

TESTIMONY OF DAVID S. FERRIERO
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BEFORE THE HOUSE COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM
ON
“PRESIDENTIAL RECORDS IN THE NEW MILLENNIUM:
UPDATING THE PRESIDENTIAL RECORDS ACT AND OTHER
FEDERAL RECORDKEEPING STATUTES TO IMPROVE
ELECTRONIC RECORDS PRESERVATION”
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Good morning Chairman Issa, Ranking Member Cummings, and members of the Committee on Oversight and Government Reform. Thank you for calling this hearing on “Presidential Records in the New Millennium: Updating the Presidential Records Act and Other Federal Recordkeeping Statutes to Improve Electronic Records Preservation,” and for your continued attention to the management and preservation of government records. Our General Counsel, Gary M. Stern, accompanies me this morning, and will be available to answer questions from the Committee.

I am pleased to appear before you today to discuss the work that the National Archives and Records Administration (NARA) does to implement the government recordkeeping laws, i.e., the Presidential Records Act (PRA) and the Federal Records Act (FRA). We appreciate your interest in improving the rules governing the collection,

storage, and preservation of and access to official electronic communications and other documents.

The National Archives has been responsible for setting government-wide policy and direction concerning how all federal agencies manage their records since the enactment of the Federal Records Act in 1950. The FRA, however, does not apply to the President, the Vice President, and those members of their staffs that advise and assist them. Nor does it govern recordkeeping by the House, Senate, Supreme Court, and Architect of the Capitol.

Until 1978, there was no statutory provision that required the President, the Vice President, and their staffs to manage or preserve their records. Those materials were treated as the personal property of the President and Vice President, much in the same way that records of individual Members of Congress and Supreme Court Justices are currently treated. The Presidential Records Act of 1978, 44 U.S.C. chapter 22, established public ownership of all presidential and vice presidential records, but it vested all records management authority entirely and exclusively with the incumbent President and Vice President. The legislative history of the PRA states that “the President is encouraged to implement sound records management practices.” H. Rep. No. 95-1487, at 4 (1978).

Because the PRA presumes that all Presidential records must be permanently preserved and transferred to the National Archives at the end of the President’s Administration, the Act allows for comparatively straightforward records management policies – i.e., the White House saves all Presidential records, with the exception of publicly received correspondence, as discussed below. In 1994, the Clinton

Administration established the policy of preserving all White House email records with an electronic recordkeeping system. The George W. Bush Administration continued this policy. While both Administrations experienced some problems preserving their emails and had undertaken restoration projects, the overall concept of capturing and preserving electronic Presidential records in their entirety became the accepted practice. NARA staff have successfully transferred the electronic Presidential records of these two Administrations into the National Archives, which have been preserved and are currently available for search and access by NARA staff. The Obama Administration is also capturing and preserving its electronic Presidential records.

The National Archives has no formal regulatory or oversight authority over how an incumbent President performs his records management responsibilities while in office, except that the President must obtain the Archivist's written views before destroying any presidential record. See 44 U.S.C. § 2203(c). Nevertheless, throughout the course of an Administration, both I and my staff endeavor to provide our best guidance and advice on matters affecting White House records management when invited to do so. In this Administration, NARA staff meet regularly with staff in the White House Office, Office of Administration, and other Executive Office of the President components on electronic records issues and provide advice as requested.

In accordance with section 2203(c) of the PRA, NARA worked with the George W. Bush Administration to apply the "bulk mail" disposal authority granted since the Reagan Administration for low level public mail received by the President and the Vice President to electronically received public correspondence. This practice includes maintaining a small electronic sample for permanent preservation and transfer to NARA.

During the Obama Administration, NARA has also provided advice for the preservation of Presidential record material generated by the White House and posted on social media websites. In addition, NARA has provided a sampling methodology for the posted record comments on White House pages on Facebook and other social media websites.

To the extent that the Committee would like to examine specific revisions to the PRA, we would have to consult with the White House and the Department of Justice before offering Administration views due to the sensitive constitutional and separation of powers issues that are associated with Congressional regulation of the Presidential recordkeeping. I can say, however, that the Archives would welcome the opportunity to engage in a constructive dialogue with the Committee and the Administration over potential revisions to the PRA.

NARA has testified several times before this Committee on the continuing challenges that federal agencies across the government have in managing and preserving electronic records under the FRA. The FRA requires each agency to follow NARA's guidance and implement a records management program. Based on the statutory framework of the FRA, 44 U.S.C. chapters 21, 29, 31, and 33, we have developed an extensive set of regulations and guidance on how agencies need to manage their records.

