

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FREEDOM OF THE PRESS FOUNDATION,  
*et al.*,

Plaintiffs,

v.

DONALD TRUMP, *et al.*,

Defendants.

Civil Action No. 26-cv-1402

**DECLARATION OF JASON R. BARON**

I, Jason R. Baron, under 28 U.S.C. § 1746, hereby declare and state as follows:

1. I am a professor of the practice in the College of Information at the University of Maryland, College Park, having been appointed as a full-time member of the faculty in 2020. Previously, from 1988 to 2000, I held the positions of trial attorney and senior counsel at the U.S. Department of Justice (DOJ), in the Federal Programs Branch of the Civil Division. In 2000, I was appointed as the first director of litigation at the National Archives and Records Administration (NARA), serving in that position for 13 years until leaving for private practice.

2. While at DOJ, beginning in 1992, I served as lead counsel for the next seven years in *Armstrong v. Executive Office of the President*,<sup>1</sup> and as lead counsel in *Public Citizen v. Carlin*.<sup>2</sup> As counsel in the *Armstrong* case, I actively participated in the drafting of White House recordkeeping guidance to comply with opinions of the court, as well as in the creation of an automated archiving system for White House e-mail, first implemented in 1994. *See, e.g.*, 877 F. Supp. 690, 715 (D.D.C. 1995) (recordkeeping guidance at Appendix C). I also assisted in the

<sup>1</sup> 810 F. Supp. 335 (D.D.C. 1993), *aff'd in part and remanded in part*, 1 F.3d 1274 (D.C. Cir. 1993).

<sup>2</sup> 2 F. Supp. 2d 1 (D.D.C. 1997), *rev'd*, 184 F.3d 900 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000).

drafting of NARA's e-mail regulations, first issued in 1995 and presently codified at 36 C.F.R. § 1236.22. Later, as director of litigation at NARA, I was a principal actor in the development of NARA's Capstone archiving policy for the preservation of e-mail records.

3. In March 2022, I testified before the U.S. Senate Homeland Security and Government Oversight Committee on the subject of electronic recordkeeping issues.<sup>3</sup> My testimony addressed in relevant part how government agencies could better comply with existing legal requirements with respect to text and electronic messaging.

4. During my time in government service, in addition to awards received from DOJ, NARA, and other agencies, I was honored to be a recipient of the Justice Tom C. Clark Outstanding Government Lawyer award from the D.C. Chapter of the Federal Bar Association, in recognition of my advocacy regarding electronic recordkeeping.<sup>4</sup> I am the only government lawyer to have received the international Emmett Leahy Award, recognizing career achievements in the field of records and information management.<sup>5</sup> I have been appointed to three two-year terms as a member of the Freedom of Information Act (FOIA) Advisory Committee to the U.S. Archivist, in 2018-2020, 2022-2024, and as part of the present 2024-2026 Committee. I previously served as Co-Chair of the D.C. Bar E-discovery and Information Governance Committee.

5. In my current capacity as a professor, I have taught graduate course seminars on government information, electronic recordkeeping, introduction to archives and digital curation,

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<sup>3</sup> See <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/Testimony-Baron-2022-03-15.pdf>.

<sup>4</sup> See <https://www.fedbar.org/district-of-columbia-chapter/district-of-columbia-chapter/justice-tom-c-clark-award/>.

<sup>5</sup> See <https://www.archives.gov/press/press-releases/2011/nr11-181.html>;  
[https://en.wikipedia.org/wiki/Emmett\\_Leahy\\_Award](https://en.wikipedia.org/wiki/Emmett_Leahy_Award).

and information governance. During the past 30 years I have written numerous scholarly articles and spoken extensively around the world on electronic recordkeeping and related issues.<sup>6</sup>

6. The statements contained in this declaration are based upon my personal knowledge gathered during my 33 years of government service, and from my knowledge of present-day government policies based on my academic research, my current service on the FOIA Advisory Committee, and FOIA requests I have filed for agency records pertaining to the implementation of Capstone-related policies.

