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

"Reforming Federal Records Management to Improve Transparency and Accountability"

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Chairman Peters, Ranking Member Paul, and distinguished members of the Committee, thank you for the opportunity to testify once again about needed reforms to the Federal Records Act (FRA) to strengthen one of the most critical components of transparency for the American public. A full historical record provides the essential infrastructure for laws like the Freedom of Information Act.

During my more than two decades at the Department of Justice and an equal time in the public interest community, I sought to ensure that the goals of the FRA were realized: government accountability to the public and preservation of our nation's history. Thomas Jefferson called information "the currency of democracy." We must preserve and spend that currency carefully. Without access to our national history, we risk repeating the errors of the past and an erosion of the fundamentals on which our democracy rests. Today I will highlight how Congress can do its part through reforms to the FRA to bring the statute into the technological age and ensure its continued vitality.

In 1950 Congress enacted the Federal Records Act to create a legal framework for managing federal records, from their creation and maintenance to their long-term preservation. Congress understood that agency records are an important part of our history and form a cornerstone of our democracy. Six decades later when President Barack Obama initiated a government-wide effort to bring records management policies and practices into the 21st century he too acknowledged that "[i]mproving records management will . . . promote openness and accountability by better documenting agency actions and decisions." Presidential Memorandum – Managing Government Records, November 28, 2011. But then, as now, ever changing technology and the government's failure to keep pace with that technology pose enormous challenges and obstacles to a more transparent and accountable government.

The Executive Branch confronting Congress in 1950 recorded its communications and actions almost exclusively on paper, and digital media was still the stuff of dreams. Today, by contrast, every part of the federal government conducts business through electronic communications that range from government-issued email accounts and telephones to ephemeral messaging apps that prevent the preservation of messages they send and receive. And while in 1950 a document's destruction created a permanent hole in our nation's history, today digital documents typically leave a digital footprint that allows for their recovery.

Unfortunately, our recordkeeping laws have not kept pace with this changing technology. Just as concerning, the National Archives and Records Administration (NARA) lacks both the will and the necessary enforcement tools to compel agency compliance with laws like the FRA. The

failure to modernize the FRA poses an unacceptable risk to the preservation of a full historical record. Congress must act now to give NARA more effective enforcement tools and the ability to impose greater and more specific recordkeeping responsibilities on all government employees.

Examples abound illustrating the depth of the problem. Previously U.S. Department of Homeland Security Inspector General Joseph V. Cuffari advised this Committee and the House Committee on Homeland Security that the U.S. Secret Service had destroyed text messages from January 5 and 6, 2021, purportedly as the result of a cell phone system migration. It subsequently came to light that text messages of then-Acting Homeland Security Secretary Chad Wolf and then-Acting Deputy Secretary Ken Cuccinelli for a key period leading up to the attack on the U.S. Capitol on January 6, 2021, also were erased by a reset of their government phones when they left government service.[1] This incident reveals several problems with our recordkeeping laws. DHS failed to fully account for the agency records of departing employees. Secret Service personnel communicated by text messages that were not placed in an agency recordkeeping system. And, despite the destruction of records that may contain critical evidence concerning the January 6 attack on the Capitol, the Archivist of the United States failed to initiate an enforcement action through the Department of Justice.

NARA's refusal to act in the face of an apparent recordkeeping violation poses an unacceptable risk that critical information explaining what happened on January 6, 2021 will be lost forever. The FRA's mandatory enforcement provision "'*requires* the agency head and Archivist to take enforcement action' through the Attorney General whenever they [become] aware of records being unlawfully removed or destroyed" and "leave[s] no discretion to determine which cases to pursue." *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 956 (D.C. Cir. 2016) (quoting *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991)) (emphasis in original); *see also* 44 U.S.C. §§ 3106, 2905(a). Indeed, the U.S. Court of Appeals for the D.C. Circuit has characterized this enforcement provision of the FRA as a key component.[2] Nevertheless in litigation and contrary to this authority, NARA has adopted an unduly cramped interpretation of the FRA's mandatory enforcement provisions that limits their application to only those records that are unlawfully *removed*. This leaves unaddressed the destruction of records.