At the beginning of his Administration, President Obama issued a Presidential Memorandum on Transparency and Open Government. NARA has subsequently emphasized that the backbone of a transparent and open Government is good records management. To put it simply, the Government cannot be open or accountable if it does not preserve – and cannot find – its records. In February 2011, we issued our second annual Records Management Self-Assessment Report for 2010. With respect to how

agencies manage electronic records, the report noted that records management programs in many agencies:

- Do not ensure that e-mail records are preserved in a recordkeeping system;
- Do not monitor staff compliance with e-mail preservation policies on a regular basis;
- Have policies that instruct employees to print and file e-mail messages;
- Consider system backups a preservation strategy for electronic records, and do not distinguish between saving and preserving electronic records;
- Consider compliance monitoring to be the responsibility of IT staff; and
- Are rarely or not at all involved with, or are excluded from altogether, the design, development, and implementation of new electronic systems.

In September 2010, NARA also produced *A Report on Federal Web 2.0 Use and Record Value*, that noted “[t]he web landscape is evolving so rapidly that if we neglect to address these issues, we risk losing the truly valuable materials created by the Federal government. NARA and Federal agencies should be proactive in working together to understand these complexities and develop solutions.” We made the following recommendations:

- Clarify how the Federal Records Act definition of a record applies to web 2.0 information.
- Mitigate public expectations of content longevity.
- Create a new General Records Schedule (GRS) item to provide dispositions for records created through clearly temporary uses of web 2.0 tools.
- Address transfer requirements for permanent web 2.0 records.
- Re-evaluate media neutrality as it applies to web records.

- Develop partnerships to identify best practices for capture and management of social media records.
- Integrate records management into agency social media policy.

One of the fundamental challenges that agencies have in managing electronic records under the FRA, and what distinguishes them from records governed by the PRA, is the need to separate records based on their retention and disposition requirements: i.e., permanent records from temporary, and long-term temporary records from short-term. Electronic records management systems generally require significant user input to file individual records, resulting in few agencies managing and preserving their email records electronically. Rather, most agencies still rely on print-to-paper as their official records management policy for email and many other electronically created records.

While the FRA still provides a viable statutory framework for managing federal records, we believe that, as a general matter, there could be ways to modernize the FRA to address more clearly the reality of managing electronic records. As Paul Wester, NARA's senior official responsible for government-wide records management, testified before this Committee last summer, we need to identify cost efficient ways to ensure that agencies manage electronic records electronically and transition away from printing and filing of e-mail and other electronic records. Without changing recordkeeping policies to reflect the current environment, while simultaneously also supporting the development and deployment of more robust electronic recordkeeping systems, the permanent record of our nation that is in electronic form will be compromised.

Given the special long-term preservation and access challenges associated with electronic records, NARA plans to identify how Federal agencies can be encouraged to

transfer preservation copies of permanently valuable electronic records to the National Archives as soon as possible, much earlier than the traditional 30 year time frame that the FRA sets out for paper records. Under existing authorities, agencies can retain permanently valuable records for more than thirty years or when no longer needed for agency business purposes. If NARA is not actively engaged with agencies to fully understand the electronic formats being used, then records may become at risk when they are eventually accessioned and the formats are no longer widely used. As part of its comprehensive review of records management practices, NARA plans to review options for mitigating this potential issue. Finally, NARA is exploring alternative ways to manage agency emails in what we hope will result in more user-friendly and cost effective approaches. We intend to begin piloting these approaches over the course of the next year.

Before closing, I do want to raise one critical but often overlooked point. Ultimately, responsibility for records management will always rest to some degree with individual federal employees, no matter what systems are in place. That was true in an era of exclusively paper records, and it remains true in an increasingly digital age. Although the development of automated email archiving systems like that used by the EOP enhance our ability to preserve key government records, updated records management policies and ongoing employee education and training remain key to sound records management practices.

I recognize the critical importance of finding solutions to the challenges faced with managing and preserving the ever increasing amounts of electronic records across the government and have made electronic records one of my main priorities as Archivist.

Indeed, as part of the transformation process that I have initiated within NARA, we are setting up our own records management laboratory to develop and test best practices, which we have already begun to do. I am committed to working with Congress, the White House, and federal agencies to do all that we can to improve electronic records management and preservation.

Mr. Chairman, this concludes my testimony. Thank you for your attention, and I am happy to answer any questions that may remain.