#### **NARA's Role in Providing Recordkeeping Guidance To The White House**

7. Prior to assuming legal custody at the end of a presidential term of all records covered under the Presidential Records Act (PRA), during a president's time in office NARA routinely provides advice and assistance on records management practices upon request of the White House Counsel's Office. This in the past has included NARA's General Counsel being given an opportunity to review and comment on recordkeeping guidance issued by the White House Counsel; this has also included providing input when the White House considers requests for the written views of the Archivist prior to the disposal of any presidential records, as required under 44 U.S.C. 2203(c) of the PRA. In addition, NARA personnel, including senior officials, archival staff, and lawyers, work closely with White House staff in planning and executing the transfer of presidential records at the end of the presidential term. This process generally starts years prior to the end of a presidency, and in recent decades has involved complex logistical planning with respect to the transfer of electronic records, including email and other forms of electronic messaging.

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<sup>6</sup> My CV can be found at <https://ischool.umd.edu/directory/jason-r-baron/>.

### NARA's Capstone Email Archiving Policy

8. NARA's voluntary Capstone policy for e-mail archiving, first announced in 2014,<sup>7</sup> was developed to eliminate the burden on individual government employees of having to manually perform recordkeeping functions. Prior to the policy, federal employees either were told to print out hard copies of emails, or with then-existing software, manually "drag and drop" emails on the screen into designated record series categories, to meet NARA's regulatory requirements for email preservation. In my experience, agency staff compliance with such recordkeeping requirements was minimal, due to the burden imposed on each employee (and especially senior officials) to take individual actions throughout the workday with respect to emails created or received about official business appropriate for longer term preservation.<sup>8</sup> The Capstone policy greatly simplifies employee recordkeeping duties by fully automating the process: under Capstone, *all* electronic mail records created or received by designated Capstone senior agency officials are deemed permanent records of the United States to be transferred to NARA at a future time. All other emails from non-Capstone account holders are to be preserved for up to seven years. Agencies are allowed to request that NARA grant exceptions to GRS retention periods, to meet their own agency-specific mission and needs. *See* General Records Schedule 6.1.<sup>9</sup>

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<sup>7</sup> NARA Bulletin 2014-06, Guidance on Managing Email, <https://www.archives.gov/records-mgmt/bulletins/2014/2014-06.html>; NARA White Paper on The Capstone Approach and Capstone GRS (2015), <https://www.archives.gov/files/records-mgmt/email-management/final-capstone-white-paper.pdf>.

<sup>8</sup> Under NARA's longstanding email regulations in place prior to the development of the Capstone policy, where agency email records are stored on an electronic network, employees have been under a duty to copy or forward email records appropriate for longer term preservation (over 180 days) to a dedicated electronic recordkeeping system, provided an agency has in place the ability to preserve those records on the network. *See* 36 C.F.R. § 1236.22(b).

<sup>9</sup> As noted below, the current version of GRS 6.1 is entitled "Email and Other Electronic Messages Managed under a Capstone Approach," <https://www.archives.gov/files/records-mgmt/grs/grs06-1.pdf>. However, the original, now superseded version of GRS 6.1, in place from 2014 through 2023, only included email communications within its scope. *See* [https://www.archives.gov/files/records-mgmt/rcs/schedules/general-records-schedules/daa-grs-2014-0001\\_sf115.pdf](https://www.archives.gov/files/records-mgmt/rcs/schedules/general-records-schedules/daa-grs-2014-0001_sf115.pdf).