In an even more troubling example, NARA and the Archivist refused to initiate an enforcement action through the Attorney General when presented with evidence that an agency inspector general appeared to have willfully destroyed federal records in response to a pending Freedom of Information Act request. That request sought documents that would shed light on the inspector general's previous actions to suppress evidence his staff had assembled on sexual harassment and misconduct at the agency. Unlike the situation with the deleted Secret Service text messages, the inspector general's deletion of his own text messages by his own admission was intentional and not part of an agency device reset. NARA asked the office of the inspector general to investigate the matter, the very same office headed by the inspector general whose actions were at issue. This approach virtually ensured there would be no accountability, especially given the statutory independence that inspectors general enjoy and their treatment as agency heads in other

[1] *See* Letter from Gary C. Peters, Chairman, U.S. Senate Committee on Homeland Security and Governmental Affairs to the Honorable Alejandro Mayorkas, Secretary, Department of Homeland Security, Aug. 10, 2022.
[2] *See Armstrong v. Exec. Office of the President*, 1 F.3d 274, 1279 (D.C. Cir. 1993).

contexts.[3] This incident highlights the need for an independent investigation of these recordkeeping violations by the Department of Justice with its panoply of investigative resources. NARA, however, once again refused to initiate an action through the Attorney General, insisting in a letter to the Project On Government Oversight that "DOJ does not generally have a role to play in helping agencies recover records that have been improperly destroyed or deleted."

NARA bases its interpretation on section 3106 of the FRA, which addresses the unlawful removal or destruction of records," 44 U.S. § 3106. That provision requires an agency head to notify the Archivist "of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, *or other destruction of records* in the custody of the agency[.]" *Id.* at § 3106(a) (emphasis added). In those instances, the agency head, with the assistance of the Archivist, "shall initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from the agency[.]" *Id.* If the agency head fails to initiate the required recovery action through the attorney general "after being notified *of any such unlawful action described in subsection (a)*," the Archivist "shall request the Attorney General to initiate such an action[.]" 44 U.S.C. § 3106(b) (emphasis added).

Section 3106 of the FRA is titled "Unlawful removal, destruction of records." Subsection (a) of that provision requires the agency head to notify the Archivist about actual or threatened records destruction, among other things. Subsection (b) of that provision requires the Archivist to initiate an action through the attorney general upon notice of the laundry list of unlawful actions listed in subsection (a), including document destruction. Despite this language, NARA has insisted that the Archivist's obligation to initiate an enforcement action through the Attorney General runs only to those records that have been unlawfully removed. In other words, NARA believes no referral to the Attorney General is warranted when the Archivist learns that records have been unlawfully destroyed.

NARA draws support from the fact that outside of the FRA DOJ may use replevin actions to seek recovery of unlawfully removed records, as it explained to the Project On Government Oversight when that organization challenged NARA's failure to refer the matter to the Attorney General. NARA's extra-textual argument ignores the entirety of section 3106 of the FRA and its clear purpose. It also ignores the authority accorded DOJ apart from the FRA to criminally prosecute the destruction of a public record or document, 18 U.S.C. § 1361, including by a records custodian, 18 U.S.C. § 2071. But how is the Attorney General to know of a violation if the information stays with the Archivist? With both unlawfully removed and unlawfully destroyed records the Attorney General has available legal mechanisms to pursue the documents' recovery and redress willful destruction. Accordingly, and contrary to the suggestion of the Archivist, referral to DOJ is more than an empty exercise.

NARA's position also ignores a series of decisions from the U.S. Court of Appeals for the D.C. Circuit starting with *Armstrong v. Bush*, 924 F.2d 292 (D.C. Cir. 1991) (*Armstrong I*), that recognize the Archivist's duty to "seek redress for the unlawful removal or destruction of

[3] *See, e.g.*, 5 U.S.C. App. § (e)(1)(A) (specifying that an office of inspector general is a "separate agency" and the inspector general shall operate as "an agency head" for certain personnel matters).

records[.]" *Id.* at 296. *See also Armstrong v. EOP*, 1 F.3d 1274, 1279 (D.C. Cir. 1993) (characterizing *Armstrong I* as authorizing claims based on records destruction); *CREW v. EOP*, 587 F. Supp. 2d 48, 56-7 (D.D.C. 2008) (*Armstrong I* permitted a legal claim "to compel the Archivist" and other agencies "to initiate action through the attorney general to restore . . . deleted emails"). And critically, NARA's interpretation ignores the technological advances since the FRA was first enacted that, at least for digital records, make their restoration possible. In 1950 Congress could not have foreseen a world where communications were conducted over the internet and deleted digital records could be restored.

