in a positive light.

There must be greater oversight of compliance with the PRA, including such measures as annual reviews and inspections by the Archivist. Due to separation of powers concerns, NARA cannot enforce the law's requirements. Congress must exercise its oversight responsibilities over the White House with respect to compliance with the PRA.

Acts of destruction and noncompliance with the Presidential Records Act demonstrate the need to strengthen the principles of transparency and accountability that constitute the bedrock of our nation's democracy. Congress must act swiftly to address these concerns since they exacerbate existing divisions in our country.

Sincerely,

Lee White
Executive Director

CC: Ranking Member Rob Portman

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[1] https://www.archives.gov/files/presidential-records-guidance.pdf.
[2] https://www.archives.gov/files/foia/Passantino%20Email%201%20of%202_redacted.pdf

OPEN THE GOVERNMENT

Statement of Lisa Rosenberg
Executive Director
Open The Government

before the SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
United States Senate

"Correcting the Public Record: Reforming Federal and Presidential Records Management"

March 15, 2022

Chairman Peters, Ranking Member Portman, and members of the Senate Homeland Security and Governmental Affairs Committee, thank you for the opportunity to submit a statement for the record regarding reforming federal and presidential records management.

Open The Government is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable and responsive government. Our broad-based coalition includes more than 100 organizations that, despite their diversity, are united by a belief that transparency is foundational to creating an accountable government.

For the past year and a half, Open The Government has worked with a group of coalition partners and outside experts to identify the most urgently needed legislative improvements to the Federal Records Act (FRA) and the Presidential Records Act (PRA). Our group came together because we are alarmed that current flaws in the FRA and the PRA undermine the creation and preservation of a complete and accurate historical record of government business.

The reforms our group has identified largely aim to address two underlying weaknesses in the FRA and the PRA that merit immediate congressional action. First, Congress must modernize the language in the FRA and the PRA to keep pace with new and emerging technologies that are used to conduct official government business. Second, Congress must strengthen enforcement mechanisms in the FRA and the PRA to ensure that individuals and agencies that violate records preservation and management policies are held accountable.

Existing Weaknesses within the FRA and the PRA
Congress enacted the FRA and PRA help keep our government open and accountable through the preservation of government records. Government records are the records of the people, and they offer the public a direct look into government decision-making. Despite the vital importance of records preservation, however, presidential administrations from both political parties have

taken advantage of both loopholes within the FRA and the PRA, and the lack of enforcement mechanisms that allow misconduct to go unpunished. These violations are a direct threat to our democracy and the public's right to government records.

History is rife with examples of FRA and PRA violations. The Reagan administration sought to conceal and destroy presidential records related to the Iran/Contra arms deal.[1] During President George H.W. Bush's administration, the White House destroyed telephone logs and other presidential records that otherwise would have been evidence in an ongoing congressional investigation.[2] White House personnel during the Clinton administration used private emails and even avoided keeping personal diaries after the White House counsel warned staff about PRA disclosure requirements.[3] In the early 2000s, President George W. Bush's administration disabled an automatic e-mail archive system that would have ensured preservation and went to court to argue unsuccessfully that the majority of Vice President Cheney's records did not fall under the PRA.[4] During the Obama administration, then-Secretary of State Hillary Clinton used a private server and failed to adequately preserve her records, and White House personnel frequently held official meetings at nearby coffee shops to avoid creating a record of the meeting through White House visitor logs (which the administration had previously agreed to do).[5, 6] During the Trump administration, the president routinely physically destroyed records by hand; senior White House officials used private devices and disappearing messaging apps to conduct official business without preserving those communications; and administration personnel used "burn bags" to destroy records.[7] In the months since former President Trump left office, revelations have continued to emerge about his administration's failures to properly preserve presidential and federal records.[8] Each of these violations led to minimal, if any, accountability for the perpetrators.

