

**Statement
Of
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**Information Policy, Census, and National Archives Subcommittee
Oversight and Government Reform Committee**

Hearing on: “The National Archives and Records Administration”

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Chairman Clay, Ranking Member McHenry, members of the subcommittee, thank you for inviting me to testify today about the National Archives and Records Administration (NARA).

My non-governmental organization, the National Security Archive, has extensive experience with National Archives’ programs, including NARA’s handling of hundreds of Freedom of Information Act (FOIA) and declassification requests submitted for accessioned records; its management of research programs and reading rooms from College Park, Maryland, to Simi Valley, California, that our staff has visited; its classification policy and oversight functions; and its records management and disposition responsibilities across the federal government.

The National Archives is not just the guardian of our nation’s most cherished historical documents – the Declaration of Independence, the Constitution, and the Bill of Rights. It is a singularly important institution dedicated to the creation of and long term access to records about the activities of our government. NARA does not exist just to help us remember what happened in the past, but also to ensure there is a record of our national story that is accessible in the future.

Indeed, while many see the Archives primarily as a “museum” for records that are no longer in current use, that view fails to acknowledge that NARA has many responsibilities with respect to records that are still operational. These include its mandatory role in federal records scheduling and disposition, oversight of the national security classification and the “controlled unclassified information” (CUI) systems, its daily publication of the *Federal Register*, and, with the addition of the Office of Government Information Services (OGIS), mediation of disputes about records that are requested by the public under FOIA.

In its efforts to implement these varied responsibilities, my experience is that the NARA staff has been open to input and eager to be effective. Dr. Allen Weinstein, the former Archivist, was loyal to the mission of the Archives and also responsive to outside stakeholders. Nonetheless, I believe I see NARA differently than the agency sees itself, and in that area of difference resides my hopes for the next Archivist of the United States.

NARA’s formal mission statement highlights its roles supporting democracy, promoting civic education, and facilitating historical understanding of our national experience. In my view, however, the agency’s mission statement fails to communicate why NARA was granted those responsibilities. Perhaps that is the source of the disconnect between my vision for the agency and the agency’s own vision. The founders of this country set up checks and balances and structures to ensure an informed citizenry because abuses thrive when there is no one watching the institutions that hold power. Congress created NARA because a functional, effective national archive is a critical component in restraining the arbitrary and unreasonable exercise of government power that is anathema to democracy. So, NARA can only fulfill its mission if it starts its work long before the boxes of old documents are trucked over to its warehouses.

When we view NARA’s mission from this perspective, it becomes clear why it is crucial for the Archives to keep pace with our evolving society. Unfortunately, however, for many years NARA has suffered from a lack of vision, drive, and authority,

and far too little support from the Executive Branch and Congress. The challenges that it now faces are daunting. Let me discuss a few of those challenges.

Electronic Records and the Records' Lifecycle:

Our manner of communicating and recording our communications today is vastly different than it was 20 years ago. Yet, NARA historically has chosen to defend a system that depends on printing and filing hard copies of records for long-term preservation long after it became apparent that such a system failed to adequately preserve records of archival value.¹

Although NARA's efforts to build the Electronic Records Archive (the "ERA") demonstrate that NARA has been preparing for the arrival of digital records (and, much of NARA's own annual reporting about its challenges, goals, and performance acknowledges electronic records as a key focus), the agency has been passive with respect trying to update records management practices at most federal agencies. For example, a recent Government Accountability Office (GAO) study found that the National Archives no longer performs inspections of agency records management programs, and has not conducted any since 2000.² GAO also found that the National Archives has not reported on its oversight activities, either to Congress or the public, preferring instead to work quietly with agencies than to expose problems.³ The result is that not much changes in federal records management until there is a scandal – such as the public exposure of the loss of millions of federal record e-mails at the White House.⁴

¹ For example, a recent Government Accountability Office report found that “for about half of the senior officials, e-mail records were not being appropriately identified and preserved in [print-and-file paper-based recordkeeping] systems.” Government Accountability Office, *Federal Records: Agencies Face Challenges in Managing E-mail*, GAO-08-699T (Apr. 23, 2008), at 3.

² Government Accountability Office, *Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management*, GAO-08-742 (June 2008), at 21-22.

³ *Id.*

⁴ National Security Archive, White House E-Mail Chronology, <http://www.gwu.edu/~nsarchiv/news/20080417/chron.htm> (last visited May 19, 2009).