9. As of the present time, over 250 federal agency components have voluntarily adopted NARA's Capstone archiving policy.<sup>10</sup> Agencies have done so as the most optimal way to meet the original 2012 mandate from the Office of Management and Budget and the Archivist of the United States requiring that e-mail records be managed and preserved in electronic form by December 31, 2016.<sup>11</sup>

### **Federal Law and Policy Re: Text and Electronic Messaging**

10. Specifically with respect to electronic messaging, the Presidential Records Act and the Federal Records Act Amendments of 2014<sup>12</sup> added preservation requirements for official White House business conducted using non-official electronic messaging accounts. *See* 44 U.S.C. § 2209. For staff in designated components of the Executive Office of the President (EOP) creating presidential or vice-presidential records, covered employees are required to copy or forward complete copies of those records to an official electronic messaging account not later than 20 days after the original sending of the message. Similar requirements are required of all federal agency employees covered under the Federal Records Act (FRA). *See* 44 U.S.C. § 2911.

11. In 2015, NARA issued Bulletin 2015-02, consisting of detailed guidance on "Managing Electronic Messages."<sup>13</sup> The Bulletin aimed to "help agencies develop strategies for managing their electronic messages" including covering "text messaging, chat/instant messaging, messaging functionality in social media tools or applications, voice messaging, and similar forms of electronic messaging systems." While the Bulletin acknowledged that "[e]lectronic messaging

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<sup>10</sup> NARA, Capstone Forms, <https://www.archives.gov/records-mgmt/rcs/schedules/capstone-forms>.

<sup>11</sup> OMB and NARA, Managing Government Records Directive, M-12-18, Goal 1.2, <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>. Other deadlines for government-wide transition to electronic recordkeeping were subsequently extended through June 2024. *See* OMB and NARA, Update to Transition to Electronic Records, [https://www.whitehouse.gov/wp-content/uploads/2022/12/m\\_23\\_07-m-memo-electronic-records\\_final.pdf](https://www.whitehouse.gov/wp-content/uploads/2022/12/m_23_07-m-memo-electronic-records_final.pdf).

<sup>12</sup> Pub. L. 113-187, 128 Stat. 2003.

<sup>13</sup> *See* <https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html>.

systems are not designed with records management functionality, such as the ability to identify, capture, and preserve records[.]” NARA went on to inform agencies on how to address this and other challenges. Specifically, NARA stated that agencies can proceed to “[c]onfigure electronic messaging systems to allow for automated capture of electronic messages and metadata.

Removing reliance on individual users will increase ability to capture and produce messages.”

12. Bulletin 2015-02 additionally stated that:

Agencies should capture content from electronic messaging accounts whether administered by the agency or third-party providers. The ability to capture will be dependent on the capabilities and configurations of the electronic messaging system. By setting a capture point and determining a minimum time frame, agencies remove the need for employees to make message by message record determinations.

13. In 2021, Congress enacted the Electronic Message Preservation Act (EMPA), which required the Archivist to promulgate regulations governing federal agency preservation of electronic messages constituting federal records. *See* 44 U.S.C. § 2912. In support of EMPA, NARA issued Bulletin 2023-02, “Expanding the Use of a Role-Based Approach (Capstone) for Electronic Messages.”<sup>14</sup> The Bulletin recognized that electronic messaging was replacing email conversations as a means for federal employees to communicate about official business. NARA stated that the advantages of the expanded Capstone policy would include that it “[a]llows for the capture of electronic messages that should be preserved as permanent from the accounts of officials at or near the top of an agency,” and that it “[a]llows use of a more simplified and automated approach to managing electronic messages, as opposed to policies that require staff to apply disposition to each message based on message content[.]” Among the factors for agencies

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<sup>14</sup> *See* <https://www.archives.gov/records-mgmt/bulletins/2023/2023-02>.

to consider is their ability to implement expanded Capstone archiving for messaging based on “current technology.”

14. Contemporaneously with Bulletin 2023-02, NARA issued a revised version of General Records Schedule 6.1, entitled “Email and Other Forms of Electronic Messaging under a Capstone Approach,”<sup>15</sup> providing guidance on incorporating electronic messaging into existing Capstone archiving requirements.