While I believe the current language of the FRA's enforcement provisions imposes on the Archivist and agencies the duty to initiate an enforcement action through the Attorney General to restore deleted records, Congress should add clarifying language that leaves no doubt as to the existence of this duty. The amendment to 44 U.S.C. § 3106 now under consideration by this Committee would advance this interest by requiring each agency head, with the Archivist's assistance, to initiate an action through the Attorney General for the recovery of records that are, *inter alia*, "defaced, altered, corrupted, deleted, erased, or destroyed[.]"

I understand this Committee is contemplating other statutory reforms that would address, at least in part, some of these problems and other gaps in the Federal Records Act. I urge this Committee to act promptly and to think beyond the latest package of reforms.

First, Congress should require every federal employee prior to leaving government service to certify their compliance with the FRA's recordkeeping requirements, particularly as to the preservation of all agency records. I understand this Committee already is considering a provision that would impose this requirement, which I support. But I would go further and require that a designated records officer at each agency certify on a yearly basis that agency employees are complying with the statutory requirement to create and preserve their federal records. Certification affords a level of accountability and transparency currently absent in the FRA. And it properly places the onus on agencies to monitor their employees' compliance with recordkeeping obligations. Further, this reporting mechanism can serve as an early warning system to avoid learning of recordkeeping violations after an agency official has left office, as was the case with Acting Homeland Security Secretary Chad Wolf and Acting Deputy Secretary Ken Cuccinelli. This in turn allows the possibility of remediation and restoration of key agency documents.

Second, Congress should impose an outright ban on the use by government employees of private devices and ephemeral messaging apps unless there is a system in place to automatically back up their content on federal recordkeeping systems. Many of the companies that create ephemeral messaging apps tout their ability to facilitate completely private discussions with no record or copy left behind through their automatically deleting function. The continued use of these apps creates a hole in our history, yet alarmingly agencies are not only ignoring these dangers but are promoting the use of specific apps such as WhatsApp. For example, the State Department encourages the use of WhatsApp to conduct diplomacy.[4] During the last administration senior

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

State Department officials used WhatsApp to discuss Ukraine policy.[5] To the extent the State Department has not captured and preserved those discussions in an agency recordkeeping system, the current administration may be harmed by the lack of access to information essential for formulating our foreign policy.

To ensure the preservation of valuable historical records, agencies should be authorized to permit the use of specific ephemeral apps to conduct agency business only where *all* phones—government issued and personal—of *all* agency personnel are configured to capture *all* communications sent or received on those apps. Absent failsafe mechanisms like this, we can expect continued and widespread use of electronic messaging apps that evade recordkeeping requirements. I understand this Committee is considering reforms along these lines and I applaud that effort.

Third, I also endorse the proposal to incorporate records management into employee performance plans. Government employees must understand the critical role they play in preserving our history and promoting accountability. Making compliance with recordkeeping requirements a part of performance plans sends a strong signal that recordkeeping matters at all levels of government.

Fourth, while I agree codifying NARA's Capstone program makes sense, I would go further as I fear it justifies agencies destroying the electronic messages of higher level officials who fall just outside the group whose electronic messages are designated for permanent preservation. Setting a floor too often results in that floor becoming a ceiling. Especially given agencies' ready access to easy and inexpensive storage for electronic records, the goal should be to preserve the maximum number of electronic messages for as wide a group as possible.

To complement and enhance these legislative fixes Congress should amend the FRA to require agency heads to create an administrative process to hear and remedy claims of unlawfully destroyed or removed documents and other repeated violations of an agency's recordkeeping requirements. I recognize the danger of overwhelming agencies and courts with non-meritorious claims. To address that concern, an administrative complaint should trigger an administrative investigation only if supported by clear and substantial evidence, and an agency's finding that this standard is not satisfied should be non-reviewable by the courts. Congress should provide for judicial review of any administrative complaint on which an agency head fails to take any action after the passage of a specified time-period. But 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 to administratively enforce the FRA's provisions on NARA alone, which has proven unable, if not unwilling, to take on a more aggressive enforcement role.

The Federal Records Act rests on the central proposition that government records, as the records of the people, play an essential role in creating a stronger democracy. But good recordkeeping

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

promotes more than abstract goals. It gives vitality to laws like the Freedom of Information Act, by ensuring greater public access to agency records. Ever-changing technologies and government officials intent on operating in secrecy and without accountability have challenged and undermined that statute as well as the FRA. We need more legislation, like that which this Committee is considering, to ensure the goals of the FRA are met. We cannot successfully chart a path for our future if we do not know what came before.

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