The instances referenced here underscore two important points. First, the FRA and the PRA—initially created during an era when government business was largely conducted on paper—are clearly no match for today's new and emerging technologies. Second, a lack of effective enforcement and accountability mechanisms leaves presidential administrations free to disregard their records preservation requirements knowing that they will not face any meaningful consequences.

Without congressional action to reform the FRA and the PRA, these violations will only continue, and our democracy will suffer as a result.

Recommendations

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[1] https://www.thenation.com/article/archive/the-first-email-scandal-long-before-hillary-clinton-iran-contra/
[2] https://www.nytimes.com/1992/11/21/us/bush-s-lawyer-says-aides-may-destroy-records.html
[3] https://www.newyorker.com/magazine/2020/11/23/will-trump-burn-the-evidence
[4] *Citizens for Responsibility and Ethics in Washington v. Cheney*, 593 F. Supp. 2d 194, 216 (D.D.C. 2009).
[5] https://www.justsecurity.org/45764/whadoes-presidential-records-act-private-email-use/
[6] *Citizens for Responsibility and Ethics in Washington v. Trump,* 302 F.3d 127 (D.D.C. 2018).
[7] See https://www.justsecurity.org/45764/whadoes-presidential-records-act-private-email-use/; https://www.npr.org/2019/03/21/705561586/kushner-used-private-email-to-conduct-official-business-house-committee-says; https://www.washingtonpost.com/politics/2022/02/05/trump-ripping-documents/;
[8] https://www.washingtonpost.com/politics/2022/02/07/trump-records-mar-a-lago/

Open The Government urges Congress to amend the FRA and the PRA to include updated language on technological advancements and stronger enforcement mechanisms.

Congress must amend both the FRA and the PRA to permit the use of private devices and disappearing messaging applications (apps) only if there is a system in place to automatically back up content to a federal system. Note this is not a statutory ban on the use of messaging apps, but rather a modest but meaningful reform to promote recordkeeping without infringing on individuals' ability to conduct government business efficiently.

As technology continues to evolve, Congress must ensure that there are regular, thorough reviews of advancements in communications technology that inform updated guidance every five years on approved technologies and how to use them. For presidential records, we recommend that the Office of Science and Technology Policy (OSTP), the Office of Administration or the National Institute of Standards and Technology issue these regular reports. For federal records, we recommend that the National Archives and Records Administration (NARA) lead this review with input from the OSTP.

To support the preservation, management and access to all electronic records, Congress must establish an advisory committee charged with the responsibility of issuing specific recommendations on automating all aspects of electronic recordkeeping.

These reforms will strengthen our recordkeeping practices, but they require additional support for National Archives and Records Administration (NARA). To ensure that NARA is properly equipped to take on these additional responsibilities, Congress must increase funding for NARA to obtain advanced search software for the purpose of more efficiently searching presidential and federal records in their custody, in response to Congressional inquiries, subpoenas, Freedom of Information Act access requests, and other types of reference requests.

We recognize that Congress faces important limitations on what enforcement mechanisms it can impose on the executive branch. We respect those constitutional limitations, but it is essential that Congress take steps to strengthen enforcement and accountability mechanisms in the FRA and the PRA to the extent possible.

As currently written, the FRA relies on the agency head or NARA bringing enforcement actions through referral to the Department of Justice to remedy violations and recover unlawfully removed records. Courts have allowed a narrow Administrative Procedure Act-based claim for private plaintiffs under certain circumstances, but plaintiffs in those cases cannot obtain direct relief from the court ordering the recovery of removed records. Congress must establish a private right of action to allow private parties to bring enforcement actions to remedy FRA violations and give the Act's requirements teeth, while allowing agencies to set up an administrative process for recovering removed records or otherwise remedying violations.

Although Congress is limited in what enforcement mechanisms it can put forward for PRA violations, increased transparency early on in a presidential administration can help bring potential violations to light before they become systemic issues. We urge Congress to require the White House Office of Administration to monitor and report to NARA and Congress on the

Executive Office of the President's compliance with the PRA. The Office of Administration should produce these reports no less frequently than annually, and these reports should be made available to the public.