15. In my March 2022 Senate testimony, I advocated for agencies authorizing one or more dedicated electronic messaging services or apps for employees to use for official government business. This would be accomplished either on government-issued phones or on phones owned by staff members with software installed for the purpose of archiving. I assisted in the drafting of a prior version of proposed legislation, re-introduced in 2024,<sup>16</sup> that would make mandatory agency adoption of Capstone archiving policies for both email and other forms of electronic messaging, and that would otherwise serve as a basis for the greater use of automated archiving for all forms of electronic messaging.

16. Some examples of federal agencies either having implemented automated archiving for text and electronic messages, or considering doing so based on existing technology, include at the (i) Department of Commerce, where at least some “department systems automatically archive text messages sent and received on department phones”<sup>17</sup>; (ii) Security Exchange Commission, which implemented the expanded Capstone messaging policy using mobile device management software on phone equipment issued to 200 Capstone officials<sup>18</sup>; and

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<sup>15</sup> See <https://www.archives.gov/files/records-mgmt/grs/grs06-1.pdf>.

<sup>16</sup> S. 4042, 118<sup>th</sup> Cong., 2d. Sess., §§ 101 & 103, <https://www.congress.gov/bill/118th-congress/senate-bill/4042/text>.

<sup>17</sup> Dep’t of Commerce Electronic Mail and Record Retention Policy, § I.B (2024), [https://www.commerce.gov/sites/default/files/2024-06/DOC-Email-and-Electronic-Messages-Policy.pdf?utm\\_source=chatgpt.com](https://www.commerce.gov/sites/default/files/2024-06/DOC-Email-and-Electronic-Messages-Policy.pdf?utm_source=chatgpt.com).

<sup>18</sup> SEC Inspector General Report, “Special Review: Avoidable Errors Led to the Loss of Former SEC Chair Gary Gensler’s Text Messages,” at 2 (2025), <https://www.sec.gov/files/sec-oig-review-587-2025.pdf>.

(iii) Centers for Medicare and Medicaid Services (CMS), where the agency “may leverage *existing* or future OIT [Office of Information Technology] software solutions to automate the capture, retention, and disposition of text messages and mobile device data as a federal record” (emphasis added).<sup>19</sup>

17. In general, the technological means for implementing automated archiving of text and electronic messages is well-known, both within and outside of the federal government. Such archiving tools are widely available in the commercial sector in response to existing regulatory requirements, including especially strict rules issued by the SEC and FINRA governing the preservation of all forms of electronic communications to and from broker-dealers.<sup>20</sup>

#### **New White House Records Retention Policy**

18. I have reviewed the White House recordkeeping guidance, issued to all EOP employees on April 2, 2026, and titled “Records Retention Policy After Office of Legal Counsel Finding that the Presidential Records Act is Unconstitutional (the “April 2 Memorandum” or the “Memorandum”), which I understand was first disclosed to the public in a court filing by DOJ on April 21, 2026.<sup>21</sup> The April 2 Memorandum contains both factual errors as well as misinterpretations of recordkeeping requirements under existing law.

19. Under the April 2 Memorandum’s “Text Messaging” paragraph, the guidance given starts off by conflating two very different aspects of recordkeeping. The Memorandum makes the statement that requiring EOP staff to transcribe “phone calls, meetings, or informal

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<sup>19</sup> CMS Policy for Records and Information Management, § 2.3.8.1 (2022), [https://www.cms.gov/files/document/cms-records-management-policy-2022.pdf?utm\\_source=chatgpt.com](https://www.cms.gov/files/document/cms-records-management-policy-2022.pdf?utm_source=chatgpt.com).

<sup>20</sup> FINRA, Books and Records: Regulatory Obligations and Related Considerations, <https://www.finra.org/rules-guidance/guidance/reports/2023-finras-examination-and-risk-monitoring-program/books-and-records> (citing to Securities and Exchange Act and FINRA Rules requiring “member firms to, among other things, create and preserve, in an easily accessible place, originals of all communications received and sent relating to their ‘business as such’ (e.g., emails, instant messages, text messages, chat messages, interactive blogs)” (bold print in original).