In many instances, NARA has had to re-process records down the line, adding expense to taxpayers and delays in access.

How does NARA address these records management problems in its most recent strategic plan? It sets goals that follow the same approach as in the past, to wait for the agencies to come to NARA and ask for help. Specifically, NARA set goals of increasing demand for better records management within the federal government in order to meet the agencies' business needs and offering its own records management services.⁵ There is no recognition that the agencies actually have a legal obligation to preserve records of historical significance and that NARA should do something to remind them of that obligation and enforce the law.

Isn't it past time, however, to start thinking longer term about a new model of records management to meet the new reality? There are new ideas being floated. For example, the National Research Council in its 2005 report on the ERA recommends that "all newly acquired agency systems that produce permanent records [] do the following: create those records in formats acceptable to NARA, include explicit metadata in their output, and use standardized mechanisms for transferring records to NARA."⁶ The Council's report even suggests that NARA should plan for the ERA to become the "off-site backup of agency records" in order to build in archival ingest of records as close as possible to their creation.⁷

Not all the blame should be placed on NARA, of course, since we need improved Information Technology procurement policies as well as more authority and funding

⁵ The National Archives and Records Administration, *Preserving the Past to Protect the Future: The Strategic Plan of the National Archives and Records Administration 2006-2016*, at 6 (2007), <http://www.archives.gov/about/plans-reports/strategic-plan/2007/nara-strategic-plan-2006-2016.pdf>.

⁶ National Research Council, *Building an Electronic Records Archive at the National Archives and Records Administration: Recommendations for a Long-Term Strategy* (Robert F. Sproull and Jon Eisenberg, eds., National Academies Press, 2005), Executive Summary at 8, available at http://www.nap.edu/nap-cgi/report.cgi?record_id=11332&type=pdfxsum.

⁷ *Id.* at 7.

from Congress to allow NARA to play a stronger compliance and oversight role.⁸ But, the time for that is now, not after the challenge becomes completely insurmountable.

Classified Records:

If it is true, as we believe, that public access to historically significant records is vital to ensure accountability and inform the public about government conduct, then these principles take on a heightened importance in the realm of national security secrecy, where access to the information is severely limited and there are strong incentives against disclosure. Unfortunately, there is massive over-classification.⁹ Classification typically hinders the release of historically significant records long after the national security sensitivity in the records has diminished and squanders scarce resources better invested in managing all federal records.

Under Executive Order 12958, as amended, records are subject to automatic declassification after 25 years. NARA currently has a backlog of more than 400 million pages of historical records already declassified by agencies since 1995 to process and review for release. Under current staff and resource allocations, it will take NARA decades before they can place these records on the open shelves or in accessible electronic databases for the public.¹⁰ That is just one part of the story. While the number

⁸ See *National Archives Oversight: Protecting Our Nation's History for Future Generations*, Hearing Before the Subcomm. on Federal Financial Management of the S. Comm. on Homeland Security and Governmental Affairs, 110th Cong. (May 14, 2008) (testimony of Thomas Blanton), available at <http://www.gwu.edu/~nsarchiv/news/20080514/index.htm>.

⁹ Officials throughout the federal government have admitted that much of this classification activity is unnecessary. Former Secretary of Defense Donald Rumsfeld acknowledged the problem in an op-ed: "I have long believed that too much material is classified across the federal government as a general rule[.]" Donald Rumsfeld, *War of the Worlds*, Wall St. J., July 18, 2005, at A12. Under repeated questioning from members of Congress at a hearing concerning over-classification, Deputy Secretary of Defense for Counterintelligence and Security Carol A. Haave eventually conceded that approximately 50 percent of classification decisions are over-classifications. *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on National Security, Emerging Threats and International Relations of the H. Comm. on Gov't Reform*, 108th Cong. 82 (2004) (testimony of Carol A. Haave); see also *id.* at 23 (testimony of J. William Leonard) ("It is no secret that the government classifies too much information.").

¹⁰ Public Interest Declassification Board, *Improving Declassification: A Report to the President*, at 28 (2007).

of pages reviewed and declassified by agencies has steadily declined in recent years,¹¹ each year new records get added to the end of the queue for declassification.¹² The problem for NARA of handling all of these records has not been addressed, just postponed. The overclassification and extended classification is costly for the public in financial terms as well inhibiting public understanding of important historical government activities.