These represent just a portion of the reforms that Open The Government and our collaborators feel are necessary to strengthen the FRA and the PRA. A full set of recommendations is enclosed with this testimony.

The FRA and the PRA are the foundation on which our nation's historical record is built. Presidential administrations from both political parties have demonstrated through their actions that the laws are currently unable to prevent recordkeeping violations or to hold individuals accountable for committing those violations. We know that we cannot rely on a norm-based system, and the courts have made it clear that their hands are tied when it comes to meaningful accountability.[9] It is up to Congress to fix the existing gaps in the FRA and the PRA to ensure there is always a complete and accurate record of history.

Open The Government thanks the committee for holding this important hearing, and we urge you to act to expeditiously strengthen the Federal Records Act and Presidential Records Act. If you have any questions or need additional information, please contact Lisa Rosenberg at lrosenberg@openthegovernment.org.

Sincerely,

Lisa Rosenberg
Executive Director
Open The Government

[9] *Citizens for Responsibility and Ethics in Washington v. Trump*, 438 F. Supp. 3d 54 (2020).

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Presidential Records Act and Federal Records Act Reform OVERVIEW

PRA Reforms

1. Eliminate the disposal provisions of the PRA to establish a bright-line rule that all presidential records merit preservation given their inherent value and the likelihood that few, if any, presidential records of a sitting president could accurately be characterized as being of no public interest.
2. Ban the use of private devices and disappearing messaging apps (on any device) unless there is a system in place to automatically back up content to a federal system.
3. Require the President to issue records preservation policy, including definition of records to be preserved, at start of administration to be reviewed by NARA.
4. Require the White House Office of Administration to monitor and report to NARA and Congress on EOP's compliance with the PRA.
5. Put proactive disclosure in PRA codifying that the White House is in charge of visitor logs.
6. Require an executive branch entity (such as the Office of Science and Technology Policy or Office of Administration, and/or NIST) to issue regular reports to NARA and Congress regarding the technological landscape to ensure that guidelines keep up with rapidly evolving technology and enable identification of systemic noncompliance.
7. Mandate the Archivist's disclosure of NARA's database on all foreign gifts received by the former President as soon as practicable and no later than three months after a President leaves office.

FRA Reforms

1. Ban the use of private devices and disappearing messaging apps (on any device) unless there is a system in place to automatically back up content to a federal system.
2. Establish a private right of action to allow private parties to bring enforcement actions to remedy FRA violations and give the Act's requirements teeth, while allowing agencies to set up an administrative process for recovering removed records or otherwise remedying violations.
3. Require proactive disclosure of all agency records retention schedules.

4. Increase funding for NARA to obtain advanced search software for the purpose of more efficiently searching presidential and federal records in their custody, in response to Congressional inquiries, subpoenas, FOIA access requests, and other types of reference requests.
5. Create opportunities for external subject matter experts to assist NARA with reviewing, and providing guidance on, proposed records retention schedules.
6. Prohibit the National Archives and Records Administration (NARA) from censoring or otherwise altering exhibition materials in a misleading manner, whether or not the materials are official government records or content obtained from private entities.
7. Create summary record on retention schedules to assist with document identification.
8. Require NARA, with input from OSTP, to review advancements in communications technology and issue guidance every five years on approved technologies and how to appropriately use them.
9. Mandate that an automatic, "drop-dead" declassification date be embedded in newly created electronic records.
10. Establish an advisory committee charged with the responsibility of issuing specific recommendations on automating all aspects of electronic recordkeeping, including with respect to the management and preservation of records, as well as providing access to records.
11. Codify the Capstone approach to email, requiring that the email accounts of designated government officials at each agency be preserved permanently, and also to require capture of electronic messages sent by those officials in a Capstone account in line with FRA Reform #1.