<sup>21</sup> See [https://storage.courtlistener.com/recap/gov.uscourts.dcd.291186/gov.uscourts.dcd.291186.19.2\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.dcd.291186/gov.uscourts.dcd.291186.19.2_1.pdf).

discussions” would be “immensely time consuming and costly,” and then goes on to say that “[s]imilarly . . . preserving all text messages would create an enormous technological burden. . . .” (emphasis added). To my knowledge based on my decades of experience in federal records management, no government official has ever construed the PRA or FRA (on which PRA guidance is modeled in relevant part) to require government employees to document all phone calls, meetings or informal discussions. Rather, in a largely still pre-electronic era, NARA guidance issued in 1995 provided for agencies to “establish procedures that require personnel at all levels to document conversations and meetings dealing with *significant program business* . . . .” (emphasis added).<sup>22</sup> I can attest as a government lawyer working in the 1980s and 1990s, any such requirement to memorialize these types of conversations and meetings was expected to be undertaken using pen and paper, word processing equipment, or only later by e-mail. There was never an “immense” time and cost associated with these policies. Moreover, text and electronic messages stand on a completely different footing than phone calls or face-to-face meetings and informal discussions: messaging represents a modern-day direct form of written documentation that increasingly is used in connection with deliberations and actions of government officials, including at the White House, and therefore meets the definition of a record under both the PRA and FRA.

20. As described earlier, both Congressional enactment of EMPA and NARA’s Bulletins in furtherance of electronic messaging encourage agencies to introduce automated archiving policies for texts and electronic messages, without introducing “an enormous technological burden.” The fact that federal agencies have indeed gone forward in implemented

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<sup>22</sup> NARA, “A Management Guide” (1995), [https://www.archives.gov/records-mgmt/policy/agency-recordkeeping-requirements.html?utm\\_source=chatgpt.com](https://www.archives.gov/records-mgmt/policy/agency-recordkeeping-requirements.html?utm_source=chatgpt.com) (stating at the top that this guidance “is no longer current”).

archiving schemes for electronic messaging using existing software directly serves to contradict the April 2 Memorandum's characterization of an undue technological burden in doing so.

21. The April 2 Memorandum also states that text messages "should only be preserved when they are the sole record of official decision-making, government action, or contain unique information not available elsewhere," and goes on to state that "staff is encouraged to ensure that any decision-making, government action, or unique information is memorialized in a more accessible format, such as an email or memorandum." These newly devised, limited preservation criteria appear nowhere in the PRA or FRA, nor to my knowledge in NARA recordkeeping guidance.

22. Curiously, the Memorandum proceeds to provide an illustration in side-by-side boxes containing alternative versions of a hypothetical text message conversation that only serves to show the utter practical difficulties EOP staff are likely to have in interpreting their legal obligations under the newly provided guidance.

23. The alternative versions of a hypothetical text exchange between two White House staffers concern a meeting held with the President (referred to as "POTUS"). In both versions, the text exchange includes a statement by (an unnamed) Staff Member A that "Steve and I met with POTUS and he approved the plan." In both versions, (unnamed) Staff Member B replies "Excellent – anything else you need me to do?" The versions then go on to differ: in the first Staff Member A states "Not currently. I will text the agencies," while in the second version, Staff Member A states "Yes – draft email to agencies documenting POTUS ok." Finally, in the first version the final text is from Staff Member B, saying "got it." In the second version, Staff Member B says "Done. In your inbox." The legend at the bottom of the two illustrations states that the first version reflects decision-making and government action and should be preserved;

for the second version, the legend states that the exchange “has been memorialized in email” and therefore “[d]oes not need to be preserved.”