NARA is the keeper of historically significant records and the home of the Information Security Oversight Office (ISOO), which is charged with oversight of the national security classification program and administration of the Public Interest Declassification Board. Therefore, NARA should be the home of a national declassification and historical records center that makes the growing volume of currently inaccessible records available to the public. Legislation is required to effect the necessary collaboration by federal agencies in the declassification process and to reform the standard for release of historical records so the burden of review diminishes as the national security and privacy interests diminish over time. Such legislation would reduce the burden, expense and delay in processing historical records, improve the effective and efficient functioning of the classification system, reduce the unnecessary expenditure of money on protection of non-sensitive materials, and increase public access to historically significant records that document our national experience.

Today, there is a national declassification initiative that was spearheaded by NARA. It came about because of a scandal involving agency reclassification of formerly available records that was uncovered by my organization and historian Matthew Aid. It

¹¹ Information Security Oversight Office, Report to the President for FY 2008 (“ISOO FY 2008 Report”), at 1, 13 (2009), *available at* <http://www.archives.gov/isoo/reports/2008-annual-report.pdf>.

¹² In addition, there currently is a backlog of 51 million pages of that qualify for potential declassification but required referrals to multiple agencies prior to declassification. These records were granted a three-year extension of the 25-year declassification date, but require review by December 31, 2009. ISOO FY 2008 Report, at 1, 13 (2009). The declassification of these records is hampered by an inefficient process, lack of coordination, and lack of commitment across agencies to resolution of all the “equities.” *Id.* at 13. In addition, declassification of special media and electronic records has been postponed until December 31, 2011. These types of records pose significant challenges to agencies that do not appear likely to be addressed by the deadline.

is a start, but it should not be the end of the progress and we should not have to wait until NARA is surprised by a front page scandal to get to the next step.

Presidential Records and Presidential Libraries:

NARA's effectiveness at preserving presidential records is another area of grave concern. The Presidential Records Act (PRA) does not give NARA the power it needs to ensure that presidential records are properly maintained, preserved, and ultimately made available to the public. Moreover, NARA appears to consider itself powerless to oversee effective recordkeeping procedures at presidential record agencies, even in the face of legitimate concerns that presidential records may be missing or destroyed. When this subcommittee held a hearing on H.R. 5811, the Electronic Communications Preservation Act, last Congress, NARA took the position that it does not have the constitutional authority to do anything more than recommend that the White House follow NARA's records preservation guidelines.¹³

Assuming, given the lack of oversight authority, that a full set of presidential records makes it to NARA at the end of a presidential administration, there are then additional challenges to the public release of the documents. The economics of the Presidential Library system has proven problematic to NARA for many years. The costs of the facilities are a constant drain on NARA's budget, and the staffing is inadequate. In our own experience at the Reagan Library over the last several years, delays in access to requested records have lengthened from an estimated 18 months (as of April 26, 2001) to an estimated 87 months (more than seven years!) by 2007, according to the letters the Reagan Library sends to requesters upon receipt of a FOIA or declassification review request. While 18 months delay is not unusual in our experience when the records at issue are highly classified, seven years of delay (and counting) effectively means

¹³ *Hearing on H.R. 5811, the Electronic Communications Preservation Act Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform, 110th Cong. (April 23, 2008) (statement of Paul M. Wester, Jr. and Gary M. Stern); see also Hearing on Electronic Records Preservation at the White House Before the H. Comm. on Oversight and Government Reform, 110th Cong. 43 (Feb. 26, 2008) (testimony of Allen Weinstein, Archivist of the United States).*

denial.¹⁴ The Reagan Library estimates that it will take 100 years before all of the Reagan White House Records will be reviewed for release.¹⁵

Moreover, the presidential library system is experiencing the same challenges as the federal government with respect to electronic records. In terms of expertise and efficiency, we see no alternative to greater centralization of the processing of those records, along the lines of what was recommended by the Public Interest Declassification Board in 2007.¹⁶ For many of the same reasons that NARA has supported the creation of a National Declassification Center (NDC) and that the agencies have cooperated with the Remote Archives Capture (RAC) program, it is increasingly becoming clear that the economics of remote storage and processing of records no longer make sense.