24. Based on my decades of experience in federal records management, it is unquestionably understood that records of meetings with the President of the United States should be preserved, and under the PRA any and all texts regarding such a meeting would be required to be preserved as permanent records to be transferred to NARA at the end of a presidential administration. Yet the April 2 Memorandum purports to draw a distinction between these two versions of a conversation, solely based on the fact that an email has been exchanged between the two speakers. The text of the email is not, however, provided, and so one cannot tell whether the email adequately documents whether “Steve” and Speaker A were the ones (perhaps among others) who met with POTUS. Nor is it clear that “documenting POTUS ok” has amounted to an email stating that POTUS “approved the plan.” More importantly, the mere fact that an email is “in your inbox” does not equate to the email ever having been forwarded further to anyone. The email could end up having been deleted by Speaker A upon receipt, or it could be deleted in a system-wide purge at a later date. Even if Speaker A takes no immediate action to delete the email in the speaker’s in-box, there is no way in which either of the two speakers could ever be said to know whether the text exchange they just had will be the sole or unique record of an apparently consequential meeting with the President. All of this illustrates how the April 2 Memorandum’s adoption of non-statutory preservation criteria creates a serious risk that presidential records will be irretrievably lost or destroyed in violation of the PRA.

25. Elsewhere in the Memorandum, under the paragraph labelled “Electronic Records,” it is stated that “[a]s a matter of prudence” the electronic records of EOP employees will be preserved. No assurance or representation is made that electronic records, including e-

mails, texts, and other forms of electronic messaging, will be preserved through the end of the Administration or transferred to NARA, either pursuant to the PRA or even as a matter of presidential discretion. In light of the plain text of the Memorandum, no electronic message exchange can be said with assurance to merely duplicate documentation of White House decision-making memorialized elsewhere.

26. One additional aspect of the Memorandum is likely to cause confusion and compliance issues on the part of EOP staff, and an attendant risk that important government records will be unlawfully lost or destroyed. The Memorandum purports to be providing guidance “on how the EOP will preserve records in light of OLC’s determination.” If the Memorandum has in fact been issued to the entirety of the EOP, it has been received and read by close to an estimated thousand individuals in the EOP who create and receive records governed by the FRA, not the PRA. These would include at a minimum staff in the Office of Management and Budget, the Office of the U.S. Trade Representative, the Office of National Drug Control Policy, and the Office of Science and Technology Policy, each of which are EOP components subject to the FRA and FOIA. As stated earlier, under the FRA, federal agency staff are required to comply with a parallel provision in that statute regarding the preservation of electronic messaging conducted on non-official electronic messaging systems. *See* 44 U.S.C. § 2911. However, the Memorandum purports to be giving interpretive guidance on text and electronic messaging that conflicts with guidance in place for those EOP agencies regarding compliance with section 2911, resulting in diminished recordkeeping under a provision of the FRA that the Trump Administration has not declared unconstitutional.

27. In public reporting as of 2024, an estimated 643 million presidential email records from the Reagan Administration to the end of the first Trump Administration are being preserved

as permanent records in NARA's legal custody.<sup>23</sup> On information and belief, this number now stands higher with the transfer to NARA of over 100 million additional emails from the Biden Administration. These emails include their attachments, and if printed out would very conservatively be estimated to constitute over three billion pages. Pursuant to the PRA and the policies of past Administrations (including in the first Trump Administration), emails, as well as texts and electronic messages that were forwarded or copied into the White House email system, are all now being preserved as permanent records under NARA's legal custody. The April 2 Memorandum provides no such assurances that emails, texts and other forms of electronic messages will continue to be managed and preserved as permanent records of the United States, as required under current law.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27<sup>th</sup> day of April, 2026

  
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Jason R. Baron

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<sup>23</sup> D. Hoffman, "A digital tsunami is coming. The National Archives is in trouble," *Washington Post* (Sept. 20, 2024), <https://www.washingtonpost.com/opinions/2024/09/20/national-archives-troubles-digital/>.