Access:

Just as the formats of records have changed, so too have the public's expectations for access. NARA, like all government agencies, must begin to heed President Obama's call for increased transparency, including the use of new tools to reach a broader segment of the public.¹⁷ This means expanded online access, improved finding aids, and digitization of collections. The actual physical space needed to review electronic records is far smaller than that needed to review boxes of paper records. Yet, to date, NARA has not chosen to aggressively pursue an online records strategy. For example, thousands of records have been digitized and reviewed under the Remote Archives Capture (RAC) program at the presidential libraries, but none of those records are available online to the public. As a result, public access to those very important records in paper form depends

¹⁴ For the Archive's prior testimony on Presidential records and the National Archives, see National Security Archive, "The Presidential Records Act in Crisis: Six Years Since White House Intervened, Five Years of 'Pure Delay'" (March 1, 2007), <http://www.gwu.edu/~nsarchiv/news/20070301/index.htm>; see also *National Archives Oversight: Protecting Our Nation's History for Future Generations, Hearing Before the Subcomm. on Federal Financial Management of the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. 28-30 (May 14, 2008) (testimony of Thomas Blanton), <http://www.gwu.edu/~nsarchiv/news/20080514/index.htm>.

¹⁵ PIDB, *Improving Declassification*, at 18.

¹⁶ *Id.* at 18-19.

¹⁷ President Barack Obama, Memorandum on Transparency and Open Government (Jan. 21, 2009), http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/.

on significant staff time and facility space. Given the funding problems that have caused NARA in some instances to reduce its hours and staff, it is critical that NARA increase its virtual availability.

In addition to regularly assessing its inventory of information and disclosure priorities, NARA should consider new methods of determining which historical records are of the greatest interest to researchers, historians, and the public. Several complementary approaches to identifying disclosure priorities make sense, particularly in areas where the Archives is focused on a systematic release program. These include increased use of historical advisors or use of interactive technologies that allow members of the public to suggest priorities and comment on others' suggestions.

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To be fair, many of the critiques I have made about NARA today are not the fault of the agency itself. NARA has been treated like a visiting cousin in the executive branch – everyone is polite, but no one has a reason to think their opinion matters much in the long run. A new Archivist who has a vision of independence and outreach by NARA could change this, particularly with new, more specific oversight authority and funding from Congress.

What does this mean with regard to the selection of the next Archivist of the United States? The person who is chosen should not be chosen merely on the basis of how well they regard our national history, but also based on their vision of what is coming in the future. That means the new Archivist must understand the promise of technology and should be someone who has experience implementing technology for preservation and access.

Moreover, the next Archivist must embrace the fact that NARA is not a museum of the past, but a resource that should serve the needs of today and tomorrow. Instead of looking at the many new responsibilities that Congress places on NARA as interference in its mission to systematically process records, the Archivist should embrace these as

opportunities to reach out to agencies and help them to do a better job preserving records for the public.

The next Archivist also must be a skilled diplomat who can interact with senior agency officials as a figure of authority, while also understanding the agencies' perspectives.

Finally, the Archivist must be an unwavering advocate of transparency and access. The Archivist should understand in his or her core that the Archives exists to help advance our democracy and it can only do so if the government creates, preserves, and then permits the public to see records of its activities and policies. The management of all of NARA's programs, from OGIS to CUI, classification to declassification, federal records to presidential records, FOIA requests to presidential libraries, and the rest, should be infused with these goals.

Thank you again for the opportunity to speak with you about these issues.

Biographical Information for Meredith Fuchs

Meredith Fuchs serves as the General Counsel to the non-governmental National Security Archive at George Washington University. At the Archive, she oversees Freedom of Information Act and anti-secrecy litigation, advocates for open government, and frequently lectures on access to government information. She organized a coalition of more than 60 groups that made transparency recommendations adopted by President Obama on the first full day of his administration. She has supervised seven government-wide audits of federal agency FOIA implementation. She served for two years as the Secretary of the Board of Directors of the American Society of Access Professionals (ASAP). She is the author of “Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy,” 58 Admin. L. Rev. 131 (2006); and “Greasing the Wheels of Justice: Independent Experts in National Security Cases,” 28 Nat’l Sec. L. Rep. 1 (2006). Previously she was a Partner at the Washington, D.C. law firm Wiley Rein & Fielding LLP. Ms. Fuchs served as a law clerk to the Honorable Patricia M. Wald, U.S. Court of Appeals for the District of Columbia Circuit, and to the Honorable Paul L. Friedman, U. S. District Court for the District of Columbia. She received her J.D. from the New York University School of Law.